

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



CITY & COUNTY OF SAN FRANCISCO,

Employer,

and

OPERATING ENGINEERS LOCAL 3,

Exclusive Representative.

Case No. SF-IM-156-M

Administrative Appeal

PERB Order No. Ad-429-M

October 15, 2015

Appearance: Rafal Ofierski, Deputy City Attorney, for City & County of San Francisco.

Before Martinez, Chair; Banks and Gregersen, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the City & County of San Francisco (CCSF) from an administrative determination (attached) by the Office of the General Counsel granting a request for factfinding by Operating Engineers, Local 3 (Local 3) pursuant to the Meyers-Milias-Brown Act (MMBA)¹ and PERB regulations.²

We have reviewed the case file in its entirety in light of the issues raised by CCSF's appeal and request for a stay. We find the administrative determination to be well-reasoned and in accordance with applicable law. We deny CCSF's appeal and adopt the administrative determination as the decision of the Board itself, as supplemented below.

¹ The MMBA is codified at Government Code section 3500 et seq. Unless otherwise noted, all statutory references are to the Government Code.

² PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

The dispute over which Local 3 has requested factfinding involves implementation of a 30-minute unpaid meal period and a corresponding lengthening of the current eight-hour shift to eight and one-half hours, affecting employees on the graveyard shift at the San Francisco Municipal Transportation Agency, a division of CCSF. CCSF does not dispute that the hours of work, including the timing and duration of non-duty periods and the length of the workday, are negotiable matters. Nor does CCSF dispute that Local 3's request for factfinding was filed within 30 days of a declaration of impasse in the parties' negotiations over the decision and/or effects of CCSF's decision to establish a 30-minute unpaid meal period. Instead, CCSF's appeal urges PERB to reexamine its position on the scope of MMBA factfinding, as set forth in *County of Contra Costa* (2014) PERB Order No. Ad-410-M (*Contra Costa*) and subsequent decisions, because, according to CCSF, the Board's "boundless application of fact finding is legally incorrect" and "leads to untenable practical consequences." Although CCSF's appeal presents various arguments, the essence of its position is that the statutory language and legislative history indicate that MMBA factfinding "is calibrated for disputes of significant dimensions, such as may arise in contract negotiation[s]," and that the "extensive, time-consuming and expensive process is a disproportionate remedy for the myriad of minor bargaining disputes that regularly arise outside of contract negotiation[s]."

None of CCSF's arguments persuade us to abandon our previous determination that both the plain language of the statute and its legislative history indicate that the Legislature intended to make MMBA factfinding available for *any* "differences" over *any* matter within the scope of representation, so long as the employee organization's request is timely and the dispute is not subject to one of the statutory exceptions set forth in MMBA section 3505.4, subdivision (a) or section 3505.5, subdivision (e). (*Contra Costa, supra*, PERB Order

No. Ad-410-M, p. 10; *City of Redondo Beach* (2014) PERB Order No. Ad-409-M, pp. 5-7.)

As we recently observed in *City of Folsom* (2015) PERB Order No. Ad-423-M, p. 3, the Board does not conduct or in any manner oversee the factfinding process nor determine the issues to be presented and, by statute, our role is limited to determining whether a request for factfinding meets the statutory criteria. (*Id.* at p. 5.) CCSF's complaint that "[a]pplying the formal, time-consuming and costly [factfinding] procedure to the myriad of minor bargaining disputes that arise outside of contract negotiation[s] is not a practical and workable result" is therefore one that it must present either to the exclusive representative, which determines whether and which disputes it will submit to factfinding, or to the Legislature.

ORDER

The City & County of San Francisco's appeal from the administrative determination in Case No. SF-IM-156-M is hereby DENIED.

Chair Martinez and Member Gregersen joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1021
Fax: (510) 622-1027



July 15, 2015

Regina Jenkins, Business Agent
Operating Engineers, Local 3
1620 South Loop Road
Alameda, CA 94502

Sallie P. Gibson, Deputy City Attorney
San Francisco City Attorney's Office
1390 Market Street, 5th Floor
San Francisco, CA 94102

Re: *City & County of San Francisco and Operating Engineers Local 3*
Case No. SF-IM-156-M
Administrative Determination

Dear Interested Parties:

On July 8, 2015, Operating Engineers Local 3 (OE3) filed a request for factfinding with the Public Employment Relations Board (PERB or Board) pursuant to section 3505.4 of the Meyers-Milias-Brown Act (MMBA) and PERB Regulation 32802.¹ OE3 asserts that it and the employer, the City and County of San Francisco (CCSF), have been unable to effect a settlement in their current negotiations. Impasse was declared by a party on June 22, 2015. The bargaining impasse concerns a meet and confer between CCSF and OE3 that relates to the inclusion of a 30-minute paid meal period for certain employees on the graveyard shift.

On July 13, 2015, the CCSF filed a position statement objecting to factfinding over this dispute. On July 14, 2015, OE3 filed a position statement in reply.

Discussion

The CCSF argues "any potential impasse here is in regard to negotiable terms and conditions of employment, whereas factfinding [under applicable sections of the MMBA] exclusively applies to impasse in a dispute arising from a new or successor Memorandum of Understanding (MOU)." The CCSF cites to two Superior Court cases wherein Superior Court judges held that MMBA factfinding applies only to bargaining for new or successor MOUs.

¹ The MMBA is codified at Government Code section 3500 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

In *County of Contra Costa* (2014) PERB Order No. Ad-410-M, the Board held that the MMBA factfinding procedures, codified at sections 3505.4 through 3505.7, “apply to any bargaining impasse over negotiable terms and conditions of employment and not only to impasses over new or successor memoranda of understanding (MOU).” The two Superior Court cases cited by the CCSF are presently on appeal and, even if they were not, do not constitute binding precedent. (*County of Riverside v. Public Employment Relations Board* (E060047, app. pending), and *San Diego Housing Commission v. Public Employment Relations Board* (D066237, app. pending).) PERB does not conduct or in any way oversee the factfinding process nor determine the issues to be presented at factfinding. (*City of Folsom* (2015) PERB Order No. Ad-423-M.)

MMBA section 3505.4, subdivision (a), provides as follows:

The employee organization may request that the parties’ differences be submitted to a factfinding panel . . . If the dispute was not submitted to mediation, an employee organization may request that the parties’ differences be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse. . . .

PERB Regulation 32802 provides as follows:

(a) An exclusive representative may request that the parties’ differences be submitted to a factfinding panel. The request shall be accompanied by a statement that the parties have been unable to effect a settlement. Such a request may be filed:

(1) Not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant either to the parties’ agreement to mediate or a mediation process required by a public agency’s local rules; or

(2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.

Here, the parties did not submit the dispute to mediation. Impasse was reached on June 22, 2015. The instant factfinding request was filed less than 30 days later, on July 8, 2015, therefore, it is timely. Accordingly, the instant factfinding request satisfies the requirements of MMBA section 3505.4 and PERB Regulation 32802.

Next Steps

Each party must select its factfinding panel member and notify this office in writing of his/her name, title, address and telephone number no later than July 23, 2015.² Service and proof of service are required.

The résumés of seven factfinders, drawn from the PERB Panel of Neutrals, are being provided to the parties via electronic mail.³ The parties may mutually agree upon one of the seven, or may select any person they choose, whether or not included on the PERB Panel of Neutrals. In no case, however, will the Board be responsible for the costs of the chairperson.

If the parties select a chair, the parties should confirm the availability of the neutral, prior to informing PERB of the selection.

Unless the parties notify PERB, on or before July 23, 2015, that they have mutually agreed upon a person to chair their factfinding panel, PERB will appoint one of these seven individuals to serve as chairperson.

Right of Appeal

An appeal of this decision to the Board itself may be made within ten (10) calendar days following the date of service of this decision. (Cal. Code Regs., tit. 8, § 32360.) To be timely filed, the original and five (5) copies of any appeal must be filed with the Board itself at the following address:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street, Suite 200
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with

² This deadline, and any other referenced, may be extended by mutual agreement of the parties.

³ The seven neutrals whose résumés are being provided are Claude Dawson Ames, Norman Brand, Andrea Dooley, Ruth Glick, Robert Hirsch, Nancy Hutt, and Walter Kaweck.

the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The appeal must state the specific issues of procedure, fact, law or rationale that are appealed and must state the grounds for the appeal (Cal. Code Regs., tit. 8, § 32360, subd. (c)). An appeal will not automatically prevent the Board from proceeding in this case. A party seeking a stay of any activity may file such a request with its administrative appeal, and must include all pertinent facts and justifications for the request (Cal. Code Regs., tit. 8, § 32370).

If a timely appeal is filed, any other party may file with the Board an original and five (5) copies of a response to the appeal within ten (10) calendar days following the date of service of the appeal (Cal. Code Regs., tit. 8, § 32375).

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding and on the San Francisco Regional Office regional office. A "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself (see Cal. Code Regs., tit. 8, § 32140 for the required contents). The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, § 32135, subd. (c).)

Extension of Time

A request for an extension of time in which to file an appeal or opposition to an appeal with the Board itself must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party (Cal. Code Regs., tit. 8, § 32132)

Sincerely,

Laura Z. Davis
Senior Regional Attorney

LD