STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ALAMEDA COUNTY PROBATION PEACE OFFICERS ASSOCIATION,

Charging Party,

v.

COUNTY OF ALAMEDA,

Respondent.

Case No. SF-CE-158-M

PERB Decision No. 1824-M

March 1, 2006

Appearances: Mastagni, Holstedt, Amick, Miller, Johnsen & Uhrhammer by Will M. Yamada, Attorney, for Alameda County Probation Peace Officers Association; Alameda County Counsel by William M. Baldwin, Deputy County Counsel, for County of Alameda.

Before Duncan, Chairman; Whitehead and McKeag, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on appeal filed by the Alameda County Probation Peace Officers Association (PPOA) to the Board agent's partial dismissal (attached) of its unfair practice charge. The charge alleged that the County of Alameda (County) violated the Meyers-Milias-Brown Act (MMBA)[1] by making unilateral changes to eliminate the Admission Day and Columbus Day holidays, and for surface bargaining. PPOA alleged that this conduct constituted a violation of MMBA sections 3500, 3504, 3505, 3505.2, 3505.4 and 3507, and PERB Regulation 32603(a) through (g).[2]

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

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

The Board reviewed the entire record in this case, including but not limited to, the unfair practice charge, the amended charge, the County's response, the Board agent's warning and partial dismissal letters, PPOA's appeal of the partial dismissal and the County's opposition to the appeal. The Board remands the partial dismissal to the Office of the General Counsel for further investigation as indicated in the discussion below.

DISCUSSION

PPOA charged that the County made unilateral changes and engaged in surface bargaining. Attached to the original charge filed January 15, 2004, were 32 specific itemized paragraphs related to action or inaction by the County that were the subject of the charge. Item 16 reads as follows:

> The 'Coalition Agreement' was prepared and signed by the COUNTY and the Alameda County safety employee organizations, including the PPOA. The 'Coalition Agreement' provides all safety employee organizations an enhanced retirement benefit formula known as '3% at 50' in return for the following concessions: (1) The deletion of Admission Day and Columbus Day as holidays and substituting two floating holidays effective 2003; (2) The County shall pay the cost of the least expensive health plan beginning 2004. The least expensive health plan shall have a plan benefit structure as the plans currently offered and as may be amended from time to time; (3) Each safety employee organization shall be part of an agree to the agreements reached with the Health Care Task Force; (4) Beginning January 1, 2004, each safety employee organization shall agree to re-open their respective MOU's in the event that the Alameda County Board of Supervisors determines that countywide fiscal responsibility requires consideration of wages set forth in any established memorandum of understanding, said memorandum (a) shall be reopened for the sole purpose of renegotiating wage.

At page 5 of the September 30, 2004, warning letter, the Board agent states:

> Lastly, the Association contends the County unilaterally eliminated the Admissions Day holiday. However, facts provided demonstrate that Admissions Day was not a holiday under the agreed-upon 2000-2002 MOU. As such, the County does not

violate the MMBA by continuing to enforce provisions of the now expired contract.

In the partial dismissal letter of November 3, 2005, the Board agent states that the Columbus Day holiday issue was not raised until the amended charge, filed October 28, 2004. She determines it is therefore untimely under the MMBA.[3]

Because the Columbus Day holiday allegation was included in the January 15, 2004, original charge, it is timely filed.

The question then becomes whether Columbus Day also was not a holiday in the agreed-upon 2000-2002 memorandum of understanding (MOU) and therefore should be addressed as the Board agent addressed the Admission Day issue.

Columbus Day clearly, from the MOU language itself,[4] is treated differently than Admission Day and should have been addressed by the Board agent.

The Board agent notes, also in the partial dismissal letter,[5] that the Columbus Day holiday is within scope. Following citations to cases related to the statute of limitations, the Board agent notes that the "charging party now bears the burden of demonstrating that the charge [was] timely filed." A simple review of the original charge shows that it was.

When PPOA filed the appeal, it stated that the original charge included the information related to the Columbus Day holiday and stated a copy of the pertinent part of the charge was attached as "Exhibit 'A'." However, the document attached only contained allegations through number 12, and did not include number 16 which related to Columbus and Admission Days.

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[3]Board agent's partial dismissal letter, page 5, "IV. Eliminated Columbus Day Holiday in 2003."

[4] "County Proposal #4" attached as Exhibit 9 to the County's March 17, 2004, response to the unfair practice charge, shows Columbus Day as an existing holiday to be deleted as part of the proposal, but does not include Admission Day on the list.

[5]At page 5.

Had the PPOA counsel read the exhibits carefully, this significant oversight could likely have been avoided.

The opposition to the appeal chastised PPOA for the appeal indicating it had no basis. Counsel for the County would have done better to go back and read the charge and then address the substance of whether or not negotiations related to the Columbus Day holiday were handled correctly.

PPOA argues on appeal that the County unilaterally took away Columbus Day while the contract was still being negotiated in violation of the MMBA. It relies on San Joaquin County Employees Assn. v. City of Stockton (3d Dist. 1984) 161 Cal.App.3d 813, 819 [207 Cal.Rptr. 876] (San Joaquin) for its premise that while the parties are in the process of negotiating a new contract, the current contract and its terms and conditions remain in effect and cannot be altered. This is a correct reading of the San Joaquin case.

In stating that Admission Day was not a holiday in the 2000-2002 MOU, the Board agent noted that "the County does not violate the MMBA by continuing to enforce the provisions of the now expired contract."[6]

As stated above, the allegations related to the Columbus Day holiday changes were not addressed by the Board agent in the warning letter. In the partial dismissal letter the allegations on that issue were dismissed as untimely. A review of the charge shows that it was, in fact, timely filed. The allegations related to the Columbus Day holiday were not appropriately investigated at the Board agent level.

The other issue raised on appeal is that of surface bargaining. The PPOA maintains that it was bad faith bargaining for the County to take away the 2003 Columbus Day holiday therefore implementing the Safety Coalition Agreement letter of June 16, 2003, before PPOA

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[6]Board agent's warning letter, p. 5.

had finalized a new MOU with the County. The terms of the agreement indicated that it, or at least parts of it, would not go into effect until all safety organizations had agreed to MOUs with the County. We believe that the entire partial dismissal must be returned to the Board agent for further investigation.

ORDER

The partial dismissal of the unfair practice charge in Case No. SF-CE-158-M is hereby REMANDED to the Office of the General Counsel for further investigation.

Member Whitehead joined in this Decision.

Member McKeag's concurrence and dissent begins on page 6.

McKEAG, Member, concurring and dissenting: Based on my review of the record, the substantive issues regarding the Columbus Day holiday were neither fully briefed by the parties, nor considered by the Board agent. Accordingly, although I have concerns regarding the tone of the decision, I concur that this matter should be remanded for further investigation.

With regard to surface bargaining, the Alameda County Probation Peace Officers Association failed to plead sufficient facts to support a prima facie case. Accordingly, this portion of the partial dismissal should be upheld. For this reason, I respectfully dissent.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1022
Fax:(510)622-1027

November 3, 2005

Will Yamada, Attorney
Mastagni, Holstedt, Amick, Miller, Johnsen & Uhrhammer
1912 I Street, Suite 102
Sacramento, CA 95814

Re: Alameda County Probation Peace Officers Association v. County of Alameda
Unfair Practice Charge No. SF-CE-158-M; First Amended Charge
PARTIAL DISMISSAL

Dear Mr. Yamada:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 15, 2004. The Alameda County Probation Peace Officers Association alleges that the County of Alameda violated the Meyers-Milias-Brown Act (MMBA)[1] by engaging in a variety of unfair practices.

I indicated to you, in my attached letter dated September 30, 2004, that certain allegations contained in the charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended these allegations to state a prima facie case or withdrew them prior to October 7, 2004, the allegations would be dismissed. I later extended this deadline at the Charging Party's request.

On October 28, 2004, Charging Party filed a first amended charge. The first amended charge alleges the following: (1) Respondent eliminated bargaining unit positions in the Home Supervision Unit; (2) failed to bargain over the decision and effects of its decision to eliminate two positions in the Juvenile Hall kitchen; (3) failed to bargain over the decision and effects of its decision to close the Weekend Academy; (4) unilaterally changed the staffing ratios; (5) eliminated the Columbus Day holiday in 2003; (6) failed to provide information; and (7) engaged in surface bargaining. This letter addresses allegations 1, 4, 5, 7 and portions of allegations 2 and 3.[2] The relevant facts are provided below.

[1] The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

[2] The amended charge does not address the allegations regarding overtime and shift bidding. As such, those allegations are dismissed for the reasons provided in my September 2004, letter.

The PPOA is the exclusive bargaining representative for the County's Group Counselors. Group Counselors organize leisure activities for detainees, supervise meals and recreation time, and maintain security systems.[3] There are currently 268 Group Counselors in the PPOA bargaining unit. The County and PPOA are currently conducting negotiations for a successor MOU.

On December 23, 2002, the County and all of its safety unions signed the Safety Coalition Agreement which provides for a 3% at 55 retirement benefit for all safety employees.[4] In exchange for this agreement, the unions agreed to the following provisions:

> 5. Each safety employee organization MOU shall be extended through 2009. The County and each safety employee organization shall meet separately regarding terms and conditions of their MOU's, which, in addition to Number 3 above, must include:
>
> A. The deletion of Admission Day and Columbus Day as holidays and substituting two floating holidays effective 2003.
>
> B. The County shall pay the cost of the least expensive health plan beginning 2004. The least expensive health plan shall have a plan benefit structure as the plans currently offered and as may be amended from time to time.
>
> C. Each safety employee organization shall be a part of and agree to the agreements reached with the Health Care Task Force.
>
> D. Beginning January 1, 2004, each safety employee organization shall agree to reopen their respective MOU's in the event that the Alameda County Board of Supervisors determines that countywide fiscal responsibility requires reconsideration of wages set forth in any established memorandum of understanding, said memoranda shall be reopened for the sole purpose of renegotiating wages.
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> 7. All of the above items must be resolved by all of the safety employee organizations for implementation of the enhanced safety retirement benefits.

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[3] Prior to October 2, 2002, the PPOA also represented probation officers. However, the probation officers decertified the PPOA and voted in the Teamsters as their exclusive representative.

[4] The Agreement was re-signed in June 2003.

PPOA is the only employee organization that has failed to complete bargaining with the County. As the PPOA has failed to reach agreement with the County on a successor MOU, the enhanced retirement benefits under the Safety Coalition Agreement have not been established.

The Alameda County Health Plan Task Force, as referenced in paragraph 5.C above, is comprised of representatives from every County labor organization. The task force convenes once a year to discuss health care rates and providers that have submitted a bid for the County's business. After the re-signing of the Safety Coalition Agreement in June 2003, the Health Care Task Force met on several occasions for purpose of identifying the health care providers and current rates. PPOA representatives participated in these meetings and received all of the relevant information provided.

In or about July 2003, the Health Care Task Force completed its meet and confer process and identified providers it would be offering during the next fiscal year. PPOA did not attend the meeting during which a vote was taken. As a result of this meet and confer process, the employee organizations voted to remove Kaiser as the lowest cost provider in order to increase competition. After completion of the Task Force meetings, PPOA representatives requested additional meetings to discuss what PPOA believed were outstanding issues. More specifically, PPOA requested the County add additional providers to the health care provider list. The County reminded the PPOA that pursuant to the Safety Coalition Agreement, employee organizations agreed to be bound by the Task Force's recommendations.

On February 20, 2003, the PPOA and County began successor contract negotiations. To date, the parties have met nearly thirty (30) times, including at least two sessions with a State mediator. Neither party has declared impasse and mediation attempts have been unsuccessful. The parties have reached tentative agreement on six (6) subjects including family leave, dental benefits and reopeners.

On May 27, 2003, the PPOA provided its first set of written proposals. Among PPOA's proposals was a new disciplinary process calling for arbitration of disciplinary appeals. The County rejected this proposal as it violated the County Charter which gives exclusive jurisdiction over disciplinary appeals to the Civil Service Commission. The County informed the PPOA of its reasons for rejecting the proposal, however the PPOA has not removed this proposal from the bargaining table. Additionally, the PPOA proposed a retirement benefit not called for in the Safety Coalition Agreement. More specifically, the PPOA proposed that it "sunset" safety employee contributions of 3% after 2009. The PPOA's proposals also called for an increase in reporting pay, wages, call back pay, holiday compensation, educational incentives, vision benefits, and life insurance. The County rejected these proposals as cost prohibitive. Lastly, the PPOA proposed a health plan change that is inconsistent with the Health Plan Task Force recommendations and the Safety Coalition Agreement as it fails to allow for amendment by the County.

The County's outstanding contract proposals call for the following: (1) Duration of agreement in conformance with Safety Coalition agreement; (2) holiday designation in conformance with

Safety Coalition agreement; (3) health care benefits in conformance with Health Care Task Force recommendations; (4) a vacation leave policy eliminating department exceptions to vacation cap requirements; (5) new uniform allowance policy; (6) a salary survey sideletter; and (7) a new appendix incorporating the Safety Coalition Agreement into the MOU.

In October 2003, the County eliminated the Columbus Day holiday, pursuant to the Safety Coalition Agreement. In late 2003, the County transferred Group Counselors working in the Home Supervision Unit into positions in other County units. This decision was communicated to PPOA and PPOA met with the County to discuss this issue on a number of occasions.

In early 2004, the County informed PPOA that it would be eliminating two (2) bargaining unit positions from the Juvenile Hall kitchen and would be closing the Weekend Academy, which employed approximately ten (10) Group Counselors. PPOA asserts the County failed to meet and confer over the decision and effects of the elimination of these programs.

PPOA also provides an unsigned and undated memorandum which alleges that on numerous occasions, the staffing levels at the Juvenile Hall fell below those required by Title 15 and 24 of the California Regulations. Title 15 and 24 appear to require a 1 to 15 staff to inmate ratio.

Based on the facts provided in the original and amended charges, the allegations discussed below fail to state a prima facie violation of the MMBA.

I. Transfer of Employees in the Home Supervision Unit

Charging Party contends the County violated the MMBA by transferring Intermittent Group Counselors from the Home Supervision unit into other bargaining unit positions. However, as noted in my warning letter, the County's shift assignment language does not apply to intermittent employees. Moreover, the County provided facts demonstrating the parties met on several occasions to discuss this change. As such, the County's actions in transferring these employees did not violate the MMBA.

II. Failure to Bargain over Decision to Eliminate Juvenile Hall Kitchen and Weekend Academy Positions

Charging Party contends the decision to eliminate positions and close the weekend academy are matters within the scope of representation. However, staffing levels are held to be a matter of management prerogative, as they reflect the level of services to be provided by the agency. (State of California (Department of Corrections) (2000) PERB Decision No. 1381.) As such, the decision to eliminate these positions and the weekend program are not matters within scope, and thus the County's failure to meet and confer over these decisions does not violate the MMBA.

III. Staffing Ratios

Charging Party contends the County violated Title 15 and Title 24 of the California Regulations by allowing staffing levels to fall below the minimums required by State law. However, as noted above, the charge does not provide any actual facts to support this allegation. As unsigned and undated memo claiming the County violated the staffing ratios is not considered a factual allegation. Moreover, PERB does not have the authority to enforce the staffing ratios required by the California Regulations. As such, this allegation fails to state a prima facie case.

IV. Eliminated Columbus Day Holiday in 2003

Charging Party contends that in October 2003, the County eliminated the Columbus Day holiday. While such an allegation is within scope, PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board (2005) 35 Cal.4th 1072 [29 Cal.Rptr.3d 234].) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.)[5] The statute of limitations is an affirmative defense which has been raised by the respondent in this case. (Long Beach Community College District (2003) PERB Decision No. 1564.) Therefore, charging party now bears the burden of demonstrating that the charge is timely filed, (cf. Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.) As the amended charge was filed on October 28, 2004, the allegation is time barred.

V. Surface Bargaining

The charge alleges that the employer violated Government Code section 3505 and PERB Regulation 32603(c)[6] by engaging in bad faith or "surface" bargaining. Bargaining in good faith is a "subjective attitude and requires a genuine desire to reach agreement." (Placentia Fire Fighters v. City of Placentia (1976) 57 Cal.App.3d 9, 25 [92 LRRM 3373].) PERB has held it is the essence of surface bargaining that a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement. (Muroc Unified School District (1978) PERB Decision No. 80.) Where there is an accusation of surface bargaining, PERB will resolve the question of good faith by analyzing the totality of the accused party's" conduct. The Board weighs the facts to determine whether the conduct at issue "indicates an intent to subvert the negotiating process or is merely

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[5] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (Firefighters Union v. City of Vallejo (1974) 12 Cal.3d 608.)

[6] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

a legitimate position adamantly maintained." (Oakland Unified School District (1982) PERB Decision No. 275; Placentia Fire Fighters, supra.)

The indicia of surface bargaining are many. Entering negotiations with a "take-it-or-leave-it" attitude evidences a failure of the duty to bargain because it amounts to merely going through the motions of negotiations. (General Electric Co. (1964) 150 NLRB 192, 194 [57 LRRM 1491], enf. 418 F.2d 736 [72 LRRM 2530].) Recalcitrance in the scheduling of meetings is evidence of manipulation to delay and obstruct a timely agreement. (Oakland Unified School District (1983) PERB Decision No. 326.) Dilatory and evasive tactics including canceling meetings or failing to prepare for meetings is evidence of bad faith. (Oakland Unified School District, supra, PERB Decision No. 326.) Conditioning agreement on economic matters upon prior agreement on non-economic subjects is evidence of an unwillingness to engage in a give-and-take. (State of California (Department of Personnel Administration) (1998) PERB Decision No. 1249-S.)

Herein, the charge is devoid of any facts demonstrating the County engaged in surface bargaining. The parties met on dozens of occasions and continue to meet and confer over a successor agreement. Moreover, the County continues to exchange proposals with the PPOA and has not engaged in any activity that could be construed as a dilatory tactic. As such, this allegation fails to state a prima facie violation of the MMBA.

Right to Appeal

Pursuant to PERB Regulations, you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Regulations 32135(a) and 32130.) A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulation 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Regulation 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Regulation 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

Extension of Time

A request for an extension of time, in which to file a document 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. (Regulation 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

ROBERT THOMPSON
General Counsel

By.
Kristin L. Rosi
Regional Attorney

Attachment

cc: William M. Baldwin

KLR

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1022
Fax:(510)622-1027

September 30, 2004

Will M. Yamada, Attorney
Mastagni, Holstedt & Chiurazzi
1912 I Street, Suite 102
Sacramento, CA 95814

Re: Alameda County Probation Peace Officers Association v. County of Alameda
Unfair Practice Charge No. SF-CE-158-M
WARNING LETTER

Dear Mr. Yamada:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 15, 2004. The Alameda County Probation Peace Officers Association alleges that the County of Alameda violated the Meyers-Milias-Brown Act (MMBA)[1] by engaging in a variety of unfair practices.

Investigation of the charge revealed the following. The PPO A is the exclusive bargaining representative for the County's Group Counselors. Group Counselors organize leisure activities for detainees, supervise meals and recreation time, and maintain security systems.[2] There are currently 268 Group Counselors in the PPOA bargaining unit. The County and PPOA are currently conducting negotiations for a successor MOU.

On December 23, 2002, the County and all of its safety unions signed the Safety Coalition Agreement which provides for a 3% at 55 retirement benefit for all safety employees.[3] In exchange for this agreement, the unions agreed to the following provisions:

> 5. Each safety employee organization MOU shall be extended through 2009. The County and each safety employee organization shall meet separately regarding terms and conditions of their MOU's, which, in addition to Number 3 above, must include:

[1] The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

[2] Prior to October 2, 2002, the PPOA also represented probation officers. However, the probation officers decertified the PPOA and voted in the Teamsters as their exclusive representative.

[3] The Agreement was re-signed in June 2003.

A. The deletion of Admission Day and Columbus Day as holidays and substituting two floating holidays effective 2003.

B. The County shall pay the cost of the least expensive health plan beginning 2004. The least expensive health plan shall have a plan benefit structure as the plans currently offered and as may be amended from time to time.

C. Each safety employee organization shall be a part of and agree to the agreements reached with the Health Care Task Force.

D. Beginning January 1, 2004, each safety employee organization shall agree to reopen their respective MOU's in the event that the Alameda County Board of Supervisors determines that countywide fiscal responsibility requires reconsideration of wages set forth in any established memorandum of understanding, said memoranda shall be reopened for the sole purpose of renegotiating wages.

* * * * *

7. All of the above items must be resolved by all of the safety employee organizations for implementation of the enhanced safety retirement benefits.

PPOA is the only employee organization that has failed to complete bargaining with the County. As the PPOA has failed to reach agreement with the County on a successor MOU, the enhanced retirement benefits under the Safety Coalition Agreement have not been established.

The Alameda County Health Plan Task Force, as referenced in paragraph 5.C above, is comprised of representatives from every County labor organization. The task force convenes once a year to discuss health care rates and providers that have submitted a bid for the County's business. After the re-signing of the Safety Coalition Agreement in June 2003, the Health Care Task Force met on several occasions for purpose of identifying the health care providers and current rates. PPOA representatives participated in these meetings and received all of the relevant information provided.

In or about July 2003, the Health Care Task Force completed its meet and confer process and identified providers it would be offering during the next fiscal year. PPOA did not attend the meeting during which a vote was taken. As a result of this meet and confer process, the employee organizations voted to remove Kaiser as the lowest cost provider in order to increase competition. After completion of the Task Force meetings, PPOA representatives requested additional meetings to discuss what PPOA believed were outstanding issues. More specifically, PPOA requested the County add additional providers to the health care provider

list. The County reminded the PPOA that pursuant to the Safety Coalition Agreement, employee organizations agreed to be bound by the Task Force's recommendations.

On February 20, 2003, the PPOA and County began successor contract negotiations. To date, the parties have met nearly thirty (30) times, including at least two sessions with a State mediator. Neither party has declared impasse and mediation attempts have been unsuccessful. The parties have reached tentative agreement on six (6) subjects including family leave, dental benefits and reopeners.

On May 27, 2003, the PPOA provided its first set of written proposals. Among PPOA's proposals was a new disciplinary process calling for arbitration of disciplinary appeals. The County rejected this proposal as it violated the County Charter which gives exclusive jurisdiction over disciplinary appeals to the Civil Service Commission. The County informed the PPOA of its reasons for rejecting the proposal, however the PPOA has not removed this proposal from the bargaining table. Additionally, the PPOA proposed a retirement benefit not called for in the Safety Coalition Agreement. More specifically, the PPOA proposed that it "sunset" safety employee contributions of 3% after 2009. The PPOA's proposals also called for an increase in reporting pay, wages, call back pay, holiday compensation, educational incentives, vision benefits, and life insurance. The County rejected these proposals as cost prohibitive. Lastly, the PPOA proposed a health plan change that is inconsistent with the Health Plan Task Force recommendations and the Safety Coalition Agreement as it fails to allow for amendment by the County.

The County's outstanding contract proposals call for the following: (1) Duration of agreement in conformance with Safety Coalition agreement; (2) holiday designation in conformance with Safety Coalition agreement; (3) health care benefits in conformance with Health Care Task Force recommendations; (4) a vacation leave policy eliminating department exceptions to vacation cap requirements; (5) new uniform allowance policy; (6) a salary survey sideletter; and (7) a new appendix incorporating the Safety Coalition Agreement into the MOU.

In late spring 2003, County representative Dennis Warde met with PPOA President Vince Bordelon to discuss changes in the shift bidding process. During this meeting, Mr. Bordelon agreed to take a management offer to PPOA's executive board. The offer would allow bidding on previously management controlled positions in exchange for an increase in the number of management controlled positions in the Mental Health Unit. Mr. Bordelon informed the County that the Board had approved the changes and a new shift bidding procedure was announced to the membership. After this announcement, several PPOA members voiced their disapproval with the plan. As such, Mr. Bordelon requested the County rescind the new policy and reinstate the previous policy. The County agreed to this change.

On December 4, 2003, the County informed Juvenile Hall staff that it was canceling all scheduled overtime effective December 7, 2003.

On February 20, 2004, Assemblywoman Loni Hancock introduced AB 3008. AB 3008 is intended to amend the County Retirement Law and allow Alameda County to provide

enhanced retirement benefits for some, but not all, safety employees. This would allow the County to provide the benefits of the Safety Coalition Agreement without resolution of PPOA's MOU. Current law precludes the County from implementing without PPOA's approval. PPOA is fighting this legislation.

Since the inception of negotiations with PPOA, all other safety unions have reached agreement with the County regarding salary and other terms and conditions of employment. Specifically, all other safety unions have agreed to yearly salary increases based on the median of salaries surveyed from specified agencies and jurisdictions. Additionally, all other safety unions have incorporated the terms of the Safety Coalition Agreement into their MOU.

Based on the above stated facts, the charge as presently written, fails to state a prima facie violation of the MMBA, for the reasons provided below.

I. Unilateral Change

In determining whether a party has violated Government Code section 3505 and PERB Regulation 32603(c),[4] PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.)[5] Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Vernon Fire Fighters v. City of Vernon (1980) 107 Cal.App.3d 802 [165 Cal.Rptr. 908]; Walnut Valley Unified School District (1981) PERB Decision No. 160; San Joaquin County Employees Association v. City of Stockton (1984) 161 Cal.App.3d 813; Grant Joint Union High School District (1982) PERB Decision No. 196.)

Charging Party contends the County: (1) unilaterally changed the overtime policy; (2) unilaterally reduced the number of bargaining unit positions; (3) phased out the use of intermittent Group Counselors; (4) allowed staffing levels to fall below the state mandatory guidelines; (5) unilaterally changed the shift bidding process; and (6) unilaterally eliminated the Admissions Day holiday. However, for the reasons provided below, each of these allegations fail to state a prima facie case.

Charging Party alleges the County unilaterally changed the overtime policy. However, PPOA fails to provide any facts supporting this contention. While it is clear the County cancelled

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[4] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

[5] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (Firefighters Union v. City of Vallejo (1974) 12 Cal.3d 608.)

scheduled overtime after December 7, 2003, it is unclear how such conduct violates the MMBA. Article 7 of the parties expired MOU provides the County with complete authority to authorize overtime hours. As overtime hours are entirely at the discretion of the County, the County's decision to eliminate unnecessary overtime hours is not a violation of the MMBA or the MOU.

The PPOA further contends the County unilaterally reduced the number of bargaining unit positions. However, as before, the Charging Party fails to provide any facts supporting this allegation. More specifically, Charging Party does not state what the prior number of bargaining unit positions was and what that number is now. Moreover, the County provides facts demonstrating the bargaining unit still consists of 268 employees, and has for some time. As such, this allegation fails to state a prima facie case.

Charging Party also contends the County phased out the use of Intermittent Group Counselors. Again, Charging Party fails to provide any facts supporting this allegation. Additionally, the County contends Intermittent Group Counselors are employed at Juvenile Hall and the Camp. Moreover, intermittent employees are by definition "as needed" employees and thus are not guaranteed employment or tenure. As such, it is unclear why Charging Party believes the County is required to employ a certain number of intermittent employees.

The PPOA also contends the County has allowed the staffing levels to fall below the State's minimum guidelines, thereby violating the MOU and the County's staffing policy. Again, the PPOA fails to provide any facts supporting this allegation. More specifically, the union fails to state when these levels fell below the minimum and where these violations took place. Moreover, the County states it can provide records from each day demonstrating compliance with the California Regulations. As the PPOA fails to provide any facts supporting their allegation, this allegation must also be dismissed.

Charging Party further contends the County unilaterally changed the shift bidding process. However, facts provided by the Respondent demonstrate that the shift bidding process was changed with the Association's approval and only changed back after the Association determined its membership was not in favor of the change. As the County and Association negotiated for the change, the change was neither unilateral nor unlawful.

Lastly, the Association contends the County unilaterally eliminated the Admissions Day holiday. However, facts provided demonstrate that Admissions Day was not a holiday under the agreed-upon 2000-2002 MOU. As such, the County does not violate the MMBA by continuing to enforce the provisions of the now expired contract.

II. Refusal to Provide Information

The Meyers-Milias-Brown Act provides in section 3500(a), "[I]t is the purpose of this chapter to promote full communication between public employers and their employees by providing a

reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations."[6]

Thus the exclusive representative is entitled to all information that is "necessary and relevant" to the discharge of its duty of representation. (Stockton Unified School District (1980) PERB Decision No. 143). PERB uses a liberal standard, similar to a discovery-type standard, to determine relevance of the requested information. (California State University (1986) PERB Decision No. 613-H.) Failure to provide such information is a per se violation of the duty to bargain in good faith.

The PPOA contends the County failed to provide relevant information. However, the charge does not specify what information was requested, when such information was requested or how the County responded to the request. Moreover, the County contends it has responded to all information requests. As the charge fails to provide the relevant facts, this allegation fails to state a prima facie case.

III. Bad Faith Bargaining

The charge alleges that the employer violated Government Code section 3505 and PERB Regulation 32603(c) by engaging in bad faith or "surface" bargaining. Bargaining in good faith is a "subjective attitude and requires a genuine desire to reach agreement." (Placentia Fire Fighters v. City of Placentia (1976) 57 Cal.App.3d 9, 25 [92 LRRM 3373].) PERB has held it is the essence of surface bargaining that a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement. (Muroc Unified School District (1978) PERB Decision No. 80.) Where there is an accusation of surface bargaining, PERB will resolve the question of good faith by analyzing the totality of the accused party's conduct. The Board weighs the facts to determine whether the conduct at issue "indicates an intent to subvert the negotiating process or is merely a legitimate position adamantly maintained." (Oakland Unified School District (1982) PERB Decision No. 275; Placentia Fire Fighters, supra.)

The indicia of surface bargaining are many. Entering negotiations with a "take-it-or-leave-it" attitude evidences a failure of the duty to bargain because it amounts to merely going through the motions of negotiations. (General Electric Co. (1964) 150 NLRB 192, 194 [57 LRRM 1491], enf. 418 F.2d 736 [72 LRRM 2530].) Recalcitrance in the scheduling of meetings is evidence of manipulation to delay and obstruct a timely agreement. (Oakland Unified School District (1983) PERB Decision No. 326.) Dilatory and evasive tactics including canceling meetings or failing to prepare for meetings is evidence of bad faith. (Oakland Unified School District, supra, PERB Decision No. 326.) Conditioning agreement on economic matters upon

[6] In addition, during bargaining the parties have "the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year." (Government Code section 3505)

prior agreement on non-economic subjects is evidence of an unwillingness to engage in a give-and-take. (State of California (Department of Personnel Administration) (1998) PERB Decision No. 1249-S.)

Other factors that have been held to be indicia of surface bargaining include: negotiator's lack of authority which delays and thwarts the bargaining process (Stockton Unified School District (1980) PERB Decision No. 143.); insistence on ground rules before negotiating substantive issues (San Ysidro School District (1980) PERB Decision No. 134.); and reneging on tentative agreements the parties already have made (Charter Oak Unified School District (1991) PERB Decision No. 873; Stockton Unified School District, supra. PERB Decision No. 143; Placerville Union School District (1978) PERB Decision No. 69.).

It is clear, however, that while a party may not merely go through the motions, it may lawfully maintain an adamant position on any issue. Adamant insistence on a bargaining position is not necessarily refusal to bargain in good faith. (Placentia Fire Fighters, supra; Oakland Unified School District, supra, PERB Decision No. 275.) "The obligation of the employer to bargain in good faith does not require the yielding of positions fairly maintained." (NLRB v. Herman Sausage Co. (5th Cir. 1960) 275 F.2d 229 [45 LRRM 2829, 2830].)

The Association contends the County has bargained in bad faith. However, facts provided demonstrate the County has exchanged proposals with the PPOA, the parties have met on nearly thirty occasions and the County has withdrawn at least three of its initial proposals. Additionally, the County has explained in detail why it will not consider modifications to the health benefit and retirement plans, as such modifications likely violate the Safety Coalition Agreement. Moreover, the County has offered the PPOA the same terms and conditions it offered and agreed to with other safety unions. As the charge fails to demonstrate the County is engaging in bad faith bargaining, the allegation must be dismissed.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before October 7. 2004. I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Kristin L. Rosi
Regional Attorney

KLR