STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

NATIONAL UNION OF HEALTHCARE WORKERS, Charging Party, v. SALINAS VALLEY MEMORIAL HEALTHCARE SYSTEM, Respondent.	Case No. SF-CE-797-M PERB Decision No. 2298-M December 20, 2012

Appearances: Siegel & LeWitter by Latika Malkani, Attorney, for National Union of Healthcare Workers; Ottone Leach Olsen & Ray by Anne Frassetto Olsen, Attorney, for Salinas Valley Memorial Healthcare System.

Before Martinez, Chair; Dowdin Calvillo and Huguenin, Members.

DECISION

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the National Union of Healthcare Workers (NUHW) from dismissal of it's unfair practice charge filed against the Salinas Valley Memorial Healthcare System (Hospital) under the Meyers-Milias-Brown Act (MMBA).[1]

The charge, as amended, alleged that the Hospital failed and refused to meet and confer in good faith over a decision to lay off employees, the implementation of the layoff, and the impacts and effects of the layoff on remaining employees, and in addition failed to provide NUHW with requested information regarding the layoff, its implementation and its negotiable impacts and effects. The Office of the General Counsel dismissed the charge for failure to state a prima facie case.

[1] MMBA is codified at Government Code section 3500 et seq. All statutory references are to the Government Code unless otherwise indicated.

We have reviewed the record and the dismissal in light of NUHW's appeal, the Hospital's response thereto, and the relevant law. Based on this review, we shall affirm in part and reverse in part the dismissal, and will remand the matter for issuance of a complaint.

We turn first to a factual summary, then the dismissal, NUHW's appeal, the Hospital's response, and lastly our discussion and disposition of the issues.

SUMMARY OF ALLEGATIONS[2]

The Hospital is a public agency and an employer within the MMBA. NUHW is an employee organization within the MMBA and represents exclusively a unit of Hospital employees pursuant to the MMBA.

On October 25, 2010, NUHW was certified to represent the Hospital's "Technical, Service and Maintenance, and Clerical" bargaining unit. Another employee organization previously represented the unit. The Hospital and the former representative were parties to a negotiated agreement that expired in August 2010, and that provided, in pertinent part: "If it becomes necessary to conduct a long-term or permanent layoff, the [Hospital] will meet and confer with [NUHW] to discuss the layoff, the existence of any practical alternatives to avoid a long-term layoff, and the effects of any long-term layoffs."

Layoff

On November 9, 2010, the Hospital requested in writing that NUHW discuss "the topic of workforce reduction at Salinas Valley Memorial Hospital." The Hospital asserted an "urgent need" to cut labor costs to assure profitability. Meet and confer meetings over "workforce reduction" commenced on November 17, 2010, and continued thereafter on

[2] At this stage of the proceedings, we assume as we must that the essential facts alleged in the charge are true. (*San Juan Unified School District* (1977) EERB* Decision No. 12; *Trustees of the California State University (Sonoma)* (2005) PERB Decision No. 1755.) (*Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.)

December 7, 8, 16, 17, 21 and 27, 2010. The Hospital declared impasse on December 22, 2010, by way of an e-mail sent to John Borsos (Borsos), NUHW's chief representative, from Bev Ranzenberger (Ranzenberger), the Hospital's chief representative. This e-mail claimed the parties had reached impasse in negotiations the night before, on December 21, 2010.

On November 17, 2010, and at subsequent meet and confer sessions, NUHW representatives demanded the Hospital meet and confer regarding, inter alia: (1) its decision to lay off employees, (2) implementation of the layoff, including timing of the layoff, and the number and the identity of employees to be laid off, and (3) impacts on employees remaining after the layoff, including workload and safety issues. Hospital representatives responded uniformly that the Hospital had no duty to meet and confer, and refused to meet and confer, regarding: (1) the decision to lay off employees, (2) the layoff implementation, including timing, and the number and the identity of employees to be laid off, and (3) the layoff's effects on working conditions of remaining employees.

On November 22, 2010, Borsos confirmed by e-mail NUHW's positions stated on November 17, 2010, and requested information relevant to the proposed layoff. Ann Kern (Kern) responded by e-mail the same day confirming the Hospital's November 17, 2010 positions. On November 19, 2010, the Hospital provided to the NUHW a list of job classifications to be laid off, but did not identify the individuals in those classifications. Borsos replied on November 23, 2010, reiterating NUHW's previously stated positions, and offering to meet again on December 7, 2010.[3] On December 3, 2010, Ranzenberger e-mailed Borsos that the Hospital had determined the layoff would occur by "the end of the calendar year."

[3] NUHW explains its brief delay thus: it had only recently become the exclusive agent for the bargaining unit, it needed time to prepare for bargaining, including recruiting and orienting a bargaining committee of employees familiar with the Hospital's operations and practices.

On December 7, 2010 the parties' representatives met. NUHW representatives demanded the Hospital disclose and bargain over the identity and job classifications of employees to be laid off, the number of employees to be laid off, the timing of the layoff, and the impact of the layoff on workload and safety of employees remaining after the layoff. Hospital representatives refused, contending these matters were not subject to meeting and conferring. Hospital representatives reiterated what previously was announced, to wit, the Hospital would lay off 79 employees by the end of the year. In declining to negotiate over the timing of layoffs, the Hospital representatives asserted that "the train had left the station." Hospital representatives declined to provide or discuss the identity and job classifications of persons to be laid off, asserting these were not layoff "effects." NUHW representatives urged the Hospital to disclose and discuss its plans for workload and safety of employees remaining after the layoff. Hospital representatives asserted that impact of a layoff upon workload and safety of remaining employees was not subject to meet and confer. Later in the day, Hospital representatives sent NUHW a one-page "complete" proposal on effects bargaining, which recited that the Hospital would lay off employees by the end of the 2010 calendar year, that employees would be notified by mail, that laid-off employees would have re-employment rights for six months and that rehire would be based on "skill/qualification/disciplinary action/seniority." The proposal offered to discuss with NUHW bumping rights for employees to be laid off.[4] This proposal did not include the numbers to be laid off.

On December 8, 2010 the parties' representatives met. They reiterated their previously described positions. NUHW criticized the Hospital's one-page "complete" proposal as lacking specificity. NUHW requested the Hospital to disclose and discuss: its entire plan for the

[4] Although this description of the one-page proposal submitted by the Hospital on December 7, 2010, is not contained in the first amended unfair practice charge (UPC), it was attached to the declaration of Razenberger in opposition to NUHW's request for injunctive relief submitted under penalty of perjury.

layoff, including the identity and job classifications of employees to be laid off, the number of employees to be laid off, the timing of the layoff, and the layoff's impact on workload and safety of remaining employees. NUHW representatives sought disclosure and discussion of the layoff notice to be given the employees to be laid off, including the timing of the notice vis-à-vis the layoff effective date, the content of the notice, severance pay and the health insurance options. NUHW representatives further sought disclosure and discussion, by Hospital department, of the layoff reductions and the impact of those reductions on the remaining department employees. Finally, NUHW sought disclosure and discussion of alternatives to layoff, including reduction in the Hospital's non-labor-cost expenses. Hospital representatives refused to discuss these matters, responding that the Hospital was moving forward within its management rights, would conduct the layoff by December 31, 2010, and would lay off whomever they needed to. The NUHW expressed at this bargaining session its objection to the employer-imposed timing of the layoff, saying that it was an artificially constructed deadline.

On December 10, 2010, the Hospital notified NUHW that the layoff would occur on December 28, 2010, and that the Hospital would send the employees notice on December 17, 2010. On December 13, 2010, NUHW responded, urging again that the Hospital confer over the timing of the layoff, and other specific effects, including the impact on remaining employees. The Hospital refused to bargain over the identity, timing, or notification of these proposed layoffs prior to announcing to the NUHW the date of the layoff. The Hospital also continued to refuse to bargain over how staffing, schedules of work, workload, and safety hazards would change for the employees remaining after the layoff, and refused to "meet and confer with the union over any practical alternatives to layoff." (Amended UPC, ¶ 17.)

On December 16, 2010 the parties' representatives met. NUHW representatives demanded the Hospital address and discuss implementation and effects issues, including the total number of employees to be laid off, the identity of the employees to be laid off, which job classifications would be subject to layoff, how shifts and work assignments would be affected and the impact of the layoff on the workload or safety of remaining employees. The NUHW reiterated its demand to meet and confer over "what other changes could be made in each of these departments, or in the hospital at large, that might render the layoffs unnecessary," (Amended UPC, ¶ 20.) Hospital representatives refused, asserting again that the timing of a layoff, and the number and identity of employees to be laid off, were its managerial prerogative. It announced that the notices to employees would be sent the following day, December 17, 2010. NUHW representatives proposed postponing the layoff pending completion of effects discussions. The Hospital refused. NUHW representatives sought again to engage Hospital representatives on the layoff's impact on remaining employees. Hospital representatives refused to engage, contending that such matters were not effects of layoff.

On December 17, 2010 the parties' representatives met. The Hospital provided NUHW what NUHW described it as the first "substantive" proposal. It addressed such topics as seniority, notice, reemployment rights and criteria. This proposal indicated the layoff would occur on December 28, 2010 and invited a discussion of bumping rights. This proposal did not address the identity and total number of employees to be laid off, the job classifications subject to layoff, and the layoff's impact on remaining employees. (See Exhibit 6, First Amended UPC.)

NUHW representatives responded to this proposal. They insisted that Hospital representatives engage as well on the number and identity of employees subject to layoff, the timing of the layoff, and the increased workload and increased safety hazards of the remaining

employees. Hospital representatives again refused to discuss these issues. Hospital representatives stated that the Hospital would soon mail layoff notices to employees. NUHW representatives began to respond to the Hospital's written proposal and continued to demand that the Hospital negotiate over the specific effects it had consistently demanded to negotiate. NUHW also urged that conferring over layoff effects was incomplete, that there was much yet to be done, and that the parties had not yet reached either agreement or impasse. The Hospital informed NUHW it would be moving forward with the layoffs.

On December 21, 2010 the parties' representatives met again. The Hospital announced that it had decided to lay off only 20 employees, not the previously-announced 79. Hospital representatives provided NUHW a list of 20 positions identified by job title but not including employee name or department, and refused to discuss the number of employees to be laid off, their department and their identity. Hospital representatives proposed a severance package for the laid off employees. NUHW agreed to consider the severance package, and offered alternative proposals concerning the effects of layoffs, including creating a supplemental unemployment benefit allowing employees to volunteer for layoffs, an "enhanced" severance package, a process for recalling the laid off employees, and the implementation of schedule changes for remaining employees.[5] Hospital representatives asserted that they would continue to confer after laying off employees. NUHW representatives urged instead a brief delay to permit completion of effects discussions before the layoff. Hospital representatives refused. As of December 22, 2010, when the Hospital unilaterally implemented the layoff by sending notices to the affected employees, the parties were engaged in bargaining over the following

[5] The Hospital characterized this interchange not as a proposal from the NUHW, but as an intent to make a proposal on these topics. This is a disputed fact, contrary to our dissenting colleague's assertion that it is undisputed that the NUHW "failed to offer any substantive proposals over a perceived effect of" the decision to lay off employees. In cases of disputed facts and conflicting allegations at the pleading stage, we refer the matter to a hearing. (*County of Inyo* (2005) PERB Decision No. 1783-M (*County of Inyo*).)

issues, but had not yet reached agreement: (1) number of employees to be laid off; (2) timing of layoffs; (3) severance pay; (4) preferential hiring and rehiring procedures; (5) per diem work. Also, on December 22, 2010, the Hospital's representative sent the NUHW president an e-mail asserting that the parties had reached impasse the night before on "the number of employees and the date of the layoff." As of this date, the Hospital continued to refuse to discuss workload and safety issues for the remaining employees.

On December 22, 2010, the Hospital sent NUHW a "list of twenty employees subject to layoff." Concurrently, the Hospital implemented the layoff, by delivering written notice of layoff to the 20 listed employees. The notice stated that the employee's job was "eliminated" effective at 8:00 a.m. on December 28, 2010, and that the Hospital would pay two weeks' severance and provide several other benefits not yet agreed upon between the Hospital and NUHW. The Hospital indicated that agreement on many effects had not been reached and it was willing to continue negotiating after notice of layoff had been sent to the affected employees. The NUHW president replied, contending the parties were not at impasse.

On December 23, 2010, the Hospital sent another e-mail to Borsos stating that the Hospital would not be making any additional changes in its proposal of December 21, 2010, and clarified that laid off employees would be given no recall rights. The NUHW alleges that by this e-mail, the Hospital reneged on an earlier proposal to provide a process for recalling laid off employees.

On December 27, 2010 the parties' representatives met. NUHW gave the Hospital a written proposal, addressing topics dealt with in the Hospital's last proposal, including seniority, order of layoff, transfers, severance pay and benefits, and recall. When he presented this written proposal, Borsos, the NUHW representative, explicitly told Hospital representatives that the NUHW had "room to move." In addition to its written proposal,

NUHW also demanded to bargain over impact of the layoffs on remaining employees, and reiterated its request to delay implementation of the layoffs until negotiations were completed. Hospital representatives refused to bargain over the number of employees to be laid off, declaring it had never been its intent to do so. The Hospital also refused the NUHW's request to discuss scheduling issues for remaining employees, what new job assignments would result due the layoff, or other impacts on remaining employees. The Hospital explained its refusal to bargain these matters, saying "we're not here to discuss those details." (Amended UPC, ¶ 35.) After receiving NUHW's written proposal, the Hospital caucused for a short time, and returned, declaring that the parties were at impasse and withdrew from the discussions. The NUHW protested and denied there was an impasse.

On December 28, 2010, at 8:00 a.m., the Hospital terminated the 20 noticed employees.

From January 3, 2011 to March 21, 2011, NUHW repeatedly demanded to bargain the Hospital's decision to layoff the 20 employees. The Hospital repeatedly refused to bargain the layoff decision.

On January 3, and January 6, 2011, NUHW demanded to bargain about the "effects" of the layoffs. According to NUHW those effects included, among other things, "the number of employees to be laid off," the "timing" of the layoffs, severance pay, and "per diem" work. On an unspecified date in January 2011, the parties reached an agreement about "per diem" work. However, the Hospital refused consistently to bargain about the number of employees to be laid off or the "timing" of the layoffs.

On January 27, 2011, Borsos wrote to the Hospital's Attorney, Anne Olsen (Olsen). Citing the California Supreme Court's decision in *International Assn. of Fire Fighters, Local 188, AFL-CIO v. PERB; City of Richmond* (2011) 51 Cal.4th 259 (*City of Richmond*), Borsos claimed, in essence, that in *City of Richmond* the Supreme Court had "reaffirm[ed]" the rule

that an employer must meet and confer to impasse over both the decision to lay off employees and the effects of that decision. Borsos demanded that the Hospital reestablish the status quo and return to meet and confer discussions.

On February 10, 2011, Olsen responded to Borsos, disputing NUHW's reading of *City of Richmond*, which she opined reserved to a public agency employer the decision of whether to layoff. Olsen reviewed the parties' pre-layoff discussions, and rejoined that the Hospital had appropriately refused NUHW's demands to confer over matters within its managerial prerogative. Olsen stated that the Hospital would meet and confer over the impact of the layoff on remaining employees.

Information Requests

As noted above, the amended charge does not describe the parties' meeting on November 17, 2010. Nevertheless, it appears NUHW then demanded information related to the layoffs because, on November 19, 2010, Kern wrote to Borsos as follows:

> The attached documents are intended to address your request for information at the November 17, 2010 meeting. We will provide documentation as it becomes available.

On November 19, 2010, Kern wrote to Borsos and answered five "miscellaneous questions" in response to NUHW's "request for additional information." Among other things, Kern stated that the Hospital expected to save $1.1 million in 2010 by not issuing cost-of-living raises. She also stated that 71 non-bargaining unit employees had accepted "buyout[s]" in 2010 and that 34 percent of those employees were managers. Kern also sent Borsos an e-mail message on November 19, 2010, listing 79 employees (only by job code and classification) that the Hospital intended to layoff.

On November 22, 2010, Borsos asked Kern to send him 12 numbered items of information. Borsos then asked Kern to identify any "work load" changes that the Hospital

may have implemented in "the last six months" (Item No. 6) and to identify any "efforts" the Hospital may have "taken to increase revenues into the hospital" (Item No. 12).

On November 22, 2010, Kern responded to Borsos as follows:

> We are evaluating your request for information and will continue to provide documentation via separate email. [My] previous emails were not meant to be all inclusive, rather to be responsive to your requests as the information becomes available. ¶ To our knowledge, Fred Seavey, [of] NUHW, has already received items 2 and 3 listed below. I would appreciate your checking with him before we duplicate our efforts in re-providing this information.

In an e-mail message dated November 22, 2010, Borsos responded to Kern as follows:

> We appreciate your responsiveness on the information that we have so far requested, and you are correct, that the information regarding Wellspring was previously provided to Fred Seavey from our union. Accordingly, we are not asking you to duplicate any response.

Although the Hospital continued to write to Borsos during the next several months, at no point did it change its expressed willingness to provide information as it became "available." Similarly, Borsos wrote to the Hospital numerous times during the next several months, but at no point did he claim that the Hospital had failed to follow through on NUHW's information requests.

THE DISMISSAL

The Office of the General Counsel determined that the charge as amended did not state a prima facie case, concluding: (a) the Hospital's decision to lay off was not a mandatory subject of meeting and conferring; (b) language in the agreement between the Hospital and NUHW's predecessor did not "waive" the Hospital's right to make a layoff decision without meeting and negotiating thereon; (c) NUHW's allegations do not establish that the Hospital failed to meet and confer over impacts and effects of the layoff decision; and (d) NUHW's

allegations fail to establish that the Hospital failed or refused to provide information requested by NUHW.

NUHW'S APPEAL

On appeal, NUHW argues that: (a) the Hospital's firm decision to lay off employees in order to reduce labor costs obliged it to meet and confer with NUHW over layoff implementation (timing, number and identity of employees to be laid off) and the impact and effects of the layoff decision on remaining employees, including workload and safety, and the Hospital did not do so; (b) PERB's agent should have issued a complaint to permit a hearing on unclear or ambiguous language in an expired memorandum of understanding (MOU) arguably requiring the Hospital to meet and confer over the layoff decision; (c) the Hospital did not meet and confer in good faith over the effects of the layoff, steadfastly refusing to confer over either implementation (timing, number and identity of employees to be laid off) or impact and effects of the decision on remaining employees, including workload and safety of such employees; and (d) NUHW sufficiently alleged that the Hospital failed to respond to NUHW's repeated requests for information regarding implementation and effects of the layoff.

HOSPITAL'S RESPONSE

In response, the Hospital argues that PERB's Office of the General Counsel properly decided the issues raised by the amended charge, and properly refused to issue a complaint. It asserts that it had no duty to negotiate over the decision to lay off employees, either under the law or under the expired MOU; that it initiated negotiations on the implementation of the layoff and provided adequate advance notice of the layoff for negotiations to be completed by the end of the year; that it explained to NUHW the need to complete the layoff by the end of the year; that the date for the layoff was not arbitrary; that it was NUHW that bargained in bad faith by refusing to submit any proposals until the eve of layoff, causing the Hospital to

effectively "bargain against itself"; that NUHW never presented any proposals on workload or safety issues for remaining employees; and that the Hospital continued to bargain in good faith after the layoff was implemented.

DISCUSSION

Standard of Review

As noted above, this case is an appeal from a dismissal and refusal to issue a complaint. Our inquiry at this stage is focused solely on the sufficiency of NUHW's allegations. We test NUHW's allegations against the legal standards for a violation of the MMBA, not against contrary allegations of the Hospital even where those contrary allegations may be more persuasively stated. We do not resolve conflicting allegations. (*Golden Plains Unified School District* (2002) PERB Decision No. 1489.) Instead, we refer them to a hearing and ultimate resolution following findings by an administrative law judge (ALJ). (*County of Inyo*; *Eastside Union School District* (1984) PERB Decision No. 466 (*Eastside*).)

The questions presented by NUHW's appeal are:

1. Whether NUHW alleged prima facie that the Hospital failed and refused to meet and confer upon request with NUHW regarding: (a) the decision to lay off employees, (b) the layoff implementation, including the timing of the layoff, and the number and identity of the employees to be laid off, and (c) the impact and effect of the layoff on the remaining employees, including workload and safety of such employees; and

2. Whether NUHW alleged prima facie that the Hospital failed and refused to provide NUHW with requested information related to the layoff.

The Layoff Decision

Under the MMBA, a decision to lay off employees is generally managerial prerogative as to which the employer has no duty to meet and confer with the employees' union over the

decision itself. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608 (*Vallejo*); *City of Richmond*; *Newman-Crows Landing Unified School District* (1982) PERB Decision No. 223 (*Newman-Crows Landing*); *Mt. Diablo Unified School District* (1983) PERB Decision No. 373 (*Mt. Diablo*).

NUHW alleges that the Hospital failed to meet and confer regarding the decision to lay off employees. The Office of the General Counsel determined that NUHW's allegation of failure and refusal to meet and confer over the November 2010 layoff decision was insufficient to state a prima facie case. We agree.

The Hospital announced its decision to lay off employees in November 2010, shortly after NUHW acceded to the status of exclusive representative in late October 2010. NUHW's predecessor organization had concluded an MOU with the Hospital, which MOU had expired in August 2010. The MOU contained a provision arguably obliging the Hospital to meet and confer over a decision to lay off employees. NUHW contends that the expired MOU obligated the Hospital to meet and confer with NUHW regarding its decision to lay off employees, and that the obligation to meet and confer over a decision to lay off continued in effect pursuant to the MMBA as part of the status quo which the Hospital was obliged by MMBA to maintain pending discussion with NUHW for a new agreement. Thus, reasons NUHW, when the Hospital made a decision to lay off employees without having met and conferred with NUHW, it violated the status quo and thus the MMBA. We disagree.

As explained above, the MMBA imposes on employers a duty to meet and confer regarding matters within the scope of representation, which does not include managerial decisions such as a decision to lay off employees. (*City of Richmond.*) Thus, the MMBA imposes a duty to meet and confer over the implementation and the impacts and effects of a layoff decision, but not the decision itself. (*Id.*) The obligation to maintain the status quo on

matters within the scope of representation following certification of a successor organization, attaches only to those matters which are mandatory subjects. (*San Joaquin County Employees Assn. v. City of Stockton* (1984) 161 Cal.App.3d 813; *County of Alameda* (2006) PERB Decision No. 1824-M; *Stanislaus Consolidated Fire Protection District* (2012) PERB Decision No. 2231-M.) Including an agreement on a non-mandatory subject within a MOU does not convert the non-mandatory subject into a mandatory subject. (*Chemical Workers v. Pittsburg Glass Co.* (1971) 404 U.S. 157;[6] *Eureka City School District* (1992) PERB Decision No. 955; *Poway Unified School District* (1988) PERB Decision No. 680.) Nor does an agreement regarding a non-mandatory subject become part of the "status quo" which an employer must maintain while meeting and conferring for a successor MOU. (*Columbus Printing Pressmen Union No. 252* (1975) 219 NLRB 268, *enf'd,* (5th Cir. 1976) 543 F2d 1161; *Berkeley Unified School District* (2012) PERB Decision No. 2268.)

The Hospital's decision in November 2010 to lay off employees was a non-mandatory subject under the MMBA. The Hospital was not obliged by its MOU with NUHW's predecessor to meet and confer regarding the layoff decision. We conclude that NUHW's allegation that the Hospital violated the MMBA when it did not meet and confer over the decision to lay off employees, fails to state a prima facie violation of the MMBA, and we dismiss this allegation.

The Impacts and Effects of Layoff

Under the MMBA, once an employer makes a layoff decision, the employer is obliged to notify the organization representing employees of the decision and to meet and confer in

[6] When construing MMBA and other California public sector labor relations statutes, California courts and PERB rely on cases construing similar language in the National Labor Relations Act. (*Vallejo.*)

good faith, upon request, regarding the reasonably foreseeable impacts and effects of the layoff decision. (*Vallejo; City of Richmond; Newman-Crows Landing; Mt. Diablo.*)

California's Supreme Court recently reconfirmed that having reached a firm decision, driven by labor cost considerations, to lay off employees, an MMBA employer must meet and confer, upon request, with the union representing the employees, both as to the implementation (including the timing, and the number and identity of employees to be laid off)[7] and as to the effects of the layoff on the remaining employees, including post-layoff workload and safety conditions of remaining employees. (*Vallejo*; *Los Angeles County Civil Service Com. v. Superior Court* (1978) 23 Cal.3d 55, 64; *City of Richmond,* at pp. 276-277.) Thus, where a layoff is driven by labor cost considerations, an employer must meet and confer in good faith, upon request, over the implementation and the reasonably foreseeable impacts and effects on remaining employees.

Meeting and conferring on the implementation and effects of a non-negotiable layoff decision should commence early enough to reach completion, including resolution of an impasse, prior to implementation of the decision. (*Mt. Diablo.*) Only under certain circumstances may an employer implement a non-negotiable layoff decision prior to completing the meet and confer process. (*Compton Community College District* (1989) PERB Decision No. 720 (*Compton CCD*) [implementation permissible prior to completing meet and confer where: (1) the layoff implementation date was not arbitrary but based on an immutable externally-established deadline, or on an important managerial interest such that delay beyond

[7] This Board's early decisions concerning the impact and effects of layoffs arose in circumstances where layoff implementation procedures were described in part by statute. (Education Code §§ 44949, 44955.) Where the statute established an immutable timeline or procedure, or stipulated that the employer alone make a decision concerning implementation, the Board concluded the issue was non-negotiable. (*Mt. Diablo.*) Where the statute provided employer discretion, and did not require that the employer alone make a decision, implementation issues like other impacts and effects of the layoff decision were deemed appropriate subjects for meeting and negotiating. (*Ibid.*)

the chosen date would undermine the employer's right to make the decision to lay off; (2) the employer gave notice of the layoff decision and implementation date sufficiently in advance of the implementation date to allow for meaningful meeting and conferring prior to the implementation; and (3) the employer met and conferred in good faith on implementation and effects prior to the implementation, and thereafter as to those subjects not resolved by virtue of the implementation].)

NUHW alleges that the Hospital refused to meet and confer regarding, and implemented the layoff without meeting and conferring over, the implementation of the layoff, including the timing, and the number and identity of employees to be laid off, and the impacts and effects of the layoff on the workload and safety of remaining employees. The Office of the General Counsel determined that NUHW's allegation of failure to meet and confer over the implementation of the layoff and the impact and effects on remaining employees was insufficient to state a prima facie case. We disagree.

Following its November 2010 notification of NUHW about the decision to lay off 79 employees "at the end of the year," the Hospital met several times with NUHW to confer regarding the announced layoff. NUHW alleges that at the outset of the discussions, and regularly during each meeting thereafter, NUHW representatives demanded that the Hospital confer regarding the implementation (timing, number and identity of employees to be laid off), and the impact and effects of the layoff on remaining employees, including their workload and their safety. NUHW alleges that the Hospital representatives responded to these demands as follows: the Hospital viewed these matters as managerial prerogative, beyond the Hospital's duty to meet and confer under the MMBA, and thus the Hospital would not meet and confer thereon. NUHW alleges that it pressed the Hospital to provide details of its announced layoff. NUHW alleges that in a series of documents the Hospital described as "proposals" Hospital

representatives revealed piecemeal to NUHW various aspects of the Hospital's layoff plan, all the while declaring that the timing, number and identity of employees to be laid off, and the impact and effects of the layoff on remaining employees, were matters of managerial prerogative and not subject to the Hospital's MMBA duty to meet and confer.

The Hospital counters that it, not NUHW, initiated the layoff talks, and that it proffered to NUHW three written proposals, while NUHW responded only with one written proposal and at the eleventh hour. NUHW concedes that the Hospital did initiate layoff talks, and made several proposals. As to layoff timing, the Hospital did change its initial position ("the end of the year") to the position it implemented ("8:00 am on December 28, 2010"). As to number of layoffs, the Hospital did change its initial position (79) to the position it implemented (20). As to which employees it would lay off, the Hospital identified those employees to NUHW at the time of its December 22, 2010 notice to the individual employees. Nonetheless, contends NUHW, the Hospital asserted continuously that the timing, and the number and identity of employees to be laid off were managerial prerogatives and not matters on which the Hospital would meet and confer. And as to the impact and effects of the layoff on the remaining employees, the Hospital refused to address either workload or safety.

The changes in the Hospital's position, accompanied as they were by assertions that these subjects were beyond the scope of representation, do not immunize it from a valid charge that it refused to bargain in good faith on the timing, number and identity of employees or on the impact of the layoff on remaining employees. Where an employer believes a matter to be outside the scope of mandatory meeting and conferring, it is obliged to explore the matter in meet and confer discussions. (*Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375.) Thereupon, the employer may change its position and meet and confer on the matter, or it may continue to

assert its prior position and decline to meet and confer. In the latter case, if the employer is incorrect, its refusal to meet and confer is unlawful. (*Sierra Joint Community College District* (1981) PERB Decision No. 179 (*Sierra CCD*) [absolute refusal to negotiate violates duty to negotiate in good faith].)

Here, it is undisputed that the Hospital's layoff decision was driven by labor cost considerations. Thus, the implementation (timing of the layoff, and the number and identity of employees to be laid off) and the impact and effects on remaining employees, including workload and safety, were mandatory subjects for meeting and conferring prior to the implementation of the layoff. (*City of Richmond.*) It is also undisputed that the Hospital declared an impasse on December 21, 2010, allegedly prematurely when NUHW had signaled it had room to move and was willing to consider some of the Hospital's proposals. The Hospital sent notices to affected employees the next day and refused NUHW's request to delay the implementation of the layoff for a couple of weeks until negotiations could be completed. As NUHW alleged, the Hospital continuously contended that the subjects of workload, safety, and identity of employees to be laid off were solely within its managerial prerogative, and repeatedly refused NUHW's requests to meet and confer thereon.[8] The Hospital's refusal to meet and confer, at least on safety and workload issues, was absolute and thus unlawful. (*City of Richmond; Sierra CCD.*) The Hospital's December 21, 2010, proposal on numbers and timing of layoff does not warrant dismissal of the unfair practice charge which also

[8] The NUHW alleged that on December 21, 2010, just before the layoff notices were sent to employees, "the employer verbally revised its former proposal concerning the number of employees subject to layoff and then promised to lay off only 20 employees.... The employer proposed various dates for the layoffs.... The union did not accept these proposals that night, but offered to consider them.... The union asked the employer to briefly postpone the effective date of these layoffs until the parties had an opportunity to complete bargaining at least over the effects of the layoffs. The hospital refused." (Amended UPC, ¶ 24.)

articulates a theory that the employer violated the MMBA by unilaterally implementing the layoff before the parties had reached a genuine impasse.

An employer may implement a non-negotiable layoff decision prior to completing its meet and confer obligations as to the effects of the layoff only under certain conditions, including the condition that it meet and confer in good faith over those matters that are mandatory subjects for meeting and conferring. (*Compton CCD.*) NUHW has alleged the Hospital unlawfully failed and refused to meet and confer in good faith over effects of its labor-cost driven layoff decision, to wit, implementation (timing, number and identity of employees to be laid off) and the impact and effects upon remaining employees, and therefore the Hospital's implementation of the layoff is unlawful. NUHW has also alleged that there was no urgency or other business necessity that required the Hospital to lay off employees before the end of the year, rather than granting NUHW's request for a couple of extra weeks of negotiations. The requests for delay came at a point in the parties' discussions in which proposals were being exchanged and when NUHW indicated it had room to move on certain issues. In short, NUHW has made out a prima facie case that the Hospital prematurely declared impasse and implemented the layoff before negotiations over implementation and effects were complete. It has also alleged that at least two of the *Compton CCD* prerequisites that could justify implementation before completion of negotiations are not present: good faith bargaining prior to implementation and a non-arbitrary date based on either an immutable externally established deadline or on an important managerial interest such that delay beyond the chosen date would undermine the employer's right to make the decision to lay off.[9]

[9] In its sworn statement opposing the NUHW's request for injunctive relief, the Hospital states that it informed NUHW on December 8, 2010, that the Hospital needed to complete the layoff by January 1, 2011, because that was the date Blue Cross/Anthem reimbursement reductions would become effective, resulting in reduced revenues to the Hospital. While this economic consideration explains why the employer selected the end of

We conclude that NUHW's allegations state a prima face case of refusal to meet and confer over the timing, number and identity of employees to be laid off, and over the impact and effects of the layoff on remaining employees, and of improper implementation of a non-negotiable decision without completing meeting and conferring in good faith over effects thereof. In reaching this conclusion, we acknowledge that the Hospital paints a very different picture of the course of negotiations, where the employer gave adequate notice of the proposed layoff and invited negotiations on what it considered negotiable implementation issues and was faced with an allegedly recalcitrant union that sought to delay bargaining by, among other things, insisting on bargaining about the layoff decision itself. As we are directed by *Eastside*, if the investigation results in "conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." At the pleading stage, it is not up to the Board agent to judge the merits of the charging party's dispute, but to leave the weighing of the evidence to the ALJ at a full evidentiary hearing. (*Saddleback Community College District* (1984) PERB Decision No. 433; *Lake Tahoe Unified School District* (1993) PERB Decision No. 994.) We leave to the ALJ the task of determining the merits of these allegations—whether the employer bargained in bad faith, or refused to bargain on negotiable subjects, or whether its hands are clean in the face of a bargaining partner that allegedly failed to make timely proposals on matters it had a right to negotiate about.

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the year as the deadline for layoff, the impending reduction in revenue does not necessarily meet the *Compton CCD* test. Though economically desirable to have reduced expenses coincide with reduced revenues, we cannot conclude at the pleading stage of this case that a brief delay in the effective date of the layoff would undermine the right of the Hospital to ultimately decide to lay off employees.

Duty to Provide Information

An employer has a duty to provide information, upon request, to a union seeking to meet and confer over matters within the scope of representation, including the implementation and effects of a layoff. (MMBA, § 3507(a)(8); accord, *Oakland Unified School District* (1983) PERB Decision No. 326; *Oakland Unified School District* (1982) PERB Decision No. 275.) This duty obliges an employer to respond promptly to the union's information request. (*Chula Vista City School District* (1990) PERB Decision No. 834.)

NUHW contends that the Hospital failed to provide information requested by NUHW regarding the layoff, its implementation and its effects. As summarized above, NUHW's allegations do not state that the Hospital failed and refused to provide, upon request, information requested by NUHW related to the layoff and its implementation and effects. Rather, NUHW admits that the Hospital offered to provide the information as it became available, and thereafter NUHW did not reject this response as insufficient nor demand that the Hospital provide the information with greater alacrity or in greater detail. We conclude, with the Office of the General Counsel, that NUHW's allegations are insufficient to state a prima facie case of failure to provide requested information, and we dismiss this allegation.

ORDER

The National Union of Healthcare Workers (NUHW) allegations in unfair practice charge Case No. SF-CE-797-M, that Salinas Valley Memorial Healthcare System failed and refused to meet and confer in good faith with NUHW over the decision to lay off employees and failed to provide NUHW relevant information concerning the layoff and effects thereof, are hereby DISMISSED WITHOUT LEAVE TO AMEND.

The remaining allegations are hereby REMANDED to the Office of the General Counsel for issuance of a complaint in accordance with this Decision.

Chair Martinez joined in this Decision.

Member Dowdin Calvillo's concurrence and dissent begins on page 24.

DOWDIN CALVILLO, Member, concurring and dissenting. I agree with my colleagues that the charge, as amended, fails to state a prima facie violation of the duty to bargain with respect to the decision to lay off employees and the refusal to provide information. I respectfully dissent, however, from the decision to remand this case back for issuance of a complaint on the issues of effects and implementation bargaining. Instead, I agree with the analysis and conclusions reached in the dismissal and warning letters that the charge fails to allege sufficient facts to establish that the Salinas Valley Memorial Healthcare System (Hospital) failed to comply with the standards for pre-negotiation implementation under *Compton Community College District* (1989) PERB Decision No. 720. I further agree that the charge failed to allege sufficient facts to establish that the Hospital violated its duty to engage in bargaining over the implementation or effects of the Hospital's decision to lay off employees. In this regard, I note the undisputed evidence that the Hospital repeatedly invited National Union of Healthcare Workers (NUHW) to negotiate over effects, including passing specific proposals concerning potential effects, even though the burden was on NUHW to identify the negotiable effects it wished to bargain. (*Newman-Crows Landing Unified School District* (1982) PERB Decision No. 223 (*Newman-Crows Landing*).) I note, further, that the charge fails to allege facts showing that NUHW made any specific, substantive proposals over any perceived effects of the Hospital's non-negotiable decision to lay off employees until the day before the layoffs were scheduled to be implemented. (*Beverly Hills Unified School District* (2008) PERB Decision No. 1969, citing *Fremont Union High School District* (1987) PERB Decision No. 651 ["Before implementing a non-negotiable decision, an employer has a duty to provide the union with an opportunity to meet and confer over any 'reasonably foreseeable effects' of the decision on

subjects within the scope of representation."]; see also *Trustees of California State University* (2012) PERB Decision No. 2287-H ["In order to make a prima facie case for violation of the duty to bargain in good faith over effects, the employee organization must demonstrate that it made a valid request to bargain the negotiable effects of the employer's decision."].) Instead, NUHW continuously took the erroneous position that the Hospital was obligated to bargain over the non-negotiable layoff decision. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608; *International Association of Fire Fighters, Locall 188, AFL-CIO v. Public Employment Relations Bd.* (*City of Richmond*) (2011) 51 Cal.4th 259; *Newman-Crows Landing*.) Accordingly, I would affirm the dismissal of the charge.