STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MENDOCINO COUNTY PUBLIC ATTORNEY'S ASSOCIATION, Charging Party, v. COUNTY OF MENDOCINO, Respondent.	Case No. SF-CE-432-M PERB Decision No. 2104-M April 21, 2010

Appearances: Beeson, Tayer & Bodine by Andrew H. Baker, Attorney, for Mendocino County Public Attorney's Association; Douglas L. Losak, Chief Deputy County Counsel, for County of Mendocino.

Before Dowdin Calvillo, Chair; McKeag and Wesley, Members.

DECISION

WESLEY, Member: This case is before the Public Employment Relations Board (Board) on exceptions filed by the Mendocino County Public Attorney's Association (MCPAA) to the proposed decision (attached) of an administrative law judge (ALJ). The complaint alleged that the County of Mendocino (County) violated the Meyers-Milias-Brown Act (MMBA)[1] when it unilaterally ceased a policy of granting a one percent cost-of-living adjustment (COLA) and simultaneously sought to recoup overpayments of the increase issued to employees by mistake. The ALJ dismissed the complaint finding that the County did not unlawfully change a policy.

The Board reviewed the proposed decision and the record in light of MCPAA's exceptions, the County's response to the exceptions, and the relevant law. Based on this review, we find the ALJ's proposed decision to be well-reasoned, adequately supported by the

[1] MMBA is codified at Government Code section 3500 et seq.

record and in accordance with applicable law. Accordingly, the Board adopts the proposed decision as the decision of the Board itself.

DISCUSSION

This case begins with the migration of attorney classifications from two existing bargaining units represented by the Service Employees International Union, Local 707 (SEIU) and the Mendocino County Management Employees Association (MCMEA), to a newly created unit represented by MCPAA. The new unit became effective in April 2006. MCPAA and the County began negotiations for an initial memorandum of understanding (MOU) three weeks later.

The MOUs for the old units represented by SEIU and MCMEA provided for a one percent COLA effective September 2006. When the one percent COLA was implemented in these units, it was mistakenly applied to the employee classifications that had been removed from the units. In January 2007, after the County realized the mistake, it corrected the error and ceased further payments of the COLA to the employees in the new unit.

The ALJ held, pursuant to the reasoning in *Chevron*, *Shell Oil*[2] and related cases, that the County was not obligated to grant the one percent salary increase attached to the MOUs of the units from which the employees had migrated. He also concluded that because the County was not obligated to grant the increase, and because the application of the increase was a clerical error, the County's prompt correction of the error did not amount to an unlawful unilateral change as contemplated in the MMBA. We concur.

[2] *Chevron Oil Co.* (1970) 182 NLRB 445; *Shell Oil Co.* (1948) 77 NLRB 1306.

ORDER

The complaint and underlying unfair practice charge in Case No. SF-CE-432-M are hereby DISMISSED.

Chair Dowdin Calvillo and Member McKeag joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

MENDOCINO COUNTY PUBLIC ATTORNEY'S ASSOCIATION, Charging Party, v. COUNTY OF MENDOCINO, Respondent.	UNFAIR PRACTICE CASE NO. SF-CE-432-M PROPOSED DECISION (10/07/2009)

Appearances: Beeson, Tayer & Bodine, by Andrew H. Baker, Attorney, for Mendocino County Public Attorneys Association; Douglas L. Losak, Deputy County Counsel, for County of Mendocino.

Before Donn Ginoza, Administrative Law Judge.

PROCEDURAL HISTORY

The Mendocino County Public Attorneys Association (MCPAA) initiated these proceedings under the Meyers-Milias-Brown Act (MMBA or Act)[1] on March 14, 2007, by filing an unfair practice charge against the County of Mendocino (County). The Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint on March 3, 2008, alleging that the County unilaterally ceased a policy of granting a one-percent, cost-of-living adjustment (COLA) and simultaneously sought to recoup overpayments of the portion of the increase issued to employees by mistake. This conduct is

[1] The Act is codified at Government Code section 3500 et seq. Hereafter all statutory references are to the Government Code unless otherwise indicated.

alleged to violate sections 3503, 3505, 3506 and 3509(b) of the Act and PERB Regulations 32603(a), (b), and (c).[2]

On March 28, 2008, the County answered the complaint, denying all material allegations and raising a number of affirmative defenses.

On May 1, 2008, an informal settlement conference was held but the matter was not resolved.

On April 30, 2009, a formal hearing was held by the undersigned in Oakland.

On July 14, 2009, following the submission of post-hearing briefs, the matter was submitted for decision.

FINDINGS OF FACT

The County is a public agency within the meaning of section 3501(c). MCPAA is an employee organization within the meaning of section 3501(a).

In January 2006, MCPAA filed a petition with the County seeking removal of attorney classifications from two larger represented units. The unit exclusively represented by Service Employees International Union, Local 707 (SEIU) included deputy district attorneys I and II, deputy public defenders I and II, and child support attorneys I and II. The unit exclusively represented by the Mendocino County Management Employees Association (MCMEA) included deputy district attorneys III and IV, deputy public defenders III and IV, and child support attorneys III and IV. In or around March 2006, pursuant to a governing board action, the County established a new unit into which the County attorneys were placed. SEIU and MCMEA memorialized the unit modifications in separate written documents executed with the County and MCPAA. Both agreements recited that the County's human resources department

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

had recommended these unit modifications to the governing board, and the governing board had approved the recommendations. According to the agreements the change in representation was effective on April 23, 2006.[3]

SEIU and the County were parties to a memorandum of understanding (MOU) effective from June 1, 2004 through September 30, 2006. Pursuant to the MOU, Article 7 ("Salary and Salary Upon Status Change"), section 1 ("Salary Increase"), set forth a schedule of three salary increases of one percent each. These increases were to be granted to all classifications in the bargaining unit as an addition to the salary range for each classification. They were to take effect on the first day of the pay period beginning April 24, 2005 (pay warrants issue at the end of each monthly pay period), January 1, 2006, and September 30, 2006.

MCMEA and the County were parties to a similar arrangement. One-percent salary increases were effective the first full pay period following January 1, 2005, January 1, 2006 and before September 30, 2006 (the expiration of the term of the agreement).[4]

Typically all of the bargaining units negotiate agreements on the same bargaining cycle. The County has also maintained uniformity in health insurance premiums for its self-insured plan without further bargaining with the various units by reserving the flexibility to increase premiums within a specified range.

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[3] A County document issued subsequently references a governing board action on April 11, 2006, and indicates this earlier date for the conception of the new unit. The documents confirming the creation of the newly formed bargaining unit reference four articles of the County's local employee relations ordinance which authorized the change. Those provisions were not entered into the record. A County witness testified that the attorneys were moved from the existing units by way of a "decertification," though no details or documentation was offered confirming that characterization of the change in status.

[4] No official MOU existed for the MCMEA unit, but there was a document setting forth terms and conditions for the unit.

MCPAA and the County commenced bargaining over an initial MOU approximately three weeks after the County recognized MCPAA. The MCPAA bargaining team consisted of three officers of the union, Matthew Finnegan, Brian Newman and Steven Jackson. The County bargaining team consisted of Fran Buchanan, an independent labor relations consultant, and Human Resources Director Stephanie Kentala. Kentala separated from the County in the summer of 2006 and was replaced by Interim Human Resources Director Linda Clouser.

MCPAA communicated its principal bargaining objectives in one of the early sessions. Finnegan urged that while negotiations were ongoing, employees in the new unit should have their terms and conditions maintained at the status quo level. Two critical pieces of the status quo were maintenance of civil service status for all bargaining unit employees and the salaries of the employees from their pre-existing units. Finnegan expressed this globally as "nobody [losing] anything." In addition MCPAA desired maintenance of benefits equal to those provided management employees for attorney IIIs and IVs, as well as extension of those benefits to attorney Is and IIs—a point of contention described below. As to new wage terms, MCPAA proposed a 30 percent increase for all steps on the salary schedule, additional increases by classification and step, a three-percent-at-fifty retirement benefit, and a 4.5 percent increase in deferred compensation County contributions.

The County team explained that it had no authority to counter-propose to the MCPAA proposals without approval of the governing board, but that it would consult with the board on a meeting-to-meeting basis. According to Finnegan's unrebutted testimony, the County team reported back that the board was willing to maintain the "status quo."

Buchanan testified that from the County's perspective the weightier issues were economic, namely salary increases, and no real negotiations could occur until later in the

summer when the County expected to complete a salary survey of comparable jurisdictions.[5] The County did agree early in the bargaining to extend civil service status to the entire bargaining unit, a matter of priority for MCPAA and communicated as such by MCPAA in one of the early sessions.

The County's practice in bargaining was to record the ongoing status of all proposals on a three-column chart with a heading for the union's proposal, the "issue/interest" and the "status." For these negotiations, the proposal column included such items as "civil service classification," "benefits," "wages," "enhanced retirement," "deferred compensation," "leave time," "training/education fund," and "posted vacancies." Finnegan testified that Buchanan showed him a document confirming the board's agreement to maintain the status quo. In that regard, each party produced one of Buchanan's status reports: MCPAA produced the report dated June 2, 2006, and the County, the one dated May 10, 2006. Both documents contain the same language regarding identification of issues. Under "benefits," Buchanan reported two proposals as being under discussion. The first of the proposals read, "County to provide benefit enhancements equal to the management level asap pending negotiations outcome." The second was "No reduction in current benefits pending negotiations outcome, e.g., longevity pay." The May 10 document is blank in the "status" column, whereas the June 2 document states that as of May 16, there would be "[n]o changes in benefits until negotiations concluded" (as to the first proposal) and "status quo pending negotiations outcome" (as to the second proposal). Buchanan testified the unrecorded agreement to maintain the "status quo" had the more limited meaning related to carrying over management level benefits for those coming from the management unit, as opposed to movement toward a uniform set of

[5] The County's salary comparability research at the time was across-the-board and not limited to the attorney classifications.

management level benefits across the unit. Essentially, as to the first proposal to extend management benefits to non-management attorneys, the County was rejecting the proposal, and as to management benefits for management attorneys, the County was willing to maintain those. Despite a request by MCPAA, no tentative agreement was created to memorialize the agreement to maintain the status quo, whatever meaning was intended by that phrase.

The parties were unable to reach agreement on terms for a new contract on their own during the remainder of 2006. Beginning with the September 2006 pay period the County increased the salary of all employees in MCPPA's bargaining unit by one percent.

At some time in January 2007, the human resources staff discovered that the attorneys had not been removed from their bargaining unit of origin for payroll purposes at the time the new unit was created. On January 29, 2007, Clouser issued a notice to employees of MCPAA's bargaining unit stating the amount of each employee's overpayment for the three-month period and giving the employee several options to elect for repayment. As a result of the same error, attorney Is and IIs got an additional three-percent increase by virtue of a wage increase obtained by SEIU in negotiations concluded after expiration of the preceding MOU. Finnegan objected to the proposed recoupment action on behalf of MCPAA, though not disputing the three-percent increase to be an error. The County relented in the face of this demand and took no additional steps to recoup the overpayments. However, it did begin issuing paychecks without the one-percent increase starting with the next pay period. In a January 31, 2007, e-mail to MCPAA leadership, County Counsel asserted that payment of the one-percent increase had been a "mistake."

Also on January 31, 2007, Clouser issued a memorandum to members of the unit further explaining the County's position. Clouser asserted that the attorneys had been moved into their new bargaining unit within the payroll office on the date of its creation for some but

not all purposes. Payroll was one of the functions for which the migration did not occur, due to "coding errors." Hence, when the bargaining units of origin received the one-percent increase, the public attorneys formerly in those units also received the one-percent increase.

In the spring of 2007, MCPAA affiliated with the International Federation of the Teamsters. Teamsters Business Agent Joe Martinelli joined the MCPAA bargaining team shortly thereafter. In March 2007, MCPAA engaged in a brief work stoppage in protest of the stalled bargaining and the one-percent issue in particular.

Shortly after the work stoppage, the parties engaged a mediator with a view to resolving their bargaining impasse. The parties spent several lengthy sessions together. After brief face-to-face dealings, the parties caucused separately with the mediator serving as a shuttle diplomat. Going into mediation, the County had agreed to maintenance of civil service status for all members of the unit, thereby leaving wages as the paramount unresolved issue.

The groundwork for an agreement came into place after the mediator requested that the County move away from its conceptual framework based on COLAs and market adjustments for each of the major classifications ("Attorney I," "Attorney II," "Attorney III," "Attorney IV," and " Chief Deputy"). Based on the methodology of a single maximum salary achievable at the end of the contract for the top step of the range for each classification, the County began constructing in reverse chronological order, annual COLAs and market adjustments for each classification in 2007, 2008 and 2009. After a few exchanges, the parties arrived at the basis for agreement to a new MOU. The parties agreed to three general annual salary increases of three percent beginning upon ratification, together with market adjustments for particular classifications, effective in July 2007 and July 2008.

Upon reaching a conceptual agreement for settlement of the contract issues, the parties agreed to present the economic terms to their respective principals and urge ratification of the

agreement. The County broached the question of the status of the various pending unfair practice charges that were before PERB. The County and MCPAA each had pending charges. Buchanan expressed her belief that the consideration provided through the economic agreement set the stage for withdrawal of all of the charges on both sides. MCPAA considered the request but responded that all but the instant unfair practice charge would be dismissed. The County prepared a letter for Finnegan's signature, confirming the union's intent to dismiss all but the one unfair practice charge contingent upon ratification of the economic terms by both sides. Finnegan declined to sign the document. As to all other issues the parties agreed to negotiate those matters at a subsequent time in anticipation of the need to produce language for an MOU agreeable to both sides. Such an MOU was eventually achieved.

ISSUE

Did the County unilaterally change the salary of employees in MCPAA's bargaining unit by eliminating the one-percent increase it had granted beginning with the September 2006 pay period?

CONCLUSIONS OF LAW

The complaint alleges that the County violated its duty to meet and confer in good faith by unilaterally repudiating a policy of increasing the salaries of bargaining unit members by one percent, effective with the September 2006 pay period. MCPAA contends that until the parties had completed bargaining over new MOUs for the newly formed bargaining unit, the status quo included the raise previously negotiated for the units from which its new bargaining unit members had migrated. The County responds that the one-percent increase policy ceased to apply to the employees in the newly formed bargaining unit, because they were no longer covered by the MOUs of the bargaining units from which they migrated.

To prevail on a complaint of unilateral change, the exclusive representative must establish by a preponderance of the evidence that (1) the employer implemented a change in policy; (2) the action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) the action is not merely an isolated incident, but amounts to a change of policy (i.e., having a generalized effect or continuing impact on terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. (*Walnut Valley Unified School District* (1981) PERB Decision No. 160; *Grant Joint Union High School District* (1982) PERB Decision No. 196.)

There is no dispute that the County proceeded without providing MCPAA notice and an opportunity to bargain, that the matter was within the scope of representation, or that it had a generalized effect or continuing impact on terms and conditions of employment. The issue is whether the County implemented a change in policy.

MCPAA relies on a line of private sector precedent following *Great Atlantic & Pacific Tea Co.* (1967) 166 NLRB 27, 29.[6] As explained there:

> As a general rule, an employer, in deciding whether to grant benefits while a representation election is pending, should decide that question as he would if a union were not in the picture. On the other hand, if an employer's course of action is prompted by the Union's presence, then the employer violates the Act whether he confers benefits or withholds them because of the Union.

(*Id.* at p. 29, fn. 1; accord *Southeastern Michigan Gas Co.* (1972) 198 NLRB 1221, 1222-1223; *Liberty Telephone & Communications* (1973) 204 NLRB 317, 318; *Parma Industries, Inc.* (1988) 292 NLRB 90, 90-91; *Lamonts Apparel, Inc.* (1995) 317 NLRB 286, 287-288; see also *Armstrong Cork Co. v. NLRB* (5th Cir. 1954) 211 F.2d 843, 845-847.) The rule has been

[6] Where the statutes are similar and reliance on private sector precedent is otherwise appropriate, PERB may rely on authorities under the National Labor Relations Act (29 U.S.C. §§ 151-169). (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 616-617.)

extended to require that an employer refrain from abandoning a prior established compensation practice even following a certification. (*American Telecommunications Corp.* (1980) 249 NLRB 1135, 1137; *E. C. Waste, Inc.* (2006) 348 NLRB 565, 572.)

The County refers to the same line of authority, citing *NLRB v. Dothan Eagle, Inc.* (5th Cir. 1970) 434 F.2d 93, a case also cited by MCPAA. In that case the court examined the question whether a historic practice of providing wage increases to apprentices should have been followed during negotiations with a new bargaining agent. The County argues that under the cited case, it was required to maintain the status quo during bargaining. And, under its interpretation of the events here, the County did not alter the status quo by declining to apply the provisions of the MOUs of the units from which the attorneys migrated.

I find this line of private sector precedent to be distinguishable. The NLRB's primary concern here appears to be with the employer's obligation during bargaining for a contract after the union is recognized following an initial organizing campaign. Typically the cases treat the issue of an employer's unilateral discontinuance of an expected raise or the selective granting of the raise only to non-represented employees as interference, discrimination, bypassing, unilateral changes, or a combination of violations. (See, e.g., *Illiana Transit Warehouse Corp.* (1997) 323 NLRB 111 [section 8(a)(1)[7] and 8(a)(3)[8] violations as a result of withholding annual raise and Christmas bonus to newly represented employees]; *Alpha Cellulose Corp.* (1982) 265 NLRB 177 [letter to employees stating legal duty to freeze wages during bargaining interpreted by employees as a penalty for choosing a bargaining representative].) But an underlying concern is with protecting employees' right to free choice

[7] 29 United States Code section 158(a)(1).

[8] 29 United States Code section 158(a)(3).

in selection of a bargaining agent, a policy historically policed with vigor by the NLRB. (See *Los Angeles Unified School District* (1998) PERB Decision No. 1267.)

MCPAA does not contend that the decision was intended as retaliation for creation of the new unit, or to demonstrate that employees could obtain comparable benefits without any representation whatsoever. (Cf. *Great Atlantic & Pacific Tea Co.*, *supra*, 166 NLRB 27 [employer's withholding of benefits "and its exploitation of such action, was a tactical maneuver designed to discriminate against employees and to interfere with the employees' freedom of choice"].) To the extent that MCPAA relies on such cases as *Alpha Cellulose Corp.*, *supra*, 265 NLRB 177, 178, fn. 1, to argue under what circumstances "benefits which have become conditions of employment by virtue of prior commitment or practice," the cases are inapposite because the unilateral change theory was parallel to a discrimination or interference violation. The County's decision is not shown or claimed to have had any material effect on employee free choice.

Not inconsistent with the same line of authority, the NLRB has found that absent other proof interference with employee free choice an employer is entitled to withhold benefits that employees would have obtained had they remained unorganized so long as the employer engages in good faith bargaining. (*Chevron Oil Co.* (1970) 182 NLRB 445, 449, citing *Shell Oil Co.* (1948) 77 NLRB 1306; *McGraw-Edison Co.* (1968) 172 NLRB 1604, 1609-1610.) When employees exercise choice in representative status they have no right to insist upon bargaining demands free from economic disadvantages, and an employer's use of economic pressures solely in support of a bargaining position cannot be held unlawful for that reason alone. (See *Shell Oil, Co.*, *supra*, 77 NLRB 1306, 1310 ["Likewise, an employer is under no obligation under the Act to make such wage increases applicable to union members, in the face of collective bargaining negotiations on their behalf involving much higher stakes."];

American Ship Building Co. v. NLRB (1965) 380 U.S. 300, 308-318 [limit on labor agency's ability to protect employee free choice in the context of good faith bargaining]; see also *NLRB v. Appalachian Electric Power Co.* (4th Cir. 1944) 140 F.2d 217, 219-220.) In this case, there is no contention—nor evidence supporting one—that the County ever refused to negotiate any proposal advanced by MCPAA so as to penalize the employees for establishing the new unit.

Evidence to the contrary is found in the County's human resources department's recommendation for establishment of the new unit to its governing board. With solicitation of approval of all the principals, that action was adopted. As the initial arbiter of its own employee relations ordinance, the County never opposed creation of the new unit. Though the employee relations ordinance was not introduced, and thus it is not clear whether the employer had any standing under its own rules to resist the recognition of MCPAA prior to the expiration of the two MOUs covering the attorneys, the County immediately commenced negotiations with MCPAA without limitation as to any subjects.[9] This willingness to reopen all terms and conditions of employment for negotiations five months prior to expiration of the pre-existing MOUs imposed on the County an opportunity cost. Not only were all terms immediately open to negotiation, retroactivity to the beginning of negotiations was a matter for negotiations.[10] MCPAA has not asserted that the County failed to maintain the status quo as to the panoply of other terms and conditions applicable to unit employees, only this particular disputed one. Thus, I do not find it effectuates the purposes of the Act to find that the County

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[9] Many MMBA employee relations ordinances are spare in terms of procedures for creation of new units from existing ones. However a contract bar rule is generally recognized by PERB as a legitimate restriction on the exercise of employee free choice.

[10] Notwithstanding MCPAA's failure to achieve retroactivity for its salary increases, retroactivity potentially would have extended to the date the employees were released from the prior bargaining units—or at the latest when negotiations commenced.

violated the statute by failing to grant a wage increase attached to the MOUs of the units from which they migrated.

Admittedly, in the context of section 8(a)(5)[11] bargaining allegations, the NLRB has stated on occasion that following commencement of bargaining and before an agreement or bargaining impasse has been reached, a violation occurs simply because the employer implements a change without notice to the exclusive representative—something which did occur here—that rule does not compel a different result given that the County was never obliged to grant the one-percent increase in the first instance. (See *NLRB v. Katz* (1962) 369 U.S. 736; *Central Maine Morning Sentinel* (1989) 295 NLRB 376, 379; *Mike O'Connor Chevrolet-Buick-GMC Co., Inc.* (1974) 209 NLRB 701, 703-704.)

Although the complaint alleges that the recoupment action constituted another aspect of the unilateral change, I find no violation because the County in reasonably short order desisted from collection of the overpaid compensation. The evidence does not demonstrate a change of generalized effect or continuing impact (i.e., a conscious creation of a new policy). (See *Moreno Valley Unified School District* (1982) PERB Decision No. 206, pp. 10-11, affd. in part, revd. in part, *Moreno Valley Unified School Dist. v. Public Employment Relations Bd.* (1983) 142 Cal.App.3d 191.)

Accordingly, I find that the County did not breach its duty to meet and confer in good faith.

PROPOSED ORDER

Based on the foregoing findings of fact and conclusions of law, and the entire record in this case, it is ordered that the complaint and underlying unfair practice charge in Case

[11] 29 United States Code section 158(a)(5).

No. SF-CE-432-M, *Mendocino County Public Attorneys Association v. County of Mendocino*, are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

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

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a), 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 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. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c), (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32130.)

Donn Ginoza
Administrative Law Judge