STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 3112, Charging Party, v. ANAHEIM UNION HIGH SCHOOL DISTRICT, Respondent.	Case No. LA-CE-5741-E PERB Decision No. 2504 October 14, 2016

Appearances: Pete Schnaufer, Business Representative, for American Federation of State, County and Municipal Employees, Local 3112; Parker & Covert by Kara R. Barnthouse, Attorney, for Anaheim Union High School District.

Before Winslow, Banks and Gregersen, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by the American Federation of State, County and Municipal Employees (AFSCME) to the proposed decision (attached) of a PERB administrative law judge (ALJ) which dismissed the complaint and AFSCME's unfair practice charge. The complaint alleged that the Anaheim Union High School District (District) unlawfully conditioned agreement and/or insisted to impasse in negotiations for a successor collective bargaining agreement on non-mandatory subjects of bargaining, including that AFSCME agree to various mid-term concessions in return for the District's promise to lay off a so-called "short list" of employees, rather than a more extensive "long list." The complaint also alleged that by the above and other conduct the District negotiated in bad faith; that during impasse proceedings, the District unlawfully conditioned reinstatement of laid off employees and restoration of employees' hours on

AFSCME's agreement to relinquish a favorable arbitration award; and that the District's Superintendent interfered with protected rights by reneging on a promise made to employees to restore their hours if AFSCME would agree to proposed changes to the District's health and welfare benefit contributions.

Following a four-day hearing and briefing by the parties, on June 12, 2015, the ALJ issued her proposed decision, which dismissed all allegations in the complaint and the underlying unfair practice charge. AFSCME has filed five exceptions to the proposed decision, challenging certain factual findings and the ALJ's legal reasoning and conclusions. The District's response argues that AFSCME's statement of exceptions and supporting brief generally fail to comply with PERB Regulations and urges PERB to adopt the ALJ's findings and conclusions.

The Board itself has reviewed the record in its entirety and considered the parties' respective exceptions and responses thereto. The record as a whole supports the ALJ's credibility determinations and factual findings and the proposed decision is well-reasoned and consistent with applicable law. Accordingly, the Board affirms the ALJ's rulings, findings and conclusions and adopts the proposed decision as the decision of the Board itself, subject to the following discussion of AFSCME's exceptions.

FACTUAL BACKGROUND

The attached proposed decision is thorough in its recitation of the procedural and factual history and its treatment of the issues raised by the unfair practice complaint. We briefly summarize here only those facts necessary to provide context for understanding the discussion of AFSCME's exceptions.

AFSCME is the exclusive representative of a bargaining unit consisting of the District's classified employees, commonly referred to as the "blue collar" unit. Three other employee

organizations represent a separate unit of classified employees, known as the "white collar" unit, the District's teachers, and its guidance counselors. The District bargains separately with each employee group.

In late 2011, AFSCME had partially prevailed in a grievance arbitration over changes to Food Service and Transportation employees' work year under Article 5, Section 5.3 of its Collective Bargaining Agreement (CBA). Some employees' hours and work years had been reduced for summer months as a result of schools changing from single-track (9-month) to multi-track (year-round) or vice versa. That contract section had required the voluntary agreement of both AFSCME and the affected employee before the District modified the work year. The arbitrators' award included back pay for affected employees but because of the large number of employees affected and their varying circumstances, the arbitrator remanded the matter to the parties to negotiate the appropriate remedy and retained jurisdiction in the event they were unable to agree. His award specifically noted "inconsistencies" in the contractual provisions governing layoff and hours of work that may "complicate" these issues in the future. The arbitrator's opinion advised the parties to "review their procedures mutually and refine the method for layoffs and reductions of hours in the future" to ensure fairness "to employees, the District, and the public in these very challenging economic times." The District petitioned in court to vacate the arbitrator's award but ultimately lost that effort.

In early 2012, the District was negotiating with each of its employee groups when it began negotiations for a successor agreement with AFSCME. The District informed AFSCME of its $11 million budget shortfall and the potential for an additional $11.5 million deficit through mid-year budget cuts if a proposed constitutional amendment, known as Proposition 30, did not pass in the upcoming general election. The District asked each employee group to make

significant concessions through furlough days and a hard cap on the District's contribution to employees' health benefits premiums. The teachers' and counselors' unions had previously agreed to the hard cap, but AFSCME and the representative of the white collar unit had not. In addition, the District informed all groups, including AFSCME, that even with furlough days, some layoffs were inevitable. The District informed AFSCME that if agreement was reached on all issues by July 1, 2012, then it would lay off only a "short list" of six employees, but that if no agreement was reached by that time, then a "long list" of 13 employees would be laid off and the hours for an additional 23 employees would be reduced. The District took the same approach in its negotiations with other employee groups.

In May, AFSCME proposed a separate, "stand-alone" agreement by which it would accept two furlough days and language providing for additional furlough days if budget conditions worsened. The proposal also acknowledged that some layoffs would occur. The District rejected this proposal, because it did not address other monetary concessions sought, including, the health benefits hard cap and modifications to CBA sections covering overtime for various employees in the blue collar unit.

In June, AFSCME proposed changes to those CBA sections that had been at issue in the 2011 arbitration (Sections 5.1 and 5.3). The District responded by proposing a broader agreement covering furloughs, health benefits hard cap, dispatcher overtime, and suspension of two personal necessity leave days. If agreed to, negotiations on other CBA issues would have continued. AFSCME rejected this offer. Meanwhile, the District reached comprehensive agreements with each of the three other employee groups by July 1. Because it had not reached agreement with AFSCME, the District laid off and reduced hours in the blue collar unit consistent with the previously disclosed long list.

Negotiations continued after the July 1 layoff. On July 18, in addition to its previous monetary proposals, the District made a counter-proposal to AFSCME's June proposal to revise Sections 5.1 and 5.3 of the CBA. The District proposed to substitute the term "meet and confer" with "meet and consult" in Section 5.1 and to remove language requiring an employee's consent to reduce the work year. The District also advised AFSCME that it would be proposing to keep employees' work years reduced who were the subject of the arbitration award, because of summer schedule changes resulting from some schools changing from year-round to traditional calendars, but that this proposal would not disturb the District's back pay obligations to the affected employees if the arbitration award was upheld by the courts.[1] The District also noted in its proposal that some of the employees who were laid off and had hours reduced on July 1 would be restored if agreement was reached. In essence, only employees on the short list would remain laid off.

In response, AFSCME again proposed a stand-alone agreement on furloughs, which the District again rejected because it did not address any of the other monetary concessions demanded by the District. At the next meeting on July 30, AFSCME proposed changes in employee overtime that would not take effect until the following year. The District rejected this proposal, as it would not save money in the upcoming budget year.

The District then presented its last, best and final offer (LBFO), which was substantively similar to its previous proposal. The parties met again on August 6 at which time AFSCME advised the District that it had no further proposals to make. The District declared impasse. AFSCME did not oppose the declaration of impasse but refused the District's request to join in it. The parties met for mediation in September 2012 and factfinding followed in October 2012.

[1] At this time, the District's petition to vacate the arbitration award had not yet been resolved in the courts.

In August, District Superintendent Elizabeth Novak (Novak) had a conversation with several blue collar unit employees in which they expressed that workload had increased since the July 1 layoffs and reduction in hours. Novak said that other school districts were facing similar circumstances and that things would likely be better when the District and AFSCME reached agreement. Later, the blue collar unit employees learned that all other groups had reached agreement with the District over health benefits and they asked Novak whether AFSCME's agreement to the same terms would suffice to restore their hours. She stated that agreement over health benefits alone would not be sufficient to reinstate laid off employees and restore hours.

During mediation, the District made a proposal consistent with all previous terms that also included a chart noting the specific blue collar unit employees whose work years would remain reduced in the summer. No agreement followed and a factfinding hearing was held and a report issued. After consideration of the report, the parties met twice for post-factfinding negotiations in November. The District dropped its proposal to modify overtime criteria and some of its other proposals. AFSCME proposed language that would allow the District to impose the same health benefit plan changes agreed to by other groups. Again, no agreement was reached. The District imposed terms and conditions of employment in December 2012 consistent with its LBFO, its post-factfinding proposals and the 12 tentative agreements and a memorandum of understanding that had been agreed to during negotiations. Although employees on the short list remained laid off, the District restored the positions and hours of those additional blue collar unit employees appearing on the long list.

THE PROPOSED DECISION

The ALJ concluded that the District had not unlawfully conditioned agreement and/or insisted to impasse on a non-mandatory subject when it advised AFSCME that it would lay off fewer employees if AFSCME agreed to various economic concessions, including furloughs, a

hard cap on District contributions to health and welfare benefits, and reduced overtime. The ALJ reasoned that the time limit for obtaining less onerous terms was not unlawful because it was within the control of the negotiating parties. She also reasoned that the District's proposal itself did not improperly combine mandatory and non-mandatory subjects because the decision to lay off was not under negotiation; rather, the proposal concerned the number and identity of employees to be laid off, which PERB regards as negotiable. Alternatively, she reasoned that, even if the proposal improperly combined mandatory and non-mandatory subjects, the District did not insist on it to the point of impasse over the objection of AFSCME, since AFSCME did not clearly communicate its unwillingness to engage in further discussion of the subject. The ALJ relied on essentially the same reasoning to reject AFSCME's parallel allegation that the District had unlawfully insisted to impasse and/or improperly conditioned agreement on non-mandatory subjects during the parties' impasse resolution proceedings.

The ALJ likewise found no bad-faith bargaining violation under the totality of circumstances test because the record included none of the traditionally-recognized indicators of bad faith, nor any other evidence that the District sought to frustrate negotiations or undermine AFSCME's authority as the exclusive representative. Although AFSCME argued that the District's proposals to change language in Sections 5.1 and 5.3 of the CBA were regressive, the ALJ found that they were not regressive when considered in the overall context of the negotiations, including the District's desire for "equity" or "parity" among the various employee groups. Additionally, the ALJ credited the testimony and interpretation of the District's negotiators that the District's proposals and the terms ultimately imposed did not seek unfettered control over key subjects of bargaining because, contrary to AFSCME's

allegations, they would not operate outside the contractual grievance procedure nor evade liability for back pay already owed under the 2011 arbitrator's award.

The ALJ also found no interference violation based on Novak's statements to employees concerning the status of negotiations, as they contained no inaccuracy, nor promise of benefit or threat of reprisal, and, when considered in context, they would not reasonably tend to undermine AFSCME's authority or suggest to a reasonable employee that the process of collective bargaining is futile.

DISCUSSION

AFSCME excepts to the ALJ's finding that its negotiators never objected to further discussion of layoffs or any other ostensibly non-mandatory subjects of bargaining. It contends that it advised the District's negotiators on several occasions that conditioning the withdrawal of proposed or actual layoffs of employees on the long list but not on the short list on AFSCME's acceptance of furloughs and other economic concessions was illegal.

For proposals affecting matters designated as mandatory subjects of bargaining, parties to a collective bargaining relationship must meet and confer upon demand. If they choose to do so, parties may also propose and include in a collective bargaining agreement matters designated as permissive subjects of bargaining, though they are not obligated to do so. (EERA,[2] § 3543.2, subd. (a)(4); *City & County of San Francisco* (2004) PERB Decision No. 1608-M, p. 3; cf. *El Centro Elementary School District* (2006) PERB Decision No. 1863 (*El Centro*), pp. 4-5.) Under PERB precedent, as a prerequisite for alleging that a party to negotiations has unlawfully insisted to impasse on a proposal containing a permissive subject of bargaining, the charging

[2] The Educational Employment Relations Act (EERA) is codified at Government Code section 3540 et seq. Unless otherwise noted, all statutory references are to the Government Code.

party must communicate its opposition to further discussion of the issue. (*Lake Elsinore School District* (1986) PERB Decision No. 603 (*Lake Elsinore*), pp. 6-7; *Travis Unified School District* (1992) PERB Decision No. 917, pp. 3-5.) While there are no magic words or particular term of art that must be used, the objecting party's statements must be sufficient under the circumstances to put the other party on notice that the objecting party is unwilling to engage in further negotiations on the issue. (*Chula Vista City School District* (1990) PERB Decision No. 834 (*Chula Vista*), p. 26; cf. *City of San Jose* (2013) PERB Decision No. 2341-M, p. 44 [prohibited bargaining subjects require no objection].)

AFSCME argues that it satisfied this requirement by demanding that the District's negotiator sign a statement acknowledging that the parties' discussions of "alternatives to a more drastic layoff" were not "bargaining" and that, "in AFSCME's mind," these discussions were not part of "negotiations" for a successor agreement. According to AFSCME Business Representative Pete Schnaufer (Schnaufer), some meetings were called negotiations and some were not called negotiations. AFSCME had raised the issue that the District's proposal included a non-mandatory subject of bargaining, which was layoffs, and that AFSCME preferred not to waive its rights in that regard. AFSCME's executive board, rather than its negotiating team, was present for those meetings not designated as "negotiations." (Reporter's Transcript (R.T.) Vol. I, 34:22-27.) AFSCME's argument fails because, regardless of AFSCME's attempt to separate "negotiations" concerning mandatory subjects from "discussions" affecting layoffs, AFSCME never sufficiently conveyed its objection to further discussion of these issues or to combining them in either setting.

The designation of subjects for bargaining as mandatory or non-mandatory is a statutory one, subject, in the first instance, to PERB's interpretation of the statute. (MMBA,[3] §§ 3504, 3509, subd. (a); EERA, § 3541.3, subd. (b).) While parties may propose and discuss permissive subjects and, if they agree to do so, include such matters in their memoranda of understanding, the statutory designation of a matter as within or outside the scope of mandatory subjects is not subject to waiver or agreement by the parties. (*Poway Unified School District* (1988) PERB Decision No. 680 (*Poway*), pp. 12, 15-16.) A permissive subject does not become mandatory by virtue of its inclusion in a collective bargaining agreement. (*Ibid*.; *Chula Vista City SD, supra*, PERB Decision No. 834, pp. 23-24; *El Centro, supra*, PERB Decision No. 1863, pp. 4-5.)

An employer's decision to layoff is not subject to bargaining, but the negotiable effects of that decision include the timing, number and identity of the employees to be laid off. (*Bellflower Unified School District* (2014) PERB Decision No. 2385, p. 6; *Salinas Valley Memorial Healthcare System* (2012) PERB Decision No. 2298-M, p. 19.) By all accounts, what was at issue in the separate layoffs discussions was whether the District would use the long list or the short list of employees to be laid off. Whether to use the long or short list clearly implicates both the number and identity of employees to be laid off and, consequently, there is no basis for characterizing the District's proposal as a permissive subject of bargaining. Additionally, alternatives to layoffs, including furloughs, reductions in employee hours or other concessions in pay or benefits, are negotiable because they necessarily affect enumerated subjects, including wages and hours. (*City of Sacramento* (2013) PERB Decision No. 2351-M, p. 22; *San Mateo City School District* (1984) PERB Decision No. 383, p. 18; *San Ysidro School District* (1997) PERB Decision No. 1198, pp. 3-4.) AFSCME does not except to the ALJ's factual finding that

[3] The Meyers-Milias-Brown Act (MMBA) is codified at section 3500 et seq.

Assistant Superintendent for Human Resources Russell Lee-Sung, who was the District's chief negotiator at the time, "clearly informed AFSCME that layoffs in the blue collar unit were a foregone conclusion, whether or not agreement was reached between the parties over the District's proposed concessions." (Proposed dec. at p. 39.) In sum, the number and identity of employees to be laid off and/or any alternatives to layoffs were the subjects implicated by the District's proposal, not the decision to layoff itself.

Even assuming we agreed that the District's proposal combined a non-negotiable decision to layoff with negotiable matters, such as the number and identity of employees to be laid off and/or demands for various concessions as alternatives to layoffs, we would still reject AFSCME's contention that the analytically permissive aspect of the proposal can or must be discussed separately from the negotiable aspects of the proposal. The fact that an employer's policy decision may simultaneously affect both negotiable and non-negotiable matters is neither unprecedented nor particularly troubling. PERB has long held that determining the academic or school calendar is part of a public school or community college district's managerial prerogative. However, in *Pasadena Area Community College District* (2015) PERB Decision No. 2444 (*Pasadena Area CCD*), we concluded that a community college district's decision to change the academic calendar from a semester to trimester basis was negotiable because there was no conceivable way that students could attend courses on a trimester basis while staff continued to work on a semester schedule and thus, the adoption of a new calendar system, a managerial prerogative, necessarily also affected employee hours and other terms and conditions of employment. (*Id*. at p. 15.) *Pasadena Area CCD* illustrates that negotiable matters do not become non-negotiable, simply because other, non-negotiable matters are implicated in the same employer decision to change policy. (See also *City of Sacramento, supra*, PERB Decision

No. 2351-M, pp. 18-20 [concluding that decision to transfer work entirely from one bargaining unit another was "fully negotiable" although it coincided with non-negotiable, managerial decision to lay off employees]; *City of Escondido* (2013) PERB Decision No. 2311-M, pp. 9-10 [same].) A contrary rule would undermine the legislative purpose of promoting harmonious labor relations through collective bargaining. (*City of Sacramento*, *supra*, at p. 22; *Poway*, *supra*, PERB Decision No. 680, pp. 15-16.)

AFSCME's other exceptions take issue with particular factual findings in the proposed decision without, however, explaining how correcting the asserted error would alter the analysis or result. Exception No. 2 asserts that the ALJ mischaracterized language in the parties' contract as requiring negotiations over hours and work year reductions before the District could implement its proposal, whereas AFSCME argues that, in fact, the contract language at issue guarantees AFSCME complete discretion to refuse to negotiate or agree to any work year reduction. However, even assuming, as AFSCME argues, that Article 5.3 of the CBA gave AFSCME absolute discretion to reject a reduction in an employee's work year, it is not apparent how this fact would support an inference of surface bargaining or demonstrate that the District engaged in any per se violation of its duty to bargain.

A party is free to propose changes to the language of an existing agreement, including any arbitral award incorporated into the agreement, and its counterpart is free to engage in such discussions or to stand on its rights under the contract, as it pleases. (*County of Tulare* (2015) PERB Decision No. 2414-M, p. 30; *Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 335-337.) But having the legal right under an existing contract to refuse to discuss such a proposal is not the same as being insulated from all consequences for standing on one's right. Because public employers retain the non-negotiable prerogative to layoff, a union

representative who refuses to discuss proposed contract modifications may face the prospect of layoffs to address an employer's bona fide lack of work or lack of funds. (*Salinas Valley Memorial Healthcare System* (2015) PERB Decision No. 2433-M, p. 9; see also *City of Sacramento, supra*, PERB Decision No. 2351-M, p. 22.) Under the circumstances, including the District's $11 million budget shortfall, AFSCME was free either to entertain the District's demands for mid-term concessions or to refuse to discuss those demands and accept the long list of employees to be laid off. No inference of bad faith arises and no per se violation follows from the District's proposal to discuss alternatives to layoffs before implementing the long list.

AFSCME also excepts to the ALJ's use of the word "borrow." The District's Chief Financial Officer and Assistant Superintendent Diane Poore (Poore) testified that the District could, under certain circumstances, "transfer" money from one fund to another to fill budgetary holes or to satisfy other obligations. However, Poore also explained that any such "transfer" would result in less revenue being budgeted in the following fiscal year to those fund(s) from which money had previously been taken. (R.T. Vol. III, 51:10-13, 73:9-12.) Unremarkably, the proposed decision used the terms *transfer* and *borrow* interchangeably when discussing the procedure in the context of the District's negotiations with another union. (p. 10.)

The significance of this distinction, according to AFSCME, is that the District discovered that it had more money available than previously projected and that it continued to demand economic concessions from AFSCME not as a financial necessity but as a matter of equity with the other unions who had previously agreed to similar concessions. The record supports the ALJ's finding that the District remained in dire financial straits and that any money transferred or borrowed from the Self-Insurance Fund for health and welfare benefits to fill holes in the general fund would, in effect, be subtracted from the source fund for the following year. (R.T.

Vol. III, 51:10-12.) Moreover, even assuming, as AFSCME argues, that the District's justification for its bargaining demands shifted to concerns of equity, that fact, by itself, would not constitute a per se violation of the duty to bargain or even necessarily support an inference of bad faith, as PERB and the courts have long recognized that "[o]ne of the realities of the collective bargaining process is that multi-unit employers must consider the effect of one bargaining unit's contract on the other units, and that parity clauses reflect this need." (*Banning Teachers Assn. v. Public Employment Relations Bd.* (1988) 44 Cal.3d 799, 806.)

To the extent AFCME excepts to the ALJ's finding that the District's bargaining proposals were not an attempt to evade back pay liability or to circumvent or nullify the parties' contractual grievance procedure, the ALJ credited the testimony of the District's then Chief Negotiator Spencer Covert over the less forthright and Schnaufer's often non-responsive testimony. As explained in the proposed decision, this determination was based on a variety of observational and non-observational factors. While the Board applies a de novo standard of review and is free to draw its own conclusions from the record, because an ALJ is in a much better position than the Board to accurately make credibility determinations based on live testimony, "the Board has determined that it will normally afford deference to administrative law judges' findings of fact involving credibility determinations unless they are unsupported by the record as a whole." (*Anaheim City School District* (1984) PERB Decision No. 364a, pp. 3-4; *Palo Verde Unified School District* (2013) PERB Decision No. 2337, pp. 25-29.) Because the record as a whole supports these findings and because AFSCME's exceptions provide no grounds to undermine the ALJ's credibility determinations, we decline to disturb her findings that the District's proposals would not evade back pay liability under the arbitrator's award and would not operate outside the grievance procedure.

AFSCME's Exception No. 3 also reiterates its contention that the District was "using a non-mandatory subject of bargaining as something [it] could give up, as a trading chip, for a series of concessions from the union which were, in the main, takeaways … on mandatory subjects of bargaining," including a cap on employer health insurance contributions, reductions in overtime and union release time, furloughs and changes to the parties' hours and work year contract language. (Underlining in original.) However, as explained above, alternatives to layoffs are fully negotiable (*North Sacramento School District* (1981) PERB Decision No. 193, pp. 4-5) and AFSCME's argument that the District used a non-mandatory subject of bargaining, i.e., the decision to layoff, to hold hostage negotiations over mandatory subjects is thus premised on a misstatement of the law and a mischaracterization of what, in fact, was encompassed by the District's proposal to lay off according to the short list or the long list.

AFSCME's Exception No. 4 argues that the District improperly demanded that AFSCME relinquish the remedy in an arbitrator's decision in return for rescinding layoffs and restoring jobs. This argument is also both factually unsupported and legally misplaced. Insisting to impasse on the withdrawal of pending grievances or unfair practice charges or conditioning settlement of mandatory subjects on the withdrawal of grievances or unfair practice charges is a per se violation of the duty to bargain. (*Lake Elsinore, supra*, PERB Decision No. 603, pp. 5-6.) As with other proposals involving non-mandatory subjects of bargaining, an employer may lawfully propose withdrawal of pending grievances and/or unfair practice charges as part of a settlement involving mandatory subjects of bargaining. It is only when an employer insists on acceptance of such a proposal "in the face of a clear and express refusal by the union to bargain" over the proposal that it per se violates the duty bargain. (*Id*. at p. 6.) Here, however, the record supports the ALJ's finding that the District's proposal on this subject was to change the parties'

contract language going forward and not intended to evade any back pay liability already owed as a result of the November 11, 2011 arbitration award. Thus, the District's proposal did not condition settlement of mandatory subjects on the withdrawal of a pending grievance. In fact, the arbitrator's award expressly invited the parties to renegotiate their procedures for layoffs and reductions in hours and work years, which were the subject of the grievance. (AFSCME Exhibit 4, p. 14.) Contrary to AFSCME's assertion, the ALJ appropriately characterized the District's attempt to limit its future liability, by re-negotiating contract language governing employee hours, as within the scope of mandatory subjects for bargaining.

AFSCME's Exception No. 5 objects to the ALJ's decision to exclude testimony from Carpenter Christopher Askier (Askier) regarding an allegation of employer interference not alleged in the complaint. The ALJ explained that she would limit the presentation of evidence to those issues identified in the complaint. (R.T. Vol. I, 133:20-27.) She also noted that she would allow Askier to testify if his testimony would support AFSCME's surface bargaining allegation. (R.T. Vol. I, 134:1-3.) AFSCME's representative indicated that Askier's testimony regarding the alleged promise made by a District official was unrelated to any allegation included in the complaint, including the surface bargaining allegation, and that Askier would therefore only be examined on other matters related to the surface bargaining allegation. (R.T. Vol. I, 134: 4-11.)

The ALJ also advised AFSCME that it could submit a motion to amend the complaint, particularly in light of her repeatedly-expressed reluctance to consider unalleged violations during the hearing. (R.T. Vol. II, 59:23 – 60:8.) AFSCME's representative acknowledged that he understood (R.T. Vol. II, 60:9), but made no motion to amend the complaint. Moreover, AFSCME made no objection to the ALJ's ruling to exclude Askier's testimony about the unalleged promise by a District official either at the hearing or in its brief before the ALJ.

The Board will raise an issue sua sponte where necessary to correct a mistake of law in a proposed decision from becoming Board precedent, but where no error is apparent in the proposed decision, we see no reason to consider an argument not raised by the parties before the ALJ. (*Morgan Hill Unified School District* (1985) PERB Decision No. 554, pp. 21-22, fn. 13.) In light of AFSCME's admission that Askier's proffered testimony was not relevant to the surface bargaining issue or any other allegation included in the complaint, and in the absence of any objection to the ALJ's ruling that Askier's testimony was therefore irrelevant, we decline to address the exception.

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-5741-E are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Winslow and Gregersen joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, LOCAL 3112, Charging Party, v. ANAHEIM UNION HIGH SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-5741-E PROPOSED DECISION (June 12, 2015)

Appearances: Pete Schnaufer, Business Representative, and Gerald Adams, President, for American Federation of State, County, and Municipal Employees, Local 3112; Parker and Covert by Spencer Covert and Michael Travis, Attorneys, for Anaheim Union High School District.

Before Valerie Pike Racho, Administrative Law Judge.

INTRODUCTION

The exclusive representative of a bargaining unit of classified employees of a school district employer alleges that, by individual acts and under a totality of circumstances, the employer bargained in bad faith during negotiations for a successor agreement. It is alleged that the employer conditioned agreement and insisted to the point of impasse on non-mandatory subjects, and also conditioned agreement on non-mandatory subjects during impasse proceedings. The exclusive representative also alleges that the employer interfered with unit employees' rights by reneging on a promise to employees to restore their hours if the exclusive representative agreed to a cap on the employer's health benefit contributions. Following the completion of statutory impasse procedures, the employer imposed terms and conditions of employment, consistent with its pre-impasse and post-factfinding proposals. The exclusive representative seeks rescission of the imposed terms as a remedy to the District's

alleged unfair practices. After consideration of the entire record, the employer's conduct in bargaining and in impasse was not in bad faith, and the employer did not interfere with employee rights as alleged.

PROCEDURAL HISTORY

On September 19, 2012, the American Federation of State, County, and Municipal Employees, Local 3112 (AFSCME or Union) filed an unfair practice charge (charge) with the Public Employment Relations Board (PERB or Board) against the Anaheim Union High School District (District) alleging various violations of the Educational Employment Relations Act (EERA or Act).[1] On October 19, 2012, the District filed a position statement responding to the charge.

On November 5, 2012, AFSCME filed a first amended charge. On November 19, 2012, the District filed a position statement responding to the first amended charge.

On December 24, 2012, AFSCME filed a second amended charge. On January 7, 2013, the District filed a position statement responding to the second amended charge.

On February 27, 2013, AFSCME filed a third amended charge. On March 4, 2013, the District filed a position statement responding to the third amended charge.

On June 24, 2013, AFSCME filed a fourth amended charge. On July 12, 2013, the District filed a position statement responding to the fourth amended charge.

On August 14, 2013, the PERB Office of the General Counsel issued a complaint alleging that the District violated EERA section 3543.5, subdivision (c), by: (1) its overall conduct during negotiations between July 18, 2011, and July 30, 2012; (2) promising to lay off fewer employees if AFSCME would agree its economic proposals, and (3) insisting to the

[1] EERA is codified at Government Code section 3540 et seq.

point of impasse on the proposal to lay off fewer employees if AFSCME agreed to its economic proposals. The complaint alleged that the District violated EERA section 3543.5, subdivision (e), by proposing, while the parties were participating in EERA impasse procedures, that AFSCME agree to reduce the hours of some unit employees in exchange for restoring laid off positions and restoring the hours of other employees who had been reduced, which, purportedly, would have relinquished an arbitration award favorable to AFSCME. Finally, the complaint alleged that the District violated EERA section 3543.5, subdivision (a), by reneging on a promise made to employees to restore their hours if AFSCME agreed to a cap on the District's health care premium contributions.

On September 3, 2013, the District answered the complaint, denying all material allegations and raising affirmative defenses. An informal settlement conference conducted at PERB's regional office on September 27, 2013, did not resolve the dispute and the matter was set for formal hearing.

On December 3-6, 2013, the formal hearing was held. Upon receipt of the parties' post-hearing briefs, the matter was submitted for decision.

FINDINGS OF FACT[2]

Jurisdiction

The District is a public school employer within the meaning of EERA section 3540.1, subdivision (k). AFSCME is an exclusive representative of a bargaining unit of classified employees within the meaning of EERA section 3540.1, subdivision (e).

[2] The entire record has been reviewed and considered, but only facts deemed germane to deciding the issues presented are discussed herein.

Background Regarding Negotiations in 2012

1. Bargaining Units and Party Representatives

Pete Schnaufer is an AFSCME-employed business agent who has represented the District's classified employee bargaining unit of operations and support personnel, commonly referred to as the "blue collar unit," for more than 30 years. He is the chief negotiator and spokesperson for the Union. Gerald Adams is a blue collar unit employee who has been the Union President for the past 15 years. Adams also sits on the Union's bargaining team. Jack Janec is a blue collar unit employee and member of the Union bargaining team who is responsible for note-taking during negotiations. Janec testified regarding his notes of several different bargaining sessions that were introduced in evidence.

The District has another classified employee bargaining unit, commonly referred to as the "white collar unit," that is represented by the California School Employees Association (CSEA). Teachers in the District are represented by the Anaheim Secondary Teachers Association (ASTA), and guidance counselors are represented by the Anaheim Personnel and Guidance Association (APGA). The District bargains separately with each employee group and was doing so in the spring of 2012. Russell Lee-Sung, the District's Assistant Superintendent of Human Resources, is typically the District's chief negotiator.

2. The Food Services and Transportation Arbitration and Award[3]

In 2011, AFSCME and the District went to arbitration before Arbitrator Fred Horowitz over consolidated grievances alleging that the District violated Article 5, "Working Hours," among other provisions, of their collective bargaining agreement (CBA) by unilaterally reducing hours and/or work years of Transportation and Food Services employees in the blue

[3] At the time of the hearing, an appeal of a superior court ruling upholding the arbitration award was pending in the court of appeals.

collar unit in 2010.[4] The arbitrator's decision was issued on November 11, 2011. The District maintained that under the layoff provisions in the CBA (Article 18), a partial layoff through hours or months reduction is permissible and the employees in this instance were properly laid off and brought back to work with shorter schedules. The provisions of CBA Article 5 chiefly at issue as stated by Arbitrator Horowitz were as follows:

> 5.1 Workday
>
> The full-time employee's regular workday shall consist of eight (8) hours of work. Any reduction in assigned time shall be accomplished in accordance with the District layoff procedures in effect at the time of the action, and only after <u>meeting and conferring</u> with AFSCME.
>
> 5.2 Workweek
>
> The employee's regular workweek shall consist of five (5) consecutive days from Monday through Friday, inclusive. It is recognized, however, that the actual workweek is a seven (7) day period, from Monday through Sunday, inclusive, and that the Board may, for valid operational reasons only, assign employees to consecutive workdays other than Monday through Friday within this seven (7) day period. The District will <u>meet and consult</u> with AFSCME before making any permanent decisions.
>
> 5.3 Work Year
>
> No employee's work year shall be reduced except by <u>voluntary agreement</u> between the employee, the District and the union….

(Emphasis added; ellipses in original.) Layoff is defined under the parties' agreement as "any loss of regular status, including loss of employment or voluntary demotion or reduction in hours in lieu of loss of employment" taken due to lack of work or funds. (CBA, Art. 18.1.2.)

Arbitrator Horowitz determined that because of economic shortfalls in its budget, the District approved in the spring of 2009 the "discontinuance and reduction of a significant

[4] The parties commonly referred to this action during hearing as the "Horowitz" arbitration and/or award.

number of classified positions[.]" The District sought to meet and confer over the issue with AFSCME in June of that year, but AFSCME was unwilling to label discussions over hours reductions or layoffs as formal negotiations. Although some discussions were held, no agreement was reached. In December 2009, layoffs in the blue collar unit were approved by the District, while it simultaneously offered to re-employ laid off workers in jobs with shorter work days or years. Because the District contracts with and provides food and transportation services to the elementary school district in Anaheim, some of whose schools operate year-round or are "multi-track," the District needed to recall back to work some unit Food Service and Transportation employees to provide services in the summer of 2010, albeit with reductions in time. In April 2010, the District approved the reinstatement of several unit classifications at varying levels of reduced hours or months. The employees were offered to take "a voluntary reduction in lieu of layoff" of fewer hours and/or months. Most employees accepted this offer and signed the requisite form, but under protest. The District sought negotiations with AFSCME over effects of layoff but none occurred and thus no agreement resulted.

Arbitrator Horowitz concluded that, despite skepticism expressed by AFSCME, the District faced a severe budget shortfall necessitating cuts, and CBA Article 18 therefore authorized the District to lay off employees for lack of funds. But he found that the manner in which "voluntary" work year reductions were solicited by the District of employees restored to work ran afoul of Section 5.3:

> [T]he evidence sustains a finding that the District violated Article 5.3 but not Articles 5.1 or 5.2 of the Agreement when implementing the unilateral reductions in the work year, workday, and workweek, respectively, affecting various employees. As noted above, Articles 5.1 and 5.2 give the District the authority to make changes in the workday or workweek after

> meeting and conferring with the Union. Because the Union refused the District's repeated requests to meet and confer over the proposed changes in the workday and/or workweek, the Union may not be heard to complain when those changes were implemented without Union concurrence. On the other hand, Article 5.3 of the Agreement expressly prevents the District from making changes to the work year without first obtaining the "voluntary agreement" of the Union and employee. Under the plain language of this provision, the conclusion that the District violated Article 5.3 when it unilaterally changed the work year for any employee is inescapable.

(Emphasis added.)

Regarding the issue of remedy, Arbitrator Horowitz determined that the record in front of him over damages was too indefinite to determine an appropriate remedy, stating that "the District merits an opportunity to refute any individual claim and/or proffer evidence in mitigation of any losses which were not the product of an Article 5.3 violation." (Emphasis added.) Thus, the issue of appropriate remedy was remanded to the parties with jurisdiction retained by the arbitrator to settle any disputes. In his conclusion statement, Arbitrator Horowitz noted that there were "inconsistencies" in the parties' contractual provisions regarding layoff and hours of service that may serve to "complicate the imposition of any subsequent layoff or reduction of hours." Thus, noting the financial uncertainty still looming in public education, Arbitrator Horowitz stated:

> [T]he parties would be well advised to review their procedures mutually and refine the method for layoffs and reductions of hours in the future. Rewriting the parties' Agreement to effect any such change is, of course, well beyond the authority of any arbitrator. Only by working cooperatively through the process of collective bargaining can labor and management improve their procedures in a manner which is fair to employees, the District and the public in these very challenging economic times.

3. The Insurance Committee and Agreements Over Health and Welfare Benefits

Representatives from all employee groups and management participate in a joint Insurance Committee that attempts to reach a consensus over health benefit plans offered by the District to its employees and makes recommendations thereon to the various bargaining groups. The Insurance Committee tries to come to a consensus around September or October of any given year for plan changes to go into effect the following January 1. Adams and Schnaufer regularly participate in Insurance Committee meetings. According to CBA Article 2 at Section 2.7, decisions of the Insurance Committee are not binding upon AFSCME, but the District and AFSCME "will work together aggressively on health and welfare cost containment."

The District self-funds its medical and dental PPO plans. It therefore relies on an actuarial report every two years and the services of a professional health care consulting firm to establish the rates of these plans. Sometimes, the projected costs of the plans are exceeded by actual costs for any given year, creating a deficit. Likewise, the costs are at times over-projected, meaning there are reserve funds left over. In 2012, the District ended up with approximately $4 million more in the health and welfare fund than what was previously expected. Typically, the District's heath care costs rise every year. Health benefits are negotiated between the District and AFSCME yearly, and are memorialized in a written side-letter agreement that the parties refer to as a memorandum of understanding (MOU).

4. The Fiscal Condition of the District in 2012 and the Status of Bargaining in Each Unit

As previously noted, the District was bargaining with all of its employee groups during the spring of 2012. The backdrop for these negotiations was an ongoing decline in funding received from the State since 2008-2009 because of decreased student enrollment and average

daily attendance (ADA), the cornerstone of State funding allocations to school districts. For instance, the projected statutory Cost of Living Adjustment (COLA) for 2012-2013 was $6,742 per unit of ADA, but the actual State-funded revenue limit that year was to be $5,281 per unit of ADA, meaning that the projected COLA was not able to be funded by the State. Heading into the 2012-2013 fiscal year commencing July 1, the District therefore faced a budget shortfall of $11 million. Thus, concessions from all labor groups were going to be sought. The District also faced the uncertainty of threatened mid-year cuts to its budget if the Governor's proposed tax initiative, Proposition 30, did not pass in the then-upcoming November 2012 general election.[5] It was determined that if Proposition 30 failed, then the District's budget would be cut by an additional $11.5 million. The District felt that it had to plan for the contingency that it would be facing a budget deficit of greater than $22 million during the 2012-2013 school year.

Under Education Code mandates, the District must certify in writing to the County Department of Education and the State whether it can meet its financial obligations in order to show fiscal solvency. In order to receive a "positive certification" from the State, the District must maintain available reserve funds of not less than two percent of its total expenditures for the current and subsequent two fiscal years. School districts that are unable to show adequate reserves, and therefore are rated with a "qualified certification" or a "negative certification," are subjected to significant State oversight. Thus, qualified or negative certifications are conditions to be avoided. With projected budget cuts of approximately $11 million in 2012-2013, and contingency plans for potential further budget shortfalls, the District was able to certify in its written report to the requisite regulatory bodies in fiscal year 2011-2012 that it

[5] I take official notice of the fact that Proposition 30 was ultimately approved by the electorate in the November 2012 election.

would be able to meet its financial obligations in order to maintain a positive certification in 2012-2013.

Because teachers are the largest employee group and thus take up the largest share of the District's operating expenses, the District typically commences negotiations with ASTA before other employee groups. In February and March 2012, ASTA and the District were negotiating over a successor agreement. During these negotiations, ASTA and the District discussed reaching the target goal of $11 million in budget cuts through a variety of methods. In concept, they agreed to meet this goal by imposing two furlough days, transferring or borrowing $3 million out of the health and welfare fund for the general fund, and laying off employees. In order to obtain the target amount, the District needed to apply these cuts to all employee groups through its individual negotiations with each exclusive representative. The approximate savings to the District if all employees are furloughed for one day is roughly $1 million.

By March 2012, ASTA and the District already had in place through previous negotiations an agreement that placed a "hard cap" on the dollar amount the District would contribute toward employee health benefit premiums. Likewise, APGA and the District also had previously agreed to a hard cap. By March 2012, only CSEA and AFSCME had not agreed to a hard cap. Dianne Poore, the District's Assistant Superintendent of Business, admitted that she was aware that ASTA had been frustrated that AFSCME and CSEA had not agreed to the same cap on District contributions that the other unions had agreed to. Lee-Sung explained that, in the past, the District's hard cap limit had been exceeded by actual health care costs. But the increased premium amount was not passed on to teacher and counselor employees in those instances because of negotiations with their unions. From the District's

perspective, it was important to achieve a cap on its health care premium contributions as a long-term strategy for containing those rising costs. CSEA eventually agreed to a hard cap through an MOU that was signed in May 2012.

Ultimately, the District reached agreements in the spring of 2012 with ASTA, APGA, and CSEA that included furlough days with triggering language for additional days, if necessary, and other monetary concessions, such as hard caps on the District's health care premium contributions.

Negotiations With AFSCME That Form the Basis of the Instant Charge and Complaint

1. Early Negotiations Activity

On March 24, 2011, the District sunshined its initial position for bargaining with AFSCME over 12 different contract articles with a proposed contract term of July 1, 2011, to June 30, 2014. On April 14, 2011, AFSCME sunshined its own initial proposal for the same contract term. This document was received in evidence as Respondent's Exhibit 2. Schnaufer was tentative in his testimony, however, whether Respondent's Exhibit 2 was, in fact, AFCSME's actual initial proposal.[6] Lee-Sung confirmed that it was, and that it was first presented by AFSCME in response to the District's initial proposal. The parties met once or twice around this period, but did not begin bargaining in earnest over a successor agreement until the following spring. The reason for this, according to Schnaufer, is that after the parties reached their yearly MOU over health care plan changes and they understood, at that time (2011), that there would be no raises or furloughs, there was really nothing else that either

[6] During negotiations, the parties used AFSCME's initial proposal to record their tentative agreements over AFSCME's proposals by each side initialing and dating the document. AFSCME also used this initial proposal for most of its subsequent proposals by indicating on the document when it intended to drop one of its proposals.

party felt a pressing need to negotiate and it "just kind of dwindled." (Hearing Transcript, Vol. I, p. 95.)

2. Negotiations in March, April, and May 2012

In February 2012,[7] the District declared its intention to specifically negotiate over salary (Article 11) and health and welfare benefits (Article 2). The parties met for negotiations on approximately nine different dates in March through May. Meetings were held on: March 14, 15, and 27; April 10 and 16; and May 8, 9, 10, and 11. The pertinent highlights of these bargaining sessions are as follows.

The District presented a written proposal over Article 11 to AFSCME on March 14, proposing two furlough days for the blue collar unit, and up to seven furlough days, if Proposition 30 was not passed or if State funding levels dropped below the current ADA unit allotment.

On March 15, Schnaufer required that Lee-Sung sign a disclaimer statement that, in essence, conveyed AFSCME did not believe that it was negotiating in a true sense regarding furlough days, but rather discussing ways to lessen the severity of threatened layoffs. Lee-Sung signed this statement because he wanted such discussions to continue. Schnaufer testified that between February and June, "some [of the parties' meetings] were called negotiations [and] [s]ome were not called negotiations," because "[w]e had raised the issue that they were attempting to discuss a non-mandatory subject of bargaining, which was layoffs, and we preferred not to waive our rights in that regard, and we had our Executive Board present instead of our negotiating team." (Hearing Transcript, Vol. I, p. 34.) During a meeting with Poore and Lee-Sung during this time period without the whole Union bargaining team

[7] All dates hereafter refer to 2012 unless stated otherwise.

present, Lee-Sung informed Union representatives that there would be layoffs in the bargaining unit even if a successor agreement was reached. Lee-Sung said that if AFSCME agreed to take furlough days, then six unit positions would be laid off. If, however, AFSCME did not agree to furlough days, then 13 unit positions would be laid off and 23 people also would have their full-time hours reduced. These two approaches to lay off were referred to as the short list (six people) versus the long list (13 people, plus an additional 23 people with hours reduced). The District also a had a short list versus long list contingency plan for its negotiations with CSEA. This plan was premised on the requirement that an agreement needed to be in place by the beginning of the next fiscal year on July 1, 2012, in order for the District to be able to meet its projected budget cuts.

On March 27, the parties discussed that if all employees were furloughed on one day, the savings for the District was approximately $973,000, with $48,000 of that savings derived from the blue collar unit. According to Janec's notes that day, Lee-Sung expressed that the District was hoping to wrap up all negotiations on contract language and setting furlough days by the April 19 meeting of the District's governing board. Lee-Sung confirmed that the short list versus the long list was not a dollar-for-dollar match in savings.

On April 10, the District presented AFSCME with a more complete written proposal than the one presented on March 14, covering several contract articles, including proposing under Article 2, "Health and Welfare," that the District's contributions to medical premiums were not to exceed certain fixed dollar amounts depending on the plans selected by employees. This proposal also covered furlough days, with contingencies for restoring days if budget conditions improved by certain amounts and for imposing more days if budget conditions worsened by certain amounts.

On April 16, the parties discussed the short list versus long list for layoffs. Lee-Sung confirmed that the District was still using that approach and would have ready the following week specific lists of positions targeted for layoff. The parties also discussed various contract proposals. It was an all-day session.

The parties met again on May 8. AFSCME presented a proposed MOU regarding furlough days. Schnaufer said that the Union's bargaining team would urge its members to agree to accept two furlough days. Lee-Sung expressed that the District respected AFSCME's willingness to agree to furloughs, but that the entire contract also needed to be settled, including health and welfare hard cap language, if the District was to achieve its financial objectives.[8] Lee-Sung also discussed the District's need for cost containment of overtime in the transportation department, which was a frequent occurrence, and at Handel and Glover stadiums, which mainly occurred during sporting events. Lee-Sung further reiterated that, no matter what, there would be some layoffs in the unit. This could not be avoided.

At the negotiations session on May 9, Lee-Sung thought it important to discuss health and welfare benefits proposals, as well as the other "important" items regarding the needed budget reductions, including dispatcher overtime costs. He noted that having a cap on the District's health benefit contributions motivates the various bargaining units to make changes to the plans at the same time, and since all bargaining units participate on the Insurance Committee, it is important that they are motivated similarly. At this session, the District made a formal, written request to meet and confer with AFSCME over the proposed layoffs and provided the list of positions that were subject to layoff. According to Janec, when Schnaufer

[8] By this time, CSEA had agreed to the hard cap language, leaving the unit represented by AFSCME as the lone employee group without such limits on District health care contributions.

asked what Lee-Sung meant by "meet and confer," Lee-Sung responded, "talk about any issues or concerns about [the] list of layoff." (Hearing Transcript, Vol. II, p. 33.)

The parties met again on May 10. AFSCME presented another proposed MOU regarding two furlough days, with triggering language for up to seven furlough days, if budget conditions worsened. AFSCME's proposal also acknowledged that a certain number of employees were to be laid off. But because it was unsure whether the short list or long list was to be presented to the District's governing board for approval, the section of AFSCME's proposal designating the number of laid off employees was left blank. Janec testified that AFSCME would have supported the short list. After receipt of AFSCME's proposed MOU, Lee-Sung expressed concern that since it only related to furloughs and layoff, it did not meet all of the significant budget reductions that the District needed in order to meet its financial obligations, and therefore could not be accepted as a stand-alone agreement. Lee-Sung reiterated that the other important cost containment measures from the District's perspective were: (1) language regarding health benefit contributions (Article 2); (2) dispatcher overtime (Article 15); and (3) Handel and Glover overtime (Article 5, Section 5.12).

At the negotiations session on May 11, Lee-Sung presented a chart summarizing the potential savings to be realized from two to seven furlough days, suspending two personal necessity leave days,[9] cutting back on dispatcher and Handel and Glover overtime, and a hard cap on health and welfare contributions. Regarding the latter issue, Lee-Sung explained that in 2009 and 2012, years in which AFSCME "held out" and did not accept recommended plan

[9] The District's earlier proposals to AFSCME also included this issue under Article 13, "Leaves." The previous CBA allowed an employee to use up to two personal necessity leave days that were not charged against the employee's allotment of sick leave. Many employees took advantage of this opportunity; thus, suspension of the practice would result in significant cost savings.

changes from the Insurance Committee, the cost to the District was $140,000 and $250,000, respectively.

3. Negotiations in June and July

Lee-Sung testified that the District believed that there had been a lack of adequate progress made in negotiations with AFSCME between March and May, especially since comprehensive agreements had been reached with all other employee groups during the same time period. For that reason, the District decided to bring in an outside negotiator to be the District's chief negotiator and spokesperson starting in June. The District hired attorney Spencer Covert for this task. During the bargaining session on June 15, Covert was present as an observer, while Lee-Sung remained the principal spokesperson. Covert met privately with Lee-Sung and reviewed the parties' previous agreement, all of the proposals that had been exchanged thus far in bargaining, and the District's budget, to prepare for the lead role. Covert took over as chief negotiator at the next bargaining session on June 25.

On June 15, several substantial proposals were exchanged. First, the District provided in the morning a comprehensive proposal covering several contract articles, among them, health and welfare (Article 2), furlough days (Article 11), and extra hours/overtime (Article 5, Sections 5.6 and 5.12.1).[10] The District's afternoon proposal focused on and expanded its Article 2 proposal, including a description of the "blended super composite rate" for HMO and

[10] These Article 5 proposals addressed the and Handel and Glover overtime issues that the District had highlighted as needing cost containment. The current contract language provided that overtime was offered to Maintenance and Grounds employees. The District proposed to eliminate reference to Maintenance and Grounds employees and have overtime at the stadiums be assigned by rotation based on seniority according to job classification and that "[e]mployees working an extra assignment which includes duties outside the job classification are not entitled [to] these assignments or overtime pay." The District's position was that only employees working at the stadiums within their regular duties and classification should be eligible for overtime.

PPO health plans. Lee-Sung explained to AFSCME that the District's latest proposal increased its health benefits contribution by $50 per month (to $1,197) from what had been proposed in April for the self-insured plan. The increased contribution was designed to prevent employees from paying out of pocket for 2013. The cap on District contributions for the HMO plan was proposed at $984 per month. The District also provided to AFSCME a copy of the recent health benefits MOU that was signed between CSEA and the District placing hard caps on the District's contributions.

AFSCME's proposal that was presented on June 15 was regarding several sections of Article 5, "Working Hours," that had been the subject of the Horowitz arbitration. For Section 5.2, AFSCME proposed to return to the current contract language of "meet and consult," thus dropping its initial proposal to substitute the phrase "meet and confer." Covert testified that Schnaufer explained that the reason for this change was, in this particular school district, those two phrases (i.e., "meet and consult" and "meet and confer") meant the same thing. Schnaufer denied making that statement in his testimony. Regarding Section 5.1, "Workday," AFSCME proposed the following language:

> The full time employee's regular workday shall consist of eight (8) hours of work. Any reduction in assigned time—<u>for full or part time employees</u>—shall be accomplished in accordance with the <u>layoff provisions of this agreement</u> and only after <u>reaching voluntary agreement between the employee, the District and the union.</u>

(Emphasis in original.) The quoted excerpt above also included a footnote stating the following:

> By placing this proposal on the table, AFSCME in no way concedes that the current language of the CBA between the parties is not sufficient to sustain a successful grievance against the recent actions of the District to reduce 8 hour employees to 7.5 hours, 7 hours, or 4 hours under the guise or pretext of a fiscal

> emergency. Nor does it release the District from an obligation to meet and confer on these issues, nor to follow the impasse procedure on same.

Covert's reaction to AFSCME's proposed Section 5.1 language was that it was "significant," because it is customary to negotiate hours between union and employer, but unusual to also require consent of the employee to modify working hours. But, notably, similar language already existed in Section 5.3 for proposed reductions in work year.

The parties met again for negotiations on June 25. The District took a new tack and introduced a proposal it labeled as a "package" MOU. A preamble stated that the parties "mutually agree to implement the following agreements at the present time so that these agreements will not be dependent upon ratification of a new collective bargaining agreement between the parties." The last section of the document was entitled "Continuing Negotiations," and provided that it was agreed and understood that the parties would continue negotiating toward a three-year successor agreement after signing the MOU and that, eventually, the MOU would be incorporated into the successor contract. Covert testified that the reason the District decided to present a proposal this way was to try to get AFSCME to make a counter-proposal regarding monetary items, instead of simply "dropping" its own proposals as had been its custom.[11] From the District's perspective, AFSCME's proposals largely did not relate to or address all of the significant financial items that the District believed it was imperative to resolve. An agreement under the package MOU would have addressed the significant monetary items while allowing more time for negotiations over language changes in other areas of the CBA.

[11] As stated previously, AFSCME's initial proposal was used throughout bargaining. AFSCME used the document to convey when it was dropping or otherwise modifying one of its initial proposals.

The package MOU proposal covered the same basic territory as previous proposals regarding the health benefits hard cap limits and number of proposed furlough days with triggering language for additional days upon worsening budget conditions. Additionally, the District proposed to suspend (for 2012-2013 and 2013-2014) the practice of two personal necessity leave days not being charged against employees' sick leave, and to rotate dispatch overtime assignments equally between four dispatcher employees.[12] There was also a section of the package MOU labeled "Layoffs, Restorations, and Reductions," wherein the District said it would rescind layoff notices for seven employees that were slated to be laid off on July 1, as well as restore the hours for 22 employees that were scheduled to be reduced.[13]

Lee-Sung and Covert spent time verbally explaining various aspects of the proposal, including the super-composite rate and why the District believed that caps on health benefit contributions were necessary. Covert explained that the District hoped to have these terms in effect by the beginning of the next fiscal year on July 1. According to Covert and Lee-Sung, Schnaufer responded that AFSCME was against the idea of a cap and would never agree to it. Schaufer did not admit to that particular statement, but testified that AFSCME generally took the position that since the District was self-insured, caps were not necessary. Following the District's presentation of the proposed package MOU, Schnaufer said that the package was not acceptable and that he had no counter proposal regarding it. Schnaufer then raised an issue of due process in decisions of the classified personnel director over employee involuntary transfers. Schnaufer testified that the topic related to an initial proposal of AFCSME's regarding Article 6. Covert believed it was off-topic based on what the parties had been

[12] Notably, this proposal did not address overtime at Handel and Glover stadiums.

[13] The net effect of this proposal was that only the short list would be laid off. One vacant position was left with its hours reduced

discussing in bargaining thus far. AFSCME also presented a proposal that day on the effects of layoff, if only six employees were to be laid off. The proposal was designated as "partial" with "more to come." Covert informed Schnaufer that when the Union had a complete proposal in that regard, the District would consider it.

Effective July 1, the District laid off and reduced the hours of a number of blue collar unit employees. It appears, but is not entirely clear from the record, that the number of employees who were laid off and had their hours reduced corresponded with the numbers proposed on the long list. Both effects bargaining and successor agreement negotiations continued after the layoffs.

The parties next met for bargaining on July 18.[14] The District submitted what it termed a "comprehensive proposal," rather than a package MOU. According to Schnaufer, he considered that the proposal had "package elements," because when he asked Covert if they could do individual TAs on its contents, Covert said that some items were tied to other items, but others were not. Covert's purported statement in this regard was not explained further in testimony. Schnaufer explained at the table that from the Union's perspective, it was hoping to get some minor or mid-level issues resolved so that the parties could concentrate on major issues.

The District's July 18 proposal was not substantively different from what it submitted on June 25 regarding: health benefits cap limits, furloughs and triggering language, suspension of personal necessity leave days, rotation of dispatcher overtime, and restoration of laid off positions and reduced hours. The District's July 18 proposal again included a proposal on

[14] On this date, the parties reached a tentative agreement (TA) on the issue of compensatory time off under Article 5, Section 5.10, and also signed a stand-alone MOU over bilingual classification pay.

overtime assignments at Handel and Glover stadiums, which had been absent from the June 25 package MOU proposal.

Additionally, the District made new proposals regarding modifying language at Article 5, Sections 5.1 and 5.3. According to Covert, this was proposed in response to AFSCME's proposals over Sections 5.1 and 5.3 that were presented at the June 15 bargaining session. The Article 5 proposals were prefaced by a recitation of quoted sections from Arbitrator Horowitz's decision and also stated:

> ***Note:*** *In the current contract, 5.1 refers to "meet and confer." 5.2 refers to "meet and consult." 5.3 refers to "voluntary agreement between the employee, the District, and the Union." Article 18 pertains to layoff. 5.1 refers to District layoff procedures, but 5.3 does not reference layoff procedures. Article 18, at section 18.1.2, definition of layoff, includes "loss of employment or voluntary demotion or reduction in hours or months in lieu of loss of employment." The District believes that the language in Article 18 is sufficient as it is to implement reduction in work day, or work week or work year, as well as loss of employment. The District, for the sake of clarity, hereby proposes to amend Section 5.1 and 5.3.*
>
> *In addition, and as a matter of precaution, the District <u>will propose reductions in work year for the classifications that were the subject of Arbitrator Horowitz's opinion and award</u> dated November 11, 2011.*
>
> [¶…¶]
>
> *The District has appealed the opinion and award to the superior court and a court decision is anticipated by the end of July. The affected classifications are certain food service and transportation employees. While the District believes that the language in Article 18 is sufficient as it is, the District <u>notifies AFSCME that its bargaining proposal does include a reduction in the scheduled work year</u> if the Arbitrator's opinion and award is not reversed <u>because there is no work for these employees</u> and they have already been working a shorter work year following their Spring 2009 reductions. <u>It is also recognized that there may be a back pay award</u> and the District makes this proposal in order to reduce or eliminate any <u>additional</u> back pay award.*

(Underscore added. All other emphasis in original.) The crux of the proposed modifications was to replace the word "confer" with "consult" in Section 5.1, and to eliminate the employee's required agreement with work year adjustments in Section 5.3, as well as add the following language:

> Any reduction in work year shall be accomplished in accordance with the District layoff procedures in effect at the time of the action, and only after meeting and consulting with AFSCME.

Covert testified that he explained during negotiations that since the Union had made a proposal regarding hours under Sections 5.1 and 5.3 and Arbitrator Horowitz had encouraged the parties to address at the bargaining table language over hours and work year, the District was responding with its own hours/work year proposals under Article 5. Covert also reminded Schnaufer that AFSCME had also proposed reverting to the "consult" language under Section 5.2 because confer and consult meant the same thing in the District, and that the District also wanted the language to be consistent. Covert also testified that he explained in at this bargaining session that the District did not intend by this proposal to eliminate or overrule the back pay that could be awarded under the arbitrator's decision, but rather to cut off further liability going forward. He also explained that the District believed that these employees' hours needed to continue to be reduced because of summer schedule changes at various schools in the elementary school district, in the case of food service workers, and because the District was no longer running a comprehensive summer program, in the case of transportation workers.[15] Schnaufer denied that Covert explained during negotiations that the District's intention was to cut off back pay liability going forward.

[15] The employees subject to the arbitration had had their hours or work years reduced since 2010 because of the summer schedule changes. AFSCME took issue with the District's

Toward the end of the bargaining session, AFSCME made a verbal proposal that if the District would agree to the short list, AFSCME would agree to the District's proposal regarding furlough days and triggering language under Article 11. The District caucused to discuss it. Upon returning to the table, Covert told the AFSCME team that the District could not accept that proposal because it failed to address the other significant financial items at issue, namely, health and welfare cap language, and dispatcher and Handel and Glover overtime. Schnaufer asked for another negotiations date and the parties scheduled one for July 30. AFSCME also requested information from the District regarding employee overtime and the District provided responsive written information at the next bargaining session.

4. The District's Last, Best, and Final Offer

At the beginning of the session on July 30, Covert summarized on a whiteboard all of the outstanding items that had and had not been agreed to, including each party's stated positions, which have been discussed at length herein.[16] Covert wrote "okay" on the whiteboard for the Union's agreement in principal with the District's furlough proposal. His summary noted that the Union had yet to make a counter-proposal regarding health and welfare, dispatcher overtime, or Handel and Glover overtime. The District informed AFSCME that the cap it was proposing regarding health and welfare benefits would not result in any out-of-pocket premiums for employees in 2013. Covert again went over the proposed reduction in

---

contention that there was "no work" for Food Service employees, because, in Schnaufer's view, some employees working in the summer had actually had their hours increased as a result of transfers from single track schools to schools on multi-track. In 2007, the parties had negotiated over a process that would have allowed Food Service employees to choose to stay in their schools during the first conversions from single to multi-tracks, regardless of seniority. However, that agreement was never executed , expired by its own terms in 2008, and AFSCME admitted that the document was not put at issue during negotiations in 2012.

[16] Also on this date, the parties reached TA over the issue of mountain trips not being charged against bus drivers' "equalization hours."

hours for Food Service and Transportation employees that were the subject of the Horowitz award. Covert reiterated that the District did not believe that the Horowitz award prevented the District from reducing hours in the future when there was an operational need to do so, and that the District's proposal was not intended to eliminate back pay already owed, but to cut it off as of July 1, 2012. No specific food service or transportation positions were identified for hours or work year reductions in the LBFO or during the discussion. Covert also talked about the confusion between meet and confer versus meet and consult in Article 5, and that the language should be consistent from the District's view.

After Covert's whiteboard presentation, AFSCME took a caucus. When it returned from caucus, AFSCME said it had a proposal on Handel and Glover.[17] It presented a proposal over Article 5, maintaining what it had previously proposed in that regard on June 15, and adding at Section 5.12.1:

> The following language will go into effect July 1, 2013, if, and only if, no layoffs have been announced or planned for 2013-2014, all furloughs—uncontested or contested—have been cancelled, and all reductions in assigned hours—contested or uncontested—have been restored: The six (6) most senior day custodians shall be placed into the rotation for overtime by seniority at Handel and Glover Stadiums. (7/30/12)

(Emphasis in original.) Janec testified that the intent of this proposal was to save the District money and to expand the overall number of employees eligible for the overtime. He admitted during cross-examination, however, that the Union never prepared or presented a cost analysis for the proposal and that it would have had no effect during the 2012-2013 school year, as it was not slated to be operative until the following school year. After confirming with Schnaufer that the proposal was not intended to go into effect for a year, was conditioned upon

[17] As it turns out, this was AFSCME's final written proposal regarding successor agreement negotiations.

all hours and layoffs restorations, and would include the most senior custodians who would also be eligible for longevity pay while serving overtime, Covert thanked AFSCME but said that it did not appear that the proposal would address the District's cost-savings concerns.

AFSCME also revised and expanded its earlier proposal regarding effects of layoff, and considerable time was spent discussing it that day. Covert said, "none of this has anything to do with any of the [District's] proposals or the request that the Union respond to our proposals." And Schnaufer responded, "That's right. We want to spend the afternoon discussing effects." (Hearing Transcript, Vol. III, p. 93.)

Covert presented the District's Last, Best, and Final Offer (LBFO) during the afternoon of the July 30 session. Lee-Sung testified that the District decided to present a LBFO because of the lack of progress on significant monetary items to that point, and a lack of meaningful response through counter-proposals from AFSCME to the District's monetary items. There were no discernible differences in the LBFO from the District's proposal on July 18. According to Lee-Sung, Covert said that the LBFO was something for the Union to consider and another bargaining session was planned for the following week so that the Union could tell the District where it stood.

5. <u>The Final Bargaining Session and Declaration of Impasse</u>

The parties' final bargaining session was held on or around August 6. Schnaufer could not recall that this final session occurred. Covert began the session by asking if AFSCME had any proposals, to which Schnaufer replied, "no." After caucusing, the District declared in joint session that the parties were at impasse and discussed the requisite filing with PERB. Covert asked if AFSCME would submit with the District a joint request to PERB for impasse determination, and Schnaufer said he would not oppose the request, but would not submit it

jointly. Schnaufer either would not admit or did not recall that this conversation took place at the bargaining table, or that he made those statements regarding impasse. Schnaufer and Covert apparently also had separate, private conversations about the impasse declaration in which Schnaufer contends he disputed the parties were at impasse. When asked whether AFSCME filed anything with PERB in response to the District's written request that PERB determine impasse and appoint a mediator, Schnaufer said, "I don't think we filed anything at all." (Hearing Transcript, Vol. I, p. 126.)

The District filed its request for impasse determination with PERB on August 7. The cover letter and statement of facts noted that in conversations with Schnaufer on August 6 and 7, Schnaufer told Covert that Covert could relay to PERB that he did not object to the District's request. The District summarized 15 contract articles still in dispute, including the ones discussed at length here under Articles 2, 5, 11, 13, and 15.[18] The District also noted that the parties had reached TA on 7 issues.[19] The District noted that the parties had met for bargaining approximately 21 times for 75 hours.[20] PERB approved the factfinding request on August 15.

In or around September, the District laid off four additional blue collar unit employees to make up for four field workers (also blue collar unit employees) that had to be returned to

---

[18] Other, more minor, disputed contract provisions over which proposals had been exchanged during the course of these negotiations were: Article 1, "Recognition;" Article 4, "Grievance Procedure;" Article 6, "Transfer Procedures;" Article 7, "Evaluation Procedures;" Article 8, "Safety Conditions;" Article 12, "Vacations;" Article 14, "Union Rights;" Article 16, "Contracting Out;" Article 22, "Reopener;" and Article 23, "Duration."

[19] It appears that the parties actually reached TA on more than 12 issues.

[20] The record contains detailed information for only 14 bargaining sessions between March and August. It is unclear whether the number 21 refers to earlier bargaining sessions in 2011 for which there is no specific information in the record.

work for operational reasons regarding field maintenance. Poore admitted during cross-examination that these layoff substitutions were a "trade-off," and that this was done for reasons of "equity," despite the fact that the District ended up with additional money in its reserve fund ($1 million more than anticipated) and health and welfare funds.

6. Mediation and Factfinding

The parties met with a State mediator on September 24. The District presented its written "Proposals Regarding Impasse" at this session. The District summarized in that document the number of bargaining sessions held and noted that 12 TAs and an MOU had been reached regarding Union proposals and a single TA had been reached over a District proposal. All of the proposals set forth in the District's LBFO were recounted. Additionally, the specific positions within food service and transportation with hours and/or work year reductions were listed in a chart in the section of the document setting forth proposals over Article 5. This chart had not been included in the LBFO. The District noted that the employees listed had been working reduced hours or years since July 1, 2010.

Agreement between the parties was not attained through mediation. The parties' dispute was then certified for factfinding by PERB.

A factfinding hearing was held on October 25 and 29, before neutral chairperson William Floyd and representatives for the District and Union. A factfinding report issued on November 15. The District concurred with the report and AFSCME dissented. The majority of the factfinding panel (panel) found that the District presented uncontroverted evidence of its precarious financial position necessitating budget cutbacks as the District proposed under

Article 11 (furloughs and triggering language).[21] Regarding Article 5, Section 5.1, the panel found no functional difference between "consult" and "confer" and merit to the District's contention that the language across Article 5 should be consistent. The panel therefore recommended that Section 5.1 language be changed to "consult" for consistency with Section 5.2. Regarding Section 5.3, the panel found that giving an employee veto power over proposed work year reductions disregards and interferes with the financial and operational needs of the District. Thus, the panel recommended that the language regarding employee agreement be removed from Section 5.3 and further not be incorporated into Section 5.1 as proposed by AFSCME.

7. Post-Factfinding and Implementation

After considering the factfinding report, the parties arranged to meet to attempt to reach agreement. At a meeting on November 26, the District presented to AFSCME its "POST-FACTFINDING NEGOTIATION PROPOSALS." The District dropped its proposal over Handel and Glover overtime.[22] Covert explained at the table that although the Handel and Glover issue was still important to the District, and still expensive for the District, after considering the factfinding report the District hoped withdrawing it might help the parties reach agreement. All other proposals remained the same, except for some additional language regarding Article 11 over the timing of scheduling furlough days. AFSCME did not present a proposal.

[21] The panel's report also recommended that the District's proposals regarding health and welfare benefits and personal necessity leave be implemented. Regarding dispatcher overtime, the panel suggested a compromise, and regarding Handel and Glover overtime, it recommended that the current contract language be maintained, i.e., no change.

[22] The District also withdrew an earlier proposal not previously discussed herein regarding employee eligibility for health benefits.

Covert said that Schnaufer said in response to the District's proposal that:

> they would never agree to a cap, they would never agree to a reduction in work year, they would not agree to Handel/Glover, they wouldn't agree to Transportation, [but] they thought that a reopener proposal with a three-year contract was a good idea.

(Hearing Transcript, Vol. III, p. 122.) Covert urged Schaufer to think over whether AFSCME had any responsive proposals. AFSCME agreed to meet again.

The parties met again, for what was to be the final time, on November 29. The District presented a document entitled, "AMENDED DISTRICT POST-FACTFINDING NEGOTIATION PROPOSALS." The District dropped a part of its proposal over Article, Section 5.6, "Extra Hours," to conform with the factfinding report recommendation and eliminate a skills and ability requirement for an employee seeking an extra hours assignment outside of the employee's classification. All other proposals remained the same from the previous meeting. Covert again noted that the District was not trying to take away back pay from the Horowitz award for food service and transportation employees, but trying to negotiate with AFSCME a reduction in hours and/or work year for those employees to conform with summer scheduling requirements.

AFSCME proposed, through Schnaufer's handwritten negotiations notes from that day, a conditional offer regarding the health and welfare benefits. It was conditioned on reaching agreement on all outstanding issues by 8 p.m. that evening or it would be withdrawn. The substance of the offer was that if a majority of the Insurance Committee had agreed to make program plan changes, and if the District and all other employee organizations, save AFSCME, had approved such changes in writing by December 1 of the school year, then the District could impose such changes on AFSCME without challenge and outside of the grievance procedure. The District considered and rejected this offer because it did not address the other

outstanding issues between the parties. The District informed AFSCME that it would recommend that the District Board of Trustees approve implementation of terms and conditions of employment at the next Board of Trustees' meeting.

On December 6, the Board of Trustees voted to implement terms and conditions of employment for the AFSCME-represented unit with an effective term of July 1, 2012, to June 30, 2015. It included all of the TAs and bilingual pay MOU reached during the course of the negotiations. The implemented terms also included: two furlough days and triggering language for additional days (Article 11); a hard cap on District health and welfare contributions (Article 2); suspension of personal necessity leave days (Article 13); dispatcher rotation for overtime (Article 15); and a reduction in hours and/or work year for food service and transportation employees and modified language in Article 5, Sections 5.1 and 5.3 as discussed herein. The Board of Trustees also approved reinstating, effective December 10, seven laid off employees and restoring full hours for 24 employees.

Unit Members' Conversations With the Superintendent

Elizabeth Novak is the Superintendent of the District. On or about August 31, Grounds Maintenance Worker Arturo Rodarte, a member of the blue collar unit, was walking through a District parking lot and observed Novak speaking with unit employees Juan Mendoza and Gabriel Gamboa. Rodarte was waved over to join the conversation. The employees expressed that their workloads were difficult since one position from their crew had been laid off and they had also lost an hour of the workday. According to Rodarte, Novak said that other school districts were facing the same difficulties and that things would "get better" if the District and Union reached an agreement.

At a Union meeting about one month later, Rodarte and others present learned that the District had reached agreement with all other unions regarding healthcare. Rodarte testified, "In our minds, we were thinking that perhaps that was the issue that was stalling the agreement between our union and the District." (Hearing Transcript, Vol. II, p. 64.) Rodarte and other unit members arranged an impromptu meeting in Novak's office shortly after the Union meeting to ask her that if the Union agreed to healthcare, would such agreement be adequate to restore their hours. Novak clarified that an agreement on healthcare alone would not be sufficient to restore hours for unit employees. On cross examination, Rodarte admitted that Novak had never promised unit employees anything in exchange for the Union's agreement, nor did she suggest that the employees talk with AFSCME about its negotiation strategy.

ISSUES

1. Did the District unlawfully condition agreement and insist to the point of impasse that it would lay off fewer employees only if AFSCME agreed to its bargaining proposals over furloughs, a hard cap on District contributions to health and welfare benefits, and overtime?

2. Under a totality of circumstances, was the District's conduct during negotiations in bad faith?

3. During impasse proceedings, did the District unlawfully condition reinstatement of laid off employees and restoration of employees' hours on AFSCME's agreement to relinquish a favorable arbitration award?

4. Did the Superintendent interfere with employee rights by reneging on a promise made to employees to restore their hours if AFSCME agreed to the District's proposed changes to its health and welfare benefit contributions?

CONCLUSIONS OF LAW

Credibility Determination

PERB resolves disputed factual accounts by using the standards of credibility set forth in Evidence Code section 780. (*Sacramento City Teachers Association (Franz)* (2008) PERB Decision No. 1959, proposed decision, pp. 15-16.) Those factors include:

> demeanor; character of testimony; capacity to perceive, recollect or communicate; bias, interest or motive; prior consistent or inconsistent statements; attitude; admissions of untruthfulness; and existence or non-existence of facts testified to.

(*State of California (Board of Equalization)* (2012) PERB Decision No. 2237-S, proposed decision, p. 8; see also *Palo Verde Unified School District* (2013) PERB Decision No. 2337, pp. 27-28.)

There are several areas of factual disagreement between Schnaufer's and Covert's testimony. In general, Covert was a credible and forthright witness who had a detailed recall of the events at issue. Covert's testimony was consistent throughout his direct and cross examinations. He answered the questions posed to him directly. Schnaufer's memory of key events at issue was decent during his direct examination, but quite spotty during cross-examination. For example, Schnaufer could not remember that a final bargaining session occurred between the parties on August 6 where impasse was declared and procedures discussed. He also could not recall, or would not admit, what was discussed at the table in open session about AFSCME's willingness to jointly submit the impasse determination request to PERB. Schaufer also had a poor recall of the events at the penultimate bargaining session. (See Hearing Transcript, Vol. I, pp. 123-125.)

Schnaufer also frequently gave equivocal and evasive answers, and, at times, unintelligible answers, to straightforward questions posed to him during cross examination,

and was recurrently argumentative. A salient example is of this is in the following exchange where it becomes clear that Schnaufer knew that the District had explained, during negotiations, its position over potential back pay in connection with its proposal to reduce hours under Article 5, but he refuses to admit that in attempt to argue that his contrary legal viewpoint on this issue is the correct one:

> Q Thank you, sir. Now, didn't Mr. Covert say that one of the reasons for this proposal was that the District, if it lost the appeal, wanted to be able to reduce or eliminate any, quote, unquote, "additional" back pay award?
>
> A No.
>
> Q Well, look at page 6 and do you see the – Would you read to yourself the last sentence, please?
>
> A Right.
>
> Q And that additional back pay award, didn't Mr. Covert explain what that meant?
>
> A No. You said some words that we took to mean that you thought this was just a back pay issue, but we knew as a matter of fact that this had as a central element the assignment and the status of those food service and bus driver.
>
> Q Okay. But let's just take the back pay. Didn't Mr. Covert discuss back pay?
>
> A At times during negotiations, you discussed back pay. I can't remember on which date.
>
> Q Okay. And didn't Mr. Covert say that the reason for this proposal was to have reduced work year so that, going forward, the District could reduce its back pay obligation to the food service and bus drivers?
>
> A No. I told you that these employees have a status and an assignment. I didn't use those words, but had a status and assignment where some employees had gotten more time, more months of work. And you kept coming back to back pay, and I

> kept trying to tell you it's much more, Mr. Covert, than back pay. It's these other issues of status and assignment.
>
> Q Okay. Did though Mr. Covert, on behalf of the District, articulate that this proposal was being made to reduce hours so to reduce or eliminate additional back pay?
>
> A <u>You kept saying that as if you hadn't heard me when I talked about the assignment and the status</u>.
>
> Q Okay. I appreciate that answer. And by the way, didn't Mr. Covert also take that position about reducing back pay every time Article Five regarding work hours was discussed?
>
> A <u>Frances Banuelos was at the bargaining table, and several times I would refer to her, and you would look at her and then ask – And then I would have her explain what actually happened, and you would take notes</u>.
>
> Q Okay. And I wouldn't say anything about back pay?
>
> A At times, you would say things about pay. At other times, we talked about assignment.

(Hearing Transcript, Vol. I, pp. 119-121; emphasis added.) The emphasized areas above demonstrate that Schnaufer was more concerned with conveying his opinion over relevant events than truthfully recounting them. Because I find that Covert's testimony was more reliable and believable than Schnaufer's, wherever there is a material difference in their factual accounts, Covert's testimony is credited over Schnaufer's.

<u>The Duty to Bargain in Good Faith</u>

The duty to negotiate in good faith imposed under EERA requires bargaining partners to demonstrate by their conduct a genuine desire to reach agreement. This duty extends to conduct during impasse proceedings. (*Moreno Valley Unified School District v. Public Employment Relations Bd*. (1983) 142 Cal.App.3d 191, 198-199 (*Moreno Valley*.) In general, the Board

looks to the totality of the circumstances, or the entire course of bargaining conduct, to determine whether there is sufficient indicia of good faith.

In *Stockton Unified School District* (1980) PERB Decision No. 143 (*Stockton USD*), for example, where the Board found the employer's entire course of conduct was an unfair practice under the totality of circumstances test, it relied on the fact that the employer's negotiator had reneged on the parties' ground rules agreement, had missed or cancelled several meetings, was recalcitrant in scheduling new meetings, and had unilaterally ended some meetings. However, under some circumstances, where a party's conduct is so egregious and has such potential to frustrate negotiations, it is considered a "per se" violation of the duty to bargain in good faith. The "per se" analysis is most often applied to situations in which one of the parties refuses to negotiate altogether or an employer unilaterally changes conditions of employment. (*Fresno County Office of Education* (1993) PERB Decision No. 975.) It also applies when a party insists to the point of impasse on a non-mandatory subject of bargaining, because a refusal to enter into an agreement over mandatory subjects on the ground that the other party will not accede to a proposal over which there is no duty to bargain "is, in substance, a refusal to bargain about the subjects that are within the scope of bargaining." (*NLRB v. Wooster Division of Borg-Warner Corp.* (1958) 356 U.S. 342, 349 (*Borg-Warner*).)[23] There is no genuine impasse reached where, as a result of a party's bad faith, negotiations stalled. (*Marin Community College District* (1995) PERB Decision No. 1092, proposed decision, p. 85.)

The complaint in this case alleges violations of the duty to bargain in good faith under both per se and totality of circumstances theories during negotiations and in impasse. The

[23] When interpreting EERA, it is appropriate for PERB to derive guidance from court decisions interpreting the National Labor Relations Act and parallel provisions of California labor relations statutes. (See, e.g., *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1, 12-13; *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

analysis begins with the per se allegations during negotiations, next examines the totality of the District's bargaining conduct, and ends with the allegation of bad faith during impasse.

1. Unlawfully Conditioning Agreement and Insistence to Impasse on a Non-Mandatory Subject of Bargaining

The complaint, referring to the District as Respondent and to AFSCME as Charging Party, frames the per se violations as follows in paragraphs 3 through 8:

> 3. During the period from July 18, 2011 through July 30, 2012, and continuing, Respondent and Charging Party were meeting and negotiating pursuant to Government Code section 3543.3 over a successor collective bargaining agreement (CBA).
>
> 4. During this period of time, Respondent's chief negotiator, Assistant Superintendent Russell Lee-Sung, informed Charging Party that if Charging Party agreed to Respondent's bargaining proposals (i.e., furloughs, caps on healthcare benefits, and overtime), the Respondent would use a "short list" that would result in the layoff of six employees; however, if no agreement could be reached by July 1, 2012, Respondent would use a "long list" resulting in the imposition of 13 layoffs paired with the reduction in hours of 23 full-time employees.
>
> 5. Charging Party did not agree to the proposals in paragraph 4 and told the Respondent that "it was contrary to law."
>
> 6. On July 1, 2012, the Respondent issued layoff notices to employees on the "long list." The parties negotiated the effects of the layoffs on July 10, 2012.
>
> 7. During a July 18, 2012, negotiation session, the parties discussed restoring and maintaining laid-off positions, however no agreement was reached. On July 30, 2012, Respondent presented its last, best, and final offer that included terms to "restore" and "maintain" the hours of employees were subject to layoff. On or about August 10, 2012, Respondent filed with PERB a Request for Impasse Determination/Appointment of Mediator, and on August 21, 2012 PERB determined that an impasse existed.[24]

[24] Some of the dates in this paragraph do not precisely align with the evidence at hearing, but the differences are inconsequential.

> 8. By the acts and conduct described in paragraphs 4 and 7, Respondent failed and refused to bargain in good faith with Charging Party in violation of Government Code section 3543.5(c).[25]

Thus, the complaint accuses the District of per se bad faith by both the conditions placed upon the District's proposals and insistence to the point of impasse on the issues presented under the long list. Some conditions placed on bargaining proposals are unlawful, while others are not. For example, PERB has recognized that it is unlawful to condition agreement on matters that are outside of the control of the negotiators. In *Fremont Unified School District* (1980) PERB Decision No. 136, the employer's proposal was contingent on a tax measure to be approved by voters, and thus, was held to be outside the control of the negotiating parties and an illegal proposal. It is also unlawful to negotiate to impasse a proposal that conditions agreement to a non-mandatory subject, such as unit modification, on acceptance of mandatory subjects. (*Berkeley Unified School District* (2005) PERB Decision No. 1744.) Similarly, the Board has also found unlawful conditional bargaining where a party refused to discuss a mandatory subject by insisting on a proposal to postpone negotiations on that subject until agreement has been reached on all others. (*City of San Jose* (2013) PERB Decision No. 2341-M.) The Board in that case found that the result was to reduce "the range of possible compromises" that could have emerged if that condition had not been imposed. (*Id*. at p. 32.)

A condition can also be unlawful if it is proposed in order to avoid a contract. In *Modesto City Schools* (1983) PERB Decision No. 291, the Board considered whether an employer's insistence on both a no-strike clause and exclusion of a binding arbitration clause

[25] This same conduct was also alleged in paragraphs 9 and 10 to constitute derivative violations of AFSCME's and employees' rights under EERA section 3543.5, subdivisions (b) and (a), respectively.

was evidence of conditional bargaining. The Board held that the employer did not condition its proposals only to avoid a contract, and thus the proposals were not per se evidence of bad faith. (*Id.* at pp. 31-32.) Furthermore, if the condition placed on a bargaining proposal is something within the control of the negotiating parties, such as a deadline set for the acceptance of a proposal, then no bad faith is inferred by the contingency. (*County of Solano* (2014) PERB Decision No. 2402-M; *Trustees of the California State University* (2006) PERB Decision No. 1871-H (*CSU*).)

As previously discussed, it is unlawful to insist to the point of impasse on a non-mandatory subject of bargaining because is it tantamount to refusing to negotiate over mandatory subjects. (*Borg-Warner*, *supra*, 356 U.S. 342, 349.) In applying this rule, the Board has found unlawful an employer's insistence to impasse over a union's relinquishing its statutory right to file grievances in its own name. (*Chula Vista City School District* (1990) PERB Decision No. 834 (*Chula Vista*).) Nonetheless, parties are free to negotiate over and include non-mandatory subjects in their agreements. (*State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2081-S (*DPA*).) A party may not, however, legally insist upon the acceptance of such proposals "in the face of a clear and express refusal by the union to bargain" over them. (*Lake Elsinore School District* (1986) PERB Decision No. 603, p. 6; citation omitted (*Lake Elsinore*).) The party opposing inclusion of a non-mandatory subject must clearly communicate its opposition to further discussion about the non-mandatory proposal before charging the other with an unfair practice. (*Travis Unified School District* (1992) PERB Decision No. 917; *Chula Vista*, *supra*, PERB Decision No. 834; *Lake Elsinore*, *supra*, PERB Decision No. 603.) It is insufficient notice for a party to

merely state that it is unwilling to agree to language that waives its statutory rights. (*DPA*, *supra*, PERB Decision No. 2081-S.)

First, addressing the allegations in paragraph 4 of the complaint, it is undisputed that Lee-Sung clearly informed AFSCME that layoffs in the blue collar unit were a foregone conclusion, whether or not agreement was reached between the parties over the District's proposed concessions. Thus, the actual "decision" to lay off was not placed on the table. The condition placed upon bargaining in this instance was the time in which to reach agreement, or face the potential for more drastic layoffs and hours reductions. The District's evidence over its fiscal condition was not refuted by AFSCME.[26] Since the District faced, during the time period of negotiations, not only a current, significant deficit but the potential for continuing erosion of its budget through threatened mid-year cuts, it is understandable why it was seeking early agreements with all of its employee groups. It is also understandable why it needed budget certainty going into the next fiscal year, and how the need for further cuts in the form of additional layoffs and hours reductions could arise the longer it took to reach an agreement with AFSCME. On the other hand, facing bleak prospects for a favorable outcome in this negotiations cycle, AFSCME had little incentive to swiftly reach agreement. In fact, AFSCME had every reason to try and prolong the inevitable concessions for as long as possible. A time-limited proposal by the District, under the circumstances, was reasonable protection against further deterioration of its finances. This is especially true since the last two times AFSCME

[26] AFSCME pointed out that the District ended up with $1 million more in reserve funds and a few million more in its health and welfare fund than originally projected. Since school districts are required to keep adequate reserves projected for more than one fiscal year and the District's plan to cover the needed $11 million in cuts already involved borrowing from health and welfare funds, the additional funds do not demonstrate a significant change in the District's fiscal health.

held out on accepting health care plan changes, for example, it cost the District several hundred thousand dollars.

Moreover, since both the deadline set for early agreement and the magnitude of layoffs and hours reductions was within the control of the negotiating parties, bad faith is not inferred by these contingencies. (*County of Solano*, *supra*, PERB Decision No. 2402-M; *CSU*, *supra*, PERB Decision No. 1871-H.) And, importantly, this situation is not one where it can be said that the District was using its proposal to avoid a contract, or, as the employer in *City of San Jose*, refusing to discuss a mandatory subject until other issues had been resolved. The time limit on agreement, with discussion over additional layoffs and hours reductions if the timeframe was not met, also did nothing to limit the range of possible compromises that could have emerged. If anything, it appears that the District was trying to use the time limit as an incentive to reach global agreement. The District also willingly discussed all of AFSCME's proposals, agreeing separately to many of them, at the same time it pushed its need for monetary concessions. These actions do not suggest unlawful conditioning.

Regarding the allegations in paragraph 7 of the complaint, it is true that the decision to lay off is a managerial prerogative and an employer must only negotiate over the effects thereof. (*Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375.) Thus, the decision to lay off is a non-mandatory subject of bargaining. However, as previously stated, the decision to lay off, itself, was not being negotiated here, as AFSCME's witnesses conceded that Lee-Sung repeatedly emphasized that some layoffs were necessary in any event. Thus, a negotiated solution could not have avoided some loss of employment in the unit. Instead, the long list versus short list paradigm, in connection with the July 1 deadline for agreement, was the

District's insurance policy against the potential monetary losses it faced in the event that AFSCME failed to timely agree to its requested concessions over overtime, health care benefits, and reduced working hours.[27]

But, even if it seemed that the District was attempting to negotiate over the decision of whether it was necessary to lay off an additional seven employees beyond the six identified on the short list, PERB has found that exploring alternatives to layoffs is appropriate for bargaining:

> Although alternatives to layoffs are analyzed as "effects" of the decision to layoff, PERB has similarly recognized that alternatives to layoffs, such as concessions in wages or benefits, are also appropriate matters for collective bargaining. (*San Mateo City School District* (1984) PERB Decision No. 383, p. 18 [expressly recognizing "options in lieu of layoff" as one of several negotiable "effects" of a layoff decision].) Whether in situations where the underlying decision is itself negotiable, such as a transfer of work from one unit to another, <u>or in situations where only the "effects" of a layoff decision are negotiable</u>, the rationale is essentially the same: because of the exclusive representative's unique ability to offer concessions in employee wages or benefits, such matters are *at least* as amenable to collective bargaining, and quite likely *more amenable*, than a "lack of work" situation involving an elimination, reduction or change in the kind of services offered.

(*City of Sacramento* (2013) PERB Decision No. 2351-M, p. 22; italics in original; underscore added.) The Board has also specifically held that the number and identity of employees to be laid off are "mandatory subjects of meeting and conferring prior to the implementation of the layoff." (*Salinas Valley Memorial Healthcare System* (2012) PERB Decision No. 2298-M, p. 19 (*Salinas*).) In *Salinas*, after being informed by the employer that some layoffs were going

[27] Notably, any proposal to reduce hours or work year, through furloughs or otherwise, is squarely within the scope of representation because it affects both hours and wages. (EERA, § 3543.2; See *San Ysidro School District* (1997) PERB Decision No. 1198.)

to be necessary and would occur, the union repeatedly requested to bargain over the timing, number, and identity of the employees to be laid off, among other issues. The employer refused, claiming that such topics were non-negotiable given that the decision to lay off was within its managerial prerogative. The Board, however, rejected this argument finding that these issues are negotiable. (*Ibid*.)

Under the Board's above rationale, it was reasonable, desirable, and necessary for the District to explore with AFSCME whether an agreement over concessions in wages and benefits could eliminate the need for more drastic layoffs than what was inevitable. Besides, since AFSCME willingly exchanged proposals on this topic with the District it cannot, in any event, charge the District with insistence to impasse on a non-mandatory subject, despite its various written and verbal attempts to convey the idea that it was not actually "negotiating." Nothing in those communications with the District gave notice of a clear and express refusal by AFSCME to further discuss the layoff issue, especially when it at the same time made its own proposals. (*Lake Elsinore*, *supra*, PERB Decision No. 603.)

For all of the above reasons, I cannot conclude that the District's conduct during bargaining was a per se violation of its duty to negotiate in good faith. Accordingly, these allegations are hereby dismissed.

2. Surface Bargaining

PERB generally resolves the question of good or bad faith bargaining by analyzing the totality of the accused party's conduct to determine whether it has engaged in unlawful "surface" bargaining. 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,

p. 15.)

Typical indicators relied on by PERB to demonstrate surface bargaining are as follows. 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, enf. 418 F.2d 736.) 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. (*Ibid.*) Other factors include: negotiator's lack of authority which delays and thwarts the bargaining process (*Stockton* USD, *supra*, PERB Decision No. 143); and insistence on ground rules before negotiating substantive issues (*San Ysidro School District* (1980) PERB Decision No. 134).

PERB has also found that regressive bargaining, such as reneging on agreements already reached during negotiations and/or making proposals that are, as a whole, less advantageous to prior offers, may support a surface bargaining claim. (*City & County of San Francisco* (2009) PERB Decision No. 2064-M, p. 3; *Chino Valley Unified School District* (1999) PERB Decision No. 1326, p. 5; *Charter Oak Unified School District* (1991) PERB Decision No. 873, pp. 17-18.) Such actions have the potential to move the parties further away from agreement. Although, regressive bargaining is not unlawful in-and-of-itself. Rather, such conduct "is unlawful if it is for the purpose of frustrating the possibility of agreement." (*US Ecology Corp*. (2000) 331 NLRB 223, p. 225, citing *McAllister Bros*. (1993) 312 NLRB 1121.) For instance, parties may offer new, even regressive, proposals if based upon changed economic conditions. (*Id*. at pp. 225-226.) On the other hand, a change in position for

suspicious reasons or without any explanation at all is evidence of bad faith. (*Mid-Continent Concrete* (2001) 336 NLRB 258, p. 260, enforced sub nom. *NLRB v. Hardesty Company, Inc*. (8th Cir. 2002) 308 F.3d 859, p. 868.)

In addition, proposals on individual issues "must be viewed in the context of the entire package of proposals." (*Ventura County Community College District* (1998) PERB Decision No. 1264 (*Ventura CCD*), warning letter, p. 6, citing *Regents of the University of California* (1996) PERB Decision No. 1157-H.) For example, an employer's apparently regressive proposal about an organizational security issue was not considered regressive as a whole because the proposal also included concessions on wages, the workday, and part-time unit members. (*Ventura CCD*, *supra*, at warning letter, p. 6.)

Adamant insistence on a bargaining position is not necessarily refusal to bargain in good faith. (*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, 231.) The "ultimate question" raised in every surface bargaining case is "whether the respondent's conduct, when viewed in its totality, was sufficiently egregious to frustrate negotiations." (*City of San Jose, supra,* PERB Decision No. 2341-M, p. 19, citing *State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2078-S.)

The complaint specifically alleges at paragraph 11 the following indicia of bad faith by the District:

> (a) offered to lay off fewer employees (i.e., using the "short list" instead of the "long list") in exchange for the Charging Party's acceptance of the Respondent's bargaining proposals, including furloughs, caps on health care insurance, and overtime; and (b) made a regressive bargaining proposal by "inserting" (into its July 18, 2012 bargaining proposal) a new demand that Charging

> Party agree to change the CBA to allow Respondent to reduce employee[s]' work years mid-contract in a manner that was not subject to the CBA's grievance procedure.

Notably, the fact that the first alleged indicium of bad faith above has been rejected as forming the basis of a per se violation should not preclude it from being considered as an indicator of bad faith under a totality of circumstances analysis. (See, *City of San Jose, supra*, PERB Decision No. 2341-M, pp. 21-23.) AFSCME argues that the District used the employees on the long list as "hostages" to force acquiescence from the Union to its demand for monetary concessions, while the District had no real need for the additional layoffs and hours reductions to be imposed under the long list. Again, AFSCME did not refute the information supplied by the District regarding its fiscal condition. AFSCME argues that since employees were ultimately restored to their positions and hours, it is obvious that the District had no need to impose the additional reductions in the first place.[28] I disagree. It is observed that, by December 2012, when the District rescinded some layoff notices and restored employees' hours on the long list, the imposed terms and conditions of employment included the District's desired budget reductions regarding dispatcher overtime, furlough days, and a health benefits contributions cap, reasonably reducing the need to maintain additional layoffs

[28] It additionally argues that the District would have saved more money if the District had laid off more employees on the long list rather than reducing the hours of 23 employees on the long list. By that reasoning, the District would also have saved the most money by simply laying off the whole unit, but such action would likely have impaired its operations impermissibly. In any event, this argument requires evaluation of the merits of the parties' proposals. Labor boards are generally prohibited from passing judgment on the substance of the proposals. (*NLRB v. American National Insurance Co.* (1952) 343 U.S. 395, 404.

and hours reductions.[29] The threat of supplementary mid-year budget reductions had also been ameliorated by this point with the passage of Proposition 30, further reducing the need to maintain all of the July cut-backs. There is simply no credible evidence that the District used the employees on the long list as "hostages," or that it otherwise proposed the long list in bad faith; therefore, this proposal does not support a finding of surface bargaining.

The complaint next alleges bad faith by the District in that its proposals to change language at Article 5, Sections 5.1 and 5.3, were regressive and would have allowed mid-year work year reductions to be accomplished outside of the grievance procedure. Neither of these suppositions were borne out by the evidence at hearing.

First, under the authorities discussed above addressing regressive bargaining, the District's introduction of this proposal on July 18 cannot be deemed regressive. The District explained, both at the bargaining table and during hearing, that its proposals over these contract provisions was in direct response to AFSCME's proposals regarding same at the June 15 meeting. Since AFSCME proposed changing language at Section 5.1 to align with that in Section 5.3, it was logical for the District to respond with a counter-proposal, especially since AFSCME was proposing to expand employee input over proposed reductions, something over which the District had expressed resistance at the table. To the extent that AFSCME argues that issues involved in the arbitration should not have been brought to the bargaining

[29] It is recognized that neither the charge, as amended, the complaint, nor AFSCME at hearing or in its brief, alleges either under per se or totality theories that any part of the imposed terms and conditions of employment constitutes a separate violation of EERA. The charge and complaint also do not allege and AFSCME does not argue that the District imposed employment terms in a manner that was inconsistent with its LBFO or post-impasse proposals. Therefore, the legality of the actual terms imposed are not squarely in front of me in this case. However, because AFSCME sought rescission of the imposed terms and conditions as a remedy, and both parties introduced substantial evidence over the imposed terms, the imposition is briefly discussed here and in following sections of the analysis.

table, again, AFSCME itself proposed changes under these contract provisions and Arbitrator Horowitz urged the parties to mutually review and revise these procedures. Accordingly, the District's proposal does not show regression under the circumstances.

As to the next point, AFSCME offered no facts in support of the notion that actions under the District's proposals on Sections 5.1 and 5.3 were intended to or would operate outside of the grievance procedure. Covert specifically testified regarding these proposals that the District never had that intent nor expressed that intent to AFSCME. On its face, neither the language of the District's proposals in this regard, or the existing CBA language at Article 5, state that District actions under those sections are not grievable. Likewise, the existing CBA language at Article 18, "Layoff and Recall," which was referenced in the existing Section 5.1 and proposed to be added to Section 5.3, does not state that the grievance procedure does not apply to layoff actions, which includes by definition reductions in work year and hours. In short, there is simply no factual support for the statement in the complaint that reductions accomplished under the proposed Article 5 language are not subject to the parties' negotiated grievance procedure. As such, this cannot infer bad faith.

To the extent that AFSCME argues in its brief that the District's proposal amounted to a waiver of its right to bargain over proposed work year and hours reductions mid-year or mid-contract, that is not demonstrated under these facts. In *Los Angeles Unified School District* (2013) PERB Decision No. 2326 (*LAUSD*), the Board adopted the rule set forth in *McClatchy Newspaper* (1996) 321 NLRB 1386, and held that a school district employer may, in negotiations over a successor collective bargaining agreement, insist to impasse on a bargaining proposal by which it seeks to retain unfettered discretion over decisions to reduce employees' hours or work year, both mandatory subjects of bargaining; however, upon

reaching impasse, the school district may not impose such a proposal as part of its last, best and final offer. In determining whether such a proposal may not be unilaterally implemented post-impasse, the Board eschews a categorical rule:

> the Board will be called on to determine on a case-by-case basis whether a proposal contains sufficient objective standards with respect to the implementation of discretionary decision-making to ensure that the role of the exclusive representative is preserved rather than undermined, and to ensure for bargaining unit members a measure of certainty, or at least predictability, in their wages, hours and terms and conditions of employment.

(*LAUSD*, *supra*, PERB Decision No. 2326, p. 41.)

Here, the District did not seek unfettered discretion over hours or work year adjustments, and even if it had, bargaining over it to impasse does not run afoul of the holding in *LAUSD*. Instead, the evidence supports finding that the District recognized and acknowledged its duty to bargain with AFSCME when the need to reduce hours or work years arises.[30] AFSCME itself proposed to keep the "meet and consult" language under its June 15 proposal for Section 5.2, stating that, in practice at the District, the parties have treated the duty to consult and confer in the same manner. Notably, the District repeatedly reminded AFSCME of this statement during bargaining and the District never took a contrary position or asserted that any diminished bargaining obligation was inferred by the word "consult." Thus,

[30] AFSCME balks at the idea of negotiating mid-contract for proposed hours and work year reductions, as demonstrated by statements in bargaining and at hearing, and given the facts that led the parties to the Horowitz arbitration. This apparently stems from the premise that "neither party to a collective bargaining agreement has a duty to negotiate over any matter covered by the agreement during its term (subject, of course, to reopener provisions." (*Los Rios Community College District* (1988) PERB Decision No. 684, p. 14; citations omitted.) However, where, as here, the existing contract sections covering hours and work year reductions included language that required bargaining with AFSCME before such actions may be completed, it strongly implies that the parties intended to negotiate those matters during the life of the agreement, if necessary. Nothing in the newly proposed language by the District disturbs that mutual obligation on the parties.

the District's proposal to substitute "consult" for "confer" in Section 5.1, in order to be consistent with the pre-existing language in Section 5.2, does not undermine the role of AFSCME to negotiate over proposed changes to hours during the period of the proposed terms and conditions of employment. As such, neither proposals over the term nor the imposition of that term post-impasse demonstrates bad faith by the District.

The record does not demonstrate any of the traditional indicia of bad faith in the District's bargaining conduct.[31] Rather, the record shows that the parties met for many sessions over several months and the District offered several unique proposals seeking concessions, while, at the same time, it agreed to many of the Union's proposals. Notably, the District adjusted its approach with the proposed package MOU on June 25, significantly omitting its proposal over Handel and Glover overtime and proposing to keep other negotiations ongoing toward a successor agreement. Since AFSCME had indicated a willingness, in theory, to accept furlough days, the omission of the Handel and Glover proposal was a concession from the District. This demonstrates a desire to reach agreement rather than to thwart negotiations. Additionally, no bad faith can be inferred from the fact that the District

[31] It is noted that the July 1 layoffs occurred before the parties had completed effects negotiations. Under *Compton Community College District* (1989) PERB Decision No. 720, such action may only occur where: (1) the layoff implementation date was not arbitrary but based on an immutable, externally-established deadline, or an important managerial interest such that delay beyond 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 implementation. I find that this standard was met under these facts because the fiscal condition of the District was described in sufficient detail to make the July 1 deadline non-arbitrary, the District gave ample notice to AFSCME of the proposed implementation date to allow for meaningful effects negotiations, and those negotiations continued after implementation. No bad faith is therefore inferred by the timing of the District's layoff action.

did not accept AFSCME's proposal agreeing to furloughs in May, because that proposal did not address any of the other significant monetary concessions that the District believed were necessary to balance its budget. The District was steadfast that the employment terms of all employee groups must include the same level of concessions in the form of health benefits cap language as well as furlough days. Seeking parity in in contract terms for legitimate business reasons in the form of across-the-board concessions does not imply bad faith. (*County of Solano, supra*, PERB Decision No. 2402-M, proposed decision, p. 21, citing *Banning Unified School District* (1985) PERB Decision No. 536.) After a review of the whole record, it cannot be found that the District engaged in surface bargaining during negotiations. Accordingly, that allegation is dismissed.

3. Bad Faith in Impasse

As previously stated, the duty to negotiate in good faith extends to conduct in impasse procedures. (*Moreno Valley, supra*, 142 Cal.App.3d 191, 198-199.) PERB defines impasse as that point where "the parties have considered each other's proposals and counterproposals, attempted to narrow the gap of disagreement and have, nonetheless, reached a point in their negotiations where continued discussion would be futile." (*Mt. San Antonio Community College District* (1981) PERB Order No. Ad-124, p. 11.) PERB has held that "a bona fide impasse exists only if the employer's conduct is free from unfair labor practices; its right to impose terms and conditions at impasse is therefore dependent on prior good-faith negotiations *from their inception through exhaustion of statutory or other applicable impasse resolution procedures*." (*City of San Jose, supra*, PERB Decision No. 2341-M, pp. 39-40 [emphasis in original], citation omitted.) The Board has further recognized that "[o]rdinarily the employer need not obtain the union's consent to implement a proposal if the proposal is lawful and the

parties have negotiated over it in good faith and reached impasse." (*LAUSD*, *supra*, PERB Decision No. 2326, p. 39.)

Since it has been previously discussed and concluded that the District's pre-impasse negotiations conduct was not in bad faith, and it is clear from the record that the impasse was genuine, given AFSCME's stated reluctance to agree to the health benefit cap language and other concessions, and lack of counter-proposals thereon, the only remaining question is whether the District's post-impasse conduct violated EERA.

The complaint alleges that the parties participated in impasse proceedings from August 21, 2012, through November 15, 2012, and that including, but not limited to, the following conduct by the District at paragraph 16, it violated the duty to participate in impasse procedures in good faith:

> During this period of time, Respondent made a proposal—while referencing a November 11, 2011, Arbitration Award finding that Respondent violated the CBA by reducing the work years of Food Service and Transportation employees without the consent of the Charging Party and employees—calling for, inter alia, reducing the work year, effective July 1, 2012, of several classifications of Food Service and Transportation employees as a condition of the Respondent restoring employees on the "long list" described in paragraph 4. The acceptance of the proposal has the effect of relinquishing the Arbitration Award's remedy that is favorable to Charging Party.

First, to the extent that the above paragraph alleges an unlawful condition placed upon bargaining through the proposal to restore hours and positions on the long list in exchange for agreement with the District's proposal to reduce Food Service and Transportation employees' hours, such a condition would be within the control of the negotiating parties, and therefore, bad faith is not inferred by it. (*County of Solano*, *supra*, PERB Decision No. 2402-M; *CSU*, *supra*, PERB Decision No. 1871-H.) There is also no indication that the proposal was made

with the intent to avoid an agreement, or that it would have effectively limited the range of possible compromises available. (*City of San Jose*, *supra*, PERB Decision No. 2341-M.) Importantly, although the impasse proposals indicated that long list employees would be restored to work, AFSCME was not being asked to agree to that provision itself; rather, that is what would be possible if the parties reached a global agreement on all other outstanding issues. Thus, this conduct is not evidence of bad faith, under either per se or totality theories.

Moreover, nothing the District's proposal to reduce hours requires AFSCME to relinquish the favorable portion of the arbitration award, despite its contrary view. The District repeatedly verbally explained during bargaining and acknowledged, in writing, that its proposal to maintain the affected employees' reduced hours, effective as of July 1, 2012, did nothing to disturb the potential back pay owed from the period of the violation found by Arbitrator Horowitz in 2010, until that effective date in 2012. Despite the fact that AFSCME was loath to agree to permanently reducing employees' work years and forego potential reinstatement of employees to their former full hours under the arbitrator's decision, nothing in the arbitration decision precluded the District from proposing at any time, even the day after it was issued, to reduce employees' work year and bargain with AFSCME either to agreement or through lawful impasse and implementation. This is what the District did during its successor negotiations with AFSCME here. Again, this is not an unlawful condition on bargaining because it remained within the control of the parties. AFSCME was either free to agree to the proposal or to lawfully maintain its adamant position and refuse it. So, too, was the District. (*Oakland*, *supra*, PERB Decision No. 275; *NLRB v. Herman Sausage Co.*, *supra*, 275 F.2d 229.)

I note that even before Section 5.3 was language was imposed, which eliminated the requirement of voluntary agreement of the employee to reduce work year, nothing in that previous language would have impaired the District's ability, under EERA's bargaining scheme, to implement a reduced work year, after lawful exhaustion of statutory impasse procedures. This is so, because the duty to bargain in good faith is owed from the employer exclusively to an exclusive representative and not to individual employees. (*Antelope Valley College Federation of Teachers (Stryker)* (2004) PERB Decision No. 1624; *State of California (Department of Corrections)* (1993) PERB Decision No. 972-S.) As stated by the Board: "[o]rdinarily the employer need not obtain the union's consent to implement a proposal if the proposal is lawful and the parties have negotiated over it in good faith and reached impasse." (*LAUSD*, *supra*, PERB Decision No. 2326, p. 39.) And an employer certainly never requires an employee's consent to do so.

Schnaufer testified and AFSCME argued in its brief that the list of Food Service and Transportation employees proposed to be reduced was "brand new," i.e., introduced for the first time, during impasse proceedings in September. This implies that this impasse proposal was regressive. I disagree. While the District's pre-impasse proposals did not specially list every Food Service and Transportation employee whose already-reduced hours were proposed to be maintained effective on July 1, the pre-impasse proposals, starting on July 18, repeatedly emphasized that the District was proposing to permanently maintain those reduced hours for all employees who were subject to the Horowitz award. AFSCME knew precisely who those employees were. Thus, the names of the employees, provided for clarity, in the District's post-impasse proposal was not new information. Furthermore, the proposal to reduce work year was not regressive in light of the fact that other proposals, since the commencement of

negotiations, had included reduced time for employees through proposed furlough days and other hours reductions. (*Ventura CCD, supra*, PERB Decision No. 1264, warning letter, p. 6.) In sum, the indicia of bad faith alleged in the complaint do not demonstrate unlawful conditions on the District's proposals, and therefore do not support finding that the District's participation in impasse procedures were not in good faith.

There are also no other traditional indicators of bad faith in the District's conduct during impasse proceedings. The record shows that the District considered the factfinding report in good faith and afterward made several concessions in its post-factfinding proposals to AFSCME in an attempt to reach agreement. Most significant was the abandonment of its proposal over Handel and Glover overtime. This shows a willingness to reach an agreement, rather than any attempt to rush to implementation. Accordingly, this allegation is dismissed.

Interference

The test for whether a respondent has interfered with the rights of employees under the EERA does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. In *State of California (Department of Developmental Services)* (1983) PERB Decision No. 344-S, p. 12, citing *Carlsbad Unified School District* (1979) PERB Decision No. 89 and *Service Employees International Union, Local 99 (Kimmett)* (1979) PERB Decision No. 106, the Board described the standard as follows:

> [I]n order to establish a prima facie case of unlawful interference, the charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under EERA.

In *Clovis Unified School District* (1984) PERB Decision No. 389, the Board held that a finding of coercion does not require evidence that the employee actually felt threatened or

intimidated or was in fact discouraged from participating in protected activity. Employers are not precluded from freely expressing their views, but are precluded from using direct communications with employees to undermine the representative's exclusive authority to represent unit members; the touchstone for determining propriety of direct communications is effect on authority of the exclusive representative. (*Muroc Unified School District* (1978) PERB Decision No. 80; see also *Trustees of the California State University*, *supra*, PERB Decision No. 1871-H.)

The complaint alleged interference with employees' rights by Superintendent Novak reneging on a promise made to employees to restore their hours if AFSCME would agree to the District's proposal regarding health benefit plan changes. The evidence at hearing did not support any portion of this allegation. First, Rodarte testified that Superintendent Novak said only that things would get better if the District and AFSCME reached an agreement. This was not a promise to do anything, and certainly no assurance to restore hours. Rodarte further admitted that the employees, in their own minds, wondered if agreement over health benefits language would be sufficient to restore hours, and consistent with what the District was stating to AFSCME at the bargaining table, Superintendent Novak informed them that that agreement alone would not be sufficient to do so. In short, there was no promise, no reneging on any promise, no derogation of AFSCME's authority, and thus, not even slight harm to any employee rights. This allegation is therefore dismissed.

PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, the complaint and underlying unfair practice charge in Case No. LA-CE-5741-E,

American Federation of State, County, and Municipal Employees, Local 3112 v. Anaheim Union High School District, are hereby DISMISSED.

Right to Appeal

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
E-FILE: PERBe-file.Appeals@perb.ca.gov

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) and 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 or received by electronic mail before the close of business, which meets the requirements of PERB 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. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a

party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)