

Christopher D. Burdick
Arbitrator-Mediator

IN FACTFINDING PROCEEDINGS UNDER
CALIFORNIA GOVERNMENT CODE SECTION 3505.4 (a)

In the Matter of a Dispute)
)
)
between)
)
)
)
CITY OF CHICO)
)
and)
)
STATIONARY ENGINEERS, LOCAL 39)
_____)

**REPORT AND
RECOMMENDATIONS OF
FACTFINDING PANEL**

PERB NO. SA-IM-3205-M

Factfinding Panel

CHRISTOPHER D. BURDICK, Esq., Impartial Chair
ALICIA ROCK, Assistant City Attorney, City-Appointed Factfinder
STEVE CROUCH, District Representative, Union-Appointed Factfinder

Hearing

July 16, 2012

Appearances

For the City: Teresa Campbell ,
Human Resources Director,
City of Chico
PO Box 3420
Chico, CA 95927

For the Union: Robert Belgeri, Business Agent
 Stationary Engineers, Local 39
 118 Belle Mill Landing
 Red Bluff, CA, 96080

INTRODUCTION

This fact-finding arises out of an impasse in negotiations between Stationary Engineers, Local 39 ("Local 39" or "Union") and the City of Chico ("City") dealing with the Union's Wastewater Plant Employees bargaining unit, a newly-created bargaining unit consisting of 11 budgeted positions in the City's Wastewater Treatment Plant ("Plant"). After a lengthy course of bargaining to create the first stand-alone Memorandum of Understanding ("MOU": Cal. Gov. Code section 3505.1) between the parties, they reached impasse in January of 2012, engaged in unsuccessful mediation, and, pursuant to the Union's demand, submitted the dispute to this fact-finding, held in the City on July 16, 2012.

Christopher D. Burdick was appointed by the Public Employee Relations Board ("PERB") to serve as Impartial Chair of the Factfinding Panel. Alicia Rock, Assistant City Attorney, was appointed to the Panel by the City, while the Union appointed its District Representative, Steve Crouch. The hearing was held on Monday, July 16, 2012, at City Hall in Chico.

Teresa Campbell, the City's (now retired) Human Resource ("HR") Director appeared for the City. Robert Belgeri, Business Agent, appeared for the Union. The time limits and deadlines set forth in Cal. Govt. Code Sections 3504 and 3505 were waived by the parties, the Panel and the Chair. The parties were afforded full opportunity to make opening statements and, in lieu of presenting witnesses in a formal, adversarial setting, to make their showings and arguments on each of the three issues in dispute. At the conclusion of the hearing, the Panel met in executive session for several hours and discussed the issues and procedural matters dealing with the drafting of this Report. On July 29, the Chair sent by E-mail his first draft Report to his co-panelists, and, over the next 10 days, received their responses and proposed revisions, modifications, deletions, and redrafts. On August 11, the Chair provided his co-panelists with his second revised Report and solicited final comments thereon. Those comments were received on

August _____, and on the date set forth below the Chair issued his final Report, with the concurrences and dissents of his co-panelists, as noted in the body of the Report.

I

CITY AND PLANT AND UNIT DESCRIPTION

The City, founded in 1860 and incorporated in 1872, is a charter city, operating under the council-manager form of government. The City, located in Butte County, is spread over 33 square miles and has a population of approximately 87,5000. Local 39 is the recognized employee organization for eleven (11) of the City's Wastewater Treatment Plant employees (to wit, six Operators I-III, one Electrical Technician, two Industrial Waste Inspectors, and two Lab Technicians (a Senior and a Tech)), in a brand-new bargaining unit carved out of the City's previously existing Service Employees International Union-TC ("SEIU-TC") unit, a bargaining unit theretofore consisting of approximately forty (40) different job classes. Local 39 was recognized as the appropriate bargaining representative for this new group only in July of 2012, although it had commenced bargaining with the City for its first MOU on behalf of the 11 employees therein in late 2011.

The City employs approximately four-hundred (400) full-time employees, in a myriad of job classifications and has the usual other bargaining units, of police officers, firefighters, clerical employees and the like, as well as a number of unrepresented job classes, including managers. The 11 employees in question work the day-shift only, but some recent, mutually-agreed-upon arrangements have been made for on-call status for those employees willing to do so, to arrange more consistent coverage of the Plant during non-working hours.

The Water Treatment Plant derives its revenues, and makes its expenditures, not out of the City's General Fund but out of the so-called "850 Enterprise Fund" account. The plant collects, treats, and releases all of the sewage from the City's residential and business owners' homes and businesses. There are a few, unincorporated islands within the City limits where the homeowners are on their own septic tanks and resist incorporation into the City for any number of reasons, one of which is resistance to paying sewage treatment rates. The 850 Fund consists of sewage treatment rates, collected by a private-sector water company which provides water to

City residents and businesses, as well as funds from bonds and, perhaps, state and federal grants and programs, where applicable. Out of the 850 Fund, the City pays the wages, benefits, and pension contributions to the California Public Employees Retirement System ("CalPERS") of the 11 employees in question, as well as a handful of supervisors and managers of the Plant. Ostensibly, of course, the City could raise, without going to the voters or users (and it has -- see *infra*), the rates paid by its residential and business users, or either or both, thereby generating more revenue into the Fund, a luxury not enjoyed by the General Fund which is subject to the strict constraints of Proposition 13.

The work performed by the employees in this bargaining unit is highly technical and tightly-regulated, and the consequences of error are severe. Any release of untreated or under-treated water into rivers, lakes, and streams can result in massive fines and penalties. The Operators I-III are licensed by the State and must undergo constant in-service training. The Lab Technicians are certified, but not licensed, but there are a number of higher levels of certification and licenses available to these job classes through independent (usually online) study or classes at community colleges.

For Fiscal Year 2012-'13, the City's bargaining team was firmly instructed by the elected 7-member Council to achieve "cost neutral" MOUs, labor agreements reflecting no increase in labor costs, City-wide, from all bargaining units as well as from unrepresented managers, professionals and supervisors, including workers paid out of Enterprise Funds. This instruction, regardless of its merits or the depth of thinking behind it, is a "fact" which the Panel must recognize. Things had apparently been even worse in FY 2010-'11, when the City sought, and received, a 5% reduction in labor costs in every bargaining unit, including the SEIU-TC unit which, at the time, included these 11 employees. Rather than taking an across-the board pay cut, or a reduction in total compensation, SEIU elected to lay off and abolish three positions, only two of which were filled. It is the City's firm contention that these 11 employees have not suffered **anything** in the last half-decade as they have watched their peers take pay cuts and reductions in compensation, and that every time the City bargaining team approaches Council with a Local 39 proposal to improve its members' financial lot in life, a unanimous Council

reminds the City's negotiators that these employees have not, in Council's opinion, shouldered their fair share of the City's financial burden.¹

II ISSUES

At the conclusion of mediation, three (3) issues, all Union proposals, remained unresolved and were submitted to this tripartite Factfinding Panel for hearing and recommendation, as follows:

- 1) Certificate Pay;
- 2) Increased paid time off (in lieu of a pay raise);
- 3) Elimination of any reference in MOU language that four technical classifications in the unit are now subject to the FLSA's "professional" overtime exemption.

III STATUTORY CRITERIA

The Meyers-Milias-Brown Act ("MMBA"; Cal. Gov. Code sections 3500 *et seq.*; eff. January 1, 1969) was amended in 2011 to add a new step to the impasse resolution procedure, namely Section 3505.4 (a), which allows the recognized employee organization (but not the employer) to insist upon mandatory fact-finding after the unsuccessful conclusion of mediation.²

Section 3504.4 (a).

If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the employee organization may request that the parties' differences be submitted to a factfinding panel. Within five days after

¹ As noted in the Union's comments, *infra*, the Union believes that the City's IAFF Firefighters were in the middle of a 7-year M OU when all of this economic turmoil took place and was in the enviable position of being able to tell the City (as it apparently did) that its members declined to participate in any economic give-backs or "suffering". So, the Union argues, the 11 employees here in question are not the only ones who escaped personally unscathed from the City's attempts to spread the pain. This may well be true but the Chair does not regard it as a very persuasive.

² This amendment is less than a masterpiece of legal drafting and leaves ambiguous the status of mediation, which prior to this amendment was entirely permissive and available only at the parties' mutual, arm's-length agreement to submit their dispute to mediation. Under the new amendment, if mediation (which still appears to be permissive and not mandatory) is resorted to, and proves unsuccessful, then the recognized employee organization (but not the city, county, or district, as the case may be) can insist upon fact finding.

receipt of the written request, each party shall select a person to serve as its member of the factfinding panel. The Public Employment Relations Board shall, within five days after the selection of panel members by the parties, select a chairperson of the factfinding panel.

(b) Within five days after the board selects a chairperson of the factfinding panel, the parties may mutually agree upon a person to serve as chairperson in lieu of the person selected by the board.

(c) The panel shall, within 10 days after its appointment, meet with the parties or their representatives, either jointly or separately, and may make inquiries and investigations, hold hearings, and take any other steps it deems appropriate. For the purpose of the hearings, investigations, and inquiries, the panel shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence. Any state agency, as defined in Section 11000, the California State University, or any political subdivision of the state, including any board of education, shall furnish the panel, upon its request, with all records, papers, and information in their possession relating to any matter under investigation by or in issue before the panel.

(d) In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following criteria:

- (1) State and federal laws that are applicable to the employer.
- (2) Local rules, regulations, or ordinances.
- (3) Stipulations of the parties.
- (4) The interests and welfare of the public and the financial ability of the public agency.
- (5) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies.
- (6) The consumer price index for goods and services, commonly known as the cost of living.
- (7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
- (8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.

...

Section 3505.5 (a).

If the dispute is not settled within 30 days after the appointment of the factfinding panel, or, upon agreement by both parties within a longer period, the panel shall make findings of fact and recommend terms of settlement, which shall be advisory only. The factfinders shall submit, in writing, any findings of fact and recommended terms of settlement to the parties before they are made available to the public. The public agency shall make these findings and recommendations publicly available within 10 days after their receipt.

(b) The costs for the services of the panel chairperson selected by the board, including per diem fees, if any, and actual and necessary travel and subsistence expenses, shall be equally divided between the parties.

(c) The costs for the services of the panel chairperson agreed upon by the parties shall be equally divided between the parties, and shall include per diem fees, if any, and actual and necessary travel and subsistence expenses. The per diem fees shall not exceed the per diem fees stated on the chairperson's résumé on file with the board. The chairperson's bill showing the amount payable by the parties shall accompany his or her final report to the parties and the board. The chairperson may submit interim bills to the parties in the course of the proceedings, and copies of the interim bills shall also be sent to the board. The parties shall make payment directly to the chairperson.

(d) Any other mutually incurred costs shall be borne equally by the public agency and the employee organization. Any separately incurred costs for the panel member selected by each party shall be borne by that party.

IV

DOCUMENTS AND MATERIALS

The parties provided the Panel with many relevant documents and materials, including the current SEIU-TC unit Memorandum of Understanding ("MOU"; Cal. Gov. Code Section 3505.1), the job descriptions for each of the classes of the bargaining unit, a packet of materials dealing with Sanitary Sewer Monthly Rates and the so-called 850 Sewer Fund, and a 20-page "Negotiations Proposal Summary/Matrix" prepared by the City's Human Resources and Risk Management Office which shows the proposals of the Union and the City on a number of issues, including the three here in dispute, as of January 25, 2012, when the parties agreed they were at impasse.

THE CITY'S FINANCIAL STATE AND ITS "ABILITY TO PAY"

This dispute deals with Union proposals to alter, and City demands to maintain, some facets of the existing financial *status quo*, and because the City asserts, albeit not too strenuously, financial distress, we review the City's financial state (including that of the 850 Enterprise Fund) as of the date of the hearing. To the extent that the City asserts a partial "inability to pay" the demands of the Union, under Sec. 3505.4(d) (4), the Panel is required to consider "the interests and welfare of the public and the financial ability of the public agency."

What makes the task unique to this bargaining unit is the fact that its members are paid not out of the City's General Fund but out of the so-called "850 Enterprise Fund", one of several funds which the City maintains and whose dollars flow from, in this case, "rates" paid by the users of the Plant's treatment services.

In April of 2011, believing that there would be a substantial increase in commercial use of the sewers and a modest increase in residential construction, City staff recommended to the Council, and Council agreed, to a not insubstantial increase in sewer rates, an increase intended, at least in part, to fund 4 new positions at the Plant, 1 position to handle increased flows and 3 to handle "regulatory needs". But, as it turned out, the new commercial construction (primarily a nitrate plan) failed to materialize, and the collapse of the housing market did not leave Chico unscathed. So, the increase in use, and the need for additional staff, never occurred, but the rates nevertheless went up. Thus, the 850 Fund has sitting, in one reserve or another, what the Union considers to be a lot of loose, available money which could be used to increase the compensation of its members. The City, conversely, says that the increased revenue is not merely sitting unused, in some bank account somewhere, but is being used to pay down the Plant's revolving fund bonded indebtedness, while everyone waits for a rebound in the economy, to add the promised staff.

This City points to its present financial state, overall and in the 850 Fund, not to justify a claim that it cannot afford the relatively *de minimis* demands of the Unit. After all, we are talking about only 11 of the City's 400 employees whose demands are, in the overall scheme of things, relatively modest. But the same is true of any relatively small bargaining unit able to claim that benefiting its small membership will not deplete the municipal fisc nor, in fact,

actually cause much of a monetary impact at all. It is the "ripple effect", the impact upon the expectation of the City's other 390 employees who will look at the Plant's workers and (not unreasonably) ask "why not me as, well?" which concerns the Council.

VI

POSITION AND ARGUMENTS OF THE PARTIES

The positions of the parties, and their arguments and rationales on the disputed issues, are as follows:

Union – The Union observes that its new members have gone for some years with no true across-the-board pay increases but have only received *de minimis* 1% cost-of-living-adjustments ("COLA's"), and that the proposals the Union has on the table before the Panel are, basically, creative alternative approaches to salary increases which are uniquely applicable to its members and will not distort the City Council's insistence upon (mostly symbolic) wage freezes.

City – the City believes that the 11 employees in this small, unique bargaining unit have essentially escaped all of the City's screw-tightening and budgetary cuts over the last several years and that it is time now for these employees to "share the pain" which the economy has inflicted upon everyone else. The City argues that designation of job classifications for exemption under FLSA is a pure management prerogative and not one upon which it is obligated to bargain, but even though these employees infrequently work any overtime, nevertheless the City has offered 40 hours of new paid leave in lieu of overtime pay to compensate these few workers. In regards to paid leaves, the City has had a historical, uninterrupted history of accruing leaves on exactly the same bi-weekly accrual basis for all of its employees (excepting firefighters, who work a different 56-hour workweek and are subject to different formulas), and worries that granting additional paid leave accruals to this small group will immediately subject the City to demands for the same beneficial increases by other employees similarly situated. In regards to certificate pay, the City believes it has a proposal on the table which meets the Union's needs and falls within Council mandates and the City's "ability to pay".

VII

THE CHAIR'S STATUTORY DISCUSSION AND ANALYSIS

Generally speaking, and in less woeful budgetary times than we are presently experiencing, collective bargaining in the public sector is primarily driven by three factors: 1) external comparability (that is, what other public employers are paying their employees similarly situated, what attractive CalPERS or 1937 Act pension options have been contracted for, etc., etc., usually on a total compensation basis); 2) internal comparability and equity (that is, what this particular public employer is providing to its other employees during the relevant round of bargaining); and 3) any increases in the CPI. In the last three or four years, as public entities have been battered by the economy, "ability to pay" and the "welfare and interest of the public" (including un- and underfunded pension and retiree health care obligations) have become increasingly more relevant criteria.

Here, the Union made only the most perfunctory showing of external comparability, relying almost exclusively upon what a handful of other public employers is paying Local 39 members. We have no way of knowing whether those jurisdictions are actually comparable under the usual criteria (size, tax base, revenues, indebtedness, the number of employees overall and in the relevant bargaining unit, etc., etc.). The City put on no showing of external comparability whatsoever but, instead, relied upon internal equity and its un rebutted showing that, over the last several years, other than a few cost-of-living increases under existing MOUs, practically every City employee³ has taken a substantial whack, except the 11 employees in this bargaining unit. Over the relevant time, the CPI has increased a little less than 2% per annum, and so practically every City employee has watched their real income decline. There is no dispute that City's approach is driven almost entirely upon the direction of the Council that all new MOUs be "cost neutral".

The Union characterizes the Council's direction (and the City bargaining team's resulting proposals) as merely "symbolic" and political and argues that none of the relevant criteria under the MMBA provide for any deference to, or reliance upon, such motivations. The Union notes that the relevant MMBA provisions guiding the Panel here make no **explicit** reference whatsoever to **internal** comparisons or equity and that the catch-all phrase in subparagraph (8)

³ With the possible exception of the Firefighters -- see Fn. 1, *supra*.

does not refer to "**criteria**" or "**factors**", but, instead, looks solely to "... [a]ny other **facts**, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations." So, the Union argues, what the City has recently paid (or, more accurately not paid) to its other employees is not legally relevant in fact-finding for this small group.

We can look to other comparable systems for some guidance here. For example, in the public school K-12 setting, Government Code Section 3548.2 (b) mandates that the fact-finding panels resolving disputes under that consider and apply the following criteria in making findings and recommendations:

- (1) State and federal laws that are applicable to the employer.
- (2) Stipulations of the parties.
- (3) **The interest and welfare of the public and the financial ability of the public school employer.**
- (4) **Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services and with other employees generally in public school employment in comparable communities.**
- (5) The consumer price index for goods and services, commonly known as the cost of living.
- (6) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits; the continuity and stability of employment; and other benefits received.
- (7) Any other **facts** not confined to those specified in paragraph (1) to (6), inclusive, which are **normally or traditionally taken into consideration** in making the findings and recommendations.

Emphasis added.

The Charter of the City and County of San Francisco provides for a final-and-binding interest arbitration procedure for all of the City's employees, and Charter Section A8.409 requires arbitration boards there to decide issues in dispute by

selecting whichever last offer of settlement on that issue it finds by a preponderance of the evidence submitted during the arbitration most nearly conforms to **those factors traditionally taken into consideration in the determination of wages, hours, benefits and terms and conditions of public and private employment, including, but not limited to: changes in the average consumer price index for goods and services; the wages, hours, benefits and terms of conditions of employment of**

employees performing similar services; **the wages, hours, benefits and terms and conditions of employment of the employees in the city and county of San Francisco**; health and safety of employees; **the financial resources of the city and county of San Francisco**, including a joint report to be issued annually on the City's financial condition for the next three fiscal years from the Controller, the Mayor's budget analyst and the budget analyst for the board of supervisors; other demands on the city and county's resources including limitations on the amount and use of revenues and expenditures; revenue projections; the power to levy taxes and raise revenues by enhancements or other means; budgetary reserves; **and the City's ability to meet the costs of the decision** of the arbitration board.

Emphasis added.

The Charter of the City of Oakland contains a final-and-binding arbitration system for its police and firefighters and requires the arbitration to consider the following criteria:

Section 910. Arbitration for Uniformed Members of the
Police and Fire Departments.

...

(b) In any such arbitration, the arbitrator is directed to take into consideration the City's purpose and policy to create and maintain wages, hours and other terms and conditions of employment which are fair and comparable to similar private and public employment and which are responsive to changing conditions and changing costs and standards of living. The arbitrator shall also consider: the interest and welfare of the public; the availability and sources of funds to defray the cost of any changes in wages; hours and conditions of employment; and all existing benefits and provisions relating to wages, hours and terms and conditions of employment of the uniformed members of the Police and Fire Departments, whether contained in this Charter or elsewhere.

The Charter of the City of San Jose, in Section 1111, establishes a system of compulsory arbitration for its police officers and firefighters and requires the arbitrator to consider the following criteria:

The Arbitration Board shall decide each issue by majority vote by selecting whichever last offer of settlement on that issue it finds most nearly conforms with **those factors traditionally taken into consideration** in the determination of wages, hours, and other terms and conditions of public and private employment, including, but not limited to, changes in the average consumer price index for goods and services, the

wages, hours, and other terms and conditions of employment of other employees performing similar services, and **the financial condition of the City and its ability to meet the cost of the award.**

Emphasis added.

There is not much consistency in these various legislative, statutory enactments, but it appears to the Chair that the Legislature and the local entities have used the words "facts", "factors", and "criteria" interchangeably, in a broad sense, directing arbitrators and fact-finding panels to look to the usual compelling labor and employment "facts of life" which drive all employers and employees to make decisions on how to run their lives and operations. Employers compare themselves with their competitors for labor, namely those other employers (public or private) of approximately the same wealth and size, offering the same kinds of services, who wish to hire (and then retain) from the same pool of applicants. Employees, on the other hand, invariably look to their own self-interest, hoping to convince their employers that the competitive labor market is paying a higher price than what is being paid to them, while also reacting (like every other covetous human being) to what their co-workers are being paid by the same employer, regardless of the nature of their work. We do not believe that the State legislature meant to prohibit MMBA factfinders from looking to internal comparisons and internal equity – what other employees are paid by the same public employer is often the single biggest source of irritation (or contentment) for individual employees.

Not to put too fine a point on it, the Union's position simply is that, after three or four years of getting nothing other than minimal COLAs and, perhaps, a few personal salary-step increases, these 11 people (like all the rest of us) want an increase in their total compensation, notwithstanding what has happened to everybody else⁴ in the City. The Union, to its credit, has been quite creative in coming up with novel ways to accomplish that end for its new members. The City's underlying belief is that it is time for these people to finally "bear some of the pain" that everyone else has borne over the last few years.

In regards to the Union's position that the Council directive is "symbolic" and mostly political, that may well be true. But much of collective bargaining (especially that which occurs behind-the-scenes, not at the table, and one-on-one with elected public officials) in the public sector is largely political and hugely symbolic. And the California Supreme Court has recognized

⁴ With the possible exception of the Firefighters: see Fn. 1, *supra*.

that a public employer's philosophical belief in, and its bargaining table insistence upon, a consistency in the application of its fringe benefits and related compensation is not, standing alone, a *per se* violation of its duty to "bargain in good faith": Banning Teachers Association, CTA/NEA vs. PERB (1988) 44 Cal 3rd 799.

Thus, the Council's directive and the City's concerns over the ripple effect on its other employees of improving paid leaves and changing the manner in which it compensates for certificates just for this small group are both "facts" which the Panel must consider. The weight to which these "facts" are entitled is discussed, *infra*. The amendment we are governed by here says nothing about pain or sacrifice, individual or communal. Nor is it probably appropriate for a fact-finding panel such as this to encourage the infliction of the pain and suffering upon any group of employees. But there is a difference between the mere infliction of pain and the not unreasonable desire that all of one's employees share equal burdens and do their part in helping the enterprise deal with economic crises.

VIII

APPLICATION OF STATUTORY CRITERIA TO THE ISSUES

A) The FLSA Dispute -- although the United States Supreme Court decision in Garcia vs. San Antonio Metropolitan Transit Authority, 49 US 528 (1985), was rendered in 1985, it was not until the last several years that the City decided to perform a complete and thorough survey of its workforce to determine which job classes, if any, qualified for one of the three "white-collar" exemptions from the overtime requirements of the Fair Labor Standards Act, ("FLSA"; 29 U.S.C. 201 *et seq.*) --that is, executive, administrative, and professional. The task was assigned to the City Attorney, which, as a result of the survey, recommended, and the Council agreed, to designate the Laboratory Technician classifications as "FLSA exempt", as "professionals". Theretofore, these job classes had not been considered so exempt and had always received overtime pay, at the time-and one-half (1.5) rate for all hours worked in excess of 40 hours a week.

The City takes the position that designation of job classifications for exemption under FLSA is a pure management prerogative and not one upon which it is obligated to give notice to, or bargain with, any union or association. The Union does not necessarily dispute this contention

but argues, alternatively, that the City is obligated to bargain upon the "impact" of such a designation upon the effected employees.⁵ It appears that these employees very infrequently work any overtime at all, and when they do it is only several hours a week, but nevertheless the City has offered 40 hours of new paid leave in lieu of overtime pay to compensate these few workers.

Here, the Union proposal in fact-finding is simply to decline the new, additional leave, and to delete any reference whatsoever in the new MOU to the designation of any job classes under the FLSA, apparently leaving the dispute about the underlying merits of the designation to other venues (i.e., the Wage and Hour Division of the United States Department of Labor, the California Public Employee Relations Board, arbitration, etc., etc.). The City, recognizing the possible loss of overtime pay, has proposed to give employees newly designated as "exempt" a grant of forty (40) hours of "Administrative Leave per calendar year", in lieu of pay for overtime hours actually worked. Although in practice the City proposal may actually benefit the few employees in question, the Union objects to the underlying concept and philosophy and does not wish to be seen as waiving any remedies or rights these employees may have in other venues.

This Panel is in no position to determine whether the City's designation of these Technicians as exempt "professionals" is correct or not. But we do know that these employees have always received overtime pay for their infrequent, modest overtime work, and the Chair sees no reason to recommend a change in this long-established past practice. There is nothing in the FLSA nor in state law which prohibits an employer from agreeing to pay its exempt employees overtime at a mutually-agreed-upon rate, and the Chair recommends that the existing past practice be continued, by adding language to the MOU which recites that while the City has made this contested designation, nevertheless the Union objects to it, but in the interim the parties agree that the employees will continue to be paid for any overtime actually worked.

B) Certificate Pay -- Under the '09-'10 SEIU MOU for the TC unit, in Article 5.7 the City had agreed to pay certain additional sums "... [i]n recognition of the additional education, training, and experience that is demonstrated through certification of employees and which is of particular value to City..." These included additional certificate pay for Equipment

⁵ For a thorough, concise discussion of the arcane niceties of the FLSA see, generally, Williams and Brehl, "Pocket Guide to the Fair Labor Standards Act" (2nd Ed., May, 2009), CPER Easy Reference Series.

Management Mechanics, Fire Equipment Mechanics, Airport Specialist Mechanics, Metasys Operators, Traffic Signal Maintenance workers, Basic Airport Safety and Operations Specialists, etc.⁶ Some of this certificate pay was calculated and paid at 2.5% over and above base salary but others (mostly the newer, more recently agreed-to) differentials are paid at \$25 per month. All certificate pay is, apparently, considered "compensation earnable" for CalPERS purposes.

As discussed briefly above, there are a number of certificates and licenses which are available to, but not required of, the Operators I-III, as well as to the Technicians. These include certificates in such fields as laboratory analysis, electrical instrumentation, Biosolid Land Application Management, environmental compliance inspection, and the like. The Union wishes to add a number of new certificates, all paid at a percentage over and above base salary, rather than at a flat, monthly rate, a method of calculation strenuously resisted by the City. The Employer established that, to the extent it has expanded its certificate pay for other employees in recent years, it has only done so at the flat \$25 per month rate and is unwilling to make an exception for the Union here. Obviously, the workers would prefer a percentage over a flat, set monthly amount, as the amount payable for each certificate would increase automatically every time the employee received an increase in her base salary. The City, conversely, wishes to avoid that very scenario.

There is also the issue of a "cap" upon the number of certificates for which the employee can be paid. It is feasible and entirely possible for an employee who exerts herself to obtain three, four, five, or more certificates or licenses in her field. The City proposes to pay for a maximum of four (4) certificates or licenses at \$25 per month for each. The Union proposes a cap of two (2) certificates or licenses at 2.5% each, to a maximum of 5%. We assume that going with a flat, monthly rate rather than a percentage of base salary results in an overall, lower total cost to the Employer.

The Chair is persuaded that the City's recent, uniform practice of limiting new certificate pay to flat monthly amounts is, given the financial uncertainties of the economic times in which we live, a more desirable approach, one which expands the number of certificates but limits the

⁶ The practice of paying additional compensation for certificates and licenses has sometimes been used as an attempt to mask pay increases for large groups of employees who ordinarily possess such certificates, such as the certificates issued by the State Commission on Peace Officer Standards and Training (POST) and Paramedic and EMT certificates widely possessed by firefighters. To provide additional, across-the-board compensation for the possession of these licenses and certificates often compensates most of the workers in the relevant bargaining units, while precluding other employees from arguing that they are entitled to similar compensation.

taxpayers' exposure while providing some incentive for employees to go out and do the necessary off-duty study to obtain these new certificates.

C Increased Paid Time Off— Commencing in Fiscal Year 2009, and in lieu of a wage increase that year, every City employee was granted forty (40) hours of "Personal Time off (PTO)", on a " use-it-or-lose-it" annual basis. This PTO leave is simply time off, and is not convertible to money, even if, at the end of the year, an employee still has "time on the books" and has been unable (or unwilling) to use it. See SEIU-TC MOU, Ex. D.

The Union's proposal at the table and during the fact-finding hearing was to "swap" this 40 hours of PTO time in exchange for an additional two (2) hours of vacation accrual for each 26-biweekly pay period, which would result in an additional fifty-two (52) hours of vacation leave every year, an increase in twelve (12) hours of paid leave. Under California law, vacation leave is, under many circumstances, not only leave but also real money, particularly at the time of separation/retirement, when the employer is obligated to pay off the departing worker, at the rate of pay at the time of termination/retirement, for all vacation leave on the books.

The City proposes maintaining the *status quo*, arguing that the public employees in general, and Chico employees in particular, get abundant paid time off, especially in comparison to their private sector peers. Chico employees get 12 paid holidays every year (86 hours), plus one additional 8-hour "floater"; accrue 12 days (96 hours) of paid sick leave every year; and get the above-mentioned 40 hours of PTO. In regards to vacation, employees accrue 80 hours of vacation after six months of employment and after 205 months (that is, about 17 years of service) accrue 200 hours per year, or about five weeks, of vacation. Thus, an employee with 18 or more years of service is entitled to take off, every year and with full pay, up to 344 hours (8.6 weeks, more or less) of paid leave, assuming they never get ill or injured. This is, under most American (but not social-democratic European) standards, a lot of paid leave every year. Nevertheless, the Union wants 12 more hours on top of this, 12 hours which no other City employee gets. The Union put on no evidence whatsoever in support of its position, and so we have no idea what comparable public agencies elsewhere provide to all water treatment plant workers. The City relied upon its own internal comparability data.

After the hearing, and as part of the process of drafting the Report, the Union modified its proposal, dropping its proposal to add additional accrual hours while continuing to propose that the additional 40 hours of PTO be treated as traditional vacation leave, so that time not used during the year of accrual could be rolled over to future years and cashed out upon separation or retirement. The Chair can find no justification for increasing the amount of vacation accrual by an additional 12 hours per year, based upon either external or internal comparability. Adding 12 more hours of paid leave to already substantial leave accrual rates and banks merely increases the City's unfunded liability for the ultimate cost, upon termination, of those accruals and banks - increasing the unfunded liabilities of municipalities these days is not a very good (nor popular) idea. ⁷

VIII RECOMMENDATIONS

Based upon the general factual background set forth above, the Chair believes that the parties should agree to a new MOU including the following terms and conditions:

- 1) No increase in the vacation accrual formula in exchange for any "swap" of Personal Time Off;
- 2) Effective December 13, 2011 employees in the bargaining unit who possess the following certifications shall be eligible to receive \$25 per month, per certification, but not to exceed four (4) certifications at any one time: Wastewater Treatment Plant Maintenance, Electrical/Instrumental, Mechanical Technologist (Grades 2-4), Laboratory Analysis (Grades 2-4), Environmental Compliance Inspection (Grades 2-4), Industrial Treatment Plant Operators (Grades 2-3: CWEA) and Wastewater Treatment Plant Operators (Grades 4-5; SWRCB);

⁷ There is a cap on the amount of vacation leave which any employee can accrue: see Ex. "D" to the SEIU-TC MOU. For an employee with 17 or more years of City service that is 500 hours (approximately 6.5 weeks). But the vacation bank is perpetually renewable and when an employee falls below the cap she may refill the account up to the total limit, thus somewhat minimizing the unfunded actuarial liability. But if every year most retirees leave with the maximum, and the City has not funded this benefit but rather treated it on a "pay-as-you-go basis", then the unfunded liability can be not insubstantial.

- 3) Effective upon ratification by the Council and the Union, the MOU shall provide, in section 5.2 thereof, that employees in the class of Laboratory Technician and Senior Laboratory Technician shall be eligible for overtime pay.

DATED: August 15, 2012

Christopher D. Burdick, Esq.,
S.B.N. 042732
Impartial Chair

CITY PANELIST COMMENTS

I agree/disagree with the Chair's findings and recommendations as set forth below. The City agrees with most of the Chair's recommendations. However, I dissent in regards to both the discussion and the recommendation on the FLSA dispute, involving four (4) job classifications: Laboratory Technician, Senior Laboratory Technician, Industrial Waste Inspector, and Senior Industrial Waste Inspector. The City sees no reason to change its FLSA exempt classification designations nor is it willing to change its practice of only paying overtime to non-exempt employees. Essentially, the City believes that the FLSA issue will be worked out in one external forum or another, at the end of some future day. Indeed, the City had thought, prior to this hearing, that the Union's chief negotiator, Mr. Belgeri, had agreed to that concept as well and it was the understanding of the City that the FLSA issue would not be addressed by the panel or in the MOU at all. Therefore, in relation to the Recommendations, the City would suggest that the FLSA issue be punted (so to speak) and proposes Recommendations as follows:

- 1) No increase in the vacation accrual formula in exchange for any "swap" of Personal Time Off; and,
- 2) Effective December 13, 2011 employees in the bargaining unit who possess the following certifications shall be eligible to receive \$25 per month, per certification, but not to exceed four (4) certifications at any one time: Wastewater Treatment Plant Maintenance, Electrical/Instrumental, Mechanical Technologist (Grades 2-4), Laboratory Analysis (Grades 2-4), Environmental Compliance Inspection (Grades 2-4), Industrial Treatment Plant Operators (Grades 2-3: CWEA) and Wastewater Treatment Plant Operators (Grades 4-5; SWRCB).

DATED: August , 2012

Alicia Rock, Esq., City-Appointed Factfinder

UNION PANELIST COMMENTS

I agree/disagree, in some regards, with all of the Chair's findings and recommendations and so I dissent from the majority thereof, for the reasons set forth below:

The City's position that these workers have not "shared in the pain" and escaped the budgetary cuts is simply incorrect. Their former Union, in fact, when given the choice on which option of sacrifice to choose, chose layoffs instead of wage reductions. So, to achieve a comparable savings, the City eliminated three positions in their bargaining unit, leaving the remaining workers with an increased workload, and so they do indeed "share in the pain" like everyone else in the workplace. Now these 11 workers are being punished/resented for an option their old Union selected, an option offered by the employer. And not every City worker has "suffered": it is Local 39's understanding that the IAFF Firefighters had a 7-year MOU in place and refused to reopen it to make a 5% concession, or, indeed, a give-back or concession of any type.

In regards to ability to pay, there can be no dispute but that there is a ready ability to pay as witnessed by the reserves accumulated in the unencumbered 850 Enterprise Fund as a result of the sewer rate increase and salary savings resulting citywide and at the Plant from the new vacant positions.

As a compromise, the Union is willing to drop its request for an additional 12 hours PTO, but still believes that abolishing the restriction on the rollover or possible cash out of PTO is warranted. Conversion of the 40 hours of PTO to a vacation-type, unrestricted accrual is a viable option in lieu of a pay increase or increase in certificate pay, and the City offered little, if any, reason why it could not accomplish this. Vacation time is, after all, just "soft dollars". Therefore, the Union proposes Recommendations as follows:

- 1) That the employees in the classifications of Laboratory Technician and Senior Laboratory Technician remain eligible for overtime pay;
- 2) Effective December 13, 2011 employees in the bargaining unit who possess the following certifications shall be eligible to receive 2 ½% per month, per certification with a cap of two certificates: Wastewater Treatment Plant Maintenance, Electrical/Instrumental, Mechanical Technologist (Grades 2-4), Laboratory Analysis (Grades 2-4),

Environmental Compliance Inspection 9 Grades 2-4), Industrial Treatment Plant Operators (Grades 2-3: CWEA), and Wastewater Treatment Plant Operators (Grades 4-5: SWRCB);

- 3) No increase in the vacation accrual formula in exchange for any “swap” of Personal Time Off. However, the 40 hours of PTO should not be on a “use it or lose it” annual basis and should be treated in the same manner as vacation.

DATED: August 2012

Steve Crouch, Union-Appointed Factfinder