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July 5, 2013

FINDINGS AND RECOMMENDATIONS
PURSUANT TO
CALIFORNIA GOVERNMENT CODE 3505.4

In the Matter of a Controversy Between)	
City of Modesto)	
Employer)	
and)	Collective Bargaining Impasse
Modesto Police & Fire Non-Sworn Association)	Factfinding
Union)	PERB Case No: SA-IM-122-M

APPEARANCES:

For the Employer: Allyson Hauck, Attorney
Renne Sloan Holtzman Sakai LLP
350 Sansome St. Suite 300
San Francisco, CA 94104-1304

For the Union: Steven W. Welty, Attorney
Mastagni, Holstedt, Amick, Miller & Johnsen
1912 I St.
Sacramento, CA 95811

FACTFINDING PANEL:

Appointed by the Employer: Dania Wong, Partner
Renne Sloan Holtzman Sakai LLP

Appointed by the Union: David E. Topaz, Negotiator / Consultant
Mastagni, Holstedt, Amick, Miller & Johnsen

Neutral Chairperson: Paul D. Roose, Arbitrator and Mediator
Golden Gate Dispute Resolution

STATUTORY FRAMEWORK AND PROCEDURAL BACKGROUND

Under amendments to the Meyers-Milias-Brown Act that went into effect on January 1, 2012, local government employers (cities, counties, and special districts) and unions in California have access to factfinding in the event they are unable to resolve contract negotiations. At the request of the exclusive representative, the parties are required to go through a factfinding process prior to the employer implementing a last, best and final offer. In accordance with regulations put in place by the California Public Employment Relations Board (PERB), the exclusive representative can request factfinding either after mediation has failed to produce agreement or following the passage of thirty days after impasse has been declared. Each party appoints a member of the factfinding panel. A neutral chairperson is selected by PERB unless the parties have mutually agreed on a neutral chairperson.

Under the statute, the factfinding panel is required to consider, weigh and be guided by the following criteria in formulating its findings and recommendations:

- 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 parties 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

Modesto Police & Fire Non-Sworn Association (MPNSA) is the exclusive representative for the miscellaneous employees of the police and fire departments in the City of Modesto, California.

Findings and Recommendations: City of Modesto – Modesto Police & Fire Non-Sworn Association

According to the City, there are currently 71 members in the bargaining unit. By the Association's count, there are between 55 and 60¹. Until 2006, the unit members were a part of a larger miscellaneous unit represented by the Modesto City Employees' Association (MCEA). Unit members successfully petitioned to carve out a separate bargaining unit at that time. Since 2006, MPNSA has bargained separately from MCEA.

The City has five other bargaining units. The two other units representing miscellaneous employees – the MCEA and the Modesto City Managers' Association – have contracts that expire in September 2013. The firefighters' unit has an agreement that expires in June 2013 and negotiations are in progress as of this writing. The police officers' unit has a contract through 2014, but is currently in a reopener on the issue of sick leave conversion to post-retirement medical benefits. By voter-approved charter amendments, police and fire unions representing sworn employees in Modesto have access to binding interest arbitration of contract impasses.

The parties have a collective bargaining agreement that expired on September 10, 2012. The extent of bargaining is not clear from the record in this matter, but it is clear that agreement on a successor contract was not reached. On February 12, 2013, PERB notified the undersigned that he had been selected as the chair of a factfinding panel in this matter pursuant to Government Code 3505. Dates were initially set in April and May of 2013. However, on March 29, 2013 the undersigned was notified by the parties that a tentative agreement (TA) had been reached in the dispute. The April factfinding date was cancelled, but the May date was retained pending ratification of the TA by the Association's membership and the City Council.

On April 29, 2013, the parties notified the undersigned that the Association's membership had voted down the tentative agreement and the parties wished to proceed with factfinding. The hearing date retained in May was rescheduled to June 19, 2013.

The panel convened on June 19, 2013 in Modesto and took on-the-record evidence and argument from both sides concerning the issues in dispute. The parties also requested that the neutral factfinder act as a mediator in assisting the parties in off-the-record discussions to attempt resolution of the matter. Accordingly, mediation was also conducted on that date. Mediation efforts proved unsuccessful. The parties then submitted their final proposals for the panel's consideration and made oral closing arguments on the record. The record was closed at the end of the day on June 19, 2013 and submitted to the panel for its findings and recommendations.

¹ The difference appears to stem primarily from whether or not to include police recruits, who temporarily reside in the unit, in the count.

BACKGROUND TO THE DISPUTE

The City of Modesto is located in the San Joaquin Valley in central California. It has a population of approximately 201,000 and is the county seat of Stanislaus County. City government provides a full range of services to its residents and businesses. Fire services are provided through a joint powers authority, the Modesto Regional Fire Authority, but fire department employees in this bargaining unit retain their status as City employees.

The MPNSA unit includes fire inspectors, animal control officers, clerks, community service officers, crime analysts, evidence and property technicians, and police identification technicians. The unit also includes police officer recruits prior to them attaining sworn status as police officers.

The City, like nearly all governmental entities in the state, has suffered a significant decline in revenue due to the economic recession. In 2007-08, the year before the decline commenced, the City's general fund revenue was \$118 million. It dropped to a low of \$102 million in 2010-11, and crept back up to \$104 million in 2011-12. The City relies heavily on property tax as a proportion of revenue, and the precipitous decline of assessed property values has taken a heavy toll. While sales tax has nearly recovered to its pre-decline levels, property tax revenues have continued to drop.

In the face of this bleak economic picture, the Association signed an agreement in January 2011 that accepted a pay freeze and mandatory unpaid furlough days during the 2010-11 and 2011-12 fiscal years. The furloughs were the equivalent of a 4.6% temporary pay reduction for those two years, and corresponding reduction in work hours. The City agreed to increase its contribution to employee medical insurance on January 1, 2011 by \$25 biweekly for employees with dependent coverage, and \$12.50 biweekly for employees without dependent coverage. And the City continued to pay 6.6% of the employees' 7% share of PERS retirement, with a formula of 2% @ 55.

The parties also agreed to continue a formula of allowing current employees, when they retire, to convert unused sick leave balances to post-employment medical benefits. By longstanding agreement, the City makes no contribution to retiree medical benefits except that generated through sick leave conversion. Under the agreement, full-time employees accrue 96 hours of sick leave per year. Upon retirement, they may use up to 90% of their unused sick leave, up to a maximum of 2,000 hours, to purchase retiree medical insurance. Each eight hours of sick leave buys one month of premium contributions at the same rate as contributed to active employees.²

² Employees with less than 416 hours at retirement may supplement the sick leave with unused vacation time.

Under this agreement, a unit member who has accrued the maximum sick leave could receive post-retirement medical benefits for over twenty years. On the other hand, a unit member who has used all sick leave as it accrues would receive no retiree medical benefit. In the 2010–12 agreement, the parties agreed to continue this benefit for current employees, but to discontinue the sick leave conversion for employees hired after December 31, 2010. Those new unit members would receive a City contribution of \$1200 per year into a Health Reimbursement Arrangement (HRA) account in lieu of sick leave conversion. The employee could access the HRA for medical expenses after retirement or after age 50 in the case of an employee who terminates employment without retiring.

THE TENTATIVE AGREEMENT

On March 28, 2013, the parties reached a tentative agreement. Both negotiating teams agreed to recommend the TA to their respective decision-makers for ratification and adoption. In a closed session of the City Council, the governing body approved the deal. Next, the Association conducted a ratification vote of its members. The members voted by majority not to ratify the TA, and the Association informed the City of this outcome.

In essence, the TA consisted of the following terms:

Term of Agreement: September 11, 2012 through March 24, 2014

PERS Retirement: Current employees would begin paying the entire 7% employee share as soon as administratively feasible. New employees would pay the 7% share and be subject to the PEPRA³ rules mandating a 50% share of normal costs and a modified retirement formula

Salary: A 1.5% across the board salary schedule increase, as soon as administratively feasible

Sick Leave / Retiree Health: The parties agreed to a complex reform of these provisions as they apply to unit members hired before January 1, 2011, as follows:

1. Freeze all sick leave balances for employees in the program into conversion bank
2. As soon as administratively possible, any sick leave accrued has no value towards retiree health contributions
3. Freeze conversion rate for hours in bank at 8 hours = \$621 per month for employees with no dependents and \$1100 per month for employees with dependents
4. Discount using first in, first out (FIFO)

³ Public Employees Pension Reform Act, a measure passed by the California state legislature and signed into law by the governor in 2012.

5. In consideration for FIFO, and in lieu of 32 hours of special leave, employees will receive a one-time lump sum payment of \$700 (minus any applicable state and federal taxes) to be effective the first pay period following council approval

6. City contribution of \$25.00 per month to an HRA for all employees hired before January 1, 2011 and participating in the S/L conversion retiree medical program effective 7/1/13. For those employees hired on or after January 1, 2011, the contribution of \$100 per month to an HRA remains unchanged.

Tentative Agreements: The parties agreed to incorporate prior tentative agreements on Articles 10, 12, 15, 19, 20, 21, 22, 23, 24, 32, 38 and 46.

POSITIONS OF THE PARTIES

The Association

The Association put forward the following proposal for settlement of outstanding issues:

Term: July 1, 2013 through June 30, 2015

Salary: Effective immediately – 1.5% increase
Effective January 2014 - \$1,000 lump sum
Effective October 1, 2014 – 1.5% increase
Effective January 2015 - \$1,000 lump sum

Retirement: Effective immediately – Employees pick up additional 6.6% of PERS share

Sick Leave / Retiree Medical Benefits: The modification to the sick leave conversion benefit as contained in the March 28, 2013 tentative agreement, provided that if the police officers' unit attains a more favorable settlement on this issue in the future, then the agreement will be modified to reflect that more favorable settlement

Prior Tentative Agreements: Include

The Association argues that the Employer can afford the Association's economic proposals. The Association cited an analysis of the City's financial health prepared by certified public accountant Shayleen Mastagni. Drawing from the City's Comprehensive Annual Financial Report (CAFR), Ms. Mastagni asserted that the City consistently has overestimated its expenses and underestimated its

revenues. She also concluded that the City has consistently run substantial surpluses that are masked by end-of-year fund transfers.

The Association cites concerns that the take home pay of its unit members is declining, due to the City's frozen health benefit contribution. The effect of the TA would be at least a 5% reduction in net pay for members, many of whom are already among the lowest-paid City employees

Because the Association's members voted down the TA, the Association contends that this is no longer a viable option.

The City

The Employer put forward the March 28, 2013 tentative agreement, as detailed above, as its proposal for settlement of all issues.

The City argues that a deal was reached in good faith, and the City is prepared to honor that agreement. The City cannot afford more than what was agreed to in the TA. All other bargaining units, the City asserts, took at least a 5% reduction in take home pay.

FINDINGS AND RECOMMENDATIONS

Taking into account all of the statutory criteria referenced above, the following are the panel's findings and recommendations in regard to the specific issues in dispute.

This is an unusual, but not unprecedented, scenario for a factfinding panel to address. A tentative agreement was reached in bargaining. One side – in this case the Association – failed to get the agreement ratified. Moving into factfinding, the parties argued their cases, each side making a detailed argument on why its position most nearly conforms to the statutory criteria.

At the end of the day, however, the Employer put forward the prior tentative agreement as its proposal, while the Association proffered a somewhat different and longer agreement as its position.

One of the duties of a factfinding panel is to intrude as little as possible into the parties' collective bargaining relationship. In this case, the best way for the panel to do that is to adopt as its recommendation an agreement that the parties themselves have already reached. That agreement is the March 28, 2013 tentative agreement.

There are three potential reasons for a factfinding panel not to adopt a prior tentative agreement as its recommendation, even when one party is proposing the TA as its position. Those three reasons are as follows:

- 1) The TA was reached as a product of bad faith bargaining. If a factfinding panel was presented with compelling evidence that fraud, deception, coercion, or widespread withholding of critical information occurred during the bargaining process, it might serve to sway a panel to deviate from that TA in its recommendations.
- 2) Circumstances had substantially changed since the signing of the TA. For example, if one party or the other persuasively argued that the employer's economic condition had dramatically improved or declined since the TA, this might be a reason to set aside the TA. Or if there had been a change in the law, or a settlement with another of the employer's bargaining units, this might stand to influence the panel.
- 3) The TA, or a portion of it, was patently unfair, was a clear violation of established standards of collective bargaining or would result in a disparate effect on a subsection of the bargaining unit. For example, if a management or union bargaining team had succeeded in including a provision or provisions that would disproportionately benefit only members of the bargaining team, then this might be cause for the panel to recommend a different agreement.

In this case, none of these factors is present. The Association did not assert any of these factors in its presentation. Therefore, the panel recommends the tentative agreement as settlement to all issues. Had the situation been reversed (and this does occur in California public sector labor relations), the panel would be making the same recommendation. In other words, if the Association's membership had ratified the agreement and the City Council had failed to adopt it, the panel would still be recommending adoption of the TA.

This recommendation should not be read as a conclusion that the Employer's position most closely conformed to all of the statutory criteria. The Association made a strong case that its proposal can be justified by analyzing comparability, cost of living, and the financial ability of the agency. In this case, these other criteria are greatly diminished in significance since the parties already reached their own agreement. This recommendation is based on the panel's view of the following statutory factors: "interests and welfare of the parties" and "other facts...which are normally or traditionally taken into consideration in making the findings and recommendations."

The panel recognizes that it is somewhat unrealistic to expect that a tentative agreement already voted down by the members will be later approved. However, this particular tentative agreement, especially the section on sick leave conversion to retiree medical benefits, is complex and may have been misunderstood by some. The passage of time and further reflection may cause some to change their minds. Since the Employer's proposal (the tentative agreement) does not include retroactive implementation, the delay caused by the rejection of the tentative agreement has resulted in several more months of pay without the deduction of the full employee share of PERS. And, finally, the panel hopes that the issuance of this report will spur the parties to resume discussions and attempt to find a solution that will be ratified by both sides.

SUMMARY OF RECOMMENDATIONS

The panel adopts the City's proposal, the tentative agreement of March 28, 2013 in its entirety, as its recommendation.



Paul D. Roose, Neutral Chairperson

Date: July 5, 2013

/s/ David E. Topaz

David E. Topaz, Association-appointed Panel Member

Date: July 5, 2013

I concur with the Recommendations

I dissent from the Recommendations (see attached explanation)

Findings and Recommendations: City of Modesto – Modesto Police & Fire Non-Sworn Association

/s/ Dania Wong _____

Dania Wong, Employer-appointed Panel Member

Date: July 5, 2013

I concur with the Recommendations

I dissent from the Recommendations (see attached explanation)

Findings and Recommendations: City of Modesto – Modesto Police & Fire Non-Sworn Association

The panel recognizes that it is somewhat unrealistic to expect that a tentative agreement already voted down by the members will be later approved. However, this particular tentative agreement, especially the section on sick leave conversion to retiree medical benefits, is complex and may have been misunderstood by some. The passage of time and further reflection may cause some to change their minds. Since the Employer's proposal (the tentative agreement) does not include retroactive implementation, the delay caused by the rejection of the tentative agreement has resulted in several more months of pay without the deduction of the full employee share of PERS. And, finally, the panel hopes that the issuance of this report will spur the parties to resume discussions and attempt to find a solution that will be ratified by both sides.

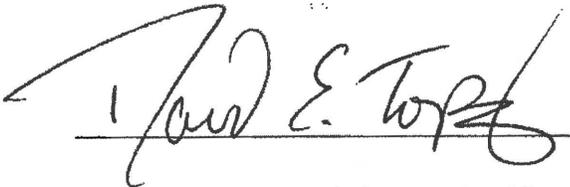
SUMMARY OF RECOMMENDATIONS

The panel adopts the City's proposal, the tentative agreement of March 28, 2013 in its entirety, as its recommendation.



Paul D. Roose, Neutral Chairperson

Date:



David E. Topaz, Association-appointed Panel Member

Date: 7/5/13

I concur with the Recommendations

I dissent from the Recommendations (see attached explanation)

PERB Case No: SA-IM-122-M

City of Modesto v Modesto Police & Fire Non-Sworn Association

Dissent to Fact Finder's Report:

I formally dissent from this written decision and will focus my attention on four of the seven criteria which were listed on page 3 of the report.

4)The interests and welfare of the parties and the financial ability of the public agency.

In this area, the Association presented compelling evidence that the City of Modesto regularly overstates its financial difficulties by budgeting very low on revenues and extremely high on expenses. In every year, save one, in the last five years, the City has ended up with significant budget surpluses that have been rolled over to the following fiscal year. The FY12/13 surplus is estimated to be over \$3 million. When the City's finance personnel were questioned on this issue at fact finding they indicated that the budgeted vacancies which created the largest portion of the savings were intended to be filled in FY 13/14, therefore there was not really a surplus. This response was not factual at best, and intentionally misleading at worse. On 6/13/13, the Chief of Police called the President of the Modesto Police and Fire Non-Sworn Association, Art Miller, into his office and advised that the City Manager had advised him there would be a hiring freeze City-wide until at least November 2013. The City has no intention of filling all budgeted vacancies, and didn't have that intention at the time the City's finance personnel testified to such at the fact finding hearing on 6/19/13.

5)Comparison of wages, hours, conditions of employment...

The Association presented its pay scales, and showed that its members are among the lowest paid in the City. The City offered no contradictory testimony. The Association also presented information that the hired auditor of the City (Moss Adams) prepared a report for the City in recommending re-organization and improvements to the City which included an observation that the City's policy is to pay its employees 15% below the market, and that Moss Adams recommended increasing that to 5% below the market to reduce attrition and the costs associated with it.

6)The consumer price index for good and services, commonly known as the cost of living.

In just the last three and one half years, the CPI-U has run as follows: *

1/09-1/10- +1.6%

1/10-1/11- +3.2%

1/11-1/12- +2.1%

2013 YTD- +.2%

This represented more than a 7.1% increase in the cost of living since January 2009. Association members have not seen a net compensation increase since 2007. The City's proposal offers 1.5% salary in exchange for employees paying 6.6% to PERS. This proposal will harm the Association members far more than it will benefit the City.

*- Source of CPI-U information- <ftp://ftp.bls.gov/pub/special.requests/cpi/cpiat.txt>

7)The overall compensation presently received by the employees...

Again, in this area, the Association presented compelling information that the cost of living has been much worse for employees in the City of Modesto, who saw their last increase to health and welfare contributions in January 2008. Since that time, health insurance costs alone have increased more than 10% per year, resulting in some members being \$300/mo. out of pocket.

Summary and Conclusion:

It is important to note that the fact finder believed that the membership of the Association did not understand the TA. This is 100% false, as the members are intimately aware of the rich retiree medical benefit, and how it works. They are also aware that the benefit is not sustainable in its current form. In fact, the Association, along with other City bargaining units approached the City attempting to adjust the program 8-10 years ago, but the City had no interest in doing so at that time. Had it been dealt with during better financial times, this bargaining cycle would not have been nearly as difficult.

Finally, I would like to address the position taken by the fact finder that the panel should not intrude into the collective bargaining relationship of the parties. The tentative agreement was something the Association leadership agreed to with full knowledge that the members would likely not agree to it, in large part due to the actions of the City that changed the circumstances of bargaining. From the inception of this bargaining cycle, the City claimed a \$12 million structural budget deficit, which the Association has already called into question by examining the inaccurate budgeting methods used by the City. Late in this bargaining cycle, the City elected to use all the savings generated by the concessions given by the other two civilian bargaining units to fund a mistletoe eradication program. The staff report to City Council specifically listed the savings as the source of funds for this program, despite the City's continued insistence that the concessions were needed to fill the \$12 million dollar structural deficit. The membership of this Association could no longer be convinced that the City wanted anything more than the ability to spend money the way it saw fit, as opposed to fixing a budget deficit. That is why the TA failed, and for the above mentioned reasons why the proposal presented at fact finding by the Association more closely represents a fair conclusion to this matter.