

FACTFINDING REPORT and RECOMMENDATIONS
Public Employment Relations Board Case # LA-IM-139-M
City of Burbank and the Burbank City Attorneys Association
Factfinding Dates: September 10, 11 & 12, 2013
Panel Deliberation: September 25, 2013

Factfinding Panel:

Don Becker, Impartial Chair
Jeff Freedman, City Representative
Joe McDougall, Association Representative

Presenters:

Association: Carol Ann Humiston, Association
City: Bruce Barsook, Liebert Cassidy Whitmore

Other City Participants in the Factfinding:

Joaquin Busquets, Human Resources Manager
Betsy Dolan, Management Services Director
Carrie Matson, Deputy Financial Services Director
Ericka Reinke, Administrative Analyst II

BACKGROUND

City

Burbank is a charter city located in the eastern part of the San Fernando Valley, in Los Angeles County, 12 miles from downtown Los Angeles. Burbank (City) has a Council-City Manager form of government with the City Council directing the collective bargaining process.

Burbank has a population of approximately 103,000 and is a full-service city in the traditional sense meaning the City has both police and fire departments. Also, and somewhat unusual for City of this size, there is a power utility, an international airport, rail and commuter rail service and station, and a large media presence, e.g., The Walt Disney Company, Warner Bros Entertainment, Nickelodeon and Insomniac Games.

Impasse

The Burbank City Attorneys Association (Association) is a new employee representative, gaining recognition for the 11-member bargaining unit on February 21, 2013. The Unit is comprised of ten attorneys and one paralegal. The attorney bargaining unit was carved out of the unrepresented mid-managers, known within the City as the Z-group. The current impasse is the culmination of bargaining to produce an initial collective bargaining agreement. The parties held six meetings with the first on February 26 and

the last on June 7. An impasse meeting, as prescribed by the City's Employer-employee Relations Ordinance, was held on June 19, 2013. No agreement was reached and the Association filed a request for factfinding with the California Public Employment Relations Board (PERB).

The PERB letter establishing the Burbank Factfinding Panel was dated July 8, 2013. Because of scheduling conflicts, the parties and the Panel waived the statutory time limits and a factfinding meeting was set for September 10, 2013.

Factfinding

When the meeting began on September 10th, there were between 29 and 31 issues, depending on what you counted as issues. The issues were:

1. Salary
2. Work schedule
3. Disciplinary procedure
4. Grievance procedure
5. Universal leave
6. Retiree medical trust (BERMT)
7. Medicare coverage
8. Disability insurance, amount only
9. Jury leave
10. Subpoena leave
11. Religious services leave
12. Election leave
13. Bereavement leave
14. Military leave
15. Pregnancy leave
16. Holidays
17. Deferred comp, 457 plan
18. Life insurance and accidental death insurance
19. Tuition reimbursement
20. Professional development pay
21. Cafeteria plan
22. Dental insurance
23. Employee assistance program
24. Vision care
25. Retiree health savings plan
26. State bar dues
27. Bilingual bonus
28. PERS payments
29. Utility retirement trust (URMT)
30. Term
31. Section 125 plan

The parties then met for two hours without the panel chair and reached tentative agreement on twelve issues. The resolved issues are:

- 11 Religious services leave
- 12 Election leave
- 13 Bereavement leave
- 14 Military leave
- 20 Professional development pay
- 21 Cafeteria plan
- 22 Dental insurance
- 23 Employee assistance plan
- 24 Vision care
- 25 Retiree health savings plan
- 27 Bilingual bonus, and
- 31 Section 125 plan

To settle these issues, the parties agreed to continue the current practices as existed when the attorneys were in the Z-Group.

That left the parties and the Panel with nineteen issues for consideration. However, some of these were compound issues, and therefore, there actually were more than nineteen subjects.

Each of the parties presented binders filled with documentation to support their positions. These documents will be referenced below using notations such as, (CT1). This refers to the document in the City binder under tab #1.

Bargaining History

It seems to the panel chair that there was very limited discussion of most of these issues during the bargaining process.

The parties had five meetings before declaring impasse. At the initial meeting the Association presented proposals that cost in excess of 20%. In subsequent meetings, the Association proposals became more extensive and costly.

The City's only written counter-proposal was delivered, at the request of the Association, via email dated April 2, 2013. The City proposal had the Association members paying the full 8% of the employee PERS contribution (an added 6%) by the beginning of the third year of the contract, while providing 3% salary increase over the same period.

Prior to the declaration of impasse by the Association, the City had not made a last, best and final offer. Mediation was not used to help break the impasse.

Statutory Criteria

Section 3505.4(d) of the California Government Code provides guidance for the factfinding panel and the parties:

- (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.

In this report and the recommendations below, the panel chair has considered each of these criteria and has given some more weight than others, based on the record established by the parties during the factfinding proceedings.

Statutory Framework (Criterion #1)

The major statutory provisions that govern collective bargaining for California cities are found in the Government Code, Section 3500 through and inclusive of Section 3511. This law was originally passed by the California legislature in 1968 and has been amended many times since. This collective bargaining law was named The Meyers-Milias-Brown Act, after the original authors of the legislation and is colloquially referred to as MMB.

The MMB attempts to set the tone for the behavior of the parties who engage in the activities set forth in the law. Government Code Section 3500, Purpose and Intent, provides in part:

- (a) It is the purpose of this chapter to ***promote full communications*** between public employers and their employees by providing a

reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment ...

Section 3505, Meet and confer in good faith, provides in part:

“Meet and confer in good faith” means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation ***personally*** to meet and confer promptly upon request by either party and continue for a reasonable period of time in order ***to exchange freely information, opinions, and proposals, and to endeavor to reach agreement*** on matters within the scope of representation...

Emphasis added to both sections.

DISCUSSION

Compensation

The following is an excerpt from a memo written by the Management Services Director to the City Manager dated August 31, 2004 (AT19, p1).

“For many years, it has been the City’s policy to look at four basic cornerstones when considering compensation issues for its employees:

- The condition of the economy as reflected by Consumer Price Index (CPI) for Los Angeles-Riverside-Orange County ...
- The capacity in the City’s approved budget ...
- Commitment to pay for performance...
- Equity in the marketplace as determined by market survey...

Recently, the City established the, “City of Burbank Financial Policies” which included the four cornerstones as Policy 14 (CT7, p13). A reference to the four cornerstones appears in many other City and Association documents and does seem to have guided the City in its compensation policy, even as late as 2010 (AT28). However, these cornerstones are not ironclad rules but merely guides for the City when determining compensation on a year-to-year basis.

Financial Ability (Criterion # 4)

The City makes a strong case that it needs to be fiscally prudent to remain solvent. Finance projects that over the next five years revenue will grow at 2.6% while expenses will grow at 2.7% (CT9, p5). To offset the imbalance between revenue and expenses the City has, “... a multi-year plan which implemented a combination of budget efficiencies, revenue enhancements, service reductions, labor negotiations strategies...” to close the budgetary gap. The City’s five-year forecast assumes that all employee groups, i.e., represented and unrepresented employees, will be paying the full “EPMC” by FY 2017-18.

Nevertheless, uncertainties remain. For instance, the City is still sorting out the impact of the closure of its redevelopment agency. The City assumes that the State will return \$25 million of “improperly withheld redevelopment funds” (CT8, p2). The State may suspend four current State mandates related to elections, domestic violence, absentee voting and identity theft. The amount of the possible reduction is unknown. The across-the-board cuts in federal spending, commonly referred to as sequestration, could reduce federal payments to the City between \$500,000 and \$700,000. Plus not all employee groups have agreed to assume payment of their part of the employee retirement cost.

As to retirement, the City knows that due to structural changes made by PERS, i.e., lowering the discount rate and changing the funding horizon from 30 rolling years to 30 fixed years, the City’s contribution rate will be increasing significantly over the next five years (CT14).

A new Walmart store was slated to open during the City’s 2013-14 fiscal year. Due to court action the store probably will not open, certainly not during 2013-14. Consequently, the City will lose income it had included as part of its projected revenue.

For a detailed account of the City’s concern, refer to City tabs 8 and 9 and its discussion on pages 4 and 5 of its written presentation. The Association objected to the City’s budget concerns, but had neither clear nor convincing information or arguments to overcome the presentation made by the City.

CPI (Criterion #6)

During the factfinding, the parties presented information about 14 different salary increases spread over a 25-year period. Only three times was the salary the same as, or close to, the relevant CPI. On four occasions the salary change was larger than the reported CPI, with a range of 125% to 250% of the CPI. On the other hand, the implemented salary was less than the CPI seven times. That ranged from no salary increase to 90% of the CPI. So there really is no pattern that can be discerned from the documentation presented to the Panel by the parties.

Furthermore, since the beginning of the recent national recession very few California public sector employers have used the CPI to determine compensation. Between 2008 and now, many California public sector employers have reduced compensation even though the CPI has increased over that same time frame.

Market Survey (Criterion #5)

During the factfinding, there was a lot of discussion about the market survey; how it should be done, what cities to include, what classes to use, etc.

According to the City presentation, it had been ten years since a survey had been performed which included the employees in this bargaining unit. When the Attorney bargaining unit was formed, the City performed a survey to be used in the upcoming Attorney collective bargaining sessions. The City used eleven comparator cities that were to be “generally comparable to Burbank” in total population, size of work force, total budget, and level and nature of municipal services (AT5, p3). These criteria are quite standard and conform to normal custom and practice for compensation surveys.

The Association objected to most of the cities and classifications used by the City. During the factfinding, the Association asserted that only Anaheim, Pasadena and Santa Monica were comparable to Burbank. Obviously, a sample of three is too small. Intuitively we know that a larger sample size produces a better result.

When responding to Association email enquiries about the survey, the City agreed their survey was flawed and proposed several times that the parties meet to discuss the survey. The City told the Association that it is common practice for the City to negotiate surveys that are acceptable to both parties in the collective bargaining process. There is nothing in the record to indicate that the Association accepted any of the email proposals to negotiate the survey that were made by the City.

So what cities and what classes in those cities should be used? This is a huge topic with lots of different approaches to the answer. The factfinding record doesn't provide enough concrete information for the panel chair to recommend a list of cities and classifications to be used in a market survey.

In any event, it is clear from the factfinding record that the City has rarely moved all classifications to 100% of market as determined by a survey.

Internal Equity (Criterion # 8)

Though not among the four cornerstones listed in the documents referred to above, as early as 1985 internal equity within and between departments, was included as a guiding principle for the City. Also, internal equity falls within the 3505.4(8) requirement to take into account, “any other facts...which are normally or traditionally taken into consideration...” when making findings and recommendations.

Internal equity once played a significant role in the salary setting process for unrepresented managers. Prior to the downturn, the City tied unrepresented managers (Z-Group) to the executive managers within their departments. Association tab 23 is a 2007 memo from the

Management Services Director to the City Manager. That memo has a long piece about why the unrepresented managers should be tied to the executive managers.

Several of the documents submitted by the Association, show that in the past, the City established an 80% relationship between Senior Assistant City Attorney and City Attorney. Members of this bargaining unit received their last salary increase in 2008. That increase was determined by maintaining the fixed differentials between the City Attorney and the various classes now in this Unit (AT34). That link was broken when the current City Attorney was hired, given a higher salary than the outgoing City Attorney, and that increase was not passed along to the other attorneys in the office.

The City maintains that its policy has changed and it no longer wants to link salaries between and among executive management and its subordinates. However, as recently as 2010 the City has linked the salaries of the top managers and the department head in Burbank Water and Power (AT49). Likewise, the City has used a link between management and its subordinates to justify management increases to alleviate the upward pressures of salary compaction (AT48).

So it's clear that as circumstances necessitate, the City will look at the link between executive and top management salaries.

Retirement

The City has a long history of paying all or a portion of the employees' normal contribution. In 1984 the City paid 4% of the employees' contribution. It's not clear from the documentation if that represented a change from prior years or was a continuation of prior years. In any event, the City's "pick-up" of the employees' contribution increased over time. Finally, in a memo from the Management Services Director to the City Manager dated September 30, 2008, the Director pointed out that all of the represented employee units had achieved Employer Paid Member Contribution (EPMC) status and that, "...the City reports this 8% (9% for sworn members) to PERS as special compensation." The Director recommended that, "...the remaining unrepresented employees be provided EPMC..."(AT24). No copy of the enabling resolution passed by the Council was included within the Association or City binders, but since the City didn't object, it can be assumed that the Council did, in fact, approve this change.

Next, we have Resolution 28,346, which was passed and adopted by the Council on June 7, 2011. At the time this Resolution passed, the employees now in the Attorney Bargaining Unit were members of the Z-Group. The Resolution provided that employees effected by the Resolution, including the members of the Z-Group, would begin to contribute part of their

employee contribution to PERS. Specifically, they would be required to pay 1% starting July 1, 2011; and additional 1% starting July 1, 2012; and an additional 2% starting July 1, 2013 for a total of 4% by July 1, 2013 (AT26). This represents one-half of the employee normal contribution. This was a unilateral change made by the City to the unrepresented employees. Other groups within the City have agreed to pay at least half of the employee contribution in FY 2013-14, some have already agreed to pay the entire employee cost and some have yet to agree to pay any portion of the employee cost.

Other Issues

At the commencement of bargaining with the City, the Association proposed changes to retirement, retirement contributions, salary, paid time off and the disciplinary/appeal system. In addition, the Association included the following, "Other existing benefits as Z group members." (CT1)

In subsequent exchanges, the Association revised its demands, improving on benefits that other Z-Group members were receiving.

It seems to the panel chair that there was very little discussion of these issues. Aside from the information the Association included in its May 31, 2013 documents and the impasse letter to the City Manager, it doesn't seem as though there was much effort expended trying to reach agreement on these issues at the bargaining table. Again, within the first two hours of the factfinding process, the parties reached tentative agreement on twelve issues.

Additionally, when presentations were being made about State bar dues, the Association was surprised to discover that the City believed that State Bar Mandatory Continuing Legal Education requirement costs could probably be reimbursed under the current language of the Tuition Reimbursement Policy. With very little discussion, the parties came very close to settling this issue.

Further evidence that these issues don't seem to have been discussed at any length at the table is jury leave. During the factfinding discussion concerning Jury Leave, the parties discovered they were in agreement.

RECOMMENDATIONS

Tentative Agreements

At the beginning of the factfinding, the parties reached agreement on twelve issues: religious services leave, election leave, bereavement leave, military leave, professional development pay, cafeteria plan, dental insurance, employee assistance plan, vision care, retiree health savings plan, bilingual bonus, and Section 125 plan. During the factfinding, the parties reached

agreement on jury leave. These thirteen agreements are incorporated into the panel chair's recommendations.

Salary

By the City's own admission, the survey used for the attorney series was flawed. Consequently, the survey can't be considered authoritative, and therefore, will be given little weight.

CPI was not used by the City to set any salaries for July 2013. Furthermore, there is no past relationship pattern between CPI and salary increases in Burbank. Consequently, CPI will be given little weight.

This leaves the third indicator – internal equity. As pointed out above, the City has recently used a relationship between a department head and subordinate managers to establish salary, and, though it was some years ago, the most recent method of setting salaries for members of this Unit was by linking them to their department head.

In 2008, the Senior Assistant City Attorney was set at 80% of the City Attorney. The panel chair recommends that this 80% relationship be used to determine the "market" position of the Senior Attorney. The current base salary of the City Attorney is \$18,334 per month. Eighty percent of \$18,334 is approximately \$14,667. To achieve this salary level, the current top of the range Senior salary must be increased by 3.61%.

To arrive at a recommendation for a salary increase in this Unit, the panel chair used the same methodology used by the City to set salaries for the Z-Group effective July 2013. That is, for July 2013, the Z-Group received 1% for all classifications plus a second 1% distributed to classifications in the Z-Group that were below market. The second 1% was distributed to the classifications on a pro-rata basis so that the impacted classifications were brought 22.4% closer to the market (CT24, p2).

Applying that approach here produces a 1.58% increase, i.e., 1% plus 22.4% of 2.61%.

Therefore, it is recommended that all classifications in this Unit receive a 1.58% increase implemented as provided below in TERM.

Retirement

Virtually all City employees are paying at least 4% toward their share of the cost of retirement, and thereby, helping to offset the City's budgetary problems. The employees in this Unit should be treated the same. It is recommended that the employees in this Unit pay an additional 2% toward the employee share of retirement. That will bring their share to 4% and the

City's share will also be 4%. The implementation date is discussed below in TERM.

Term

It is recommended that both the change in salary and PERS contributions should occur on the first day of the first full pay period in fiscal year 2013-14, or whatever day is customary in the City of Burbank to begin a negotiated salary increase. If for any reason the PERS contribution cannot begin on the date specified, then it is recommended that the salary increase be held and begin on the same day that the PERS contribution begins.

It is further recommended that the effective date for the provisions of this CBA be the day it is approved by the City Council, after having first been ratified by the Association, unless there is another effective date for a specific provision of the CBA, and end at midnight on June 30, 2014.

Market Survey

It is recommended that parties meet to negotiate the provisions of a market survey that will be used to guide the parties when setting compensation for FY 2014-15. It is further recommended that the survey encompass total compensation and not just salary. The meaning of total compensation should be one of the subjects of the market survey negotiations but the parties should be guided by statutory criterion #7 listed above.

It is further recommended that the negotiations begin immediately or at least by early January 2014. That gives the parties time to develop the survey and then to perform or have it performed in time to use it as a guide for the negotiations of a successor CBA.

Lastly, to facilitate the process, it is recommended that the parties bring in a consultant who is a specialist in the performance of public sector market surveys. This person could attend the negotiations and act as a resource for the process. To be sure this person is not predisposed toward either party, it is recommended the parties each pay one-half of the cost of the consultant.

All Other Issues

Of the nineteen issues listed above, one was settled during the factfinding proceedings, three received recommendations immediately above and three are non-economic. That leaves twelve economic issues. In view of the City's budgetary constraints, it is recommended that universal leave, retiree medical trust, Medicare coverage, disability insurance, subpoena leave, pregnancy leave, holidays, deferred comp, life insurance and accidental death, tuition reimbursement, state bar dues and the Utility retirement trust continue as current for the term of the CBA recommended above.

BCAA FACT FINDING REPORT/DISSENT

PERB Case No. LA-IM-139-M

Procedural History

On June 7, 2013, after negotiations with the City had dragged on for months with no substantive negotiation from the City, the BCAA declared an impasse. PERB assigned Don Becker as the “neutral” Fact Finder. The City’s outside counsel, Bruce Barsook, was selected by the City to present the City’s evidence and argument; Mr. Barsook’s law partner at Liebert Cassidy & Whitmore, Jeff Friedman was selected as the City’s representative on the Fact Finding Panel. The BCAA selected Senior Asst. City Attorney Carol Humiston to present the City’s evidence and argument; Senior Asst. City Attorney Joe McDougall was selected as the BCAA’s representative on the Fact Finding Panel.

As required by California Government Code § 3505.4, Mr. Becker, Ms. Humiston and Mr. McDougall were available and prepared to proceed for the ten days thereafter, the time required by law for the Fact Finding Panel to meet with the parties and hear testimony. During those ten days, either Mr. Friedman or Mr. Barsook was unavailable during normal business hours. Mr. Becker gave the BCAA an ultimatum. Unless the BCAA waived the ten day time limit under California Government Code § 3504.4, Mr. Becker would require the BCAA to present its evidence and argument first in the presence of the Fact Finding Panel, outside the presence of Mr. Barsook but in the presence of his law partner, Mr. Friedman, giving Mr. Barsook access to the evidence and argument presented and an opportunity to respond; then Mr. Barsook could present his evidence and argument to the Fact Finding Panel, but Ms. Humiston could not be permitted to be present to listen or respond. Given this Hobson’s Choice, over the BCAA’s objection, the BCAA involuntarily waived the statutorily mandated time limitation. The next available date when all of the parties could be available at the same time and place was September 10, 2013. The fact finding hearing concluded on September 12, 2013 and the fact finding panel met for deliberations on September 25, 2013. The draft fact finding report was distributed on October 3, 2013, and was subsequently amended several times. Mr. Becker delivered his Fact Finding Report, dated October 16, to the BCAA on October 18, 2013.

Summary of Argument

Mr. Becker’s Final Report fails to address the criteria required by California Government Code § 3505.4, fails to address the majority of the terms and conditions of employment presented to him at the fact finding hearing, is devoid of any real fact finding, and is simply Mr. Becker’s unsubstantiated attempts to placate the City.

Pursuant to California Government Code § 3505.4, the Fact-Finder must reach its fact findings and recommendations based on eight 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 to employees performing similar services in comparable public agencies; (6) The cost of living; (7) The overall compensation presently received by the employees; (8) Any other facts which are normally or traditionally taken into consideration in making the findings and recommendations.

With the foregoing criteria in mind, the BCAA presented evidence to Mr. Becker on all of the criteria under California Government Code § 3505.4, referencing all of the terms and conditions of employment that Mr. Becker's Fact Finding Report acknowledges were issues, but which Mr. Becker fails to address. Moreover, there are few if any findings of fact.

The following addresses some of the more significant issues which Mr. Becker failed to address¹, or the unsubstantiated recommendations Mr. Becker did make.

Disciplinary/Greivance Procedure

The Burbank City Charter, Section 320. City Attorney: provides: "(c) The City Attorney shall appoint and remove all officers and employees of the City employed in the City Attorney's office subject, when applicable, to the Civil Service system establish for the City...." In passing Section 320 of the Burbank City Charter, the City Council recognized and acknowledged that the City of Burbank is best served by professional attorneys whose legal opinions and recommendations are not subject to employment retaliation or political influences by the City Attorney, a political appointee. No City employees other than the "officers and employees of the City employed in the City Attorney's office" are guaranteed Civil Service protection in the City Charter.

Starting in 2002, the City Council adopted various Resolutions attempting to exempt certain job classifications from Civil Service protection, including members of the unrepresented middle managers and newly hired unrepresented middle managers. However, a Resolution cannot void the City Charter, and these Resolutions cannot remove Civil Service protection from

¹ Mr. Becker's derogatory reference that the BCAA did not know that the City's "After Hours Education" reimbursement policy would pay for their MCLE is quite typical of his attitude towards the BCAA. The reason the BCAA did not know that it applies is because: (1) it has never been used to pay for MCLE; (2) during negotiations, the City representative never once mentioned it could be used to pay for MCLE; (3) by its very terms, it requires a "grade of C or better," and there are no grades for MCLE; (4) it is expressly called "After Hours" when MCLE is not conducted after hours; (5) it requires the education be taken on the employees own time, which is not when MCLE is taken; and (6) the City Attorney's Office has always had to budget for MCLE.

the “officers and employees of the City employed in the City Attorney’s office.” All members of the BCAA are entitled to Civil Service protection as a matter of law under the City Charter.

Nonetheless, during labor negotiations, knowing that it was the City’s practice to negotiate a disciplinary and grievance arbitration procedure outside Civil Service with other labor groups, the members of the BCAA offered not only to agree to an alternate disciplinary and grievance arbitration procedure from the Civil Service system, but offered to draft a legally enforceable arbitration agreement, that encompassed Federal and state statutory employment discrimination claims pursuant to *14 Penn Plaza LLC v. Pyett*, 556 U.S. 147 (2009), and that could be used as model for future negotiations with other City bargaining units. The City rejected this extraordinarily generous offer.

While Mr. Becker acknowledged that a disciplinary/grievance procedure was an issue with which he was presented, he completely ignored the undisputed evidence presented by the BCAA, and by so doing, has fallen short of his responsibility as a neutral fact finder.

Burbank Employee Medical Trust(BERMT)

In December 10, 2002, as part of the collective bargaining process, the City Council approved the establishment of a Burbank Employee Retiree Medical Trust (BERMT). As part of this VEBA (Voluntary Employee Benefit Association), the City agreed to a one-time initial set-up contribution of \$20,000, with a set-aside for an additional \$2.4 million to pay for three years’ worth of payments for prospective retirees.

Commencing on April 25, 2003, the City began taking deductions from not just the voluntary members of the VEBA in the City’s collective bargaining units, but the City also started taking unauthorized and non-voluntary deductions from the unrepresented managers, which at the time included members of the BCAA.

Over the next ten years, unrepresented middle managers who had no input into the management of the BERMT, had more than \$1 Million involuntarily taken from their paychecks and placed in the BERMT. Members of the BCAA, then unrepresented middle managers, challenged the City’s unauthorized deductions from their paychecks for the BERMT. The City ignored the voices of attorneys in the Burbank City Attorney’s Office and continued to make involuntary deductions.

During labor negotiations, the BCAA raised the illegality of the involuntary BERMT deductions; the BCAA did not want to lose the benefit of as much as ten years of involuntary contributions, but required some input into the management of the BERMT. The City simply refused to address it. Finally, in June 2013, five members of the BCAA filed complaints with the Department of Labor Standards Enforcement. The City continued its total black out on discussing this issue.

Without any discussion or negotiation, on July 3, 2013, the City unilaterally stopped taking the involuntary payroll deductions for BERMT from five members of the BCAA who filed claims with the Department of Labor, and then subsequently stopped involuntary payroll deductions for BERMT from all BCAA members.

The City ultimately acknowledged that the ten years of involuntary payroll deductions from members of the BCAA were illegal. In an attempt to avoid liability with the Department of Labor Standards enforcement, the City unilaterally decided to refund three years of illegal pay check deductions (more than \$500,000), based on the "statute of limitations," but has never explained how it intends to reimburse the members of the BCAA for up to ten years of involuntary contributions.

None of the City's unilateral changes were negotiated with the BCAA, nor was the BCAA consulted before the unilateral decision that resulted in the members of the BCAA losing their participation in the BERMT. Currently, the members of the BCAA have as much as ten years of involuntary paycheck deductions invested in the BERMT; there is no representation on the BERMT Board; BERMT has made amendments which divest some members of the BCAA from considerable benefits previously promised, and asserts that they may do so at their whim; some members of the BCAA who have not reached an eligibility level since involuntary deductions stopped have made involuntary contributions for which they will receive no benefit; and the BERMT has still not advised what the consequences will be for the City's unilateral actions.

While Mr. Becker acknowledged that BERMT was an issue with which he was presented, he completely ignored the undisputed evidence presented by the BCAA, and by so doing, he has fallen short of his responsibility as a neutral fact-finder.

PERS Employer Paid Member Contribution

Since 1984, the City has promised by repetitive Resolutions to pay the employee PERS cost for the members of the BCAA (Resolution Nos. 21,047, 21,407, 21,509, 21,733, 22,295, 27,182, 27,786, 27,795, 27,786.) These Resolutions are contractual promises to the members of the BCAA as a matter of law, and are subject to the California state and Federal Constitutional prohibition against a public entity impairing its contract for its financial benefit. The seriatim promises to pay for PERS contained in these Resolutions are neither vague, ambiguous, or implied; they are express and unequivocal.

In 2010, the City unilaterally made the decision to begin deducting from the paychecks of BCAA members to pay for their PERS. And while the City attempted to persuade the public and many of the collective bargaining groups into believing that the City needed to renege on its promises for financial reasons, and that the City was across-the-board requiring City employees to pay for their PERS, in fact, that was not the case. For example, the City gave members of the IBEW an 8% offset raise to counteract their payment of PERS, plus additional significant yearly

raises ever since. When the new City Manager was hired, by contract the City required him to pay for his own PERS retirement, but provided significant offsetting financial incentives to do so. The City has capped the City Attorney's obligation to pay for her PERS by contract to a maximum of 4%.

During labor negotiations, the BCAA raised the illegality of the City's involuntary and illegal deductions from their paychecks to pay for PERS. The City not only refused to even discuss it, the Interim City Manager expressly relayed the threat from the Interim Management Services Director that she could impose an 8% PERS deduction from the paychecks of the BCAA members. The BCAA sought discovery regarding various documents to support their claim of illegality, and the City refused to provide it. That discovery is currently the subject of an unfair labor practice charge. In fact, the BCAA has filed a government claim against the City in order to pursue legal action.

Mr. Becker acknowledged that the employer paid PERS contribution was an issue with which he was presented. However, because the City has not provided the requested documents and information,² Mr. Becker did not have all of the information necessary for him to make a valid fact finding and recommendation. In essence, the BCAA was deprived of the opportunity to present the evidence to Mr. Becker that would establish City's obligation to pay the BCAA members' PERS contribution.

Salary

The City of Burbank has an unambiguous and well-documented compensation philosophy which takes into account cost of living. The BCAA presented a myriad of Resolutions and Staff Reports documenting this compensation philosophy. California Government Code § 3505.4(6) required Mr. Becker to make a factual finding regarding the cost of living. The BCAA submitted undisputed evidence that the cost of living since their members' last raise, using the Bureau of Labor Statistics recommended regional CPI-U for the years 2008 to the present, was more than 7%. However, Mr. Becker made no cost of living finding and ignored the significant salary degradation that the members of the BCAA have sustained because of the rise in the cost of living. Instead, Mr. Becker made a random and unsupported salary recommendation.

Like the cost of living, California Government Code § 3505.4 required Mr. Becker to make a factual finding comparing the "wages, hours, and conditions of employment to employees performing similar services in comparable public agencies." There can be no dispute that legal issues faced by a municipal entity like the City of Burbank are complex, with an enormous influx of daytime labor workforce, an airport, a water and power utility, waste disposal, water reclamation, in-house criminal prosecution, police and fire departments, a media

² This matter is the subject of a pending unfair labor practice charge against the City seeking a PERB Order compelling discovery.

district, and a proactive City Council. However, during labor negotiations, the City's Management Services Department conducted a "salary survey" of public entities that did not provide comparable services, skewing the survey to avoid the obvious gap between the salaries of the members of the BCAA and comparable public entity attorneys. Furthermore, the "salary survey" was inaccurate in a myriad respects, which Management Services was ultimately forced to admit. At the Fact Finding hearing, the BCAA submitted unchallenged evidence of the cities that provided comparable services and therefore, required comparable legal support; the BCAA submitted evidence of the salaries and benefits of comparable job responsibilities at these comparable cities. The evidence established that the members of the BCAA are grossly underpaid. Mr. Becker failed to make the required comparison, because to do so would be inconsistent with his random and unsupported salary recommendation.

For the last two salary increases the members of the BCAA received, the City did not use a salary survey, but instead, used the salary of the City Attorney as the benchmark. A Staff Report explained the reason--these employees are "an integral and valuable part of the organization....due to their value in the organization, it is important that internal relationships be considered...." Furthermore, when the members of the BCAA last received a raise benchmarking their salary to the City Attorney, the City acknowledged that with the raise at that time, the members of the BCAA "will be significantly behind survey." And yet for the last five years, the members of the BCEA have not had a raise. In contrast, other unrepresented middle managers who were also benchmarked to their Department Executive's salary were given a raise in 2010 because their Executive's salary increased, and then were given an additional raise in 2013. Furthermore, since 2008, the City Attorney's salary has increased significantly; she received a 2.5% increase in pay in May, and has been recommended for an additional 2% raise in salary for October 2013. Mr. Becker's initial recommendation was to benchmark the members of the BCAA to the City Attorney, which would have meant a significantly higher raise. But in his Final Report he had abandoned that recommendation for his current random and unsupported salary recommendation.

Mr. Becker accepted, without any real analysis, the City's shop-worn mantra that the City's financial condition is precarious. The City's own budget documentation establishes a projected \$4.9M surplus for 2013-2014. The best evidence of the City's true financial condition is the City's spending. The BCAA produced evidence of the City's true financial condition, for example, the recent contract between the City Manager and the City, which belies any claim of financial insecurity. Yet Mr. Becker made no factual findings regarding the City's financial condition.

Mr. Becker's proposed salary recommendation: (1) ignores the already significant degradation in salary the members of the BCAA have suffered in light of the increase in the cost of living; (2) ignores the substantial gap between the BCAA salaries and comparable salaries for attorneys in comparable public entities; (3) increases the salary gap between the members of the BCAA and the City Attorney at a time when the members of the BCAA have been forced to take

on greater responsibilities because the City Attorney eliminated the position of Chief Assistant City Attorney; (4) and ignorantly accepts the City's misrepresentations regarding the instability of the City's financial condition, even when it was belied by evidence of the City's spending and the City's own financial experts have predicted a \$4.9M budget surplus.

Conclusion

The fact finding process involved a significant amount of effort without yielding output of any value, other than tentative agreement on existing benefits which could have been achieved by the City responding in writing, even once, to BCAA's several written proposals during the negotiation process. Regrettably, Mr. Becker's portion of the Factfinding Report and Recommendations does nothing more than observe that the parties are at impasse and make recommendations that are unsupported by fact-finding or law. I, therefore, dissent from the findings and recommendations.

Dated: October 28, 2013



Joseph H. McDougall,
BCAA Designated Member of Fact Finding Panel

The panel chair recommends that language be included in the CBA that provides that it is within the City Attorney's sole discretions to grant or terminate a flexible 9/80 schedule as proposed by the Association.

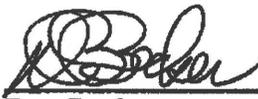
As to disciplinary/grievance procedures, the Association did not make a case that was either convincing or compelling enough to recommend changes over the objections of the City.

Utilization of Report

As written above several times, it is the panel chair's conclusion that the parties did not do enough to reach agreement on the subjects under discussion. Both parties have an obligation to "personally" meet to exchange freely information, opinions, and proposals, and endeavor to reach agreement

It is the hope of the panel chair that after receiving this report, the parties will meet to negotiate and be guided by the intent of Section 3505 of the MMB.

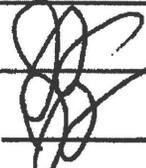
Respectfully submitted,


Don Becker Date 10-16-2013
Chair, Burbank Factfinding Panel

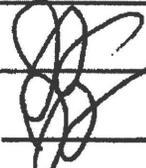
Concur _____

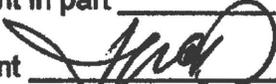
Concur _____

Concur in part _____

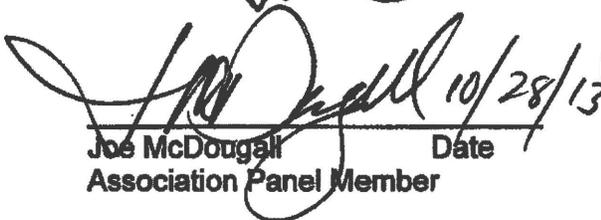
Concur in part  _____

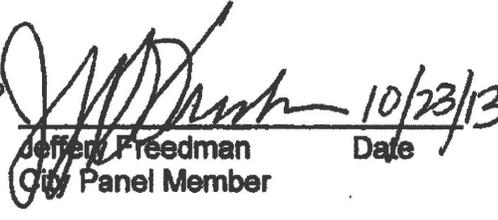
Dissent in part _____

Dissent in part  _____

Dissent  _____

Dissent _____


Joe McDougall Date 10/28/13
Association Panel Member


Jeffery Freedman Date 10/23/13
City Panel Member

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FACT FINDING PURSUANT TO ASSEMBLY BILL 646

IN RE THE MATTER OF:
BURBANK CITY ATTORNEYS ASSOCIATION
AND
CITY OF BURBANK

PERB CASE: LA-IM-139-M
CONCURRENCE AND PARTIAL
DISSENT

The undersigned sat as City panel member in a fact finding procedure between the Burbank City Attorneys Association (BCAA) and the City of Burbank (City) held on September 10, 11 and 12, 2013. The other members of the panel were BCAA designee Joseph H. McDougall and neutral Donald Becker. Mr. Becker sat as chair of the panel, having been so designated by the Public Employment Relations Board (PERB.)

Mr. Becker issued his recommendations pursuant to Government Code section 3505.5 on October 16, 2013. The undersigned concurs with Mr. Becker's recommendations with the following exceptions and therefore dissents as follows.

1. Salary

Mr. Becker recommends that the base pay rates for the positions in the BCAA bargaining unit (Senior Assistant City Attorney, Assistant City Attorney, Deputy City Attorney and Litigation Paralegal) be determined by setting 80% of the City Attorney salary as the target market salary for the Senior Assistant City Attorney and then moving the salary for that title toward the target using the distribution methodology the City used for Z Group salary increases

1 for Fiscal Year 13-14. This methodology results in a 1.58% salary increase for the Senior
2 Assistant City Attorney. The other BCAA titles would receive the same salary increase.

3 While I concur with the percentage increase Mr. Becker proposes, I do not agree with the
4 methodology Mr. Becker uses to arrive at the percentage increase. My view is that the City's
5 financial position and its ability to pay should be the primary factor in determining employee
6 compensation during periods of financial uncertainty.

7 **2. Term of Agreement & PERS**

8 Mr. Becker recommends an agreement that would last only eight and a fraction months,
9 expiring June 30, 2014. Labor peace and stability are generally best advanced by multiyear
10 agreements. Here, an agreement of more than one fiscal year, with increases in employee
11 payment of PERS member contribution up to the full eight percent, and with modest pay
12 increases, as proposed by the City during negotiations, would keep City labor costs predictable.
13 The City's goal with all labor groups is to move toward employees paying the full PERS member
14 contribution over the next few years, and the City has in fact achieved that goal with several
15 groups. A one year agreement with BCAA does not achieve this critical City goal.

16 **3. Duty to Meet and Confer**

17 Mr. Becker adds at the last page of his recommendations (at P. 12) a statement that "the
18 parties did not do enough to reach agreement." While it was certainly true that not enough was
19 done to reach agreement, I cannot agree with any implication that the City was at all responsible
20 for the breakdown in negotiations. As I read the record, I am of the view that the Association put
21 the City in a Catch 22 situation which made it impossible to reach agreement absent an immediate
22 and total capitulation to the Association's demands. BCAA began the process by submitting an
23 initial offer and stating essentially that if the offer was not accepted, the Association would take
24 the matter to fact finding. There were only five meetings, the first on February 26 and the last on
25 May 31, 2013; there was an additional meeting scheduled for April 5 that BCAA failed to attend.
26 Mr. Becker's report acknowledges that, "at the initial meeting the Association presented
27 proposals that cost in excess of 20%. In subsequent meetings, the Association proposals became
28 more extensive and costly" (P. 3). The City's offer, submitted April 2, was sent at BCAA's

1 request by email. BCAA continued to add new demands as late as May 31, the last meeting
2 between the parties. Then, BCAA declared impasse on June 7 without giving the City an
3 opportunity to respond to these new proposals or make a last, best and final offer.

4 Mr. Becker's report also notes that "both parties have an obligation to 'personally' meet to
5 exchange freely information, opinions, and proposals, and endeavor to reach agreement" (P. 12).
6 Much of the communication during negotiations did, in fact, occur over email rather than in
7 person at the table; however, this was done at BCAA's insistence and in opposition to the City's
8 explicitly stated desire to negotiate at the table (CT24 & 25). Throughout the negotiations, the
9 City made good faith efforts to engage BCAA in meaningful dialog regarding the issues and was
10 continually rebuffed. Mr. Becker's report cites a key attempt by the City to negotiate with BCAA
11 regarding the survey. In fact, the City requested to meet with BCAA on this subject multiple
12 times; BCAA rejected the City's requests. These requests regarding survey are only a few of
13 numerous examples of the City's ongoing efforts to fulfill its obligation to meet and confer in
14 good faith. The City was dealing with a party that did not really want to negotiate.

15 **4. Conclusion**

16 I cannot agree with Mr. Becker's recommendations as to use of percentages to set salary,
17 PERS member contribution or term of agreement. To that extent I dissent. Otherwise, I concur
18 with Mr. Becker's recommendations.

19 DATED: October __, 2013

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21 JEFFERY C. FREEDMAN,
22 City Designated Member of Fact Finding Panel
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