

The Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint against the Association on August 5, 2010. The Association filed an answer on August 25, 2010.

In Unfair Practice Case No. LA-CE-555-M (LA-CE-555-M), the Association filed an unfair practice charge against the City on August 19, 2009. PERB issued a complaint against the City on August 5, 2010. The City filed an answer on August 25, 2010.

In Unfair Practice Case No. LA-CE-564-M (LA-CE-564-M), the Association filed an unfair practice charge against the City on October 7, 2009. PERB issued a complaint on August 16, 2010, and the City filed an answer on August 25, 2010.

In Unfair Practice Case No. LA-CE-585-M (LA-CE-585-M), the Association filed an unfair practice charge against the City on December 23, 2009. PERB issued a complaint on August 13, 2010, and the City filed an answer on August 25, 2010.

PERB held an informal settlement conference covering all four cases on October 12, 2010, but none of the cases were settled. PERB held a formal hearing on February 22-24, 2011. With the receipt of the final post-hearing brief on May 24, 2011, the cases were submitted for decision.

FINDINGS OF FACT

Background

The City is a public agency within the meaning of MMBA section 3501(c) and PERB Regulation 32016(a).² The Association is an exclusive representative within the meaning of PERB Regulation 32016(b) of an appropriate unit of employees. Under MMBA sections 3509

² PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

and 3511, PERB has jurisdiction over the City, the Association, and the unit, except with regard to persons who are peace officers as defined in Penal Code section 830.1.

In 2008 and 2009, the City and the Association found themselves in a difficult situation. The Association's members were relatively underpaid, but the City was underfunded. The Association felt the need to increase compensation, while the City felt the need to cut compensation costs. This made for difficult bargaining.

LA-CE-555-M

Although the charge in LA-CE-555-M was not the earliest one to be filed, it covers the earliest period of time. The complaint alleges in part:

3. In or around October and November 2008, Charging Party [the Association] requested to commence negotiations with Respondent [the City] over a successor Memorandum of Understanding.
4. Respondent refused Charging Party's requests to commence negotiations in October and November 2008.
5. On or about December 30, 2008, Charging Party and Respondent began negotiating pursuant to Government Code section 3505.
6. During the parties' negotiations, Respondent refused to schedule negotiation sessions from February 5, 2009 to April 16, 2009, refused to discuss Charging Party's initial bargaining proposal; stated that it would never discuss Charging Party's initial bargaining proposal with Charging Party; and declared impasse when Charging Party insisted that Respondent discuss its initial bargaining proposal with Charging Party.

The complaint further alleges that by its conduct the City failed and refused to meet and confer in good faith.

The evidence at hearing showed that on October 18, 2008, the Association's chief negotiator, Ken George (George), contacted the City's chief negotiator, William Yanonis (Yanonis), and asked that they meet "prior to any negotiations." Yanonis agreed, and the two

met on October 23, 2008. During their discussion, Yanonis expressed uncertainty as to whether and to what extent the State of California (State) might withhold funds from the City. The two also discussed possible dates for negotiations.

On December 16, 2008, the Association's president, Chip Arias (Arias), contacted Yanonis and asked to begin negotiations "at your earliest convenience." Yanonis responded that he thought he should continue to deal with George on negotiation dates. He never refused to negotiate with the Association.

Negotiations began on December 30, 2009. The Association made its initial proposal, every item of which involved a significant increase in compensation. The base salary for non-sworn positions was proposed to increase by 3 percent twice a year for two years and then by 4 percent twice a year for two years. Even without compounding, this would represent an increase of 28 percent over four years. The City did not respond in detail to the Association's proposal but let it be known that it wanted no increases at all. The City encouraged the Association to get "creative" in other ways.

The parties met again on January 15, 2009. The City's management services director made a presentation on the City's deteriorating financial situation. What the State might do was still unknown. The City made no proposal.

The parties next met on February 5, 2009. Yanonis informed the Association that the City Council's direction was that there would be no wage increases. Yanonis also informed the Association that he would be on vacation for the month of March. The Association did not object.

The parties next met on April 16, 2006. The City's financial condition had continued to deteriorate. The City made its first comprehensive proposal, every item of which involved cost savings, including the following:

Eliminate holidays and effectuate one (1) furlough (unpaid day), or an equivalent number of unpaid furlough days.

The City informed the Association that this item was intended to provide a 5 percent annual cost savings.

In an exchange of e-mail messages later that month, Yanonis asked George for a list of all Association bargaining issues. George responded in part:

The only [proposal] we had on the table I guess would be our original proposal, which was never discussed. I'm thinking that it is dead according to your last counter.

Yanonis replied that the City's financial presentation on January 15, 2009, had been its response to the Association's proposal.

When the parties met again on May 1, 2009, the Association presented a proposal that was essentially the same as its initial proposal of December 30, 2009. The City rejected every item of the proposal and declared impasse. The Association caucused and returned with a more modest proposal, and the City withdrew its declaration of impasse. Both sides made concessions, and negotiations appeared to be on track toward agreement.

LA-CO-100-M

The complaint in LA-CO-100-M alleges in part:

3. During the period from October 18, 2008 to October 30, 2009, Respondent [the Association] and Charging Party [the City] were meeting and conferring pursuant to Government Code section 3505.

4. During this period of time, Respondent engaged in the following conduct: Respondent delayed scheduling negotiation sessions with Charging Party from May 14, 2009 until August 28, 2009 and then again from August 28, 2009 until October 30, 2009. Respondent made a regressive bargaining proposal on August 28, 2009; Respondent attended the October 30, 2009 negotiation session without sufficient authority to reach an agreement.

The complaint further alleges that by its conduct the Association failed and refused to meet and confer in good faith.

The evidence at hearing showed that on May 14, 2009, progress toward an agreement was derailed. The City presented to the Association a comprehensive package proposal that was different from its previous proposals. For one thing, the package proposal specified a two-year term. Moreover, in the first year employees were to be “assigned thirteen (13) unpaid vacation days and/or unpaid holidays.” The Association found the unpaid vacation provision unacceptable. In fact, as the City later learned, it would have been illegal to implement the provision.

The Association decided to retain legal counsel. On June 11, 2009, George informed Yanonis that attorney Michael McGill (McGill) would be “handling negotiations from this point forward.” On June 12, 16 and 23, 2009, Yanonis attempted to contact McGill to schedule further negotiations. On June 24, 2009, McGill made an information request, to which Yanonis responded on July 8, 2009. On August 7, 2009, McGill and Yanonis agreed to schedule negotiations for August 27 and 28, 2009.

On August 27, 2009, the City presented a revised two-year package proposal. In both years, employees were to “receive a five percent (5%) wage offset or; [sic] thirteen (13) unpaid vacation days.” The City apparently still did not know that the unpaid vacation provision would be illegal.

On August 28, 2009, the Association made a two-year proposal of its own, stating for the first time that it “will accept furloughs of 104 work hours for each year.” The Association also proposed binding arbitration, layoff protection, and time for donning and doffing uniforms, all for the first time.

On September 3, 2009, Yanonis sent McGill an e-mail message with another revised package proposal, this one with a term of two-and-a-half years (December 19, 2008, through June 17, 2011). For the first time, the City proposed furlough hours, not unpaid vacation or unpaid holidays. The City did not offer binding arbitration, layoff protect, or time for donning and doffing uniforms. The parties met again on September 10, 2009, but there were no new proposals. When the parties met again on September 29, 2009, the City made what it called its “Last/Best/Final Offer” (LBFO), which was the same as its proposal of September 3, 2009.

The Association agreed to take the LBFO to its members for a vote, and proceeded to do so. At some point, the parties agreed to meet again on October 30, 2009. On October 28, 2009, McGill sent Yanonis a letter stating:

As you know, I called you yesterday and left a message stating that due to unforeseen issues, I would have to cancel contract negotiations scheduled for October 30, 2009. As I said, I do have some availability next week if you are free.

Since that time, I have been informed that the POA [Association] negotiation team remains free to meet with you and receive any information the City needs to pass along. As I informed you in my message, the POA voted unanimously to reject the City’s impasse procedure and any further information.

Unless I hear that the meeting is unnecessary, I will advise the negotiation team to attend the meeting as previously agreed on October 30, 2009 at 9:00 a.m.

At the meeting on October 30, 2009, the Association was represented by its president, Bryan Dillard (Dillard), instead of McGill. Dillard hand-delivered McGill’s letter of October 28, 2009, to Yanonis, who had not previously received the letter or the phone message referenced in it. Yanonis in turn hand-delivered a letter initiating impasse procedures. Yanonis scheduled an impasse meeting for November 6, 2009, but asked the Association to waive the impasse meeting and proceed to mediation. Dillard declined to waive the impasse meeting in McGill’s absence, but McGill later waived it on the Association’s behalf.

The complaint in LA-CE-564-M alleges in part:

3. On or about September 29, 2009, Respondent [the City] acting through its agent Chief Negotiator and Human Resources Director William Yanonis, advised Charging Party's [the Association's] bargaining team that it was in Charging Party's best interests to immediately agree to Respondent's last, best and final contract proposal because all terms, including Respondent's proposed 5% pay cut to employees' wages, would be retroactive to the commencement of contract negotiations.

The complaint further alleges that by its conduct the City interfered with the Association's rights.

Association President Dillard was questioned and testified as follows about the end of negotiations on September 29, 2009, after the City made its LBFO:

Q Now at the conclusion of that meeting there was some discussion and statements made by Mr. Yanonis. Do you recall what he said?

A Yes, I do.

Q What was it?

A We [the Association's bargaining team] were actually just getting up to walk out. I had actually just stood up or was standing up when he made a comment to the effect of the longer this takes, the more damaging this is going to be to your employees. I remember sitting immediately – I remember it was just very vivid that we, just because of what happened next. You [McGill] were standing up and had your papers in your hand and turned and sat right back down, which left us standing, those of us who were still standing looking at each other, so we quickly sat down following your lead, and I remember you asked him to explain what he meant by that.

Q And what did he say?

A He went into, again the longer this process takes to come to an agreement for the MOU [Memorandum of Understanding] and turn into a contract, and he did state something to the effect the narrower the window became for the City to recover its cost savings that it was trying to get.

Q And what did you understand that to mean?

A My understanding was the two year agreement that it would narrow that window, I understood that as their frustration in trying to get this done. But he never really was specific as to how it would be more damaging, other than it would be more costly. And he didn't say how. He didn't specify. It was kind of vague and ambiguous as far as he just left it open for us. It was almost like let your mind run riot over what's going to happen next.

Q Did he indicate one way or another whether the time spent negotiating, the months it had taken to negotiate, that the City was going to recoup their savings from that period of time?

A I understood that - - He didn't say that, no, not specifically. He didn't give a specified time limit either, so there was no percentage given. I guess it was going to be more costly.

The testimony of Yanonis himself, while less vivid, was generally consistent with Dillard's testimony on this point.

Yanonis had made similar statements in e-mail messages to Association representatives. In a message to George dated May 28, 2009, he stated:

Also, I have notified the other bargaining units that as holidays pass, and the time frame for effectuating unpaid leave shrinks, the initial impact to the bargaining unit may be greater, i.e., instead of the reduction(s) being spread out over a longer period of time, it may be necessary to attain these savings in a shorter time frame which will result a greater one-time effect on the employees involved.

Yanonis made essentially the same statement in a message to George dated June 5, 2009.

In a message to McGill dated September 4, 2009, Yanonis stated:

As for the 5% wage offset remaining, at this time the option would be with the LPOA. However, as I mentioned at our last negotiating session, as the window of opportunity for effectuating furlough days closes, the City is reserving the right to shift back to a 5% wage offset. I mentioned to the prior LPOA Rep (Ken George) that I am concerned the longer this negotiation goes on,

the probability employees will experience a greater one time economic impact increases.

Yanonis was not more specific about the possible “greater one-time effect” or “greater one time economic impact” on employees.

LA-CE-585-M

The complaint in LA-CE-585-M alleges in part:

3. During the period of time from October 23, 2009 through August 27, 2009, Respondent [the City] and Charging Party [the Association] were meeting and conferring pursuant to Government Code section 3505.

4. While the parties were meeting and conferring pursuant to Government Code section 3505, Respondent presented Charging Party with a last, best, and final offer, which provided in relevant part:

In the first year period of this [Memorandum of Understanding] (December 19, 2008 through June 30, 2010) an employee will receive a five percent (5%) salary offset or; an employee shall be assigned the total equivalent of one hundred and four (104) furlough work hours. Prior to February 1, 2010, and with two weeks notice to their immediate supervisor, employees may request unpaid furlough hours. Requests must be made in a minimum of four (4) hour increments and shall be granted based on the operational need of the department. An employee who fails to schedule off the required amount of furlough hours by February 1, 2010, shall be unilaterally assigned such remaining furlough hours by the department prior to June 18, 2010.

In the second period of this agreement (July 1, 2010 through June 17, 2011) an employee will receive a five percent (5%) salary offset or; an employee shall be assigned the total equivalent of one hundred and four (104) furlough work hours. Prior to February 1, 2011, and with two weeks notice to their immediate supervisor, employees may request unpaid furlough hours. Requests must be made in four (4) hour increments and shall be granted based on the operational need of the department. An employee who fails to schedule off the required amount of furlough hours by February 1, 2011, shall be

unilaterally assigned such days by the department prior to June 17, 2011.

5. On or about December 18, 2009, Charging Party and Respondent participated in impasse procedures pursuant to Respondent's local rules.

6. While Charging Party and Respondent were participating in impasse procedures, Respondent presented Charging Party with a revised last, best, and final offer, which provided in relevant part:

A one-year salary reduction of 5% (which will result in a salary cost savings of \$249,365[]). The City originally proposed that this reduction be effective beginning June 20, 2009 through June 20, 2010. However, as the parties were not able to reach agreement prior to June 20, 2009, the City proposes modifying the terms of the reduction to account for the passage of time.

The City now proposes a 10.769% reduction for 12 consecutive pay-periods (effective for the pay period paid on January 22, 2010 through June 18, 2010). This change in percentage over a shorter period of time still results in the same cost savings of \$249,365.

The complaint further alleges that by its conduct the City failed and refused to participate in impasse procedures in good faith and also retaliated against the Association.

The complaint accurately quotes from the City's LBFO of September 29, 2009. That LBFO remained unchanged until December 18, 2009, when the parties went to mediation. The mediator was unable to bring the parties to agreement. At the end of mediation, the City gave the mediator what it called its "Revised Last/Best/Final Offer" (Revised LBFO) to give to the Association. There was no further mediation or negotiation.

The complaint accurately quotes from the City's Revised LBFO, which proposed for the first time a 10.769 percent salary reduction. On January 5, 2010, the City implemented its Revised LBFO, including the 10.769 percent reduction.

ISSUES

1. Did the City make an unlawful unilateral change?
2. Did the City retaliate against the Association?
3. Did the City threaten the Association?
4. Did the City bargain in bad faith?
5. Did the Association bargain in bad faith?

CONCLUSIONS OF LAW

Unilateral change

At the center of this case is what happened at the end: the City's unilateral implementation of a salary reduction of 10.769 percent for the 12 pay periods paid on January 22, 2010, through June 18, 2010. The Association alleges that this was an unlawful unilateral change.

In determining whether a party has violated Government Code section 3505 and PERB Regulation 32603(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (*Stockton Unified School District* (1980) PERB Decision No. 143.)³ Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (*San Joaquin County Employees Association v. City of Stockton* (1984) 161 Cal.App.3d 813; *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802; *Grant Joint Union High School District* (1982)

³ When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

PERB Decision No. 196; *Walnut Valley Unified School District* (1981) PERB Decision No. 160.)

At all times relevant to this case, MMBA section 3505.4 stated:

If after meeting and conferring in good faith, an impasse has been reached between the public agency and the recognized employee organization, and impasse procedures, where applicable, have been exhausted, a public agency that is not required to proceed to interest arbitration may implement its last, best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law.

In the present case, the City unilaterally implemented, after impasse, a salary reduction of 10.769 percent for the 12 pay periods paid on January 22, 2010, through June 18, 2010.

As the City's Revised LBFO acknowledged, the City had previously proposed a 5 percent salary reduction to be effective June 20, 2009, through June 20, 2010. That was the proposal that was negotiated to impasse and went through mediation. The Revised LBFO with its 10.769 percent reduction was never subject to negotiation or mediation. The Revised LBFO was presented only when all negotiation and mediation had ended. At that point, it was not even a "take it or leave it" proposal. It was simply a matter of "take it."

In its post-hearing brief, the Association points to the similar case of *Laguna Salada Union High School District* (1995) PERB Decision No. 1103 (*Laguna Salada*). In that case, the employer had negotiated to impasse a proposal to reduce salaries by 1.76 percent for ten months, effective July 1, 1992. On June 15, 1993, after impasse procedures were completed, the employer implemented a one-month salary reduction of 17.6 percent. PERB held: (1) that the methodology used to make adjustments in employee wages is a negotiable subject, just as is the level to which wages are to be adjusted; (2) the employer's salary reduction proposal did

not reasonably comprehend the salary reduction methodology it implemented; and (3) the implementation therefore constituted an unlawful unilateral change. I reach all the same conclusions here.

Retaliation

The Association alleges that the 10.769 percent salary reduction was not only an unlawful unilateral change but was also an act of retaliation for the Association's participation in bargaining and impasse procedures. To demonstrate that an employer retaliated against employees in violation of Government Code section 3506 and PERB Regulation 32603(a), the charging party must show that: (1) the employees exercised rights under MMBA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employees; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210; *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416; *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553.)

In its post-hearing brief, the Association argues that even if the 10.769 percent salary reduction had been comprehended by the City's unrevised LBFO, it would have been unlawfully retaliatory, because it took into account the passage of time while the Association exercised its rights to negotiation and mediation. This argument goes too far.

If the Association's argument were correct, an employer's last, best, and final offer could never legally comprehend a salary reduction methodology that takes account of the passage of time during negotiations and impasse procedures. If this were true, PERB's analysis of what was comprehended in the employer's salary proposal in *Laguna Salada*, *supra*, PERB Decision No. 1103 would have been pointless, and PERB's holding that salary

reduction methodology is a negotiable subject would not have its plain and ordinary meaning.

I reject the argument and dismiss the allegation of retaliation.

Threat

The Association alleges that the City interfered with the Association by making an unlawful threat. To demonstrate a prima facie case of interference, a charging party must show that the respondent's conduct tends to or does result in some harm to employee rights guaranteed by the Act. (*Carlsbad Unified School District* (1979) PERB Decision No. 89 at p. 10.) In *Chula Vista City School District* (1990) PERB Decision No. 834, at pp. 10-13, the Board stated:

As more fully explained below, employer speech causes no cognizable harm to employee rights granted under EERA unless it contains "threats of reprisal or force or promise of a benefit." Therefore, a prima facie case of interference cannot be based on speech that contains no "threats of reprisal or force or promise of a benefit."

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In *Rio Hondo Community College District* (1980) PERB Decision No. 128, pages 18-20, this Board looked to the National Labor Relations Act (NLRA) for guidance in formulating a test for determining when employer communications will be considered violative of the provisions of EERA. Specifically, the Board examined section 8(c) of the NLRA which provides:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit. [Fn. omitted.]

Noting that EERA contains no provision parallel to section 8(c), the Board nevertheless found that "a public school employer is entitled to express its views on employment-related matters over which it has legitimate concerns in order to facilitate full and knowledgeable debate" and set forth the test to be applied as follows:

[T]he Board finds that an employer's speech which contains a threat of reprisal or force or promise of benefit will be perceived as a means of violating the Act and will, therefore, lose its protection and constitute strong evidence of conduct which is prohibited by section 3543.5 of the EERA. (*Id.* at p. 20.)

Whether the employer's speech is protected or constitutes a proscribed threat or promise is determined by applying an objective rather than a subjective standard. (*California State University* (1989) PERB Decision No. 777-H, P.D., p. 8.) Thus, "the charging party must show that the employer's communications would tend to coerce or interfere with a reasonable employee in the exercise of protected rights." The fact, "That [sic] employees may interpret statements, which are otherwise protected, as coercive does not necessarily render those statements unlawful." (*Regents of the University of California* (1983) PERB Decision No. 366-H, fn. 9, pp. 15-16; *BMC Manufacturing Corporation* (1955) 113 NLRB 823 [36 LRRM 1397].)

The Board has also held that statements made by an employer are to be viewed in their overall context (i.e., in light of surrounding circumstances) to determine if they have a coercive meaning. (*Los Angeles Unified School District* (1988) PERB Decision No. 659, p. 9, and cases cited therein.)

Additionally, the Board has placed considerable weight on the accuracy of the content of the speech in determining whether the communication constitutes an unfair labor practice. (*Alhambra City and High School Districts* (1986) PERB Decision No. 560, p. 16; *Muroc Unified School District* (1978) PERB Decision No. 80, pp. 19-20.) Thus, where employer speech accurately describes an event, and does not on its face carry the threat of reprisal or force, or promise of benefit, the Board will not find the speech unlawful.

In the present case, the Association alleges that Yanonis made an unlawful threat on September 29, 2009, after the City made its LBFO.

The PERB complaint alleges that Yanonis told the Association's bargaining team that the LBFO, including the proposed 5 percent salary reduction, "would be retroactive to the commencement of contract negotiations." The evidence did not show that Yanonis made such

a statement. The evidence did show that Yanonis said that the longer the negotiations took, the narrower the window for cost savings would be, and the greater the damage to the employees would be.

I note that Yanonis made his statements in the context of bargaining, and only to the Association's bargaining representatives. Under *Laguna Salada, supra*, PERB Decision No. 1103, as I understand it, Yanonis could have proposed in bargaining a salary reduction methodology that concentrated the impact of a salary reduction into a shorter period of time the later the implementation occurred. Yanonis seems to have been suggesting such a methodology.

The problem with what Yanonis did is that he failed to turn his suggestions into a specific proposal on salary reduction methodology, which would then have been subject to bargaining and impasse procedures. This failure turned the implementation of a specific salary reduction methodology into an unlawful unilateral change, but I do not believe it also turned the suggestions into unlawful threats.

Bad faith

Each party alleges that the other engaged in bad faith surface bargaining. Bargaining in good faith is a "subjective attitude and requires a genuine desire to reach agreement." (*Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9, 25 (*Placentia Fire Fighters*)).) PERB has held it is the essence of surface bargaining that a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement. (*Muroc Unified School District* (1978) PERB Decision No. 80.) Where there is an accusation of surface bargaining, PERB will resolve the question of good faith by analyzing the totality of the accused party's conduct. The Board weighs the facts to determine whether the conduct at issue "indicates an intent to subvert the

negotiating process or is merely a legitimate position adamantly maintained.” (*Oakland Unified School District* (1982) PERB Decision No. 275; *Placentia Fire Fighters*, at p. 25.)

The indicia of surface bargaining are many. Entering negotiations with a “take-it-or-leave-it” attitude evidences a failure of the duty to bargain because it amounts to merely going through the motions of negotiations. (*General Electric Co.* (1964) 150 NLRB 192, 194, enf. 418 F.2d 736.) Recalcitrance in the scheduling of meetings is evidence of manipulation to delay and obstruct a timely agreement. (*Oakland Unified School District* (1983) PERB Decision No. 326.) Dilatory and evasive tactics including canceling meetings or failing to prepare for meetings is evidence of bad faith. (*Ibid.*) Conditioning agreement on economic matters upon prior agreement on non-economic subjects is evidence of an unwillingness to engage in a give-and-take. (*State of California (Department of Personnel Administration)* (1998) PERB Decision No. 1249-S.)

Other factors that have been held to be indicia of surface bargaining include: negotiator’s lack of authority which delays and thwarts the bargaining process (*Stockton Unified School District, supra*, PERB Decision No. 143); insistence on ground rules before negotiating substantive issues (*San Ysidro School District* (1980) PERB Decision No. 134); and renegeing on tentative agreements the parties already have made (*Charter Oak Unified School District* (1991) PERB Decision No. 873; *Stockton Unified School District, supra*; *Placerville Union School District* (1978) PERB Decision No. 69).

It is clear, however, that while a party may not merely go through the motions, it may lawfully maintain an adamant position on any issue. Adamant insistence on a bargaining position is not necessarily refusal to bargain in good faith. (*Placentia Fire Fighters, supra*, 57 Cal.App.3d 9, 25; *Oakland Unified School District, supra*, PERB Decision No. 275.) “The

obligation of the employer to bargain in good faith does not require the yielding of positions fairly maintained.” (*NLRB v. Herman Sausage Co.* (5th Cir. 1960) 275 F.2d 229.)

In the present case, the allegations of surface bargaining were often not proven and were generally insufficient to establish bad faith. The City did not refuse to commence negotiations in October and November 2008, as alleged. The City’s chief negotiator did take a vacation in March 2009, but the Association did not object. The City did not respond in detail to the Association’s initial proposal, but it did clearly communicate and explain a position that applied to every aspect of that proposal: that the City could not agree to increases in compensation. The City did declare impasse on May 1, 2009, but it withdrew the declaration the same day when the Association made a more modest proposal.

For its part, the Association did delay scheduling negotiation sessions from May 14, 2009, to August 28, 2009, but this was because the Association needed to retain legal counsel, at least in part because the City had unexpectedly proposed an illegal unpaid vacation provision. The Association did raise new issues in its proposal of August 28, 2009, but that proposal also accepted 104 hours of furloughs for the first time. The Association did not delay scheduling negotiation sessions from August 28, 2009, until October 30, 2009; in fact the parties met twice in that time period, on September 10 and 29, 2009. The Association’s chief negotiator did miss the meeting of October 30, 2009, but by then negotiations had ended in impasse, and the chief negotiator later waived the impasse meeting as the City had requested.

I conclude that all allegations of bad faith surface bargaining must be dismissed.

REMEDY

MMBA section 3509(b) states in part:

The initial determination as to whether the charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board [PERB].

In the present case, the City has been found to have violated the MMBA by unilaterally implementing a salary reduction without negotiating the salary reduction methodology. It is therefore appropriate to order the City to cease and desist from such conduct.

In *Laguna Salada, supra*, PERB Decision No., 1103, the parties had stipulated in part:

The parties further STIPULATE that the Charging Party shall not request, [n]or shall PERB order, “make whole” relief in this case; provided that, all other remedies customarily available to PERB shall be available in this case.

PERB stated in response:

The Board’s statutory remedial powers cannot be limited or constrained by stipulation of the parties. Therefore, this section of the stipulation has no effect on PERB’s authority.

However, the main purpose of EERA section 3541.5 (c) is to empower the Board to take what actions it deems necessary to effectuate the policies of EERA. A primary purpose of EERA is to enhance stability in employer-employee relations and promote the collective resolution of issues and disputes. Since the parties appear to have reached agreement with regard to the issue of any make whole remedy in this case, the Board concludes that it is appropriate to give deference to that agreement. Therefore, the Board will not include a make whole order as part of its remedy in this case.

It thus appears that in a case involving a *Laguna Salada* violation, a make whole remedy is appropriate, unless the parties agree otherwise.

MMBA section 3511 states:

The changes made to Sections 3501, 3507.1, and 3509 of the Government Code by legislation enacted during the 1999-2000 Regular Session of the Legislature shall not apply to persons who are peace officers as defined in Section 830.1 of the Penal Code.

PERB’s remedial authority under MMBA section 3509 thus does not extend to persons who are peace officers. The make whole remedy that PERB can order therefore does not extend to unit members who are peace officers as defined in Section 830.1 of the Penal Code.

It is also appropriate to order the City to post a notice incorporating the terms of the order in this case. (*Placerville Union School District, supra*, PERB Decision No. 69.)

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaints and the underlying unfair practice charges in Case No. LA-CO-100-M, *City of Lompoc v. Lompoc Police Officers Association*, and Cases Nos. LA-CE-555-M and LA-CE-564-M, *Lompoc Police Officers Association v. City of Lompoc*, are hereby DISMISSED.

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found in Case No. LA-CE-585-M, *Lompoc Police Officers Association v. City of Lompoc*, that the City of Lompoc (City) violated the Meyers-Milias-Brown Act (Act), Government Code sections 3503, 3506 and 3509(b), by unilaterally implementing a salary reduction without negotiating the salary reduction methodology with the Lompoc Police Officers Association (Association). All other allegations are hereby DISMISSED.

Pursuant to section 3509(b) of the Government Code, it hereby is ORDERED that the City, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

Unilaterally implementing a salary reduction without negotiating the salary reduction methodology with the Association.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Make whole those unit members who are not peace officers as defined in Section 830.1 of the Penal Code and who suffered a salary reduction of 10.769 percent for the 12 pay periods paid on January 22, 2010, through June 18, 2010, unless the City and the Association agree otherwise.

2. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the City customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the City, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on the Association.

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

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

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

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code,

§ 11020, subd. (a).) A document is also considered “filed” when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)

Thomas J. Allen
Administrative Law Judge

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California**



After a hearing in Unfair Practice Case No. LA-CE-585-M, *Lompoc Police Officers Association v. City of Lompoc*, in which all parties had the right to participate, it has been found that the City of Lompoc violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq., by unilaterally implementing a salary reduction without negotiating the salary reduction methodology with the Lompoc Police Officers Association (Association).

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

Unilaterally implementing a salary reduction without negotiating the salary reduction methodology with the Association.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE MMBA:

Make whole those unit members who are not peace officers as defined in Section 830.1 of the Penal Code, who suffered a salary reduction of 10.769 percent for the 12 pay periods paid on January 22, 2010, through June 18, 2010, unless the City and the Association agree otherwise.

Dated: _____

CITY OF LOMPOC

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.