STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SACRAMENTO COUNTY ATTORNEYS ASSOCIATION, Charging Party, v. COUNTY OF SACRAMENTO, Respondent.	Case No. SA-CE-387-M PERB Decision No. 1943-M February 14, 2008
SACRAMENTO COUNTY PROFESSIONAL ACCOUNTANTS ASSOCIATION, Charging Party, v. COUNTY OF SACRAMENTO, Respondent.	Case No. SA-CE-388-M

Appearances: Carroll, Burdick & McDonough by Gary M. Messing and Jason H. Jasmine, Attorneys, for Sacramento County Attorneys Association and Sacramento County Professional Accountants Association; Krista C. Whitman, Attorney, for County of Sacramento.

Before Neuwald, Chair; McKeag and Wesley, Members.

DECISION

NEUWALD, Chair: These cases are before the Public Employment Relations Board (PERB or Board) on appeal by the Sacramento County Attorneys Association (SCAA) and the Sacramento County Professional Accountants Association (SCPAA)[1] of a proposed decision by an administrative law judge (ALJ). These consolidated cases alleged that the County of

[1]Collectively the SCAA and SCPAA shall be referred to as the Associations.

Sacramento (County) unilaterally changed the eligibility criteria for future retirees' participation in the Retiree Health Insurance Program in violation of the Meyers-Milias-Brown Act (MMBA).[2] The ALJ dismissed the complaint and underlying unfair practice charge finding the issue moot because the County rescinded the change in policy.

The Board reviewed the entire record in this matter, including the unfair practice charge, complaint, stipulated record, the Associations' statement of exceptions, the County's response thereto, and supplemental briefing requested by the Board.[3] Based upon this review, the Board hereby reverses the ALJ's proposed decision and finds a violation in accordance with the discussion below.

PROCEDURAL HISTORY

On April 17, 2006, the Associations filed unfair practice charges against the County. On July 8, 2006, the PERB General Counsel's Office issued a complaint alleging that the County breached its duty to meet and confer in good faith when it unilaterally changed future retirees eligibility to receive medical offset payments effective January 1, 2007, interfered with the Associations' right to represent bargaining unit employees, and interfered with the rights of

[2]The MMBA is codified at Government Code section 3500, et seq. Unless otherwise specified, all statutory references are to the Government Code.

[3]On appeal, the Associations present new charge allegations and new supporting evidence not previously presented to the ALJ. PERB Regulation 32635(b) precludes a charging party from raising new allegations or new supporting evidence on appeal without good cause. The Associations fail to demonstrate good cause. The new evidence submitted by the Associations goes to the new allegation. As such, the Board does not address the new evidence presented. (PERB regs. are codified at Cal. Code of Regs., tit. 8, sec. 31001, et seq.)

unit employees to be represented, in violation of MMBA sections 3503, 3505 and 3506,[4] and PERB Regulation 32603(a), (b), and (c).[5]

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[4]MMBA section 3503 provides in relevant part:

> Recognized employee organizations shall have the right to represent their members in their employment relations with public agencies.

Section 3505 states:

> The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.
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> '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 prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent.

Section 3506 states:

> Public agencies and employee organizations shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502.

[5]Regulation 32603 provides, in relevant part, that it is an unfair practice for a public agency to do any of the following:

On June 28, 2006, the County answered the complaint, admitting certain charges, denying all substantive allegations, and asserting the affirmative defense that it was not obligated to bargain the proposed change in the Retiree Health Insurance Program (RHIP). Two informal settlement conferences were conducted on July 10 and August 11, 2006, but the dispute was not resolved.

On September 25, 2006, a formal hearing was scheduled in Sacramento. Testimony was not taken due to the parties' stipulation to submit a statement of undisputed/stipulated facts (Statement). The parties presented 12 joint exhibits. The Statement was received as joint exhibit 13. On December 1, 2006, the cases were submitted for decision following receipt of post-hearing briefs. The ALJ's proposed decision was issued on January 22, 2007.

(a) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(b) Deny to employee organizations rights guaranteed to them by Government Code section 3503, 3504.5, 3505.1, 3505.3, 3507.1, 3508(d) or 3508.5 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith with an exclusive representative as required by Government Code section 3505 or any local rule adopted pursuant to Government Code section 3507.

FINDINGS OF FACT

Jurisdiction

SCAA and SCPAA are recognized exclusive representatives within the meaning of PERB Regulation 32016(b). The County is a public agency under PERB Regulation 32016(a),[6] and Section 3501(c).[7]

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[6]In pertinent part, PERB Regulation 32016 provides:

> (a) Public agency. 'Public agency' means every governmental subdivision, every district, every public and quasi-public corporation, every public agency and public service corporation, every town, city, county, city and county and municipal corporation, whether incorporated and whether chartered or not. For purposes of these regulations, the term 'public agency' shall exclude the City of Los Angeles, County of Los Angeles, and superior and municipal courts, and does not mean a school district or a county board of education or a county superintendent of schools or a personnel commission in a school district having a merit system as provided in Chapter 5 (commencing with Section 45100) of Part 25 and Chapter 4 (commencing with Section 88000) of Part 51 of the Education Code or the State of California. The term 'public agency,' as used herein, also excludes any transit agency not subject to the MMBA.
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> (b) Exclusive representative. References in these regulations to an 'exclusive representative' means an employee organization that has been recognized or certified as an exclusive or majority bargaining agent pursuant to MMBA.

[7]Section 3501(c) states:

> (c) Except as otherwise provided in this subdivision, 'public agency' means every governmental subdivision, every district, every public and quasi-public corporation, every public agency and public service corporation and every town, city, county, city and county and municipal corporation, whether incorporated or not and whether chartered or not. As used in this chapter, 'public agency' does not mean a school district or a county board of education or a county superintendent of schools or a personnel commission in a school district having a merit system as provided in Chapter 5 (commencing with Section 45100) of Part 25 and Chapter 4 (commencing with Section 88000) of Part 51 of the Education Code or the State of California.

Stipulated Facts

SCAA is the recognized exclusive representative for non-supervisory and supervisory attorneys employed by the County working in the offices of the District Attorney, the Public Defender and the Department of Child Support Services. SCAA and the County are parties to a valid memorandum of understanding with a term of December 30, 2001 through June 30, 2006 (SCAA MOU).

SCPAA is the recognized exclusive representative for non-supervisory accountants and auditors employed by the County. SCPAA and the County are parties to a valid memorandum of understanding with a term of February 23, 2003 through June 30, 2006 (SCPAA MOU).

On or about December 28, 2005, SCAA notified the County of its intent to terminate the SCAA MOU effective June 30, 2006, and commence negotiations for a successor agreement as soon as possible. SCAA advised the County that Gary Messing (Messing) would serve as SCAA's chief negotiator.

On or about January 30, 2006, SCPAA notified the County of its intent to terminate the SCPAA MOU and commence negotiations for a successor agreement. SCPAA identified Messing as its chief negotiator for contract negotiations with the County.

The County has maintained the RHIP since 1980. Based on annual determinations of the County Board of Supervisors, eligible County retirees have been provided a health insurance offset payment to assist them with the purchase of health insurance. Offset payments to retirees are calculated based on the retiree's service credit. Retirees who participate in the RHIP are not vested in the offset payments.

County employees were eligible to participate in the RHIP in effect for the year 2006 as follows:

> Individuals who leave active employment with at least 10 years of service in [Sacramento County Employees' Retirement Service] SCERS, or due to industrial or non-industrial disability regardless of years of service, are eligible to participate in the [RHIP]. [Jt. Exhibit 4.]

On or about January 26, 2006, the County forwarded a written proposal to SCAA and SCPAA advising that the Board of Supervisors would be holding a public hearing on January 31, 2006, to consider changes to the RHIP for calendar year 2007. While the County proposed to maintain the existing level of medical offset payments to exiting retirees for calendar year 2007, the County proposed to limit the number of current employees who could participate in the RHIP after January 1, 2007. The County stated that the proposed "policy change will eliminate the eligibility for offset payments for many future retirees."

Upon receiving the County's proposal, SCAA and SCPAA directed letters to the County advising that such changes to the RHIP are within the scope of representation and may not be implemented unilaterally. SCAA and SCPAA asked the County not to implement the changes for current employees who may retire in the future.

The County conceptually approved the proposed changes to the RHIP on February 7, 2006.

On or about March 17, 2006, the County notified SCAA and SCPAA that the Board of Supervisors would be considering the proposed changes to the RHIP at its March 28, 2006, hearing. Specifically, the County proposed to limit eligibility for current County employees to participate in the RHIP as follows:

> Any Annuitant who left County employment on or after January 1, 2007 having worked for at least 10 years in SCERS-covered employment, and having attained at least 60 years of combined age and service prior to January 1, 2007, and who begins receiving SCERS pension payments within 120 days of leaving SCERS-covered employment; or

> Any Annuitant retiring on or after January 1, 2007 who is granted a service-connected disability retirement from SCERS, regardless of years of service. [Emphasis in original.]

The County's Director of Labor Relations stated that if any employee organization desired to meet on the matter, they should notify his office no later than March 24, 2006.

SCAA and SCPAA sent letters to the County's Director of Labor Relations on March 22, 2006, contending that the proposed changes in the RHIP for current SCAA and SCPAA represented employees who retire after January 2007 are within the scope of representation, and requested to meet and confer over the matter. SCAA and SCPAA also reminded the County of their requests to bargain for new contracts, and that proposals pertaining to a RHIP should be presented in the context of those negotiations.

The County approved and implemented the proposed eligibility changes to the RHIP on March 28, 2006.

On April 19, 2006, the County responded to SCAA's and SCPAA's earlier correspondence. The County asserted its view that the RHIP relates to benefits which are peculiar to retirees, and thus is not subject to mandatory bargaining and has never been made the subject of permissive bargaining. The County further stated that the "County is not willing to bargain the subject matter."

SCAA and the County held their first bargaining session for a new MOU on June 2, 2006. During the second bargaining session on June 27, 2006, SCAA opened the issue of retiree health benefits and made a proposal for retiree health benefits. The County rejected SCAA's proposal.

On May 31, 2006, SCPAA and the County commenced bargaining for a successor MOU. SCPAA opened the issue of retiree health benefits during the second bargaining

session, on June 27, 2006, and subsequently made a specific proposal on the matter. The County rejected SCPAA's proposal for retiree health benefits.

On September 12, 2006, prior to the effective date of the eligibility changes to the RHIP for 2007, the Board of Supervisors approved a revised RHIP, which returned to the 2006 eligibility requirements and deleted the provisions that affected current employees who would retire on or after January 1, 2007. The County's recommendation to the Board of Supervisors stated that "based on subsequent discussions with County Counsel and Labor Relations, we have determined that it would be a prudent business practice to continue discussions with labor organizations regarding implementation of a retiree health savings plan" and "we recommend a return to the 2006 eligibility requirements while staff continues discussion with labor organizations to develop a retiree health savings plan."

ASSOCIATIONS' EXCEPTIONS

The Associations except to the ALJ's conclusion that the issue was moot due to the County's rescission of its unilateral implementation. Specifically, the Associations argue:

> [A]ll of the evidence in the record shows that although the County did rescind its unilateral implementation, it never changed its position that it was not obligated to bargain. Further, there was certainly nothing in the record to suggest that the County has somehow lost its power to renew the conduct. To the contrary, the County's September 2006 rescission said that the County would only discuss 'implementation' of its changes.
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> The record clearly reflects that the Associations had made their own proposals with regard to future medical benefits for current employees. [Citation.] Yet the County continues to refuse to bargain in good faith, and that portion of the Associations' claims (the County's refusal to bargain in good faith) have never been addressed. [Citation.]
> (Emphasis in original; fn. omitted.)

In response to the Board's request for supplemental briefing, the Associations argue that "the County [had] a mandatory obligation to bargain any proposed changes to retirement health benefits for current employees" because the County made changes to the eligibility criteria for current County employees.

COUNTY'S RESPONSE

The County argues that:

1. "Although the stipulated facts support Charging Parties' assertion that the County was unwilling to bargain the subject matter, none of the stipulated facts or exhibits support the contention that the refusal to bargain had a detrimental and adverse impact on negotiations"; and

2. The remedy sought by the Associations "was an order that the County 'cease and desist from failing and/or refusing to comply with the meet and confer requirements of the MMBA.'" The County states that "[o]nce the policy was revised to delete the new eligibility rules, there was no longer any policy change even arguably subject to meet and confer requirements."

In their supplemental briefing, the County argues that the case was moot and, if not, the "proposed decision should still be upheld as the proposed changes [were] not a mandatory subject of bargaining."

DISCUSSION

In determining whether a party has violated MMBA 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.)[8] 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. (Vernon Fire Fighters v. City of Vernon (1980) 107 Cal.App.3d 802 [165 Cal.Rptr. 908]; Walnut Valley Unified School District (1981) PERB Decision No. 160; San Joaquin County Employees Association v. City of Stockton (1984) 161 Cal.App.3d 813 [207 Cal.Rptr. 876]; Grant Joint Union High School District (1982) PERB Decision No. 196.)

The Board addressed the issue of future retirement benefits for current employees in Madera Unified School District (2007) PERB Decision No. 1907 (Madera). In Madera, the Board held that "the future retirement benefits of active workers are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining."

Here, the criteria to determine whether a current employee is eligible for retirement benefits is at issue. Just as the Board found in Madera, "future retirement benefits for employees are within scope of bargaining because they are part of an employee's compensation package and therefore related to 'wages'." Modification of the eligibility criteria directly impacts whether a current employee will receive the future retirement benefit. Thus, this subject falls within the scope of representation.

The parties are in agreement that the County adopted an ordinance modifying the eligibility criteria to limit the number of current employees who could participate in the RHIP

[8]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. (Firefighters Union v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507].)

effective January 1, 2007. The County implemented this change without giving the Associations an opportunity to bargain. Therefore, the County unilaterally changed a policy within the scope of bargaining without meeting its obligation to bargain.

The County argues that by rescinding the ordinance, there is no longer any policy change even arguably subject to meet and confer requirements, and the issue is now moot. In Amador Valley Joint Union High School District (1978) PERB Decision No. 74, however, the Board held that the later reversal or recission of a unilateral action or subsequent negotiation on the subject of a unilateral action does not excuse a violation. (See Marin Community College District (1980) PERB Decision No. 145.) As stated in San Mateo Community College District (1979) PERB Decision No. 94, unilateral actions are disfavored: (a) because of their destabilizing and disorienting impact on employer-employee affairs; (b) such action derogates the representatives negotiating power and ability to perform as an effective representative in the eyes of the employees and undermine exclusivity; (c) such action denigrates negotiations consistent with statutory design under the Educational Employment Relations Act (EERA);[9] and finally (d) such action unfairly shifts community and political pressure to employees and their organizations, and at the same time reduces the employer's accountability to the public. The fact that the County reversed its position and restored the status quo before the new policy went into effect, does not cure the unlawful unilateral change.

REMEDY

The usual remedy for an unlawful unilateral change in policy is to order a restoration of the status quo. In this case, the parties stipulated that the County already rescinded the policy change. It is therefore unnecessary to order a restoration of the status quo.

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

ORDER

Upon the foregoing finding of facts, conclusions of law, and the entire record in this case, it is found that the County of Sacramento (County) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3505 and 3506, and PERB Regulation section 32603(a), (b) and (c).

Pursuant to Government Code sections 3509(a) and 3541.5(c), it is hereby ORDERED that the County and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the exclusive representatives on matters within the scope of representation, as defined by MMBA section 3504, with particular reference to the modification of future retiree health benefits.

2. Denying the Sacramento County Attorneys Association (SCAA) and the Sacramento County Professional Accountants Association (SCPAA) their right to represent unit members by failing and refusing to meet and negotiate about matters within the scope of representation.

3. Interfering with employees because of their exercise of their right to select an exclusive representative to meet and negotiate with the employer on their behalf by refusing to bargain matters within the scope of representation with the exclusive representative.

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

1. Within ten (10) workdays following the date this Decision is no longer subject to appeal, post at all work locations in the County where notices to employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the County, indicating that the County 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.

2. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. The County 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 SCAA and SCPAA.

Members McKeag and Wesley joined in this Decision.

APPENDIX

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 Nos. SA-CE-387-M, Sacramento County Attorneys Association v. County of Sacramento, and SA-CE-388-M, Sacramento County Professional Accountants Association v. County of Sacramento, in which all parties had the right to participate, it has been found that the County of Sacramento violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3505 and 3506, and PERB Regulation section 32603(a), (b) and (c).

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

CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the exclusive representatives on matters within the scope of representation, as defined by MMBA section 3504, with particular reference to the modification of future retiree health benefits.

2. Denying the Sacramento County Attorneys Association and the Sacramento County Professional Accountants Association their right to represent unit members by failing and refusing to meet and negotiate about matters within the scope of representation.

3. Interfering with employees because of their exercise of their right to select an exclusive representative to meet and negotiate with the employer on their behalf by refusing to bargain matters within the scope of representation with the exclusive representative.

Dated: _____ COUNTY OF SACRAMENTO

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.