STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

METROPOLITAN WATER DISTRICT SUPERVISORS' ASSOCIATION, Charging Party, v. METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, Respondent.	Case No. LA-CE-466-M PERB Decision No. 2055-M August 26, 2009

Appearance: Lawrence Rosenzweig, Attorney, for Metropolitan Water District Supervisors' Association.

Before Dowdin Calvillo, Acting Chair; McKeag and Wesley, Members.

DECISION

DOWDIN CALVILLO, Acting Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Metropolitan Water District Supervisors' Association (Association) of a Board agent's dismissal of its unfair practice charge. The charge alleged that the Metropolitan Water District of Southern California (District) violated the Meyers-Milias-Brown Act (MMBA)[1] by refusing to bargain over both its decision "to take away District vehicles from members of the bargaining unit" and the effects of the decision. The Board agent dismissed the charge after finding the Association had waived its right to bargain over the alleged change.

The Board has reviewed the dismissal and the record in light of the Association's appeal and the relevant law. Based on this review, the Board affirms the dismissal of the charge for the reasons discussed below.

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

BACKGROUND

On May 25, 2006, the District sent a memorandum to the representatives of the District's recognized employee organizations, including Association President Don Forsyth, informing them of proposed revisions to the District's operating policies. One of the policies listed in the memorandum was Operating Policy F-13, Long-Term Vehicle Assignment. Copies of the listed operating policies were attached to the memorandum. The memorandum stated in closing:

> If you would like to meet to discuss any of the revisions, please notify me at your earliest convenience. Otherwise, Management will assume that your bargaining unit has no questions or comments on these Operating Policies.

It is undisputed that the Association and the District did not meet and confer regarding Operating Policy F-13 before its implementation by the District on October 12, 2006. The charge does not allege that the Association requested to meet and confer about Operating Policy F-13 at any time between May 25, 2006, and June 16, 2008.

Operating Policy F-13 "establishes the policies and criteria for the long-term assignment and use of Metropolitan vehicles." In general, the operating policy allows long-term vehicle assignments when an employee's duties require him or her to travel directly from home to the worksite or an emergency location and long-term assignment would be more efficient than checking out a pool vehicle as needed. The operating policy includes the following specific policies:

> 2. Long-term vehicle assignments are reviewed as part of the annual budget cycle.
>
> 5. Long-term vehicle assignments are not renewed automatically and may be terminated by management at any time.

6. Upon expiration of the Long-Term Vehicle Assignment, the operator is to immediately cease use and return custody of the vehicle to Fleet Management.

On June 16, 2008, the District notified the Association that it was terminating the long-term vehicle assignments of some supervisory unit members pursuant to Operating Policy F-13. That same day, the Association requested in writing to meet and confer over "both the decision to take away the vehicles and the effects of such a decision." By letter of June 25, 2008, the District declined the Association's bargaining demand, citing the Association's failure to request to meet and confer over Operating Policy F-13 before it was implemented.

The Board agent sent the Association a warning letter indicating that the allegations in the charge showed the Association had waived its right to bargain over Operating Policy F-13 by not demanding to meet and confer over the policy prior to its implementation. In a subsequent phone conversation with the Board agent, the Association's counsel asked the Board agent to dismiss the charge so the Association could file an appeal with the Board. Based on this conversation, the Board agent dismissed the charge.

DISCUSSION

In determining whether a party has violated MMBA section 3505 and PERB Regulation 32603(c)[2] by refusing or failing to meet and confer in good faith, 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] An absolute refusal to meet and confer on a subject within the scope of

[2] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

[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.)

representation is a per se violation. (*Sierra Joint Community College District* (1981) PERB Decision No. 179.) Policies allowing employees to use employer-owned vehicles to commute to and from work fall within the scope of representation because the savings employees realize from not commuting in their own vehicles is a part of their compensation. (*Los Angeles Unified School District* (2002) PERB Decision No. 1501; *West Covina Unified School District* (1993) PERB Decision No. 973; *State of California (Department of Transportation)* (1983) PERB Decision No. 333-S.) Therefore, a refusal to bargain over a vehicle use policy is a per se violation of the duty to meet and confer in good faith.

It is undisputed that on June 25, 2008, the District refused to bargain over its termination of long-term vehicle assignments for some supervisory unit members. However, it is axiomatic that a refusal to bargain is not an unfair practice if the refusing party had no duty to bargain. We find the District had no obligation to bargain over the terminations because the Association had waived its right to bargain over Operating Policy F-13.[4]

When an employer gives an employee organization written notice of a proposed change to a matter within the scope of representation and provides reasonable opportunity to meet and confer over the change before implementation, the employee organization's failure to request bargaining constitutes a waiver of its right to meet and confer over the change. (*Stockton Police Officers' Assn. v. City of Stockton* (1988) 206 Cal.App.3d 62, 66; *Stationary Engineers*

[4] Waiver is an affirmative defense that must be proven by the party asserting it. (*Regents of the University of California* (2004) PERB Decision No. 1689-H.) When a respondent can establish an affirmative defense as a matter of law based on undisputed facts, "the charge must be dismissed even when the charging party has otherwise established a prima facie case." (*Long Beach Community College District* (2003) PERB Decision No. 1568.) It is undisputed that the Association did not demand to bargain over Operating Policy F-13 prior to its implementation in October 2006. Thus, the issue of waiver based upon this undisputed fact is purely a legal one that PERB may consider at the charge stage.

v. San Juan Suburban Water Dist. (1979) 90 Cal.App.3d 796, 802; *Santee Elementary School District* (2006) PERB Decision No. 1822.)

The District provided the Association with written notice of its intent to adopt Operating Policy F-13 almost five months before it was implemented. The charge does not allege that the Association requested to meet and confer over Operating Policy F-13 prior to its implementation or, indeed, at any time prior to June 16, 2008. Therefore, by its inaction, the Association waived its right to meet and confer over Operating Policy F-13.

In its charge, the Association points out that the District's May 25, 2006 memorandum asked for "questions or comments" from employee organizations regarding the proposed operating policy changes, suggesting that the memorandum did not express a willingness to meet and confer over the changes. However, the memorandum also stated the District was willing to "meet to discuss" any of the proposed changes. Further, once an employer gives appropriate notice of a proposed change, it is not required to invite bargaining. (*Stockton Police Officers' Assn.*, *supra*, 206 Cal.App.3d at pp. 65-66; *State of California (Board of Equalization)* (1998) PERB Decision No. 1258-S.) Thus, the District's May 25, 2006 memorandum was sufficient to trigger the Association's duty to request to meet and confer over the change.

On appeal, the Association contends that even if it waived its right to meet and confer over the District's decision to implement Operating Policy F-13, it did not waive its right to meet and confer over the effects of the decision. In support of this argument, the Association cites *Santee Elementary School District*, *supra*. That case, however, involved rather unique factual circumstances that are not present in the instant case.

In *Santee Elementary School District*, *supra*, the district provided notice of its intent to modify a board policy regarding concerted activity. The revised policy prohibited work

stoppages and directed the district superintendent to "develop a written plan to 'delineate actions to be taken in the event of a strike or threatened strike'." The charging party employee organization discussed the revised policy and decided not to request bargaining over it. The Board held that the employee organization waived its right to bargain over the policy.

Around the same time it received the revised policy, the employee organization received a draft of the superintendent's regulation implementing the policy. The regulation set forth in detail the consequences to bargaining unit members of participating in prohibited work stoppages. The employee organization demanded to bargain over the regulation before it was adopted by the district's governing board. The Board held that the employee organization's failure to demand bargaining over the policy change did not constitute a waiver of its right to bargain over the effects of the change.

The Board's holding on the effects bargaining waiver was based on the fact that it was impossible for the employee organization to determine the foreseeable effects of the policy change on bargaining unit members from the policy itself, which provided that the consequences of violating the policy were to be delineated in a separate regulation. Only after it actually saw the regulation could it determine foreseeable effects and decide whether to demand bargaining over them. Thus, in that case, the notice of the policy change without the corresponding implementing regulation did not clearly inform the employee organization of the nature and scope of the proposed change. (See *Lost Hills Union Elementary School District* (2004) PERB Decision No. 1652 ["an employer, to fulfill its bargaining obligation, must provide a notice which is communicated in a manner which clearly informs the recipient of the proposed change" (internal quotations and citation omitted)].)

Here, the District provided a copy of Operating Policy F-13 along with the May 25, 2006 memorandum. The operating policy clearly states that long-term vehicle assignments are

to be reviewed on an annual basis, that management may terminate an assignment at any time, and that once an assignment is terminated, an employee is to immediately relinquish the assigned vehicle to the District. Thus, the notice and attached policy provided sufficient information for the Association to determine the foreseeable effects of the proposed policy on supervisory unit members, including any effects resulting from termination of a long-term vehicle assignment. Accordingly, the Association was obligated to demand to bargain over effects prior to implementation and its failure to do so constituted a waiver of its right to meet and confer over foreseeable effects of the District's decision to adopt Operating Policy F-13.

In sum, the charge failed to establish that the District had a duty to bargain with the Association over terminating long-term vehicle assignments pursuant to Operating Policy F-13. Therefore, the District did not commit an unfair practice by refusing the Association's demand to meet and confer over the terminations.

ORDER

The unfair practice charge in Case No. LA-CE-466-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Wesley joined in this Decision.