STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

COUNTY OF SAN LUIS OBISPO, Charging Party, v. SAN LUIS OBISPO GOVERNMENT ATTORNEYS' UNION and SAN LUIS OBISPO DEPUTY COUNTY COUNSEL ASSOCIATION, Respondents.	Case Nos. LA-CO-123-M LA-CO-124-M PERB Decision No. 2427-M June 3, 2015

Appearances: Renne Sloane Holtzman & Sakai by Jeffrey Sloan and Steve Cikes, Attorneys, for County of San Luis Obispo; Silver, Hadden, Silver, Wexler & Levine by Stephen H. Silver and Jacob A. Kalinski, Attorneys, for San Luis Obispo Government Attorneys' Union and San Luis Obispo Deputy County Counsel Association.

Before Huguenin, Winslow and Banks, Members.

DECISION

BANKS, Member: These cases were consolidated for consideration by the Public Employment Relations Board (PERB or Board) of exceptions filed by the San Luis Obispo Government Attorneys' Union (SLOGAU) and the San Luis Obispo Deputy County Counsel Association (DCCA) (collectively, Unions) to the proposed decision of a PERB administrative law judge (ALJ). The ALJ concluded that the Unions had violated the Meyers-Milias-Brown Act[1] and PERB regulations[2] by refusing to bargain over proposed changes to the amounts of

[1] The MMBA is codified at Government Code section 3500 et seq.

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

employee contributions to the County of San Luis Obispo's (County) pension and retirement plan and/or how pension cost increases are to be allocated between the County and employees represented by the Unions. The ALJ also concluded that the Unions had refused to bargain over a proposed change in the method for calculating the prevailing wage of unit employees, which, pursuant to the County's Prevailing Wage Ordinance, functions as a benchmark for determining the amount change to employee wage rates.

The Unions deny that they refused to bargain and they argue, in the alternative, that they were under no obligation to meet and confer regarding either proposal at issue in this case. According to the Unions, both proposals would impair vested employee rights protected by the contracts clauses of the California and federal Constitutions, and are therefore outside the scope of mandatory subjects.

The County avers that both proposals were fully negotiable, as they affected statutorily-enumerated subjects of wages. It urges the Board to adopt the proposed decision and seeks the standard Board remedy, including an order for the Unions to cease and desist from refusing to bargain and an affirmative order to bargain in good faith, upon request, over all matters within scope.

For the reasons set forth below, we affirm the ALJ's conclusion that the Unions violated the MMBA and PERB regulations by refusing to bargain over the County's proposal to change the formula and/or amounts of employee pension contributions. In doing so, we rely on the Unions' admissions in their answers to the complaints that they refused to bargain over this proposal and on the judicially-developed doctrine of the conclusiveness of pleadings. We do not rely on the ALJ's alternative reasoning that the Unions' conduct constituted a refusal to bargain over this proposal.

We also reverse the ALJ's conclusion that the Unions unlawfully refused to bargain over the County's proposal to change the definition of the prevailing wage.

PROCEDURAL HISTORY

On November 9, 2010, the County filed unfair practice charges with PERB alleging that the Unions violated the MMBA and PERB regulations by refusing to bargain over a proposal that employees assume certain costs of funding future pension benefits of current employees.

On April 7, 2011, the County withdrew from its charges an allegation that the Unions also violated PERB Regulation 32604, subdivision (e).[3] On the same date, PERB's Office of the General Counsel issued complaints in both cases alleging that the Unions violated MMBA section 3506, subdivision (b),[4] and PERB Regulation 32604, subdivision (c),[5] by refusing to bargain proposed changes in the amount of employee contributions to the County's pension plan and/or over how pension cost increases would be allocated between the County and employees represented by the Unions.

On April 21, 2011, the Unions answered the complaints, admitting certain facts, denying others and asserting various affirmative defenses. Specifically, the Unions admitted

[3] PERB Regulation 32604, subdivision (e), includes catch-all language making it unlawful for an employee organization "[i]n any other way [to] violate MMBA or any local rule" adopted by a public agency under MMBA jurisdiction.

[4] Among other things, MMBA section 3509, subdivision (b), authorizes PERB to investigate unfair practice charges and to issue a complaint "alleging any violation of [the MMBA] or of any rules and regulations adopted by a public agency pursuant to [MMBA section] 3507 or 3507.5."

[5] PERB Regulation 32604, subdivision (c), makes it unlawful for an employee organization subject to MMBA jurisdiction to "[r]efuse or fail to meet and confer in good faith as required by [MMBA] section 3505 or by any local rule adopted pursuant to [MMBA] section 3507."

that they refused to bargain over changes to employee contribution rates to the County's pension plan and over how pension cost increases would be allocated between bargaining unit employees and the County. However, the Unions denied the negotiability of the County's proposals affecting these subjects and asserted that agreeing to bargain over these proposals would impair certain vested contractual benefits owed to employees that the Unions could not bargain away "any more than [they] could bargain away last year's salary."

On July 5, 2011, PERB's Office of the General Counsel conducted an informal settlement conference but the dispute was not resolved.

On September 30, 2011, the County moved to amend the complaints to allege that the Unions further violated the MMBA and PERB regulations by refusing to bargain over a proposal to change the definition and/or method for calculating the prevailing wage set forth in the County's Prevailing Wage Ordinance.

On October 3, 2011, the Unions moved to dismiss the complaints.

On January 10, 2012, an ALJ granted the County's motion to amend the complaints and denied without prejudice the Union's motions to dismiss the complaints.

On January 18, 2012, the Unions filed an answer to the amended complaint in which they denied that they had refused to bargain over the County's prevailing wage proposal and, in fact, averred that the Unions agreed to the essence of the proposal that there be no increase in the salaries or other compensation for bargaining unit employees during the period under negotiations. The Unions also asserted various affirmative defenses, including lack of PERB jurisdiction over the matters complained of and mootness inasmuch as the County had unilaterally implemented its last, best and final offer that there be no increase in the prevailing

wage of unit employees for one year, without respect to how the formula would be calculated in future years.

On March 26-27 and June 11, 2012, the ALJ presided over three days of formal hearing at which the parties entered into the record several stipulations and 30 joint exhibits. The parties simultaneously filed opening and closing briefs on August 21 and September 5, 2012.

On February 4, 2013, the cases were transferred to a second ALJ following retirement by the initial ALJ. No party objected to the transfer.

On May 29, 2013, the second ALJ issued a proposed decision in which she determined that the Unions had refused to bargain over both County proposals at issue in this dispute.

On June 14, 2013, the Unions filed a statement of exceptions to the proposed decision, a supporting brief and a request for oral argument. On July 24, 2013, the County filed a response to the Union's exceptions.

FACTS

Unless noted below, neither party has excepted to the ALJ's findings of fact. The Board finds the statement of facts set forth in the proposed decision is adequately supported by the record and, with minor modifications, we adopt the ALJ's factual findings as the findings of the Board itself.

The County is a public agency within the meaning of MMBA section 3501, subdivision (c), and PERB Regulation 32016, subdivision (a). The Unions are recognized employee organizations within the meaning of MMBA section 3501, subdivision (b), and the

exclusive representatives of all attorneys employed by the County as Deputy District Attorneys and Deputy County Counsel.[6]

The County's Pension System

Unlike the vast majority of counties in California, the County does not contract with the California Public Employees' Retirement System, and has not established a pension system under the County Employees' Retirement Law of 1937 (Gov. Code, § 31450 et seq). Rather, since 1958, the County has maintained an independent pension system, the San Luis Obispo County Pension Trust (Trust), pursuant to Government Code section 53215 et seq. In 1968, the Board of Supervisors adopted a retirement plan and set of by-laws (collectively, "the Plan") which govern the operation of the Trust. In or around 1974, membership in the Trust became a mandatory condition of employment with the County.

The Trust is managed by a seven-member Board of Trustees, which is a separate and independent entity from the County Board of Supervisors. (See Gov. Code, § 53219.) Three members of the Board of Trustees are appointed by the County Board of Supervisors, three are elected by County employees, and the seventh member, the County Treasurer, sits ex officio. An Executive Secretary is responsible for running the day-to-day operations of the Trust, and reports directly to the Board of Trustees. Since 1990, Albert A. ("Tony") Petruzzi (Petruzzi) has been the Executive Secretary of the Trust.

The Trust is funded through a combination of employer appropriations, employee contributions, and investment earnings. The Plan at section 5.01 defines the computation of contributions in relevant part as follows:

[6] SLOGAU represents a bargaining unit comprised of Deputy District Attorneys, while DCCA represents a separate bargaining unit of Deputy County Counsel.

> Each Member of the Pension Trust will contribute, by means of payroll deduction, an amount of money equal to the Member's normal rate of contribution times the Member's compensation proportionate to the ratio of actual paid hours, less overtime, to normal hours. The normal rates of contribution for all Members shall be based on age at the nearest birthday at the time of most recent entry into this Retirement Plan....The schedules of rates of contributions utilized by the Pension Trust shall be those adopted by the Board of Supervisors *upon recommendation of the Board of Trustees. The Board of Trustees shall base its said recommendation on the report of the actuary engaged by the Board of Trustees.*

(Emphasis added.) Section 5.02 of the Plan "Normal Rate of Contribution for Miscellaneous Members," provides that "[e]ffective January 1, 1989 and continuing thereafter in the absence of affirmative contrary action by the Board of Supervisors, the normal rates of contribution for Miscellaneous Members shall be those set forth in Appendix A. . . ." (Emphasis added.)[7]

Section 5.05.1 of the Plan, "Employer 'Pick Up' of Normal Contributions," permits the County to designate some of its appropriations to the Trust as "normal contributions" made on behalf of employees. Plan section 16.05(a) sets forth the legal obligation of the County to make appropriations to the Trust "as are found to be necessary. . . . Such appropriations shall be made at the rate of total Member's salaries that is recommended by the actuary so that sound actuarial funding of Pension Trust and the Retirement Plan is maintained." Plan section 19.03 addresses the funding of cost of living adjustments. Plan section 19.03(a) requires the establishment of a "Cost of Living Reserve Fund." Plan section 19.03(b) provides that the County "shall contribute" to the Cost of Living Reserve Fund on a monthly basis at the percentage of members' salaries that is recommended by the actuary.

[7] Appendix A-1 sets forth the differing percentage of contributions, depending upon the age of the employee upon his or her entry into the Plan. The different contribution percentages are not at issue in this dispute.

Section 16.04 of the Plan requires actuarial investigations to be conducted at least every two years. Annual actuarial investigations are also allowed under this section of the Plan and are more common, according to Petruzzi. The Board of Trustees contracts with independent accounting firms to provide these actuarial services. The purpose of the report by an actuary is to determine the "valuation" of the Plan by evaluating the assets and liabilities of the Trust in order to ensure that it is fully funded and solvent. As described by Petruzzi, the costs normally associated with funding the Trust are the costs of funding the liabilities. The "normal" cost is the current year's accrual of retirement benefits. The unfunded liability, sometimes referred to Unfunded Actuarial Accrued Liability (UAAL) is where the assumptions that the Trust uses to fund the plan were not met in some way, such as when investments did not earn the expected rate of return, or salaries exceeded the expected levels. Finally, there is a Cost of Living Adjustment (COLA) that, according to Petruzzi, is to be solely funded by the County.

Plan section 16.04 further provides:

> Upon the basis of the investigation, valuation, and recommendations of the actuaries, the Board of Trustees *shall recommend* to the Board of Supervisors such changes in the rates of interest, in the rates of *contributions of Members*, and in *County and District appropriations* as are necessary.

(Emphasis added.) The County introduced into the record several contracts between the Board of Trustees and its actuaries between 1986-2008. These contracts provided that if increases or decreases in "contribution rates" were deemed necessary by an actuarial investigation, the actuarial report should express the required increases or decreases in several alternatives. The various possibilities ranged between either the County *or* employees bearing 100 percent of the increase (or decrease), to the County and employees sharing the change in contribution in various percentages. According to Petruzzi, the reason for the presentation of several

alternatives was to inform the negotiations process between the County and affected employee groups and to provide examples of the manner in which the rate change might be allocated between the County and employees. In Petruzzi's opinion, the Board of Trustees is not enabled or permitted to dictate to the County how an increase or decrease in pension funding should be allocated between employer appropriations and employee contributions.[8] Rather, the Board of Trustees' responsibility in this regard is simply to inform the County of the total required rate of appropriation and to leave to the collective bargaining process to determine how much—if any—of the rate increase or decrease should be applied to employee contribution rates.

The Prevailing Wage Ordinance

In 1984, the electorate adopted section 2.48.180 of the County Ordinance Code providing verbatim:

> In fixing compensation to be paid to persons in the county's employ, the board of supervisors and every other authority authorized to fix salaries or wages, *shall* provide a percentage change in compensation *at least equal to* the percentage change in compensation for the same quality of service rendered to persons, governmental agencies, firms or corporations under similar employment.
>
> Prevailing salaries or wages *shall be determined by negotiations* between the county's employer representatives and the recognized employee organization(s).
>
> In case such prevailing salaries or wages cannot be agreed to by the parties, the matter may be submitted to a mutually selected

[8] Leslie Thompson (Thompson), the current actuary, shares this opinion. In response to an inquiry from Petruzzi over common practices for her clients, Thompson stated that when an actuarial valuation is performed, she provides the total contribution required, and then clients who are subject to collective bargaining agreements later negotiate the "split." According to Thompson: "It is not the position of the actuary to set policy on the funding of the plan, and that includes policy on the source of the funds."

arbitrator who shall make advisory recommendations to the *negotiation* parties.

(Emphasis added.)

History of the Parties' Disputes Regarding Pension Contributions and the Prevailing Wage Ordinance

I. The County Proposes Increases in Employee Pension Contributions

In January 2007, the Board of Trustees recommended a significant overall increase in the County appropriation rate, which amounted to an approximately 7.66 percent increase in pension contributions for the DCCA-represented bargaining unit.[9] However, the resolution passed by the Board of Trustees did not expressly recommend an increase in employee contribution rates. The Unions attributed the increase to the adoption in 1997 of a "corridor funding policy," whereby, if the Trust remained within 90 percent to 110 percent funded as determined by the actuary, then the County, according to the Unions, was permitted to contribute less than what was actually required by the Trust. In 2007, the Trust fell below the 90 percent threshold. In the Unions' view, this underfunding practice over the years had significantly increased the UAAL, which, along with the COLA, they contend was the sole responsibility of the County to fund under the "express" terms of the Plan. The Unions point to Article 19 of the Plan to support their argument that COLA funding is the exclusive obligation of the County. The Unions, however, do not identify any particular Plan section that obligates the County to exclusively fund increases in pension contributions tied to the UAAL.

[9] The recommended increases varied by employee bargaining unit. At this time, SLOGAU and the County were parties to a memorandum of understanding (MOU) in effect through June 2010. A "me too" provision in the MOU provided that employees represented by SLOGAU would receive the same level of benefits and compensation as those represented by DCCA.

Upon learning of the pension contribution increases recommended by the Board of Trustees, the County requested bargaining with the Unions. In negotiations with DCCA,[10] the County proposed that the employee contribution rate be increased by 2.5 percent. DCCA took the position that it was not required to bargain with the County over the amount of an increase in employee pension contribution rates because such increases can only be implemented in accord with Plan sections 5.01 and 16.04. DCCA argued that because the Board of Trustees stated the recommended increase in terms of the *County* rate of appropriation only, and did *not also* specifically state that *employee* contribution rates should be increased by any percentage or amount, the Board of Trustees intended that the increase be borne only by the County and not by employees. According to the Unions' interpretation of the Plan, because only the Board of Trustees can determine the rates or amounts of contributions, and because it may make such determinations based solely on the recommendations of the actuary, the amounts and/or the relative shares of contributions by the County and its employees are not proper subjects for bargaining.

After negotiations reached impasse, the Board of Supervisors adopted a resolution in June 2008 that implemented the 2.5 percent increase in DCCA-represented employees' pension contribution rate, and the Board of Trustees soon thereafter adopted its own resolution confirming this increase. In accord with the "me too" provision in SLOGAU's MOU, the County and the Board of Trustees passed similar resolutions imposing a 2.5 percent increase in the pension contribution rate for SLOGAU-represented employees.

[10] Apparently no bargaining occurred with SLOGAU at this time because of the "me too" provision tying the compensation and benefits for the SLOGAU-represented unit to the terms applicable to DCCA-represented employees.

In August 2008, the County and DCCA began negotiations over terms and conditions of employment for the 2008-2009 fiscal year. The negotiations were protracted and effectively merged with negotiations for 2009-2010. The County again proposed that employees continue to share in paying for the cost of pension increases with the County. The County proposed that employee contributions be increased by a total of 1.55 percent. Again, DCCA took the position that it was not required to negotiate with the County over increases in employee contributions, which could only be mandated by the Board of Trustees upon recommendation of the Plan actuary. After negotiations again resulted in impasse, in April 2010, the County imposed and the Board of Trustees confirmed an increase in DCCA-represented employees' contribution rate of 1.32 percent retroactive to July 1, 2008, and .23 percent retroactive to July 1, 2009. These same increases were also imposed on SLOGAU-represented employees pursuant to the "me-too" MOU provision.

II. Disputes Over Prevailing Wages During Prior Negotiations

In October 2003, the County agreed to a "pension benefit enhancement" whereby the County's "pick-up" of employee contributions would be treated as pensionable income. As a result, employees represented by both Unions received a 9.29 percent increase in pensionable income. According to the County, the cost of this benefit amounted to approximately 3.06 percent of wages. In exchange for the enhancement, the Unions agreed to a 1.53 percent "offset," i.e., reduction, from what employees would have received under the prevailing wage formula during fiscal years 2003-2004 and 2004-2005. The Unions maintain that they were informed upon agreeing to this offset that it would remain in effect only for those two years.

In December 2006, the County passed a resolution that repealed the prevailing wage offset. This resolution acknowledged that employees had been subject to a prevailing wage offset as payment for a portion of the pension enhancement. The resolution further stated that "[t]his offset is now being assumed by the County."

According to the Unions, through the 2006 resolution, the County "permanently" agreed to assume the entire cost of the pension benefit enhancement and to eliminate the prevailing wage offset. In the Unions' view, as a result of the County's action:

> employees performing services thereafter earned as part of their return consideration the vested contractual right to continue to receive this pension enhancement without having to bear any additional cost, whether through a reduction in their entitled prevailing wage or otherwise.

During negotiations in 2008-2009 and 2009-2010, however, the County proposed to revive the prevailing wage offset. The Unions maintained that this change interfered with their "vested contractual rights" to have the County "fully fund" the pension enhancement, and to receive prevailing wages under the ordinance. The County's unilateral imposition of terms and conditions of employment in 2008-2009 and 2009-2010 included a reinstatement of the prevailing wage offset.

The County also proposed to change the methodology used in calculating the value of insurance benefits provided in comparable employment settings in computing the prevailing wage during the 2008-2010 negotiations. Previously, the value of benefits was calculated based on the maximum contributions available under comparable employers' plans—i.e., typically the plan for an employee plus two or more dependents. The County proposed instead

to average the employers' contribution rates paid across different categories—i.e., employee only, employee plus one dependent, etc. The Unions argued that, in the absence of a voter-approved amendment to the Prevailing Wage Ordinance, no deviation in the methodology used to calculate the prevailing wage is permitted, because the only way to determine the requisite percentage change under the ordinance is to use the same methodology every year. Otherwise, one is not comparing "apples to apples," but to something else. The Unions also contend that the County's unilateral imposition of changed methods of calculation of prevailing wages impaired their represented employees' vested contractual rights under the ordinance.

Negotiations in 2010-2011

The parties' disagreements regarding the negotiability of increased employee pension contributions and changes to the prevailing wage calculation bled into the next round of negotiations which are the subject of the present dispute.

On April 30, 2010, County Director of Human Resources Tami Douglas-Schatz (Douglas-Schatz) sent a letter to SLOGAU President Andy Cadena requesting negotiations for a successor MOU. On June 15, 2010, Douglas-Schatz also wrote to DCCA President Ann Duggan requesting bargaining for a new contract. Jeff Sloan (Sloan) was the chief negotiator for the County and Stephen Silver (Silver) was the chief negotiator for the Unions. Sloan and Silver both testified to their participation in negotiations. Ultimately, the parties met seven times over 10 months but were unable to reach agreement. The bargaining sessions and pertinent communications between the parties are briefly summarized as follows.

1. First Meeting - July 28, 2010

The County's bargaining team met separately with the bargaining teams for both Unions. No proposals were exchanged, but Douglas-Schatz shared with the Unions her instructions from the County for 2010-2011 bargaining; these instructions were three-fold: (1) explore the possibility of a two-tier retirement system for newly hired employees; (2) attempt to reach an agreement that employees would share, roughly equally, in any increased pension costs; and (3) re-evaluate the calculation of the prevailing wage.

On August 30, 2010, Sloan sent Silver the County's opening bargaining proposals. The County proposed to split equally with employees a 1.11 percent total increase in pension contributions that had been recommended by the Board of Trustees after actuarial analysis in 2009. The 1.11 percent recommended increase was attributed to 0.29 percent increase in the cost of the COLA, 0.27 percent increase in the normal cost of the basic pension benefit, and 0.55 percent increase in the UAAL.[11] The County also proposed that the salary rate for 2010-2011 should not be increased from 2009-2010, that the list of comparable employers used to calculate the prevailing wage should be modified, and that the prevailing wage offset to fund the pension enhancement continue.

2. Second Meeting - August 31, 2010

At their separate meetings on this date, the Unions and the County discussed holding joint bargaining sessions in the future. In response to the County's opening proposals, Silver told County representatives that the Unions did not believe that they could bargain over the issue of increased employee pension contributions. Silver testified at the hearing that the

[11] The Unions' position is that, historically, employees' contributions have only been applied to fund the normal cost of the basic pension benefit.

Unions felt that they were being put in an "impossible position" because of the Unions' pending lawsuit against the County. According to Silver, the Unions also made "very clear" to the County their concerns that negotiations on the County's proposals would expose them to the risk of being sued by bargaining-unit employees for unlawfully bargaining away their vested rights. Silver stated:

> [W]e also realized that, if we were to negotiate, the County could very well use that as an admission against us in the pending litigation, because our position was that rates are not subject to negotiations. They're only subject to being implemented in accordance with the terms of the plan. So, we were just in a difficult position. We could not negotiate. So, we explained that to the County at that time.

DCCA presented a written "Counter Offer" to the County at this meeting. In relevant part, DCCA proposed that the County rescind the increased employee pension contributions that were unilaterally imposed in 2008 and 2010. DCCA further reiterated that its members would not agree to have any term of their pension plan included in a collective bargaining agreement. Regarding the prevailing wage issue, the Unions proposed that compensation determinations be based on the five "comp" counties proposed by the County and two additional counties, and that "the value of making the pick-up pensionable shall not be included as a component of compensation. . . ."

3. Third Meeting - September 9, 2010

At this meeting, the County agreed to conduct joint negotiations on common issues with both Unions. After a presentation by the County regarding its prevailing wage proposals, Silver expressed the idea that any change in the methodology of calculation of the prevailing wage would result in the impairment of employees' vested right to receive a percentage change under the ordinance. Silver testified:

> [W]e couldn't agree to something that would not afford our members what they were entitled to under the prevailing wage ordinance. . . . [T]he ordinance only called for a percentage change . . . . And I remember using the, comparing apples to apples, analogy by saying you can only calculate a percentage change by comparing apples to apples.

In other words, the Unions' stance on this issue was that once the comparable employers had been initially settled on, they could never be changed.[12] In the Unions' view, changing the comparable employer pool would mean that the percentage change for that year could not be determined and this would violate the ordinance.

4. Fourth Meeting - September 21, 2010

No proposals were exchanged at this meeting. In an e-mail sent by Sloan to Silver before the meeting, Sloan acknowledged that although the County was asking employees to share in pension cost increases, the employees' share should be limited to the normal cost of the basic benefit. Sloan also stated that the County was "well aware" that the County is required to pay amounts identified for COLA and the UAAL, but opined that "that does not mean that the County is obligated to ignore increases in COLA and UAAL costs when deciding what to propose in bargaining." Silver responded to Sloan via e-mail. He proposed that if the parties were willing to view the issues simply in economic terms they might have a chance for agreement. Silver suggested that what the County was really seeking was a .56 percent reduction in compensation in "any agreeable form." From that starting point, Silver indicated, the Unions would be willing to talk, but not from the perspective of requiring agreement over pension cost sharing.

[12] The Unions acknowledged that their argument would not apply to changes to the comparable employer pool resulting in a *higher* prevailing wage than the prior comparators. Thus, the Unions were prepared to negotiate enhancements, but not concessions, on this subject.

On January 31, 2011, after the filing of the unfair practice charges in this matter, Sloan wrote to Silver summarizing negotiations up to that point and stating his understanding of the parties' respective positions regarding pension cost sharing and the prevailing wage issues. Silver responded by letter to Sloan on February 8, 2011. Silver clarified the Unions' position regarding employee pension contributions by stating that "historically the only times there were negotiations over the allocation of rate increases were (1) when the County agreed to 'pick-up' a portion of the required member contributions, and (2) when obtaining an enhanced benefit that would require additional funding." Silver asserted that after reviewing records of the Trust, the Unions had found no evidence that employee organizations and the County had ever bargained over increases in employee contribution rates that resulted solely from changes in actuarial assumptions (without a concomitant change in the level of benefits). Regarding the dispute over calculation of the prevailing wage, Silver stated that "both employee organizations recognize that the Ordinance allows for negotiations (1) regarding an increase that is granter [sic] than that percentage change in the prevailing wage and (2) to clarify any differences regarding the calculation of that percentage change."

5. Fifth Meeting - March 29, 2011

At this meeting, the County presented a "package" proposal applicable to both units. This proposal still sought to split equally between the County and employees any increase in pension costs, but clarified that the employees' share was not to exceed the normal cost of the basic pension benefit. Regarding the prevailing wage issue, the County still proposed no wage increase during the term of the agreement but also proposed forming a subcommittee to review a draft classification study and to further study and refine as necessary the formula for calculating the prevailing wage. The Unions viewed the County's proposal on this date as

being virtually identical to its opening bid with the exception of changes in the term of the agreement from one year to two and the proposal of the subcommittee. According to Silver, the Unions' view that agreeing to these proposals would mean abridging the vested rights of its members remained the same.

6. Sixth Meeting - April 19, 2011

No proposals were exchanged at this meeting. However, on May 2, 2011, Silver wrote to Sloan with identical counter proposals from DCCA and SLOGAU in response to the County's package proposal of March 29, 2011. The Unions proposed to waive a percentage increase in the prevailing wage for 2010-2011 only and to make no changes to employee compensation or other terms or conditions during the same time period.

7. Seventh Meeting - May 3, 2011

This meeting was the last time the parties met in-person. The County rejected the Unions' counter proposals delivered the day before. Silver believed, but was not certain, that he proposed at this session that the Unions agree to split increases with the County on the normal cost of the basic plan, with the County paying 60 percent and the Unions paying 40 percent, if the County would agree to pay 100 percent of increases to the COLA and UAAL. Silver was also uncertain whether this verbal proposal was made during an off-the-record discussion with Sloan, or formally during the meeting. In either event, no written record of this offer was introduced into the record.

County representatives declared impasse and, shortly after the meeting, followed up with a written confirmation of impasse which included the County's "final" offers to the Unions. These offers were virtually identical to those presented on March 29, 2011.

The parties began, but did not complete, an impasse meeting pursuant to procedures in the County's local rules, which require mutual consent for mediation. The Unions requested mediation, but the County declined. The impasse meeting was later completed via telephone conference call on June 14, 2011, thereby concluding the impasse procedure.

8. Post-Impasse

On July 22, 2011 Sloan wrote to inform Silver that County staff would urge the Board of Supervisors to unilaterally implement the County's attached last, best, and final offers to the Unions, which were identical to the final offers presented on May 3, 2011. On July 27, 2011, Silver wrote to the Board of Supervisors urging them not to unilaterally adopt the County's last, best and final offers because the Unions believed that doing so would violate the terms of the Plan. Silver urged the Board of Supervisors to adopt the Unions' final proposal instead, which was identical to that presented on May 2, 2011, with the addition that employees' salaries would be reduced by .56 percent for the 2010-2011 fiscal year.[13] On August 31, 2011, the Board of Supervisors authorized the unilateral implementation of the County's last, best and final offers to the Unions.

THE PROPOSED DECISION

The issues identified in the amended complaint were whether the Unions had unlawfully refused to negotiate regarding the County's proposals to change the formula and/or increase the amounts of employee pension contributions and to change the definition and/or

[13] The Unions' final written offers made no reference to a "60-40" split between the County's and employees' share of increases in normal pension contributions as Silver suggested he had proposed verbally either "on" or "off" the record on May 3, 2011. Because of Silver's vacillation during testimony regarding this point and the lack of documentary evidence to support his claim, the ALJ concluded that no such formal proposal was made during negotiations.

formula for calculating the prevailing wage under the County's Prevailing Wage Ordinance. Because the ALJ analyzed both allegations as *outright* or per se refusals to bargain rather than as "surface bargaining" allegations, the proposed decision was not concerned with whether the Unions lacked the subjective good faith required by the MMBA. Although the ALJ's reasoning differed as to each allegation, the proposed decision determined that the Unions had violated the MMBA and PERB regulations by outright refusing to bargain over both proposals.

With respect to the pension contribution allegation, the ALJ offered two reasons to support her determination that the Unions had refused outright to bargain. First, the ALJ relied on the judicial doctrine known as the conclusiveness of pleadings, under which, an admission of material allegations in a party's pleading removes that issue from controversy and bars the party from offering any evidence contrary to its admission.[14] Because the Unions had admitted in their answers to the complaints that they had "refused to bargain" with respect to the County's pension contribution proposal, the ALJ determined that these admissions were conclusive, and that it was unnecessary to examine the totality of their conduct to ascertain whether they had a sincere intent to reach agreement. Therefore, the only remaining issue to determine for this allegation was whether the County's proposal was within the scope of representation or whether, as the Unions maintained, it was non-negotiable, because it would impair vested rights set forth in the Plan and protected by the California and federal Constitutions.

[14] As discussed below, although the conclusiveness of pleadings is a judicially-developed doctrine, PERB has previously invoked the doctrine in its decisional law. (*Regents of the University of California* (2012) PERB Decision No. 2302-H (*Regents*), proposed dec. at p. 15, citing *Pinewood Investors v. City of Oxnard* (1982) 133 Cal.App.3d 1030, 1035.)

Alternatively, the ALJ determined that, even without the Unions' admission in their answers, their conduct during negotiations also constituted an outright refusal to bargain, because the Unions would not entertain the County's proposal and instead insisted on limiting the discussion to their own proposal to provide the County with an equivalent or greater dollar amount in savings through salary reductions.

Regarding the negotiability of the County's pension contribution proposal, the ALJ rejected the Unions' contention that, because employee pension rights "vest" upon acceptance of employment, the substantive future benefits are removed from the scope of bargaining. Citing various PERB and federal precedent holding that future retirement benefits of current employees are "part and parcel of their overall compensation," the ALJ reasoned that employee contributions toward such benefits are likewise negotiable. The ALJ also reviewed California and federal cases holding that previously negotiated retirement benefits may be modified or even eliminated through collective bargaining, provided such changes are reasonable, bear a material relationship to the integrity and success of the pension system, and include comparable advantages to offset any disadvantages to employees. Although the proposed decision did not address each case relied on by the Unions *individually*, the ALJ nonetheless explained that, "none of the cases cited by the Unions, including those that are omitted from the discussion herein, hold that in light of vesting rights, changes in employees' pension contribution rates or other proposed modifications to current employees' pension plans are therefore specifically *excluded* from the scope of bargaining under applicable collective bargaining statutes." (Proposed dec. at p. 27, original emphasis.)

With respect to the second allegation, i.e., that the Unions refused to bargain over the County's prevailing wage proposal, the ALJ acknowledged that the Unions did not oppose, and in fact, *agreed to*, that part of the County's proposal to freeze employee salaries in 2010-2011, and that they were thus willing to forego their right to *any* percentage change under the ordinance for that year. However, the ALJ observed that the proposed wage freeze was *only one part of* the County's proposal; it would also establish a committee to study and modify the methodology used to calculate the prevailing wage.

According to the ALJ, the Unions "steadfastly maintained" during bargaining that the County's proposal to change the methodology for calculating the prevailing wage would not result in an "apples to apples" comparison and so the required percentage change could not be calculated. The proposed decision also found that the Unions would not engage in discussion of the proposed study, "because they believed that doing so could impair their members 'vested contractual rights' under the Ordinance."

The ALJ rejected the Unions' argument that there was no need to bargain over any changes to "future" prevailing wage methodology, because the Unions had agreed to freeze employee salaries for 2010-2011. Citing *City of Torrance* (2008) PERB Decision No. 1971-M, the ALJ reasoned that the Unions' willingness to discuss and agree to *portions of* the County's prevailing wage proposal "does not preclude the finding of a per se violation," where the record demonstrated a refusal to discuss *other*, negotiable portions of the proposal, which were "separate and distinct from the salary freeze component." Additionally, the ALJ reasoned that the Unions' bargaining obligation was not excused by their belief that a conflict with other statutory schemes *might* occur, since the proposed committee never formed or proposed *actual* changes to the prevailing wage formula.

DISCUSSION

The Unions have asserted 10 exceptions to the proposed decision, which, for the purposes of the discussion below, have been grouped as follows: Two exceptions challenge the ALJ's determinations that the Unions failed and refused to bargain over both the County's pension contribution and prevailing wage proposals. Most of the remaining exceptions take issue with the ALJ's interpretation of the Pension Plan, and with the ALJ's interpretation of statutory and decisional law regarding the negotiability of employee pension benefits. Aside from one exception disputing the accuracy and significance of testimony by Petruzzi, the Executive Secretary of the Pension Trust, regarding the role of actuarial recommendations in setting the amounts of member contributions, the Unions have not specifically excepted to any of the ALJ's factual findings.

In response to the County's proposal to increase employee pension contributions, the Unions proposed a *salary cut* designed to achieve an equivalent amount in cost savings. The Unions also demanded maintaining the status quo regarding pension contributions and benefits. According to the Unions, in proposing to increase employee pension contributions, what the County was *really* demanding was a .56 percent *reduction* in employee compensation and, because the Unions were more than willing to negotiate to meet *that* demand "in any agreeable form," they contend that their actual conduct belies any conclusion that they refused to bargain.[15]

[15] In their exceptions, the Unions argue that their counteroffer for a pay cut instead of a change in the retirement benefits formula would actually provide *greater* cost-savings than the County's proposal. While "not absolutely certain," because she had not "consider[ed] every piece of it," Douglas-Schatz admitted on cross-examination that it "could be true" that the Unions' proposal would have saved the County more money than the language proposed and ultimately imposed by the County.

Exception to the ALJ's Conclusion that the Unions Refused to Bargain Over the Pension Contributions Proposal.

The Unions except to the ALJ's reliance on the conclusiveness of their pleadings as one-sided and contrary to public policy.[16] The Unions do not deny that in answering the complaints, they stated that they had "refused to bargain" over the pension contribution proposal. However, they contend that the ALJ gave undue emphasis to these "qualified" admissions, while simultaneously and selectively ignoring similarly "careless" statements made by counsel for the County during the course of these proceedings.[17]

The Unions also argue that, if adopted, the proposed decision would create perverse incentives that are contrary to the MMBA's fundamental purpose of promoting full communication between public employers and their employees. Because the duty to bargain does not require making concessions or agreeing to any proposal, the Unions argue that they have been penalized for their candor in explaining the basis of their disagreement with the County, whereas if they had simply stood on their rights and refused *to agree* to the proposal, without explanation, they would face no liability in this matter. We reject both arguments.

[16] In addition to arguing that they should not be held to the admissions contained in their answers, the Unions also except to the ALJ's alternative reasoning, i.e., that their actual conduct constituted a refusal to bargain over the County's pension contributions proposal. However, because the Board does not adopt that portion of the proposed decision, we find it unnecessary to address the Unions' arguments on this point.

[17] At the hearing, Sloan occasionally described the Unions' position as a "rejection" of the County's proposal, rather than *a refusal* to bargain over that proposal. During his testimony as a witness to negotiations, Sloan testified that, "the parties were frequently exchanging information regarding the County's proposal for increased pension contribution rates for represented employees," and that, "in the context of the ebb and flow of negotiations," Sloan attempted to provide the Unions with information about the County's pension contributions proposal, which was "central to negotiations."

Where a party to negotiations refuses to discuss a particular subject or proposal based on the belief that it encompasses matters outside the scope of mandatory subjects, the lawfulness of that refusal turns on whether the subject or proposal is negotiable. (*Sierra Joint Community College District* (1981) PERB Decision No. 179 (*Sierra*), pp. 6-7.) Because the obligation to meet and confer promptly upon request regarding mandatory subjects of bargaining is absolute (*Dublin Professional Fire Fighters, Local 1885 v. Valley Community Services Dist.* (1975) 45 Cal.App.3d 116, 118), there is no "good-faith doubt," "mistake of law" or similar defense available when a party has refused outright to meet or negotiate, because it denies or entertains doubt as to the negotiability of a proposal. (*San Mateo County Community College District* (1993) PERB Decision No. 1030 (*San Mateo*), p. 12; *Sierra, supra,* PERB Decision No. 179, pp. 6-7; *El Monte Union High School District* (1982) PERB Decision No. 220, p. 11; *San Francisco Community College District* (1979) PERB Decision No. 105, pp. 7-8, 12-16.) If the matter is within scope, then the refusal to discuss it is a per se violation of the duty to bargain and, unlike a surface bargaining allegation, no further inquiry into the respondent's subjective motive is necessary. (*Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M, p. 15; *Charter Oak Unified School District* (1991) PERB Decision No. 873 (*Charter Oak*), p. 8, fn. 3; *California State University* (1990) PERB Decision No. 799-H, adopting proposed dec. at pp. 51-52; *NLRB v. Katz* (1962) 369 U.S. 736, 742-743.)

As explained in the proposed decision, the Unions admitted in their answers to the complaints that they had "refused to bargain" over the County's proposal to change the formula for allocating pension costs between employees and the County. Both in their answers and during negotiations, the Unions argued that they could not legally negotiate over the County's pension contribution proposal, because it would weaken their position in separate

litigation filed in superior court over the same issue, and that any agreement they might come to on this matter could subject them to legal action by unit members for bargaining away vested employee rights. The Unions thus argued that they were legally privileged to refuse to meet and confer over these issues, because the rights are protected from impairment or abrogation by the contract clauses of the California and federal constitutions, and because a recognized employee organization cannot legally bargain away the vested rights of the employees it represents. Moreover, as the ALJ noted, although the Unions' admission in their pleadings was repeatedly referenced during the hearing, they never requested leave to amend their answers.

Under the doctrine of "conclusiveness of pleadings," a pleader is bound by well pleaded material allegations or by a failure to deny well pleaded material allegations. (Code Civ. Proc., § 431.20.) Facts admitted or not denied in a pleading are considered "judicial admissions," which are conclusive on the pleader. A "judicial admission" is therefore not regarded procedurally as "evidence." It is fundamentally different from evidence in that it serves as a *waiver of proof* of the fact admitted and has the effect of removing the matter from controversy. (*Valerio v. Andrew Youngquist Construction* (2002) 103 Cal.App.4th 1264, 1271, modified (Dec. 3, 2002), citing 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 413, pp. 510–511.) A judgment may rest in whole or in part on the admission without proof of the fact. (*Malone v. Roy* (1897) 118 Cal. 512, 514; *Brown v. Aguilar* (1927) 202 Cal. 143, 149; *Giguiere v. Patterson* (1934) 138 Cal.App. 167, 171-172.)

The doctrine concerns only matters admitted in the pleadings, such as a party's answer to a complaint. It does not apply to admissions by a party-opponent or statements made by a party's representative in the course of a hearing. (Evid. Code, § 1222; *O'Mary v. Mitsubishi*

Electronics America, Inc. (1997) 59 Cal.App.4th 563, 570.) Although the trier of fact is ordinarily free to consider such statements (see, e.g., Evid. Code, §§ 1221, 1222, 1271, 1280; *O'Mary v. Mitsubishi, supra,* 59 Cal.App.4th 563, 572; *Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 315-327), because an admission in the pleadings *forbids* consideration of contrary evidence, any discussion of evidence offered to rebut a judicial admission is irrelevant and immaterial. (*Valerio v. Youngquist Constr., supra*, 103 Cal.App.4th 1264, 1271, citing *Braverman v. Rosenthal* (1951) 102 Cal.App.2d 30.) Thus, even assuming we agreed with the Unions' interpretation of statements made by counsel for the County during negotiations or at the hearing, under the conclusiveness of pleadings doctrine, the ALJ was correct to disregard such statements to the extent they were offered to rebut the Unions judicial admission that they had "refused to bargain" over the County's pension contributions proposal.

We are sensitive to the fact that PERB is not a court, but an administrative agency, and that the formalities of practice and procedure in the judicial system are not always appropriate for fulfilment of PERB's mission, which includes assisting parties and representatives who are laypersons. (PERB Regs. 32175, 32176, 32180, 32620, subd. (b)(1); *Reed District Teachers Association, CTA/NEA (Reyes)* (1983) PERB Decision No. 332, p. 6; *California State University, Hayward* (1987) PERB Decision No. 607-H, p. 21; *Los Angeles Community College District* (1994) PERB Decision No. 1060, p. 9; *Los Banos Unified School District* (2007) PERB Decision No. 1935, adopting warning letter at p. 2.) However, PERB has previously relied on the conclusiveness of pleadings doctrine. (*Regents, supra*, PERB Decision No. 2302-H, proposed dec. at p. 15.) Despite its potential for harsh results, we find nothing wrong with the ALJ's application of the doctrine here to find that the Unions refused

to bargain over the County's retirement proposal and that consideration of evidence on this issue was unnecessary.

Nor do we agree with the Unions that application of the conclusiveness of pleadings doctrine in this case unfairly punishes the Unions for their candor or creates perverse incentives for parties to withhold their reasons for rejecting a bargaining proposal. The Unions are correct that the duty to bargain does not compel either party to reach agreement or make concessions. (*Saddleback Valley Unified School District* (2013) PERB Decision No. 2333, p. 7; *Oakland Unified School District* (1981) PERB Decision No. 178 (*Oakland*), pp. 7-8.) Even if a party's reasons for insisting that a particular subject be included or excluded from the contract are questionable, if *the reasons offered* are sincerely held, the position may be adamantly maintained even to the point of impasse. (*Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9, 23 (*City of Placentia*), citing *NLRB v. Herman Sausage Co.* (5th Cir. 1960) 275 F.2d 229, 231-232 (*Herman Sausage*).)

However, a flat refusal to reconcile differences, by failing to offer counterproposals may be an indicator of bad faith, if no explanation or rationale supports the refusal (*Oakland, supra,* PERB Decision No. 178, p. 8), while a refusal to offer some explanation or substantiation for one's position, where such information exists and has been requested, constitutes an outright refusal to bargain. (*County of Solano* (2014) PERB Decision No. 2402-M, pp. 11-12; *NLRB v. Truitt Mfg. Co.* (1956) 351 U.S. 149, 152-153.) We therefore reject the Unions' suggestion that they could have escaped liability in this dispute by simply refusing *to agree* and withholding their true reasons for doing so. In fact, the result would have been the same, as adamant refusal to agree *without some* justification is no less an unfair practice

than a flat refusal to discuss a negotiable subject at all. (*San Mateo, supra,* PERB Decision No. 1030, p. 12; *Mt. Diablo Unified School District* (1983) PERB Decision No. 373, p. 24.)

Exceptions to the ALJ's Interpretation of Statutory and Decisional Law

Several of the Unions' exceptions dispute the ALJ's interpretation of statutory or decisional law regarding the negotiability of pension benefits. The Unions challenge the accuracy and relevance of the ALJ's discussion of *federal* authority regarding the negotiability of retirement benefits, while they assert that the proposed decision "does not refute, address or even mention" *California* appellate cases purportedly holding that employee organizations cannot bargain away the vested rights of the employees they represent.[18] The Unions do not dispute that "even vested retirement benefits can be reduced or adversely altered if they are accompanied by comparable new advantages," but they except to the proposed decision's *application* of that rule in the present context, because, as they point out, the County *never* proposed any comparable advantages to offset the proposed disadvantages to employees. They argue that in the absence of any comparable offsetting advantages, the bargaining obligation *does flow in only one direction*, i.e., that while they may bargain for *greater* benefits, under California law, they cannot agree to lesser benefits with respect to vested employee rights.

In a similar vein, the Unions except to the ALJ's statement that, "none of the cases cited by the Unions . . . hold that in light of vesting rights, changes in employees' pension contribution rates or other proposed modifications to current employees' pension plans are . . .

[18] In addition to *Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 131, the Unions except to the ALJ's failure to discuss *Florio v. City of Ontario* (2005) 130 Cal.App.4th 1462, *Phillips v. State Personnel Bd.* (1986) 184 Cal.App.3d 651, *Wright v. City of Santa Clara* (1989) 213 Cal.App.3d 1503 and *California League of City Employee Associations v. Palos Verdes Library Dist.* (1978) 87 Cal.App.3d 135 (*Palos Verdes Library Dist.*).

specifically *excluded* from the scope of bargaining under applicable collective bargaining statutes." (Emphasis in original.) They assert, to the contrary, that "no California reported case holds that such proposed changes are within the scope of bargaining," and they point to various cases which they contend come to exactly the opposite conclusion.[19]

The Unions are correct that not all of the authorities cited in their post-hearing briefs, including various California authorities, were specifically mentioned or discussed in the proposed decision. In fact, the ALJ acknowledged that she would not address every case individually, but that, after having reviewed the cases, in her view, none necessarily supported the Unions' position.[20] Nor, under the circumstances, do we think it would have been necessary or desirable for the ALJ to dissect each case individually, so long as *the substance* of the Unions' position was addressed by the proposed decision, which we find to be the case.

Article 1, section 9, of the California Constitution prohibits passage of a law impairing contractual obligations.[21] As interpreted by California courts, the contract clause limits the

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[19] In this context, the Unions cite *Mendocino County Employees Assn. v. County of Mendocino* (1992) 3 Cal.App.4th 1472, *International Brotherhood of Electrical Workers v. City of Redding* (2012) 210 Cal.App.4th 1114, and *California Assn. of Professional Scientists v. Schwarzenegger* (2006) 137 Cal.App.4th 371.

[20] The ALJ explained that, in her view, "none of the cases cited by the Unions, *including those that are omitted from the discussion herein*, hold that in light of vesting rights, changes in employees' pension contribution rates or other proposed modifications to current employees' pension plans are . . . specifically excluded from the scope of bargaining under applicable collective bargaining statutes."

[21] "A . . . law impairing the obligation of contracts may not be passed." (Cal Const., art. I, § 9.) The federal Constitution's contracts clause similarly provides that, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." (U.S. Const., art. I, § 10, cl. 1.)

state's power "to modify its own contracts with other parties, as well as contracts between other parties." (*Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1130.) Analysis of a contract clause claim requires inquiry into: "(1) the nature and extent of any contractual obligation . . . and (2) the scope of the Legislature's power to modify any such obligation." (*Id.* at p. 1131, quoting *Valdes v. Cory* (1983) 139 Cal.App.3d 773, 785.) The party asserting a contract clause claim has the burden of "mak[ing] out a clear case, free from all reasonable ambiguity," that a constitutional violation has occurred. (*Floyd v. Blanding* (1879) 54 Cal. 41, 43.)

Under California law, a "vested," right of employees to a pension or other benefits may be implied from a county ordinance or resolution, such as a collective bargaining agreement or pension plan, which has been adopted by the county's board of supervisors, when the language or circumstances accompanying its passage clearly evince a legislative intent to create private rights of a contractual nature enforceable against the county. In each case, whether an implied term creates vested rights, in the absence of a legislative bar, is a matter of intent, as determined under the traditional rules of statutory or contract interpretation. (*Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1177 (*County of Orange*); see also *Thompson v. Board of Supervisors* (1986) 180 Cal.App.3d 555, 562, fn. 5 [rules of statutory construction apply to local ordinances].)

The Unions apparently do not contend that pension contributions and benefits are categorically excluded from the scope of representation. Indeed, as the proposed decision observes, there is considerable authority – both California and federal – holding that the

pension contributions and the future benefits of current employees are negotiable subjects.[22] However, the fact that a subject is within the scope of representation does not mean that negotiated terms affecting that subject are never subject to the protections of the contracts clauses of the California or federal Constitutions. (*County of Orange, supra*, 52 Cal.4th 1171, 1177; *Palos Verdes Library Dist., supra,* 87 Cal.App.3d 135.) Thus, the Unions argue that, *once vested*, by virtue of having been fixed either in a collective bargaining agreement or, as here, in a pension plan adopted by the governing agency, pension benefits and employee contributions towards future benefits may be neither unilaterally altered by the public employer nor bargained away by the employees' collective bargaining representative, except under very limited circumstances that are not present here.

However, as in other "vested rights" cases, a threshold question here is not whether agency decisions or appellate opinions treat pension contributions and benefits as mandatory subjects for bargaining, but whether there exists "clear" evidence of "a legislative intent to create private rights of a contractual nature enforceable against the county." (*County of Orange, supra*, 52 Cal.4th 1171, 1177.) Where the language of the governing statute (in this case, the

[22] *Allied Chem. & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.* (1971) 404 U.S. 157 is the leading federal case. Following federal precedent, PERB has likewise determined that pension, health and other fringe benefits are within the scope of representation because they are each part of the total compensation package, even if their payment is deferred until a future date. (*County of Sacramento* (2009) PERB Decision No. 2045-M, pp. 2-3; *County of Sacramento* (2008) PERB Decision No. 1943-M, pp. 11-12; *Madera Unified School District* (2007) PERB Decision No. 1907, p. 2; *Temple City Unified School District* (1989) PERB Decision No. 782, pp. 11-13; *Temple City Unified School District* (1990) PERB Decision No. 814, p. 10; *Clovis Unified School District* (2002) PERB Decision No. 1504, pp. 17-18; *Palo Verde Unified School District* (1983) PERB Decision No. 321, p. 8, fn. 3.) Taken together, the above cases recognize that wages, fringe benefits and pensions are generally *fungible* components of an "overall compensation package," and that, upon request, a public agency and the employees' representative must bargain not only over the total amount of the package, but also over how it will be distributed among its constituent parts. (*Madera, supra*, PERB Decision No. 1907, p. 2; *City of San Jose* (2013) PERB Decision No. 2341-M, pp. 31-32.)

pension plan) or the surrounding circumstances do not clearly and unmistakably indicate an intent to confer rights of a contractual nature, including a promise *not* to change the specific formulas or benefits of a pension plan, no such promise should be inferred. (*Claypool v. Wilson* (1992) 4 Cal.App.4th 646, 669-670.) Put simply, unless the Unions can show a clear legislative intent to create vested rights and thereby remove employee compensation or otherwise negotiable subjects from the scope of bargaining, those matters remain subject to negotiation. (*San Bernardino Public Employees Assn. v. City of Fontana* (1998) 67 Cal.App.4th 1215, 1224-1225 (*City of Fontana*).)

For the reasons explained in the proposed decision and reiterated below, we agree with the ALJ that the governing terms of the Plan do not clearly demonstrate a legislative intent to bind the County with respect to the amounts or distribution of employee contributions towards future retirement benefits.

Exceptions to the ALJ's Interpretation of the Governing Plan Provisions

The Unions except to the proposed decision's interpretation of two provisions of the Plan, and particularly with the ALJ's determination that, "the Plan does not set absolute caps on the percentage of the employee's contribution rate." The Unions argue, to the contrary, that the pertinent provisions of the Plan "only allow for increases [in employee contributions] based upon an actuarial recommendation," and that "recognized employee organizations . . . cannot bargain to increase member rates in a manner not recommended by the actuary. . . ." We disagree.

The provisions relied on by the Unions do confer an absolute right to "permanency" in the particular benefits or contributions formulas. Section 5.01 of the Plan states, in pertinent part, that "The schedules of rates of contributions utilized by the Pension Trust shall be those

adopted by the Board of Supervisors upon recommendation of the Board of Trustees. The Board of Trustees shall base its said recommendation on the report of the actuary engaged by the Board of Trustees." The other section relied on by the Unions, Section 16.04, states in pertinent part, that "Upon the basis of the [actuarial] investigation, valuation, and recommendations of the actuaries, the Board of Trustees shall recommend to the Board of Supervisors such changes in the rates of interest, in the rates of contributions of Members, and in County and District appropriations as are necessary."

The Unions interpret these provisions as permitting the Board of Supervisors to increase employee contributions only after a recommendation by the actuary and, moreover, to preclude collective bargaining over the amounts or relative shares of such contributions between the County and its employees. Although the Plan language speaks of increases in employee contributions based on *recommendations* of the actuary, it also seems to reserve ultimate authority for making such changes to the County's Board of Supervisors. Although the County has historically covered the costs of increased contributions, the Plan does not require it to do so. We therefore agree with the ALJ that collective bargaining over the relative share of any contributions would not annul, supersede or set aside the language of the Plan. The Unions have not shown how employee rights to a particular rate of contributions or benefits have "vested." (*People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, 599-601; *City of Fontana, supra,* 67 Cal.App.4th 1215, 1224-1225; *Mount Diablo Education Association (DeFrates)* (1984) PERB Decision No. 422, pp. 5-6.)

Additionally, as suggested above, because we agree with the ALJ that the Plan does not confer the rights which the Unions assert, we find it unnecessary to comment on whether any

of the California or federal court cases cited by the Unions shed any light on when, or under what circumstances, vested rights may be modified through collective bargaining.

Exception to the Proposed Decision's Description of the Testimony of Petruzzi

The Unions also except to the ALJ's interpretation of Petruzzi's testimony regarding the historical practice of the Pension Trust. They argue that the ALJ focused exclusively on Petruzzi's testimony on direct examination, during which Petruzzi described the Board of Trustees' responsibility as limited to recommending when contribution rate increases are necessary, but remaining agnostic as to how such increases should be allocated between the County and its employees. However, according to the Unions, Petruzzi effectively undermined this interpretation when he admitted on cross-examination that, aside from the present dispute, he was unaware of any previous increase in member contribution rates, unless recommended by the Plan because of a change in actuarial assumptions, to correct an actuarial error that had benefitted both the County and employees, or when the parties had agreed to share the costs of a newly-added benefit. Since none of these circumstances is present in the current dispute, the Unions argue that, contrary to Petruzzi's testimony on direct examination, the historical practice of the Pension Trust supports the Union's interpretation of the Plan. We are not persuaded.

When PERB is required to interpret contractual provisions, including the terms of a pension plan, to decide an unfair practice case, it follows the traditional rules of contract interpretation as codified in the Civil Code. (Civ. Code, §§ 1638-1645.) Foremost among these is the requirement that we look first to the language of a written agreement, and that if its terms are clear and explicit, then it *alone* governs the interpretation and there is no need to

resort to bargaining history, past practice, or other extrinsic evidence. (Civ. Code, §§ 1638, 1639, 1644; *City of Riverside* (2009) PERB Decision No. 2027-M.)

Because we agree with the ALJ that the Plan language does not support the Unions' contention that the County has delegated to the Pension Trust all authority to set employee compensation, we find it unnecessary to address this exception. Even accepting the Unions' account of the historical practice of the Pension Trust, that finding alone would not trump the provisions of the Plan documents, which, in our view, do not *clearly* evince a legislative intent to divest the County of its authority to set employee compensation, subject to its meet and confer obligations under the MMBA. (*County of Orange, supra,* 52 Cal.4th 1171, 1184, 1187; *Chisom v. Board of Retirement of County of Fresno Employees' Retirement Assn.* (2013) 218 Cal.App.4th 400, 413-414.)

Exception to the ALJ's Conclusion that the Unions Refused to Bargain Over Portions of the County's Prevailing Wage Proposal

The Unions also except to the ALJ's conclusion that they refused to bargain over any aspect of the County's prevailing wage proposal. They argue that, whatever their stated reasons, the record demonstrates that they did in fact negotiate with regard to the methodology and marketplace for the prevailing wage calculation and that they simply refused to agree with every aspect of the County's proposal, as is their right under the MMBA and decisional law. We find merit in this exception.

The County's Prevailing Wage Ordinance requires a percentage change in employee compensation that is "*at least equal to*" the percentage paid to County employees for performing the "the same quality of service rendered" by other employees in "similar

employment." According to the language of the ordinance, the universe of employees working in "similar employment" is among those matters that "shall be determined by negotiations" between the County and employee organizations. The Unions' initially proposed to include in the prevailing wage formula the five counties proposed by the County plus two additional counties. The ALJ found, and we agree, that the Unions repeatedly acknowledged their willingness to negotiate a list of "comparable" employers, so long as it would result in enhancements, but not reductions, to employee compensation under the "at least equal to" language in the prevailing wage formula. Like the federal labor law on which it was modeled, the MMBA does not compel either party to agree to a proposal or require the making of a concession. (*City of Placentia, supra,* 57 Cal.App.3d 9, 22-23, citing 29 U.S.C. § 158(d); see also *Oakland Unified School District* (1982) PERB Decision No. 275, pp. 14-15.) Because the "right to remain firm" in negotiations is well established, we find no per se violation in the Unions' insistence, even to the point of impasse, that they would only agree to a prevailing wage formula that would result in wages "at least equal to" or greater than the existing level of compensation.

In fact, despite their stated position, the record demonstrates that the Unions engaged in significant "give and take" not only on the prevailing wage formula, but also on the resulting *level* of employee compensation. Throughout the negotiations, the Unions *agreed to* the essence of the County's proposal, which was that employees receive *no wage increase* during the period subject to negotiation and they eventually proposed a 0.56 percent *wage reduction* which, as they point out, was equal to *or greater than* the amount in costs savings the County sought to recover through its proposal to change employee pension contributions.

Although the ALJ found that the Unions bargained over both the methodology and the level of employee compensation, she nonetheless determined that they had refused outright to bargain, because they insisted that, once set, the prevailing wage formula constituted a "vested right" that could not be changed, and because, while they agreed to forego any wage increases, they failed to respond to those portions of the County's proposals that looked to change the prevailing wage methodology for future increases. The ALJ reasoned that, "Although the Unions were willing to address *part* of the County's proposal, and always remained willing to negotiate over percentage increases greater than what they would be entitled to under the Ordinance, they 'steadfastly maintained' during bargaining that the County's proposal to change the comparators or methodology would not result in an 'apples to apples' comparison and so the required percentage change could not be calculated." (Proposed dec. at p. 34, emphasis added.) According to the ALJ, "the Unions' bargaining obligation was not excused because of their belief that a conflict with other statutory schemes might occur." Additionally, "[t]heir willingness to discuss other aspects of the employer's proposal over the prevailing wage issue does not preclude the finding of a per se violation," because the Unions refused to respond *to that portion* of the proposal for a subcommittee to study the issue. In our view, neither aspect of the Unions' conduct constitutes a per se violation.

We consider first the Unions' "vested rights" argument. Because they pertain to employee compensation, we agree with ALJ that the County's prevailing wage proposals involved negotiable subjects. (MMBA, §§ 3500, 3504, 3505; *City of Fontana, supra,* 67 Cal.App.4th 1215, 1224-1225; *County of Santa Clara* (2010) PERB Decision No. 2114-M; *Swift Adhesives, Div. of Reichhold Chemicals, Inc.* (1995) 320 NLRB 215, 216.) We likewise agree with the ALJ's implicit finding that, when the County repealed the pension benefit

enhancement and eliminated the corresponding 1.53 percent offset to the prevailing wage in 2006, the parties did not thereby intend to remove these issues from all future negotiations. Such a "calcification of working conditions" is contrary to the principles of collective bargaining and will only be entertained upon "clear and unmistakable" evidence that the public agency intended to grant employees private rights of a contractual nature that survive and effectively supersede future collective bargaining obligations. (*City of Torrance, supra*, PERB Decision No. 1971-M, p. 27; *City of Fresno v. People ex rel. Fresno Firefighters, IAFF Local 753* (1999) 71 Cal.App.4th 82, 97; *City of Fontana* (1998) 67 Cal.App.4th 1215, 1224-1225; cf. *Palos Verdes Library Dist.*, supra, 87 Cal.App.3d 135, 150.)

But while we agree with the ALJ that the Unions' "vested rights" argument was thus mistaken or misplaced with respect to the prevailing wage issue, we do not think this argument, by itself, can determine the lawfulness of the Unions' conduct here, as it was not the only argument offered by the Unions in support of their position. In addition to their "vested rights" argument, the Unions *also* argued that one can only logically compare "apples to apples" to determine whether "comparable" work in other locations warranted a change in the wages of County employees, and that a change in the formula would disrupt the methodological integrity of the comparison. And, while related to their "vested rights" argument, the Unions negotiators *also* advised the County of their essentially *pragmatic* concern of avoiding lawsuits brought by their own members for having bargained away arguably vested rights. Because of its representative function, a union may reasonably wish to avoid costly or politically damaging litigation with the employees it represents, even when it is confident that it will ultimately prevail on the merits. (*International Brotherhood of Electrical Workers v. Foust* (1979) 442 U.S. 42, 52.)

While we reject the merits of the Unions' "vested rights" argument, we recognize that the issue was at least debatable and therefore the source of a legitimate concern of avoiding litigation. The statute and the decisional law interpreting the duty to bargain do not require that every argument made in support of one's position be meritorious or "accurate" in any empirically verifiable sense. (*City of Placentia, supra*, 57 Cal.App.3d 9, 22-23, 25, citing *Herman Sausage, supra,* 275 F.2d 229, 230-232.) Although the Unions gave some explanations for their position that were "questionable," nothing in the record suggests that their belief in the logic and expediency of maintaining the existing formula was not "sincere" or "fairly maintained." (*Ibid.*) Thus, while the Unions argued, in our view *mistakenly*, that the prevailing wage formula was not subject to negotiation, because this position was not stated in a pleading and was not the only explanation offered, the Unions nonetheless explained their opposition to the County's proposed changes in the prevailing wage formula "in sufficient detail to permit the negotiating process to proceed on the basis of mutual understanding." (*Jefferson School District* (1980) PERB Decision No. 133, p. 11; *City of Glendale* (2012) PERB Decision No. 2251-M, adopting dismissal letter at p. 4.) A party who initially asserts that a negotiable matter is outside the scope of representation but then engages in actual bargaining on the subject has not refused outright to bargain; if the party persists in its position that a negotiable matter is non-negotiable, then its conduct constitutes a per se violation of the duty to bargain. (*San Mateo, supra*, PERB Decision No. 1030, p. 12; cf. *Salinas Valley Memorial Healthcare System* (2012) PERB Decision No. 2298-M, pp. 18-19.)

We next consider the Unions' alleged refusal to bargain over a *part* of the County's prevailing wage proposal. During the negotiations regarding the prevailing wage formula, the Unions initially proposed the addition of two cities to the comparator pool. Although they

later abandoned this proposal and demanded the status quo, the exchange of proposals on the prevailing wage issue does not demonstrate an outright refusal to bargain. It is true that the Unions did not respond directly to that part of the County's proposal for a subcommittee to study future changes to the prevailing wage formula. However, by the time the County proposed the subcommittee, the Unions had already explained their adamant opposition to *any* change in the existing formula. At that point, it was unnecessary for them to specifically reject a proposed subcommittee whose stated purpose was to work toward the same result they had already rejected. When a party has already explained the basis for its opposition, it need not continue to do so each time the same or similar terms are proposed. (*Regents of the University of California* (2010) PERB Decision No. 2094-H, pp. 20-24; *Charter Oak, supra,* PERB Decision No. 873.)

We are not persuaded by the ALJ's reliance on *City of Torrance, supra,* PERB Decision No. 1971-M, pp. 24-27, and similar cases holding that a party's willingness to reach agreement on other subjects will not shield it from liability when it has refused to discuss a negotiable subject. While the proposition cited is a correct statement of law, we find it inapplicable here. The Unions not only discussed, but agreed to, the primary aspect of the County's proposal, while their previously-expressed concerns about comparing "apples to apples" and avoiding litigation made it unnecessary for the Unions to respond to the remaining aspect of the County's proposal.

We therefore reverse the proposed decision's conclusion that the Unions unlawfully failed and refused to bargain with respect to the County's prevailing wage proposal.

The Unions' Request for Oral Argument

The Unions have also requested oral argument before the Board itself, a request that the County opposes. The Board has historically denied requests for oral argument when the record is adequate, the parties have had an opportunity to fully brief the matter, and the issues are sufficiently clear to make oral argument unnecessary. (*Los Angeles Community College District* (2009) PERB Decision No. 2059; *Monterey County Office of Education* (1991) PERB Decision No. 913.) In addition to a voluminous record consisting of nearly 70 exhibits, the parties presented testimony from several witnesses and had the opportunity to examine and cross-examine each witness over the course of a three-day hearing. They also filed post-hearing briefs with the ALJ in which they argued various points and authorities. Because the record has been fully developed and the issues are sufficiently clear to make additional argument unnecessary, we deny the Unions' request for oral argument.

ORDER

Based on the foregoing findings of fact and conclusions of law and the entire record in this case and pursuant to the Meyers-Milias-Brown Act (MMBA), Government Code section 3509, the Public Employment Relations Board (PERB or Board) AFFIRMS the conclusion of the proposed decision that the San Luis Obispo Government Attorneys' Union and the San Luis Obispo Deputy County Counsel Association (collectively, Unions) violated sections 3505 and 3509, subdivision (b), of the Government Code and committed an unfair practice pursuant to PERB Regulation 32604, subdivision (c) (Cal. Code Regs., tit. 8, § 31001 et seq.), by failing and refusing to meet and confer in good faith with the County of San Luis Obispo (County) regarding the County's proposal to increase employee pension contributions

and/or change the formula for distributing pension costs between the County and its employees.

Based on the foregoing findings of fact and conclusions of law and the entire record in this case and pursuant to the MMBA, Government Code section 3509, the Board REVERSES the conclusion of the proposed decision that the Unions violated sections 3505 and 3509, subdivision (b), of the Government Code and committed an unfair practice pursuant to PERB Regulation 32604, subdivision (c), by failing and refusing to meet and confer in good faith with the County regarding the County's proposal to change the formula for calculating the prevailing wage, pursuant to the County's Prevailing Wage Ordinance.

The Unions, their governing board and their representatives, shall:

A. CEASE AND DESIST FROM:

Failing and refusing to meet and confer in good faith with the County, upon request, regarding proposed changes to employee pension contributions.

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

1. Meet and confer with the County upon proper request over the subjects of the amount of employee pension contributions and/or how pension cost increases should be allocated between the County and employees represented by Unions.

2. Within ten (10) work days of the service of a final decision in this matter, post at all work location where the Unions customarily post notices to their members, copies of the Notices attached hereto. The Notices must be signed by authorized agents of the Unions indicating that the Unions will comply with the terms of this Order. Such posting shall

be maintained for a period of thirty (30) consecutive work days. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the Unions to communicate with County employees represented by the Unions. Reasonable steps shall be taken to ensure that the Notices are not reduced in size, altered, defaced or covered with any other material.

3. Written notification of the actions taken to comply with the Order shall be made to the General Counsel of PERB, or the General Counsel's designee. The Unions 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 County.

Members Huguenin and Winslow 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. LA-CO-123-M and LA-CO-124-M, *County of San Luis Obispo v. San Luis Obispo Government Attorneys' Union and San Luis Obispo Deputy County Counsel Association,* in which all parties had the right to participate, it has been found that the San Luis Obispo Government Attorneys' Union (SLOGAU) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3505 and 3509, subdivision (b), and committed an unfair practice pursuant to subdivision (c) of PERB Regulation 32604 (Cal. Code Regs., tit. 8, sec. 31001 et seq.) by failing and refusing to meet and confer over the County of San Luis Obispo's (County) proposal regarding the amount of employee pension contributions and/or how pension cost increases should be allocated between the County and employees represented by SLOGAU.

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

A. CEASE AND DESIST FROM:

Refusing to meet and confer with the County upon proper request over matters within the scope of representation.

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

Meet and confer with the County upon proper request over the subjects of the amount of employee pension contributions and/or how pension cost increases should be allocated between the County and employees represented by SLOGAU.

Dated: _____

SAN LUIS OBISPO GOVERNMENT ATTORNEYS' UNION

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.

APPENDIX

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

A. CEASE AND DESIST FROM:

Refusing to meet and confer with the County upon proper request over matters within the scope of representation.

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

Meet and confer with the County upon proper request over the subjects of the amount of employee pension contributions and/or how pension cost increases should be allocated between the County and employees represented by DCCA.

Dated: _____

SAN LUIS OBISPO DEPUTY COUNTY COUNSEL ASSOCIATION

By: _____
Authorized Agent

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