STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

AFSCME LOCAL 127 and SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION, Charging Parties, v. CITY OF SAN DIEGO, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-352-M PROPOSED DECISION (8/22/08)

Appearances: Rothner Segall & Greenstone by Ellen Greenstone, Attorney, for AFSCME Local 127; Nancy Roberts, Supervising Labor Representative, for San Diego Municipal Employees Association; Latham & Watkins LLP by Mark S. Pulliam, Attorney, for City of San Diego.

Before Thomas J. Allen, Administrative Law Judge.

In this case, two unions allege that a city failed to bargain in good faith and failed to follow its own impasse procedures in alleged violation of the Meyers-Milias-Brown Act (MMBA).[1] The city denies any violation.

PROCEDURAL HISTORY

AFSCME Local 127 (AFSCME) filed an unfair practice charge against the City of San Diego (City) on February 13, 2007. The General Counsel of the Public Employment Relations Board issued a complaint against the City on May 21, 2007. The City filed an answer to the complaint on June 18, 2007. The San Diego Municipal Employees Association (SDMEA) filed an application for joinder as a party on July 5, 2007.

PERB held an informal settlement conference on July 6, 2007, but the case was not settled. AFSCME filed a motion to amend the complaint on August 3, 2007. Both AFSCME's motion to amend and SDMEA's application for joinder were granted on August 22, 2007.

[1] MMBA is codified at Government Code section 3500 and following.

The City filed a motion to dismiss or bifurcate the case on September 7, 2007. AFSCME filed a second motion to amend the complaint, along with an amended unfair practice charge, on September 10, 2007. SDMEA joined AFSCME's motion on September 12, 2007. AFSCME's motion was granted on September 24, 2007; the City's motion was denied on the same date.

PERB held a formal hearing on September 25-28 and October 29-31, 2007. With the receipt of the final post-hearing briefs on February 15, 2008, the case was submitted for decision.

FINDINGS OF FACT

The City is a public agency under MMBA. AFSCME and SDMEA are recognized employee organizations under MMBA and are the exclusive representatives of appropriate units of City employees.

AFSCME and the City are parties to a Memorandum of Understanding (MOU) for the term July 1, 2005, through June 30, 2008, with a Management Rights article (Article 8) stating in part:

> The rights of the City include among others, the exclusive right to determine the mission of its constituent departments, commissions, and boards; set standards of service; determine the procedures and standards of selection for employment and promotion; direct its employees, take disciplinary action for just cause; relieve its employees from duty because of lack of work or for other lawful reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which governmental operations are to be conducted; take all necessary actions to carry out its mission in emergencies; and complete control and discretion over its organization and the technology of performing its work.

SDMEA and the City are parties to an MOU for the same term with a substantially similar Management Rights article (Article 31).

The MOU for AFSCME also has an Article 50 concerning (among other things) contracting out, stating in part:

> Except as prohibited by Article 3, Recognition, the City's decision to transfer unit work for reasons other than labor costs to other employers, to other bargaining units or to other City employees is not subject to meet and confer. However, if the decision to transfer unit work is based on labor costs, then the City will provide [AFSCME] with notice and opportunity to meet and confer on both the decision to transfer unit work and the impact of the transfer on mandatory subjects.

The MOU for SDMEA seems to have no comparable provision. Both MOUs also have extensive Retirement articles (Article 43 for AFSCME, Article 22 for SDMEA).

On February 2, 2006, the City proposed two amendments to the City Charter, to be placed on the ballot as Propositions B (concerning retirement benefits) and C (concerning "managed competition" that could lead to contracting out). From February 16 to March 26, 2006, the City bargained to impasse with various employee organizations over the proposed ballot language. Beginning July 24, 2006, the City met and conferred with a coalition of employee organizations including AFSCME and SDMEA (Coalition) over the rules and procedures by which the Propositions would be implemented if they passed. On November 7, 2006, both Propositions were passed by a wide margin, especially Proposition B.

Proposition B

Proposition B added to the City Charter a requirement that any future retirement system benefit increase be approved by the voters. The Proposition did not define the term "increase" or specify the timing and process for voter approval. On November 21, 2006, after the election, and after a dozen bargaining sessions over a four-month period, the City made its last, best, and final offer on an implementing ordinance addressing such issues. The City and the Coalition scheduled another bargaining session for December 1, 2006, on which date the

Coalition made its own last, best, and final offer on Proposition B implementation. The City then declared impasse.

City Council Policy 300-06, which governs employer-employee relations, states in relevant part:

> VII. IMPASSE PROCEDURES:
>
> A. Initiation of Impasse Procedures.
>
> If the meet and confer process has reached an impasse, either party may initiate the impasse procedures by filing with the City Council a written request for an impasse meeting, together with a statement of its position on all disputed issues. An impasse meeting shall then be scheduled promptly by the [Mayor].[2] The purpose of such meeting shall be:
>
> a. To identify and specify in writing the issue or issues that remain in dispute.
>
> b. To review the position of the parties in a final effort to resolve such disputed issue or issues; and
>
> c. If the dispute is not resolved, to discuss arrangements for the utilization of the impasse procedures provided herein.
>
> B. Impasse Procedures.
>
> If no agreement is reached at an impasse meeting, impasses shall then be resolved by a determination by . . . the City Council after a hearing on the merits of the dispute . . . .

With regard to the impasse over the implementation of Proposition B, neither the City nor the Coalition filed with the City Council a request for an impasse meeting, and none was scheduled or held.

Instead, even before the final December 1 bargaining session, the City put on the City Council's docket for December 5, 2006, the introduction of the Proposition B implementing

[2] Before the City adopted a "strong mayor" form of government, the meeting was to be scheduled by the City Manager.

ordinance. On December 1, 2006, which was a Friday, the City offered to schedule an "impasse meeting" with the Coalition "this weekend, or on Monday," before the City Council meeting on Tuesday. The Coalition found the City's scheduling offer "not feasible." In an e-mail message to the City dated December 4, 2006, the Coalition acknowledged that impasse meetings historically had not been held in all cases of impasse, but it also asserted that there had never been so little time between the declaration of impasse and the impasse hearing "to have the discussion of how the impasse procedure would happen."

Meanwhile, on a supplemental docket for the December 5 City Council meeting, the Mayor recommended in part that the City Council take the following action:

> Provid[e] an impasse procedure, if necessary, for Management and City Labor Organizations currently involved in Ballot Measure Implementation Ordinance negotiations regarding voter approval of retirement system increases . . . .

In a letter to the Mayor dated December 4, 2006, the Coalition asked that the Proposition B implementing ordinance be pulled from the December 5 docket, that the impasse hearing be rescheduled, and that the City "[f]ollow Council Policy 300-[0]6 with regard to the requirements of the impasse meeting, prior to conducting an impasse hearing before the City Council." The Mayor did not accede to any of these requests.

The minutes of the December 5 City Council meeting state in part, "IMPASSE HEARING HELD." Whether there was actually an impasse hearing consistent with City Council Policy 300-06 is in dispute.

The minutes indicate that the impasse hearing was held from 4:33 p.m. to 5:08 p.m. and from 6:12 p.m. to 6:13 p.m., for a total duration of 36 minutes. This portion of the meeting addressed the negotiation of ordinances implementing both Propositions B and C, which had recently been passed by the voters. The City Attorney advised the City Council, "In that

context, there is no right to meet and confer [on implementing ordinances], in my judgment." The Coalition asked the City Council, as it had previously asked the Mayor, that the matter be rescheduled. The Mayor told the City Council that the Coalition's procedural objections were "factually inaccurate" and "a disservice to the public process," that he would not budge in negotiations, and that the City and the Coalition were at impasse. So ended that portion of the City Council meeting.

Later the City Council President called the matter of the proposed Proposition B implementing ordinance, which was based on the City's last, best, and final offer, and announced that the Council would "now hold an impasse hearing." The City Attorney advised that "there is no right to meet and confer, and if there is no right to meet and confer, there is no impasse." He further advised that the Council could take three basic actions: approve the proposed ordinance, reject the proposed ordinance, or make requests that the Mayor return to discussions with the Coalition on specific areas.

The Mayor again told the Council that he would not budge in negotiations. He said there were "a number of issues that remain subjects of disagreements" with regard to Proposition B implementation, and he described one such issue. He acknowledged that the Council had the option to continue the matter but strongly recommended against it. Representatives of the City, the Coalition, and the public then addressed the Council, mostly about Proposition C but also about Proposition B. After the presentations, the Council President stated in part:

> And tonight we find ourself [sic] in a position that we hadn't anticipated, where just a day or two ago we found out that we really have very few options, according to our lawyer [the City Attorney], about what we do with these implementation ordinances. We can either vote for it, vote against it, or direct the Mayor to consider other changes, which he's indicated he won't entertain.

Another Council member stated that she did not understand why "we don't need to have a vote on the impasse hearing before we consider [the Proposition B implementing ordinance]." The City Attorney insisted that "this is not an impasse hearing at this point" because "as I indicated to you before, there's no requirement for an impasse hearing post-election on these issues." Yet another Council member stated:

> And so when we're – we have to follow the law and vote it up or down, or vote it down with recommendations, which seems to be a futile effort today, then I have a little bit of concern about that because where does the Council have the ability to really have input?

The City Council nonetheless followed the recommendations of the Mayor and the City Attorney and unanimously passed the Proposition B implementing ordinance.

Proposition C

Proposition C added to the City Charter language that allowed for "managed competition." The new language stated in part:

> The City may employ any independent contractor when the [Mayor] determines, subject to City Council approval, City services can be provided more economically and efficiently by an independent contractor than by persons employed in the Classified Service while maintaining service quality and protecting the public interest. The City Council shall by ordinance provide for appropriate policies and procedures to implement this subsection. Such ordinance shall include minimum contract standards and other measures to protect the quality and reliability of public services. A City department shall be provided with an opportunity and resources to develop efficiency and effectiveness improvements in their operations as part of the department's proposal. The [Mayor] shall establish the Managed Competition Independent Review Board to advise the [Mayor] whether a City department's proposal or an independent contractor's proposal will provide the services to the City most economically and efficiently while maintaining service quality and protecting the public service. . . . The City Council shall have the authority to accept or reject in its entirety any proposed agreement with an independent contractor submitted by

> the [Mayor] upon recommendation of the Managed Competition Independent Review Board . . . .

Proposition C did not describe in detail how this managed competition would work, but rather required the City Council to provide an appropriate implementing ordinance.

As with the Proposition B implementing ordinance, the City and the Coalition began bargaining over the Proposition C implementing ordinance on July 24, 2006, and the City made its last, best, and final offer on November 21, 2006, while scheduling another bargaining session for December 1, 2006. The City's final offer was its ninth bargaining proposal, and the December 1 session was the twentieth bargaining session. The Coalition made a total of seven counterproposals, but it did not make a last, best, and final offer. As with the Proposition B implementing ordinance, the City declared impasse on December 1, 2006.

With regard to the Proposition B implementing ordinance, there is no dispute in this case that the City bargained to impasse in good faith, but there is such a dispute with regard to the Proposition C implementing ordinance. The dispute centers on three sets of facts.

The first set of facts concerns bargaining about minimum standards for outside contractors. In the City's first bargaining proposal, dated July 24, 2006, the heading "Contract Standards and Procedures" was one of eleven headings in a 7-page document. The proposal stated in part:

> The minimum contract standards shall include, but not be limited to, the following: (1) that the contractor has provided this service for other cities, counties, districts, agencies or private entities for a sufficient time period, and thereby has demonstrated its ability and expertise to provide the service; (2) that the contractor provide proof that it maintains an adequate level of liability insurance consistant [sic] with City of San Diego risk management requirements; (3) that there is no reliable information demonstrating that the contractor has engaged in unethical business practices; (4) that the contractor has a policy of equal employment opportunity; (5) that the contractor has committed to complying with all City requirements in the

> performance of the service, including compliance with the City's "living wage" ordinance, if that ordinance is applicable to the work; (6) that the contractor has appropriate safety policies and procedures in place to protect the public and its employees in providing the service. [Emphasis added.]

The City's first proposal thus set forth six mandatory minimum standards.

The Coalition's first counterproposal, dated August 30, 2006, also set forth six mandatory minimum standards. Two of these standards were identical to numbers (1) and (4) in the City's proposal; two were expanded versions of numbers (2) and (3); and two were new. The City's next proposal, dated September 13, 2006, stated in part:

> The minimum contract standards may include, but not be limited to, the following: . . . [Emphasis added.]

The proposal then set forth ten standards, including the City's six original standards, but not the Coalition's two new standards. As indicated by the word "may," these ten standards were non-mandatory for the City.[3]

In later City proposals, the number of standards grew to twelve, and then thirteen, but remained non-mandatory. The City's eighth proposal, however, set forth twelve mandatory standards and four non-mandatory standards. Of the City's six original standards, numbers (2), (4), (5), and (6) were again mandatory, while number (1) was non-mandatory, and number (3) ceased to be a standard and became one of five "factors" for the independent review board to "consider." In the City's last, best, and final offer, dated November 21, 2006, the mandatory and non-mandatory standards remained the same.

In the City's last, best, and final offer, the heading "Minimum Contract Standards and Contractor Qualifications" was one of 16 headings in a 13-page document. Other headings included "Pre-Competition Assessment," "Resources for City Employees Involved in Managed

[3] The minimum standards would be mandatory for the contractors, but only if the City chose to include them.

Competition," "Consideration of Proposals by Independent Review Board," "City Manager and City Council Consideration of Decision of Independent Review Board," and "Notice to Affected Labor Organization and Affected Employee Procedures."

The second set of facts concerns the discussion of a guidebook and administrative regulation (AR) on managed competition. During bargaining over the Proposition C implementing ordinance, the City and the Coalition had discussions but not negotiations about a guidebook and AR. The parties understood that the guidebook and AR would be separate from the ordinance, but the Coalition took the position that the guidebook and AR should be negotiated at the same time as the ordinance. The City maintained the position that negotiations on the ordinance should be completed first.

When the Coalition made its counterproposals on managed competition, the City sometimes responded that certain issues might be addressed in the guidebook and AR. For example, in a memo dated September 13, 2006, the City responded to a Coalition counterproposal on confidentiality and conflict of interest by saying, "Some of these ideas might be suitable for an administrative regulation." In the same memo, the City responded to a counterproposal on cost analysis by saying in part, "The City suggests that the cost analysis concept be addressed in the administrative regulation."

The Coalition requested a draft version of the guidebook and AR, which the City eventually provided on October 18, 2006. The City emphasized that the document was a draft that "will continue to be edited in the future." On November 21, 2006, when the City made its last, best, and final offer, the Coalition requested a current version of the draft guidebook and AR, which the City agreed to provide before the next bargaining session. In an e-mail message to the Coalition dated November 21, 2006, the City stated:

> The Coalition will be meeting on Friday, December 1, to review the Managed Competition AR's and the Guidebook, which will be emailed on Thursday, November 30.

On November 30, 2006, the City did e-mail to the Coalition a current version of the draft guidebook and AR.

In an e-mail message to the City dated November 30, 2006, the Coalition stated in part:

> The Coalition [at the November 1 bargaining session] indicated that it was not able to [verb omitted in the original] your LB&F [last, best, and final offer] on managed competition until we heard the City's presentation on the Administrative Regulation; which we anticipate might potentially address the few remaining, but significant, concerns that we have on that matter. The City's presentation of the AR is scheduled for tomorrow . . . .

In an e-mail response later that day, the City did not mention the guidebook and AR but rather stated in part that "we are meeting tomorrow to hear the Coalition's response to our last, best & final proposals on both ordinances."

At the bargaining session on December 1, 2006, the Coalition said it had questions about the guidebook and AR, but the City would only discuss the implementing ordinance itself, as to which it had made its last, best, and final offer. The City promised to discuss and negotiate the guidebook and AR later. The Coalition said that it needed to understand the guidebook and AR in order to respond to the City's last, best, and final offer, but that it might be able to make its own last, best, and final offer the following week. The City nonetheless declared impasse that day.

The third set of facts (which overlaps with the second) concerns the City's declaration of impasse. As with the Proposition B implementing ordinance, the City put the introduction of the Proposition C implementing ordinance on the City Council's docket for December 5,

2006, even before the final December 1 bargaining session.[4] Unlike the Proposition B implementing ordinance, the Proposition C implementing ordinance was not the subject of a last, best, and final offer from the Coalition, before or after the City's declaration of impasse. In its letter to the Mayor dated December 4, 2006, the Coalition stated in part:

> On Managed Competition, the Coalition's position is that we are not at impasse as the matter of reconciling the implementing ordinance and the Administrative Regulation still remains to be resolved.

The Mayor did not agree.

The impasse procedures for the Proposition C implementing ordinance took the same course as those for the Proposition B implementing ordinance. No request for an impasse meeting was filed with the City Council, and none was scheduled or held. The City offered on Friday, December 1, 2006, to schedule an "impasse meeting" with the Coalition "this weekend, or on Monday," but the Coalition found the scheduling offer "not feasible." The Mayor recommended that the City Council provide an "impasse procedure" as part of its meeting of December 5, 2006. The Coalition unsuccessfully asked the Mayor to reschedule the matter.

The minutes of the December 5 meeting state that an impasse hearing was held from 4:33 p.m. to 5:08 p.m. and from 6:12 p.m. to 6:13 p.m., but the City Council President actually announced the start of the hearing later that evening. The City Attorney advised that the Coalition had no right to an impasse hearing and that the Council could take three basic actions: approve the proposed ordinance, reject the proposed ordinance, or make requests that the Mayor return to discussions with the Coalition on specific areas. The Mayor said he would not budge in negotiations, and some members of the City Council expressed confusion or

[4] The original docketing notice incorrectly said that negotiations had concluded on November 21, 2006. The City later corrected the error.

frustration about their role in the process, before the Council unanimously passed the implementing ordinance, based on the City's last, best, and final offer.

During the December 5 meeting, the Mayor's representative stated in part:

> There definitely will be elements of the AR [and] guide that will impact wages, hours, and working conditions, and we absolutely understand that we will need to negotiate that, and we look forward to that.

After the meeting, however, the City's position apparently changed.

On January 30, 2007, the City sent separate letters to AFSCME and SDMEA stating:

> Attached are the revised Managed Competition Guidebook and Administrative Regulation. Should your organization wish to meet and confer on any impacts to mandatory subjects of bargaining, please identify those impacts you wish to meet and confer upon and contact [the City] no later than February 13, 2007 to schedule the first meeting.

The attached guidebook was 25 pages long; the attached AR was 7 pages long.

On February 12, 2007, AFSCME responded with an e-mail message stating in part:

> While you are aware that we wish to Meet and Confer, I will need more time to identify the specific areas over which we wish to Meet and Confer.

SDMEA also expressed its desire to meet and confer over the guidebook and AR, without identifying specific issues.

On February 13, 2007, the City sent AFSCME an e-mail message stating in part:

> If I do not receive a written response, identifying what AFSCME Local 127 believes to be mandatory subjects by Friday, February 16, the City will view this as Local 127's waiver to meet and confer.

The City sent a similar message to SDMEA.

On February 16, 2007, AFSCME sent the City an e-mail message stating in part:

> The Guidebook and AR are policy documents intended to implement the Managed Competition charter amendment and

> implementation ordinance. Their content may adversely affect the wages, hours and working conditions of our members. As such, AFSCME wishes to meet and confer on both the AR and the Guidebook.

On the same date, the City responded with an e-mail message again asking AFSCME to identify mandatory subjects of bargaining. The City told AFSCME to do so by February 23, 2007, or waive its right to meet and confer. Later, on March 16, 2007, the City informed AFSCME by letter that it considered AFSCME's "lack of response as a waiver of the right to meet and confer over the [guidebook and AR], and this matter is closed."

SDMEA appeared to fare somewhat better than AFSCME. On February 23, 2007, SDMEA sent the City a letter stating in part:

> In response to your request that MEA identify impacts we wish to meet and confer upon, please be advised that MEA wishes to meet and confer on all matters contained in the Managed Competition Guidebook and Administrative Regulation relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours and other terms and conditions of employment.
>
> . . .
>
> Although this is by no means an exhaustive list of the possible mandatory subjects of bargaining, the following is a general list of topics that would be subject to meet and confer:
>
> > Development of the Statement of Work
> > Request for Proposal Development
> > Transition and Monitoring
> > Proposal Management
>
> Additionally, as the Administrative Regulation in whole impacts working conditions, the entire document is subject to meet and confer.

The City agreed to and did meet with SDMEA on March 8 and 19, 2007. After the latter meeting, however, the City informed SDMEA that it was pulling the guidebook off the table so a consultant could rewrite it. Further meetings were postponed.

On June 11, 2007, the City sent SDMEA a copy of the rewritten guidebook.[5] In a cover letter, the City stated in part:

> Should your organization wish to meet and confer on any impacts to mandatory subjects of bargaining, please identify those impacts you wish to meet and confer, prior to our first meeting, which I have tentatively scheduled for Wednesday, June 27.

The enclosed guidebook had grown from 25 pages to 57 pages. On June 26, 2007, SDMEA informed the City by letter that it was not ready to meet and confer over the guidebook.

Meanwhile, the City did begin meeting with AFSCME. The City and AFSCME met seven times from July 9, 2007, to August 24, 2007. They spent the time reviewing the rewritten guidebook, getting as far as page 20. AFSCME never reached the point of making a counterproposal.

The City began meeting with SDMEA on July 25, 2007, and SDMEA did make counterproposals. At a meeting on August 1, 2007, SDMEA proposed a labor management committee on managed competition, two purposes of which were to "[d]iscuss collective bargaining issues which may come up as a result of managed competition activities" and "to make recommendations to the Mayor and City Council." At a meeting on August 7, 2007, SDMEA proposed an appeal process for managed competition. The City considered these counterproposals and then informed SDMEA that it was not interested. The City did not tell SDMEA that these counterproposals were outside the scope of mandatory subjects of bargaining.

At a meeting on August 29, 2007, SDMEA presented a list of 35 "items and issues which remain outstanding at this time," including the labor management committee and the appeal process, both of which had previously been rejected by the City. At the same meeting,

[5] The City did not include a copy of the AR. In fact, it is unclear from the record what happened with the AR after that point.

the City orally responded to the first 23 items on the list, rejecting SDMEA's position on each one. On September 5, 2007, the City responded to the remaining 12 items in an e-mail message. The City again rejected SDMEA's position on each issue, asserting that various issues were a matter of management rights (numbers 24 and 30), were adequately covered by the Municipal Code (numbers 25, 26, 27, and 31), were beyond the scope of discussion regarding managed competition (number 29), were already adequately addressed in the guidebook (numbers 31 and 35), or were inconsistent with the Municipal Code (number 32). With regard to an employee cost calculation issue (number 28), the City responded that the issue "will be addressed by the City with MEA at a later date." With regard to the appeal process issue (number 34), the City responded that the idea was "previously rejected." On none of the 35 issues did the City respond with a counterproposal of its own.

No more meetings were held, either with SDMEA or AFSCME, and no agreement was reached. No impasse was declared, and no impasse procedures were invoked.

On September 7, 2007, the City went ahead and issued the guidebook, now 53 pages long. There was no provision for an appeal process. There was a provision for a "proposed" labor advisory committee, one purpose of which was to "[r]epresent bargaining unit employees in the Managed Competition Program." The City's proposed labor advisory committee was different in composition and purpose from the labor management committee previously proposed by SDMEA.

Also on September 7, 2007, the City sent a letter to SDMEA stating in part:

> It is the City's position that MEA did not identify any impacts on mandatory subjects of bargaining in the content of the Managed Competition Guide . . . .
>
> That said, and as discussed with MEA at our last managed competition meeting, the City proposes to establish a labor advisory committee regarding managed competition. The

> purpose of the labor advisory committee is to provide a venue for organized labor to raise issues and provide input regarding the managed competition process. The City proposes that each labor organization impacted by the managed competition process may have up to two representatives on the committee. Should MEA agree to participate on this committee, the City would propose that the committee meet monthly, at least initially, and that the first meeting be held on September 25, 2007. At the first meeting, we can discuss the composition of the labor advisory committee, how the committee will work, how often we will meet, as well as other topics of interest to MEA.

The letter did not explain why the City's proposed labor advisory committee (or SDMEA's proposed labor management committee) was not subject to bargaining in connection with the guidebook. The City sent a similar letter to AFSCME.

Also on September 7, 2007, the Mayor issued a memo to City personnel, announcing the release of the guidebook, and providing an overview of the City's plans and the informational resources available to employees.[6]

Under cross examination at the PERB hearing, the City's labor relations director acknowledged that in the guidebook and AR "[t]here may have been some issues which would have an impact on mandatory subjects of bargaining." He did not specify what those issues might have been, other than employee and contractor cost calculation, which was to be addressed later. The City's chief negotiator testified that an SDMEA representative had once asked him what the mandatory subjects in the guidebook and AR were. The negotiator had responded in part, "I think that's your duty to point it out to us and we'll consider it."

[6] AFSCME and SDMEA argue that in this memo the City unlawfully bypassed the unions. An employer unlawfully bypasses a union, however, only when it deals directly with employees (1) to create a new policy of general application or (2) to obtain waiver or modification of existing policies applicable to those employees. (See Clovis Unified School District (2002) PERB Decision No. 1504.) The City's memo did neither.

unit employees" so as to give rise to a duty to bargain under Claremont Police Officers Assn. v. City of Claremont (2006) 39 Cal.4th 623 (Claremont). That is, however, exactly what the ordinance does: it determines which retirement system benefit increases are subject to voter approval or disapproval, and when, and how. The ordinance thus directly affects whether employees get a negotiated retirement system benefit increase immediately, or after a delay, or not at all. This is very different from Claremont, in which the employer merely implemented a study of racial profiling, with only a minimal impact on working conditions.

The City cites City of Fresno v. People ex rel. Fresno Firefighters (1999) 71 Cal.App.4th 82 (Fresno) as "directly on point." In Fresno, however, the court found to be outside the scope of mandatory bargaining a policy change that merely affected the employer's initial bargaining position and did not place any impediments to future bargaining. In the present case, the Proposition B implementing ordinance does place an impediment on future bargaining: with regard to any retirement benefit system increase, as defined by the ordinance, the parties will not be able to bargain for an immediate or guaranteed increase.

The City acknowledges that Proposition B "*may* affect [employees] *in the future*, when retirement benefits are submitted to the voters" [emphasis in the original], and promises, "Effects bargaining will occur at that time." It is not clear exactly what "effects" the City is promising to bargain. Surely, however, the City is not promising that each time in the future it bargains a retirement system benefit increase it will then bargain from scratch about whether the increase is subject to voter approval, and when, and how. Such a promise would make meaningless the Proposition B implementing ordinance itself, as well as the bargaining that preceded it.

ISSUES

1. Did the City violate its own impasse procedures with respect to the Proposition B implementing ordinance?

2. Did the City fail to bargain in good faith with respect to the Proposition C implementing ordinance?

3. Did the City violate its own impasse procedures with respect to the Proposition C implementing ordinance?

4. Did the City fail to bargain in good faith with respect to the Proposition C guidebook?

CONCLUSIONS OF LAW

Proposition B implementing ordinance impasse

MMBA section 3504 states:

> The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.

PERB has held that the matter of retirement benefits for current employees is within the scope of mandatory subjects of bargaining. (See, e.g., County of San Joaquin (2003) PERB Decision No. 1570-M; County of Sacramento (2000) PERB Decision No. 1943-M.)

In the present case, the Proposition B implementing ordinance relates to retirement benefits for current employees. The City nonetheless argues that it had no duty to bargain or to follow its impasse procedures concerning that ordinance.

The City argues first that the Proposition B implementing ordinance does not have "a significant and adverse effect on the wages, hours, or working conditions of the bargaining-

The City also argues that the Proposition B implementing ordinance is outside of scope as "fundamentally managerial." It argues in part:

> At most, it [the ordinance] tangentially touches upon retirement benefits by adding a step to the process for enacting new benefits. But it does not "primarily" involve such benefits as it neither defines nor establishes benefits themselves.

As already noted, however, the relation of the ordinance to retirement system benefit increases is hardly tangential: the ordinance will affect when such increases occur and may affect whether they occur at all. The City cites San Francisco Fire Fighters Local 798 v. Board of Supervisors (1992) 3 Cal.App.4th 1482 (San Francisco) in support of its argument, but the test in San Francisco for whether a decision is fundamentally managerial is whether the employer's need for unencumbered decision-making outweighs the benefit to employer-employee relations of bargaining about the action in question. The City does not make the argument that the Proposition B implementing ordinance meets this test.

The City also argues that the Proposition B implementing ordinance is exempt from bargaining under the Management Rights articles of the MOUs. For AFSCME, that article provides in part:

> The rights of the City include among others, the exclusive right to determine the mission of its constituent departments, commissions, and boards; set standards of service; determine the procedures and standards of selection for employment and promotion; direct its employees, take disciplinary action for just cause; relieve its employees from duty because of lack of work or for other lawful reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which governmental operations are to be conducted; take all necessary actions to carry out its mission in emergencies; and complete control and discretion over its organization and the technology of performing its work.

The article for SDMEA is similarly generally-worded, with no reference to retirement benefits. In San Jacinto Unified School District (1994) PERB Decision No. 1078,[7] PERB held that generally-worded management rights language would not be construed as a waiver of statutory bargaining rights. Any waiver of a right to bargain must be "clear and unmistakable." (Bldg. Material & Constr. Teamsters' Union v. Farrell (1986) 41 Cal.3d 651; Amador Valley Joint Union School District (1978) PERB Decision 74.)

I conclude that the Proposition B implementing ordinance was within scope and that the City had a duty to bargain about it. In this case, there is no dispute that the City did in fact bargain about it in good faith and to impasse. The question is whether the City then properly followed impasse procedures.

MMBA section 3505 states:

> The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.
>
> "Meet and confer in good faith" means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific

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

> procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent. [Emphasis added.]

MMBA section 3505.4 states in part:

> If after meeting and conferring in good faith, an impasse has been reached between the public agency and the recognized employee organization, and impasse procedures, where applicable, have been exhausted, a public agency that is not required to proceed to interest arbitration may implement its last, best, and final offer, but shall not implement a memorandum of understanding . . . .[Emphasis added.]

In other words, if a public agency negotiates to impasse, and has applicable impasse procedures, it must exhaust those procedures, and it must allow adequate time for the procedures to resolve the impasse.

MMBA section 3507 states in part:

> (a) A public agency may adopt reasonable rules and regulations after consultation in good faith with representatives of a recognized employee organization or organizations for the administration of employer-employee relations under this chapter.
>
> The rules and regulations may include provisions for all of the following:
>
> . . .
>
> (5) Additional procedures for the resolution of disputes involving wages, hours and other terms and conditions of employment.

MMBA section 3509 states in part:

> (b) A complaint alleging any violation of this chapter or of any rules and regulations adopted by a public agency pursuant to Section 3507 or 3507.5 shall be processed as an unfair practice charge by the board [PERB] . . . .

PERB Regulation 32603[8] states in part:

> It shall be an unfair practice for a public agency to do any of the following:
>
> (a) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.
>
> (b) Deny to employee organizations rights guaranteed to them by Government Code section 3503, 3504.5, 3505.1, 3505.3, 3507.1, 3508(d) or 3508.5 or by any local rule adopted pursuant to Government Code section 3507.
>
> (c) Refuse or fail to meet and confer in good faith with an exclusive representative as required by Government Code section 3505 or any local rule adopted pursuant to Government Code section 3507 .
>
> . . .
>
> (e) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2 or required by any local rule adopted pursuant to Government Code section 3507.
>
> . . .
>
> (g) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

In other words, if a public agency adopts a local rule, including a rule on dispute resolution procedures, and then violates it, it commits an unfair practice within PERB's jurisdiction.

In San Francisco Unified School District (2008) PERB Decision No. 1948,[9] PERB recently noted that impasse procedures were almost certainly included in state law to protect the public from the disruption of public employee strikes, by providing a method other than a

[8] PERB regulations are codified at California Code of Regulations, title 8, section 31001 and following.

[9] Judicial appeal pending.

work stoppage for resolving a deadlock in bargaining. Because the procedures were designed primarily for the benefit of the public, they could not be waived by employers and employee organizations.

In the present case, City Council Policy 300-06 states in relevant part:

> VII. IMPASSE PROCEDURES:
>
> A. Initiation of Impasse Procedures.
>
> If the meet and confer process has reached an impasse, either party may initiate the impasse procedures by filing with the City Council a written request for an impasse meeting, together with a statement of its position on all disputed issues. An impasse meeting shall then be scheduled promptly by the [Mayor]. The purpose of such meeting shall be:
>
> a. To identify and specify in writing the issue or issues that remain in dispute.
>
> b. To review the position of the parties in a final effort to resolve such disputed issue or issues; and
>
> c. If the dispute is not resolved, to discuss arrangements for the utilization of the impasse procedures provided herein.
>
> B. Impasse Procedures.
>
> If no agreement is reached at an impasse meeting, impasses shall then be resolved by a determination by . . . the City Council after a hearing on the merits of the dispute . . . .

With regard to the impasse over the implementation of Proposition B, neither the City nor the Coalition filed with the City Council a request for an impasse meeting, and none was scheduled or held.

The City argues in part that Policy 300-06 does not actually require an impasse meeting. The City relies on the language stating that either party "may" request the meeting. In the City's view, this makes the meeting optional, not mandatory. In context, however, I would read the language differently. The latter part of the Policy provides for a hearing to

resolve an impasse only "[i]f no agreement is reached at an impasse meeting." If the impasse meeting is optional, then the impasse hearing is also optional, and there is no mandatory process for resolving the impasse. This conclusion would seem inconsistent with MMBA section 3505.4, which requires that "impasse procedures, where applicable, have been exhausted," and MMBA section 3505, which requires "adequate time for the resolution of impasses" where impasse procedures exist. Moreover, it appears inconsistent with the very purpose of impasse procedures: to protect the public from the consequences of public sector economic warfare. I conclude that at least before the City or an employee organization uses one of its ultimate post-impasse weapons (unilateral change on the one hand, work stoppage on the other), at least one of the parties must request an impasse meeting, although either party "may" do so.

The City notes that impasse meetings historically have not always been held. Given the public's interest in impasse procedures, however, I do not see how the past practice of the City and its employee organizations can relieve either of them of their duty to follow Policy 300-06 in this regard.

The City also argues that "applying [the Policy] literally in this case would be absurd." I would think that if the Policy was literally absurd, the City would change it rather than argue against it. Be that as it may, the City argues:

> The Policy should not be interpreted to require the circular procedure of the Mayor informing the [City] Council of the need for an impasse meeting, and then the City Council informing the Mayor that he should schedule an impasse meeting.

The City's argument is flawed for several reasons. First, under the Policy, it may be an employee organization, not the Mayor, "informing" the City Council of an impasse, in which case there is no circularity. Second, under the Policy, the Mayor is not just "informed" that he

or she "should" schedule a meeting; rather, the Mayor "shall" promptly schedule a meeting. Moreover, when the parties reach impasse, and thus may threaten the public with the consequences of economic warfare, I see nothing absurd about getting the City Council involved in making sure that an impasse meeting is promptly scheduled.

Finally, the City argues that "if an impasse meeting were required, none was held only because the Coalition never responded to the City's offer to hold one." Again, given the public's interest in impasse procedures, I do not see how the Coalition's conduct could relieve the City of the requirement that an impasse meeting "shall" be scheduled. Furthermore, in this case the City declared impasse on a Friday and then offered to schedule an "impasse meeting" with the Coalition "this weekend, or Monday," before an "impasse hearing" on Tuesday. Not surprisingly, the Coalition found this scheduling offer "not feasible." The offer certainly seems to have been inconsistent with MMBA section 3505, which requires "adequate time for the resolution of impasses" where impasse procedures exist. This seems especially true given the three-fold purpose of an impasse meeting as set forth in Policy 300-06.

I therefore conclude that the City did not follow its own Policy 300-06 with regard to holding an impasse meeting. There remains the issue of whether the City followed the Policy with regard to holding an impasse hearing.

As previously noted, the latter part of Policy 300-06 provides for an impasse hearing only "[i]f no agreement is reached at an impasse meeting." Without an impasse meeting, there thus can be no proper impasse hearing under the Policy. Furthermore, in the present case, without an impasse meeting the parties obviously did not adequately "discuss arrangements for the utilization of the impasse procedures provided herein," as required by the Policy. As a result, there was confusion even about when the impasse hearing took place: in the afternoon,

as the official minutes indicated; in the evening, as the City Council President announced; or not at all, as the City Attorney seemed to assert.

The confusion was exacerbated by the City Attorney's advice to the Council that they could take three basic actions: approve the proposed ordinance (based on the City's last, best, and final offer), reject the proposed ordinance (leaving the Proposition B implementation issues unresolved, and possibly leaving Proposition B unimplemented), or make requests that the Mayor return to discussions with the Coalition on specific areas (even though the Mayor made clear he would not budge in bargaining). I do not see how this advice could be consistent with the requirement of Policy 300-06 that "impasses shall then be resolved by a determination by . . . the City Council after a hearing on the merits of the dispute." It appears that, given the City Attorney's advice, no matter to what extent a hearing might show that the merits favored some position of the Coalition, the Council could not make a determination that would resolve any part of the dispute in the Coalition's favor.

The City Attorney made clear, of course, that in his view there was no duty to bargain, and therefore no impasse, and therefore no need for an impasse hearing. I have concluded otherwise. Unfortunately, the City's Attorney's advice apparently helped to make sure that no proper impasse hearing occurred.

I ultimately conclude with regard to the Proposition B implementing ordinance that the City violated its own impasse procedures requiring both an impasse meeting and an impasse hearing. Because those procedures were required by a local rule (Policy 300-06), the City's conduct violated PERB Regulation 32603. Because the City did not exhaust the required impasse procedures, it also violated MMBA section 3505.4. Because the City did not allow adequate time for the procedures to resolve the impasse, it also violated MMBA section 3505.

Furthermore, because the City's conduct denied AFSCME and SDMEA their rights to represent their members, the City violated MMBA section 3503. Because the City's conduct interfered with the rights of employees to be represented, the City also violated MMBA section 3506.

Proposition C implementing ordinance negotiations

The Proposition C implementing ordinance relates to a managed competition process that may lead to the contracting out of City services if they "can be provided more economically and efficiently by an independent contractor" than by City employees. It is now well established under the MMBA that contracting out that is motivated in part by the desire to reduce costs is within the scope of mandatory subjects of bargaining. (Rialto Police Benefit Assn. v. City of Rialto (2007) 155 Cal.App.4th 1295.) The City nonetheless argues that it had no duty to bargain concerning the Proposition C ordinance.

As with the Proposition B implementing ordinance, the City argues that the Proposition C ordinance does not have a significant and adverse effect on the wages, hours, or working conditions of employees so as to give rise to a duty to bargain. The City argues in part that the ordinance does not alter the status quo as established by Proposition C itself. The ordinance, however, has many significant details that do not appear in Proposition C. The ordinance (based on the City's last, best, and final offer) has sixteen headings, including "Pre-Competition Assessment," "Minimum Contract Standards and Contractor Qualifications," "Resources for City Employees Involved in Managed Competition," "Consideration of Proposals by Independent Review Board," "City Manager and City Council Consideration of Decision of Independent Review Board," and "Notice to Affected Labor Organization and Affected Employee Procedures." These subjects are just barely mentioned (if at all) in

Proposition C itself, and the details in the ordinance significantly determine the likelihood of contracting out and its effect on employees.

The City further argues that the ordinance has no effect on employees because the City has not yet decided (and may never decide) to contract out. PERB has held, however, that policies concerning possible future contracting out, as well as contracting out itself, are within scope. (State of California (Department of Personnel Administration) (1986) PERB Decision No. 574-S (policy structuring how contracting decisions will be made); Healdsburg Union High School District (1980) PERB Decision No.132 (policy requiring notice and negotiation of contracting out).)

As with the Proposition B implementing ordinance, the City also argues that the Proposition C ordinance is outside of scope as "fundamentally managerial." It argues in part:

> The Proposition C Ordinance primarily establishes the internal procedures the City plans to use to assess the eligibility of services for Managed Competition and to review potential independent contractors. . . . Again, the standards an independent contractor must meet have nothing to do with employment conditions of the Charging Parties . . . .

The Proposition C ordinance does not, however, simply establish internal City procedures with no external effect; it establishes policies and standards that determine the likelihood of contracting out and its effect on employees. The standards for independent contractors, for example, will directly affect the amount of outside competition City employees may face in trying to hold on to their bargaining unit work. The City does not argue that its need for unencumbered decisionmaking in this matter outweighs the benefit to employer-employee relations of bargaining about the issue.

As with the Proposition B implementing ordinance, the City also argues that the Proposition C ordinance is exempt from bargaining under the Management Rights articles of

the MOUs. Those articles, however, are generally-worded, with no reference to contracting out. As stated above, such generally-worded language is not a clear and unmistakable waiver of the right to bargain.

I conclude that the Proposition C implementing ordinance was within scope and that the City had a duty to bargain about it. The next question is whether the City did in fact bargain about it in good faith and to impasse.

The charge alleges that the City engaged in bad faith or "surface" bargaining with regard to the Proposition C ordinance. Bargaining in good faith is a "subjective attitude and requires a genuine desire to reach agreement." (Placentia Fire Fighters v. City of Placentia (1976) 57 Cal.App.3d 9, 25 (Placentia Fire Fighters).) PERB has held it is the essence of surface bargaining that a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement. (Muroc Unified School District (1978) PERB Decision No. 80.) Where there is an accusation of surface bargaining, PERB will resolve the question of good faith by analyzing the totality of the accused party's conduct. The Board weighs the facts to determine whether the conduct at issue "indicates an intent to subvert the negotiating process or is merely a legitimate position adamantly maintained." (Oakland Unified School District (1982) PERB Decision No. 275; Placentia Fire Fighters, supra.)

The indicia of surface bargaining are many. Entering negotiations with a "take-it-or-leave-it" attitude evidences a failure of the duty to bargain because it amounts to merely going through the motions of negotiations. (General Electric Co. (1964) 150 NLRB 192, 194, enf. 418 F.2d 736.) Recalcitrance in the scheduling of meetings is evidence of manipulation to delay and obstruct a timely agreement. (Oakland Unified School District (1983) PERB Decision No. 326.) Dilatory and evasive tactics including canceling meetings or failing to

prepare for meetings is evidence of bad faith. (Ibid.) Conditioning agreement on economic matters upon prior agreement on non-economic subjects is evidence of an unwillingness to engage in a give-and-take. (State of California (Department of Personnel Administration) (1998) PERB Decision No. 1249-S.)

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

It is clear, however, that while a party may not merely go through the motions, it may lawfully maintain an adamant position on any issue. Adamant insistence on a bargaining position is not necessarily refusal to bargain in good faith. (Placentia Fire Fighters, supra, 57 Cal.App.3d 9; Oakland Unified School District, supra, PERB Decision No. 275.) "The obligation of the employer to bargain in good faith does not require the yielding of positions fairly maintained." (NLRB v. Herman Sausage Co. (5th Cir. 1960) 275 F.2d 229.)

As noted above, the dispute about the City's good faith centers on three sets of facts, one of which concerns bargaining about minimum standards for outside contractors. The City initially offered six mandatory standards; the Coalition countered with six, including two that were identical to the City's offer; the City then responded with ten non-mandatory standards. Ultimately, the City offered and enacted twelve mandatory standards (including four of its initial six) and four non-mandatory standards.

AFSCME and SDMEA argue that the City "withdrew agreement to its own proposals after the unions agreed to them." I cannot agree with this characterization. The Coalition actually accepted only two of the City's initial standards, and it proposed four others that were new or different. Under these circumstances, I do not find that the City withdrew from a significant agreement on standards for contractors.

The City argues for its part that any charge of regressive bargaining is "frivolous." I cannot agree with this characterization either. The City's early move from mandatory to non-mandatory standards was certainly regressive, and even when the City ultimately offered twelve mandatory standards, two of its initial six were not among them. The City thus did back away from parts of its own initial proposal.

For me the question is to what extent the City's regressive bargaining in this one area is evidence of bad faith. Considering how many issues were negotiated, how many sessions were held, and how many proposals and counterproposals were exchanged, I find it only a slight indication of bad faith.

The second set of facts concerns the discussion of a guidebook and administrative regulation (AR) on managed competition. The Coalition maintained that the guidebook and AR should be negotiated at the same time as the ordinance, while the City maintained that negotiations on the ordinance should be completed first. Both positions had their advantages and disadvantages. The Coalition thought it best to negotiate all the issues together, while the City thought it best to negotiate the legal framework before the "nuts and bolts." Based on the evidence as a whole, I believe that both the Coalition and the City maintained their positions in good faith.

AFSCME and SDMEA argue in part that the City engaged in "conditional" bargaining of the sort found to be unlawful in Modesto City Schools (1983) PERB Decision No. 291. In

that case, however, PERB found a violation where the employer had conditioned agreement on the union's abandonment of certain statutory rights, which the City did not do here. In the same case, the employer had also conditioned agreement on the inclusion and exclusion of certain contract provisions. PERB found that this could be an indication of bad faith only "if the intent of the adamant position is to avoid a contract or weaken the union." PERB found no such evidence there; I find none here.

AFSCME and SDMEA also argue that the City insisted on "piecemeal" or "fragmented" bargaining of the sort found to be unlawful by the National Labor Relations Board. In the cases they cite, however, the employers had completely frustrated negotiations for collective bargaining agreements by insisting that the unions first accept certain proposals. (See, e.g., Patrick & Company (1980) 248 NLRB 390 (insistence on acceptance of employer's wage proposal); South Shore Hospital (1979) 245 NLRB 848 (insistence on acceptance of reduction in benefits); Pillowtex Corporation (1979) 241 NLRB 40 (insistence on acceptance of employer's proposal on noneconomic issues.) In the present case, the City did not so insist, nor were the negotiations over the implementing ordinance completely frustrated. I conclude that the City's bargaining position on the guidebook and AR is not significant evidence of bad faith.

The third set of facts concerns the City's declaration of impasse. When the City declared impasse on December 1, 2006, it had already put the implementing ordinance on the City Council's docket. The City had not yet received a last, best, and final offer from the Coalition, which said it needed more time and more information about the guidebook and AR. These facts do suggest that the City was impatient to get out of bargaining and into impasse.

On the other hand, the parties had been in negotiations since July 24, 2006, and the City's own last, best, and final offer had been made on November 21, 2006. It is not clear

even now whether the Coalition would have been able to move from its previous counterproposal (dated November 2, 2006). In its letter to the Mayor dated December 4, 2006, the Coalition stated in part:

> On Managed Competition, the Coalition's position is that we are not at impasse as the matter of reconciling the implementing ordinance and the Administrative Regulation still remains to be resolved.

This letter suggests that the Coalition thought the parties were at impasse primarily because the guidebook and AR had not been yet negotiated, as the Coalition thought necessary, although the City did not. Under these circumstances, I find the City's rush to impasse to be some evidence of bad faith, but in the totality of circumstances I do not find that AFSCME and SDMEA have proved bad faith.

Did the City and the Coalition actually bargain to impasse? In the circumstances of the present case, I do not find it necessary or appropriate for PERB to decide the question. While some statutes give PERB specific authority to determine that an impasse exists,[10] MMBA does not. Under MMBA, impasse procedures are generally left to local rules, regulations or ordinances, or to the mutual consent of the parties. (See MMBA sections 3505 and 3505.2.)

In the present case, City Council Policy 300-06 (quoted above) provides a procedure for an impasse meeting, the purpose of which is:

> a. To identify and specify in writing the issue or issues that remain in dispute.
>
> b. To review the position of the parties in a final effort to resolve such disputed issue or issues; and
>
> c. If the dispute is not resolved, to discuss arrangements for the utilization of the impasse procedures provided herein.

[10] See Government Code sections 3548 and 3590.

It appears that if this procedure had been followed there could be little if any doubt about whether an impasse existed. Rather than try to determine on its own whether an impasse existed, PERB may more appropriately determine whether or not the City's impasse procedures were followed. That is indeed the next question in this case.

Proposition C implementing ordinance impasse

As noted above, the impasse procedures for the Proposition C implementing ordinance took the same course as those for the Proposition B implementing ordinance. No request for an impasse meeting was filed with the City Council, and none was scheduled or held. The impasse hearing, if there was one, was marked by confusion and frustration, with no real opportunity for the City Council to resolve the impasse other than in the City's favor.

For the same reasons already given with regard to the Proposition B implementing ordinance, I also conclude with regard to the Proposition C implementing ordinance that the City violated its own impasse procedures requiring both an impasse meeting and an impasse hearing. Because those procedures were required by a local rule (Policy 300-06), the City's conduct violated PERB Regulation 32603. Because the City did not exhaust the required impasse procedures, it also violated MMBA section 3505.4. Because the City did not allow adequate time for the procedures to resolve the impasse, it also violated MMBA section 3505.

Furthermore, because the City's conduct denied AFSCME and SDMEA their rights to represent their members, the City violated MMBA section 3503. Because the City's conduct interfered with the rights of employees to be represented, the City also violated MMBA section 3506.

Guidebook negotiations

With regard to the managed competition guidebook, the City argues in part, "The City believed that the Guide was entirely outside the scope of representation." The evidence shows

otherwise. At the City Council meeting on December 5, 2006, the Mayor's representative stated in part:

> There definitely will be elements of the AR [and] guide that will impact wages, hours, and working conditions, and we absolutely understand that we will need to negotiate that, and we look forward to that.

Even at the PERB hearing, the City's labor relations director acknowledged that in the guidebook and AR "[t]here may have been some issues which would have an impact on mandatory subjects of bargaining."

Despite its knowledge that aspects of the guidebook were within scope, the City demanded as a precondition of bargaining that AFSCME and SDMEA identify the mandatory subjects. AFSCME apparently never did so to the City's satisfaction, although the City ultimately went ahead and met with ASFSCME. SDMEA apparently did identify mandatory subjects to the City's satisfaction. In its letter of February 23, 2007, SDMEA listed the following topics:

> Development of the Statement of Work
> Request for Proposal Development
> Transition and Monitoring
> Proposal Management

The City agreed to meet with SDMEA on March 8 and 19, 2007.

Later, on August 1 and 7, 2007, SDMEA made counterproposals on a labor management committee and an appeal process. The City did not tell SDMEA that these counterproposals were outside the scope of mandatory subjects of bargaining, nor does there seem to be any plausible argument that they were. The City considered the counterproposals and said it was not interested.

Still later, on August 29, 2007, SDMEA identified 35 "items and issues which remain outstanding at this time." The City did not tell SDMEA that all of these issues were outside

the scope of mandatory subjects of bargaining. On the contrary, with regard to the 12 issues to which the City responded in writing, the City told SDMEA that no more than four were outside of scope.[11] On none of the 35 issues did the City respond with a counterproposal of its own.

On September 7, 2007, without further meetings, the City went ahead and issued the guidebook. There was no provision for an appeal process or a labor management committee, but there was a provision for a "proposed" labor advisory committee. On the same date, the City sent a letter taking the position that "MEA did not identify any impacts on mandatory subjects of bargaining in the context of the Managed Competition Guide." The letter went on to describe the proposed labor advisory committee, with no explanation of why that committee (or SDMEA's proposed labor management committee) was not subject to bargaining in connection with the guidebook.

Good faith bargaining should be a conversation, and part of that conversation should be an effort by both sides to sort out what is within scope and what is outside of scope. As PERB held in Healdsburg Union High School District (1984) PERB Decision No. 375, the give-and-take of the bargaining process itself should be used to resolve the ambiguities in bargaining proposals.

The City turned this conversation into a guessing game. It knew that there were matters within scope in its 57-page proposed guidebook, but it challenged AFSCME and SDMEA to guess which subjects it would recognize. AFSCME never really played the game, but SDMEA did. For awhile the City played along, but it was a game SDMEA could not win. On September 7, 2007, the City declared that the game was over, and that in fact there had never

[11] Of these four, the City said that two were matters of management rights, one was beyond the scope of discussion regarding managed competition, and one was inconsistent with the Municipal Code. I make no finding as to whether these four items were actually outside of scope.

been a game. At that point it was clear that neither SDMEA nor AFSCME would be allowed to have a meaningful conversation with the City about the guidebook.

The totality of the City's conduct with regard to the guidebook evidences bad faith. Contrary to what the City had promised in 2006, the City had no apparent interest in bargaining in 2007. The guidebook was going to be what the City (and its consultant) said it should be, regardless of anything the unions proposed. The City went through the motions of meeting with AFSCME and SDMEA, but it sought agreement only on its own terms.

I conclude with regard to the Proposition C guidebook that the City failed to meet and confer in good faith, in violation of MMBA section 3505, and that the City's issuance of the guidebook was therefore an unlawful unilateral change. Furthermore, because the City's conduct denied AFSCME and SDMEA their rights to represent their members, the City violated MMBA section 3503. Because the City's conduct interfered with the rights of employees to be represented, the City also violated MMBA section 3506.

REMEDY

MMBA section 3509(b) in part gives PERB jurisdiction to determine "whether the charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purposes of this chapter [MMBA]." In California State Employees' Ass'n v. Public Employment Relations Bd. (1996) 51 Cal.App.4th 923, 946, the court stated in part:

> Restoration of the status quo is the normal remedy for a unilateral change in working conditions or terms of employment without permitting bargaining [unit] members' exclusive representative an opportunity to meet and confer over the decision and its effects. (See, e.g. Oakland Unified School Dist. v. Public Employment Relations Bd. (1981) 120 Cal.App.3d 1007, 1014-1015 [175 Cal.Rptr. 105].) This is usually accomplished by requiring the employer to rescind the unilateral change and to make employees "whole" from losses suffered as a result of the unlawful unilateral change.

In the present case, the City has been found to have violated MMBA sections 3503, 3505 and 3506 by failing to follow its own impasse procedures with regard to the implementing ordinances for Propositions B and C, and by failing to bargain in good faith with AFSCME Local 127 (AFSCME) and the San Diego Municipal Employees Association (SDMEA) about the Managed Competition Guide issued on September 7, 2007. It is therefore appropriate to order the City to cease and desist from this conduct, to rescind the Managed Competition Guide, and to bargain in good faith with AFSCME and SDMEA about its contents and their effects. It is also appropriate to order the City to post a notice incorporating the terms of the order in this case. (Placerville Union School District, supra, PERB Decision No. 69.)

In their post-hearing briefs, AFSCME and SDMEA specifically state that they are not asking PERB to order the repeal of the implementing ordinances. I shall therefore simply assume (without ordering) that the City Council will amend those ordinances as may be necessary after the completion of impasse procedures.

I appreciate that good faith bargaining about the guidebook may further delay the City's implementation of its managed competition program. Negotiations do take time, especially when they concern a lengthy, complex and unfamiliar document like the guidebook. On the other hand, negotiations are generally more efficient than litigation or economic warfare.

Furthermore, even at the time of the PERB hearing, the City could not have actually implemented its managed competition program, because it had not yet bargained about employee and contractor cost calculation, which it apparently acknowledges as a mandatory subject for eventual negotiations.[12] If those negotiations have still not been completed, perhaps they can be combined with negotiations about the guidebook.

[12] The Managed Competition Guide issued on September 7, 2007, specifies the software to be used but does not specify how it will be used. How the software is used will

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the City of San Diego (City) violated the Meyers-Milias-Brown Act (Act), Government Code section 3500 and following. The City violated the Act by failing to follow its own impasse procedures with regard to the implementing ordinances for Propositions B and C, and by failing to bargain in good faith with AFSCME Local 127 (AFSCME) and the San Diego Municipal Employees Association (SDMEA) about the Managed Competition Guide issued on September 7, 2007. All other allegations are hereby DISMISSED.

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

A. CEASE AND DESIST FROM:

1. Failing to follow its own impasse procedures.

2. Failing to bargain in good faith.

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

1. Follow its own impasse procedures with regard to the implementing ordinances for Propositions B and C.

2. Rescind the Managed Competition Guide issued on September 7, 2007, and bargain in good faith with AFSCME and SDMEA about its contents and their effects.

3. Within 10 workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the City customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the City, indicating that it will comply with the terms of this Order. Such posting shall be

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shape the decision whether or not to contract out to reduce costs – a decision within the scope of mandatory subjects of bargaining.

maintained for a period of 30 consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

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

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

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

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

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130; see also Government Code section 11020(a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies

and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

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

Thomas J. Allen
Administrative Law Judge

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 No. LA-CE-352-M, AFSCME Local 127 and San Diego Municipal Employees Association v. City of San Diego, in which all parties had the right to participate, it has been found that the City of San Diego violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 and following.

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

A. CEASE AND DESIST FROM:

1. Failing to follow our own impasse procedures.

2. Failing to bargain in good faith.

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

1. Follow our own impasse procedures with regard to the implementing ordinances for Propositions B and C.

2. Rescind the Managed Competition Guide issued on September 7, 2007, and bargain in good faith with AFSCME Local 127 and San Diego Municipal Employees Association about its contents and their effects.

Dated: _____ CITY OF SAN DIEGO

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.