STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

OPERATING ENGINEERS LOCAL 3, Charging Party, v. CITY OF CLOVIS, Respondent.	Case No. SA-CE-513-M PERB Decision No. 2074-M October 30, 2009

Appearance: Lozano Smith by David M. Moreno, Attorney, for City of Clovis.

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

DECISION

WESLEY, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the City of Clovis (City) to the proposed decision of an administrative law judge (ALJ). The ALJ found that the City violated the Meyers-Milias-Brown Act (MMBA)[1] when it failed to resume negotiations with Operating Engineers Local 3 (also referred to as Clovis Public Works Employees' Affiliation or CPWEA) after impasse was broken, and failed to implement the City's last, best, and final offer after it was accepted by CPWEA. The proposed decision ordered the City to implement a three percent salary increase effective July 1, 2007.

The Board has thoroughly reviewed the proposed decision and the record in light of the City's exceptions and the relevant law.[2] Based on this review, the Board finds that CPWEA

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

[2] The City's request for oral argument is denied. The Board has historically denied requests for oral argument where an adequate record has been prepared, the parties had ample opportunity to present briefs, and the issues before the Board are sufficiently clear to make oral

failed to establish that the City violated MMBA sections 3503, 3505, 3506 and 3509(b), and PERB Regulation 32603(a), (b) and (c).[3] Therefore, for the reasons stated herein, we reverse the proposed decision and dismiss the complaint.

FINDINGS OF FACT

CPWEA is the exclusive representative of a unit of City employees who work in the Public Works Department. CPWEA and the City are parties to a memorandum of understanding (MOU) effective July 1, 2005 through June 30, 2008. The MOU includes a provision that on or about March 2007, the parties would re-open negotiations regarding wages for July 2007 through June 2008, the third year of the MOU.

The parties began negotiations on the wage re-opener in May 2007. After multiple bargaining sessions the parties were unsuccessful in reaching agreement. On July 13, 2007, the City proffered its last, best, and final offer of a three percent salary increase, effective July 1, 2007. On July 17, 2007, CPWEA rejected the offer and declared impasse.

Following unsuccessful mediation sessions, the parties met to resume negotiations on September 21, 2007. The City proposed a three percent salary increase effective July 1, 2007, or in the alternative, a three percent salary increase effective October 1, 2007 plus a one-time payment of $400. CPWEA countered with a proposal for a four percent wage increase. The City rejected this proposal and informed CPWEA that the three percent salary increase effective July 1, 2007 constituted its last, best, and final offer.

On September 28, 2007, CPWEA chief negotiator Doug Gorman (Gorman) sent a letter to the City's chief negotiator, Jeff Cardell (Cardell), stating that the City's proposal had been

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argument unnecessary. (*Antelope Valley Health Care District* (2006) PERB Decision No. 1816-M; *Monterey County Office of Education* (1991) PERB Decision No. 913.)

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

voted down by the union membership and the union again declared impasse. The letter also informed the City that CPWEA intended to file an unfair practice charge alleging that the City had engaged in surface bargaining.

On October 9, 2007, the City Manager sent a memorandum to employees represented by CPWEA regarding the status of negotiations, stating in part:

> Given the current fiscal conditions of the City, the declining economy in general, and considering the competitiveness of the existing wage scales for this unit in the marketplace, I believe that the City's offer of a 3.0% wage increase retroactive to July 1, 2007, for all employees in this unit, was a very good offer.
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> CPWEA's labor representative informed the City's labor negotiators that the unit members who voted on the City's most recent wage proposal voted not to accept it. In view of the fact that CPWEA representatives/membership has rejected various versions of the City's wage offer several times, and considering that CPWEA representatives have declared on two (2) occasions that the negotiation process is at impasse, the City has decided to conclude its efforts to reach agreement on this issue.

On October 24, 2007, CPWEA filed an unfair practice charge alleging that the City had engaged in bad faith bargaining with respect to the wage re-opener.

After receiving the City Manager's October 9, 2007 memorandum, Gorman assumed the City would implement its last, best, and final offer of a three percent salary increase. Gorman was aware that the City had imposed final offers on other bargaining units. However, by late January 2008, Gorman realized the City had not implemented the three percent wage increase.

On February 1, 2008, after discussions with union membership, Gorman left a voicemail message advising Cardell that CPWEA would dismiss the pending unfair practice charge if the City would implement the three percent salary increase contained in its last, best, and final offer.

In response, on February 7, 2008, Cardell sent a letter to Gorman that stated, in part:

> Thank you for your telephone call of February 1, 2008, regarding resolution of the Unfair Labor Practice Charge (ULPC) filed by [CPWEA]. As I understand your proposed resolution, in recognition of improved labor relations made in the Public Utilities Department, CPWEA is willing to dismiss the ULPC in exchange for implementing the City's "last best and final offer" of three (3) percent effective July 1, 2007, which was offered by the City during the last meet and confer process.
>
> The City appreciates CPWEA's interest in resolving the ULPC. The City also desires to resolve this issue; however, we must decline the offer as stated above in view of the fact that CPWEA previously rejected the City's wage offer and declared the negotiations process to be at impasse. The City considers the negotiations concerning wages for the third year of the 2005-2008 MOU to be concluded. Additionally, the City considers the assertions made by CPWEA in the ULPC to be without merit, and therefore, not subject to the type of "trade off" you have proposed.

Cardell concluded the letter by stating that the City looked forward to opening negotiations on a successor MOU in the near future.

CPWEA did not respond to the City's February 7, 2008, letter.

On March 11, 2008, CPWEA amended its charge to allege that the City's February 7, 2008 letter was an unlawful rescission of the last, best, and final offer, and a further indicator of surface bargaining.

On March 27, 2008, the PERB General Counsel issued a complaint that alleged that by failing to implement its last, best, and final offer of a three percent wage increase for the third year of the MOU, the City had committed an unfair practice.[4]

[4] CPWEA withdrew all other allegations, leaving only the allegation regarding the refusal to implement the last, best, and final offer.

DISCUSSION

MMBA section 3505 provides that local government agencies and recognized employee organizations "shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment."

The parties in this matter engaged in negotiation efforts on the wage re-opener from May 2007, through September 28, 2007, when CPWEA rejected the City's last, best, and final offer of a three percent salary increase, and declared impasse. The proposed decision held that Gorman's subsequent voicemail message effectuated a valid acceptance of the City's offer, which automatically created a binding, enforceable agreement between the parties. In its appeal, the City contends that the evidence does not support finding that CPWEA accepted the City's offer.

The Board agrees with the City and concludes the record does not establish that CPWEA made a valid acceptance of the City's last, best, and final offer.[5]

At the hearing on this matter, the entirety of Gorman's testimony on this issue is as follows:

> Q . . . when you made the phone conversation to Jeff Cardell, was it your intent to accept the last, best and final offer?
>
> A Yes, it was.

The record is void of any direct testimony by Gorman (or any other CPWEA witness) as to the actual content of the voicemail message. The remainder of the CPWEA "testimony" on this issue is made by CPWEA's attorney, primarily during opening arguments, and thus cannot be considered evidence in support of CPWEA's charge.

[5] Pursuant to MMBA section 3505.4, once an impasse has been properly reached between the parties, a public agency "may implement its last, best, and final offer." This provision is permissive, not mandatory. Therefore, while the parties are properly at impasse, the City is not obligated to implement its last, best, and final offer.

The bulk of the direct witness testimony as to the content of the voicemail message comes from Cardell, who testified as follows:

> Q Can you explain the nature of that contact?
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> A Mr. Gorman gave me a telephone call and made a proposal that in exchange for dismissal of the unfair labor practice charge that we should go ahead and implement the 3 percent offer retroactive to July 1st. And it was with the spirit of, or the recognition that the reason for the call was that things were going well at the Public Utilities Department and let's try to put this behind us and let's, so let's try to make this go away by we'll dismiss this if a, [sic] if the 3 percent is provided back to July 1st.

Cardell further testified that he understood Gorman's proposal to be nothing more than a settlement offer of the unfair practice charge. The only other evidence of the content of Gorman's voicemail message is reflected in Cardell's February 7, 2008 letter. In the letter, Cardell summarized his understanding of the purpose of the call and CPWEA's proposal to settle the charge. The City declined CPWEA's settlement offer via the February 7, 2008 letter, explaining why it did not believe the offer to be an appropriate resolution to the unfair practice charge.

Gorman's testimony, simply responding "yes" to the CPWEA attorney's characterization of Gorman's subjective intent in making the telephone call to Cardell, is wholly insufficient to demonstrate the actual content of the voice message. Therefore, in the absence of evidence on the record to demonstrate that Gorman's telephone message was anything more than an attempt to open settlement negotiations with respect to the unfair practice charge, as reported by Cardell, we simply cannot make the leap to find that the

telephone message was a specific, and unconditional, acceptance of the City's last, best, and final offer, that created an agreement between the parties.[6]

Moreover, MMBA section 3505.1, provides that:

> If agreement is reached by the representatives of the public agency and a recognized employee organization or recognized employee organizations, they shall jointly prepare a written memorandum of such understanding, which shall not be binding, and present it to the governing body or its statutory representative for determination.

Consequently, even if Gorman's voicemail message represented a valid acceptance of the City's last, best, and final offer, the proposed decision's finding that it created a binding and enforceable agreement is in error. As the City correctly asserted in its appeal, Section 3505.1 requires that the agreement be reduced to writing and ratified by the City before it will become binding on the parties. Numerous cases have discussed and approved this interpretation. In *Long Beach City Employees Association, Inc. v. City of Long Beach* (1977) 73 Cal.App.3d 273, the court denied a petition to compel the city to adopt a memorandum of understanding, and soundly rejected the union's argument that it was bad faith for the city council to refuse to ratify the agreement. The Court explained that the MMBA,

> . . . expressly provides that the memorandum 'shall not be binding' but shall be presented to the *governing body* of the agency or its statutory representative for *determination*, thus reflecting the *legislative decision that the ultimate determinations are to be made by the governing body itself.*

(*Long Beach,* p. 278, citing *Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22.)[7]

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[6] The absence of evidence that CPWEA made any attempt to respond to the City's February 7, 2008 letter to clarify its intent to accept the last, best, and final offer, as opposed to making a settlement offer on the unfair practice charge, further supports our finding herein.

[7] Also citing *Glendale City Employees' Assn., Inc.* v. *City of Glendale* (1975) 15 Cal.3d 328, and *Crowley v. City and County of San Francisco* (1977) 64 Cal.App.3d 450.

In the case at hand, the record is void of any evidence that an agreement was reduced to writing and ratified by the City. Therefore, a finding that a binding agreement was created which mandates implementation of the three percent salary increase is contrary to law.[8]

Unalleged Violation

The City also excepts to the ALJ's conclusion that Gorman's voicemail message amounted to changed circumstances that broke the impasse between the parties, such that the City's failure to resume bargaining was a violation of the duty to bargain in good faith.[9]

We conclude that no findings can be made as to the allegation that the City violated its duty to bargain in good faith when it failed to resume negotiations as a result of a significant concession by CPWEA because it was not alleged in the complaint. The Board may only review unalleged violations when the following criteria are met: (1) adequate notice and opportunity to defend has been provided the respondent; (2) the acts are intimately related to the subject matter of the complaint and are part of the same course of conduct; (3) the unalleged violation has been fully litigated; and (4) the parties have had the opportunity to examine and be cross-examined on the issue. (*Fresno County Superior Court* (2008) PERB

[8] The proposed decision cites *Local 512, Warehouse & Office Workers' Union v. NLRB* (9th Cir. 1986) 795 F.2d 705, in support of the finding that acceptance of the City's last, best and final offer by CPWEA creates a binding, enforceable agreement. However, this case is distinguished, because the private sector parties in *Local 512* were not covered by a statutory scheme that mandated ratification of the parties' agreement. Furthermore, although the parties in *Local 512* were subject to a stipulation that any agreement reached would be binding only if ratified by the employees and approved by the employer, the court made a specific finding that these conditions had been satisfied.

[9] In *Modesto City Schools* (1983) PERB Decision No. 291, the Board held that "impasse suspends the bargaining obligation only until 'changed circumstances' indicate an agreement may be possible." Changed circumstances include concessions "which have a significant impact on the bargaining equation." (*Ibid.*) The duty to bargain in good faith is thus revived. Where concessions are made by one party, they must be given consideration by the other, and a good faith effort must be made to determine the potential for agreement. (*Ibid.*)

Decision No. 1942-C.) The unalleged violation also must have occurred within the applicable statute of limitations period. (*Ibid.*)

These criteria have not been met in this case. As stated previously, the complaint alleged only that the City violated its duty to bargain in good faith by failing to implement its last, best, and final offer. The claim that Gorman's voicemail message constituted a "changed circumstance" that revived the City's duty to bargain was not alleged in CPWEA's charge, was not alleged in the complaint, was not introduced at hearing, and was not raised by CPWEA until its post hearing brief. The City was not provided notice, or adequate opportunity to fully litigate the issue, and did not have the opportunity to examine and cross-examine witnesses on this issue. Therefore, we cannot consider whether the City's February 7, 2008, letter constituted an unlawful failure to resume bargaining in response to changed circumstances, in violation of the MMBA.

ORDER

Based on the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. SA-CE-513-M are hereby DISMISSED.

Acting Chair Dowdin Calvillo and Member Neuwald joined in this Decision.