

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



NATIONAL UNION OF HEALTHCARE
WORKERS,

Charging Party,

v.

SALINAS VALLEY MEMORIAL
HEALTHCARE SYSTEM,

Respondent.

Case No. SF-CE-797-M

PERB Decision No. 2433-M

June 15, 2015

Appearances: Siegel, LeWitter & Malkani by Latika Malkani, Attorney, for National Union of Healthcare Workers; Law Offices of Anne Frassetto Olsen by Anne Frassetto Olsen, Attorney, for Salinas Valley Memorial Healthcare System.

Before Martinez, Chair; Winslow and Banks, Members.

DECISION

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions to a proposed decision (attached) pursuant to the remand order contained in *Salinas Valley Memorial Healthcare System* (2012) PERB Decision No. 2298-M (*Salinas Valley I*). *Salinas Valley I* directed the PERB Office of the General Counsel to issue a complaint alleging that the Salinas Valley Memorial Healthcare System (Hospital) failed to meet and confer over the effects and implementation of layoffs before implementing those layoffs. Specifically, the complaint alleged that the Hospital violated the Meyers-Milias-Brown Act (MMBA)¹ and PERB Regulation 32603(a), (b), and (c)² by refusing to negotiate with National Union of Healthcare Workers (NUHW) over the timing, number and identity of

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

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

employees to be laid off in December 2010, and over the impact and effects of the layoffs on remaining employees.

After a two-day evidentiary hearing, the administrative law judge (ALJ) dismissed the complaint, having determined that NUHW had failed to prove that the Hospital had refused to negotiate over the number, timing and related effects on laid off employees or over the effects of the layoff on those employees who remained in the Hospital's employ, or had prematurely proceeded with the layoff prior to reaching impasse. The ALJ further concluded that the Hospital had satisfied the test set forth in *Compton Community College District* (1989) PERB Decision No. 720 (*Compton*), i.e., that delay in implementation of the layoff would compromise the Hospital's managerial prerogative to reduce labor costs. NUHW excepted to the ALJ's proposed decision.

The Board itself has reviewed the record in this matter in its entirety in consideration of the issues raised by NUHW's exceptions, including the pleadings, the hearing record, the proposed decision, NUHW's exceptions and the Hospital's response. We conclude that the ALJ's findings of fact are adequately supported by the record as a whole, and adopt them as our own, as supplemented by this decision. We also adopt the ALJ's conclusions of law, except as discussed below.

DISCUSSION

Factual Summary

The essential facts are not in dispute, and NUHW does not except to any factual finding in the proposed decision. We briefly summarize the facts for the purpose of discussion.

NUHW was certified on October 25, 2010,³ as the exclusive representative of a bargaining unit of service and technical employees, having successfully decertified Service

³ All dates refer to 2010 unless otherwise noted.

Employees International Union-United Healthcare West (SEIU-UHW). On November 9 the Hospital's Chief Operating Officer, Beverly Ranzenberger (Ranzenberger), notified John Borsos (Borsos), NUHW's vice president/secretary treasurer, of an urgent need to meet and confer over layoffs. She asked NUHW to provide several possible dates within the following two weeks for discussions. NUHW had not yet assembled a bargaining team.

As early as Summer 2010, the Hospital learned that it would be losing its Blue Cross Tier 1 status (a preferred reimbursement status) on January 1, 2011, which would lead to increased costs to patients covered by Blue Cross. Since another hospital in the area would have Tier 1 status as of January 1, 2011, the Hospital predicted that a certain number of patients would elect to be admitted to the other hospital in order to take advantage of lower costs, thereby reducing the Hospital's patient census (or number of patients occupying beds). Ranzenberger had determined that independent of the loss of the Tier 1 status, the Hospital's patient census had decreased dramatically in 2010 because of fewer elective surgeries in light of the economic recession. Consequently, there was less work to be done at the Hospital. The Hospital decided to implement layoffs before January 1, 2011, in part, because of these factors.

The parties first met concerning this issue on November 17. Ranzenberger notified NUHW of the Hospital's decision to lay off about 100 bargaining unit members, or 57.7 full-time equivalents (FTEs), by the end of 2010 and explained the reasons for the decision, including the decrease in patient census, and the loss of Tier 1 status. NUHW asserted that the decision to lay off employees was a mandatory subject of bargaining and demanded to bargain over the layoff decision, as well as the effects. According to NUHW Field Representative Ernie Gonzales (Gonzales), NUHW demanded to bargain over how the work assignments of the laid off employees would be distributed to the remaining employees, and the safety impact of the additional workload for remaining employees. However, according to Gonzales, the

Hospital only wanted to bargain over the effects on the employees who were going to be laid off, including recall rights, bumping, and severance payments, but not over the effects on remaining employees.

The parties did not meet again until December 7, but between the initial meeting and December 7, the parties exchanged numerous e-mails, most of which represented NUHW's assertions that the decision to lay off was a mandatory subject of bargaining and that the Hospital had not provided sufficient justification for the layoffs. The Hospital disputed both assertions, and provided requested information regarding job classifications to be reduced, the current number of employees, and the number of FTEs the Hospital anticipated reducing. The Hospital also asked NUHW to make proposals on such negotiable effects as seniority, bumping rights, re-employment rights, severance payments, and continuation of health and welfare benefits. However, the Hospital also maintained that its timeline for implementing the layoffs was by the end of 2010.

The parties met again on December 7 and 8. The Hospital reiterated its determination to move forward with the layoffs, as its patient census was down and it anticipated an additional drop in patient census after losing Blue Cross Tier 1 status. On December 7, the Hospital also declined NUHW's November 22 request to combine negotiations over a successor memorandum of understanding (MOU) with negotiations over the effects of layoff, claiming that it needed to first conclude negotiations on the effects of layoffs.⁴ The Hospital presented NUHW with a written proposal on December 7, addressing how and when employees would be notified of the layoffs, as well as proposing a six-month rehire list containing criteria including employee skills, qualifications, pending disciplinary actions, and

⁴ NUHW renewed its demand on December 6, asserting that negotiations over both issues were one and the same. On December 7, Ranzenberger again refused to begin negotiations on a successor MOU and insisted on discussing the effects of layoff first.

seniority. There was no evidence that NUHW responded to this proposal or made a counter-proposal concerning the timing of layoffs.

The parties held another bargaining session on December 8, but there is little evidence about what transpired during this meeting. However, on the same day, Ann Kern (Kern), the Hospital's executive administrative director, e-mailed Borsos: "In anticipation of our concluding the effects bargaining negotiations on the upcoming reduction in force soon, we are prepared to enter into contract negotiations with NUHW and would like to receive your proposal." Kern offered a list of seven possible dates between December 10 and December 23. There is no evidence that NUHW responded to this invitation prior to the end of 2010. However, the Hospital rejected NUHW's repeated requests to combine negotiations over effects of layoffs with bargaining over a successor MOU. According to the Hospital, it declined to combine these negotiations because of the timeframe in which the staff reductions needed to occur and its perception that MOU negotiations could not be completed before the end of 2010.

The parties had a total of seven bargaining sessions between November 17 and December 27, all devoted to the impending layoffs. The Hospital firmly maintained its position that it had the authority to unilaterally determine that a layoff was required, while NUHW repeatedly voiced its position that the decision to lay off employees was negotiable.

Particularly significant was the meeting of December 21. By this time, the Hospital had announced that the number of FTEs to be reduced by the end of the year had decreased to 11.9, or approximately 20 employees.⁵ Responding to Borsos' insistence on reviewing each

⁵ One point of contention between the parties was the Hospital's alleged refusal to provide to NUHW the names of employees to be laid off. While the Hospital initially provided NUHW with the total number of employees and the FTE reduction it planned, it did not initially provide the names because it did not want to pre-empt NUHW's anticipated proposals for selecting who would be laid off, i.e., by seniority or some other method. Ranzenberger

department to more fully understand how the reductions would affect patient care, Ranzenberger asserted that employee work schedules would not change dramatically, and that after the layoffs, the Hospital would use per diem employees and other strategies to fill schedule gaps. The parties discussed preferential re-hire rights, but NUHW offered no response or counter-proposal to the Hospital's proposal on re-hire rights. The Hospital expressed urgency concerning the impending notification to employees. NUHW returned from a caucus, criticized the Hospital's written proposal for purportedly being incomplete, and proposed the creation of a supplemental unemployment benefit, which, according to the Hospital, would have cost \$100,000. NUHW continued to maintain that the Hospital was obligated to bargain over its decision to lay off employees.

The Hospital rejected NUHW's proposal on supplemental unemployment benefits and announced that it was "moving forward." Borsos responded, "We're done," which Ranzenberger interpreted as a declaration of impasse by NUHW.

However, the parties returned to the bargaining table on December 27, one day before the layoffs occurred and five days after the affected employees were notified of their layoff. NUHW had submitted its first written proposal on December 26. This proposal, labeled a "package proposal," consisted of an amended version of Article 11, ("SENIORITY") of the expired SEIU-UHW MOU. The proposal also addressed transfers within a classification, promotions and transfers outside of classification, transfer limits, call off and call back, the Hospital's responsibility to avoid layoffs, temporary reductions in work, long-term or permanent layoffs, layoff order, alternatives to reductions in force, severance pay, benefits to

testified without contradiction that she explained to two NUHW bargaining team members, Marilyn Benson and Esther Fierros-Nuñez, the Hospital's rationale for not disclosing names, including a wish not to cause distress to those employees near the holidays. The bargaining team members did not object. On December 22, the Hospital provided NUHW with the names of the employees to be laid off.

laid off employees, a supplemental unemployment benefit fund, recall, credit for prior seniority, staffing for clusters of nurses, a training and upgrade fund, equality of sacrifice, an employee buy-out program, and recognition of NUHW at the mammography center.

In light of NUHW's proposal and Borsos' indication that the union had room to move, Ranzenberger conceded the parties were not at impasse regarding the number of positions to be laid off and the date of the layoff. Ultimately, the Hospital rejected NUHW's proposal because it was a package proposal and the Hospital believed acceptance of the proposal would be acquiescing to NUHW's demand that effects bargaining be combined with bargaining for a successor MOU. Even though Borsos again indicated NUHW had room to move and asked the Hospital for a counterproposal, Ranzenberger declared impasse.

On December 28, the Hospital implemented the first round of layoffs.⁶ The parties continued effects bargaining until at least April 4, 2011.

Proposed Decision

The ALJ concluded that the Hospital did not fail to bargain in good faith about any of the effects of the layoff. To the contrary, he concluded that NUHW caused significant delay by, among other things, insisting that it had a right to negotiate over the decision to lay off and failing to offer any proposals concerning the effects of layoff until two days before the layoff was to occur.

The ALJ also concluded that under *Compton, supra*, PERB Decision No. 720, the Hospital was permitted to implement its managerial decision to lay off, even if negotiations over the effects of layoff had not been completed.

⁶ A later round of layoffs occurred in 2011.

NUHW's Exceptions

NUHW generally takes exception to the ALJ's conclusion that the Hospital did not fail to bargain over the number, timing and related effects of the proposed layoff, or over effects on remaining employees. NUHW disagrees with the ALJ's conclusion that the Hospital was reasonable in concluding that negotiations as to the scope of the layoffs were at impasse when the layoffs were implemented on December 27. According to NUHW, no genuine impasse was reached, and the Hospital was therefore not privileged to implement the layoffs on December 27.

NUHW has failed to identify the grounds for these exceptions. Rather, it merely expresses disagreement with the ALJ's conclusion and repeats arguments it made to the ALJ. The Board need not address arguments that have already been adequately addressed, particularly where the excepting party has simply reasserted its claims without identifying a specific error of fact, law or procedure that would justify reversal. (*Los Angeles Superior Court* (2010) PERB Decision No. 2112-I; *Morgan Hill Unified School District* (1995) PERB Decision No. 1120, p. 3; *State of California (Department of Youth Authority)* (1995) PERB Decision No. 1080-S.) For reasons discussed in the proposed decision, we agree with the ALJ that the Hospital did not fail to bargain in good faith over the number, timing and related effects on employees to be laid off. Because we conclude that the Hospital satisfied the *Compton* factors, it is unnecessary to determine whether the parties were at a genuine impasse when the layoff occurred.

We address three additional exceptions raised by NUHW. First, NUHW disagrees with what it characterizes as the ALJ's "Erroneous Premise That The Union Was Required To Provide and Did Not Provide Alternatives to Achieve Labor Costs Savings." (NUHW Exceptions, p. 29.) NUHW also asserts that the ALJ wrongly concluded that the Hospital

satisfied the factors enumerated in *Compton, supra*, PERB Decision No. 720 regarding implementing layoffs prior to the conclusion of effects bargaining. Finally, we address NUHW's claim that the Hospital refused to negotiate over the effects of the layoff on the remaining employees.

1. Alternatives to Achieve Labor Cost Savings

We do not agree, as NUHW alleges, that the ALJ concluded that NUHW was *required* to provide alternatives to achieve labor cost savings. Instead, he concluded that the Hospital could not be liable for failing to bargain over the implementation of the layoff where NUHW had not offered any concrete proposals on any negotiable subjects related to the layoffs. After reviewing the instances in which NUHW declined to discuss various effects of layoff such as the order of layoff, the number of employees to be laid off, or an alternative date for the layoff, the ALJ, in looking at the totality of the circumstances presented by the factual record, concluded:

In light of NUHW's failure to signal any intent to propose economic concessions that would constitute an alternative to the Hospital's labor cost reduction goal, offer any concrete proposal on the timing of the layoff, or propose a different configuration for the reductions, the record fails to demonstrate that the Hospital exhibited bad faith by resisting bargaining over the timing, number, and other effects on those to be laid off.

(Proposed Dec., pp. 35-36.)

The ALJ correctly considered NUHW's failure to provide alternative cost-saving measures as one of multiple factors in support of the conclusion that the Hospital did not fail to bargain in good faith over the effects of the December 2010 layoff. We agree with the ALJ's observation:

When NUHW asserts that the Hospital refused over the first four bargaining sessions to make a genuine attempt to reach agreement over the particular employees, job classifications, and total number of employees subject to layoff, it is really referring to the

Hospital's resistance to engage NUHW in discussions to rebut [NUHW's] assertions that the layoffs were unnecessary, This is tantamount to a claim of right to negotiate the decision to lay off.

(Proposed Dec., p. 36.)

NUHW also claims that the ALJ failed to consider NUHW's repeated efforts during bargaining to discuss whether the number of layoffs could be reduced by various alternatives, such as saving the benefitted positions first by reducing the per diem positions. The evidence shows that the Hospital rejected the per diem proposal as a viable alternative, because per diem positions are used to fill in when regular employees cannot work a particular shift. Reducing per diem employees would do nothing to ultimately save labor costs. Simply because the Hospital rejected NUHW's proposal does not mean that it refused to negotiate or bargained in bad faith. (See, e.g., *Kings In-Home Supportive Services Public Authority* (2009) PERB Decision No. 2009-M, p. 10: "The Board has held that while a party may not merely go through the motions of negotiations, it may lawfully maintain an adamant position on any issue.")

NUHW also takes issue with what it characterizes in the proposed decision as a disapproval of NUHW's attempts to question the Hospital's need for layoffs. We disagree with this characterization.

Negotiations over the effects of layoff may include the exclusive representative's robust efforts to persuade the employer that layoffs can be avoided. Those efforts may include economic concessions, or other ideas for cost-savings, or the presentation of facts that demonstrate the layoff is not necessary or need not be as deep as management proposes. However, if an exclusive representative expects to successfully establish that an employer failed to negotiate in good faith over the effects and implementation of layoffs, the exclusive representative must participate in the give-and-take of negotiable proposals, i.e., the effects and

implementation of the layoff. The union cannot monopolize negotiations with its insistence on negotiating over a non-negotiable managerial decision, i.e. the decision to lay off, and hope to delay or prevent the implementation of those layoffs by charging the employer with bad faith bargaining.

We do not read the proposed decision to suggest that NUHW had an *obligation* to propose alternatives that help the employer achieve cost savings. An exclusive representative faced with impending layoffs of unit members may choose not to offer economic concessions in trade for fewer layoffs. But where a layoff is undertaken to reduce labor costs, a union cannot claim that the employer refused to bargain over the number of employees to be laid off when the union offers no concessions of sufficient value to the employer to obviate the need for layoffs.⁷ If NUHW had proposed economic concessions, there is no doubt such proposals would be within the scope of bargaining, and the Hospital would be obliged to respond in good faith. But that is not what occurred here.

NUHW also asserts that it was in a proverbial “catch-22,” because the Hospital refused to bargain over a successor MOU until negotiations over the effects of layoff concluded. According to NUHW, labor cost savings could be fully explored only in the context of MOU negotiations. In short, NUHW asserts that it was the Hospital’s unwillingness to combine layoff negotiations with successor MOU bargaining that stymied NUHW’s ability to present labor cost savings proposals.

⁷ While a union is not obligated to propose economic concessions in order to obviate the need for the layoff or to mitigate the severity of the layoff, if it chooses to offer concessions, our case law holds that such proposed alternatives to layoff are appropriate matters for negotiations. (*San Mateo City School District* (1984) PERB Decision No. 383, p. 18; *City of Sacramento* (2013) PERB Decision No. 2351-M, p. 22.) See also *Pan American Grain Co., Inc. v. N.L.R.B.* (1st Cir. 2009) 558 F.3d 22, 27: employees must be given the “opportunity to negotiate concessions that reduce overall costs and thus spare jobs.”

This argument would have some weight if NUHW had sent any signal that it was willing to make a proposal that would have addressed labor costs savings, other than its per diem proposal. The record supports the ALJ's finding that NUHW failed to propose, or otherwise indicate to the Hospital that it was interested in exploring making economic concessions that could have been traded for jobs.

More significantly, the facts do not support NUHW's assertion that the Hospital's refusal to combine successor MOU negotiations with the effects bargaining prevented the Union from making job-saving concessions, if it had chosen to do so. Borsos first requested that effects bargaining be combined with successor MOU negotiations on November 22, 2010, at which time he said the NUHW bargaining team had not yet been selected. He informed the Hospital that he expected his bargaining team would be in place by December 1. Borsos reiterated his demand to combine negotiations on December 5. Three days later, the Hospital notified Borsos that it was prepared to begin successor MOU negotiations and offered a list of seven possible bargaining dates, all in December. NUHW did not respond to the invitation to open successor negotiations until sometime after the layoff occurred. It cannot now complain about the employer creating a "catch-22" situation.

NUHW was not prevented from offering economic concessions because of the Hospital's refusal to combine effects bargaining with successor MOU negotiations. The Hospital offered to begin MOU negotiations as early as December 10, but NUHW ignored this opportunity, at least during the remainder of December. But more significantly, negotiations over the effects of layoffs continued after they were implemented. Nothing prevented NUHW from proposing concessions in exchange for saving jobs (or recalling laid off employees) during any of the parties' several negotiating sessions held between January and April 2011.

Because the Hospital briefly asserted that effects bargaining over layoffs needed to be completed before successor MOU bargaining commenced, we take this opportunity to distinguish this case from *City of San Jose* (2013) PERB Decision No. 2341-M (*San Jose*), where we held that piecemeal or fragmented bargaining tactics are an indicia of bad faith bargaining. In *San Jose* the Board described piecemeal bargaining as a tactic “whereby one party insists on negotiating certain subjects in isolation from others, or seeks to impose arbitrary limits on the range of possible compromises it will consider.” (*Id.* at p. 29.) The facts alleged in *San Jose* and the private sector cases on which *San Jose* relied all involved situations in which the employer refused to discuss certain issues until other matters were resolved, thereby preventing the opportunity for the “horse trading” that characterizes good faith bargaining. The Board explained that permitting the employer to remove issues from the bargaining table, one by one, would impair the ability to reach an overall agreement through compromise.

In *San Jose, supra*, PERB Decision No. 2341-M, the employer was alleged to have initially proposed several reductions in the compensation package, including a 10 percent wage reduction, and elimination of the sick leave payout. Although “retirement reform” had been informally discussed before formal negotiations began and identified by the City as a major source of concessions in “total employee compensation,” the City proposed deferring discussion of retirement issues to mid-term bargaining during the future MOU. During the course of negotiations, the union solicited from the City substantive proposals on retirement, but the City allegedly refused to discuss or offer a substantive proposal on the subject and insisted to impasse on a side letter that would defer negotiations over retirement until the parties had reached complete agreement on all other subjects. The Board held in *San Jose* that “a party may not refuse to discuss a mandatory subject by insisting on a ‘proposal’ that

postpones negotiations on certain mandatory subjects until agreement on all others is secured.”

(*Id.* at p. 27.)

The facts in this case differ from those alleged in *San Jose, supra*, PERB Decision No. 2341-M. Although the Hospital refused NUHW’s request to combine negotiations over effects of layoff with successor MOU negotiations, indicating it did not believe the latter could be completed before the date selected by the Hospital for the layoff, the Hospital did not condition successor MOU negotiations on an agreement regarding layoff effects. Negotiations over both matters continued after the layoffs were implemented. Even though Ranzenberger said in November 2010, that the Hospital wanted to complete effects bargaining before embarking on the larger task of negotiating a complete MOU, in actual fact, the Hospital did not hold MOU negotiations hostage to agreement on layoff effects, as evidenced by its offer to commence negotiations on a successor MOU on several dates in December.

Nor do we find that the Hospital’s refusal to combine negotiations over layoff effects with the MOU negotiations constituted an unreasonable delay in bargaining over the successor MOU. As noted earlier, the delay was actually only between December 1, when Borsos said his bargaining team would be assembled, and December 8, when Kern e-mailed him with a list of dates and a request to begin successor MOU negotiations.

2. Implementing Layoffs Prior to the Conclusion of Effects Bargaining

The ALJ concluded that the Hospital was reasonable in concluding that the parties were at an impasse on December 27 with respect to the “scope of the layoff.” (Proposed Dec., p. 42.) As noted earlier, NUHW excepts to this conclusion. We need not reach this issue, however, because it is legally irrelevant. Even if the negotiations over the effects of layoff were not at impasse, the hospital would nevertheless have been permitted to implement its

managerial decision to lay off because it satisfied the three-part test of *Compton, supra*, PERB Decision No. 720.

Compton, supra, PERB Decision No. 720 articulated a test for determining when an employer may implement a firm, non-negotiable managerial decision before negotiations over the effects are completed. The Board in *Compton* held:

[U]nder some circumstances an employer, prior to agreement or exhaustion of impasse procedures, may implement a nonnegotiable decision after providing reasonable notice and a meaningful opportunity to bargain over the effects of that decision. In such cases, we will apply the following requirements:

1. the implementation date is not an arbitrary one, but is based upon either an immutable deadline (such as the one set by the Education Code or other laws not superseded by EERA) or an important managerial interest, such that a delay in implementation beyond the date chosen would effectively undermine the employer's right to make the nonnegotiable decision;
2. notice of the decision and implementation date is given sufficiently in advance of the implementation date to allow for meaningful negotiations prior to implementation; and
3. the employer negotiates in good faith prior to implementation and continues to negotiate in good faith after implementation as to those subjects not necessarily resolved by virtue of the implementation. [Citation omitted.]

(*Id.* at pp. 14-15.)

NUHW asserts that none of these factors were met in this case, and the ALJ therefore erred in concluding that the Hospital was free to implement the layoff before negotiations over the effects were completed. We disagree.

In *Compton, supra*, PERB Decision No. 720, and subsequent decisions applying the first prong of the *Compton* test, the Board has found the test satisfied by such factors as a final

budget deadline (*Compton*, p. 16)⁸ or the elimination of state funding by the Legislature, despite the absence of any immutable deadline or determination that a delay in implementation would effectively undermine the employer's right to implement the layoff. (*State of California (Department of Corrections & Rehabilitation, Department of Personnel Administration)* (2010) PERB Decision No. 2115-S (*Corrections*).)

In *Corrections, supra*, PERB Decision No. 2115-S, p. 9, PERB held:

[The] implementation of the nonnegotiable decision to lay off employees prior to the completion of negotiations over the effects of the layoff is permissible where the decision to implement *was not arbitrary*, the employer gave sufficient notice of the implementation date to provide for meaningful negotiation, and the employer continues to negotiate in good faith. (*Compton*.)

(Emphasis added.)

In light of how the Board has applied the first *Compton* factor, we join the ALJ in concluding that the Hospital's layoff implementation date was not arbitrary, because it was pegged to the loss of Blue Cross Tier 1 status and a reduction in reimbursement rates on January 1, 2011, factors external to the Hospital's decision-making authority and beyond its control. The Hospital exercised its management prerogative to reduce staff in light of foreseeably lower patient census numbers and a reduction in revenue. We are also persuaded by the fact that NUHW never proposed an alternative date for the layoffs based on a different substantive reason other than that cited by the Hospital.⁹

⁸ *Compton, supra*, PERB Decision No. 720 did not make any finding (under the very test it had just prescribed) that delay in implementing layoffs would have undermined the school district's right to lay off employees. However, the Board still deemed that the employer had satisfied the first factor regarding implementing layoffs prior to the conclusion of effects bargaining, stating: "The District's willingness to negotiate, and the need to reduce its expenditures prior to the submission of the final budget by September 6, warranted the chosen implementation dates." (*Id.* at p. 16.)

⁹ As the ALJ noted, NUHW did propose a two-week delay in the implementation date so that negotiations could be completed. Given NUHW's own delaying tactics in these

We note that in *Salinas Valley I, supra*, PERB Decision No. 2298-M, footnote 9, the Board stated: “[W]e cannot conclude at the pleading stage of this case that a brief delay in the effective date of the layoff would undermine the right of the Hospital to ultimately decide to lay off employees.” (*Salinas Valley I*, pp. 20-21, fn. 9.)

Our decision today, based as it is on a full evidentiary record, does not conflict with the Board’s observation in the above-quoted footnote. (*Salinas Valley I, supra*, PERB Decision No. 2298-M.) That case was decided at the pleading stage of the case, where “it is not up to the Board agent to judge the merits of the charging party’s dispute, but to leave the weighing of the evidence to the ALJ at a full evidentiary hearing.” (*Saddleback Community College District* (1984) PERB Decision No. 433; *Lake Tahoe Unified School District* (1993) PERB Decision No. 994.) The Board stated in *Salinas Valley I*, that “the impending reduction in revenue *does not necessarily* meet the *Compton CCD* test.” (*Salinas Valley I*, pp. 20-21, fn. 9; emphasis added.) The implication is that the impending reduction in revenue *may* meet the *Compton* test, but that such a finding was inappropriate at the pleading stage. As the Board now has the full evidentiary record before us, we find that the Hospital has met the first *Compton* factor.

With regard to the second *Compton* factor related to timing of notice, the Hospital provided NUHW with notice of the layoffs nearly two months prior to the date of the layoffs and reasonably soon after NUHW’s date of certification as the exclusive representative of the Hospital’s service and technical employees. In *Oakland Unified School District* (1985) PERB Decision No. 540, the Board held that the passage of a resolution setting an implementation date two months hence would not be a per se violation of the duty to bargain, since it afforded

negotiations, the last-minute proposal to postpone the layoffs did not render the Hospital’s deadline arbitrary.

the parties an ample opportunity to bargain prior to implementation. Ranzenberger testified without contradiction that the Hospital was willing and able to bargain over effects in November, but that NUHW delayed bargaining because of Borsos' schedule conflicts. The record indicates that the Hospital had the intention of bargaining over effects immediately upon its notification to NUHW of the proposed layoffs. We therefore find that the Hospital has satisfied the second *Compton* factor.

With regard to the third factor, good faith bargaining prior to and after implementation, we find the Hospital bargained in good faith about the effects of the layoff, both before and after the layoff, as fully described in the ALJ's proposed decision.

On these grounds, we find that the ALJ did not err in concluding that the Hospital met all three *Compton* factors, and therefore was permitted to implement the December 2010 layoff, regardless of whether the parties were at impasse over the effects negotiations at the time of implementation.

3. Post-Implementation Negotiations

NUHW excepts to the ALJ's conclusion that the Hospital did not fail to bargain over the effects of the layoff on remaining employees, asserting that he erred by declaring that the Hospital was justified in delaying negotiations over the effects on the remaining employees until after negotiations were concluded on the effects on employees to be laid off. The NUHW also avers that the proposed decision ignores evidence that the Hospital failed to meaningfully engage in effects bargaining over the workload and safety of the remaining employees.

However, the evidence supports the ALJ's findings on this point. The parties continued to bargain over various effects of the layoff after its implementation. In early January 2011, the parties exchanged proposals concerning the use of laid off employees as per diem employees. Minutes from a labor-management meeting held on February 11, 2011, show that

NUHW was presented with “three prior staffing schedules” in Environmental Services. On April 26, 2011, Ann Kern wrote to Borsos and other NUHW officials recounting the meetings and subjects of those meeting that had taken place between January 5, 2011 and April 4, 2011. (Joint Ex. 11, April 26, 2011, letter from Kern (Kern Letter).) Included in that description was a representation that on February 2, 2011, NUHW was presented with “proposed schedules and how proposed duties would be redistributed amongst remaining staff. We advised of shift changes and requested a rebid of shifts.” The Kern Letter describes a meeting on February 8 to again discuss proposed changes to staffing schedules, and the effect of the layoffs on remaining staff. Several other meetings were described between February 8 and April 4 where NUHW failed to respond to the Hospital’s proposed schedules and request for a rebid. Finally, the Kern Letter describes the meeting of April 4, 2011, in which she asked the NUHW stewards if they had any proposals responsive to the Hospital’s proposed schedule changes and request for rebid. “Your response was to rehire all the employees that had been laid off and that keep [*sic*] all positions as they were prior to the December layoffs.”

Borsos replied to this letter on April 29, 2011, but he did not contradict any of Kern’s factual assertions about the Hospital’s schedule and rebid proposals that had been discussed at the various meetings she described between January 5 and April 4, 2011. Instead, he disputed Kern’s declaration of impasse, complained about the Hospital’s refusal to provide requested information, and its alleged unilateral change in the call off of staff in environmental services.

These facts fully support the ALJ’s conclusion that NUHW failed to prove that the Hospital refused to bargain over the effects of the layoff on remaining employees.

ORDER

The complaint and underlying unfair practice charge in Case No. SF-CE-797-M are hereby DISMISSED.

Chair Martinez and Member Banks joined in this Decision.



STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

NATIONAL UNION OF HEALTHCARE
WORKERS,

Charging Party,

v.

SALINAS VALLEY MEMORIAL
HEALTHCARE SYSTEM,

Respondent.

UNFAIR PRACTICE
CASE NO. SF-CE-797-M

PROPOSED DECISION
(6/30/2014)

Appearances: Siegel, LeWitter & Malkani by Latika Malkani, Attorney, for National Union of Healthcare Workers; Ottone, Leach, Olsen and Ray, by Anne F. Olsen, Attorney, for Salinas Valley Memorial Healthcare System.

Before Donn Ginoza, Administrative Law Judge.

PROCEDURAL HISTORY

National Union of Healthcare Workers (NUHW) filed an unfair practice charge and amended charge under the Meyers-Miliias-Brown Act (MMBA or Act)¹ against the Salinas Valley Memorial Healthcare System (Hospital) on December 17, 2010, and March 21, 2011, respectively. On April 7, 2011, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) dismissed the charge. On December 12, 2012, PERB reversed the dismissal in part in *Salinas Valley Memorial Healthcare System* (2012) PERB Decision No. 2298-M. On February 14, 2013, the Office of the General Counsel on remand issued a complaint alleging that the Hospital refused to negotiate over the timing, number, and identity of employees to be laid off, and the effects of the layoffs on remaining employees.

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

This conduct is alleged to violate sections 3503, 3505, and 3506 of the Act and PERB Regulation 32603(a), (b), and (c).²

On March 13, 2013, the Hospital filed its answer to the complaint, denying the material allegations and raising affirmative defenses.

On April 15, 2013, an informal settlement conference was held, but the matter was not resolved.

On February 26 and 27, 2014, a formal hearing was conducted in Oakland.

On June 2, 2014, the matter was submitted for decision with the submission of post-hearing briefs.

FINDINGS OF FACT

NUHW is an “employee organization,” within the meaning of section 3501(a), and an “exclusive representative” of a bargaining unit of public employees, within the meaning of PERB Regulation 32016(b). The Hospital is a “public agency” within the meaning of section 3501(c).

The Hospital provides a full range of acute care, maternal care, and outpatient services. NUHW’s bargaining unit is composed of service and technical employees, with such classifications as admitting and registration clerks, surgical sterile processing technicians, clerk typists, cooks, environmental services aides, nutrition services aides, licensed vocational nurses, nurse aides, transcriptionists, and unit assistants. The Hospital staff includes full-time and part-time employees (one-half time or greater), all of which receive health and welfare benefits, as well as per diem employees who do not receive benefits. Part-time employees are plentiful because the Hospital is a 24/7 facility and those positions are needed to fill gaps in

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

coverage. Per diem employees are called upon to fill shifts for regular employees on both short and extended leaves.

NUHW was certified as the exclusive representative of the unit on or about October 25, 2010, following a successful challenge to the Service Employees International Union, United Healthcare Workers West (SEIU). The memorandum of understanding (MOU) between SEIU and the Hospital had expired at the time of certification.

A number of SEIU's former staff and officers assumed positions with NUHW, including Vice President/Secretary-Treasurer John Borsos, Field Representative Ernest Gonzales III, and Chief Steward Esther Fierro-Nunez. These agents were aware that the Hospital had undertaken a reduction in force during the summer of 2010, induced through severance package offers to the non-represented ("non-affiliated") staff. However, they were informed and believed that the Hospital had no intention of reducing staffing in NUHW's unit.³

Hospital Chief Operating Officer Beverly Ranzenberger was in charge of managing day-to-day operations. The staff of the Human Resources department reported to her, including Executive Administrative Director Ann Kern.

In 2010, Ranzenberger was given direction to reduce operational costs as a result of decreasing patient census and the loss of preferred reimbursement status ("Tier One") with Blue Cross for Monterey County. The change in status followed unsuccessful contract negotiations with the insurer and was to take effect on January 1, 2011. A rival hospital in the area maintained Tier One status. This was expected to exacerbate the declining patient census problem because patients could be served at the other hospital with lower out-of-pocket costs

³ NUHW only provided disputed hearsay evidence of the Hospital's lack of intention to conduct layoffs.

and many of the physicians in the area had admitting privileges at both facilities. The Hospital estimated a loss of \$1.4 million in monthly revenue as a result of losing Tier One status, based on total monthly operating revenues of \$30 million. Even prior to the announced loss of Tier One status, the Hospital's annual average daily census had dropped in both the 2009 and 2010 fiscal years, ending June 30. The decrease was 11.9 percent in 2010.⁴

In a letter dated November 9, 2010, Ranzenberger notified Borsos of the "urgent" need to meet and confer regarding layoffs.⁵ Ranzenberger asked for several dates within the next two weeks. Around this time NUHW was only just beginning to conduct bargaining surveys for successor contract negotiations and electing its bargaining team members. NUHW was "caught off guard" by the notice of planned layoffs. A meeting was scheduled for November 17. Approximately 30 bargaining unit representatives attended that meeting on released time.

November 17 Meeting

The first meeting, held on November 17, was informational in nature. Chief Financial Officer Hospital Vice President/Finance John Fletcher made a presentation on the financial situation prompting the decision to lay off. Borsos, Gonzales, and Fierro-Nunez were among the NUHW representatives in attendance.

At the time of this meeting, the Hospital had analyzed the workload and determined that 57.7 full-time-equivalent (FTE) positions needed to be eliminated from the bargaining

⁴ Hospital records show the census decline began in 2008, after a 20-year period in which census had never fallen below 2008 levels. During the 2008-2010 period, census did not recover and remained flat in 2011 and 2012, though the figure for that period was boosted by increases in (less lucrative) outpatient visits.

⁵ All meeting dates and correspondence hereafter are in 2010, unless otherwise indicated.

unit. Workload was decreasing as evidenced by the number of “call offs,” where employees are asked to volunteer not to work a scheduled shift, and if there are no volunteers, management orders the employees not to report.

NUHW responded that it did not believe the claims of financial distress and asserted that the Hospital was more profitable than most of its peers. NUHW members were informing the union that census had not dropped significantly. NUHW believed the Hospital was required to prove a lack of work before it could reach agreement with the union. From the outset NUHW asserted its right to bargain both the decision and the effects of the proposed layoff. According to Gonzales, the Hospital made it difficult to bargain effects because it provided only incomplete information as to such matters as the employees targeted for layoff. When the union questioned the projected layoff date, the Hospital stated it was exercising its managerial prerogative on the matter. From the very first meeting the Hospital asserted it was only interested in bargaining over the effects of the employees to be laid off and not the effects on those who would remain.

Borsos echoed Gonzales’s view that the Hospital carried the burden to prove a lack of work. Borsos testified that Fletcher’s presentation was “pathetic” and “riddled with [million dollar] errors,” and that the Hospital’s case was weak in light of excessive levels of executive compensation. Borsos further maintained that bargaining over the layoffs needed to be incorporated into the successor agreement negotiations because that was where the money issues were.

Exchanges After the November 17 Meeting

Kern responded to Borsos regarding the November 17 meeting in a November 19 letter. Citing PERB precedent, Kern asserted that the Hospital’s determination to proceed with the

layoff was not negotiable, only the effects of it were. Kern provided responses to NUHW's information requests and promised to continue providing information going forward.

Information as to the amount of savings achieved by the Hospital's summer and fall buyouts of non-affiliated employees was provided. 71 non-affiliated staff accepted the buyout in the summer, of which 34 percent were managerial or supervisory.

Also on November 19, Kern emailed NUHW a list of the bargaining unit classifications from which the 57.7 FTE reductions were needed. The list showed 662 total employees (or 558.1 FTE positions), the current employee headcount by classification, and the number of FTEs populating those headcounts (number of full-time and part-time positions).⁶ In addition, the Hospital provided its recent financial statements. Kern urged NUHW to meet prior before the end of the month to address the issues and "dialogue at a minimum about the order of the layoffs, bumping rights, and seniority application."

The projected layoff list did not include the names of the employees subject to layoff. The Hospital did not provide the names initially because it did not want to preempt NUHW's choice of the manner of selecting employees for layoff, whether it was by seniority or other factors, or a possible proposal on conversion of some staff to per diem status (allowing employees to retain a lesser employment status). Ranzenberger considered it possible that NUHW would propose a wage reduction in lieu of some layoffs, as had other units. Ranzenberger also believed it was more "humane" not to identify employees by name because of the emotional trauma, especially around the holidays. Ranzenberger testified without contradiction that she explained the Hospital's rationale for not disclosing names in an off-the-

⁶ Gonzales believed the size of the unit was well over 700 employees at the time of certification.

table conversation with NUHW stewards Fierro-Nunez and Marilyn Benson, and neither objected.

In an early morning November 22 email to Kern, Borsos asserted that the Hospital had “not made its case to proceed with the layoffs, particularly in the wake of the buyout.” He also indicated that NUHW would not waive its right to bargain over the decision to layoff. Borsos requested additional information with a focus on the Hospital’s recent contract with a consulting company named Wellspring, staffing plans in the nursing units and any changes recently implemented, efforts by the Hospital to increase revenues, other savings measures, current staffing patterns of departments projected to incur layoffs, and “how the hospital proposes the work will be performed if the position is eliminated.” Borsos demanded that the layoff bargaining be incorporated into the negotiations for the successor agreement rather than be bifurcated. Although Gonzales testified that as of November 22 NUHW had requested the names of the employees to be laid off, Borsos’s email of the same date states the union was only seeking a breakdown by job position, not the actual names.

Borsos sought the Wellspring information because he believed it was a “slash and burn” consulting group used by hospitals to lower labor costs by forcing increased worker productivity. While admitting that workforce reductions would be appropriate when patient census is down, Borsos suspected that Wellspring had recommended changes to the patient acuity formulae in nursing units – which determine the complement of staffing by skill level – in order to impose leaner staffing ratios as a way to achieve cost savings. Implementation of lower ratios would have a cascading effect downward to bargaining unit staff. Given the union’s view that census was not dropping, Borsos believed the Hospital was first required to establish that it was not simply trying to reduce staff in order to achieve cost savings in the

manner Wellspring was known for doing. Borsos asserted that the Hospital failed to provide sufficient information from which NUHW could determine that that was not case. He also described getting information from the Hospital regarding the potential to eliminate per diem hours in order to save a benefitted position as like “pulling teeth.”

In an email later in the day on November 22, Kern stated the Hospital’s disagreement with NUHW’s view that the layoff decision was a shared one. Kern acknowledged that an agreement might be reached if NUHW offered concessions achieving the same economic savings as the layoff, but requested that any such proposal be made at once. She asserted that “time is of the essence.” Kern rejected a change in the timeline so as to accommodate the commencement of contract negotiations, citing the delay involved. Kern insisted that the union be “prepared to fully discuss” such effects as “seniority application to layoff, bumping rights, reemployment rights, [and] effects of the layoff on health and welfare benefits/severance/unemployment” at the next meeting.

In a November 23 email, Borsos reiterated to Kern that the decision to layoff was negotiable because it was driven by labor costs. Borsos stated: “[W]e are concerned that [the] hospital seems intent to move forward on these proposed changes without fully establishing the need to take such drastic cuts while lacking what appears to be a well-thought out plan to both implement the cuts, and perhaps, more importantly, take into consideration how the patients will best be cared for by those workers who remain.” Borsos took issue with the amount of money spent on the Wellspring contract, the fact that the Hospital was only looking at non-staff cuts after achieving a 10 percent cost savings from the buyouts, and the decision to move forward despite continuing profitability.

In a November 29 email, Kern requested that NUHW choose two meeting times from the dates of December 6, 7 and 9. Kern disputed that the Hospital had only just recently begun to consider non-labor cost savings. Borsos replied the following day that he would be available on the 7th or 8th.

In a December 3 email, Ranzenberger complained about NUHW's threat to cancel two scheduled meetings unless the Hospital agreed to released time for 20 union members. Gonzales disputed Ranzenberger's insinuation that the union was using released time as tactic to delay bargaining.⁷

The Hospital provided an agenda in advance of the December 7 meeting listing a financial presentation and the subject of "effects bargaining" that included the topics of bumping rights (application of seniority), reemployment rights, transfer opportunities, and the layoff timeline. In a December 4 email, Borsos objected to the agenda as not being jointly developed, and reiterated the union's objection to limiting the negotiations to effects bargaining as opposed to decisional bargaining.

In a December 5 email, Kern provided NUHW with the estimated annual savings from the June/July buy-outs (\$8 million) and October buy-outs (\$4.3 million). In a December 6 email, Borsos repeated NUHW's demand to combine decisional bargaining and effects bargaining with contract bargaining.

⁷ The number of employees required by NUHW to be released for the sessions appeared to be an irritant to the Hospital to the extent it created scheduling issues. Throughout the negotiations, the number of released employees was about 20 employees, in addition to three or four NUHW staff members. Gonzales testified that because the bargaining team was just being selected, NUHW began by inviting all the stewards to the meetings.

December 7 Meeting

The December 7 session began with the Hospital laying out its economic justification for the layoffs. Vice President Physician and Business Development Liz Lorenzi made a presentation concerning the loss of Blue Cross Tier One status. Borsos inquired whether NUHW could use its relationship with teacher unions to assist in the Hospital's negotiations with Blue Cross. According to NUHW's bargaining notes, Lorenzi responded that due to an insinuation by Blue Cross of a breach of contract, an orchestrated effort with the teacher unions was not advisable.⁸

Chief Financial Officer Frank Katsuda was then called upon to explain the Hospital's cash requirements. Katsuda stated the cash balance had dropped from \$60 million the previous year to \$40 million in October 2011. Lorenzi cited the need for a seismic retrofit, improvements to the central energy plant, implementation of an electronic medical records system, and construction of a parking structure. Ranzenberger testified that the \$20 million decline in the cash balance was due to a decrease in patient volume and that a prudent cash reserve needed to operate the Hospital for 90 days amounted to \$90 million.⁹ As to these points, Borsos testified that the Hospital never made a convincing argument as to the timing of

⁸ NUHW introduced bargaining notes of the bargaining sessions of December 7, 21, and 27. In labor cases, bargaining notes are regarded as business records and may be received into the record as substantive evidence of what occurred at bargaining meetings. (*Continental Can Co.* (1988) 291 NLRB 290, 294 [hearsay exceptions]; *Pacific Coast Metal Trades Dist. Council* (1986) 282 NLRB 239, 239 fn. 2 [same]; *Mack Trucks, Inc.* (1985) 277 NLRB 711, 725 [same, and weight needs to be judged].) The weight to be given the notes should be based on their quality, detail, and consistency, as well as other relevant circumstances. The notetaker, Shannon Romo, worked at the Hospital as a transcriptionist. Her notes are generally verbatim, include start and end times, and appear to be contemporaneously drafted.

⁹ At the hearing Ranzenberger added that following the loss of Tier One status, the Hospital suffered a decrease in net revenue of \$20.8 million in calendar year 2011. Ranzenberger also conceded that the Hospital generated over \$6 million in profits for the same four month period in 2010 and 2011.

the layoffs. He questioned the seismic retrofit because the legislation mandating it did not require compliance until 2030.

NUHW's bargaining notes indicate there was then a discussion about Medicare and Medi-Cal reimbursements and declining patient census, and a statement from Katsuda that due to rising unemployment, more patients were uninsured. After the Medicare and Medi-Cal discussion, Ranzenberger asserted that everyone knew patient volume was down. Borsos insisted the union was "just trying to understand the numbers," that the Hospital's November 17 presentation was "not impressive," and that the union did not think the Hospital had made its case for the layoffs. Ranzenberger responded that the parties needed to "get the layoff question resolved," while stressing the Hospital's need to move forward. When Ranzenberger persisted, Borsos countered that the Hospital does not "get to dictate" and if the Hospital was not going to answer questions, the meeting would be over. After an assertion by Kern that the Hospital had given the union "every document," Borsos stated that the union was "not bargaining by email." Borsos replied that NUHW had found "million dollar errors" in the materials provided by the Hospital. Attempting to change the subject, Kern then asked for input on its proposal, and described the subjects: (1) notice by mail; (2) a six-month rehire list after layoff; (3) preferential rehire to previous employees, subject to skills, qualification, disciplinary action, and seniority; and (4) a "benefit waiting period for rehire." The Hospital also sought input on seniority in the event of rehire and a grievance process for the laid off employees.

Also according to the bargaining notes, after the proposal presentation and a meeting break, Borsos expressed interest in who was being targeted for layoff and requested that the Hospital walk the union through the Wellspring contract regarding the labor productivity and

cost assessment components. In that vein, Borsos referenced an opening contract negotiations proposal. Borsos asserted that Wellspring was retained to recommend changes and requested the Hospital “put [that] on the table so we can go at one time.” Ranzenberger objected to straying from the subject of effects. Borsos responded that NUHW had a right to propose alternatives to the layoff and suggested the parties take a “block of days” to “bargain the whole thing.” By way of clarification, Borsos stated the union was “responding in [the] context of full contract [bargaining].”¹⁰ Ranzenberger objected to the tie-in with contract negotiations. Later in the meeting Borsos claimed that the prior reductions in force were needed just to pay the Wellspring contract. Katsuda stated that Wellspring was paid \$4 million and saved \$12 million. Borsos also stated that it was clear the Hospital wanted layoffs but not clear where they “need to be,” or if the Hospital knew, it was “not communicating.”

As the meeting drew to a close, Ranzenberger asserted that contract negotiations could not be completed in the two weeks left before the proposed layoffs went into effect. Borsos stated the Hospital was “missing an opportunity” in terms of the parties’ relationship. Ranzenberger conceded that might be the case, but the “train had left the station,” and the Hospital was the conductor. Borsos responded, “Then we’re the brakes.” Borsos added that NUHW might accept the Hospital’s direction if it could show the actual decrease in workload by department, and that currently the decision appeared to be driven by labor costs.¹¹ Borsos

¹⁰ Borsos admitted on cross-examination that the union did not present an early economic proposal once the contract negotiations began. He later added that an economic concession proposal to offset the layoffs would similarly not have been advisable until the Hospital had demonstrated how much it was really saving from all its efforts.

¹¹ Summarizing the exchanges here, Borsos testified: “We had said to the Hospital, if you can demonstrate that work is not there, we’ll talk about how the reductions occur. And the Hospital was never willing to engage in a discussion on how to demonstrate that the work was not there.” The Hospital did provide NUHW with a statistical report of patient census

also demanded a showing of shared sacrifice by management, administration, and other bargaining units.

Ranzenberger testified that she explained that the December 31 layoff implementation date was based primarily on the loss of Tier One status, coupled with the declining census. The bargaining notes indicate that Ranzenberger stated that the layoffs were occurring “by [management] right.” Despite Kern’s November 19 letter stating openness to negotiate effects without qualification, Gonzales repeated at the hearing his claim that the Hospital was only willing to negotiate the effects of the employees subject to layoff, not the effects on those remaining. NUHW’s bargaining notes do not corroborate Gonzales’s testimony, at least as to this meeting. They give no indication of a place in the meeting where the issue logically would have arisen.¹² Ranzenberger testified that she explained the Hospital would follow past practice in terms of rebidding schedules of the employees who remained after the layoff but received no feedback from NUHW.

Borsos testified that he objected to the Hospital’s failure to provide the names of the employees to be laid off, as this information was necessary to determine if the expired contract’s seniority provisions were being followed. Because the expired contract was “mostly silent” on the layoff process, including bumping rights, Borsos believed it was necessary to negotiate these issues. Two important issues were whether work would be transferred to other units after the layoff and the potential for increased work on remaining employees when certain shifts were eliminated. Another issue was how work assignments would be made after

comparing the 2009 and 2010, year to date numbers as of October. It showed a patient census decline of 360 out of total of 17,000 days (or an average of 36 fewer per month).

¹² Gonzales testified that at the December 7 meeting and others that followed, NUHW sought to bargain the effects on the remaining employees before negotiating the effects on the employees to be laid off, just the reverse order sought by the Hospital.

the layoffs were implemented. Borsos explained that NUHW's desire to combine contract negotiations with layoff bargaining stemmed from the anticipated concessions the Hospital would seek in contract negotiations and the unfairness of imposing two sets of concessions sequentially.

In a December 8 email, Kern informed NUHW of its availability to begin contract negotiations on eight days in December after concluding effects bargaining, which she anticipated would be "soon."

December 8 Meeting

As promised by the Hospital at the December 7 session, NUHW received the Hospital's proposal in writing one day prior to the session. The proposal consisted of one page of text. The proposal stated the Hospital's intention to layoff "by the end of the calendar year," invited NUHW to discuss bumping rights, and recapitulated the rehire list proposal with an invitation for NUHW to define seniority. There are no bargaining notes from the December 8 meeting and scant testimony explaining what occurred. Borsos testified that the Hospital's assertion that "time was of the essence" was a "joke" and that the Hospital's presentation "created more questions than it answered" because it lacked specificity. He asserted the layoff date was "set arbitrarily" with no input from the union. There is no evidence that NUHW responded to the Hospital's written proposal at the December 8 meeting, counter-proposed an alternative date for the layoffs, offered any economic alternatives to the layoffs, or offered a proposal on the effects. Gonzales testified that the Hospital's proposal and others by the Hospital took too narrow a view of the range of negotiable effects.

Exchanges Following the December 8 Meeting

On December 10, Ranzenberger informed Borsos by email of the Hospital's decision to implement the layoffs on December 28. Ranzenberger testified that the reason for selecting that date was so that laid off employees could receive a paycheck for that pay period. With notices planned for December 17 and the next meeting scheduled for December 16, Ranzenberger sought additional meeting dates to bargain effects before December 16. Ranzenberger also alerted NUHW to transmission of more detail on its proposal (i.e., the layoffs and "possibilities of options of recall and reinstatement"), and that the Hospital would be inviting input no later than December 14 in hopes of concluding effects bargaining prior to issuance of the layoff notices. Ranzenberger asserted in her email that despite the Hospital's proposal at the December 8 meeting, NUHW failed to provide the Hospital with "the opportunity to discuss any of the issues."

Gonzales testified that the December 17 notice date was not one to which NUHW had agreed, and the union objected to the Hospital proceeding without having provided the names of the affected employees. NUHW also interpreted the December 28 as a regressive proposal given the previous statement that the layoffs would occur by the "end of the calendar year."

In a December 13 letter, Borsos informed Ranzenberger that the Hospital was in violation of the Worker Adjustment and Retraining Notification Act (WARN) (Lab. Code, sec. 1400 et seq.) in terms of inadequate notice to laid off employees, repeated the union's assertion of lack of justification for the layoffs, and cited the Wellspring-initiated staffing acuity system changes. Borsos wrote:

We have asked the hospital to make a concrete proposal on the layoffs as well as other changes that the hospital may be seeking. To date the hospital has refused.

We have asked the hospital to quantify how much money the hospital expects to save through its massive layoff it has announced. To date the hospital has refused.

We have asked the hospital to spell out in detail its proposal for how the work will be performed if the hospital implements its proposed layoffs. To date the hospital has refused.

We have asked the hospital to immediately commence negotiations for a full collective bargaining agreement. To date the hospital has refused.

In a December 14 email to Kern, Borsos made a number of information requests including, among other items, the “exact savings” to be achieved as a result of the layoffs, the process for implementing staffing schedule changes, the number of call-offs, estimated savings as a result of staffing matrices changes, and a “detailed accounting of how the work contained in the position being eliminated will be performed.”

In a December 15 letter to Borsos, Ranzenberger asserted that the WARN Act does not apply to the Hospital. She stated that the Hospital had repeatedly informed NUHW that layoffs would occur within the December time frame, and that while the Hospital asserted the non-negotiability of the decision to layoff, it had always been “willing to meet to discuss the effects of the layoff and its impact on the employees to be laid off and the impact on working terms and conditions.” She asserted that NUHW had maintained its right to negotiate the decision to lay off but failed to provide any proposal in terms of the effects of the layoff. Ranzenberger concluded by requesting that NUHW focus first on completing effects bargaining for the employees being laid off and then move to the impact on the remaining employees.

In a December 15 letter emailed to Borsos, Ranzenberger provided a more detailed proposal on the effects of the layoffs, contained in two pages of single-spaced text. This

document proposed that layoffs would occur by reverse seniority in the classification identified for reduction, with the possibility of discussion about laid off employees converting to per diem status and its effect on current per diem staff. The effective date of the layoff remained December 28. Discussion of bumping rights was also proposed. The previous proposal on the rehire list included an exclusion of employees with an active disciplinary action except upon administrative approval. The new proposal contained provisions on seniority calculation for rehired employees.

The Hospital also provided a revised layoff list as of December 16 containing the classifications for reduction by headcount and FTE. For the first time it also proposed transfer of certain employees to the per diem list. The total FTE reduction was reduced to 51.55. In an attempt to show the shortfall in available work hours for clinical staff (nurse aide, licensed vocational nurse, clinical assistant, etc.), the Hospital also provided a list of call-offs during the month of November.

Despite receiving the Hospital's December 15 revised proposal and reviewing it prior to the next meeting, NUHW prepared no written counterproposal for the next meeting. The union still believed the Hospital had no right to lay off until it proved there was insufficient work.

Borsos also testified that NUHW had made a related proposal to the Hospital in early December for the contract negotiations. The proposal itself was not introduced, and Borsos only described it as dealing with "a number of issues." By way of explanation, Borsos testified that negotiations on timing and alternatives to layoffs was contingent upon a determination of how much the Hospital was saving in total employee compensation, including from wages, health insurance, and pension benefits.

December 16 and 17 Meetings

The next bargaining session occurred on December 16. The Hospital attempted to explain the trends in call-offs to demonstrate reduced workload. There is no other evidence of what transpired at that session.

On December 17, the Hospital presented a revised, five-page, single-spaced written proposal described as a "Proposal for Memorandum of Understanding." It again proposed reverse seniority in the job classification as the order for the layoff. The effective date of the layoff was changed to "no later than" December 30, yet another change in Borsos's view. The proposal offered the right to move to per diem status without loss of seniority hours, with a cap on the total number per department. Bumping rights were proposed for "remaining employees after reduction in force." Vacant positions within a department would be identified and the most senior eligible to bid would be awarded the position. Temporary schedules would be established pending the bidding. Similar rights were proposed for classifications that were hospital-wide. The proposal provided reemployment/recall rights to the former classification based on "skill, qualification, disciplinary action and seniority," with maintenance of the recall list for one year for both laid off and per diem employees. Gonzales conceded that the proposal on bumping rights, though "not clear" as to intent, did address the remaining employees, but it failed to address the issue of the redistribution of work.

During these two sessions, NUHW offered no proposal or counterproposal on the number or timing of the layoffs, nor did it propose alternatives to the layoff. No concessions were proposed or signaled, such as those that might support its demand to incorporate the layoff issues into the contract negotiations.

Ranzenberger testified that the Hospital recognized its obligation to negotiate workload effects on remaining employees. While she asserted the establishment of schedules for the remaining employees was a managerial prerogative, she conceded that once the schedules were established matters related to workload would be negotiable. Ranzenberger believed that due to lower census and a comparatively light workload for existing employees, no major increase in workload would result from the layoffs.

Exchanges Following the December 16 and 17 Meetings

Following the December 17 meeting, NUHW's attorney Jonathan Siegel sent a December 20 letter to the Hospital's governing board asserting a violation of the WARN Act and charging the Hospital with refusing to bargain a successor agreement, the decision to layoff, and the effects of the layoffs.

Also on December 20, Kern emailed Borsos a sample layoff notice, an updated roster of all unit positions by FTE and percentage of per diem staffing, and a list of the employees to be laid off by name, FTE, and current seniority hours. The Hospital applied reverse seniority in selecting the employees for the layoff. Ranzenberger testified that this was the first time employees had been identified by name because the names were not known until the Hospital applied the rule of reverse seniority. The list indicated that the proposed FTE reductions had been reduced from 47.15 to 11.90, which amounted to reducing the number of employees affected from 70 to 20. The Hospital decided to postpone additional layoffs to a later date. The proposed layoff date was returned to December 28, with notices to issue on December 21.¹³ Ranzenberger testified the decision to reduce the layoff list was not a product of the

¹³ In an attempt to rebut complaints at the bargaining table by Borsos of a lack shared sacrifice, the Hospital presented statistics showing that between 2009 and 2012, non-affiliated

negotiations, adding, “The only rationale was we wanted some layoffs by the end of the year . . . and we wanted to begin dialogue about the effects. And it became obvious to us, until we could get a number that we thought was acceptable for the initial layoffs, we were going to have no dialogue with the Union.” Ranzenberger testified that NUHW never made a specific demand for names of the employees to be laid off prior to this time. Although Borsos testified that he objected to the Hospital’s failure to provide names at the December 7 meeting, the bargaining notes do not corroborate his claim. Given the subject matter discussed on December 7 and the context of the negotiations, Borsos’s testimony on the point is not credited.

December 21 Meeting

Gonzales testified that little progress had been made when the parties met on December 21, especially as to the effects on the remaining employees, and that the reduction in the scope of the layoff was made without NUHW’s input. NUHW asserted across the table it believed the Hospital had reduced the number because of the threatened WARN Act litigation. The Hospital stated that additional layoffs would occur in the future. Gonzales repeated his claim that the Hospital was unwilling to negotiate the issue of the impact on workload for remaining employees. Gonzales conceded that NUHW made no counterproposal on the number to be laid off, and offered no economic concessions or alternatives that would reduce the number to be laid off. NUHW floated the idea of a supplemental unemployment insurance plan, though no written proposal was presented, and as noted below the proposal was not fully formed. As to the Hospital’s proposed December 28 layoff date, Gonzales testified that the parties “discussed” extending it by another two weeks so bargaining could be completed.

staff suffered a reduction of total FTE from 452 to 240, certified nurses from 477 to 397, service and technical employees from 599 to 514, and operating engineers from 35 to 24.

Fierro-Nunez testified that the union proposed eliminating per diems before part-time staff as an alternative, though the union proposed no number because the Hospital was unwilling to discuss such effects as how the remaining work would be accomplished. She understood that NUHW was proposing to apply savings from contract negotiations to mitigate the layoffs.

NUHW's bargaining notes indicate that after Ranzenberger expressed a desire for "some frank talk about layoff[s]" based on the Hospital's movement on layoff numbers, Borsos responded that "maybe the flip side is a different outcome than you were anticipating" and that the instant session could end up being "a crossroads . . . threshold moment." Next, Borsos cited the WARN Act dispute as a species of the effects to be bargained (i.e., timing and notice). Borsos stated that NUHW wanted to "step back and find a better outcome," one that included a public debate about quality of care because the registered nurses were overloaded.

Switching topics, Ranzenberger began walking the union through the pared-down, 11.9 FTE layoff list. Borsos responded by insisting on going through each department to "more fully understand what you're doing," "how it affects patient care," and "how the work gets done." Borsos cited confusion about housekeeping, which was suffering the greatest number of reductions. Ranzenberger stated that the reductions were driven by lower census and asserted that the schedules were not going to change dramatically. Following the layoffs, the Hospital would begin with temporary schedules, filled in with per diems as well as the "stretching" of part-time employees, or possibly premium pay. When Borsos objected to lack of clarity on scheduling, Ranzenberger responded that it would continue to analyze staffing, while anticipating dropping census. Later Borsos suggested that NUHW might be able to show that there were enough hours in a particular department such that the number of per

diems retained could be converted to a part-time, benefitted position. Just prior to going to a caucus, Borsos wanted the Hospital to share its analysis, if it had one, of patient volume.

NUHW's notes also reflect that after the caucus, Ranzenberger stated the Hospital was not prepared to make any changes to the revised list. Borsos responded that the parties continued to have a disagreement about the scope of effects bargaining and provided an illustration of how NUHW could demonstrate alternatives to layoffs by using per diems. Ranzenberger requested that the parties go through the Hospital's latest written proposal as it related to relevant provisions in the MOU and pledged that the Hospital would comply with the MOU in terms of posting schedules for retained employees. When Borsos questioned whether the Hospital was refusing to bargain effects, Ranzenberger stated that the Hospital was not willing to further reduce the number of reductions in light of its recent "dramatic" movement. She further asserted there is a management right to determine the number of staff for the volume of work needed. When she suggested the possibility of offering the unit preferential rehire rights, Borsos answered that the union would be "happy to listen." After Ranzenberger provided further explanation of the Hospital's proposal, Borsos responded that the union understood the proposal.

NUHW's bargaining notes also indicate that prior to going to a second caucus, Borsos told the Hospital it needed to "respond to scheduling." Ranzenberger asked if NUHW was refusing to bargain over its proposal. Borsos replied that the Hospital was engaging in "classic bad faith" by only bargaining in a "limited area." Ranzenberger answered that the Hospital was willing to continue meeting but the "most pressing issue" was the impending notification of employees. Borsos stated that the union was considering the proposal but that it was incomplete. After another caucus, NUHW responded with comments on specific issues in the

proposal. Borsos cited the lack of provisions for voluntary layoff, suggested creation of the “supplemental unemployment benefit” with “some cost to the employer,” raised a question on accumulated sick leave, cited the possibility of saving positions through per diems, and maintained the union’s position on decisional bargaining. The Hospital caucused.

Ranzenberger returned to state that the Hospital had already made a proposal on severance, that it would add sick leave hours to employees in the mammography center, and that it was rejecting the supplemental employment benefit proposal. The meeting concluded with Borsos offering to present a proposal at the next meeting, which was scheduled for December 27, the day before the layoffs were to take effect.

At the end of the meeting Ranzenberger stated that the Hospital was “moving forward.” Although not reflected in the minutes and disputed by Gonzales, Ranzenberger testified that Borsos responded, “We’re done,” which she interpreted as a statement of impasse, at least as to the number of employees and the date of the layoff.

Events Following the December 21 Meeting

On December 22, the Hospital issued layoff notices for the affected employees and shared a copy with NUHW. The notice indicated payment of two weeks severance, and detailed other matters related to termination, such as COBRA benefits and reference letters. Kern requested a copy of NUHW’s written proposal prior to the next meeting scheduled for December 27.

On December 22, Hospital President Sam Downing issued a memorandum to all staff seeking to correct the record following news articles regarding the reduction in force. Referring to a story about the reduced layoff list, Downing wrote that the article incorrectly stated there was a “change” in the number of layoffs because the Hospital was still intent on

reducing the workforce by six percent. In that regard, he stated only that accommodations had been made with the unions regarding the “timing” of the layoffs.

In a December 22 email, Ranzenberger informed Borsos that the parties had reached impasse on the number of employees and the date of the layoff. She stated the Hospital’s intention to honor its proposal on severance pay and expressed regret that the parties had not reached agreement on a preferential hiring list, potential for per diem positions, and seniority issues. Ranzenberger expressed openness to further negotiations on these and other issues and expected NUHW’s written proposal. Borsos responded in kind that day asserting the parties were not at impasse on any issues, and stated the union’s desire to negotiate on the decision to layoff and other effects. He requested that the Hospital reduce its revised proposal to writing. One minute later, Kern emailed Borsos a list of the employees noticed for layoff and requested seeing the union’s proposal in advance of the December 27 meeting. Kern also proposed dates for contract bargaining in January.

On December 23, Ranzenberger emailed Borsos to say: “We will ask, as we have all along to focus our discussion on reaching agreement, if possible, for these affected individuals [those to be laid off on December 28] and the impact on the remaining employees.” She stated that she could not describe her statements made at the table as “anything other than an unequivocal statement of impasse.” She stated that in light of the Hospital’s multiple outstanding proposals without any written response or verbal agreement, the Hospital would not be providing any additional proposals.

In a December 26 email to Ranzenberger, Borsos objected to the Hospital’s “incredibly inflexible, and inhospitable, take-it-or-leave bargaining approach” and its contradictory messages regarding the number of layoffs. He objected to the Hospital’s inflexibility on the

date of the layoff, calling it “artificially created,” and to the Hospital’s unwillingness to counter-propose or entertain an alternative target date. Borsos concluded by requesting that the Hospital delay the layoffs by two weeks in order to complete the bargaining over effects.

In an afternoon December 27 email prior to the next bargaining session, Ranzenberger provided Borsos a summary of the negotiations from the Hospital’s perspective. She cited six meetings since November 17, each lasting three hours. She claimed NUHW had been provided ample opportunity to present an alternative plan to the layoff, but had failed to do so. Ranzenberger contended the Hospital’s effects proposal was more generous than the one negotiated with the registered nurses unit. Ranzenberger expressed dismay that the union had not provided a copy of its promised written proposal in advance of the meeting. Gonzales testified it was not NUHW’s practice to do so.

December 27 Meeting

NUHW began the meeting complaining about Downing’s memorandum suggesting that it indicated regressive bargaining as to the number of employees to be laid off. Ranzenberger answered that the Hospital had “not changed our target.” Borsos elicited from Ranzenberger that the next layoff would likely occur in January 2011 and that it would be determined on the basis of further assessments of volume and workload. Ranzenberger attempted to close off that discussion by stating the purpose of the meeting was to discuss the December layoffs.

NUHW presented its first written proposal to the Hospital at the December 27 meeting. The seven-page, single-spaced proposal addressed a number of subjects, including but not limited to, seniority, application of seniority, transfers within a classification, promotions and transfers outside the classification, severance, health benefits for laid off employees, a supplemental unemployment benefit fund, and recall rights.

NUHW's bargaining notes indicate the meeting began with Borsos stating the parties were not at impasse on the number employees to be laid off and that NUHW had room to move. Ranzenberger countered that the notices had already issued. Borsos then got Ranzenberger to concede the parties were not at impasse regarding the number of positions and date of the layoff, with the caveat, "but after this evening we may be at a different point." Borsos immediately asked for the "assignments/schedules for affected employees." Ranzenberger asserted the schedules were going to remain temporary, that the parties were not there to discuss "those details" and asked for NUHW's proposal. Borsos asserted that effects bargaining includes "how the work gets done by those who remain." Ranzenberger did not disagree, but again asked for the proposal. Borsos stated NUHW's intention to do that, but objected that NUHW was still trying to "figure out your process." Just after obtaining the Hospital's openness to a proposal on the number of positions to be laid off, Borsos objected to the Hospital's failure to provide the data relied on by Wellspring to "right size" the departments, followed by a demand for clarification of the Hospital's proposal on employees moving to a different classification if suitably qualified. Borsos followed that with a demand to discuss seniority lists. He reviewed NUHW's proposal. Borsos asserted the union's supplemental unemployment insurance plan costing \$100,000 was reasonable, and laid out a number of proposals on recall rights. Borsos requested a discussion about the ratio of managers to staff and demanded a compensation reduction of 20 percent from all administrators prior to the layoffs. The Hospital requested a caucus. It returned 30 minutes later and announced it was rejecting NUHW's proposal because it was a package proposal and the parties were at impasse. Borsos disputed that, stating the union had room to move on its

proposal and expected a counterproposal from the Hospital. Ranzenberger restated that the parties were at impasse, and the Hospital concluded the meeting.

Gonzales conceded on cross-examination that as of December 27 NUHW still held the position that the employer did not have the right to lay off employees without negotiating the decision and that it did not yet have a concrete proposal on the date of layoffs. He also admitted that, other than Borsos's proposal to work with the teacher unions on Blue Cross's contract, NUHW never proposed any economic concessions that might avoid layoffs, such as a temporary cut in pay or benefits. Gonzales further testified that after the December 27 meeting NUHW began making proposals regarding the December 2010 layoffs in the contract negotiations.

Events Subsequent to the Layoffs

On January 3, 2011, Kern informed Borsos in an email that the Hospital was willing to offer per diem positions for NUHW employees laid off in departments that may require them, but generally not to exceed 20 percent of "total individuals in each per diem status." Borsos responded on January 3, agreeing to per diem positions for any employees interested but objected to the 20 percent cap. He did not propose further meetings on the subject.

On January 27, 2011, Borsos wrote to Anne Olsen, counsel for the Hospital demanding that the Hospital restore the status quo prior to December 28. Borsos asserted that the Hospital had either flat refused to negotiate or surface bargained over the number of employees to be laid off, their identity, the timing of the layoff, the workload and safety of the remaining employees, the manner in which the layoff would be implemented, and the elimination of work resulting from transfers to other units. He demanded resumption of negotiations over these matters. Borsos cited *International Assn. of Fire Fighters, Local 188, AFL-CIO v. Public*

Employment Relations Bd. (2011) 51 Cal.4th 259 (*City of Richmond*). Borsos also demanded compliance with outstanding information requests, including but not limited to the method by which the Hospital implemented the layoff and the manner in which work would be distributed to remaining employees.

Olsen responded in a February 10, 2011 letter asserting that the *City of Richmond* decision supported the Hospital's position because it was not required to bargain over the decision to layoff, and, citing language from the case, that the reason for allowing a union to request effects bargaining is to enable the parties to "negotiate concessions that reduce overall costs and spare jobs." But in this case, she continued, NUHW had "delayed or obstructed the discussions and attempted to coerce the Hospital to enter into decision bargaining"; made only one written proposal that called for the Hospital to "give up management rights on layoffs and condition the layoff on a reduction in the salaries of non-bargaining unit members," that it "failed to make any labor cost concessions that would have mitigated the need for layoffs;" that it "failed to clearly identify areas of impact and meet and confer in good faith on those areas"; and, that having "failed to enter into effects bargaining prior to the implementation of the layoffs," NUHW waived its right to do so. The Hospital reaffirmed its commitment to meet concerning the impact of the layoff on the remaining employees "as it has done since the layoffs." Kern added that the Hospital had complied with all reasonable requests for information.

On February 15, Borsos replied to Olsen in a letter, disputing her characterization of the events, and repeating NUHW's demand for restoration of the status quo ante. He stated NUHW still believed the Hospital was required to bargain over the decision to lay off, though the Hospital also had an obligation to negotiate over the effects, as stated in *City of Richmond*.

Borsos testified that the parties “continued to bargain over the layoffs until [the parties] settled the contract in January of 2012.” But he asserted that after December 27 “the Hospital refused to bargain over or even discuss it because then they would say it’s part of litigation” and that “[t]hey wouldn’t discuss the impact of the layoffs after that.” However, the record contains an April 26, 2011 email from Kern to Borsos, Gonzales, Fierro-Nunez, and Benson recounting the history of meetings (January 5, January 25, February 2, February 8, March 2, March 21, March 28, and April 4, 2011) regarding effects bargaining. Kern noted that she had provided current job duties, current schedules, proposed schedules, and how proposed duties would be redistributed. According also to the email, Kern asked NUHW on April 4 for any proposals on the proposed schedule changes and requests for a rebid. Ranzenberger was aware of these meetings in 2011 and attended some. She testified that NUHW presented no proposals regarding the effects on the remaining employees. Gonzales offered only vague testimony on the point, stating that NUHW made some proposals on the “December layoffs” in the context of the contract negotiations. Borsos responded to Kern’s April 26 email, claiming a number of issues raised by NUHW’s December 27 proposal were still outstanding, and that the Hospital had not provided requested information, including reports by Wellspring. Borsos again demanded restoration of the status quo ante.

ISSUES

(1) Did the Hospital fail to meet and confer in good faith over the number, timing, and related effects on laid off employees?

(2) Did the Hospital absolutely fail to meet and confer over the effects on the employees who remained?

CONCLUSIONS OF LAW

PERB Decision No. 2298-M

A brief discussion of PERB's decision that led to the issuance of the complaint in this case is necessary because it constitutes the law of the case. PERB identified the issues on appeal as whether the Hospital violated the MMBA by refusing to negotiate the decision to layoff, refused to negotiate the effects of the layoffs on both the laid off employees and those remaining, and failed to provide relevant and necessary information. (*Salinas Valley Memorial Healthcare System, supra*, PERB Decision No. 2298-M, p. 13.)

PERB affirmed the Board agent's dismissal as to bargaining over the decision to lay off and the information request. As to the former claim, PERB explained that the Hospital's decision to lay off employees was a non-mandatory subject of bargaining under the MMBA, and it rejected the argument as framed by Borsos based on *City of Richmond, supra*, 51 Cal.4th 259 (*City of Richmond*). Though focusing on the union's argument based on layoff language in the expired MOU and the Hospital's obligation to maintain the status quo, PERB nevertheless concluded that the Hospital was not required to bargain over the decision to lay off because that decision was within the Hospital's managerial prerogatives. In so holding PERB relied on *City of Richmond* as well as *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, *Newman-Crows Landing Unified School District* (1982) PERB Decision No. 223 (*Newman-Crows Landing*), and *Mt. Diablo Unified School District* (1983) PERB Decision No. 373. (*Salinas Valley Memorial Healthcare System, supra*, PERB Decision No. 2298-M, pp. 9-10, 13-14.) In affirming the dismissal of the information request allegation, PERB relied on NUHW's concession that the Hospital had responded to all requests as information became available and the union's failure to object to any responses as being inadequate. (*Id.* at p. 22.)

In addition, PERB provided a rationale for the alleged prima facie violations, adhering to NUHW's theory that the Hospital consistently disputed its obligation to negotiate the "timing, and number and identity of the employees to be laid off and the impacts and effects of the layoff on the workload and safety of remaining employees," all while only revealing its layoff plan in a "piecemeal" fashion. (*Salinas Valley Memorial Healthcare System, supra*, PERB Decision No. 2298-M, pp. 17-18.) In regard to the timing-number-identity issues, PERB relied on the theory that the Hospital unilaterally implemented before a genuine bargaining impasse. (*Id.* at pp. 19-20, citing *Compton Community College District* (1989) PERB Decision No. 720.) In regard to the workload and safety issues, PERB concluded the charge alleged an unlawful absolute refusal to bargain. (*Salinas Valley Memorial Healthcare System, supra*, PERB Decision No. 2298-M, p. 19, citing *Sierra Joint Community College District* (1981) PERB Decision No. 179.)

Analysis

As noted above, the decision to lay off is non-negotiable because it is within the employer's managerial prerogatives. (*City of Richmond, supra*, 51 Cal.4th 259.) However, the effects of the layoff are negotiable. (*Newman-Crows Landing, supra*, PERB Decision No. 223, pp. 12-13.) In addition to the impact on employees subject to the reduction in force, a layoff "may concurrently impact upon those employees who remain." (*Ibid.*) When an employer provides advance notice to the union of its decision, the union must request effects bargaining or risk waiving its right to negotiate. (*Sylvan Union Elementary School District* (1992) PERB Decision No. 919, pp. 9-10.) The union's request to bargain effects need not take a particular form and need not identify the specific effects sought to be negotiated, so long as it communicates the intention to negotiate the effects as distinguished from the decision itself.

(*County of Sacramento* (2013) PERB Decision No. 2315-M, pp. 6-9; *Newman-Crows Landing, supra*, PERB Decision No. 223.) Once the union requests bargaining over the effects of a workforce reduction, the employer is obligated to negotiate over all reasonably foreseeable effects of that change. (*Regents of the University of California* (1997) PERB Decision No. 1221-H, pp. 6-7.)

Consistent with PERB's decision, NUHW mounts a two-part argument here. First, the parties negotiated the effects of layoffs on the employees to be laid off but failed to bargain to agreement or impasse based on the Hospital's (1) outright refusal during the initial meetings to negotiate the number, timing, and various other effects on the employees to be laid off while citing its managerial prerogatives, (2) failure to provide information, (3) regressive bargaining as a result of first reducing the number to be laid off but contradicting itself through President Downing's statement that the Hospital remained committed to reducing the workforce by six percent, and (4) premature unilateral implementation prior to a genuine impasse. (See *Mt. Diablo Unified School District, supra*, PERB Decision No. 373, p. 21, citing *Stockton Unified School District* (1980) PERB Decision No. 143 [where the parties engage in some effects negotiating, the question is whether there is sufficient evidence based on the totality of the circumstances to establish that the employer lacked subjective intent to reach agreement].) Second, by taking a narrow view of the effects that could be bargained, as reflected in its proposals, the Hospital absolutely refused to bargain over the effects on the remaining employees. (See *Sierra Joint Community College District, supra*, PERB Decision No. 179.)

The Hospital contends that after providing NUHW notice and an opportunity to engage in effects bargaining, NUHW waived its right to negotiate by "failing to provide an effective and valid notice of any legitimate desire to bargain effects as all communications from the

Union were hopelessly embedded and contaminated with its constant demand that the Hospital was obligated to negotiate the decision to lay off employees.” As to the negotiations that did occur, the Hospital argues that it met in good faith and made proposals on effects of the layoff as to all matters identified in the complaint, and as a result was privileged to proceed with implementation of the layoffs under *Compton Community College District (1989) PERB Decision No. 720*, which establishes guidelines regarding unilateral implementation in cases of effects bargaining.

Number, Timing, and Related Layoff Effects

NUHW fails to identify any unequivocal statements by the Hospital at the bargaining table supporting its contention that the Hospital maintained the number, timing, implementation, effects of, and alternatives to layoffs were within its managerial prerogatives.¹⁴ At the parties’ first meeting on November 17, the Hospital informed NUHW of the proposed number of employees to be laid off, namely 57.7 FTEs. NUHW’s claim that the Hospital refused to negotiate the date of the layoff, in part by asserting it was within its managerial prerogatives, was conclusory and uncorroborated. An employer may select the layoff date as an initial matter and present it to the union as its proposal for the timing of the layoff. (See *State of California (Department of Corrections & Rehabilitation, Department of Personnel Administration) (2010) PERB Decision No. 2115-S*, pp. 7-8.) In its agenda for the December 7 meeting, the Hospital identified the layoff timeline as a topic open for discussion.

¹⁴ NUHW’s framing of the effects on laid off employees is broader than stated in the complaint by adding the “implementation” and “numerous [other] specific effects.” Although no amendment to the complaint was sought, the complaint can be reasonably construed to include these matters, and the test for an unalleged violation is met. (*State of California (Department of Social Services) (2009) PERB Decision No. 2072-S*, pp. 3-4.)

Relying on its bargaining notes, NUHW asserts that at the December 7 meeting, Ranzenberger refused to discuss the timing of the layoffs. The notes do not support this contention. Instead they indicate in the broader context that Ranzenberger only disputed the union's contention that the decision to lay off was a negotiable matter. When Ranzenberger stated the "train had left the station," she was rejecting Borsos's demand that the parties couple the contract negotiations with the effects bargaining in order to provide NUHW with a broader arena in which to exchange concessions for a smaller number of layoffs, and dismissing his admonition that the Hospital was missing an opportunity to begin the new relationship on better footing. NUHW never came to the table with an alternative date for the layoffs. Borsos did request that the layoffs be delayed for two weeks, but his only justification was the need for more time to complete the effects bargaining. When NUHW presented its first written proposal with still one day left prior to implementation of the layoffs, it still did not propose an alternative date for the layoffs.

While NUHW repeatedly asserted during the bargaining that the Hospital had failed to reveal the details of its layoff plan, the evidence does not support this contention. Only two days after the initial meeting, the Hospital provided NUHW with a list identifying the specific classifications comprising the proposed 57.7 FTE reduction. The information sufficiently disclosed the number and identity of those targeted for layoffs on the basis of job classification. Gonzales emphasized the names were needed in order to permit negotiations of the workload impact on remaining employees. NUHW's attempt to explain why a list by classification was insufficient and frustrated its attempt to bargain over effects is unconvincing. Later, at the December 21 meeting, Ranzenberger walked the union through the pared-down list of 11.9 FTE by department. Consistent with the Hospital's contention that

NUHW was unable to distinguish its demand to bargain the decision, Borsos responded by insisting on going through each department to determine “how the work gets done” and “how [the layoff] affects patient care.”

Borsos also contended that the names were needed to determine if the Hospital was complying with its obligation to lay off based on seniority. However, the issue of compliance was premature, because, despite the Hospital’s attempt to submit the issue to negotiations, NUHW declined to discuss the order of layoff because it desired to drill deeper into the numbers justifying the Hospital’s decision to lay off. After not receiving a proposal on the order of layoff, the Hospital then announced it would proceed by reverse seniority and provided the names. Even after presenting its first written proposal, NUHW never gave the Hospital a counterproposal identifying a different number for the layoffs or a different configuration for the proposed reduction. (See *Mt. Diablo Unified School District*, *supra*, PERB Decision No. 373, p. 51 [effects of a layoff are negotiable to the extent “the decision to lay off would have a reasonably foreseeable adverse impact on employees’ working conditions and [a] proposal is intended to address employee concerns generated by that anticipated impact” (italics added)]; *San Mateo City School District* (1984) PERB Decision No. 383 [alternatives to layoffs such as voluntary demotions or reductions in hours are negotiable].) In contrast, the Hospital demonstrated movement on both the timing and number of layoffs by sharply lowering the number to be laid off in the initial round from 57.7 FTE to 11.90, and deferring the remaining reductions to January or beyond. On December 17, it offered laid off employees the right to move to per diem status without loss of seniority.

In light of NUHW’s failure to signal any intent to propose economic concessions that would constitute an alternative to the Hospital’s labor cost reduction goal, offer any concrete

proposal on the timing of the layoff, or propose a different configuration for the reductions, the record fails to demonstrate that the Hospital exhibited bad faith by resisting bargaining over the timing, number, and other effects on those to be laid off. When NUHW asserts that the Hospital refused over the first four bargaining sessions to make a genuine attempt to reach agreement over the particular employees, job classifications, and total number of employees subject to layoff, it is really referring to the Hospital's resistance to engage NUHW in discussions to rebut Borsos's assertions that the layoffs were unnecessary, either because of labor concessions already achieved throughout the buy-outs, doubts about actual reduced workload, excessive executive compensation, or the Hospital's sustained profitability. This is tantamount to a claim of right to negotiate the decision to lay off. As late as the December 21 meeting, Borsos was claiming that the parties needed to "step back and find a better outcome," one that included a public debate about quality of care. In *City of Richmond*, *supra*, 51 Cal.4th 259, the court reaffirmed the rule that the decision to reduce labor costs through a layoff as a result of "a decline in revenues or other financial adversity" is a managerial prerogative. (*Id.* at p. 129; see also *Newman-Crows Landing*, *supra*, PERB Decision No. 223, p. 13 [determination of lack of sufficient work is a managerial prerogative].) The Hospital's contention that it was frustrated in its ability to discharge its duty to meet and confer because NUHW insisted there needed to be agreement on the necessity for layoffs is well taken.

NUHW asserts that the Hospital refused to complete negotiations on all the outstanding issues raised by its December 27 written proposal and prematurely declared impasse.

Although NUHW claims the amount of severance was still in issue and the Hospital did issue two weeks of severance when it implemented the layoff, NUHW's written proposal demanded the same amount. Despite a difference in the length of recall rights, the Hospital did not notify

laid off employees that its proposal, as opposed to NUHW's, had been implemented. Although the Hospital rejected NUHW's package proposal at the December 27 meeting, there is no evidence it foreclosed future negotiations on any outstanding issues. As of that date, the Hospital was still trying to achieve resolution on the number and timing issues.

NUHW's claim also rests on its belief that the Hospital failed to provide more detailed substantiation for the layoffs or additional information regarding their implementation (including how the work would be completed by the remaining employees). PERB affirmed the dismissal of NUHW's claims based on a refusal to provide information. (Cf. *KLB Industries, Inc.* (2011) 357 NLRB No. 8, *enfd.* (D.C. Cir. 2012) 700 F.3d 551 [failure to provide information on a significant bargaining subject precludes a valid impasse and the implementation of a final offer].) Any alleged failure by the Hospital to provide information cannot constitute an indicium of bad faith bargaining. (*Salinas Valley Memorial Healthcare System, supra*, PERB Decision No. 2298-M, p. 22.) Regardless, Ranzenberger answered questions about how the work would be scheduled for the remaining employees at the December 21 meeting. She explained essentially that the situation would be fluid; that it would involve use of both part-time and per diem employees to gap-fill without any dramatic change in the schedules. Ranzenberger anticipated rebidding and issues related to that. Given that the December layoffs ultimately reached only 11.9 of the unit's 558.1 total FTE, the Hospital's prospective view was reasonable.¹⁵ NUHW's position assumed, without any credible factual basis, that the workload could not be covered by the remaining employees, and claimed more positions could be saved without ever presenting a concrete proposal to achieve

¹⁵ The 11.9 FTE reduction amounted to only 2 percent of the unit.

cost savings.¹⁶ Similarly, although it asserts that job duties would change after the layoff and claims the Hospital refused to bargain over the matter, NUHW never made a proposal to address the alleged effect. (See *Rio Hondo Community College District* (1982) PERB Decision No. 279, pp. 17-18; *Davis Joint Unified School District* (1984) PERB Decision No. 393, p. 26, fn. 11 [an employee is required to perform all duties reasonably contemplated within the scope of his/her job description].)

NUHW's contention that the Hospital acted in bad faith by waiting until days prior to the layoff to produce the names of the employees targeted is rejected. The union believes the Hospital offered no time to discuss alternatives to layoff or the effects on the remaining employees. Again, NUHW alternately challenged the Hospital to produce more information to justify the layoff, disputed the need for it, and demanded combining effects and contract negotiations, without once signaling a proposal to achieve alternative labor cost savings. The Hospital was justified in prioritizing the limited negotiating time available to the effects on the employees to be laid off and deferring the issues concerning the remaining employees. This became more apparent to the Hospital's bargaining team over time as NUHW refused to constructively engage on the Hospital's proposals on a range of effects issues typically related

¹⁶ *City of Richmond* holds that the number of layoffs is a negotiable effect, but the decision to proceed is at the same time within its managerial prerogatives. To the extent the MMBA envisions negotiations over this subject because it is a labor cost issue, it can only mean that the union must be willing to propose alternatives that help the employer achieve cost savings. (*City of Richmond, supra*, 51 Cal.4th at p. 273, citing *Pan American Grain Co., Inc. v. N.L.R.B.* (1st Cir. 2009) 558 F.3d 22, 27.) In other words, it calls upon the union to elect between a greater scope of employment and reduced per capita benefits, or the layoffs as proposed. Though the absence of a true lack of funds or lack of work would appear to undermine the managerial prerogative insulating the employer from bargaining the decision, PERB has never held that a union may prove such a pretext as the premise for demanding bargaining over the decision itself.

to employees to be laid off. (Cf. *N.L.R.B. v. United Nuclear Corporation* (10th Cir. 1967) 381 F.2d 972, 977, cited in *Fire Fighters Union v. City of Vallejo, supra*, 12 Cal.3d 608.)

The Hospital did not engage in regressive bargaining by scaling back its layoff list to 11.9 FTE while stating its intention not to waver from the initial reduction in force plan. Downing's statement only clarified that the change related to the timing of the layoffs. The Hospital had never renounced its intent to proceed with a six-percent reduction, and its statement to that effect at the December 21 meeting was simply confirmation of the point. As it asserted in its opening statement, the Hospital was bargaining against itself with respect to the issues it thought were critical to the effects bargaining.

In sum, the Hospital offered NUHW an opportunity to make proposals regarding the timing, number, and related effects on the employees to be laid off as well as the effects on those remaining, and requested immediate disclosure of cost savings proposals. NUHW did not respond in a manner indicating it wanted to engage the Hospital on the relevant issues. Consistent with the Hospital's view, it appears that NUHW's overriding concern was to preserve its right to argue that the decision to lay off was negotiable. There is no evidence the Hospital refused to continue negotiations as to any outstanding issues related to effects arising from the layoff itself after it was implemented. What remains is the related issue of whether the Hospital prematurely proceeded with the layoff in order to meet its January 1 goal.

In *Compton Community College District, supra*, PERB Decision No. 720, PERB explained that an employer may implement a non-negotiable decision after providing reasonable notice and a meaningful opportunity to bargain over the effects of that decision. (*Id.* at p. 14, citing *Mt. Diablo Unified School District, supra*, PERB Decision No. 373 and *Oakland Unified School District* (1985) PERB Decision No. 540.) *Compton* developed a test for an

implementation occurring prior to completion of negotiations or impasse that contains the following elements: (1) the implementation date is not an arbitrary one, but is based upon either an immutable deadline or an important managerial interest, such that a delay in implementation beyond the date chosen would effectively undermine the employer's right to make the non-negotiable decision; (2) notice of the decision and implementation date is given sufficiently in advance to allow for meaningful negotiations prior to implementation; and (3) the employer negotiates in good faith prior to implementation and continues to negotiate in good faith after implementation as to those subjects not necessarily resolved by virtue of the implementation. (*Compton Community College District, supra*, PERB Decision No. 720, pp. 14-15.)

The Hospital selected the layoff date based on the timing of the loss of Tier One status with Blue Cross as well as the already declining census. The size of the impending rate change was substantial and a discrete event outside the control of the Hospital, such that any delay in implementation would compromise its managerial prerogative to reduce labor costs in response to declining revenue. (*Oakland Unified School District, supra*, PERB Decision No. 540, p. 19 [employer's deadline of beginning of the fiscal year not shown to be arbitrary].) The Hospital attempted to open negotiations early enough to reasonably allow for completion of effects bargaining as to the employees identified for layoffs. Its initial notice was on November 9, close to two months prior to its proposed implementation at the end of the calendar year. (See *Oakland Unified School District, supra*, PERB Decision No. 540, pp. 16-17 [two months provided "ample" opportunity to complete effects bargaining].) The Hospital drove the attempts to schedule sufficient bargaining dates. As reflected in her December 22 email, Ranzenberger did not assert the parties were at impasse on all issues for the employees to be laid off, only the number to be laid off and the date of the layoff. Lastly, for the reasons set

forth above, NUHW has failed to prove under the totality of circumstances that the Hospital engaged in bad faith bargaining as to the matters relating to the employees to be laid off. The elements of the *Compton* test are satisfied.

NUHW contends that the elements of the *Compton* test are not met because the Hospital, by providing the list of names of employees subject to layoff only a few days before the notices were sent out, denied the union a reasonable opportunity to negotiate effects. To the contrary, the Hospital first provided notice of the opportunity for negotiations on November 9 and followed that with a list of the classifications targeted for layoff on November 19. (*Oakland Unified School District, supra*, PERB Decision No. 540, pp. 16-17.) Again, as noted above, the lack of names was inconsequential. Similarly, NUHW's contention that the deadline was arbitrary because the Hospital rejected the union's demand to combine layoff and contract negotiations is unpersuasive. NUHW cites no authority requiring the employer to accede to such a demand. In addition, NUHW's demand that the Hospital justify the reduction in force in minute detail and its failure to present a timely proposal on effects for the laid off employees demonstrates delay on its part. (See *M & M Contractors* (1982) 262 NLRB 1472 [employer unilateral implementation justified "[w]hen a union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining"]; Higgins, *The Developing Labor Law* (5th ed. 2006) chap. 13, p. 906.) On December 27, the day NUHW finally presented its first written proposal, Ranzenberger conceded the Hospital's previous assertion of impasse as to employees to be laid off was retracted. Borsos immediately responded by announcing that NUHW was still trying to figure out the Hospital's work processes and objecting to the Hospital's lack of responsiveness on the Wellspring contract. And instead of a proposal that included cost savings, NUHW presented a

package proposal that, as a result of its supplemental unemployment insurance proposal, included new costs of \$100,000. The Hospital was reasonable in concluding, at least for that moment, that the parties were at impasse as to the scope of the layoff.¹⁷

Effects on Remaining Employees

Turning lastly to the question whether the Hospital absolutely refused to negotiate over the effects on the remaining employees, it must be noted that in the bargaining preceding the layoffs the Hospital declined to address the effects on the remaining employees. But this was occurring at the same time NUHW was demanding a detailed justification for the layoff. NUHW's failure to engage the Hospital on its effects bargaining proposals as to the employees to be laid off prompted the Hospital to prioritize those issues over the workload effects on remaining employees. Ranzenberger reasonably believed the effects on remaining employees would be minimal based on the reduced scope of the layoff, the prediction that patient census would further decline beginning on January 1 due to lower reimbursements, and the Hospital's determination to take a wait-and-see approach using temporary schedules following the layoffs. Under all these circumstances, the Hospital was justified in delaying negotiations over the effects on the remaining employees.

That said, the record lacks evidence that the Hospital ever categorically refused to negotiate the effects on the remaining employees throughout the entire period of time the parties were meeting. Gonzales's insistence that the Hospital absolutely refused to bargain the effects on remaining employees is contradicted by the Hospital's early correspondence

¹⁷ The Hospital's contention that NUHW waived its right to negotiate effects by failing to make an effective demand is rejected. The problem was not that NUHW failed to demand effects bargaining – it did so immediately – but that it simultaneously demanded, and persisted in demanding, decisional bargaining, causing it to delay the effects bargaining. However, its last-minute proposal did preserve its right to bargain those issues.

affirming its duty to bargain over this subject. It is undermined by NUHW's failure to offer a proposal regarding distribution of the work remaining. Despite at least nine additional effects bargaining sessions between January and April 2011, during which NUHW was provided information regarding scheduling and rebidding, NUHW offered no evidence to substantiate its claim that the Hospital refused to negotiate effects on remaining employees. Thus, NUHW has failed to meet its burden of proving an absolute refusal to bargain over the effects on the remaining employees.

For all the foregoing reasons, the Hospital did not fail to meet and confer over the effects of the December 2010 layoff.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, the complaint and underlying unfair practice charge in Case No. SF-CE-797-M, *National Union of Healthcare Workers v. Salinas Valley Memorial Healthcare System*, is hereby DISMISSED.

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 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
E-FILE: PERBe-file.Appeals@perb.ca.gov

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, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 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, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 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, §§ 32300, 32305, 32140, and 32135, subd. (c).)