STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

STATIONARY ENGINEERS LOCAL 39, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, Charging Party, v. EL DORADO COUNTY SUPERIOR COURT, Respondent.	Case No. SA-CE-26-C PERB Decision No. 2523-C March 20, 2017

Appearances: Weinberg, Roger and Rosenfeld by Gary P. Provencher, Attorney, for Stationary Engineers Local 39, International Union of Operating Engineers, AFL-CIO; Wiley, Price and Radulovich by Joseph E. Wiley and Monna R. Radulovich, Attorneys, for El Dorado County Superior Court.

Before Gregersen, Chair; Banks and Winslow, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Stationary Engineers Local 39, International Union of Operating Engineers, AFL-CIO (Local 39) to a proposed decision (attached) by an administrative law judge (ALJ), dismissing the complaint and Local 39's unfair practice charge against the El Dorado County Superior Court (Court). The charge and complaint alleged that the Court violated the Trial Court Employment Protection and Governance Act (Trial Court Act)[1] by refusing Local 39's demand to bargain over increased health benefit rates for 2014, unless and until Local 39 could show a change in circumstances, after the parties' negotiations for a successor agreement covering this and other subjects had previously resulted in impasse.

[1] The Trial Court Act is codified at Government Code section 71600 et seq.

The Board has reviewed the entire record, the proposed decision, and the parties' exceptions, responses and supporting briefs in light of applicable law. Based on this review, we find that the ALJ's findings of fact are adequately supported by the record and her conclusions of law are well-reasoned and in accordance with applicable law. We hereby adopt the proposed decision as the decision of the Board itself, subject to the following discussion of Local 39's exceptions.

FACTUAL BACKGROUND

The essential facts, as described in the proposed decision, are not in dispute. We summarize the ALJ's factual findings here to provide context. Local 39 and the Court were parties to a memorandum of understanding (MOU) covering, among other subjects, employee health care benefits and the respective employer and employee contributions for the costs thereof. The MOU was effective February 12, 2011 through September 30, 2012, and the parties' representatives began negotiations for a successor MOU in August 2012. The representatives met 7 or 8 times and reached a tentative agreement on October 3, 2012, which contained language covering health benefit costs and other economic subjects, but this tentative agreement was rejected by Local 39's membership. By mid-November 2012, the parties' representatives had again reached a tentative agreement, which was also rejected by Local 39's members. They resumed negotiations on January 8, 2013, but again failed to reach agreement.

Pursuant to the Court's Employer-Employee Relations Rules (EERR), the parties participated in mediation on April 11, 2013 after which, the Court submitted its last, best, and final offer (LBFO), which was also rejected by Local 39's members. On May 18, 2013, the Court implemented its LBFO but did not implement any changes to health benefits. Consequently, the health benefits language of the expired MOU remained in place, which

capped the employer's contribution at $325 per pay period and made employees responsible for any rate increases above the 2012 cap, subject to negotiations.

In June 2013, Local 39 requested to reopen negotiations for a successor agreement but the Court declined, unless Local 39 could demonstrate changed circumstances that would break the previously-declared impasse. Further correspondence ensued regarding additional funding for the Court from the Legislature, though the Court maintained that the additional funding had not changed its financial position in areas related to the parties' negotiations. As a result, negotiations did not resume until fall 2013, when Local 39 learned that health benefit rates would increase for 2014 beyond the amount the Court was required to contribute under the expired MOU, and demanded to bargain over this issue.

The parties met on November 12, 2013. Local 39 passed its previous proposal to split health benefit increases 50/50 and the Court responded with a package proposal aimed at settling all remaining subjects in dispute from the parties' previous MOU negotiations. As part of a counterproposal for a MOU, Local 39 changed its position on health benefit contributions from a 50/50 split for costs exceeding the cap to a new cap at an increased dollar amount. Both sides' proposals were also linked with other economic proposals, including offsets in various dollar amounts. After further discussion and exchange of proposals, on November 14, 2013, the parties reached a third tentative agreement which was also rejected by Local 39's membership. After Local 39 members had rejected this third tentative agreement, on November 25, 2013, Local 39 requested to continue negotiations over the health benefit rate increase separately. On December 12, 2013, the Court's representative indicated that, unless Local 39 could demonstrate a change in its position regarding any condition that led to the current impasse, the discussion of this issue has been exhausted and further meetings on the

subject would be futile. The Court did not formally declare impasse or invoke the impasse resolution procedures of the EERR.

Local 39 did not respond or deny that negotiations were at impasse and the Court did not initiate the impasse procedures under its EERR. Instead, on January 21, 2014, Local 39 filed the present unfair practice charge.

THE PARTIES' POSITIONS

For the most part, Local 39's exceptions reiterate the arguments in its post-hearing brief before the ALJ. Local 39 excepts to the ALJ's finding that the main sticking points in negotiations concerned salary and retirement benefit contributions and not health benefit contributions. The significance of this point is to support Local 39's contention that it remained concerned about the Court's contributions to employee health benefits and that the parties engaged in meaningful negotiations on this subject in October-November 2013, during which both sides changed positions sufficiently to break the previously-declared impasse.

Local 39 also excepts to the ALJ's findings and conclusion that, after Local 39's members rejected the November 13, 2013 tentative agreement, further negotiations would be futile, and that the Court was therefore privileged to refuse to bargain, absent substantial evidence of changed circumstances. Local 39 contends that these findings and conclusions are contradicted by the fact that the parties reached the same type of agreement regarding health benefit contributions only eight months after they resumed negotiations. Local 39 argues that, the Court's refusal to continue negotiations unless Local 39 accepted the Court's proposal, prevented the parties from continuing to negotiate over a hard cap number, and that, but for this take-it-or-leave-it tactic, the parties could have reached to an earlier agreement on a flat rate contribution amount and settled the MOU.

Finally, Local 39 excepts to the ALJ's refusal to award back pay for the period from December 12, 2013, when the Court refused to continue bargaining over health benefit contributions, to September 1, 2014, the effective date of the successor MOU, which increased the amount of the Court's contribution.

The Court contends that Local 39's exceptions do not comply with the requirements of PERB's Regulations and urges the Board to reject them without considering the merits of Local 39's arguments. In the alternative, the Court maintains that Local 39's exceptions lack merit and urges the Board to adopt the ALJ's findings of fact and conclusions of law.

DISCUSSION

Compliance with PERB Regulation 32300[2]

We first address the Court's contention that Local 39's exceptions should be summarily rejected for non-compliance with PERB Regulation 32300 governing exceptions to a proposed decision. The Regulation requires that a statement of exceptions and/or supporting brief include: (1) a statement of the specific issues of procedure, fact, law or rationale to which each exception is taken; (2) identify the page or part of the decision to which each exception is taken; (3) designate the portions of the record relied upon; and (4) state the grounds for each exception. (PERB Reg. 32300, subd. (a)(1)-(4).) Exceptions must be stated with specificity to afford both the respondent and the Board with enough information to answer, and rule, on the appeal. (*California State Employees Association (O'Connell)* (1989) PERB Decision No. 726-H, p. 3.) To avoid piecemeal litigation, an exception not specifically urged is waived, pursuant to subdivision (c) of the Regulation. (PERB Reg. 32300, subd. (c); *Bellflower*

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

Unified School District (2015) PERB Decision No. 2455, p. 3, fn. 4; *Brawley Union High School District* (1982) PERB Decision No. 266, p. 11.)

The Court complains that Local 39 has presented a statement of exceptions combined with a supporting brief which does not adequately identify each exception, the supporting evidence and/or the grounds for each exception. We disagree. While the content of exceptions to a proposed decision is clearly delineated by PERB Regulation 32300, the form in which exceptions are presented may vary. (*Regents of the University of California (San Francisco)* (2014) PERB Decision No. 2370-H, p. 10.) The excepting party may file a statement of exceptions, a brief or both. (*Ibid*.) We find nothing procedurally improper in combining a statement of exceptions with a supporting brief, so long as the filing includes the content identified in the Regulation. The introduction to Local 39's statement of exceptions asserts that pages 13-15 of the proposed decision contain "both factual and legal errors." It then lists the asserted errors and summarizes Local 39's arguments. Additional citations to specific page numbers of the proposed decision are included for the factual findings and legal conclusions in dispute.

While the Court complains that Local 39 should have set forth its exceptions in a more easily identifiable manner, for example, by numbering the exceptions, Local 39's filing introduces its various points of disagreement with the ALJ and then uses separate headings for each argument. Under each heading and sub-heading, Local 39 also identifies by page number the portions of the proposed decision at issue. Although Local 39's filing includes no citation to the Reporter's Transcript (R.T.), it apparently does not rely on any testimony from the hearing. Instead it properly cites to several exhibits admitted into the record as the evidence supporting Local 39's arguments.

The Court correctly notes that Local 39's filing includes no citations to statutory, decisional or any other authority in support of its arguments. However, the grounds for Local 39's disagreement with the proposed decision are readily discernible from the document and we regard the omission of any legal citations or other supporting authority as indicative of the merits of Local 39's arguments rather than a procedural deficiency justifying summary rejection of its exceptions. Contrary to the Court's contention, Local 39's filing complies with the requirements of PERB Regulations and we therefore turn to the merits of Local 39's arguments.

Whether Health Benefit Contributions Were Among the Main Sticking Points in Negotiations

Although the Board reviews exceptions to a proposed decision de novo, it need not address arguments that have already been adequately addressed in the same case or that would not affect the result. (*Trustees of the California State University (Culwell)* (2014) PERB Decision No. 2400-H (*Trustees of CSU (Culwell)*), pp. 2-3; *Los Angeles Superior Court* (2010) PERB Decision No. 2112-I, pp. 4-5; *Morgan Hill Unified School District* (1995) PERB Decision No. 1120, p. 3.) The Board has routinely declined to address issues raised in exceptions or on appeal, where the party seeking relief has simply reasserted its claims without identifying a specific error of fact, law or procedure to justify reversal. (*Los Rios College Federation of Teachers (Sander, et al.)* (1995) PERB Decision No. 1111, pp. 6-7; *State of California (Department of Youth Authority)* (1995) PERB Decision No. 1080-S, pp. 2-3; *San Bernardino City Unified School District* (2012) PERB Decision No. 2278, pp. 2-3; *County of San Diego* (2012) PERB Decision No. 2258-M, pp. 2-3.)

Local 39 excepts to the ALJ's finding that the main sticking points in negotiations concerned salary and retirement benefit contributions and not health benefit contributions. The ALJ's finding is supported by the record. Local 39's chief negotiator James Britton testified that

the sticking points in negotiations were salary and retirement contributions rather than health insurance contributions. (R.T. 28:12-39:1.)

Moreover, the ALJ found that the previous impasse was broken when the parties resumed negotiations in November 2013 and thus, even if we were inclined to reject the ALJ's factual findings regarding the main sticking points in negotiations, which we are not, it is unclear how this particular point would affect the outcome. If, as Local 39 argues, health benefit contributions comprised an additional sticking point in negotiations, such a finding would further support rather than undermine the ALJ's ultimate factual findings and conclusions that, after Local 39's members rejected the November 13, 2013 tentative agreement, negotiations were again at impasse, and the Court was therefore privileged to refuse to bargain, absent evidence of changed circumstances. Because Local 39 has not explained how this purported error in the proposed decision would alter the result, we reject the exception.

Whether Negotiations Were at Impasse as of December 2012

Under PERB and private-sector precedent, impasse exists "where the parties have considered each other's proposals and counterproposals, attempted to narrow the gap of disagreement and have, nonetheless, reached a point in their negotiations where continued discussion would be futile." (*County of Riverside* (2014) PERB Decision No. 2360-M, pp. 12-13, and cases cited therein; *Mt. San Antonio Community College District* (1981) PERB Order No. Ad-124, p. 11.) Section 2.0 of the Court's EERR defines impasse in substantially identical terms. California and federal authorities alike emphasize that impasse is a "fragile" and "temporary" state of affairs that may be broken by a change in circumstances, usually through either a change of mind or the application of economic force. (*Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 898-899; *Charles D. Bonanno Linen*

Service, Inc. v. NLRB (1982) 454 U.S. 404, 412; see also *County of Trinity (United Public Employees of California, Local 792)* (2016) PERB Decision No. 2480-M, p. 3.) If impasse is broken, the duty to bargain revives and the parties are legally obligated to resume meeting until negotiations result in agreement or a subsequent impasse. (*Los Angeles Unified School District* (2013) PERB Decision No. 2326, p. 13, fn. 13, citing *PERB v. Modesto City Schools Dist., supra,* 136 Cal.App.3d 881, 898-899.)

However, it is incumbent on the party asserting that an impasse has been broken to point to the changed circumstances that would justify a return to the bargaining table. (*Serramonte Oldsmobile, Inc. v. NLRB* (D.C. Cir. 1996) 86 F.3d 227, 233.) Mere speculation regarding possible concessions by the other party is insufficient to revive bargaining. There must be substantial evidence that a party is committed to a new bargaining position. (*Ibid*.) Vague and general statements about possible concessions or a request by one party for additional meetings, if unaccompanied by an indication of the areas in which that party foresees future concessions, are insufficient to break an impasse where the other party has clearly announced that its position is final. (*Serramonte Oldsmobile v. NLRB, supra*, 86 F.3d 227, 233; *TruServ Corp. v. NLRB* (D.C. Cir. 2001) 254 F.3d 1105, 1117, *as amended (Aug. 17, 2001)*.) Whether a genuine impasse exists and, likewise, whether a previously-declared impasse has been broken by changed circumstances, are, essentially, factual questions that must be determined on a case-by-case basis. (*Modesto City Schools* (1983) PERB Decision No. 291, pp. 37-38; *City of San Jose* (2013) PERB Decision No. 2341-M, p. 41; *Atlas Tack Corp*. (1976) 226 NLRB 222, 227-228.)

Local 39 excepts to the ALJ's findings that, after Local 39's members rejected the November 14, 2013 tentative agreement, negotiations were at impasse and that further negotiations would be futile, absent changed circumstances. It also excepts to the ALJ's

conclusion that, as of December 12, 2013, the Court was legally privileged to condition further negotiations on Local 39 showing a change of position or some other changed circumstances. In support of these exceptions, Local 39 points out that, when the parties returned to the table in October 2013, Local 39 requested bargaining *solely* on the issue of health benefit contributions. It also notes that the successor MOU included language regarding health benefit contributions that was substantially the same as Local 39's October 2013 proposal.

Local 39 does not dispute the ALJ's finding that negotiations for a successor MOU had resulted in a genuine impasse in January 2013. Nor does it dispute the ALJ's statement of the law that, once negotiations result in a genuine impasse, either party may refuse further negotiations in the absence of changed circumstances that would break the impasse. (See, e.g., *City of San Jose, supra,* PERB Decision No. 2341-M, pp. 39-40 citing *Modesto City Schools, supra,* PERB Decision No. 291, p. 39.) Instead, Local 39 argues that, because it requested negotiations solely over health benefit contributions in November 2013, the parties were not at impasse *on that issue,* and that the ALJ therefore erred in finding that negotiations remained at impasse. According to Local 39, the ALJ's finding that the main sticking point in negotiations concerned differences over salary and retirement contributions is not probative for whether negotiations regarding health benefit contributions could resume or continue on a meaningful basis, particularly since the parties' disagreements on that issue were relatively minor. Local 39 apparently asserts that the ALJ incorrectly framed the issue as whether the Court violated its duty to meet and confer *over a successor MOU*, rather than over *single-issue bargaining* over health benefit contributions. We find no merit to these arguments.

Although impasse necessarily entails an *overall* deadlock in negotiations, it may stem from disagreement over a single subject, if the disagreement is of such importance that the

parties' failure to agree on that one subject causes all negotiations to break down. (*City of Roseville* (2016) PERB Decision No. 2505, p. 33; *In Re Calmat Co.* (2000) 331 NLRB 1084, 1097.) Wages and benefits are sometimes of such critical and "overriding importance" in negotiations that a disagreement over one of these subjects may justify a belief that further bargaining would be futile, absent changed circumstances. (*Calmat Co., supra*, 331 NLRB at p. 1097; *In Re Richmond Elec. Services, Inc.* (2006) 348 NLRB 1001.) Thus, the fact that the parties' main points of disagreement concerned salary and retirement contributions does not undermine the ALJ's finding that, by January 2013, successor negotiations had reached impasse on all subjects to be included in a successor MOU, including health benefit contributions.

Local 39 also points out that, unlike in January 2013 when the Court declared impasse and invoked the impasse resolution procedures contained in the EERR, in December 2013, it simply reasserted its view in a letter to Local 39 that negotiations were at impasse, but did not again formally declare impasse or re-invoke the impasse resolution procedures. However, our precedents under other PERB-administered statutes suggest that "once the statute's impasse procedures have been concluded, PERB has no authority to recertify impasse or [to] reinvoke impasse procedures," which have already failed to resolve the dispute. (*Modesto City Schools, supra*, PERB Decision No. 291, p. 38; see also *State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2017-S, adopting partial dismissal at p. 4.) Thus, it was unnecessary for the Court to make another formal declaration of impasse or invoke the impasse resolution procedures in the EERR when those same procedures had already been exhausted without resolving the same dispute over a successor MOU.

Nor, under the circumstances presented here, does Local 39's request to bargain health benefit contributions separately alter the analysis or result. Parties may agree to ground rules governing the time and place of their negotiations, including arrangements to discuss specific subjects separately or in a particular order. (*Southwestern Community College District* (1998) PERB Decision No. 1282, adopting warning letter at p. 3; *Compton Community College District* (1989) PERB Decision No. 728, adopting proposed decision at p. 56.) Absent such agreement, a party may not insist on separating one negotiable subject from all others or make continued negotiations conditional upon reaching agreement over a single subject and thereby refuse to discuss other subjects that may form the basis of a possible compromise. (*City of San Jose, supra,* PERB Decision No. 2341-M, pp. 29-30; *Visiting Nurse Services of W. Massachusetts, Inc.* (1998) 325 NLRB 1125, 1130-1131, enforced by (1st Cir. 1999) 177 F.3d 52, 59.)

Although Local 39 requested a resumption of negotiations over health benefit contributions in October 2013, it points to no ground rules or similar agreement *requiring* the Court to negotiate this issue separately from the other subjects in dispute. Even assuming language in Article 9 in the expired MOU authorized *single-issue* negotiations over strategies for reducing employee health benefit contributions in the event of an increase in premiums in excess of 7 percent for a plan year, there is no evidence that Local 39 ever asserted such a right or objected to reopening big-table negotiations. To the contrary, Local 39 countered the Court's package proposal with its own package proposal, effectively acquiescing to the Court's demand that negotiations resume, not on a single-issue basis, but for a comprehensive agreement settling all subjects in dispute. In the absence of some notice to the Court, Local 39

must be estopped from asserting after the fact that it retracted a waiver of any right it may have had to bargain health benefit contributions separately from all other subjects.

The fact that the parties eventually reached the same type of agreement regarding health benefit contributions in 2014 does not, as Local 39 contends, undermine or contradict the ALJ's finding that, as of December 12, 2013, further negotiations would be futile. As explained in the proposed decision, the reason the parties eventually reached agreement in the Summer of 2014 was a true change in circumstances brought about by the allocation of additional funding for the Court. That subsequent development, however, does nothing to undermine the ALJ's finding of impasse in negotiations as of December 12, 2013.

Whether the ALJ Improperly Denied Local 39's Request for Back Pay

Local 39 excepts to the ALJ's denial of its requested remedy, including an award of back pay from December 2013 until August 2014. Local 39 contends that, as a result of the Court's refusal to bargain in December 2013, employees were improperly denied the more favorable health benefits contributions provision in the successor MOU. However, because Local 39's exceptions have identified no error of fact or law that would alter the outcome of the proposed decision, we find it unnecessary to rule on the circumstances in which a back pay award would be appropriate or on the appropriate measure of damages. (*Trustees of CSU (Culwell), supra,* PERB Decision No. 2400, pp. 2-3.)

ORDER

The complaint and underlying unfair practice charge in Case No. SA-CE-26-C are hereby DISMISSED.

Chair Gregersen and Member Winslow joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

STATIONARY ENGINEERS LOCAL 39, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, Charging Party, v. EL DORADO COUNTY SUPERIOR COURT, Respondent.	UNFAIR PRACTICE CASE NO. SA-CE-26-C PROPOSED DECISION (September 30, 2015)

Appearances: Weinberg, Roger & Rosenfeld by Gary P. Provencher, Attorney, for Stationary Engineers Local 39, International Union of Operating Engineers, AFL-CIO; Wiley, Price & Radulovich by Joseph E. Wiley, Attorney, and Monna R. Radulovich, Attorney, for El Dorado County Superior Court.

Before Robin W. Wesley, Administrative Law Judge.

INTRODUCTION

In this case, a union alleges that the employer violated the Trial Court Employment Protection and Governance Act (Trial Court Act)[1] when it refused to bargain a successor agreement unless the union demonstrated a change in its position. The employer denies any violation of the Trial Court Act, or regulations of the Public Employment Relations Board (PERB or Board).[2]

[1] The Trial Court Act is codified at Government Code section 71600 et seq. All statutory references are to the Government Code unless otherwise stated.

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

PROCEDURAL HISTORY

On January 21, 2014, Stationary Engineers Local 39, International Union of Operating Engineers, AFL-CIO (Local 39) filed an unfair practice charge against the El Dorado County Superior Court (Court). The Court filed a position statement in response to the charge on February 13.

On October 2, 2014, the PERB Office of the General Counsel issued a complaint that alleged the Court breached its duty to meet and confer in good faith when it refused Local 39's request to negotiate a successor agreement until Local 39 showed a change in its position. This conduct allegedly violated Trial Court Act sections 71631, 71635.1, 71633, and 71634.2, and was an unfair practice under Trial Court Act section 71639.1, subdivision (c), and PERB Regulation 32606, subdivisions (a), (b), and (c).

On October 29, 2014, the Court filed an answer to the complaint, admitting some allegations and denying others.

The parties did not participate in a PERB settlement conference. A formal hearing was held on February 24, 2015, and the case was submitted for decision following receipt of post-hearing briefs on May 5.

FINDINGS OF FACT

The Court is a trial court within the meaning of Trial Court Act section 71601, subdivision (k), and PERB Regulation 32033, subdivision (a). Local 39 is an exclusive representative within the meaning of PERB Regulation 32033, subdivision (b), of a bargaining unit of Court employees. In 2012-2013, approximately 65 of the Court's 90 employees were in the Court General Bargaining Unit, represented by Local 39.

Local 39 and the Court were parties to a memorandum of understanding (MOU) effective February 12, 2011, through September 30, 2012. Article 9 covered employee health benefits, and provided that the Court's contribution toward employee health benefits in 2012 was capped at $325 per pay period.[3] Article 9, section A-1, stated that if the 2012 medical premiums "increase more than 7% for the plan year, either party may request to meet and confer on strategies for reducing employee healthcare contributions."

In August 2012, Local 39 and the Court began negotiations for a successor MOU. Business Representative James Britton (Britton) was Local 39's chief negotiator. Judicial Council representative Michael Guevara (Guevara) was chief negotiator for the Court. Due to funding reductions, the Court sought concessions. Local 39 proposed that health benefit rate increases be split 50/50. The parties participated in seven or eight bargaining sessions, and reached a tentative agreement on October 3. The tentative agreement increased the health benefit cap from $325 to $344, but did not include a salary increase, and required employees to begin making retirement contributions. The tentative agreement was rejected by the Local 39 membership.

On November 16, 2012, Local 39 and the Court reached a second tentative agreement. This agreement was also rejected.

The parties resumed negotiations on January 8, 2013, but did not reach an agreement. At the conclusion of the bargaining session, the Court declared impasse and invoked impasse procedures in accordance with the Court's Employer-Employee Relations Rules (EERR).[4]

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[3] This is the single employee rate.

[4] EERR Section 2 defines "Impasse" as:

> [T]hat the Court and a recognized employee organization have reached a point in their meeting and conferring in good faith

An impasse meeting was held with the Court Executive Officer, but the parties did not reach agreement.

On April 11, 2013, Local 39 and the Court participated in mediation, but did not reach agreement.[5] At the conclusion of the mediation session, the Court submitted its last, best, and final offer (LBFO).

One week later, Local 39 notified the Court that the membership rejected the LBFO, and requested factfinding.[6] On April 23, 2013, the Court declined to participate in factfinding.

On May 6, 2013, the Court notified Local 39 that it would implement LBFO terms on May 18. The Court did not implement any changes to health benefits. The health benefit contribution cap remained $325 per pay period, and employees were responsible for any rate increases above the 2012 cap.[7]

> where their differences on matters to be included in a memorandum of understanding and matters on which they are required to meet and confer, remain so substantial and prolonged that further meeting and conferring would be non-productive.

EERR Section 15 states, in part:

> If the meet and confer process has reached impasse as defined in this policy, either party *may* initiate the impasse procedures by filing a written request for an impasse meeting and a statement of its position on all disputed issues with the Court Executive Officer.

(Emphasis added.)

[5] EERR Section 16 states, in part, that, "Either party *may* request mediation." (Emphasis added.)

[6] EERR Section 17 states, in part, that, "The parties *may* mutually agree to submit the impasse to fact-finding." (Emphasis added.)

[7] Britton testified that health benefit rates did not exceed the cap until 2014, so employees did not pay increased health benefits costs before 2014.

On June 18, 2013, Local 39 requested to reopen negotiations for a successor agreement. The Court responded on June 24 that unless Local 39 demonstrated a change in position or circumstances, the parties remained at impasse.

On July 3, 2013, Local 39 asserted that the Legislature's recent grant of $265,000 to the Court demonstrated changed circumstances. On July 8, the Court responded, acknowledging that the Governor recently signed a budget providing an additional $60 million to state trial courts, but the Court did not yet know its share of the appropriation. The Court also explained that the funds were restricted to the purpose of "maintaining or increasing public access to justice." The Court advised Local 39 that until the Judicial Council decided how to allocate funds to the trial courts, it was unable to determine if the augmentation created a change in circumstances.

On August 6, 2013, the Court provided Local 39 with an update on its budget, reporting that it would receive an allocation of $239,635, once it submitted a plan meeting the criteria for increasing public access to justice.

On September 5, 2013, the Court provided Local 39 with a copy of its plan to fund increased public access. The Court advised that the allocation had not changed the Court's financial position in areas related to the parties' contract, but the Court invited Local 39 to show a change in its position.

In early October 2013, Local 39 learned that health benefit rates would increase for 2014. On October 8, Local 39 demanded to bargain over the 2014 health benefit increases. The parties scheduled a bargaining session for November 12.

On November 12, 2013, Local 39 again proposed that health benefit rate increases be split 50/50. Guevara advised Local 39 that the Court wanted to resolve the entire contract, and

submitted a package proposal. The parties exchanged and discussed proposals for a successor agreement. Local 39 proposed a cash offset in lieu of a salary increase.

On November 14, 2013, the parties reached a tentative agreement for a new contract, in which the Court agreed to enhance its pre-impasse offer by providing employees a cash offset. The health benefit proposal remained substantially the same as in the two prior tentative agreements, increasing slightly from $344 in the October 3, 2012 tentative agreement, to $351 in the latest tentative agreement.

On November 25, 2013, Britton informed the Court that the tentative agreement was rejected by the membership "by a large margin." Local 39 demanded to continue negotiations over the health benefit rate increase. Britton testified that the membership did not have an issue with the health benefits cap; their objections focused on salary and retirement contributions.

The Court responded on December 12, 2013, stating, in part, "because the Court continues to prefer to reach an agreement, the Court is willing to meet and confer with the Union if the Union can explain, prior to the scheduling of any meet and confer sessions, how it has changed its position in regard to any condition that led to *the current impasse*. *Otherwise, the Court believes that the discussion of this issue has been exhausted, and further meetings on this subject would be futile.*" (Emphasis added.)

Britton testified that he understood from the letter that the Court believed the parties were at impasse. Local 39 did not respond or deny that the parties were at impasse, and the Court did not initiate impasse procedures under the EERR.

On June 20, 2014, Local 39 demanded to bargain a new MOU, claiming that the State budget signed by the Governor demonstrated a change in the Court's financial status.

On July 11, 2014, the Court responded that the Judicial Council had not yet allocated funds for 2014-2015, or established funding restrictions, and the Court had not finalized its budget. The Court was optimistic, however, that the new budget would be fiscally positive. The Court suggested scheduling negotiations after the Judicial Council made a final determination on budgetary restrictions and allocations.

In August 2014, Local 39 and the Court initiated negotiations and reached agreement on a MOU, effective September 1, 2014, through September 30, 2017.

ISSUE

Did the Court violate its duty to meet and confer in good faith when it refused Local 39's demand to bargain a successor agreement unless Local 39 could show a change in position?

CONCLUSIONS OF LAW

Trial Court Act section 71634.2 requires a trial court and a recognized employee organization to "meet and confer in good faith regarding wages, hours, and other terms and conditions of employment." It is an unfair practice under Trial Court Act section 71639.1, subdivision (c), and PERB Regulation 32606, subdivision (c), for a trial court to "refuse or fail to meet and confer in good faith with an exclusive representative."

Once a bona fide impasse is reached, either party may refuse to negotiate further, and the employer may implement changes in terms and conditions of employment reasonably comprehended in its LBFO. (*Public Employment Relations Board v. Modesto City Schools District* (1982) 136 Cal.App.3d 881; *Modesto City Schools* (1983) PERB Decision No. 291; *Rowland Unified School District* (1994) PERB Decision No. 1053; *State of California (Department of Personnel Administration)* (2010) PERB Decision No. 2102-S.) The duty to

bargain is suspended only until changed circumstances indicate that an agreement may be possible. (*Modesto City Schools, supra*, PERB Decision No. 291; *Rowland Unified School District, supra*, PERB Decision No. 1053; *State of California (Department of Personnel Administration), supra*, PERB Decision No. 2102-S.)

There is no dispute that the parties reached an impasse in negotiations for a successor agreement in January 2013. The parties thereafter participated in impasse procedures under the EERR. Ultimately, the Court implemented terms of its LBFO on May 18, 2013.

Local 39 first requested to resume negotiations on June 18, 2013. The Court responded that unless Local 39 demonstrated a change in position or circumstances, the parties *remained at impasse*. Local 39 claimed that a State budget allocation demonstrated changed circumstances to break the impasse. The Court informed Local 39 that the allocation had not changed the Court's financial position in areas related to the parties' contract, but also invited Local 39 to show a change in its position. Local 39 did not indicate a change in its bargaining position, nor did it dispute the parties remained at impasse.

The parties were still at impasse in October 2013, when Local 39 demanded to bargain over health benefit rates. Local 39 contends that impasse was broken when the Court agreed to resume negotiations.

In *PERB v. Modesto City Schools District, supra*, 136 Cal.App.3d 881, 899, the Court stated that:

> [A] legal impasse can be terminated by nearly any change in bargaining-related circumstances. "An impasse is a fragile state of affairs and may be broken by a change in circumstances which suggests that attempts to adjust differences may no longer be futile. . . . Most obviously, an impasse will be broken when one party announces a retreat from some of its negotiating demands."

(*Citations omitted*.)

Once impasse is broken, the duty to bargain revives. (*Ibid*.; *Stanislaus Consolidated Fire Protection District* (2012) PERB Decision No. 2231-M, fn. 14.) In *Rowland Unified School District, supra,* PERB Decision No. 1053, the Board stated:

> The [employer's] duty to resume negotiations following good faith completion of impasse arises only if the [union's] proposals contained a concession from its earlier position which demonstrates that circumstances have changed and agreement may be possible.

The obligation to resume negotiations may result from concessions from either party. (*Ibid*.) "The duty to bargain revives when one party proposes a concession from its earlier bargaining position which indicates that agreement may be possible." (*Rowland Unified School District, supra,* PERB Decision No. 1053, p. 7.)

The dispute in this case focuses on the parties' interactions in late 2013. In October 2013, after learning that health benefit rates would increase in 2014, Local 39 demanded to bargain over health benefits. The Court's December 12, 2013 letter suggests that it believed that the parties were still at impasse, and it was not obligated to participate in further negotiations over health benefits. The Court, however, was interested in reaching agreement on a contract, and agreed to return to the bargaining table. Local 39 contends that whether the Court had an obligation to return to the bargaining table is immaterial, because impasse was broken when the Court agreed to resume negotiations.

During the November 12, 2013 bargaining session, the Court expressed interest in resolving the entire contract, and submitted a package proposal. Local 39 again proposed a 50/50 split in increased health benefit costs. The parties exchanged and revised proposals, and the Court ultimately agreed to Local 39's proposal for a cash offset. Both parties changed their positions during these negotiations. Local 39 proposed a cash offset in lieu of a salary

increase, and the Court enhanced its pre-impasse offer when it agreed to the cash offset. These concessions demonstrate that the original impasse was broken. (*PERB v. Modesto City Schools District*, *supra*, 136 Cal.App.3d 881; *Rowland Unified School District*, *supra*, PERB Decision No. 1053 [The obligation to resume negotiations may result from concessions from either party.].) In fact, the parties' concessions led to a third tentative agreement. Thus, impasse was broken during the November 2013 negotiations for a successor agreement, and the duty to bargain revived. (*Rowland Unified School District*, *supra*, PERB Decision No. 1053.)

The Court contends that after the Local 39 membership rejected the third tentative agreement, the parties were again at impasse. The Court asserts it had no further movement to make, and Local 39 gave no indication it had room to move. Local 39 disputes the parties were at impasse because the Court did not declare impasse and invoke the impasse procedures. The Court asserts that it advised Local 39 the parties were again at impasse but it would resume negotiations if Local 39 identified concessions or a change in position. The Court argues that it was not obligated to hold an impasse meeting or proceed to mediation under the EERR after declaring impasse.

It is "indisputable that either party may unilaterally declare that it believes negotiations are at an impasse." (*County of Riverside* (2014) PERB Decision No. 2360-M, p. 17.) The Trial Court Act does not include a definition of "impasse," but the EERR defines impasse as:

> [T]hat the Court and a recognized employee organization have reached a point in their meeting and conferring in good faith where their differences on matters to be included in a memorandum of understanding and matters on which they are required to meet and confer, remain so substantial and prolonged that further meeting and conferring would be non-productive.

In *Mt. San Antonio Community College District* (1981) PERB Order No. Ad-124, p. 5, the Board defined impasse similarly, stating, "impasse exists where the parties have considered each other's proposals and counterproposals, attempted to narrow the gap of disagreement and have, nonetheless, reached a point in their negotiations where continued discussion would be futile." In *Modesto City Schools*, *supra*, PERB Decision No. 291, p. 33.) the Board described impasse as "that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless."

In evaluating disputed claims of impasse, the Board evaluates the totality of the bargaining conduct leading up to the impasse declaration. (*Placentia Fire Fighters, Local 2147 v. City of Placentia* (1976) 57 Cal.App.3d 9; *Kings In-Home Supportive Services Public Authority* (2009) PERB Decision No. 2009-M.) Under this standard, PERB determines whether the charged party's conduct as a whole "indicates an intent to subvert the negotiating process or is merely a legitimate position adamantly maintained." (*Oakland Unified School District* (1982) PERB Decision No. 275; *Kings In-Home Supportive Services Public Authority*, *supra*, PERB Decision No. 2009-M.)

The determination of a bona fide impasse is a question of fact. PERB considers objective factors in assessing whether an impasse exists, including the number and length of bargaining sessions; the time period over which negotiations have occurred; the extent to which proposals and counterproposals have been made and discussed; the number of tentative agreements and unresolved issues; the importance of the outstanding issues; the extent of the parties' differences or opposition; and the good faith of the parties in negotiations. (*City & County of San Francisco* (2009) PERB Decision No. 2041-M; *Modesto City Schools*, *supra*, PERB Decision No. 291; *County of Riverside*, *supra*, PERB Decision No. 2360-M.)

In *Regents of the University of California* (1985) PERB Decision No. 520-H, the Board affirmed the union's declaration of impasse. The Board found the parties met frequently, and submitted proposals and counterproposals. The parties discussed the proposals and reviewed their differences during the final five bargaining sessions, yet they made only minor movement. The Board concluded the parties were far apart on economic issues and several important noneconomic issues. The Board found therefore that the declaration of impasse was reasonable based on the totality of circumstances.

In *Kings In-Home Supportive Services Public Authority*, *supra*, PERB Decision No. 2009-M, the Board found, based on the charge allegations, that the parties had a series of productive bargaining sessions, with significant wage concessions from both parties. During the final bargaining session, the employer made another wage concession but then declared the parties were at impasse. The Board found the union stated a prima facie case that the employer prematurely declared impasse because the parties were continuing to display movement, and the union was not given the opportunity to respond to the employer's final offer.

In *City of Selma* (2014) PERB Decision No. 2380-M, the parties held only two bargaining sessions, and only a single proposal from the city was exchanged and discussed. Thereafter, the city called an emergency meeting to present its LBFO, which was different than its prior offer, without discussion. A few days later, the union emailed a counterproposal accepting much of the city's LBFO, and requested to continue negotiations if the city found the union's proposal unacceptable. The city refused to participate in further bargaining sessions, rejected the union's proposal, declared impasse, and advised that the city council would consider the LBFO in five days. The Board found that the city prematurely declared impasse in a rush to conclude negotiations and adopt a budget.

As discussed above, impasse was broken and the duty to bargain revived when the parties returned to the bargaining table in November 2013. Local 39 submitted the same 50/50 split health benefit proposal that it proposed in the parties' earlier negotiations. The Court, seeking to resolve the contract, submitted a package proposal. The parties exchanged proposals and counterproposals, and the Court eventually enhanced its pre-impasse proposal by agreeing to Local 39's cash offset proposal. The health benefit rates remained substantially the same as in the prior tentative agreements.

The third tentative agreement reflected concessions by both parties in the cash offset. When the Local 39 membership rejected the tentative agreement, Local 39 demanded to continue negotiations over health benefit rates.

The parties had long attempted to obtain a new agreement, beginning negotiations in August 2012. Local 39 admitted the sticking points in reaching agreement were salary and retirement contributions, not health benefits. Although the parties bargained again for only three days when impasse was broken in November 2013, their positions had been discussed and refined since August 2012, during approximately ten bargaining sessions. The third tentative agreement was not rejected based on health benefits, but on compensation. The attempt to obtain a contract by concessions on the cash offset failed when the tentative agreement was rejected by the membership. It is clear that the remaining issues revolved around compensation. Thus, the Court's declaration that the parties were again at impasse was reasonable based on the totality of the circumstances.[8]

[8] Article 9, section A-1, of the MOU provides that if the health benefit rates "increase more than 7% for the plan year," either party could request to meet and confer over health benefit contributions. The only evidence in the record about the amount of the increase in rates was when Britton was asked by the undersigned if he had previously testified that the 2014 health benefit rates exceeded seven percent. Britton answered, "They did." Local 39 did not

Local 39 contends impasse is not proper because the Court did not declare impasse or invoke the impasse procedures.

The Court responded to Local 39's demand to continue negotiations by indicating the parties were again at impasse, stating:

> [B]ecause the Court continues to prefer to reach an agreement, the Court is willing to meet and confer with the Union if the Union can explain, prior to the scheduling of any meet and confer sessions, how it has changed its position in regard to any condition that led to *the current impasse. Otherwise, the Court believes that the discussion of this issue has been exhausted, and further meeting on this subject would be futile.*

(Emphasis added.)

These words clearly convey the Court's position that the rejection of the third tentative agreement, "led to the current impasse." The Court confirmed that discussions had been exhausted and further meetings would be futile. Britton understood that the Court believed the parties were at impasse. Thus, the Court adequately notified Local 39 that it believed the parties were at impasse. Although the Court invited Local 39 to demonstrate some movement or change in its position, Local 39 did not dispute the Court's declaration of impasse, or advise that it had any proposals to offer.

Furthermore, the Court was not required to participate in impasse procedures. The EERR provides that, "If the meet and confer process has reached impasse . . . either party *may* initiate the impasse procedures." The term "may" demonstrates that the impasse procedures are permissive. The parties had previously utilized the impasse procedures without success. Although the Court did not again invoke the procedures, neither did Local 39.

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mention this provision of the MOU or the amount of the rate increase in its post-hearing brief, or assert any bargaining obligation derived from this provision. Assuming there was a contractual obligation to meet and confer over health benefit rates, the parties satisfied that obligation when they returned to the bargaining table in November 2013.

The original impasse was broken when the parties returned to the bargaining table in November 2013, submitted proposals and counterproposals, changed positions, and reached a third tentative agreement. The parties reached a second impasse after Local 39 rejected that tentative agreement. The Court declared impasse on December 12, 2013, but advised it was willing to meet and confer if Local 39 could show a change in its position. As the EERR did not require the parties to participate in impasse procedures, the Court did not violate its duty to bargain in good faith when it declared a second impasse, and declined further negotiations unless Local 39 could show a change in its position.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law, and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. SA-CE-26-C, *Stationary Engineers Local 39, International Union of Operating Engineers, AFL-CIO v. El Dorado County Superior Court*, are 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 Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

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

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 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 which meets the requirements of California Code of Regulations, title 8, section 32135, subdivision (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 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).)