STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 521, Charging Party, v. COUNTY OF FRESNO, Respondent.	UNFAIR PRACTICE CASE NO. SA-CE-768-M PROPOSED DECISION (May 28, 2015)

Appearances: Weinberg, Roger & Rosenfeld, by Kerianne R. Steele, Attorneys, for Service Employees International Union Local 521; Liebert Cassidy Whitmore, by Che I. Johnson, Attorney, and Evan A. Merat, Deputy County Counsel for the County of Fresno.

Before Shawn P. Cloughesy, Chief Administrative Law Judge.

INTRODUCTION

This case alleges that a public agency employer engaged in surface bargaining and unlawfully imposed its last, best, and final offer (LBFO) which violated its duty to meet and confer in good faith. The public agency employer denied any violation of the Meyers-Milias-Brown Act (MMBA) or Public Employment Relations Board (PERB or the Board) Regulation.[1]

PROCEDURAL HISTORY

On November 30, 2011, the Service Employees International Union Local 521 (Local 521) filed an unfair practice charge (charge) against the County of Fresno (County). On

[1] MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references are to the Government Code. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

January 4, 2012, Local 521 requested injunctive relief (Injunctive Relief Request No. 612) of PERB. The request was denied by the Board on January 13, 2012.

On January 18, 2012, the PERB Office of the General Counsel issued a complaint alleging that the County violated MMBA sections 3503, 3505 and 3506, and PERB Regulation 32603, subdivisions (a), (b), and (c). Paragraph 4 of the complaint alleges that the County failed to meet and confer in good faith by: (a) submitting a package of proposals with a representation that a rejection of one proposal was a rejection of all proposals; (b) setting a deadline for reaching an agreement without explanation; (c) insisting on a new retirement tier for newly-hired employees; (d) refusing to consider Local 521's proposal for an alternative retirement plan; (e) summarily rejecting all but two of Local 521's proposals; (f) failing to provide actuarial information supporting the County's proposed new retirement tier; (g) issuing its LBFO when 500 of the County's proposals remained on the table; (h) declaring impasse before Local 521 could complete its membership ratification vote on the LBFO; (i) stating it would adopt the LBFO by December 6, 2011, without providing any explanation as to why it needed to act by that date; (j) Board of Supervisor Member Henry Perea stating that he thought the County was imposing the LBFO in order to avoid the implementation of Assembly Bill 646 (AB 646); and (k) adopting the LBFO on December 6, 2011, and implementing it on December 12, 2011.

The PERB complaint further alleged that the County refused to meet with Local 521 after the union accepted the County's proposal that employees would bear any increases in the costs of health insurance premiums and offered to return to the negotiating table for a significant counterproposal. The PERB complaint also alleged that the County violated MMBA section 3506 by interfering with County employees' right to discuss union matters and

to possess or distribute union materials on County property. The PERB complaint asserted that those actions were unfair labor practices under MMBA section 3509, subdivision (b), and PERB Regulation 32603, subdivision (a).

On February 8, 2012, the County filed its answer denying any violation of the MMBA or PERB Regulations. On January 26, 2012, an informal conference was held, but the matter was not resolved.

Motion to Quash Subpoenas of County Board Supervisors

On or about January 30, 2012, Local 521 served personal subpoenas upon the County Counsel's Office who accepted service on behalf of County Board of Supervisors Debbie Poochigian (Poochigian); Judy Case (Case); Phil Larson (Larson); Henry Perea (Perea); and Susan Anderson (Anderson). On February 21, 2012, the County filed a motion to quash these subpoenas. Specifically, the County alleged that Local 521 sought privileged testimony concerning the Supervisors' deliberative process, sought testimony protected by the attorney-client privilege, sought testimony protected by the attorney work-product privilege, and sought hearsay or irrelevant testimony.

On February 24, 2012, Local 521 filed its opposition to the motion stating that it was not seeking closed session deliberations, but to question particular Supervisors about their public comments made in open session at Board of Supervisors' meetings (Perea, Larson, and Poochigian), Board budgetary meetings (Case), and to the *Fresno Bee* newspaper about the negotiations of another County bargaining unit, the Fresno County Prosecutors Association (Anderson). Local 521 asserted that the comments made in open session establish that the Board of Supervisors approached bargaining with Local 521 with a "take-it-or leave-it" attitude and were rushing to impose terms and conditions of employment in order to avoid

mandatory factfinding as set forth in AB 646. In support of its argument, Local 521 cited to *County of Riverside* (2010) PERB Decision No. 2119-M, where public comments from three of the five members of a county's board of supervisors were used to demonstrate that the county unlawfully interfered with employees' organizing efforts. It is unclear from the decision in that case whether the supervisors actually testified or whether the public comments were just admitted.

On February 27, 2012, the County filed its reply to the opposition to quash the subpoenas contending that Local 521 was seeking the deliberative process of the Board of Supervisors in coming to its decision to implement terms.

On February 28, 2012, the parties met in a prehearing conference to discuss the motion. Both sides appeared and argued at the motion. The County stated that it would not object as to the foundation or hearsay of recorded comments made in open session or to the press, but reserved the right to object to the relevancy of such comments. Local 521 stated it was entitled to question the Supervisors about these public comments. Later, Local 521 stated it would be open to a limiting order where the Board of Supervisors were limited to what they stated in public and the context in which the statement was made.

On February 29, 2012, the ALJ issued his ruling granting the motion to quash the subpoenas. His ruling stated in pertinent part:

> On February 28, 2012, a pre-hearing conference was held in which the representatives appeared. After the representatives argued the matter before the Administrative Law Judge (ALJ), the ALJ decided to read *County of Los Angeles v. Superior Court* (1975) 13 Cal.3d 721 (*County of Los Angeles*) once more and determine whether he was going to grant the motion to quash or limit the testimony of the Supervisors as to their specific statements about their approval of the Board's Last, Best and

> Final Offer in non-privileged settings.[2] The ALJ believed that *County of Los Angeles*, where a taxpayer sought to depose the Board of Supervisors for approving a salary ordinance giving salary increases to its employees in exchange for their agreement not to engage in an illegal threatened strike, was the case factually closest to the instant case. In *County of Los Angeles*, the taxpayer sought to invalidate the local ordinance.
>
> After reviewing *County of Los Angeles* again, I have decided to quash the subpoenas. In a back door way, Local 521 seeks to elicit statements from Supervisor(s) as to the Board's intent, ie., mental processes, (or another Supervisor(s)' intent) in imposing the Last, Best and Final Offer in order to avoid the upcoming consequences of AB 646. Regardless, Local 521 is still inquiring into the mental processes of the Board's enactment and should be prohibited from doing so. Additionally, even where "bad faith" is required to be proved, these mental processes cannot be inquired into. (*County of Los Angeles*, p. 730.)
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> Local 521 also seeks other statements from Supervisors made during Budget Sessions or Open Sessions. Individual statements from Supervisors are not statements from the County employer and these subpoenas will also be quashed.

On March 1, 2012, Local 521 filed an interlocutory appeal of the ALJ's ruling to quash the subpoenas of Board Supervisors, pursuant to PERB Regulation 32200. Local 521 asked the ALJ to join in its interlocutory appeal, especially since Local 521 agreed to restrict questioning into the subjective motives and internal mental processes of the Supervisors. On March 8, 2012, the County filed its opposition. The ALJ refused to join to certify the matter to the Board and the issue was not submitted.

The Formal Hearing and the Amendments to the Complaint

The formal hearing was held on March 12, 13, and 22, and April 26 and 27, 2012. During the hearing, the ALJ refused to admit recordings and/or transcripts of Board of

[2] Local 521 had no objection to such a limiting order.

Supervisors' meetings as proof of Supervisors' mental processes behind their vote to impose the LBFO on employees.

On March 14, 2012, Local 521 withdrew paragraphs 11 through 20 of the complaint concerning the alleged interference with employees' right to discuss union matters and to possess and/or distribute union materials.[3] On March 15, 2012, Local 521 moved to amend the complaint. The proposed amendment corrected some dates, added new factual allegations relating to its bad faith bargaining charge, and asserted that the County's bargaining conduct also interfered with employees' right to be represented by Local 521. On March 19, 2012, the ALJ granted Local 521's motion and issued an amended complaint.[4] The amended complaint added the following factual allegations to paragraph 4:

> 4. During the period of time described in paragraph 3, Respondent engaged in the following conduct:
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> [¶ . . . ¶]
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> l. Through its implemented terms, the County created a new retirement tier, applicable to new hires.
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> m. Through its implemented terms, the County revised the Jail Work Redesign Plan, thereby modifying the number of hours that Correctional Officers must work before qualifying for overtime pay.
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> n. Through its implemented terms, the County eliminated the Physician's Statements article in the Unit 2 Memorandum of Understanding, and on or about December 23, 2011, in anticipation of a strike by Charging Party, Respondent, acting through its agent, Linda Penner, issued a new policy requiring employees to bring a physician's note to verify each instance of sick leave use.

[3] Local 521 withdrew these paragraphs of the complaint without prejudice with the intent that it would add these allegations to another PERB case, Case No. SA-CE-783-M.

[4] The amended complaint added a new paragraph 11, which replaced the paragraph that Local 521 withdrew on March 14, 2012.

On March 21, 2012, the County filed its answer to the amended complaint. Again, the County denied any violation of the MMBA or PERB Regulations.

The matter was submitted upon the filing of post-hearing reply briefs on June 11, 2012.

Post-hearing Motions

On October 24, 2012, Local 521 requested that the ALJ take official notice of *City of Pinole* (2012) PERB Decision No. 2288-M (*Pinole*). The County argued that the decision was irrelevant to the facts of the instant case. This request is GRANTED and the ALJ takes official notice of the decision and will determine the applicability of the decision to the instant case.

On November 21, 2012, Local 521 requested that the ALJ take official notice of the complaint and contents of the unfair practice case file in *Service Employees International Union, Local 521 v. County of Fresno,* PERB Case No. SA-CE-793-M. On November 26, 2012, the County opposed the request. The case has not been fully adjudicated and as such, it would be prejudicial for the ALJ to give it any weight at this point. As such, the request to take official notice is DENIED.

On December 11, 2013, Local 521 requested that the ALJ reopen the record in the instant case to include portions of *Service Employees International Union, Local 521 v. County of Fresno,* PERB Case Nos. SA-CE-793-M, SA-CE-840-M, and SA-CE-846-M. Regarding PERB Case No. SA-CE-840-M, official notice is taken of the fact that PERB's General Counsel's Office dismissed the charge in that matter on July 23, 2014, and no appeal of that dismissal was filed. Regarding PERB Case Nos. SA-CE-793-M and SA-CE-846-M, the cases have not been fully adjudicated and as such would be prejudicial for the ALJ to give them any weight at this point. As such, the requests to take official notice is DENIED.

On January 9, 2014, Local 521 requested that the ALJ take official notice of *City of San Jose* (2013) PERB Decision No. 2341-M (*San Jose*). On April 22, 2014, Local 521 requested that the ALJ take official notice of *County of Riverside* (2014) PERB Decision No. 2360-M. Both requests are GRANTED and the ALJ takes official notice of the decisions and will determine the applicability of the decisions to the instant case.

On May 20, 2014, Local 521 requested that the ALJ take official notice of the proposed decision in *Orange County Attorneys Association v. County of Orange* (2014) PERB Case No. LA-CE-814-M. Exceptions were filed on this proposed decision on June 23, 2014. As this proposed decision is not final, this request is DENIED and official notice will not be taken.

On or about December 4, 2014, the County requested that the ALJ reopen the record to take new evidence and to take official notice of documents which demonstrate that Local 521 did not need five weeks to conduct a ratification vote and that the parties remain at impasse over a three year period. On or about December 23, 2014, Local 521 filed its opposition. The motion to reopen the record and take official notice is DENIED, as it would require taking additional evidence and providing Local 521 the opportunity to rebut that evidence. Moreover the probative value of that evidence does not justify the extraordinary measure of reopening the record about events occurring two years after the hearing.

FINDINGS OF FACT

The Parties and Their Principal Representatives

The County is a public agency under MMBA section 3501, subdivision (c), and PERB Regulation 32016, subdivision (a). Under PERB Regulation 32016, subdivision (b), the Association is the exclusive representative six different appropriate County bargaining units: (1) Unit 2 (Sheriff's and Probation Department personnel); (2) Unit 3 (mental health

professionals and social workers); (3) Unit 4 (eligibility workers); (4) Unit 12 (clerical, paramedical, building, and service employees); (5) Unit 22 (professional, paraprofessional, and technical employees); and (6) Unit 36 (supervisory employees). Local 521 represents around 4,100 County employees altogether, roughly two-thirds of the County's total workforce. Each of the six bargaining units is covered by a separate Memorandum of Understanding (MOU). All six of the MOUs expired on October 30, 2011.

Beth Bandy (Bandy) is the Deputy Director of the Department of Personnel Services. Bandy assigned Labor Relations Manager John Pinheiro (Pinheiro) to be the County's Chief Labor Negotiator for all six of Local 521's bargaining units. At the times relevant to this case, the County's negotiating team had four regular members. Pinheiro reports directly to Bandy, and Bandy reports directly to County Chief Administrative Officer (CAO) John Navarrette (Navarrette). Official County actions must be approved by its elected Board of Supervisors.

Tom Abshere (Abshere) is Local 521's Fresno Office Director. He has been the chief negotiator and spokesperson for Local 521 and its earlier iteration, Local 535, since 1995. Prior to working directly for the union, Abshere was employed by the County as a correctional officer. At all times relevant to this case, Local 521's negotiating team for all six units had around 20 regular members in total.

The County's Financial Condition and Negotiations Preparations

County representatives described the County's financial condition heading into the 2011 negotiations as "dire." According to County figures, it faced a mixture of rising retirement and salary costs and decreased revenue. The County estimated that its operational costs rose by around $115 million over the past five years. It expected retirement contribution costs to rise by $40 million and employee salaries to increase by an additional $20 million in

2011. The County had reduced expenses in the past through both layoffs and furloughs. In the five years preceding 2011, the County laid off approximately 1,000 of its 7,200 employees. It also enacted furloughs and a similar type of reduction, known in the County as "Temporary Office Closures."[5] Furloughs and other unpaid time off programs can save the County between 1.33 to 1.92 percent of employee salary annually, per 40 hours of reductions. However, Bandy said that layoffs and furloughs were not ideal because County residents began complaining about decreases in County services. It is undisputed that the County's personnel rules, which were not provided for the record, give the County the unilateral authority to furlough employees for up to 80 hours per year.

During the County's annual budget preparation process, CAO Navarrette directed all County departments to reduce their salary budgets by 10 percent. He said that each department had flexibility in how to achieve the target reductions, including layoffs, department restructuring, and offsetting the reductions through new revenue-generating programs. Navarrette did not direct anyone from the County to achieve any reductions in negotiations. Nor was he involved in the parties' negotiations in any way.

The County's negotiating team, which included Pinheiro and Bandy, decided that it needed to reduce both short and long-term operational expenses in negotiations for all 24 of its bargaining units, including Local 521's six units. The contracts for all bargaining units expired

[5] A Temporary Office Closure, or "TOC," is somewhat of a misnomer because the program is designed to allow County facilities to remain open. TOCs work by reducing affected employee salaries by the desired number of hours (e.g., 40 hours) spread out equally over the County's regular 26 pay periods each year, and then providing employees with a commensurate amount of unpaid time off. Employees may use their unpaid days at their own discretion (with supervisor approval) with the understanding that such leave must be taken before using paid leave. The parties used the terms "furloughs" and "TOCs" practically interchangeably since both refer to unpaid days off for employees as a means to temporarily reduce salary costs. It is understood that TOCs are slightly more favorable to the County because of the lower risk of service reductions.

sometime in 2011. The County's negotiators decided to propose salary reductions and new less-costly retirement tiers for future safety and general employee hires. The negotiating team also reached out to different County department heads about whether any provisions in existing contracts created procedural problems. The County's negotiators expressed an overall goal of removing personnel policies, such as scheduling and leave, among all units and removing scheduling, attendance, and leave policies from bargaining unit MOUs in favor of applying the policies from the County's personnel rules and local salary resolutions to all employees uniformly. The County sometimes referred to this goal as "language cleanup" in the various contracts.

Communications Preceding the 2011 Negotiations

On May 2, 2011, Bandy sent a letter to Abshere via email expressing interest in beginning negotiations over successor MOUs for all Local 521's units as soon as possible. Bandy offered 12 dates in May to commence bargaining.

Abshere replied on May 11, 2011, asserting that "we have not heard of any substantial reasons from the County on why it would behoove both parties to open negotiations so soon." According to Abshere, successor negotiations typically commence around two or three months before the current agreement expires. He also said that the parties did not previously take issue with continuing negotiations after the MOU expired. In his response to Bandy's letter, Abshere said that Local 521 was unprepared to open full negotiations, but that Local 521 was willing to "sit down and discuss" how unit members could assist with the County's financial circumstances. During the hearing, Abshere explained that the parties had previously met informally over retirement costs in 2006. During those discussions, the parties began exchanging proposals on modifying the County's existing defined benefit pension plan for

employees. The parties agreed to add new retirement tiers for both safety and general employees. Abshere said he was offering to meet with the County on a similar, informal basis before starting successor MOU negotiations in earnest.

Bandy sent Abshere another letter on June 24, 2011, restating the County's interest in commencing successor negotiations. She said that "the County believes that it is in all parties' best interest, including the citizens of Fresno County, to ensure that we have a successor MOUs complete and in place when the current contracts expire on October 30, 2011." She further said that negotiations should begin due to negotiators' schedules, and "the anticipated amount of work to be done during our negotiations[.]" During the hearing, Abshere testified that the County expressed its goal of reaching agreement by October 30, 2011, but that no one ever said that it was necessary to conclude negotiations by that date. Abshere replied to Bandy via email, reiterating his view that the County had not explained the need to commence negotiations earlier than had been done in the past. He also repeated his offer to "sit down and discuss" the County's financial situation prior to beginning successor negotiations. At hearing, Abshere said he knew that the County would be requesting salary concessions from Local 521's units. He said "[i]f they were really out there for salary savings, they could have got them in July [2011] . . . but they chose not to do that."

On or around July 20, 2011, Abshere and Pinheiro spoke via telephone. Pinheiro said that he expressed the County's goal of resolving issues relating to the attendance and scheduling policies for Local 521's units. According to Pinheiro, Abshere said that the negotiations should focus on "dollars" and not on contract "language cleanup" issues. Pinheiro also recalled Abshere stating that "any severe changes" to the aforementioned attendance policies "could potentially cause a 'strike situation.'" Pinheiro said that the parties would

discuss those issues in greater detail when negotiations began. Pinheiro recorded what he recalled of this conversation in an [email] message maintained in the County's bargaining files. Abshere did not recall using the term "strike situation," but did not dispute expressing firm opposition to changing the scheduling and attendance policies contained in the MOUs.

Local 521's Negotiations Preparations

Local 521 began its own preparations for negotiations by drafting a spreadsheet containing the monetary concession the County agreed to with other bargaining units. By June 2011, the County had reached agreement with the majority of its 24 bargaining units. Abshere observed that the other units agreed to between 2 and 8 percent in salary reductions, depending on the unit, with other reductions to various types of specialty pay and leave. Abshere said that he expected the County to seek a similar level of concessions from Local 521's units. He described the monetary terms reached with the other units as "reasonable." Abshere also said that he typically prepares two or three proposals ahead of wherever the parties are currently at in negotiations.

The 2011 Successor Negotiations

Successor negotiations began in August 2011. On August 12, the negotiating teams met and discussed ground rules. The County proposed a set of ground rules that were not described in great detail for the record. Abshere rejected the County's proposed rules. He said that Local 521 declined to propose its own rules and suggested to the County that the parties "let the law dictate" instead. No ground rules were agreed upon. The parties also discussed the frequency of meetings and whether negotiations for the different units would occur separately or at one table. The County expressed its preference for meeting multiple times each week, in the evenings, or during the weekends. It also stated that the parties negotiate

terms for each unit separately. Local 521 could not meet consistently more than once per week due to Abshere's schedule in negotiating with other employers. Abshere said that Local 521 would attempt to meet more frequently when needed. Local 521 also took the position that negotiations for all units should occur together. Ultimately, the parties typically met once per week and discussed all units at the same table.

The County's negotiators used the meeting to offer its perspective on its current financial condition. They also outlined their three main bargaining goals of: (1) salary reductions; (2) new retirement tiers to save costs; and (3) non-economic contract changes, such as changes to achieve more uniform personnel practices throughout the County.

The County's Initial Proposal

The County presented its initial proposal for all bargaining units on August 31, 2011. The proposal contained more than 600 items relating to the County's three asserted goals. Regarding salary, the County proposed reducing salaries between 18 and 20 percent for each of the six units. The County also proposed reducing or eliminating various forms of premium and differential pay. Bandy said that the County developed the salary proposals for each of the County's 24 bargaining units based on what salary increases the units received over the past five years. Because Local 521's units received up to 30 percent increases through Cost of Living Adjustments (COLAs), the County believed that it was equitable to propose a 20 percent salary concession. It was unclear to what extent the County's negotiators explained this rationale to Local 521, but Abshere acknowledged that the two sides discussed how Local 521 received "good COLAs" in the past while discussing salary concessions.

Regarding retirement costs, the County proposed a new third retirement tier for all future safety employees and a new fourth tier for all non-safety employees. The new tiers

provided for slower benefits accrual rates, a less-favorable method to calculate final salary when determining pension benefits, and no COLAs. The County had previously expanded its retirement tiers in 2006 and it had an ongoing committee to explore the idea of additional tiers. Local 521, as well as other members of the community were part of that committee. The members of that committee had access to almost all of the County's information regarding its pension plan. Abshere said that he was not surprised to see the County's retirement proposal.

The County also offered several proposals regarding what it referred to as "language cleanup." Those proposals ranged from simple issues, such as replacing reference to "Local 535" with "Local 521" and deleting provisions entitling Local 521 to 15 copies of the parties' MOU, to complex, such as changing policies regarding employees hours and shifts to be, in the County's view, more consistent with the County as a whole. Among the most hotly contested were the proposals to eliminate: (1) the "SWAP" program for correctional officers, security officers, juvenile correctional officers, and senior juvenile correctional officers; (2) the attendance and punctuality policy in the Department of Child Support Services (DCSS); (3) prerequisites before the County can require employees to provide physician verification before using sick leave; and (4) enhanced benefits for correctional officers assigned to 12-hour shifts under the County's "Jail Work Redesign Plan."

The SWAP program allows correctional and security officers in Unit 2 to exchange shifts with the approval of the appropriate watch commander. The County may revoke employees' SWAP privileges and discipline employees for failing to follow through with an agreed-upon shift exchange. The County proposed eliminating this program altogether, contending that managing all of the shift exchanges became administratively burdensome for supervisors.

Under the DCSS attendance policy, the department and Local 521 meet annually to discuss the shift start time selection process and decide the number of staff needed for each shift. The County proposed eliminating the policy altogether in favor of giving the department more discretion in setting employees' schedules.

The physician's note policy in the MOUs existing at the time required that an employee be counseled in writing about his or her attendance before the County could direct the employee to submit a physician's note verifying an absence for illness. The County proposed eliminating this pre-requisite in favor of the standard practice in its personnel rules and in Salary Resolution 610.34 (SR 610.34). SR 610.34 states that leave for illnesses may only be used in the event of either a "bona fide illness or injury of an employee" or "[m]edical, dental, mental, or eye-care consultations." The resolution further states that "[t]he Department Head shall, *in any instance where deemed warranted*, require that an employee submit a statement from a California-licensed physician setting forth the specific which necessitate the employee's absence for illness or injury purposes[.]" (Emphasis added.)

The Jail Work Redesign Plan, as it existed at the time, established three different work schedules per two-week pay period: (1) ten 8-hour shifts; (2) eight 10-hour shifts; and (3) seven 12-hour shifts. Under the 2008 Unit 2 MOU, correctional officers assigned to the 12-hour shifts received certain enhanced benefits such as a higher holiday time accrual rate than other employees, and additional bereavement leave. Under the MOU, employees in those shifts were not entitled to overtime even though their regular shift exceeded 80 hours per pay period. However, it was unclear from the record whether the correctional officers at issue would have been entitled to any overtime pay under State or federal law. The County proposed eliminating the enhanced benefits for the 12-hour shift employees.

Abshere told Pinheiro that he felt the County's initial salary proposal was "outrageous" and was greater than what the County had expressed was needed. During the hearing, Abshere acknowledged knowing that the salary negotiations would be difficult, but that he thought he knew where the parties would "end up" financially because he had seen the agreements the County reached with other unions. According to Abshere, "it was no shock to us [where] we were going [on] economic [issues]. It was the non-economic stuff that set it off."

Abshere questioned the need for the County's proposed non-economic changes. He expressed surprise because he felt that the County was seeking more non-economic concessions from Local 521's units than other units. No evidence was presented about whether other bargaining units had the same or similar scheduling and attendance polices as existed in the Local 521 MOUs. In subsequent meetings, the County brought department heads responsible for the scheduling and attendance policies to describe their concerns. Abshere suggested that representatives from each party at the department level meet to resolve any issues with those policies. Pinheiro rejected that idea, stating that the matters should be resolved through the parties' negotiating teams.

The parties discussed the County's initial proposal at length over the course of two negotiating sessions. From the County's perspective, the number of proposals was high because the County made the identical proposal to each of Local 521's six bargaining units. From Local 521's point of view, each proposal was unique due to differences in the MOUs for each unit.

The County described its initial proposal as a "package proposal." It never expressed, however, that rejecting any one of the proposals would be interpreted as rejecting the entire package. To the contrary, in written communications between the parties, a County

representative said "[t]hough the County maintains its position that each and every proposal we've put on the table is legitimate and important, the County **never** stated nor in any other way suggested that all proposal must be agreed upon for a successor MOU." Abshere admitted that Pinheiro made similar statements during negotiations.

Local 521's Initial Proposal

The parties met for negotiations on September 8, 2011. By that point, the parties reached some tentative agreements over less contentious non-economic issues. Due in part to the number of remaining issues at large, Local 521 proposed extending all six units' MOUs in their entirety for 24 months. Abshere said that this included freezing the limits on the County's contributions towards employee healthcare costs at current levels. Abshere said that, by maintaining these contribution limits, employees would pick up all of the expected increases in healthcare costs for the life of the new MOUs. In the alternative, Local 521 proposed continuing the meet and confer process over the County's initial offer and reserved the right to make proposals of its own. Local 521's proposal had a deadline of September 15, 2011. The County rejected the offer to rollover the existing MOUs.

The October 6, 2011 Meeting

The negotiating teams met again on October 6, 2011. The County reduced its proposed salary concession by between 2 to 4 percent, depending on the bargaining unit. Its proposal for new retirement tiers remained the same, as did its stance on the most contentious scheduling and attendance policies described above.

Local 521 made its first salary proposal at this meeting, offering to freeze all previously agreed upon wage increases, except for a subset of its members that were added to Local 521's units in 2006.[6] Local 521 proposed modest salary increases for the 2006 classifications.

Local 521 also proposed a Deferred Retirement Option Program (DROP) plan to address the County's pension costs. Under Local 521's proposal, both safety and general employees may voluntarily opt into the DROP plan at after a certain age and number of service years. Once in the program, the participant's accrued retirement assets would be transferred to an investment account and neither the County nor the employee make any future contributions towards any retirement benefits. Employees in DROP must retire within 10 years of entering the program. Local 521 estimated that if enough people opted into the plan, that the County could save between $5 million to $6 million. Local 521 also proposed retaining the SWAP program and not changing the benefits of correctional officers working under the Jail Work Redesign Plan.

Pinheiro told Abshere during the meeting that he did not believe that Local 521's DROP proposal was legal because the County Employees' Retirement Law of 1937 (the '37 Act)[7] did not allow general employees to participate in such a program. Abshere disagreed and took the position that nothing in the '37 Act specifically precluded non-safety employees' participation. The two did not resolve their difference in opinion. Neither side presented legal authority supporting its position either at the negotiating table or at hearing. Pinheiro said that

[6] The parties agreed to add around 60 positions to the Local 521's units in 2006. This group will be referred to collectively as the "2006 classifications." Local 521 maintained that those employees had not had the benefit of prior negotiated salary increases and that their salary was therefore lower than similar positions who had been represented for a longer period.

[7] The '37 Act is codified at Government Code section 31450 et seq., and governs the retirement benefits for certain public employees, including those in the County.

the County would look into the proposal if there was a legislative change to the '37 Act. As it stood, neither party accepted the opposing side's retirement proposals.

The October 20, 2011 Meeting

During the parties' October 20, 2011 negotiation session, Local 521 continued proposing zero salary increases, except the 2006 classifications and the DROP plan. It also proposed 40 hours of mandatory furloughs or TOCs in the 2012-2013 fiscal year and an additional 40 hours of TOCs in 2013-2014. Local 521's proposal also included 80 hours of voluntary TOCs in 2012-2013 and 2013-2014. Local 521 proposed small salary increases for the 2006 classifications. It proposed that the parties withdraw other proposals remaining in dispute, including the County's proposed changes to scheduling and attendance policies.

The County rejected Local 521's TOC proposal, stating that it was not interested in furloughs or similar programs because the County did not believe that the savings from furloughs would be significant enough, did not want to enact reductions that would impact County services to the public, and preferred ongoing cost savings. Pinheiro also explained that the parties already recognized that the County had the authority to unilaterally order up to 80 hours furloughs every year under its personnel rules. From the County's perspective, the proposal for 40 hours of unpaid time off actually limited the County's authority. The County's pending proposal (made on October 13, 2013), included between 8.5 and 13.5 percent in salary reductions, depending on unit and classification, with additional reductions to differentials and specialty pay. It maintained its position on the new retirement tiers and the most contested non-economic issues.

Local 521's Request for Actuarial Information

On or around October 20, 2011, Local 521 requested information relating the County's pension plans. This request included both the County pension board's most recent evaluation report as well as the most recent actuarial data. On October 20, 2011, the County responded by providing a report from the County pension board's actuary, Cheiron, dated December 2010, which discussed alternative retirement structures based on actuarial data collected in June 2010. Abshere objected that the County had not provided "the right information." At hearing, he explained that the information provided was outdated and that he believed that the pension board's actuary had more recent data. He said that his belief was based on his prior service on the pension board. No one from the pension board or its actuary testified. Nor was it established whether the pension board functioned as an arm of the County or was an independent entity, not directly associated with the County itself. It was also not clear that Abshere communicated his beliefs to the County's negotiators. Later on October 20, 2011, Bandy sent Local 521 with reports created in February and May 2011, concerning the anticipated savings from the County's proposed retirement tiers. It is unclear whether those reports were based on different figures. It was also unclear whether Local 521 made further requests for the actuarial information after this second response.[8]

The October 27, 2011 Meeting

The parties met again on October 27, 2011. The County proposed reducing salaries by between 7 and 12.5 percent, depending on classification, with additional reductions in

[8] Two developments after October 20, 2011, are relevant to the discussion of this issue. First, in a letter dated November 7, 2011, Abshere informed Pinheiro that Local 521 had "many outstanding information requests," but it was unclear from the record whether he was referring to its request for actuarial data. Second, there was some evidence that the County produced additional responsive information in or around February 2012, when the new information became available to the County.

differentials and specialty pay. It again maintained its position on the new retirement tiers and the most contested non-economic issues. Local 521 proposed a 2 percent salary reduction for most classifications that would terminate on October 27, 2014. It maintained its DROP proposal as well as its proposal that the parties withdraw all other disputed proposals.

Local 521's Retirement Cost-Sharing Proposal

At some point during bargaining, Local 521 verbally proposed that the parties modify how costs were shared under the County's original two retirement tiers, rather than create new tiers. Abshere said that he believed that the County agreed with its various unions in 1976 to pick up 50 percent of what would normally be employees' contributions towards the existing retirement plans. Abshere admitted that he was "still in high school at the time," and did not have firsthand knowledge of how the retirement cost-sharing was structured.[9]

Bandy testified that the County had explored modifying the existing retirement tiers, but discovered that its first two tiers did not have employee pick-ups. The County believed that employees in those plans had a vested right to have the County continue its contributions towards those plans and that those rights could not be disturbed in negotiations with Local 521. In or around November 2011, Local 521 requested information about employees' cost pick-up for the first retirement tier, Pinheiro responded that there was no such pick-up. The County nevertheless attempted to approximate the figures Local 521 was seeking, assuming for the purposes of the request that such a pick-up existed. The County provided its response, in writing on November 10, 2011.[10] In the response the County reiterated the County's position

[9] Counsel for the County objected to Abshere's testimony on this issue as uncorroborated hearsay.

[10] It appears as though there was an earlier response on November 7, 2011. That response and Local 521's reaction, if any, was not provided for the record.

that the first two retirement tiers did not have any employee pick-ups. There was no evidence of any further follow-up from Local 521.

The November 3, 2011 Meeting

The parties' second-to-last meeting occurred on November 3, 2011. The County proposed salary reductions of between 6 and 11 percent, with additional differential and specialty pay reductions. The County's proposal remained otherwise the same on the key issues referenced above.

Local 521 proposed a temporary 2 percent salary reduction in addition to 40 hours of mandatory TOCs in both 2012-2013 and 2013-2014. Its proposal also included some salary increases for the 2006 classifications, 80 hours of voluntary TOCs, the DROP plan, and the withdrawal of all other proposed changes. By that point, Local 521 had not made any proposals that included new retirement tiers and had not proposed any alternative scheduling or attendance policies. This was Local 521's final proposal passed across the table.

The County's Last, Best, and Final Offer (LBFO)

The County presented its LBFO at the parties' final negotiation session on November 10, 2011. By then, the parties had met 14 times, including the August 12, 2011 meeting where no proposals were exchanged. The LBFO proposed a 9 percent salary reduction for all classifications, with additional reductions in differentials and specialty pay. It continued its proposal for new retirement tiers, eliminating the SWAP program, the DCSS attendance policy, and the benefits for correctional officers working 12-hour shifts under the Jail Work Redesign Plan. The County also proposed maintaining its contributions towards medical benefits to the levels set under the prior MOUs, similar to Local 521's earlier suggestion. The LBFO also incorporated all previous tentative agreements. At the time, the parties had reached

more than 100 such agreements, albeit on less contentious non-economic issues. Several of the other proposed non-economic items were withdrawn from consideration. The first line of the LBFO stated that it had an effective term of "December 12, 2011 through June 30, 2012." Bandy said that she explained the effective date of the LBFO to Local 521's negotiators, something that Abshere denies.

Abshere expressed surprise at receiving the LBFO. He said that he expected negotiations to continue well after October 30, 2011, when the MOUs expired. Local 521's negotiators held a caucus. When they returned, Abshere said that the union would present the LBFO to its members through a ratification vote. Pinheiro asked Abshere whether Local 521's negotiators would recommend approving or rejecting the LBFO to the membership and Abshere responded "neither," because Local 521's team was not ready to accept or reject the LBFO.

Pinheiro instructed that Local 521 should respond no later than November 23, 2011, to which Abshere responded that the County could not dictate the timeline of the ratification vote. Abshere said Local 521 would inform the County once the vote was complete. Local 521 did not provide any timeline at the meeting. Local 521 did not request the County's assistance in arranging space for members to hold the ratification vote. Nor did the County offer such assistance at the time.

There is some dispute over the conclusion of the meeting. Abshere said that the parties mutually agreed to cancel the next scheduled negotiation session, November 17, 2011. Pinheiro said that he asked Abshere whether it would be productive for the parties to meet and Abshere responded "no."

The Ratification Vote

Abshere testified that Local 521's policy is to conduct contract ratification votes in person. He also said that Local 521 typically uses multiple balloting locations throughout the County due to the size of its membership. The ballots gave members the option of accepting the employer's LBFO or authorizing Local 521's negotiators to return to negotiations and, if necessary to call a strike. This was standard practice under Local 521's ratification vote process. Local 521 also asked members to vote on whether to accept the County's health benefits proposal.

Local 521's voting period opened November 28, 2011, after the Thanksgiving holiday.[11] Abshere said that it typically takes between two and five weeks to hold a contract ratification vote. In this case, the voting period started on November 28 and ended on December 16, 2011. Local 521 scheduled a vote count for Saturday, December 17, 2011. When the voting period began, Local 521 produced various flyers describing the County's LBFO for the membership. Among the materials circulating was a flyer stating "Your Bargaining Team recommends a NO vote!!"[12] Other materials distributed by Local 521 at the time encouraged members to "TAKE A STAND!" and to demand "NO CUTS!" in negotiations.

Abshere informed the County of the voting period in a letter dated November 18, 2011. Later that day, Pinheiro responded to Abshere's letter stating that the County believed that three weeks was a reasonable amount of time to coordinate, administer, tally, and communicate

[11] Official notice is taken of the fact that in 2011, Thanksgiving Day was November 24.

[12] Abshere also said that, sometime after the November 10, 2011 bargaining session, Local 521's negotiators decided that it could not accept the County's LBFO and would not recommend the proposal to its bargaining units.

the results of the ratification vote. He then said "if the County does not receive the results of SEIU's vote and/or a counter proposal should the County's Last, Best, and Final proposal be rejected by your membership, by November 30, 2011, the County will consider our proposal rejected and will deem SEIU – Local 521 and the County of Fresno to be at impasse." Pinheiro also announced that, on December 6, 2011, the County would present its Board of Supervisors with the County's LBFO as an agenda item. Three days later, on November 21, 2011, Pinheiro sent a second letter reiterating that the LBFO had an effective date of December 12, 2011, and in order to maintain that date, the County was required to publicly agendize the item in compliance with public notice laws beforehand. December 6, 2011 was the last scheduled Board of Supervisors meeting before December 12, 2011. Pinheiro also offered to assist Local 521 in finding facilities to conduct the ratification vote sooner.

In letters dated November 18 and 28, 2011, Local 521 stated its position that the parties were not at impasse and that it would be unlawful for the County to unilaterally impose its LBFO on the bargaining units. In one letter, Abshere said that, once Local 521 completed its ratification vote and tallied the ballots, the parties could meet to either sign the MOUs or commence further negotiations. He did not explicitly state that Local 521 had a new proposal, nor did he indicate any willingness to shift from Local 521's November 3, 2011 proposal. Pinheiro responded on November 28, 2011. He said "I do agree that the parties are currently not at impasse; however, if the County does not receive the result of your vote and/or a counter proposal from SEIU – Local 521 by November 30, 2011, at 5:00 p.m., we will consider our proposal to be rejected and the parties to be at impasse." Pinheiro said that the County would consider any counter proposal made by Local 521. He also repeated his offer to assist Local 521 in completing its ratification vote.

In a letter dated November 30, 2011, County counsel informed Local 521 that unless the County received a new proposal on "core economic issues," it would conclude that future meetings would be futile.

The County's Declaration of Impasse

After not receiving further response from Local 521 by the end of the day on November 30, 2011, the County declared impasse by a letter dated December 1, 2011. It stated in the letter that it considered its LBFO rejected. The County further stated that it would go forward with its plan to bring the LBFO to the County's Board of Supervisors on December 6, 2011, for implementation effective December 12, 2011. The County does not have any impasse procedures in its local rules, other than voluntary mediation.

On December 1, 2011, Local 521 sent a letter directly to the Board of Supervisors stating its position that the parties were not at impasse, and that the County's pre-mature declaration of impasse and other bargaining conduct violated the duty to bargain in good faith. It urged the Board of Supervisors to reject the resolution to impose the LBFO and to wait for Local 521's ratification vote results. The letter also stated that "SEIU's bargaining team stands ready, willing, and able to return to the table and present a counter offer that may be more acceptable to the County tha[n] SEIU's prior offers." The letter did not detail the content of the counter offer.

The Board of Supervisors' Approval to Implement the LBFO

On December 6, 2011, the County's Board of Supervisors was presented with an agenda item to either approve implementation of the County's LBFO for all Local 521 bargaining units or to approve Local 521's November 3, 2011 offer. The Board of Supervisors voted to approve implementation of the LBFO in a vote of three to two.

The Ratification Vote Results and Local the Parties' Subsequent Actions

Local 521 completed its ratification vote, as scheduled, on December 16, 2011. It tallied the votes on December 17, 2011, and determined that the membership of all six bargaining units elected to reject the County's LBFO, to authorize Local 521's negotiators to return to negotiations and, if needed, to call for a strike. The membership voted separately to accept the County's health benefits proposal. Abshere communicated these results to the County by a letter dated Monday, December 19, 2011. Abshere also stated that Local 521 was "prepared to present a counter offer to [the County's] Last, Best, and Final." Other than mentioning acceptance of the County's healthcare proposal, the letter did not describe the nature of Local 521's proposal in great detail. He suggested that the parties meet during the weeks of December 26, 2011, or January 2, 2012.

The parties continued communicating through counsel. By that point, Local 521 had already filed the present unfair practice charge and, as detailed above, was considering requesting injunctive relief from PERB. On December 20, 2011, counsel for Local 521 suggested that the parties work with a mediator to resolve their dispute. Attorneys for the County replied on December 21, 2011, declining the offer to participate in mediation and requesting that Local 521 email the counter offer referenced in Abshere's December 19, 2011 letter. Local 521's counsel responded by stating "[w]e will not bargain via [email], and demand that the County return to the table promptly." When questioned about this stance at the hearing, Abshere said that the County's request as "very weird," explaining that the parties had never negotiated a "full contract" through email and that he felt that the only way that the parties would reach agreement was if they were all sitting across the table together. Local 521 did not share the details of its counter offer.

The December 2011 Strike Preparations

In or around late December 2011, there were rumors that Local 521's bargaining unit members were going to strike. On December 23, 2011, the County issued a notice to probation department employees in Units 2, 12, and 36, stating "[i]t appears that bargaining units 2, 12, and 36 may go on strike. As you may be aware, employees who absent themselves from work, including a strike, are not eligible to be paid by the County." The notice further directed that employees seeking to take medical leave must provide a physician's verification that there was a medical need for the absence. The notice referenced that such notice was required under SR 610.34. On December 29, 2011, Abshere sent a letter to the County asserting that the notice was inconsistent with SR 610.34. Employees in Local 521's bargaining units did go on strike on or around January 23, 2012.

ISSUE

Did either the County's bargaining conduct throughout the 2011 successor negotiations or the terms implemented unilaterally after it declared impasse violate the duty to bargain in good faith?

CONCLUSIONS OF LAW

Local 521 alleges that the County violated the duty to meet and confer in good faith under MMBA section 3505 under a variety of theories. The amended PERB complaint similarly describes multiple examples of the County's negotiating conduct that are alleged to constitute violations of the duty to meet and confer in good faith under MMBA section 3505. This proposed decision will organize discussion of those theories as follows: (I) whether the parties reached lawful and legitimate impasse on December 1, 2011, when the County declared impasse; (II) whether the County, after declaring impasse, made unlawful unilateral policy

changes; (III) whether the County unlawfully interfered with the protected right to strike; and (IV) whether the County properly refused to hold further bargaining sessions after it declared impasse.

I. The Existence of a Lawful, Bona Fide Impasse

Local 521's central argument in this case is that the parties were not at genuine lawful impasse on December 1, 2011, when the County declared impasse. Determining the presence or absence of a bona fide impasse is essential in bargaining cases where, as here, terms are imposed on employees unilaterally at the end of bargaining. (*County of Riverside*, *supra*, PERB Decision No. 2360-M, p. 11.) An employer does not violate the duty to bargain in good faith by imposing negotiable terms and conditions of employment after reaching lawful impasse and completing any required impasse procedures. (*Id.* at p. 11; *Rowland Unified School District* (1994) PERB Decision No. 1053 (*Rowland*);[13] If, on the other hand, impasse either was not bona fide or was the product of the employer's bad faith, then the employer is not entitled to impose matters within the scope of representation unilaterally, absent some excuse or exception to the duty to meet and confer in good faith. (*County of Riverside*, p. 11.)

Examination into whether the parties have reached genuine impasse typically requires evaluating the entire course of the parties' negotiations. This is because the parties can only be at a bona fide and lawful impasse in negotiations if those negotiations occurred in good faith. (*County of Riverside, supra*, PERB Decision No. 2360-M, pp. 11-12.) If there is no evidence of bad faith during the negotiations, then the question of legitimate impasse turns on whether the parties have reached a point in the bargaining process where future meetings would no

[13] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, p. 616; *Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M, p. 13, fn. 4.)

longer be fruitful. (*Ibid.*) In this case, Local 521 contends that no genuine impasse exists here both because the County negotiated in bad faith and because the parties had not yet reached the point where additional meetings would be unproductive. Each of these two theories will be discussed below, followed by a discussion of other alleged bad faith conduct from the County immediately following the declaration of impasse.

A. The Surface Bargaining Claim

Local 521 accuses the County of unlawful "surface bargaining," throughout the 2011 negotiations for successor MOUs. In evaluating surface bargaining claims, PERB examines the "totality of circumstances" or "entire course of conduct" in which the negotiations took place. (*San Jose, supra*, PERB Decision No. 2341-M, pp. 18, 22.) This analysis looks to the entire course of negotiations, including the parties' conduct at and away from the bargaining table, to determine whether a party has negotiated with the requisite subjective intention of reaching an agreement. (*Id.* at p. 22, citing *Pajaro Valley Unified School District* (1978) PERB Decision No. 51, pp. 4-5, *In re Atlas Mills, Inc.* (1937) 3 NLRB 10.) Bargaining in good faith is a "subjective attitude and requires a genuine desire to reach agreement." (*Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9, p. 25 (*Placentia Fire Fighters*).) The essence of surface bargaining is where a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement. (*Muroc Unified School District* (1978) PERB Decision No. 80, p. 13, citing *Inter-Polymer Industries* (1972) 196 NLRB 729, pp. 759-760.)

Various kinds of conduct may be evidence of bad faith. Entering negotiations with a "take-it-or-leave-it" attitude evidences a failure of the duty to bargain because it amounts to merely going through the motions of negotiations. (*General Electric Co.* (1964) 150 NLRB

192, p. 194, enf. 418 F.2d 736.) Recalcitrance in the scheduling of meetings is evidence of manipulation to delay and obstruct a timely agreement. (*Oakland Unified School District* (1983) PERB Decision No. 326 (*Oakland*), pp. 33-34.) Dilatory and evasive tactics including canceling meetings or failing to prepare for meetings is also evidence of bad faith. (*Ibid.*) Conditioning agreement on economic matters upon prior agreement on non-economic subjects is evidence of an unwillingness to engage in a give-and-take. (*State of California (Department of Personnel Administration)* (1998) PERB Decision No. 1249-S, warning letter, pp. 4-5.) Other factors that have been held to be evidence of surface bargaining include: negotiator's lack of authority which delays and thwarts the bargaining process (*Temple City Unified School District* (2008) PERB Decision No. 1972, p. 11); insistence on ground rules before negotiating substantive issues (*San Ysidro School District* (1980) PERB Decision No. 134, proposed decision, p. 31.); and reneging on tentative agreements the parties already have made. (*Stockton Unified School District* (1980) PERB Decision No. 143, pp. 24-25; *Placerville Union School District* (1978) PERB Decision No. 69, pp. 6-7.)

While a party may not merely go through the motions during bargaining, it may lawfully maintain an adamant position on any issue being discussed. Adamant insistence on a bargaining position is not necessarily refusal to bargain in good faith. (*Placentia Fire Fighters*, *supra*, 57 Cal.App.3d at p. 25; *Oakland Unified School District* (1982) PERB Decision No. 275, p. 15.) "The obligation of the employer to bargain in good faith does not require the yielding of positions fairly maintained." (*NLRB v. Herman Sausage Co.* (5th Cir. 1960) 275 F.2d 229 (*Herman Sausage Co.*), p. 231.) The ultimate question raised in every surface bargaining case is whether the respondent's conduct, when viewed in its totality, was sufficiently egregious to frustrate negotiations. (*San Jose*, *supra*, PERB Decision

No. 2341-M, p. 19, citing *State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2078-S.)

1. The County's Initial Proposal

The amended PERB complaint asserts that the County's initial proposal, passed across the table on August 31, 2011, was evidence of bad faith for two reasons. First, the proposal had almost 700 separate items. Second, the County considered it a "package proposal."

PERB generally eschews a formulaic approach when reviewing the parties' bargaining conduct. (*San Jose, supra*, PERB Decision No. 2341-M, p. 19.) Thus, there are no fixed rules governing the manner in which proposals are exchanged. Rather, PERB typically examines the actual content and the context of the parties' proposals when evaluating good faith in negotiations. (*Ventura County Community College District* (1998) PERB Decision No. 1264, warning letter, p. 6, citing *Regents of the University of California* (1996) PERB Decision No. 1157-H.)

Here, although the size of the County's initial proposal might have been startling, there is nothing inherently unlawful with presenting a large number of proposals. The County expressed its interest in commencing negotiations in early May 2011. On June 24, 2011, more than two months before parties exchanged their first proposals, the County informed Local 521 that it would be prudent to begin negotiations as soon as possible due to "the anticipated amount of work to be done" at the table. Local 521 declined to start negotiations until August 2011. In addition, the record shows that several of the County's proposals were not complex. Some proposals were as simple as replacing references to SEIU "Local 535" with "Local 521." The parties agreed to more than a hundred of the County's proposals, with Abshere stating they were "easy to do" over the course of a few bargaining sessions. The

record furthermore shows that Abshere and Pinheiro engaged in some preliminary discussions over the most highly contested economic and non-economic issues in July 2011, before negotiations commenced. Abshere also admitted to knowing about several of the most contentious issues, including the County's interest in salary concessions, new retirement tiers, and changes to the SWAP program. Those issues remained in dispute throughout negotiations, even after the County withdrew a large number of its proposals. The County also stated its interest in meeting more frequently to work through the parties' proposals, but Local 521 declined. Under these circumstances, the number of proposals presented by the County does not indicate that it lacked the subjective intent to reach an agreement with Local 521.

Local 521 also argues that the "package" nature of the County's proposals also indicates bad faith. According to Local 521, "[i]t is conventionally understood that the significance of a 'package proposal' is that a rejection of any part of a package constitutes a rejection of the entire package." Using package proposals does not in itself indicate bad faith so long as the issues raised in the proposals were all addressed in negotiations. (See e.g., *Charter Oak Unified School District* (1991) PERB Decision No. 873 (*Charter Oak*), p. 15.) The record here shows that the parties discussed the County's initial proposal at length over the course of two bargaining sessions and that the initial proposal formed the basis of several tentative agreements.

Moreover, Local 521's argument based on the "conventional understanding" of the term "package proposal" is not persuasive here because the County expressly informed Local 521 that it was using the term in a different way. In *City of Selma* (2014) PERB Decision No. 2380-M (*Selma*), the Board rejected an employer's claim that a union's use of the term "package" proposal inherently meant that the offer was an "all or nothing proposition."

(*Id.* at p. 18, rev. den. *City of Selma* (2014) PERB Decision No. 2380-a-M.) The Board instead reviewed the parties' actual communications about the proposal, and concluded that it was never asserted that the employer was required to accept all aspects of the proposal. (*Id.* at pp. 18-19.) The same conclusion is reached here. The County sent Abshere a letter stating that "the County **never** stated nor in any other way suggested that all proposals must be agreed upon for a successor MOU." Abshere admitted that Pinheiro made similar statements throughout negotiations. This further suggests that the County's use of package proposals was not designed to and did not inhibit negotiations.

In addition, both parties in this case made package proposals in negotiations. There was no evidence that either side believed that agreement could only be reached based on the entire package presented. In fact, the tentative agreements reached by the parties, were based on both sides' proposals. This again suggests that the parties were willing to consider and reach agreement on aspects of one another's proposals, not only the entire package. Under these circumstances, the County's use of package proposals does not indicate that it lacked the subjective intent to reach an agreement with Local 521.

2. The Alleged Deadline for Negotiations

According to the amended PERB complaint, the County set October 30, 2011, as the deadline for completing successor MOU negotiations. The MMBA does not specify how long or how often the parties must meet to satisfy their duty to bargain in good faith. (*Santa Clara County Correctional Peace Officers' Assn., Inc. v. County of Santa Clara* (2014) 224 Cal.App.4th 1016 (*Santa Clara*), p. 1038.) To the contrary, the duty to meet and confer in good faith obligates both parties to continue negotiations:

> for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach

> agreement on matters within the scope of representation . . . include[ing] adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent.

(MMBA, § 3505; see also See *Garden Ridge Management, Inc.* (2006) 347 NLRB 131, pp. 143-147; *Tajon, Inc.* (1984) 269 NLRB 327, p. 328.) Parties remain free to propose and agree in advance "on a period of time that they consider reasonable to allow them to freely exchange information and proposals and endeavor to reach agreement." (*Santa Clara*, p. 1039.) On the other hand, one party's unilateral attempt to dictate the pace of negotiations may evidence bad faith depending on the quality of the negotiations held, the type of proposals exchanged, and the legitimacy and/or justification asserted for the negotiations timeline. (*County of Solano* (2014) PERB Decision No. 2402-M (*Solano*), proposed decision, pp. 27-8, citations omitted.) Bad faith will not necessarily be inferred from one party's refusal to adhere to the other's internal negotiation timelines. (*Selma, supra*, PERB Decision No. 2380-M, pp. 20-22; *Folsom-Cordova Unified School District* (2004) PERB Decision No. 1712 (*Folsom-Cordova*), proposed decision, p. 29; *University of California, Lawrence Livermore National Laboratory* (1995) PERB Decision No. 1119-H (*Lawrence Livermore*), warning letter, p. 3.)

Here, the allegation in the PERB complaint was not proven with facts. Although the County expressed its interest in completing negotiations by October 30, 2011, both Abshere and Pinheiro stated at hearing that the County never gave a deadline for the parties' negotiations and no contrary evidence was produced. The record also shows that both parties continued making proposals in November 2011 and multiple negotiation sessions were scheduled and held that month as well. In short, Local 521 has not established that the County set an arbitrary deadline for completing negotiations by October 30, 2011.

Local 521 maintains that even expressing an interest in completing negotiations before the existing MOUs expired was "illogical" due to the fact that, in the past, the parties had negotiated past the expiration date of the previous MOUs. However, even if this assertion were true, it would not necessarily mean that the County's interest in reaching its concessionary goals sooner rather than later demonstrates bad faith. The County clearly set forth its position that it needed cost savings in this round of bargaining. It had already achieved some savings with several other bargaining units while Local 521 continued to receive what Pinheiro described at the table as "good COLAs." It is not evidence of bad faith for the County to seek to achieve its desired concessions as soon as possible. Under these circumstances, the County's desire to reach agreement by October 30, 2011, does not indicate that the County lacked the subjective intent to reach an agreement with Local 521.

3. The County's Insistence Upon Including a New Retirement Tier

Local 521 alleges that the County insisted to the point of impasse on a non-mandatory subject of bargaining, namely, the new less costly retirement tiers in the parties' successor MOUs. Insistence to impasse on non-mandatory subjects of bargaining, over the opposing party's objection, is evidence of bad faith. (*Berkeley Unified School District* (2005) PERB Decision No. 1744, pp. 6-7, citing *Travis Unified School District* (1992) PERB Decision No. 917, *Lake Elsinore School District* (1986) PERB Decision No. 603.) PERB has long held that employees' retirement benefits impact wages and are therefore mandatory subjects of bargaining. (*County of San Joaquin* (2003) PERB Decision No. 1570-M, p. 7, citing *Temple City Unified School District* (1989) PERB Decision No. 782, *Jefferson School District* (1980) PERB Decision No. 133; *Clovis Unified School District* (2002) PERB Decision No. 1504, pp. 17-18.) In *City of Glendale* (2012) PERB Decision No. 2251-M, a union alleged that the

parties were engaged in bargaining over a variety of negotiable subjects, including new retirement tiers for new hires. (*Id.* at dismissal letter, p. 4.) PERB found no evidence of a refusal to bargain in good faith over negotiable subjects, instead concluding that the employer's insistence upon a two-tiered retirement system for new employees was lawful hard-bargaining. (*Ibid.*) In *San Jose*, *supra*, PERB Decision No. 2341-M, the Board found that an employer's insistence to impasse on its proposal to defer any discussion of retirement reform - including new contemplated retirement tiers for prospective employees - constituted an outright refusal to negotiate over matters within the scope of representation. (*Id.* at p. 20.)

Here, Local 521 likens the County's proposals for new retirement tiers to proposals for employees or employee organizations to waive their statutory rights. (See e.g., *Chula Vista City School District* (1990) PERB Decision No. 834 [concerning waiver of a union's right to file grievances in its own name].) However, Local 521 does not identify the statutory right or other analogous non-mandatory subject of bargaining implicated by the County's retirement benefits proposals. On their face, the County's proposals appear to concern monetary benefits for newly hired employees. To the extent that Local 521 asserts that the proposals constitute waivers of rights not established through the MMBA, this argument is not supported. Local 521 identifies neither the statutory scheme nor the rights implicated by the County's offers. The one section of external law cited by Local 521 covering retirement issues in its brief expressly contemplates negotiations over retirement tiers. (See Gov. Code, § 31458.9, subdivision (b).) "Local 521 may be asserting that the County's retirement tier proposals violate future employees' vested pension rights. This argument would also be unpersuasive because the 'contractual basis of a pension right is the exchange of an employee's services for the pension right offered by the statute' and thus future employees do not have a vested right in

any particular pension plan." (*Deputy Sheriffs' Assn. of San Diego County v. County of San Diego* (2015) 233 Cal.App.4th 573, p. 579, internal quotations and citations omitted, review denied April 1, 2015, S224690).)" Under these circumstances, Local 521 has not demonstrated that the County's proposal for new retirement tiers amounted to an insistence to impasse on non-mandatory subjects of bargaining.

4. The County's Alleged Refusal to Consider Local 521's Proposals

The PERB complaint asserts that the County failed to properly consider and explain its position on Local 521's retirement savings proposals. A party's failure to explain or clarify its positions during negotiations may indicate bad faith. (*Chula Vista City School District*, *supra*, PERB Decision No. 834, proposed decision, pp. 60-61; *Oakland Unified School District* (1981) PERB Decision No. 178, p. 8.)

In this case, Local 521 maintains that the County rejected both its written proposal for a DROP plan as an alternative to the existing retirement system as well as its verbal proposal for employees to pay a greater share of the employees' pick-ups under the County's first two retirement tiers. The evidence shows that the County rejected the first idea as unlawful. Pinheiro stated that the County would be willing to consider Local 521's DROP proposal after Local 521 supported passage of legislative changes that would make the proposal clearly lawful. Abshere disagreed with Pinheiro's assessment, but said that he was unaware of any non-safety employees participating in a DROP plan. Under the circumstances, bad faith is not inferred on the County. The County appeared to have a facially persuasive argument that a retirement program not specifically mentioned in the '37 Act was not permissible and Local 521 provided no examples or legal authority contradicting the County's assertion. Nor did Local 521 support its claim that the proposal was lawful at hearing or in its meeting with

Pinheiro. It is reasonable under the circumstances that the County might want to avoid utilizing a retirement program that carried the risk of being later invalidated. Based on these facts, it is not concluded either that the County failed to explain to Local 521 why its DROP proposal was unacceptable or that the County's rejection of this proposal was unreasonable. (See *County of Alameda* (2006) PERB Decision No. 1824-M (*Alameda*), warning letter, p. 7 [holding no bad faith where an employer explained that it could not agree to retirement benefits changes because of its belief that the changes violated other existing agreements].)

Regarding Local 521's proposal to share the costs of the employees' pick-ups under the existing retirement plan, Pinheiro asserted that the County's initial retirement tiers did not have employee pick-ups. Thus, he said the County could not agree to share the costs of pick-ups that it did not believe existed. Again, Local 521 disagreed with that conclusion, but did not provide evidence for the record indicating that Pinheiro's statements were untrue or misleading. Because Local 521 members were on the County's committee discussing retirement reform, those members had access to almost all of the County's information regarding its pension plan. Presumably, if Local 521 believed the County's assessment to be in error, it could have used that information to rebut Pinheiro's claims. Based on the record presented, it is not concluded either that the County failed to explain to Local 521 why other retirement plan proposal was unacceptable or that the County's rejection of this proposal was unreasonable.

According to the PERB complaint, the fact that the County only accepted two of Local 521's proposals throughout the course of negotiations was further evidence of bad faith. As stated above, the duty to bargain in good faith does not obligate either party to yield any fairly maintained position. (*Herman Sausage Co.*, *supra*, 275 F.2d at p. 231.) Here, the

County explained at the outset of negotiations that its three aims in negotiations were to: (1) obtain salary concessions, (2) create new retirement tiers for both safety and non-safety employees; and (3) replace certain scheduling and attendance policies with the polices in place under the County's personnel rules or salary resolutions. Although Local 521 was not required to accede to the County's objectives in bargaining, the County was also free to reject proposals that were contrary to its negotiation goals, after evaluating those proposals in good faith and communicating its position across the table. There was no evidence that the County failed to take those steps here. Accordingly, The County's rejection of Local 521's proposals does not in-and-of-itself constitute evidence of bad faith.

5. Taking Inflexible or Predictably Unacceptable Bargaining Positions

Although not mentioned specifically in the PERB complaint, Local 521 argues in its closing brief that the County took impermissibly inflexible and predictably unacceptable bargaining positions at the table.[14] Offering predictably unacceptable proposals may be evidence that the offering party lacked the intent to reach agreement in the first place. (See *San Bernardino City Unified School District* (1998) PERB Decision No. 1270 (*San Bernardino*), proposed decision, p. 83, citing *Oakland, supra*, PERB Decision No. 326.) To constitute evidence of bad faith, the proposals must be "so patently unreasonable as to frustrate possible agreement." (*Redwood City School District* (1980) PERB Decision No. 115 (*Redwood*), proposed decision, pp. 11-12.)

In *San Bernardino, supra*, PERB Decision No. 1270, an employer proposed removing the union's organizational security clause and also deleting leave provisions that were the

[14] The County asserts that Local 521 should be precluded from discussing bargaining conduct not specifically referenced in the PERB complaint, as amended. This argument is rejected, as contrary to PERB's traditional totality of the circumstances analysis. (*County of Riverside, supra*, PERB Decision No. 2360-M, pp. 11-12.)

subject of recent grievances. (*Id.* at proposed decision, pp. 83-84.) The employer in that case never articulated a legitimate explanation for removing those provisions. (*Id.* at proposed decision, p. 85.) PERB found that both proposals were predictably unacceptable and were designed to thwart reaching agreement. (*Ibid.*) In *Oakland, supra*, PERB Decision No. 326, the Board examined the employer's inflexible position at the negotiating table concerning the effects of employee layoffs. There, the employer expressed a willingness to "explore" certain union proposals, such as severance pay, rehire rights, and additional notice of future layoffs. But its actual proposals maintained an extremely rigid position, rejecting proposals for even nominal severance pay and notice.[15] (*Id.* at pp. 38-39.)

In *Redwood, supra*, PERB Decision No. 115, PERB held that an employer's proposal for a 5 percent pay differential was not so predictably unacceptable so as to evidence bad faith bargaining even though the union preferred a 6.25 percent differential. (*Id.* at proposed decision, p. 11.)

Here, Local 521 identifies four County proposals as being either predictably unacceptable or not fairly maintained, namely, the proposed 20 percent salary reductions, the elimination of the SWAP program for Unit 2 employees, the elimination of the attendance policy for DCSS employees, and the insistence on new retirement tiers for all employees.

a. The County's Initial Salary Offer

Regarding the County's initial salary offer, a 20 percent proposed reduction is unquestionably substantial, but bad faith is not inferred from the circumstances. The County reduced the amount in concessions it sought in each of its following seven offers, eventually proposing around half the amount originally proposed. Abshere stated at hearing that although

[15] One proposal from the union in that case involved $1 in severance pay and 31 days' notice before layoff, 1 day more than what was required under the Education Code.

he considered the County's initial salary proposal to be "outrageous," he also believed that the parties would eventually bridge their gaps on all monetary issues. Local 521 asserts that the proposed salary reductions were greater than what the County achieved in negotiations with other bargaining units, but Bandy explained during the hearing that Local 521's units, in the past, had received higher salary increases in preceding years. She said that the County's negotiators felt that commensurate reductions were appropriate. Abshere admitted to discussing Local 521's "good COLAs" in negotiations over salary. In addition, it is noted that the County reached agreements with several bargaining units as early as June 2011, months before negotiations with Local 521 even began. Thus, those other bargaining units felt the impact of agreed-upon concessions while Local 521's units continued to receive salary increases under their current MOUs. For all these reasons, it is not concluded that the County's salary proposals were unfairly maintained, unlawfully inflexible, or otherwise demonstrated a subjective intent to thwart negotiations.

b. The County's Scheduling and Attendance Policy Proposals

Regarding the SWAP and DCSS scheduling and attendance proposals, the County explained that its rationale for both proposals was that it wanted greater management control and consistency over scheduling and reductions in the amount of administrative time supervisors spend overseeing scheduling. It brought in the department heads who oversee both programs to explain these problems from their perspective. Local 521 disagreed with the County's assessments, but mere disagreement over the need for a proposed change does not make the proposal predictably unacceptable or unlawfully inflexible. It is true that the County never modified its proposals on these two issues which in some cases could suggest inflexibility, but in this case Local 521 never made a counter-proposal, other than to leave the

polices unchanged. Under these facts, since both parties maintained their initial position steadfastly, the County's conduct does not indicate bad faith. Local 521 also suggested that the policies be negotiated separately from the main successor MOU table by representatives from the affected departments. Again, it was not unreasonable for the County to insist that its selected negotiating team handle all the parties' bargaining. (See *Westminster School District* (1982) PERB Decision No. 277, p. 7 [holding that both parties have the unqualified right to select who will represent their interests in negotiations].) Under these circumstances, the County's proposals on the SWAP program and the DCSS attendance policy, appear to be lawful hard-bargaining. It is not concluded that the proposals indicate bad faith.

c. The County's Proposals for New Retirement Tiers

Local 521 also maintains that it was impermissibly inflexible for the County to insist that all 24 County bargaining units accept the same new retirement tiers. The Board has previously found that a party's insistence that all of an employer's units achieve similar agreements and where the settlement of one unit's contract is dependent on the settlement of others on similar terms was unlawful coalition bargaining. (*Compton Community College District* (1989) PERB Decision No. 728, pp. 3-4, citing *Gilroy Unified School District* (1984) PERB Decision No. 471, p. 8.) In contrast, in *Pinole*, *supra*, PERB Decision No. 2288-M, the employer proposed changes to employees' pension costs that was similar to what was recommended by other neighboring employers. (*Id.* at p. 4.) The Board did not find evidence of bad faith absent some showing that the employer lacked any willingness to compromise based on the specific circumstances in those negotiations. (*Ibid.*) In this case, Local 521's claim that the County took an inflexible position was not proven at hearing. Whereas Local 521 is correct that the County never deviated from original benefits formula for its new

retirement tiers, it is also the case that Local 521 never offered a different formula.[16] Thus, the ALJ is unable to conclude whether the County would have deviated from its original proposed retirement tier formulas had something else been proposed. Nor was it shown that the County's resolution of negotiations with Local 521 was dependent on the outcome of its negotiations with any other County unit. Under these circumstances, it is not concluded that the County's decision to propose the same retirement tiers for all its 24 units was evidence of bad faith.

6. The Alleged Failure to Provide Requested Actuarial Information

Local 521 accuses the County of failing to provide it with requested actuarial information about its proposal for new retirement tiers. The duty to meet and confer in good faith requires the parties "to exchange freely information," about negotiations and negotiable subjects. (MMBA, § 3505.) Accordingly, the parties' bargaining obligation includes a duty to furnish requested information germane to the negotiations. (*City of Burbank* (2008) PERB Decision No. 1988-M, p. 8; see also *Chula Vista City School District*, *supra*, PERB Decision No. 834, p. 50.) During bargaining, each side "is entitled to [the] information it needs 'to understand and intelligently discuss the issues raised in bargaining.'" (*Town of Paradise* (2007) PERB Decision No. 1906-M, proposed decision, p. 5, quoting *Trustees of the California State University* (1987) PERB Decision No. 613-H.) However, the right to receive information is not unlimited. Employers have no obligation to produce information that either does not exist or it does not possess. (*Solano*, *supra*, PERB Decision No. 2402-M, p. 12, citing *Los Angeles Superior Court* (2010) PERB Decision No. 2112-I (*LA Superior Court*).) Likewise, bad faith will not be inferred when an employer partially complies with a request for

[16] As explained above, the County had already explained its belief that Local 521's alternative retirement proposals were either not legal or not possible.

information and the requesting union fails to communicate its dissatisfaction with the response or clarify its request. (*LA Superior Court*, partial dismissal letter, p. 6.)

In the present case, Local 521 asserts that it requested actuarial data from the County on or around October 20, 2011. The County responded that day providing a report dated December 2010 from the County pension board's actuary. The report discussed the impact of alternative retirement plans, such as the ones proposed by the County. The report was based on actuarial data from June 2010. Abshere informed Pinheiro that it wanted more recent information. Bandy again responded that day with additional newer actuarial studies relating to the County's proposed new retirement tiers. The record is unclear as to whether anyone in Local 521 raised the matter further after this second response from the County. Once the County responded to Local 521's request a second time, Local 521 was obligated to clarify its request further or explain why the provided information was deficient. (*LA Superior Court*, *supra*, PERB Decision No. 2112-I, partial dismissal letter, p. 6.) There was no evidence that Local 521 did so in this case.

During the hearing, Abshere testified as to his belief that the pension board's actuary possessed more up-to-date data by October 2011. He said that his belief was based on his past service on with the pension board. Citing to *Regents of the University of California* (2010) PERB Decision No. 2094-H, Local 521 argues that the County's duty to respond to information requests includes the obligation to contact the pension board's actuary, Cheiron, to determine whether newer data was available. Although there may be circumstances where an employer's duty to respond to information requests includes contacting third parties with whom the employer has a working relationship to obtain the requested information, it is not concluded that those circumstances are present here. Abshere's past experience with the

pension board notwithstanding, it was not proven from the record that the pension board's actuary possessed the information Local 521 sought in October 2011. In addition, even assuming that Abshere's beliefs were true, there was no showing that anyone at the County would have known what data the pension board's actuary possessed and when. Nor was there evidence that Abshere ever informed anyone at the County that the pension board or its actuary might have more recent data. No one from the County testified as to having any working understanding of how the pension board operates or when that entity receives is actuarial data from its actuary.[17] Based on these facts, it is not concluded that the County's failure to provide additional actuarial information was evidence of bad faith.[18]

7. The County's LBFO

The PERB complaint alleges that the County's decision to present its LBFO on November 10, 2011—while there were still hundreds of unresolved proposals—was further evidence of bad faith. Local 521 is correct that, before November 10, there were numerous proposals still at large. The County elected to withdraw several of those proposals in its LBFO, instead focusing on those proposals that were either agreed to already or discussed

[17] Local 521 also asserts, without evidence, that the pension board's actuary was a subcontractor of the County. There was no showing that either the pension board operated as a County department or other County-controlled entity. There was likewise no showing that the County had any relationship to the pension board's actuary.

[18] Local 521 also suggests that the County failed to properly respond to its request for a target monetary amount that the County was seeking in savings. The record shows that Pinheiro responded to that request by stating that the County was looking to reduce its operational costs on both the short- and long-term. In *Solano*, *supra*, PERB Decision No. 2402-M, the Board found no evidence of bad faith in an employer's failure to provide its negotiations "target savings" because there was no evidence that such a target was calculated and because the union received other requested financial information. (*Id.* at pp. 11-12.) The same is true here. There was no showing that the County had calculated its savings target for the 2011 negotiations or that the County failed to provide any requested financial information in its possession.

extensively during bargaining. The remaining disputed issues included salary reductions, the new retirement tiers, changes to the SWAP program, the DCSS attendance policy, the physician note requirement, and the Jail Work Redesign Plan. The record shows that Local 521 actually favored reducing the number of proposals being discussed. Most of Local 521's own proposals included the County's agreement to withdraw its non-economic proposals. During the hearing, Abshere testified as to his belief that the County's non-economic issues were the true impediment to agreement. He said he believed that the parties could have reached a deal on the economic concessions, but for the County's other proposals. In this light, the County's decision to reduce its proposals brought the parties closer to, not further from, agreement and accordingly does not constitute evidence of bad faith.

8. The Timing of the County's Declaration of Impasse

The PERB complaint alleges that it was bad faith for the County to declare impasse on December 1, 2011, almost three weeks before Local 521 completed its membership ratification vote on the County's LBFO. The Board has found that a premature or unfounded declaration of impasse may evidence a lack of intent to reach agreement in the first place under PERB's totality of the circumstances analysis. (*Rio School District* (2008) PERB Decision No. 1986, p. 8.) In this case, both Pinheiro and Bandy said that the County declined to declare impasse on November 10, 2011, when it presented the LBFO, because they hoped that the LBFO would trigger some substantive movement from Local 521. Local 521's negotiators did not give an immediate response, but instead decided to hold the ratification vote. As the voting period opened, it became clear that Local 521's negotiators did not favor the LBFO and recommended that the membership reject it as well. By then, Local 521 still had not informed the County's negotiators of the content of any potential counter to the LBFO. Nevertheless, just a week

later, on November 18, 2011, Pinheiro still offered to review any counter offer from Local 521. He also said that if Local 521 did not accept or counter the LBFO by November 30, 2011, the County would consider its proposal rejected and would conclude that the parties had reached impasse. Pinheiro reiterated that offer in subsequent letters dated November 21 and 28, 2011. County counsel made a similar offer on November 30, 2011. It notably does not violate the duty to bargain in good faith to place time limits on the acceptance of a proposal. (*Trustees of the California State University* (2006) PERB Decision No. 1871-H, dismissal letter, p. 2.) Here, it was only when the County's team felt that no substantive response was forthcoming that they decided to declare impasse. At the time, Local 521 had not made a proposal for nearly one month and had not given any indication of its willingness to move from its November 3, 2011 proposal for 2 percent salary reductions, 40 furlough hours for 2 years, no new retirement tiers, and no changes to any scheduling or attendance policies. Under these circumstances, the timing of the County's declaration of impasse does not suggest that the County lacked the intent to reach an agreement.

After reviewing the County's conduct throughout negotiations, the alleged indicators of surface bargaining, when viewed separately or together as a whole, do not demonstrate that the County engaged in unlawful surface bargaining. This bargaining conduct accordingly did not violate the duty to meet and confer in good faith.[19]

[19] Local 521 argues in its initial brief that the County's bargaining strategy was to "bring the SEIU to its knees to send a message to all County exclusive representatives and their members." This claim does not ring true under the record presented. It is undisputed that by the time negotiations with Local 521 commenced, the County had already reached agreement with most of its bargaining units. Moreover, the level of monetary concessions sought in its LBFO did not differ greatly from what it sought and agreed to with other units. Finally, for the reasons already discussed above, Local 521 did not provide sufficient evidence that the County's action amounted to bad faith.

B. The Existence of a Bona Fide Impasse

Irrespective of the County's good or bad faith in negotiations, Local 521 also asserts that movement was still reasonably possible during negotiations. The MMBA has no precise definition of when parties reach impasse in bargaining. The Board has described impasse through case law as the point where "the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless." (*Modesto City Schools* (1983) PERB Decision No. 291, p. 33.) The Board has also expressed that 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." (*Mt. San Antonio Community College District* (1981) PERB Order No. Ad-124, p. 5; see also *County of Riverside, supra*, PERB Decision No. 2360-M, pp. 12-13.) The County's Employee Relations Ordinance defines "impasse" as a "deadlock in the meet and confer process" over matters that require bargaining and that impasse procedures are available "only when all other attempts at reaching an agreement through meeting and conferring in good faith have been unsuccessful." The common idea in all of these definitions is that the parties have met, considered one another's proposals in good faith, but have come to the point where additional negotiation sessions would no longer be fruitful or productive.

As this case indicates, determining the legitimacy of impasse in disputed cases is not an easy task. PERB commonly examines the parties' negotiations for factors such as "the number and length of negotiating sessions between the parties; 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 reached; and the extent to which unresolved issues remain." (*County of Riverside, supra*, PERB Decision No. 2360-M. p. 14, citing PERB

Regulation 32793, subdivision (c).) Also important is the significance of the issues remaining in dispute and the gulf of the parties' differences on those issues. (*County of Riverside*, citing *The Sacramento Union* (1988) 291 NLRB 552.) Movement on minor issues does not preclude a determination that the parties remain at odds on other more significant matters. (*California State University* (1990) PERB Decision No. 799-H, proposed decision, p. 48, citing *Regents of the University of California* (1985) PERB Decision No. 520-H, p. 17.) On the other hand, the Board in *Kings In-Home Supportive Services Public Authority* (2009) PERB Decision No. 2009-M (*Kings*), found that the employer's declaration of impasse was premature. There, the parties had a series of productive bargaining sessions and both demonstrated a willingness to make economic concessions and display movement. And yet, the employer presented its LBFO unexpectedly and afterwards refused to meet further or discuss its LBFO. The Board concluded that, under those facts, further progress in negotiations was still reasonably possible. (*Id.* at p. 10.)

In the present case, the negotiating teams met 14 times and began exchanging proposals in late August 2011. During that time, the County made eight proposals and reduced the amount in salary concessions it sought from Local 521 represented employees. By November 10, 2011, the County removed several of its non-economic proposals, as Local 521 requested. Local 521 made eight proposals of its own, but the parties were not close to agreement on any of the County's asserted priorities for those negotiations. Despite Local 521's assertions to the contrary, the record shows that the parties discussed these proposal at least to the point where it was clear that the parties would not see eye-to-eye. (See *Alameda*, *supra*, PERB Decision No. 1824-M, warning letter, p. 7.)

During the hearing, Abshere admitted that Local 521 took major issue with some of the County's non-economic proposals, such as the proposal to eliminate the SWAP program or the DCSS attendance policy. Abshere said that he made it "very clear" to the County that Local 521 "wasn't going to give up members' rights they'd fought for years to get into their MOU[,]" in order to satisfy the County's interest in having more managerial discretion on those issues.

One unusual aspect to the negotiations in this case is that, when the County presented its LBFO on November 10, 2011, Pinheiro unambiguously stated that the County was not declaring impasse at the time. Yet, on December 1, 2011, with no intervening meetings or proposals exchanged, Pinheiro officially declared impasse. Pinheiro explained this apparent anomaly at hearing by stating that, although the County's negotiators felt that the parties remained very far apart when it presented its LBFO, they did not declare impasse at the time because they hoped for some kind of response from Local 521. Pinheiro said "we were hopeful that, with an LBFO presented to SEIU, that perhaps they would modify their proposal to where it would get enough traction to where we could present to our board or at least to my principals, to where it could move further along the chain." Unlike in *Kings*, *supra*, PERB Decision No. 2009-M, Pinheiro informed Local 521 that it remained open to reviewing any new proposals from Local 521. However, Pinheiro noted that no one from Local 521 ever gave any indication at that point that it would agree to anything greater than the 2 percent salary concession it had proposed for most unit members.[20] Pinheiro and Abshere both

[20] Local 521's latest proposal also included furloughs, but it is undisputed that the County had the authority under its personnel rules (not submitted for the record) to initiate furloughs unilaterally without bargaining.

testified that Local 521 expressed its adamant opposition to some of the County's non-economic proposals.

Local 521 argues in its brief that it had additional proposals at the ready if the parties ever resumed negotiations. However, there was no evidence that Local 521 ever communicated the substance of those proposals to the County. This is true even though the County requested a counter offer to its LBFO multiple times in November 2011. Nor did Local 521 ever communicate its willingness to move from its position on key disputed issues such as salary concessions, new retirement tiers, and changes to the SWAP and DCSS attendance policies. One party's expression that it still had "room to move" does not, by itself, prevent a finding that the parties have reached bona fide impasse. (*Kings*, *supra*, PERB Decision No. 2009-M, pp. 11-12, citing *City & County of San Francisco* (2007) PERB Decision No. 1890-M.) One party must demonstrate an actual and significant change in bargaining position. (*State of California (Department of Personnel Administration)* (2010) PERB Decision No. 2102-S (*DPA*), proposed decision, pp. 8-9.) One side's request for additional meetings, unaccompanied by an explanation of which areas that the party foresees future concessions does not break a lawful and genuine impasse. (*Id.*, citing *TruServe Corp. v. NLRB* (D.C. Cir. 2001) 254 F.3d 1105, p. 1117.) Even though there was some small possibility that Local 521's membership would vote to ratify the LBFO, by the time the election was underway, Local 521's negotiators were clearly and unambiguously advocating against ratification. For all these reasons, it is concluded that the County had a reasonable and good faith belief that the parties were not making any additional progress in negotiations. It

follows that the parties were at a bona fide impasse on December 1, 2011, when the County declared impasse.[21]

C. The County's Conduct Immediately After Declaring Impasse

Local 521 also claims that the County's actions after it declared impasse demonstrated bad faith or otherwise constitutes violations of the duty to bargain in good faith. Local 521 accuses the County of failing to explain its decision to present the LBFO to its Board of Supervisors on December 6, 2011, approving the LBFO in order to avoid the effects of AB 646 and unlawfully approving the LBFO before Local 521 completed its membership ratification vote.

1. The County's Alleged Failure to Explain its Decision to Present its LBFO to the County's Board of Supervisors on December 6, 2011

The PERB complaint alleges that the County never explained its decision to place unilateral implementation of its LBFO on the Board of Supervisors' December 6, 2011, agenda. This allegation is not supported by the record. Around a week after presenting the LBFO, on November 18, 2011, Pinheiro informed Local 521 by letter that the County planned on submitting its LBFO for Board of Supervisors approval on December 6, 2011. Three days later, on November 21, 2011, Pinheiro sent a second letter explaining that, in order to retain the LBFO's December 12, 2011 effective date, the County was required to publicly agendize the item in compliance with public notice laws beforehand. The record further shows that the

[21] Local 521 also argues that the December 1, 2011 declaration of impasse was premature because its members indicated a willingness to accept the County's healthcare costs proposal. This argument is unpersuasive. Local 521 did not express its willingness to accept that proposal until after December 1, 2011. Accordingly, Local 521's decision has no impact on whether the parties were genuinely at impasse on December 1, 2011. In addition, accepting the County's healthcare proposal did not change the fact that significant differences remained regarding the salary concessions, new retirement tiers, and the County's non-economic proposals.

Board of Supervisors meets regularly on Tuesdays and that Tuesday, December 6, 2011, was the last scheduled Board of Supervisors meeting in advance of December 12, 2011. Under these circumstances, the allegation that the County failed to explain its decision to agendize the LBFO for the December 6, 2011 meeting is unsupported by the record.

In its closing briefs, Local 521 argues that scheduling the Board of Supervisors' vote for December 6, 2011, was also evidence of bad faith. It correctly points out that it would have been possible for the County to have scheduled implementation on December 13, 2011, and still maintained the December 12, 2011 effective date for the LBFO. This assertion, although true, does not change the dynamics of the parties' negotiations at the time. Local 521 did not request that the County delay implementation until December 13, 2011. Nor did it provide the County's negotiators with any reason for postponing the Board of Supervisors vote until December 13, 2011. There was no other showing that doing so would have brought the parties closer to agreement. Without any request or reason to postpone, it is not concluded that the decision to select the December 6, 2011, date demonstrates bad faith.

Local 521 further claims the County unreasonably determined that December 12, 2011, was an "unmovable" deadline for implementing its LBFO. As explained above, one side's attempt to set artificial deadlines or dictate the pace of negotiations may indicate bad faith depending on its willingness to engage in negotiations fully, the quality of negotiations, and the legitimacy of the reasons for the deadline. (*Solano*, *supra*, PERB Decision No. 2402-M.) In this case, there is nothing inherently unreasonable about the December 12, 2011 effective date of the LBFO. That date was more than a month after the County presented the LBFO to Local 521. The date was, moreover, consistent with the way the County had set the effective date in prior proposals. Pinheiro initially said that the County used the expiration of the MOUs

as the effective date of its proposals. When it became clear that that date would not be met, they moved the date to mid-November. When that date was not met either, the County selected mid-December. There was also insufficient evidence that the County was inflexible about the effective date. In the letters referenced above, dated November 18 and 21, 2011, Pinheiro stated that the County remained willing to consider any new proposals from Local 521. Both Bandy and Pinheiro echoed that sentiment at hearing, testifying that the County's negotiators were hopeful that Local 521 would counter the LBFO and were willing to resume negotiations if something spurred further movement at the table. Local 521 responded by holding a ratification vote over the course of five weeks and recommending that its members reject the LBFO. During this time, Local 521 did not express any willingness to shift its position on the most highly disputed issues. Based on these facts, the County had no reason to believe that delaying implementation of the LBFO would have improved the chance to reach agreement. Accordingly, the County's decision to agendize approval of its LBFO on December 6, 2011, to be effective on December 12, 2011, was not evidence of bad faith.

2. The Board of Supervisors' Decision to Impose the LBFO Before Local 521 Completed its Ratification Vote

Local 521 also maintains that the Board of Supervisors' December 6, 2011, decision to authorize unilateral implementation of the LBFO before Local 521 completed its ratification vote indicates bad faith. Five days before the vote, Local 521 sent the Supervisors a letter urging them to delay approval until after the membership vote, asserting that it had a counter offer for the County's negotiators should the parties resume negotiations.

As explained above, employers may only unilaterally impose negotiable terms and conditions on represented employees at the end of bargaining when the parties have reached a

lawful and bona fide impasse. (*County of Riverside, supra*, PERB Decision No. 2360-M, p. 11.) But once legitimate impasse has been reached, the parties' bargaining obligations are suspended and the employer may implement changes that were reasonably comprehended to be within its last, best, and final offer. (*Rowland, supra*, PERB Decision No. 1053, pp. 6-7; see also *Saddleback Valley Unified School District* (2013) PERB Decision No. 2333 (*Saddleback*), proposed decision, p. 17.) However, "impasse is a fragile state of affairs and may be broken by a change in circumstances that suggest that attempts to adjust differences may no longer be futile." (*PERB v. Modesto City Schools District* (1982) 136 Cal.App.3d 881 (*Modesto*), p. 899.) Once impasse is broken, the duty to bargain revives. (*Ibid.*; see also *Stanislaus Consolidated Fire Protection District* (2012) PERB Decision No. 2231-M (*Stanislaus*), p. 13, fn. 14.) If one party makes significant concessions post-impasse, the other party must make a good faith effort to determine whether the concessions have the potential for reaching agreement through further negotiation sessions. (*Modesto City Schools, supra*, PERB Decision No. 291, p. 39, citing *NLRB v. Webb Furniture* (4th Cir. 1966) 366 F.2d 315; see also *Saddleback*, proposed decision, p. 13.) During this time:

> either party is free to conclude that it has made all the concessions it can and that further negotiations are futile. Where this determination is reached in good faith, NLRA-type impasse exists. The parties may decline further requests to bargain and may implement policies reasonably comprehended within previous offers made and negotiated.

(*Modesto City Schools*, p. 39.)

In this case, it has already been concluded that the parties were at a bona fide impasse on December 1, 2011. Both Pinheiro and Bandy believed that Local 521 scheduled its membership ratification vote solely to delay the implementation of the County's proposed concessions. Regardless of the accuracy of this assessment, the circumstances of the parties'

negotiations remained the same.[22] By the time the Board of Supervisors voted on imposing the LBFO, Local 521 had not made a new proposal for more than a month. Although Local 521 had never officially informed the County's negotiators whether it was accepting or rejecting the LBFO, it produced flyers for its members recommending against ratification. By then, Local 521 had not given the County's negotiators any indication that would be willing to make new concessions. Local 521 did inform the Supervisors that it was prepared to counter the LBFO, but provided no actual details of its offer that might lead one to conclude that a deal was possible.[23] While it is true that the membership vote presented some possibility for agreement, it was clear that Local 521's leadership opposed ratification. In light of these facts, the County had no reasonable basis from which to conclude either that the membership vote would have broken impasse or that a new proposal that would change the dynamics at the negotiations table was coming. As stated above, the duty to bargain in good faith does not obligate one party to adhere to the others' internal negotiations timelines. (*Folsom-Cordova, supra*, PERB Decision No. 1712, proposed decision, p. 29; *Lawrence Livermore*, *supra*, PERB Decision No. 1119-H, warning letter, p. 3.) Applying that reasoning here, the County was not obligated to abide by Local 521's internal time table absent some showing that the election or its aftermath carried with it some promise of generating progress in negotiations. That

[22] It is noteworthy that Pinheiro offered assistance in expediting the voting process as early as November 21, 2011, around a week before voting commenced. Local 521 did not explain why it declined the County's offer. In subsequent communications, Abshere apparently ignored the Pinheiro's offer, asserting that the County had not helped in setting up the election.

[23] Local 521 is not faulted for failing to communicate the terms of a counter offer directly to the Board of Supervisors, as doing so may have constituted an unlawful bypass of the County's chosen negotiators. (See e.g., *San Ramon Valley Unified School District* (1982) PERB Decision No. 230, p. 16.) Local 521's failure to detail its proposal is raised here only to highlight the fact that it never communicated the terms of its counter offer to anyone at the County.

showing was not made here. Accordingly, the County's decision to approve implementation of the LBFO before the membership election ended was not evidence of bad faith.

3. The County's Alleged Effort to Avoid Factfinding

Local 521 contends that the County rushed to impasse in order to avoid the possibility of mandatory factfinding pursuant to amendments to the MMBA contained in AB 646.[24] Its primary support for this position was statements allegedly made by County Board of Supervisor Perea. Evidence about Perea's alleged statements was not taken at hearing based on the ALJ's ruling during the hearing that testimony concerning the Board of Supervisors' deliberative process was not admissible to demonstrate their intent in a legislative act and that the comments of individual Supervisors in public meetings were not indicative of the County's intent. In essence, Local 521 is asking the ALJ to reconsider his earlier decision. There are two ways for an aggrieved party to obtain review of an ALJ's ruling on a motion. First, the party may file a request for interlocutory appeal to the PERB Board pursuant to PERB Regulation 32000. (See PERB Regulation 32190, subd. (f).) The Board only will not accept an appeal of a PERB agent's ruling unless the agent joins in the request. (PERB Regulation 32000.) Second, the party may challenge the ALJ's ruling by filing exceptions to the ALJ's proposed decision after it issues. (*State of California (Department of Corrections & Rehabilitation)* (2010) PERB Decision No. 2136-S, pp. 7-8; see also PERB Regulation 32300.) In this case, Local 521 did request the opportunity to file an interlocutory appeal to the Board. The ALJ declined to join in that request and the matter was not submitted to the Board. At this

[24] AB 646 amended the MMBA to introduce advisory factfinding as a procedure for resolving bargaining impasses before an employer may implement its LBFO. (*County of Contra Costa* (2014) PERB Order No. Ad-410-M, pp. 28-30.) These amendments to the MMBA took effect on January 1, 2012. (*City of Santa Rosa* (2013) PERB Decision No. 2308-M (*Santa Rosa*), proposed decision, p. 2, fn. 2.)

point, Local 521's sole remaining opportunity to seek review of the ALJ's decision is through exceptions to the Board.[25]

Even if the ALJ were to reconsider his earlier decisions about admitting evidence of Supervisors' deliberative processes, his conclusions would remain the same. Local 521 cites two cases in support of its position that evidence about Supervisors' statements should have been admitted at hearing. First, it cites to *Carlsbad Unified School District* (1989) PERB Decision No. 778 (*Carlsbad*), where an employer refused to have members of its governing board testify about discussion taking place in a closed session board meeting. PERB held in that case that the confidentiality rules regarding closed session meetings did not shield the employer from its burden of providing a non-retaliatory reason for taking action against the charging party. PERB concluded that the employer still had the burden to explain its otherwise contradictory justifications for the action in question. (*Id.* at pp. 18-19.)[26] The case does not, as Local 521 suggests, stand for the principle that the employer should have submitted evidence of the employer's deliberative process. Rather, the issue was whether the employer satisfied its burden of proof based on the overall record that was presented.

Local 521 also relies upon *County of Riverside*, *supra*, PERB Decision No. 2119-M. There, the Board found that public statements made from three of a county's five supervisors could reasonably be interpreted as coercive and discouraging union organizing activities. (*Id.* at pp. 21-23.) The county's human resource director and chief executive officer also made

[25] PERB Regulation 32410 allows party's to a decision of the Board itself to request reconsideration under extraordinary circumstances. However, the Board recently found that the reconsideration procedure in PERB Regulation 32410 "applies only to Board decisions arising out of exceptions to a proposed decision by an ALJ after a formal hearing." (*Berkeley Federation of Teachers, Local 1078 (Crowell)* (2015) PERB Decision No. 2405a, p. 14.)

[26] PERB later found no unlawful retaliation in *Carlsbad*, *supra*, PERB Decision No. 778, for reasons unrelated to the above discussion.

similar statements. (*Id.* at pp. 9-10.) Unlike the present situation, the comments in that case were not about a particular legislative act or decision. Instead, the supervisors in that case were responding to comments from the public about whether the organizing campaign was a good idea in the first place. (*Ibid.*) The case is therefore distinguishable from *County of Los Angeles, supra*, 13 Cal.3d 721, in that *County of Riverside* did not concern itself with the mental process behind any legislative enactment. For that reason, the reasoning in that decision does not apply here.

Local 521 asserts that other evidence proves that the County was rushed to impasse in order to avoid the factfinding provisions in AB 646. It references a December 13, 2011, Board of Supervisors agenda approving imposing the County's LBFO on a different bargaining unit (Unit 30) after that unit's representative made only one offer, refused to meet, and refused to counter the County's proposals. Local 521 also notes that the County did not impose new terms upon its unrepresented employees until January 2012 and that Bandy admitted that the County could have approved the LBFO concerning Local 521's bargaining units on December 13, 2011, to be effective on December 12, 2011. These facts, even if true, are insufficient to establish a rush to impasse. As already stated above, after the County presented the LBFO, Local 521's negotiators refused to state whether it was either accepting the LBFO or countering the offer. Local 521 never shared the details of any counter proposal, despite the multiple requests to see it. Under these circumstances and as stated above, the County did not appear to have any reasonable belief that moving its original implementation schedule would bring the parties closer to agreement.

II. The County's Unlawful Unilateral Changes

In addition to its claims about the County's conduct during negotiations, Local 521 also accuses the County of enacting three unlawful unilateral policy changes. Specifically, Local 521 asserts that two parts of the LBFO could not be lawfully imposed on employees unilaterally. It also alleges a unilateral change to sick leave policies as they existed after the LBFO was imposed. Each of the alleged unlawful unilateral changes is discussed below.

A. The Unilateral Implementation of a New Retirement Tier

Local 521 asserts that laws governing public pensions prohibit the County from implanting the new retirement tiers in its LBFO without Local 521's agreement. It references Government Code section 31485.9, subdivision (b), which states:

> No resolution, ordinance, contract, or contract amendment under this chapter adopted on or after January 1, 2004, may provide different retirement benefits for any subgroup of general members within a membership classification, including, but not limited to, bargaining units or unrepresented groups, unless benefits provided by statute for members hired on or after the date specified in the resolution are adopted by the county or district governing board, by resolution adopted by majority vote, pursuant to a memorandum of understanding made under the Meyers-Milias-Brown Act (Chapter 10 (commencing with Section 3500) of Division 4 of Title 2). All nonrepresented employees within similar job classifications as employees in a bargaining unit subject to a memorandum of understanding, or supervisors and managers thereof, shall be subject to the same formula for the calculation of retirement benefits applicable to the employees in the bargaining unit. No retirement contract amendment may be imposed by the employer in absence of a memorandum of understanding under the Meyers-Milias-Brown Act.

(Emphasis added.)

Local 521 interprets the above language as creating a statutory guarantee that covered employers can only create new retirement benefit tiers for represented employees through

agreement. It asserts that the County's unilateral action here constituted a waiver of employees' statutory rights under Government Code section 31485.9, subdivision (b). In doing so, Local 521 analogizes the present case to *Rowland*, *supra*, PERB Decision No. 1053, where the Board found that an employer could not unilaterally impose a waiver of the union's statutory right to bargain over negotiable matters. (*Id.* at p. 10.)

It appears that the text of Government Code section 31485.9, subdivision (b), places limits on when county employers may alter the retirement benefits for subsets of its general employees. However, this aspect of the record was not fully developed at hearing. In *Pinole*, *supra*, PERB Decision No. 2288-M, a union alleged that State pension laws prohibited the respondent city from insisting to a negotiations impasse that unit members make pension contributions in excess of certain set limits. As in this case, the union in *Pinole* argued that the employer's actions constituted a waiver of employees' statutory rights under State pension laws. (*Id.* at p. 11.) The Board described the union's argument as "unique," in that there was "no guiding PERB precedent and the legal issues involved are technical and complex issues of pension laws outside PERB's normal jurisdiction[.]" (*Id.* at pp. 12-13.) Although the Board directed that the PERB Office of the General Counsel issue a complaint on the union's theory, the Board also expressed reluctance in interpreting pension laws without a full record of how those laws were applied. It said that it would "rely on the parties to more fully make their case with evidence of legislative history, practices throughout the state and other means." (*Id.* at p. 11.)

Here, neither party provided any information about the application of Government Code section 31485.9, subdivision (b), through either evidence or stipulation. Nor did the parties request that PERB take notice of the legislative history of that section or any other

statute. Finally, the parties did not cite to or in any other way reference any case, treatise, law review article, or other publication interpreting Government Code section 31485.9, subdivision (b). As in *Pinole*, *supra*, PERB Decision No. 2288-M, there is an insufficient record from which to adjudicate this claim. Moreover, even if one assumed that Local 521's interpretation of the statute in question was correct, the County's actions would violate sections of the Government Code other than the MMBA that PERB does not enforce. As discussed in greater detail above, the duty to bargain in good faith does not prohibit employers from imposing terms reasonably comprehended within their last, best, and final offer after reaching a bona fide impasse in negotiations. (*Rowland*, *supra*, PERB Decision No. 1053, pp. 6-7.) If implementation of new retirement tiers after impasse violates some other section of the Government Code, PERB lacks the jurisdiction to adjudicate that violation. Accordingly, this claim is dismissed.

B. The Unilateral Change to Overtime Policies

The PERB complaint alleges that the County unlawfully modified the number of hours correctional officers must work in order to qualify for overtime. Local 521 did not address this allegation in either its closing brief or its reply brief. Based on statements made during the hearing, it appears as if the basis for this claim is that the imposed terms for 84 hour assignments under the Jail Work Redesign Plan constituted a waiver of employees' right to overtime under laws external to the MMBA. In some cases, insisting to impasse on and/or unilaterally imposing terms which violate an immutable standard under external law may violate the duty to bargain in good faith. (See e.g., *San Jose*, *supra*, PERB Decision No. 2341-M, p. 49.) However, in this case, Local 521 did not provide enough detail to support this claim. It did not, for example, elaborate upon what overtime rights it believes were

waived. Nor did it cite to any external laws governing overtime or establish whether the correctional officers working the 84 hours shifts qualify for overtime protection laws. It is also worth noting that the County never actually proposed or imposed any changes to employees' entitlement to overtime. All of its proposals for changes to the Jail Work Redesign Plan left the overtime provisions at status quo. For this reason, this allegation was not proven at hearing. This claim of an unlawful unilateral change is therefore dismissed.

C. The Unilateral Implementation of a New Physician's Verification Policy

Local 521 alleges that the County unilaterally implemented a new policy requiring unit members to submit a physician's verification for medical absences. Unilateral changes to negotiable subjects are "per se" violations of the duty to bargain and violate MMBA section 3506.5, subdivision (c), and PERB Regulation 32603, subdivision (c). (*City of Livermore* (2014) PERB Decision No. 2396-M, p. 20.) To establish a prima facie case for an unlawful unilateral change, the charging party must show that: (1) the employer took action to change existing policy; (2) the policy change concerned a matter within the scope of representation; (3) the action was taken without giving the exclusive representative notice or opportunity to bargain over the change; and (4) the change has a generalized effect or continuing impact on terms and conditions of employment. (*Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262, p. 9, citing *Grant Joint Union High School District* (1982) PERB Decision No. 196, p. 10; *Walnut Valley Unified School District* (1981) PERB Decision No. 160, p. 5; see also *Vernon Fire Fighters, Local 2312 v. City of Vernon* (1980) 107 Cal.App.3d 802, pp. 822-823.)

In this case, Local 521's allegation arises from the County's December 23, 2011 notice to employees in Units 2, 12, and 36 that, due to ongoing strike rumors, employees would need

to provide a physician's verification for any claimed medical leave. In *Chico Unified School District* (1983) PERB Decision No. 286 (*Chico*), the parties' existing sick leave policy allowed the employer to demand a doctor's verification "when reasonably required." (*Id.* at p. 13.) The Board concluded that the language of the policy gave the employer flexibility to require verification when it felt it was appropriate and that a sick-out by a large number of employees was the exact type of situation where verification would be reasonably required. (*Id.* at pp. 13-14.)

As discussed above, the record here shows that the County was lawfully permitted to implement its LBFO after reaching genuine impasse in its successor MOU negotiations with Local 521. The implemented terms included rescinding previously applicable rules concerning physician verification of absences in favor of the process included in County SR 610.34. For purposes of this argument, Local 521 appears to concede that the medical verification provisions in the MOU were no longer in effect after the County's imposed terms took effect and that, in their absence, County SR 610.34 governed employees' use of medical leave. As in *Chico*, *supra*, PERB Decision No. 286, SR 610.34 specifies that medical leave may be used for any bona fide illness or injury or for medical, dental, mental or eye-care consultations. The rule further allows County department heads to require physician's verification of medical absences "in any instance where deemed warranted[.]"

Local 521 claims that the December 23, 2011 notice was unlawful because the physician verification provisions of SR 610.34 only apply to specific employees who have a history of abusing sick leave. It further contends that the County can only require verification on a case-by-case, individual basis. Neither of these assertions were proven at hearing. When interpreting any legislative act, one turns first to the plain language of the enactment. Where

the language is clear and unambiguous, no extrinsic evidence is necessary. (*Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, p. 340; *Santa Rosa, supra*, PERB Decision No. 2308-M, proposed decision, p. 9.) Here, nothing in the plain reading of SR 610.34 restricts the County's ability to require medical verification to instances of prior abuse. Nor does the resolution state that the verification requirement can only be used on an individual basis. To the contrary, SR 610.34 allows the County latitude in deciding to require verification whenever it decides it is warranted. Even if one examined extrinsic evidence, Local 521 does not assert any other basis supporting its interpretation of the resolution. Local 521 does not dispute that its members authorized a strike and that it was engaged in strike preparations at the time. The County's actions appear to have been a lawful exercise of its authority under SR 610.34 based on existing strike rumors. Under the circumstances, Local 521 has not established the first element of the unilateral change analysis, i.e., that a change in policy occurred. This claim of an unlawful unilateral change is therefore dismissed.

III. Alleged Interference With the Right to Strike

Local 521 also asserts that the December 23, 2011 notice interfered with employees' protected right to strike. MMBA section 3502 states in relevant part: "public employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." Public agencies may not unreasonably interfere with protected rights. (MMBA, § 3506; PERB Regulation 32603 subd. (a).) The test for whether a respondent has interfered with employee rights under the MMBA does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. (*City &*

County of San Francisco (2011) PERB Decision No. 2206-M, warning letter, p. 3.) The courts have described the standard as follows:

> (1) That employees were engaged in protected activity; (2) that the employer engaged in conduct which tends to interfere with, restrain or coerce employees in the exercise of those activities, and (3) that employer's conduct was not justified by legitimate business reasons.

(*Public Employees Assn. of Tulare County, Inc. v. Board of Supervisors of Tulare County* (1985) 167 Cal.App.3d 797, p. 807; *Carmichael Recreation & Park District* (2008) PERB Decision No. 1953-M, citing *Carlsbad, supra*, PERB Decision No. 89, other citations omitted.) If the charging party establishes that the employer's conduct interferes or tends to interfere with the exercise of protected rights, then the burden shifts to the employer to produce a legitimate reason for its conduct. (*Stanislaus, supra*, PERB Decision No. 2231-M, p. 22.)

In *Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M, the Board acknowledged that employees covered by the MMBA have a "basic right to strike" unless it is shown that the strike poses a substantial and imminent threat to public health and safety. (*Id.* at p. 25, citing *County Sanitation Dist. No. 2 of Los Angeles v. Los Angeles County Employees' Assn.* (1985) 38 Cal.3d 564, pp. 585-586; *City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, p. 606.) At the same time, the Board has also found that an employer facing a potential strike "unquestionably has the right to prepare for [the] strike by taking prudent actions which do not violate the law." (*Rio Hondo Community College District* (1983) PERB Decision No. 292 (*Rio Hondo*), pp. 10-11, citing *Betts Cadillac Olds* (1951) 96 NLRB 268, p. 286, *Quaker State Oil Refining Corp. v. NLRB* (1958) 121 NLRB 334.) Among the lawful actions an employer may take include hiring substitutes and refusing to pay striking workers for time not worked. (*Rio Hondo*, pp. 10-11,

citing *NLRB v. McKay Radio & Telegraph Co.* (1938) 304 U.S. 333, *Simplex Wire & Cable Co.* (1979) 245 NLRB 543.)[27]

Here, the County's December 23, 2011 notice did not expressly prohibit or otherwise discourage employees from any strike activity. It merely stated, accurately, that employees on strike were not eligible to be paid for that time and that the County would require employees claiming medical absences during the strike period to provide verification of the medical reason. Under these circumstances, Local 521 has not demonstrated that the notice caused some harm to employees' rights.

Even if it were true that the notice caused "slight harm" to the right to strike, the County was justified in taking some precautions ahead of the impending strike. This includes warning employees of existing sick leave policies and informing them that striking employees were not entitled to their pay. (See *Rio Hondo, supra*, PERB Decision No. 292, pp. 10-11; *Chico, supra*, PERB Decision No. 286, pp. 13-14.) On balance, it is not concluded that the County's December 23, 2011 notice unlawfully interfered with protected rights. Local 521's claim of unlawful interference with protected rights is dismissed.

IV. The Duty to Resume Negotiations

Local 521's final argument is that the County had an obligation to return to negotiations after Local 521 stated that it had a new counter proposal to the County's implemented LBFO. As explained in greater detail above, a lawful and legitimate impasse in negotiations suspends the parties' bargaining obligations and either party may refuse to meet further until circumstances change. (*Rowland, supra*, PERB Decision No. 1053, pp. 6-7.) Impasse may be broken by changed circumstances demonstrating that further meetings may no longer be futile.

[27] *Rio Hondo, supra*, PERB Decision No. 292 cited *Simplex Wire, supra*, 245 NLRB 543 at its Labor Relations Reference Manual citation, i.e., 102 LRRM 1452.

(*Modesto*, *supra*, 136 Cal.App.3d at p. 899.) For example, if one party makes a significant new proposal, the other party must consider it in good faith and determine whether the concessions have the potential for reaching agreement. (*Modesto City Schools*, *supra*, PERB Decision No. 291, p. 39.) In *Modesto City Schools*, the Board found that an employer violated the duty to bargain in good faith after it failed to review a neutral factfinders' report with recommendations for resolving their impasse and also refused to meet with the union and consider newly proposed concessions. (*Id.* at p. 44.) The concessions in that case included acceding to the employer's position on the length of the agreement, minimum class sizes, and transfer policies, as well as other proposals recommended by the factfinding report. (*Id.* at pp. 39-40.) In contrast, in *Charter Oak*, *supra*, PERB Decision No. 873, the Board held that an employer was not obligated to physically meet again over the charging party's proposal to accept a factfinding panel's recommendations because the employer had already reviewed and rejected those recommendations in a written dissent to the panel's report. (*Id.* at pp. 11-12.) In *Saddleback*, *supra*, PERB Decision No. 2333, PERB concluded that the employer did not have a duty to resume negotiations because none of the union's post-impasse proposals approached the level of monetary concessions the employer sought to achieve. (*Id.* at proposed decision, pp. 14-17.)

In this case, Local 521 asserts that it "continuously informed" the County that it had a new offer with substantial movement from its last proposal. This assertion was not supported by the record. Local 521's first written communication about the substance of any counter offer to the LBFO was made in a letter dated December 19, 2011. In that letter, Abshere informed Pinheiro by letter that Local 521 had a counter offer prepared and was willing to accept the County's healthcare costs proposal. Abshere did not detail any other aspect of

Local 521's counter offer. In subsequent communications between the parties' lawyers, the County requested the details of Local 521's proposal to determine whether it changed the current circumstances or whether it would provide a basis for agreement. Local 521 refused to "bargain via email" and demanded a face-to-face meeting to discuss the proposal. Local 521 did not agree to share its proposal with the County and the County refused to meet further.

As in *Charter Oak, supra*, PERB Decision No. 873, and *Saddleback, supra*, PERB Decision No. 2333, the parties' post-impasse conduct did not demonstrate that further negotiations would be productive. It is true that Local 521 said that its members agreed to the County's proposal to freeze its healthcare costs to the levels established in the prior MOUs, but Local 521 had already made a similar proposal earlier in bargaining. In addition, Local 521 gave no indication of any willingness to move from its position on the more heavily contested issues such as salary concessions, retirement costs, and the County's proposed changes to scheduling and attendance policies. At that point in the parties' negotiations, the parties salary proposals were still roughly 7 percent apart. In addition, the parties could not agree on a way for the County to reduce its retirement costs and Local 521 had not presented any counter offers regarding the County's attendance and scheduling proposals. Local 521 was free to maintain its position on these issues, but doing so did not bring the parties any closer to agreement. Furthermore, Abshere's only explanation for declining to share the details if Local 521's proposal in advance of any meeting was that doing so would be "very weird." Even if one concluded that Local 521 could lawfully insist on only discussing its proposal in a face-to-face meeting, the County was also free to determine whether future meetings would be productive based on the information it had available. As stated above, merely stating that there was still "room to move," without an indication of areas where actual progress can be achieved

by further meetings is not sufficient to negate impasse. (*Kings*, *supra*, PERB Decision No. 2009-M, pp. 11-12; *DPA*, *supra*, PERB Decision No. 2102-S, proposed decision, pp. 8-9.) Without any information suggesting that movement was possible on the core issues in dispute, the County's decision that further meetings would not be productive was reasonable.

Local 521 asserts that the duty to meet and confer in good faith requires face-to-face meetings. It cites to MMBA section 3505 which states, in relevant part:

> "Meet and confer in good faith" means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation[.]

(Emphasis added.)

This argument is unpersuasive for at least two reasons. First, it is not concluded that the parties' bargaining obligation requires each and every negotiation session to be live and in person. Nor does it require face-to-face meetings, in every instance, upon demand. In this case, the parties' negotiators met in person 14 times between August and November 2011 and held other discussions via letter and email. This satisfies the requirements of MMBA section 3505.

Second, as explained above, the County's obligation to meet and confer under MMBA section 3505 was suspended after it lawfully declared impasse on December 1, 2011. Negotiations remained suspended when Local 521 demanded additional in person meetings later that month. (*Rowland*, *supra*, PERB Decision No. 1053, pp. 6-7.) Nothing in the Local 521's communications during this time was sufficient to break the parties' impasse and reinstate the duty to meet and confer in good faith. Accordingly, even if the duty to meet and

confer under MMBA section 3505 required the County to meet in person, the parties' bargaining obligations were suspended at the time Local 521 made the request. For that reason, the County could lawfully refuse to meet until something dislodged the impasse. Local 521 did not demonstrate that impasse was broken. Therefore, this allegation is dismissed.

V. Conclusion

The record here shows that the parties were engaged in highly contentious hard-bargaining. From the beginning of negotiations until the final meeting, 14 sessions later, the parties remained far apart on core issues such as the appropriate level of salary reductions, how to reduce the County's ongoing retirement costs, and whether there should be changes to scheduling and attendance policies. These negotiations, though contentious, did not have the hallmarks of bad faith. The County was willing to meet as frequently as possible, made significant movement on important disputed issues, withdrew some contentious proposals, provided requested information it possessed, considered Local 521's ideas and proposals, and ultimately tried to reach a deal consistent with its goals as outlined from the outset of bargaining. When viewed together as a whole, the County's actions up until it declared impasse do not indicate that the County lacked the subjective good faith necessary to reach an agreement. For many of the same reasons, the County also reasonably believed that no further progress was possible in its negotiations with Local 521. There was a noticeable lack of progress for all of the most disputed issues in bargaining. By November 2011, Local 521 gave no indication that it intended on making proposals that would bring the parties closer to agreement. Even when Local 521 announced that it had a counter to the LBFO, it declined to

share that proposal with the County's negotiators or explain how the offer might reinvigorate the stalled negotiations.

The record furthermore shows that the County implemented terms that were reasonably comprehended within its LBFO after the parties reached impasse. There was no showing that the County implemented terms that either were not explored in bargaining or violated the MMBA. Based on the record presented, it is not concluded that the County's conduct during negotiations, the terms it imposed on unit members, or its refusal to hold further meetings violated the duty to bargain in good faith.

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-768-M, *Service Employees International Union, Local 521 v. County of Fresno*, are hereby DISMISSED.

Right to Appeal

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
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).)