

CLIENT NEWS BRIEF

PERB Clarifies Parameters on Duty to Bargain Mandatory Subjects in Labor Negotiations

The Public Employment Relations Board (PERB) recently held that an employer may not use a "Side Letter" proposal to postpone negotiations on certain mandatory subjects of bargaining until after the parties reach agreement on other issues. According to PERB, such tactics amount to piecemeal bargaining and violate the duty to bargain.

In *American Federation of State, County and Municipal Employees, Local 101 ("AFSCME") v. City of San Jose ("City")* (2013) PERB Decision No. 2341-M, AFSCME filed an unfair practice charge alleging that the City bargained in bad faith through surface bargaining and by adopting a "rush to impasse" strategy. Facing a budget shortfall in 2011, the City sought a ten percent reduction in total employee compensation, including benefits, healthcare, and retirement costs. In the course of bargaining, the City raised the subject of retirement reform but then sought to defer negotiations on retirement benefits until after a deal had been reached on a salary reduction. The City proposed this through a "Side Letter," tabling negotiations on retirement reform to an unspecified future date, even though it constituted one third of the City's proposed cuts. AFSCME insisted on including retirement reforms in the negotiations, but the City refused. After twice declaring an impasse, the City imposed its last, best, and final offer (LBFO) which included a 10 percent reduction in overall employee compensation.

A PERB Regional Attorney initially dismissed the AFSCME charge, stating that existing case law allows a party to insist to impasse on a proposal that may not be acceptable to the other party. The Regional Attorney also concluded that the City's Side Letter proposal – effectively deferring negotiations on the matter of retirement reform – could be lawfully bargained to impasse and then implemented after exhausting the impasse process.

On appeal, the PERB Board unanimously overturned the PERB Regional Attorney's decision. In its ruling, PERB relied on National Labor Relations Board (NLRB) cases to support its holding that a party cannot refuse to negotiate on mandatory subjects by insisting on a proposal to set those negotiations aside until an indefinite future date. PERB stated that this violated the parties' "mutual obligation" to negotiate, and eliminates "any meaningful role for the bargaining representative." (Emphasis in original, citing *FirstEnergy Generation Corp.* (2012) 358 NLRB No. 96.) While it considered the "totality of circumstances" in the bargaining history, PERB also emphasized that just one indicator of bad faith – such as the City's refusal to bargain retirement reforms – could be sufficient to allege a prima facie case in an egregious case.

PERB therefore reversed the dismissal of the charge and remanded it to the General Counsel's office for a complaint to be issued. This notable PERB decision provides further clarity on the overall duty to bargain and an employer's limits on using the impasse process.

If you have any questions about mandatory subjects of bargaining in labor negotiations, please feel free to contact one of our [eight offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#) or [Twitter](#), or download our [Client News Brief App](#).

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Darren C. Kameya
Senior Counsel and Labor & Employment
Practice Group Co-Chair
Los Angeles Office
dkameya@lozanosmith.com



Teddy K. Miller
Associate
Walnut Creek Office
tmiller@lozanosmith.com



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