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## PERB to Employers: “Bargaining Costs Are Now on the Table as a Remedy”

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On April 26, 2023, the California Public Employment Relations Board (PERB) issued a decision awarding a remedy against an employer that had, up to that point, been largely theoretical: recovery for increased costs incurred from bargaining and other acts of representation related to an employer’s alleged unlawful conduct (bargaining costs). (*City and County of San Francisco* (2023) PERB Decision No. 2858-M.)

Although in recent years, PERB has acknowledged the possibility of this form of remedy (and even in one case, granted a form of it), *City and County of San Francisco* makes it clear that PERB views these sanctions as reasonable and fitting in the right circumstance. This important decision also provides public employers with insight as to when PERB is likely to award these potentially significant costs, and the factors that it will take into consideration in doing so.

### Background

The underlying facts in *City and County of San Francisco* involve the complex interplay between charter city sovereignty and the state law governing public employee relations for cities, counties, special districts, and certain other political subdivisions of the state, known as the Meyers-Milias-Brown Act (MMBA). In simpler terms, this decision concerned an employer’s refusal to negotiate a mandatory subject of bargaining. In sum, during mid-contract negotiations over firearms premium compensation for welfare fraud investigators—an unresolved issue that had carried over from successor negotiations—disagreement arose between the City and County of San Francisco (City) and the union, Operating Engineers Local No. 3 (OE3), about whether the additional compensation should be retroactive. While OE3 proposed retroactive increases, the City firmly held to the position that its charter barred retroactive payments of any kind.

Notably, at the time, the City had recently lost another PERB case in which a different union had challenged the City’s interpretation of its charter as requiring negotiations to be cut off by a specified date. Despite this prior loss, the City held firm to its interpretation of the charter and refused to bargain OE3’s proposal for retroactive pay. Eventually, the City retracted its position and agreed to some retroactive pay, but by that time, OE3 had filed an unfair practice charge against the City for bad faith bargaining.

## PERB's Decision

PERB found that the City had per se failed to bargain in good faith by refusing, for more than three months, to bargain or even consider OE3's proposal for retroactive pay. The City's position was found particularly suspect in light of the prior PERB decision that had directed the City to interpret its charter in conformance with the MMBA, which it had not done, according to PERB. While PERB considered the fact that the City had retracted its initial position and eventually agreed to certain retroactive pay, this did not immunize the City from liability, but rather was considered as a factor in determining the amount that the City was liable to pay.

## The Remedy

To address the City's violations, OE3 sought two types of remedies: (1) attorneys' fees and other litigation costs; and (2) compensation for the increased cost of bargaining and other representation associated with the City's conduct. Premised on its broad authority to determine appropriate remedies, PERB found that, while attorneys' fees were not available in this instance, OE3 was entitled to bargaining costs with interest. In so doing, PERB stated that, unlike attorney's fees, which require a showing that the opposing party pursued a frivolous argument in bad faith, a party seeking bargaining costs merely needs to demonstrate by a preponderance of the evidence that the offending party's conduct caused a harm and that it is reasonably feasible to estimate the financial impact of that harm. In general, such bargaining costs include the expense of outside negotiator(s) used by the union. However, PERB also found that, if after these costs have been awarded, a dispute arises over their value to such a degree that legal counsel for the prevailing party must perform work beyond a first set of declarations and supporting briefing, then attorneys' fees for any further, reasonable time spent effectuating the award, may be awarded, regardless of whether the other party acted frivolously in litigating the award.

As support for such a remedy, PERB cited to a series of its recent opinions which have been slowly building on this concept, largely grounded on prior PERB decisions where attorneys' fees were awarded for work in ancillary matters, such as related litigation in court, and federal precedent. In this instance, PERB determined that bargaining costs were a proper make-whole remedy because the evidence showed that the City's interpretation of the charter had "illegally frustrated negotiations," which imposed extra bargaining costs on OE3.

## Takeaways

*City and County of San Francisco* gives employers a critical inside look into the expanding risk and potential liability from a refusal to bargain subjects within the scope of representation. Although this case dealt with an employer subject to the MMBA, the same remedy could be awarded against a school district, community college district, or other public employer. Indeed, as a general matter, following this decision:

- If a union files an unfair practice charge and is successful, PERB may award bargaining costs in addition to other available remedies.
- These costs are available as long as the union can show that the employer's conduct caused a harm and it is reasonably feasible to estimate the financial impact.
- If the value of the award is unsuccessfully challenged by the employer, PERB may award the union attorneys' fees for a large portion of the work spent defending the award, even if the employer had a good faith basis to challenge the award.

# Client News Brief

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