STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 521, Charging Party, v. COUNTY OF TULARE, Respondent.	Case No. SA-CE-748-M PERB Decision No. 2414-M February 26, 2015

Appearances: Weinberg, Roger & Rosenfeld by Kerianne R. Steele, Attorney, for Service Employees International Union, Local 521; Renne, Sloan, Holtzman & Sakai by Erich W. Shiners, Attorney, for County of Tulare.

Before Huguenin, Winslow and Banks, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Service Employees International Union, Local 521 (SEIU) to the proposed decision of an administrative law judge (ALJ). The complaint alleged that the County of Tulare (Tulare) violated its duty to bargain, in violation of the Meyers-Milias-Brown Act (MMBA) and PERB Regulations,[1] by unilaterally altering its policy, as contained in Addenda B and C of the parties' expired 2009-2011 Memorandum of Understanding (MOU), of providing promotions and merit pay increases for employees in flexibly allocated classifications.

The ALJ concluded that, because the parties had reached a bona fide impasse in negotiations, and because the 2009-2011 MOU expired on August 1, 2011, the County was authorized by MMBA section 3505.7 (former section 3505.4) to implement a proposal to

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

reinstitute a "freeze" on flex promotions and merit pay increases. The ALJ also rejected SEIU's contention that the County unlawfully repudiated the provisions of Addenda B and C.

SEIU excepts to the ALJ's findings of fact and conclusions of law. It argues that Addenda B and C of the 2009-2011 MOU established future rights of employees to deferred promotions and compensation, that such rights survived expiration of the MOU, and that, in accordance with the express language of Addenda B and C, these benefits became due and owing on the first pay period following expiration of the 2009-2011 MOU. The County denies that the 2009-2011 MOU established future rights to promotions and pay increases that survived expiration of the MOU. It argues that, after bargaining to impasse, it was authorized by MMBA section 3505.7 to impose terms and conditions of employment, including a continued freeze on promotions and pay increases provided for by its own Personnel Rules. Accordingly, the County urges the Board to adopt the proposed decision.

Having reviewed the parties' briefs and the entire record in this matter, we agree with the ALJ's conclusion that, upon reaching a bona fide impasse in negotiations and, in the absence of any applicable impasse resolution procedures, the County was privileged to impose, *on a prospective basis*, terms and conditions of employment that would re-freeze its schedule for promotions and pay increases for employees in flexibly allocated classifications. However, we disagree with the ALJ's conclusion that the promise contained in Addenda B and C of the 2009-2011 MOU to restore employees to the County's preexisting promotion and pay schedule did not survive expiration of the parties' 2009-2011 MOU. We therefore reverse that portion of the proposed decision that concluded that the County was not obligated to make a one-time adjustment to employee classifications and step increases in accordance with the County's promotion and pay schedule.

PROCEDURAL HISTORY

On August 8, 2011, SEIU filed an unfair practice charge alleging that the County had bargained in bad faith and had repudiated the terms of Addenda B and C of the parties' 2009-2011 MOU.

On September 21, 2011, the County responded with a position statement in which it denied the material allegations and appeared to assert, as an affirmative defense, that PERB lacks jurisdiction to consider SEIU's allegation that the County repudiated a contractual provision, because, in this case, the complained of conduct is not also an unfair practice.

In response to the County's assertion that PERB lacked jurisdiction to hear a "pure" contract claim, on September 29, 2011, SEIU filed a "presentation of claim" against the County in which it sought an unspecified amount of damages on behalf of employees for the County's alleged breach of contract. On October 28, 2011, the County denied SEIU's presentation of claim on the basis that the facts alleged therein were presently before PERB, which has exclusive jurisdiction over alleged unfair practices.

On November 28, 2011, SEIU filed an amended charge and on December 13, 2011, the County filed an amended position statement in which it conceded that PERB has exclusive jurisdiction to consider all of the allegations included in SEIU's charge.

On January 30, 2012, SEIU withdrew its surface bargaining allegation.

Also on January 30, 2012, PERB's Office of the General Counsel issued a complaint, which alleged that the County had unilaterally changed two policies relating to promotions in flexibly-allocated classifications and merit step increases, without bargaining in good faith to impasse or agreement.

On February 2, 2012, SEIU filed a motion to amend the complaint to add an allegation that the County's conduct constituted a repudiation of the parties' 2009-2011 MOU. The County filed an opposition to this motion on February 8, 2012.

While SEIU's motion to amend was pending before the ALJ, on February 24, 2012, the County filed an answer to the complaint, in which it denied the material allegations and asserted various affirmative defenses.

On February 28, 2012, the parties attended an informal settlement conference but were unable to resolve the dispute.

On March 7, 2012, the ALJ denied SEIU's motion to amend the complaint as duplicative of the unilateral change theory already set forth in the complaint.

On May 16, 2012, a formal hearing was convened and, after post-hearing briefs were received by the ALJ, the matter was fully submitted for decision on June 30, 3012.

On February 13, 2013, the ALJ issued a proposed decision, which dismissed the complaint and underlying unfair practice charge.

On March 11, 2013, SEIU filed exceptions to the proposed decision and on April 2, 2013, the County filed its response to SEIU's exceptions.

FACTUAL BACKGROUND

The Board adopts the ALJ's factual findings and credibility determinations, as modified below.

SEIU is the exclusive representative of County employees in five bargaining units: Unit 1 – Clerical and Related; Unit 3 – Technical & Vocational; Unit 4 – Social Services; Unit 6 – Health Services; and Unit 7 – Supervisors & Staff Management.

SEIU and the County were parties to an MOU whose term was August 1, 2009 through July 31, 2011. The MOU covered employees in the five SEIU-represented bargaining units. The MOU included the following two provisions:

ADDENDUM B

FLEXIBLY-ALLOCATED CLASSIFICATIONS

> Effective August 2, 2009 suspend Personnel Rule 3.1.1 for all classifications within a flexibly[-]allocated class series for the term of the contract. Exceptions to this suspension of the rule may be made by the County Administrative Officer on a case by case basis. Commencing the first full pay period following the expiration of the agreement each employee having qualified during the term of the agreement for promotion to a higher classification in a flexibly-allocated classification will be placed at the step in that classification which in the absence of this provision would have taken effect during the agreement. Further the eligibility date for the subsequent step or promotion in a flexibly-allocated classification, if any, will be set up in the payroll system on the date, which in the absence of this provision would have taken effect during the agreement. Nothing herein precludes the rights of the County not to grant such a promotion or step increase as set forth in the Personnel Rules and regulations.

ADDENDUM C

MERIT INCREASES

> Effective August 2, 2009, merit or step increases will be suspended for the term of the contract. During the contract period the County will track and identify the dates on which merit increases would normally be received. Commencing the first full pay period following the expiration of the agreement each employee having qualified during the term of the agreement will be placed at the step in the range which in the absence of this provision would have taken effect during the agreement. Further the eligibility date for the next step, if any, will be set up in the payroll system on the date, which in the absence of this provision would have taken effect during the agreement. Nothing herein precludes the rights of the County not to grant a merit increase as set forth in Rule 4 of the Personnel Rules and regulations.

(Emphasis added.)

A flexibly-allocated classification is one that typically contains several classification levels within a class series, such as, Child Support Officer I/II/III. Level I is an entry level classification assigned to probationary employees. If an employee passes probation, the employee is automatically promoted to Level II and receives a 5 percent salary increase.

Merit step increases are granted following annual performance evaluations if the employee meets certain performance ratings. There are five salary steps within each classification level. If an employee receives an appropriate performance rating, the employee is moved to the next step and is granted a 5 percent salary increase.[2]

2008 Negotiations

In 2008, SEIU and the County conducted negotiations between March and August. During negotiations, the County proposed a one-time bonus payment equivalent to a 2 percent salary increase. The parties did not reach agreement. Impasse was declared and the County imposed its proposal. In September 2008, SEIU members participated in a strike.

In December 2008, after the State of California reduced anticipated funding, the County closed two health care clinics and laid off several hundred employees. After layoff notices were sent to employees on December 26, 2008, SEIU and the parties bargained over the effects of the layoffs but reached no agreement. SEIU contends that the County's director of public health, who attended some of the negotiations, mislead SEIU's representatives about whether hospital directors had been consulted about the impact of the layoffs.

[2] The County's Personnel Rules were not included in the record. However, the parties do not dispute that Personnel Rule 3.1.1 provides for promotions and pay increases in flexibly-allocated classifications and for merit or "step" increases for employees in "flexible" classifications. Nor do they dispute that SEIU-represented clerical, technical, social worker, health services and supervisory employees in bargaining units 1, 3, 4, 6 and 7 are employed in "flexible" classifications that, in the absence of an agreement to the contrary, would have received the promotions and merit step increases included in Personnel Rule 3.1.1.

2009 Negotiations

In June 2009, County Administrative Officer Jean Rousseau (Rousseau) made a presentation to representatives of all employee organizations regarding the fiscal shape of the County. SEIU entered negotiations with the understanding that the County would be seeking concessions from all of the unions representing County employees.

The parties began negotiations on June 22, 2009. Elaine Carter (Carter) was the chief negotiator for SEIU. Linda Shockley (Shockley) was the SEIU president at the time. Greg Gomez (Gomez) would later succeed Shockley as SEIU president. Both Shockley and Gomez served on SEIU's bargaining team. Human Resources and Development Director Tim Huntley (Huntley) was the County's chief negotiator.

SEIU and the County agreed to freeze promotions in flexibly-allocated classifications (hereafter referred to as "flex promotions") and merit step increases for the term of the MOU. SEIU wanted assurances from the County that employees who had given up flex promotions and/or merit steps would eventually be placed on the step they would have achieved and would receive the merit increases they would have received. While other unions representing County employees were only willing to agree to one year of concessions and return to the table in following years, Gomez testified that SEIU agreed to forego promotions and merit pay increases for SEIU-represented employees for the entire two-year period of the MOU then being negotiated. According to Gomez, in return for SEIU's agreement to suspend the promotions and pay increases included in the County's Personnel Rules for two years, the County's negotiator promised to restore SEIU-represented employees in flexible classifications to the classification and pay levels they would have attained during the two years of the MOU, if the promotions and pay increases had not been suspended.

Gomez also testified, "[W]e wanted clear language that put the pressure on the County to maintain tracking of how people were going to be or should have been promoted during that period of time. And that's why this language exists is because we wanted that burden to be on the County." At the bargaining table, Huntley indicated that the County could track the information in its payroll system and he affirmed the proper steps would be restored. The parties never discussed, however, what would happen at the end of the contract if the County's finances had not improved. Gomez testified, "we were only negotiating for the period of the term of the contract, not past that, so I mean, . . . we didn't have a crystal ball." In sidebar discussions away from the bargaining table, Carter, Shockley and Huntley worked out the language that became Addenda B and C.

The parties reached a tentative agreement on July 22, 2009. SEIU's membership ratified the MOU on July 30, and the County Board of Supervisors approved the MOU on August 11. During the term of the MOU, SEIU-represented employees in flexibly allocated positions did not receive promotions or merit pay increases in accordance with the agreement that the County would freeze the flex promotions and merit step increases provided for by its Personnel Rules.

2011 Negotiations

On March 21, 2011, the County requested that SEIU begin the meet and confer process for a successor MOU. During these negotiations, Kristy Sermersheim (Sermersheim) served as SEIU's chief negotiator, and Shelline Bennett (Bennett) as the County's lead negotiator.

On April 25, 2011, Rousseau met with employee organization representatives and informed them the County was facing another difficult year financially.

After several delays, SEIU and the County set the first bargaining session for June 6, 2011. On June 6, Sermersheim called and left a message for Bennett cancelling the meeting.

Later that day, Bennett emailed the County's opening proposal to Sermersheim. The proposal included a continuation of the freeze on flex promotions and merit step increases.

The parties met for their first bargaining session on June 13, 2011. At that time, the County's projected deficit was approximately $3.8 million.[3] Due to the deficit, Bennett informed SEIU that the County was proposing a status quo on concessions. Bennett explained that the cost of "unfreezing" only the merit increases would total $4.1 million: $2.8 million to move employees to the step they would have obtained absent the freeze, and $1.3 million for merit increases due in fiscal year 2011-2012. SEIU maintained that flex promotions and merit step increases had to be restored. SEIU asserted that, effective August 1, 2011, the first day after the MOU expired, employees were entitled to move to the classification level and/or merit step they would have achieved absent the negotiated freeze included in the 2009-2011 MOU.

The parties met again on June 20, 2011, but no proposals were exchanged. At each bargaining session, the parties discussed their respective positions on flex promotions and merit step increases. SEIU continued to assert that the frozen flex promotions and merit step increases needed to be restored. The County explained that it could not afford any proposals that increased County costs.

On June 30, 2011, SEIU presented its opening proposal containing both economic and non-economic items. In response to the County's proposal on flex promotions, SEIU's proposal stated, "[n]eed more discussion." On merit step increases, SEIU proposed that (1) the

[3] By the next bargaining session, the projected deficit had increased to $4.6 million.

freeze be lifted effective July 31, 2011, the last day the 2009-2011 MOU was in effect,[4] and (2) a sixth salary step be created that was 5 percent above step five. The County rejected the sixth step proposal because it would cost more than $2 million.

During the July 8, 2011 bargaining session, SEIU presented a revised proposal on non-economic terms.

On July 14, 2011, the County presented its last, best and final offer (LBFO) to SEIU. The LBFO included agreement on or counterproposals to SEIU's non-economic items, but retained the proposal to continue the freeze on flex promotions and merit step increases.

On July 19, 2011, SEIU presented a counterproposal to the County's LBFO, proposing that employees be moved to their proper salary step/classification under Addenda B and C, and then freeze flex promotions and merit step increases for the period of the new MOU. The parties continued to explore cost alternatives. The County discussed insurance funding as an alternative to SEIU's restoration of wage increases. SEIU rejected this suggestion. In an off-the-record discussion, SEIU posed hypotheticals which suggested flexibility on the promotion freeze, but remained firm that merit step increases be restored. After further discussions, the County presented a revised LBFO that included some modifications to non-economic issues, but rejected SEIU's proposal on flex promotions and merit step increases. Bennett informed

[4] Gomez gave conflicting testimony on the significance of the July 31, 2011 date in SEIU's proposal. He first testified that SEIU was trying to "get something for our membership." When questioned about restoration of the merit increases on July 31, 2011, rather than August 1, however, Gomez said this was not a new proposal, but simply a statement of the existing terms of the 2009-2011 MOU. Gomez testified that Sermersheim may have been confused about the effective date of the restoration of merit increases when drafting the provision. This testimony is not credible. During the first bargaining session, SEIU claimed the frozen wage increases were to be restored August 1, 2011, after the MOU expired. Further, SEIU presented this as a bargaining proposal, not merely a statement of existing terms, clearly reflecting a new effective date for restoration of flex promotions and merit step increases.

SEIU that the parties were at impasse.[5] SEIU inquired whether the County would agree to mediation. Bennett said no because mediation had not been successful in the past.

On July 26, 2011, the County Board of Supervisors unanimously approved a resolution to impose terms from the County's LBFO on the five SEIU-represented bargaining units effective August 1. The imposed terms would "[m]aintain [the] current suspension of Personnel Rule 3.1.1. for all classifications within a flexibly allocated class series." The County estimated that, if the freeze on promotions and pay increases were lifted, the immediate payroll cost of adjusting employee salaries to the appropriate pay step, as demanded by SEIU, would be $2.8 million.

At the same meeting, the County Board also approved LBFOs that continued a freeze on flex promotions and merit step increases for employees in other, non-SEIU-represented bargaining units.

THE PROPOSED DECISION

The ALJ framed the issue as whether the County unlawfully implemented a continued freeze on flex promotions and merit step increases, and concluded that, because the parties had reached a bona fide impasse in negotiations, the County was legally privileged to implement a continued freeze on flex promotions and merit step increases following the expiration of the MOU. In arriving at this conclusion, the ALJ relied on PERB's four-part test for a unilateral change. The elements of that test are set forth in the proposed decision as follows: (1) the employer breached or altered a written agreement or established past practice; (2) such action

[5] Gomez testified about the County's declaration of impasse, "I believe [Sermersheim] stated that we weren't at impasse as far as she thought, that there was still room to negotiate." This is uncorroborated hearsay testimony. In any case, allegations regarding surface bargaining, premature declaration of impasse, and unlawful approval of the LBFO are not included in the complaint and thus are not at issue in this case. (PERB Reg. 32300, subd. (c); *Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M, pp. 31-32.)

was taken without providing notice or opportunity to bargain over the change; (3) the change was not merely an isolated breach of the contract, but amounts to a change in policy (i.e., it has a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment); and (4) the change concerns a matter within the scope of representation.

The ALJ concluded that the matters covered by Addenda B and C, including promotions, job classifications and wages, are negotiable; and that the "continuing impact" requirement was met, because, absent a freeze, employees would have received flex promotions and wage increases as they advanced through the classification levels and merit steps. However, the ALJ concluded that the remaining elements of the test were not met. She concluded that the SEIU-represented employees had no vested right to flex promotions and merit step increases, because once negotiations over these matters had resulted in impasse, the County could impose its proposal to continue the freeze on flex promotions and merit step increases. The ALJ reasoned that, "[t]o apply a contrary rule would nullify the meaning of MMBA section 3505.7, which allows an employer upon reaching impasse to implement provisions that modify the terms of an expired MOU."

The ALJ also rejected SEIU's contention that, pursuant to *Fountain Valley Elementary School District* (1987) PERB Decision No. 625 (*Fountain Valley*), the County's refusal to follow the provisions of Addenda B and C should be analyzed as a mid-term modification or repudiation of an existing agreement for which the element of "notice and opportunity to bargain" is not dispositive. According to SEIU, because the promise to restore employees to the classification and pay step schedule was part of the MOU, SEIU was under no obligation to re-negotiate that promise and the County was not free to change or depart from its terms, even after giving notice and opportunity to bargain. (*Id.* at p. 6.)

In rejecting SEIU's contention that the language of Addenda B and C established a vested right that survived expiration of the MOU, the ALJ relied on evidence of the parties' bargaining history and found each of the "vested right[s]" cases cited by SEIU factually distinguishable. The ALJ did not specifically address whether the language of Addenda B and C itself established a future right that survived expiration of the MOU. Instead, she concluded that, once the MOU expired and the parties' negotiations for a successor agreement had reached impasse, the County was free to implement its proposal to continue suspending promotions and pay increases otherwise provided for by its local rules.

SEIU'S EXCEPTIONS

SEIU excepts to several of the ALJ's findings and conclusions, including her ultimate conclusion that SEIU failed to establish that the County had repudiated an established policy providing for restoration of its preexisting schedule for flex promotions and merit step increases following expiration of the 2009-2011 MOU. SEIU contends that the ALJ mistakenly concluded that Addenda B and C established no future rights of employees which survived expiration of the MOU. The crux of SEIU's argument is that, because the rights established by Addenda B and C survived expiration of the MOU, the County could not eviscerate those rights by unilaterally imposing a proposal to continue the freeze on flex promotions and merit step increases, even after the MOU itself had expired and the parties had bargained to impasse. According to SEIU, because Addenda B and C established "future rights," the determinative question is not whether the parties were engaged in negotiations for a successor agreement or whether they had reached impasse in those negotiations, nor whether other provisions of the 2009-2011 MOU had expired, but whether the County repudiated or altered a policy that survived parties' agreement.

Although SEIU argues that the language of Addenda B and C requires the County to reinstate or "thaw" the frozen Personnel Rules requiring promotion and pay increases, it concedes that the County is not precluded from imposing contrary terms *on a prospective basis* in the event of a bona fide impasse in negotiations for a successor MOU. Nor does SEIU assert that employees are entitled to any back pay for the period of the promotion and wage freeze. Rather, it argues that the language merely obligates the County to institute a one-time adjustment to employees' classifications and pay rates, regardless of what the parties might agree to include in the successor MOU, or what terms the County might impose in the event of a genuine impasse in negotiations for a successor MOU.

THE COUNTY'S RESPONSE TO SEIU'S EXCEPTIONS

The County argues that it neither agreed to an ongoing restoration of the flex promotions and merit step increases upon expiration of the 2009-2011 MOU, nor to waive its right to bargain to impasse and, pursuant to MMBA section 3505.7, to impose terms, including a proposal to re-freeze employee promotions and pay increases. The County concedes that some authorities relied on by SEIU[6] recognize that contractual rights may survive expiration of a collective bargaining agreement, but avers that no such rights are at issue here, because those cases dealt with the procedural right to arbitrate grievances that arose during the term of the contract, as opposed to establishing a substantive right to promotions and pay increases that, in effect, supersede the employer's general right to impose terms affecting mandatory subjects of bargaining upon exhausting efforts to reach an agreement and any applicable impasse resolution procedures. The County argues that neither the language of Addenda B and C nor the parties' bargaining history establishes that the expired 2009-2011 MOU included an

[6] *Nolde Brothers, Inc. v. Bakery Workers* (1977) 430 U.S. 243 (*Nolde Bros.*), *Litton Financial Printing Division v. NLRB* (1991) 501 U.S. 190.

absolute guarantee that the wage and promotion freeze would end in August 2011, and that "the reference in each addendum to the first pay period of August merely sets a time when the promotions and increases were to be implemented *if the parties agreed to lift the freeze at that time*." (Original emphasis.)

The County contends that *International Brotherhood of Electrical Workers, Local 1245 v. City of Redding* (2012) 210 Cal.App.4th 1114 (*City of Redding*) and other "future rights" cases are not controlling, because they do not address what the County asserts is "the issue in this case: whether an alleged vested right trumps an employer's statutory right under the MMBA to implement its LBFO upon impasse." According to the County, because the court in *City of Redding* did not interpret the MMBA, "PERB is not required by Government Code § 3509, subdivision (b), to follow the court's decision" nor to consider *City of Redding* as even persuasive authority in this case. (County Response to Exceptions, p. 12.)

The County also argues that PERB should avoid reliance on *City of Redding* and other contract clause cases, because "*any* limitation on the County's ability to negotiate wages in a successor MOU would run afoul of the California Constitution, and "[i]t would . . . set up a conflict between two constitutional principles: *impairment of contract* and a county's [constitutional] authority to set employee compensation." (County Response to Exceptions, p. 14, emphasis added.) According to the County, PERB should "strive at all costs to avoid creating a constitutional conflict it is not empowered to resolve, and which need not be resolved in this case." (County Response to Exceptions, p. 14.)

DISCUSSION[7]

Because the Central Issue in this Dispute Concerns the Meaning of Addenda B and C, Traditional Rules of Contract Interpretation Apply.

SEIU contends that this dispute centers on the meaning of contractual terms and that the ALJ erred in relying on the parties' bargaining history or other extrinsic evidence, instead of applying the "plain meaning" rule of contract interpretation. We agree.

Although PERB is without jurisdiction to enforce collective bargaining agreements (MMBA, §§ 3505.8, 3509, subd. (a), 3541.5, subd. (b)), as the agency responsible for administering California's public-sector labor relations statutes, part of our mission is "to make it possible for the parties to negotiate collective bargaining agreements in good faith and, once they have done so, to protect their right to rely on their agreements." (*Fountain Valley, supra*, PERB Decision No. 625, adopting proposed dec. at p. 8.) We may therefore interpret contractual provisions, when necessary to decide an unfair practice case. (*City of Riverside* (2009) PERB Decision No. 2027-M, p. 10; *Fresno Unified School Dist. v. National Education Assn.* (1981) 125 Cal.App.3d 259, 271-274; *State of California (Departments of Veterans Affairs & Personnel Administration)* (2008) PERB Decision No. 1997-S, pp. 14-16.)[8]

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[7] Pursuant to PERB Regulation 32315, SEIU has requested oral argument. Historically, the Board has denied such requests, when an adequate record has been prepared, the parties had ample opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear to make oral argument unnecessary. (*Antelope Valley Health Care District* (2006) PERB Decision No. 1816-M; *Arvin Union School District* (1983) PERB Decision No. 300.) Because all of the above criteria are met in this case, we deny SEIU's request for oral argument.

[8] *Fresno USD v. NEA* and *State of California* arose under the Educational Employment Relations Act (§ 3540 et seq.), and the Ralph C. Dills Act (§ 3512 et seq.). However, where California's public-sector labor relations statutes are similar or contain analogous provisions, agency and court interpretations under one statute are instructive under others. (*Redwoods Community College Dist. v. Public Employment Relations Bd.* (1984) 159 Cal.App.3d 617, 623-624.)

When doing so, we follow accepted rules of contract interpretation aimed at effectuating the mutual intent of parties, as it existed at time of contracting, insofar as it was ascertainable and lawful. (Civ. Code, §§ 1638-1645; *Los Angeles Superior Court* (2010) PERB Decision No. 2112-I, adopting partial dismissal letter at p. 2; *City of El Cajon v. El Cajon Police Officers' Assn.* (1996) 49 Cal.App.4th 64.) If the language of a written agreement, as understood in its ordinary and popular sense, is clear and explicit, then it *alone* governs the interpretation and there is no need to resort to bargaining history or other extrinsic evidence to divine the parties' intent. (Civ. Code, §§ 1638, 1639, 1644; *City of Riverside, supra*, PERB Decision No. 2027-M, p. 11; *Alday v. Raytheon Co.* (9th Cir. Ariz. 2012) 693 F.3d 772, 782 (*Alday v. Raytheon*).)[9]

To determine the parties' intent, the whole of the contract taken together must be considered, so as to give effect to every part, if reasonably practicable, with each clause assisting in the interpretation of others. (Civ. Code, § 1641.)[10] Thus, an interpretation which renders a part of the instrument to be surplusage should be avoided. (*National City Police Officers' Assn. v. City of National City* (2001) 87 Cal.App.4th 1274, 1279; *City of Riverside, supra*, PERB Decision No. 2027-M, pp. 12-13.) The Board's interpretation should harmonize any potential conflict between provisions of the agreement and give a "reasonable, lawful and effective

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[9] Civil Code section 1638 provides that, "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."

Civil Code section 1639 provides that, "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this Title."

Civil Code section 1644 provides that, "The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed."

[10] Civil Code section 1641 provides that, "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."

meaning to all the terms," as provided in Civil Code section 1641. (*Los Angeles Superior Court, supra,* PERB Decision No. 2112-I.) Where a contract is susceptible of two interpretations, one of which is reasonable and fair, and the other is unreasonable or unfair, the latter interpretation must be rejected and the first accepted. (Civ. Code, § 1643; *Division of Labor Law Enforcement Dept. of Indus. Relations v. Safeway Stores, Inc.* (1950) 96 Cal.App.2d 481, 490.)[11] Additionally, all contracts, whether public or private, are interpreted according to the same rules, unless otherwise directed by the statute. (Civ. Code, § 1635.)[12] Thus, there are no "special rules of law" applied to an agreement, simply because one party thereto is a government entity. (*Sheppard v. North Orange County Regional Occupational Program* (2010) 191 Cal.App.4th 289, 313 (*Sheppard v. NOCROP*); *Kemper Const. Co. v. City of Los Angeles* (1951) 37 Cal.2d 696, 704 (*Kemper Const. Co.*).)

The procedural history outlined above demonstrates that the present dispute turns on the meaning of Addenda B and C of the parties' expired 2009-2011 MOU. The complaint alleged that, on or about August 1, 2011, the County unilaterally changed its policy regarding flex promotions and merit step increases for SEIU-represented employees by refusing to implement the provisions of Addenda B and C of the expired 2009-2011 MOU. In anticipation of the hearing, SEIU moved to amend the complaint to specifically allege that the County had repudiated the provisions of Addenda B and C. The ALJ denied SEIU's motion, reasoning that a contract repudiation theory was already encompassed in the complaint's unilateral change allegation. Not surprisingly then, in its closing brief before the ALJ, SEIU argued that the

[11] Civil Code section 1643 provides that, "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."

[12] Civil Code section 1635 provides that, "All contracts, whether public or private, are to be interpreted by the same rules, except as otherwise provided by this Code."

substantive rights of employees to flex promotions and merit step increases arose not from the MMBA but from the language of Addenda B and C, which the County refused to implement and thus repudiated.

However, while the proposed decision acknowledged SEIU's contract repudiation theory, it did not examine the language of Addenda B and C to explain *what the parties intended* when they agreed that, "[c]ommencing the first full pay period following the expiration of the agreement," SEIU-represented employees "*will be placed*" at the step in their classification, and "*will be placed*" in the pay range, "which in the absence of this provision would have taken effect during the agreement." (Emphasis added.) Instead, the ALJ rejected SEIU's argument that Addenda B and C established employee rights that survived expiration of the agreement, based on evidence of the parties' bargaining history,[13] and on policy grounds.[14] While these may be legitimate considerations, they are not determinative. In every contract dispute, the analysis must begin with the parties' intent, as demonstrated by the ordinary and plain meaning of the language of their agreement. (Civ. Code, §§ 1638, 1639,

[13] The ALJ noted that, as the MOU's expiration drew near, SEIU proposed to change the effective date of Addenda B and C from August 1 to July 31, 2011, so that restoration of the County's promotion and pay increase schedule would occur *before* the MOU expired. The ALJ reasoned that SEIU's proposal to change the effective date was inconsistent with its assertion that Addenda B and C *already* guaranteed restoration of the promotions and pay increases. From this apparent inconsistency in SEIU's bargaining positions, the ALJ then concluded, that the SEIU-represented employees did not have a vested right to flex promotions and merit step increases that survived expiration of the 2009-2011 MOU. As discussed below, even though we accept the ALJ's credibility determination regarding Gomez's testimony on this point, we do not consider it dispositive of the ultimate issue in this case, which is what the parties intended *during 2009 negotiations* when they agreed to the language of Addenda B and C, *not* SEIU's bargaining strategy in the successor negotiations occurring *two years later*.

[14] The ALJ expressed concern that finding employees had a vested, post-expiration right to flex promotions and merit pay increases would preclude the County from implementing terms for current employees, even after bargaining to impasse, and would therefore nullify the meaning of MMBA section 3505.7. We address this concern below.

1644; *City of Riverside, supra*, PERB Decision No. 2027-M, p. 11; *City of Redding, supra*, 210 Cal.App.4th 1114, 1120; *Alday v. Raytheon, supra,* 693 F.3d 772, 782.) Because the ALJ made no finding that that the operative language of Addenda B and C, as understood in its ordinary and plain sense, is ambiguous, we agree with SEIU that there was no basis for resorting to extrinsic evidence of the parties' bargaining history. (Civ. Code, § 1638; *City of Redding, supra*, 210 Cal.App.4th 1114, 1120; *Regents of the University of California (Davis)* (2010) PERB Decision No. 2101-H, p. 21.)

We next consider SEIU's contention that the language of Addenda B and C demonstrates an intent to restore the flex promotions and merit step increases that were suspended, but not eliminated, by the 2009-2011 MOU, and that such rights survived expiration of the MOU.

Whether Addenda B and C Established Enforceable, Post-Expiration Rights

SEIU argues that the plain meaning of Addenda B and C establish contractual rights to restoration of employee promotions and pay increases, which survived expiration of the 2009-2011 MOU. Alternatively, it argues, that even if the pertinent contract language were ambiguous, the parties' bargaining history demonstrates that they intended to restore the promotion and pay increase schedule provided for by the County's Personnel Rules upon expiration of the 2009-2011 MOU. We agree with SEIU on both points.

Addenda B and C provide that, "[c]ommencing the first full pay period following the expiration of the agreement," SEIU-represented employees "*will be placed*" at the step in their classification, and "*will be placed*" in the pay range "which in the absence of this provision would have taken effect during the agreement." (Emphasis added). When referring to future events, the ordinary and plain meaning of the verb "will" is the same as "shall," which is to impose a duty or requirement. (Black's Law Dictionary (9th ed. 2009) "SHALL.") This usage is the mandatory sense that drafters typically intend and that courts typically uphold as an

enforceable obligation. (Black's Law Dictionary; *Cole v. Antelope Valley Union High School Dist.* (1996) 47 Cal.App.4th 1505, 1513.)

SEIU's interpretation is consistent with California cases. In *City of Redding, supra*, 210 Cal.App.4th 1114, a public agency ratified a series of collective bargaining agreements each of which stated that the public agency "will pay" 50 percent of the group medical insurance program premium for each retiree and dependents, if any, presently enrolled "and for each retiree in the future" who goes directly from active status to retirement and continues the group medical insurance without a break in coverage. The court interpreted this language as establishing enforceable, contractual rights against the city.

Similarly, in *Ivens v. Simon* (1963) 212 Cal.App.2d 177, a public agency maintained a five-step classification and pay plan according to which employees "shall be paid" at the succeeding step of the pay range, upon satisfying certain criteria. Although an employee's department head certified that she had satisfied all criteria, the city council refused to approve her pay increase. The employee petitioned for writ of mandate to compel the employer to place her at the next step in the established pay range. The trial court dismissed the petition but the appellate court reversed, reasoning that, once adopted by the city council, the classification and pay plan formed part of the employment contract which the city was not free to repudiate as to services already performed. (*Id.* at pp. 179-180.) In analogous circumstances, other California courts have reached the same result. (*California League of City Employee Associations v. Palos Verdes Library Dist.* (1978) 87 Cal.App.3d 135, 150 (*California League*); *Youngman v. Nevada Irrigation Dist.* (1969) 70 Cal.2d 240, 247 (*Youngman*); and *Sonoma County Organization of Public Employees v. County of Sonoma (1979)* 23 Cal.3d 296, 314.)

Other jurisdictions have followed similar reasoning. In *Naches Valley School District No. JT3 v. Cruzen* (Wash. Ct. App. 1989) 54 Wn. App. 388, a collective bargaining agreement

entitled teachers to compensation for accumulated but unused sick leave "at retirement." The language of the agreement did not include any limitation on when the "retirement" must occur. The school district contended that, because sick leave is a contractual rather than statutory right, it was not required to pay sick leave compensation to teachers who retired after expiration of the agreement. The Washington Court of Appeal rejected this argument, because the language of the agreement did not in any way qualify or limit the term "retirement" to any particular time period. (See also *Champine v. Milwaukee County* (Wis. Ct. App. 2005) 2005 WI App. 75, p. 17.)

Neither the proposed decision, nor the County has suggested any reasonable alternative interpretation of the phrase "will be placed." The proposed decision ignores this language altogether, while the County argues that, "the reference in each addendum to the first pay period of August merely sets a time when the promotions and increases were to be implemented *if the parties agreed to lift the freeze at that time*." (Original emphasis.) According to the County, Addenda B and C created no more than an obligation for the County to track the promotions and pay increases which would have occurred, had the Personnel Rules schedule not been suspended, so that these could be properly credited to employees, "if and when the freeze was lifted."

The County concedes that Addenda B and C required it to keep track of accrued flex promotions and merit step increases, so that these could be credited to employees when the freeze was lifted. However, it argues that the terms of the MOU were too indefinite and uncertain to establish a firm promise to restore the flex promotions and merit step increases set forth in the Personnel Rules. Moreover, because the freeze on flex promotions and merit step increases was negotiated during a severe budget shortfall, the County argues that SEIU necessarily assumed the risk that the County's financial situation would not improve, and that the freeze would therefore be extended. Additionally, it argues that, even if Addenda B and C established a definite and certain promise, the County was privileged to ignore any promise it

previously made to restore flex promotions and merit step increases, so long as it bargained in good faith to impasse on all negotiable subjects before imposing terms consistent with its proposal to continue or re-implement the freeze on flex promotions and merit step increases.

We reject the County's interpretation because it ignores or unduly strains the ordinary and plain meaning of the words "will be placed," and because we can find no support for it in any other language of Addenda B and C. (*Victor Valley Community College District* (1986) PERB Decision No. 570 (*Victor Valley*), p. 24; *Inglewood Unified School District* (1984) PERB Decision No. 401 (*Inglewood*), adopting proposed dec. at p. 37.) A fundamental flaw in the County's interpretation is that it ignores the "will be placed" language in Addenda B and C entirely, or treats it as conditional, when no other language in the MOU suggests that the promise to restore flex promotions and merit step increases was conditioned on any future event. Had the parties intended to condition restoration of the flex promotions and merit step increases on an improvement in the County's finances, they would have included language to that effect in their agreement, or at least discussed some metric for determining when the County's financial situation had improved sufficiently to justify restoring flex promotions and merit step increases. However, the record demonstrates that they did neither.

The County apparently contends that it retained sole discretion to decide when its financial situation had improved sufficiently to return to the flex promotions and merit step increases called for by its Personnel Rules. However, this interpretation turns the "will be placed" language into an illusory promise. If there were no limits on the County's discretion to continue freezing flex promotions and merit step increases indefinitely, then there was no reason to include language in Addenda B and C stating that employees "will be placed" in the appropriate classification and the appropriate step of the pay scale upon expiration of the MOU. We reject this interpretation because, "[a]s in all contracts, [a] collective bargaining agreement's

terms must be construed so as to render none nugatory and avoid illusory promises." (*Alday v. Raytheon, supra,* 693 F.3d 772, 784; Civ. Code, §§ 1635, 1641.) In the absence of any evidence of a contrary meaning, we find the language of Addenda B and C sufficiently clear to establish an enforceable promise that, on the date specified, the County would restore the flex promotions and merit step increases provided for by its Personnel Rules and place SEIU-represented employees at the steps in the classification and pay ranges that employees would have attained had the parties not agreed to suspend flex promotions and merit step increases during the 2009-2011 MOU.

Evidence of the Parties' Bargaining History Also Supports SEIU's Interpretation.

To the extent it is necessary to examine the parties' bargaining history, unlike the ALJ, we think this evidence likewise supports SEIU's interpretation. Although not discussed in the proposed decision, Gomez testified that the County promised to restore the flex promotions and merit step increases for SEIU-represented employees in return for SEIU's willingness to forego such promotions and increases for the entire term of the 2009-2011 MOU. Specifically, Gomez testified that, while bargaining with SEIU for the 2009-2011 MOU, the County was simultaneously demanding concessions from four other unions representing County employees. Perhaps believing that the County's finances would improve sooner rather than later, other unions representing County employees were only willing to agree to one year of concessions at a time.

However, because SEIU *alone* among all the County unions was willing to forego flex promotions and merit step increases for a full *two-year period* as part of its agreement, it was "the only union to have gotten a two-year agreement at that table," and, its MOU was "the only one[] that had that language specifically in there." According to Gomez, "we made very clear

to the County that we wanted our members to be made whole at the end of those two years"[15] and, "as a reward for giving up those two years and for settling with the two-year agreement," Huntley proposed the language that became Addenda B and C, including a definite date for flex promotions and merit step increases to be restored.

Gomez's testimony was somewhat tentative. He testified that he "looked at" the 2009 agreements between the County and other unions and that, "from the ones that I remember," SEIU's was "the only one[] that had that language specifically in there." However, the County produced no witness with personal knowledge of the 2009 negotiations to contradict Gomez on this point. Nor did it produce the MOUs it reached with other County unions during the 2009 negotiations, or any other documentary evidence, to contradict Gomez's recollection that SEIU's MOU was "the only one[] that had that language specifically in there." Where one witness is the only source of evidence on a particular issue in dispute, any finding on that issue must be based on the testimony of that witness. (*Baker Valley Unified School District* (2008) PERB Decision No. 1993, p. 11; *Victor Valley, supra,* PERB Decision No. 570, p. 24.) Contrary to the proposed decision, we find the evidence of the parties' bargaining history, including Gomez's undisputed testimony that SEIU was willing to forego flex promotions and merit step increases for the entire term of the MOU, supports SEIU's contention that, in return, it obtained a firm promise from the County to restore flex promotions and merit step increases once the MOU expired.

[15] Gomez explained that the term "make whole" meant that employees "would wind up on the step that they should have been" on, but that SEIU did not expect "that we would get retroactive payment for those two years." Gomez also testified that SEIU had assured its membership that "we would get our . . . step increases for those two years." Gomez's testimony on this point coincides with that of the County's chief negotiator.

The ALJ discredited conflicting testimony from Gomez concerning SEIU's June 30, 2011 proposal to change the effective date of Addenda B and C from "the first full pay period *following* the expiration of the agreement [emphasis added]" to July 31, 2011, *i.e.*, the last day the MOU was in effect. Gomez acknowledged that he did not know the precise reason why SEIU had proposed moving the restoration date forward to occur before the MOU expired, as opposed to after expiration. He testified that SEIU's chief negotiator may have proposed the July 31 language because she was confused about the effective date of the restoration of flex promotions and merit step increases when drafting SEIU's proposal. The ALJ rejected this explanation and found that SEIU presented this language "as a bargaining proposal, not merely a statement of existing terms, clearly reflecting a new effective date for restoration of flex promotions and merit increases." She reasoned that, if SEIU had believed it was already entitled to restoration of flex promotions and merit step increases following expiration of the 2009-2011 MOU, it would not have proposed changing the restoration date to July 31. We need not and do not disturb the ALJ's credibility determination concerning this testimony, since it is not dispositive or even necessarily probative of the central issue in dispute. Aside from the language of Addenda B and C itself, the best evidence of the parties' intent is not what their negotiators believed or proposed *in 2011* during negotiations *for a successor MOU*, but what they understood and bargained for *in 2009*, when they agreed on the language of Addenda B and C.

Gomez also admitted that the parties discussed very little, if anything, about "what would happen" at the end of the 2009-2011 MOU. Although the ALJ cited this testimony as undermining SEIU's position, in fact, it also undermines the County's assertion that its promise to restore employee promotions and pay increases was somehow contingent on an unspecified improvement in the County's financial situation, apparently to be determined at the

County's sole discretion. However, regardless of what they did or did not discuss in negotiations, the parties ultimately agreed on language expressly stating that SEIU-represented employees "will be placed" in the appropriate steps in the County's promotion and pay schedule upon expiration of the 2009-2011 MOU, *i.e.*, at the step in the classification and pay range which, in the absence of the parties' agreement to suspend such flex promotions and merit step increases, "would have taken effect during the agreement."

Other evidence of the parties' bargaining history and past practice supports SEIU's interpretation. Gomez testified that, because of a history of contentious negotiations, SEIU's negotiators were concerned that the County "would wind up screwing us somehow," so SEIU "wanted clear language that put the pressure on the County to maintain tracking of how people were going to be or should have been promoted" during the period of the freeze on flex promotions and merit step increases. According to Gomez, Addenda B and C's language requiring the County to track employees' progress toward flex promotions and merit step increases, even when the County's schedule was suspended, reflected its desire and expectation that employees "*will be placed*" at the appropriate classification and pay range step, when the MOU and the freeze expired.

The County argues that this language demonstrates no more than an agreement that flex promotions and merit step increases were to be tracked during the freeze so that they could be credited properly to employees "*if and when the freeze was lifted.*" (Emphasis added.) While we agree with the County that Gomez's testimony about the "tracking" language, if considered alone, would provide insufficient support for SEIU's interpretation, we do not agree that the tracking obligation is *entirely* separate from the County's promise that employees "will be placed" in appropriate steps in the County's classification and pay scale. The fact that SEIU bargained for tracking language lends at least some support to its interpretation in that it is

consistent with SEIU's asserted expectation that the County would return employees to the previous flex promotion and merit step increase schedule upon expiration of the 2009-2011 MOU.

Arguably, the tracking language also demonstrates some concern with ensuring that the County fulfilled its obligation to make employees "whole" in a verifiable manner, since the belief among SEIU's representatives was that the County "would wind up screwing us somehow." However, while the presence of the tracking language lends at least some support to SEIU's interpretation of Addenda B and C, as indicated above, by statute and under well-settled decisional law, the more persuasive and, in fact, the *dispositive* evidence in support of SEIU's interpretation is the ordinary and plain meaning of the "will be placed" language of Addenda B and C itself. (Civ. Code, §§ 1638, 1639, 1644; *City of Riverside, supra*, PERB Decision No. 2027-M, p. 11; *Alday v. Raytheon, supra,* 693 F.3d 772, 782.)

Although we have determined above that Addenda B and C established future rights of employees that survived expiration of the agreement, this case also presents a separate but closely-related issue of the relationship between contractual rights and the statutory right of a public employer to impose terms and conditions of employment at impasse. In the County's formulation, the question is "whether an alleged vested right trumps an employer's statutory right under the MMBA to implement its LBFO upon impasse." We now turn to that issue.

Whether Collectively-Bargained Future Rights Are Exempt from the Impasse Rule

The proposed decision accurately recites the general rule that, because terms and conditions of employment are subject to re-negotiation upon expiration of a collective bargaining agreement, the employer's duty to refrain from unilateral action exists only until such time as bargaining over a successor agreement has resulted in agreement or impasse. However, the proposed decision goes further. It suggests that recognizing future rights that

survive expiration of an MOU would, as a matter of law, "nullify the meaning of MMBA section 3505.7."

The County similarly argues that, "[c]onsistent with black letter federal labor law, the [MMBA] gives an employer the right to implement terms of its LBFO once the parties have reached impasse, provided there is no MOU in effect." According to the County, because it "neither intended to create a contractual right that would survive expiration nor waived its right to implement upon impasse its final proposals on flex promotions and merit step increases, [¶] . . . [¶] no contractual right to restoration of flex promotions or merit step increases survived expiration of the MOU", and any limitation on the County's ability to bargain in good faith to impasse and implement its proposal to re-freeze flex promotions and merit step increases would "eviscerate section 3505.7 of the MMBA" and "directly interfere[] with the County's constitutional authority to set employee compensation." (County Response to Exceptions.) We disagree with both the ALJ's and the County's interpretation of the MMBA and with the County's reliance on federal precedent.[16]

The purpose of the MMBA is to promote the resolution of labor disputes through collective bargaining. (MMBA, § 3500.) As the Supreme Court observed, a statute that encouraged the negotiation of agreements, yet permitted the parties to retract their concessions and repudiate their promises whenever they choose, would impede rather than promote good-faith bargaining. (*Glendale City Employees Assn. v. City of Glendale* (1975) 15 Cal.3d 328, 336 (*City of Glendale*).) The MMBA does not permit parties to accept the benefits of a collective bargaining agreement and then reject less favorable provisions that were intrinsic to

[16] We address here the County's *statutory* argument regarding the waiver of employer rights to impose terms at impasse under MMBA section 3505.7 while, within the limits of our jurisdiction and only to the extent necessary, we address the separate constitutional argument below.

the bargain. (*San Bernardino Public Employees Assn. v. City of Fontana* (1998) 67 Cal.App.4th 1215, 1224-25 (*City of Fontana*).)

Once they have been ratified, the terms and conditions contained in an MOU are fixed for the duration of the agreement. (*City of Glendale, supra,* 15 Cal.3d 328, 335-337.) During its term, neither party to a collective bargaining agreement has a duty to bargain over any matter covered by the agreement. (*Mt. Diablo Unified School District* (1983) PERB Decision No. 373, pp. 45-47.) If they have included strong "waiver" or "zipper" language in their agreement, then no duty to bargain arises, even as to mandatory subjects *not* covered by the agreement. (*Los Rios Community College District* (1988) PERB Decision No. 684, p. 14.) In such circumstances, either party may decline a request for bargaining over any matter covered or "zipped up" by the agreement. (*Los Angeles Community College District* (1982) PERB Decision No. 252 (*LACCD*), pp. 10-11; *Inglewood, supra,* PERB Decision No. 401, adopting proposed dec. at pp. 35-37.)

If the representative agrees to discuss a subject covered or zipped up by the agreement, the employer may not bargain to impasse and unilaterally impose terms that vary from those contained in the agreement, unless the representative has clearly and unequivocally waived the protections of the zipper clause. (*LACCD, supra,* PERB Decision No. 252, pp. 10-11; *Contra Costa Community College District* (1990) PERB Decision No. 804, pp. 8-10.) Likewise, the failure to reach agreement on any open subjects of bargaining does not repudiate any terms and conditions already agreed upon by the parties. (*Trustees of the California State University* (2001) PERB Decision No. 1470-H (*Trustees of CSU*), adopting dismissal letter at p. 5; see also *St. Barnabas Med. Ctr.* (2004) 341 NLRB 1325; *Mack Trucks, Inc.* (1989) 294 NLRB 864, 865; *Herman Bros., Inc.* (1984) 273 NLRB 124, fn. 1, enforced by (3d Cir. 1985) 780 F.2d 1015.)

The above authorities demonstrate that the impasse rule is subject to any outstanding contractual obligations the employer may have incurred. We find nothing in the language or purpose of MMBA section 3505.7 to suggest that the right to impose terms at impasse in successor negotiations authorizes the employer to disregard any outstanding contractual obligations under its previous agreement, simply because those obligations do not mature until after the agreement has expired.

The County's invocation of "black letter federal labor law" is also misplaced. It is true that under federal law, private-sector employers may impose terms consistent with their LBFOs upon reaching a bona fide impasse in negotiations. (*Empire Terminal Warehouse Co.* (1965) 151 NLRB 1359, 1360-1362, affd. *sub. nom. Dallas General Drivers, Warehousemen and Helpers, Local Union No. 745, Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. NLRB* (D.C. Cir. 1966) 355 F.2d 842; *American Federation of Television and Radio Artists, AFL-CIO, Kansas City Local v. NLRB* (D.C. Cir. 1968) 395 F.2d 622, 624.) However, the County cites no authority – California or federal - for the proposition that an employer's right to impose terms unilaterally at impasse in successor negotiations trumps any executory contractual obligations arising from a prior agreement. To the contrary, the National Labor Relations Board (NLRB) and the federal courts regard an employer proposal to extinguish its liability for accrued wages and benefits under a previous agreement to be a nonmandatory subject of bargaining. (*Swift Adhesives, Div. of Reichhold Chemicals, Inc.* (1995) 320 NLRB 215, 216 (*Swift Adhesives*), enforced by (8th Cir. 1997) 110 F.3d 632; *Harvstone Mfg. Corp.* (1984) 272 NLRB 939, 942-943, enforcement den. on other grounds (7th Cir. 1986) 785 F.2d 570.) The NLRB has reasoned that the statutory duty to bargain over wages, hours, and terms and conditions of employment pertains to *current and future* wages, hours and terms and conditions, not to re-negotiate terms and conditions that have *already* been

fixed by an earlier agreement. (*R. E. Dietz Co.* (1993) 311 NLRB 1259, 1266; accord *Trustees of CSU, supra*, PERB Decision No. 1470-H, adopting dismissal letter at p. 5.) We find persuasive the private-sector cases holding that an employer is not privileged to insist to impasse on a proposal to renegotiate terms settled by a previous agreement, nor to impose terms that take back wages or benefits that have already accrued to employees.[17]

Nor are we persuaded by the County's argument that an employer's statutory right to impose terms at impasse is non-waivable and therefore precludes finding that employee rights may survive or mature after expiration of a collective bargaining agreement. Again, federal precedent is instructive. Under federal labor law, it is well-settled that where parties have expressly or impliedly agreed to limit their use of economic weapons their agreement to do so is controlling. (*Hydrologics, Inc.* (1989) 293 NLRB 1060, 1062; *Speedtrack, Inc.* (1989) 293 NLRB 1054, 1055; *Local 174, Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Lucas Flour Co.* (1962) 369 U.S. 95, 104-105 (*Teamsters v. Lucas Flour Co.*); *Gateway Coal Co. v. United Mine Workers of America* (1974) 414 U.S. 368, 381-82.)[18] Although the cases typically involve an asserted waiver of the right to strike, we see no reason to establish a

[17] Although we presume that a duly recognized representative has the power to waive or limit employees' statutory rights through collective bargaining to the same extent as the employees themselves may lawfully do so (*Porter v. Quillin* (1981) 123 Cal.App.3d 869, 874-875; *J. I. Case Co. v. NLRB* (1994) 321 U.S. 332, 337-338; *cf. Berkeley Unified School District* (2012) PERB Decision No. 2268 (*Berkeley*), pp. 2-3, fn. 3), because this case involves an employer's *imposition* of retroactive terms, as opposed to a collectively-bargained *agreement*, we need not and do not address the separate issue of whether or under what circumstances the representative may agree to economic concessions with retroactive effect.

[18] Private-sector precedent established under the National Labor Relations Act (29 U.S.C., §§ 151, et seq.), or the California's Agricultural Labor Relations Act (Lab. Code, §§ 1140-1166.3), is persuasive for interpreting parallel or comparable provisions in the PERB-administered statutes. (*McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 311; *Moreno Valley Unified School Dist. v. Public Employment Relations Bd.* (1983) 142 Cal.App.3d 191, 196.)

different rule, simply because the economic weapon being surrendered belongs to the employer. Under PERB precedent, just as the representative may agree to contractual language that waives or limits the right to strike or engage in other concerted activities (*Regents of the University of California* (2004) PERB Decision No. 1638-H, pp. 3-5), so, too, may an employer agree to contractual terms that waive or limit its right to use economic force, including its right to act unilaterally at impasse. (*Covina-Valley Unified School District* (1993) PERB Decision No. 968, adopting dismissal letter at p. 2.)

While a no strikes clause generally applies only during the term of the agreement (*Hydrologics, supra,* 293 NLRB 1060, 1062), where the parties clearly intend otherwise, they may expressly or impliedly agree to continue or re-new a no strikes clause during a contractual hiatus. (*Ibid.*) For example, an agreement to arbitrate disputes may survive expiration of the agreement (*Nolde Bros., supra,* 430 U.S. 243) and, by implication, waive employees' right to strike over arbitrable disputes. (*Teamsters v. Lucas Flour Co., supra,* 369 U.S. 95, 104-105; *Gateway Coal Co. v. United Mine Workers, supra,* 414 U.S. 368, 381-382.) Contrary to the County's assertion, there is no categorical rule against finding that a waiver of the employer's right to act unilaterally at impasse may survive expiration of the agreement which gave rise to the waiver. In each case, the parties' intent, as reflected in their agreement, is controlling, though the Board may also examine bargaining history or other extrinsic evidence, if necessary, to discern their intent. (Civ. Code, §§ 1638, 1639.)

With respect to the County's waiver argument, we can discern no meaningful difference between the "clear and unmistakable" standard used for waiver analysis and the "clear agreement" or "clear intent" language used by the California Supreme Court and the Court of Appeals in "vested rights" cases. If the "statutory language and [the] circumstances accompanying its passage clearly '. . . evince a legislative intent to create private rights of a

contractual nature enforceable against the State'" (*City of Fontana, supra,* 67 Cal.App.4th 1215, 1223 citing *Valdes v. Cory* (1983) 139 Cal.App.3d 773, 786; *Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1184 (*Retired Employees Assn.*)), then, by definition, the public agency has also waived its right under the MMBA to impose terms that would impair those rights. Conducting a separate "waiver" analysis here would potentially lead to the absurd conclusion that a legislative body had *clearly* intended to bind itself contractually to its employees, but that it could, nonetheless, abrogate the very rights it had promised, because it had not *clearly* waived its statutory right to act unilaterally at impasse. Such anomalous results would discourage rather than promote collective bargaining under the MMBA and are therefore to be avoided. (*City of Glendale, supra*, 15 Cal.3d 328, 335-337.) Because we have already determined that the language of Addenda B and C and the surrounding circumstances demonstrate a "clear intent" to create private rights that survive expiration of the parties' 2009-2011 MOU, we need not retrace what are essentially the same analytic steps to show that the County has "clearly and unmistakably" waived its right to impose terms that vary from its contractual obligations under Addenda B and C.

Contrary to the proposed decision, we hold that parties may expressly agree to limit an employer's right to impose terms at impasse, or they may impliedly achieve the same result by agreeing to terms that do not mature until after the agreement has expired. Accordingly, where, as here, a contractual right survives expiration of the agreement, the employer is not free to impose terms that abrogate or impair that right. Not only would it be "grossly unfair" to change the terms of the bargain *after* employees had already performed services (*California League, supra*, 87 Cal.App.3d 135, 140), it would also discourage good-faith collective bargaining, since parties could have no reasonable expectation that, once negotiated, their agreements would be

enforced. (*Fountain Valley, supra*, PERB Decision No. 625, adopting proposed dec. at p. 8; *City of Fontana, supra,* 67 Cal.App.4th 1215, 1224-1225.)

Prohibiting Retroactive Imposition of Terms Containing Economic Concessions is Consistent with California Judicial Authority Regarding Vested Rights of Public Employees.

In addition to the above issues of statutory construction and contract interpretation, the parties have raised several significant questions involving constitutional issues and the scope of PERB's authority to decide this case. Although PERB has no authority to decide constitutional issues (Cal. Const., art. III, § 3.5[19]; *California Assn. of Professional Scientists v. Schwarzenegger* (2006) 137 Cal.App.4th 371, 381-382 (*CAPS v. Schwarzenegger*)), the fact that such issues are implicated in a labor dispute does not automatically divest PERB of its power and duty to investigate, decide and remedy alleged unfair practices. (*San Diego Municipal Employees Assn. v. Superior Court* (2012) 206 Cal.App.4th 1447, 1458.) The agency may assert its jurisdiction to avoid constitutional issues. (*Leek v. Washington Unified School Dist.* (1981) 124 Cal.App.3d 43, 51-53.) It may also address matters of external law directly, where necessary to apply and interpret unfair labor practice decisions in conformity with existing judicial interpretations of the MMBA or to harmonize the MMBA with external law. (MMBA, § 3509, subd. (b).) In the past, such issues have included whether the constitutionally protected or "vested" status of employee rights to deferred compensation or other forms of longevity-based benefits precludes negotiability over those subjects. (*City of Pinole* (2012) PERB Decision No. 2288-M, p. 8; *City of San Jose* (2013) PERB Decision No. 2341-M,

[19] Under the California Constitution, administrative agencies have no power to "declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional; [or, to] declare a statute unconstitutional. . . ." (Cal. Const., art. III, § 3.5.)

pp. 46-49.) We return to these issues in the present case in an attempt to harmonize our interpretation of the MMBA with external law.

Because public employment is governed by statute, and not by contract, the general rule is "that 'public employees have no vested right in any particular measure of compensation or benefits, and that these may be modified or reduced by the proper statutory authority. . . .'" (*City of Fontana, supra*, 67 Cal.App.4th 1215, 1223, citing *Butterworth v. Boyd* (1938) 12 Cal.2d 140, 150.) Thus, terms and condition of employment "may be modified or reduced by the proper statutory authority" on a prospective basis.[20] (*Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 854-855; *CAPS v. Schwarzenegger, supra,* 137 Cal.App.4th 371, 375; *City of Fontana, supra,* 67 Cal.App.4th 1215, 1224-1225; *Miller v. State of California* (1977) 18 Cal.3d 808, 814; *Markman v. County of Los Angeles* (1973) 35 Cal.App.3d 132, 134.) This judicial presumption reflects the view that a legislature's primary function is to enact policies, rather than to make contracts, and that to construe laws, which are inherently subject to revision and repeal, as contracts would improperly curtail the essential powers of a legislative body and potentially blindside the taxpaying public with unexpected obligations. (*Chisom v. Board of Retirement of County of Fresno Employees' Retirement Assn.* (2013) 218 Cal.App.4th 400, 413-414 (*Chisom*).)

The MMBA similarly makes public employees' wages, hours and terms and conditions of employment subject to negotiation *and to periodic renegotiation.* (MMBA, §§ 3504, 3505;

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[20] The contract clauses of the state and federal constitutions limit the power of public entities to modify their own contracts with other parties. (Cal. Const., art. I, § 9; U.S. Const., art. I, § 10, cl. 1.) California's courts have long held that a contract of employment is formed on the first day of employment and that rules governing the employment contract, *as they existed at that time*, are protected against changes that detrimentally affect "fundamental" employee rights. (*Retired Employees Assn., supra*, 52 Cal.4th 1171, 1182; *City of Redding, supra,* 210 Cal.App.4th 1114, 1119; *California Teachers Assn. v. Cory* (1984) 155 Cal.App.3d 494, 506 (*CTA v. Cory*); *Betts v. Board of Administration of Public Employees' Retirement System* (1978) 21 Cal.3d 859, 863 (*Betts*).)

City of Fresno v. People ex rel. Fresno Firefighters, IAFF Local 753 (1999) 71 Cal.App.4th 82, 97; *City of Torrance* (2008) PERB Decision No. 1971-M, pp. 26-27.) The terms of an MOU are fixed for the duration of the agreement (*City of Glendale, supra,* 15 Cal.3d 328, 335-337; *Fountain Valley, supra*, PERB Decision No. 625) and an employer must maintain the terms of an expired MOU until negotiations have resulted in a new agreement or impasse. (*San Joaquin County Employees Assn. v. City of Stockton* (1984) 161 Cal.App.3d 813, 818-819 (*City of Stockton*); *NLRB v. Katz* (1962) 369 U.S. 736 (*Katz*).) However, as a general rule, public employees have no vested right to their collectively-bargained wages or benefits *beyond the life of the agreement*, because they have no legitimate expectation that such benefits will continue, unless they are renegotiated as part of a new agreement. (*City of Fresno, supra,* 71 Cal.App.4th 82, 97; *City of Fontana, supra,* 67 Cal.App.4th 1215, 1224-1225; *Vielehr v. State of California* (1980) 104 Cal.App.3d 392.)

Although it is thus presumed that a public agency's ordinance or resolution does not grant contractual or vested rights to its employees (*City of Fontana, supra,* 67 Cal.App.4th 1215, 1224-1225), that presumption may be overcome by clear evidence that the agency expressly or by implication intended to create private, enforceable rights of a contractual nature. (*Retired Employees Assn., supra*, 52 Cal.4th 1171, 1184, 1187.) A public employer and its employees may expressly or impliedly agree to provide for "future rights" which accrue during the life of an agreement, but which survive or only become enforceable after its termination. (*San Mateo County Community College District* (1979) PERB Decision No. 94, p. 19 (*San Mateo*); *John Wiley & Sons, Inc. v. Livingston* (1964) 376 U.S. 543, 555.) The fact that future rights do not mature until after the agreement that gives rise to them has expired does not make those rights unenforceable. (*Youngman, supra*, 70 Cal.2d 240, 246; *International Union, United Auto., Aerospace, and Agr. Implement Workers of America (UAW) v. Yard-Man, Inc.* (6th Cir. Mich.

1983) 716 F.2d 1476, 1479.) In each case, the determinative question is whether the parties intended to form a contract. (*City of Redding, supra*, 210 Cal.App.4th 1114, 1119.) Because contracts between public agencies and their employees are interpreted according to the same rules as other contracts, where a public agency intended to create private rights of a contractual nature, such promises are enforceable against the agency. (Civ. Code, § 1635; *Kemper Const. Co., supra,* 37 Cal.2d 696, 704; *Retired Employees Assn., supra*, 52 Cal.4th 1171, 1178-1179; *Sheppard v. NOCROP, supra,* 191 Cal.App.4th 289, 313.)

Legislative intent to grant contractual rights may be expressly stated, or it may be implied, if the legislative act contains an unambiguous element of exchange of consideration by a private party in return for consideration offered by the agency. (*Retired Employees Assn., supra*, 52 Cal.4th 1171, 1184.) Where the legislation is the ratification or approval of a contract, the intent to form a contract is clearly shown. (*Ibid.*) Although Government Code section 25300 requires that the compensation of county employees be addressed in an ordinance or resolution,[21] the statute does not prohibit a county from forming a contract with implied terms.[22] The Supreme Court has long held that public employment gives rise to certain implied obligations which are protected by the Constitution's contract clause. Among these obligations is the right of public employees to compensation for services rendered. (*Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 852-853; *Olson v. Cory* (1980) 27 Cal.3d 532, 537-538; S*onoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 314.)

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[21] "The board of supervisors shall prescribe the compensation of all county officers and shall provide for the number, compensation, tenure, appointment and conditions of employment of county employees. Except as otherwise required by Section 1 or 4 of Article XI of the California Constitution, such action may be taken by resolution of the board of supervisors as well as by ordinance." (Gov. Code, § 25300.)

[22] Implied contractual terms are no less enforceable than express terms, so long as they do not vary from the express terms. (*Retired Employees Assn., supra*, 52 Cal.4th 1171, 1178.)

Under California law, an employee acquires an irrevocable or "vested" interest in a benefit when the employment contract is formed, even if the benefit does not "mature" until later.[23] A "statute fixing government payments may amount to an offer which, when accepted by performance, culminates in a contract between the government and the offeree." (*California Assn. of Nursing Homes etc., Inc. v. Williams* (1970) 4 Cal.App.3d 800, 817.) Once vested, the right to compensation cannot be reduced or eliminated without unconstitutionally impairing the contract obligation. (*Theroux v. State of California* (1984) 152 Cal.App.3d 1, 8; *Olson v. Cory, supra,* 27 Cal.3d 532, 537-538.) A public agency may not deny or impair payment of deferred compensation under an implied contract any more than it may refuse to make salary payments provided by an express term of an agreement. (*California League, supra*, 87 Cal.App.2d 135, 139.) Thus, the rules governing the employment contract, on the first day of employment, are protected against changes that detrimentally affect the public employee's "fundamental" rights, including the right to compensation for services rendered. (*Retired Employees Assn., supra,* 52 Cal.4th 1171, 1182; *City of Redding, supra,* 210 Cal.App.4th 1114, 1119; *CTA v. Cory, supra,* 155 Cal.App.3d 494, 506; *Betts, supra,* 21 Cal.3d 859, 863.)

Vested contractual rights may be modified on a prospective basis before they become due, so long as such changes are reasonable, *i.e.*, they must have been adopted to maintain the flexibility and integrity of the system, they must bear some material relationship to its purpose and successful operation, and any changes which result in a disadvantage to employees must be

[23] The "vesting" of a benefit may be distinguished from its "maturing," which occurs after all conditions precedent to the payment of the benefit have occurred or when the benefits are otherwise within the control of the employee. (*Retired Employees Assn., supra,* 52 Cal.4th 1171, 1189, fn. 3.) Thus, a longevity-based benefit, such as an annual promotion or pay increase for satisfactory service, "vests" on the first day of employment when such a policy is in place. The benefit does not "mature," i.e., become due and owing, however, until satisfactory service has been performed for one year or as otherwise specified by the established policy. (*California League, supra*, 87 Cal.App.3d 135, 139.)

offset by comparable new advantages. (*Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 131; *California League, supra,* 87 Cal.App.3d 135, 140-141; *Valdes v. Cory, supra,* 139 Cal.App.3d 773, 784.) While public employees thus have no irrevocable right to continued employment, or to continue to accrue a particular benefit after it has been repealed, once work has been performed while a contract or unilateral promise is in effect, permitting retroactive revocation of that promise would be unjust. (*Retired Employees Assn., supra,* 52 Cal.4th 1117.)

A public employee's right to deferred compensation thus need not be expressly stated, because it is implied from the fact that the employee has already performed services in exchange for the promised compensation. (*Youngman, supra,* 70 Cal.2d 240, 246; *State of Mississippi, for Use of Robertson v. Miller* (1928) 276 U.S. 174, 179.) While frequently the subject of retirement benefits litigations, these principles are no less applicable to other forms of deferred compensation, including longevity-based pay increases. (*City of Redding, supra,* 210 Cal.App.4th 1114; *California League, supra,* 87 Cal.App.3d 135, 140; *Youngman, supra,* 70 Cal.2d 240, 246; *Olson v. Cory, supra,* 27 Cal.3d 532, 537-538; *County of Sonoma, supra,* 23 Cal.3d 296, 314.)

In *California League*, a public agency's Personnel Policies and Procedures provided for various longevity-based benefits, including an annual promotion and pay increase schedule. The Personnel Policies and Procedures had been adopted by the agency's governing body and had been in place for several years. After bargaining to impasse with the employees' representative, the agency unilaterally eliminated the longevity-based benefits. The representative petitioned for a writ of mandate to compel the agency to reinstate benefits. The trial court ruled that the agency could not eliminate the benefits as to those employees who had been working towards them before their unilateral elimination. The appellate court affirmed, reasoning that it would be "grossly unfair" to allow a public agency to eliminate

such benefits and reap the reward of services already performed. (*California League, supra*, 87 Cal.App.3d 135, 140.)

Youngman relies on similar reasoning. In *Youngman,* a public employer maintained a salary schedule for all classifications of employees, which established five steps within each classification. The "announced practice" of the employer was to review each employee's situation annually and to advance the employee to the next step if his or her performance merited advancement. The practice of annual review and advancement upon satisfactory performance was contained in the employer's Personnel Policies following consultation with the employees' designated representative. (*Youngman, supra,* 70 Cal.2d 240, 245.) After the employer unilaterally discontinued this practice, an employee and the representative filed suit, asserting various causes of action. The trial court dismissed the complaint. The California Supreme Court reversed, explaining that the complaint stated a cause of action for breach of express and implied contracts for the employer's discontinuation of its practice of annual review and advancement. The court explained that, even if employees were hired on a month-to-month basis, and thus had no reasonable expectation of long-term employment, the public agency must still honor its implied promise of annual wage increases, if the employees continued working until the time when the annual increases were to take effect. (*Id.* at p 247.)

We are cognizant of the Supreme Court's cautionary note in *Retired Employees Assn.,* where the Court stated that, as with any contractual obligation that would bind one party for a period extending far beyond the term of the employment contract, implied contractual rights to vested benefits should not be inferred without a clear basis in the contract or convincing extrinsic evidence. (*Retired Employees Assn., supra*, 52 Cal.4th 1171, 1184; see also *City of Fontana, supra,* 67 Cal.App.4th 1215, 1223; *Chisom, supra,* 218 Cal.App.4th 400, 413-414.) We believe the facts in the present case meet that test. As discussed above, SEIU has offered a

plausible interpretation of Addenda B and C, while the County has offered no interpretation of the operative "will be placed" language. To the extent it is necessary to examine extrinsic evidence, SEIU has also offered uncontradicted testimony that it alone among County unions specifically bargained for the promises contained in Addenda B and C in return for agreeing to two-years of economic concessions.

Moreover, because SEIU has asserted that it is entitled to a one-time adjustment and not to ongoing application of the flex promotion and merit step increase schedule included in the County's Personnel Rules, the contractual rights in dispute are not being asserted for a period extending far beyond the term of the employment contract. Rather, the parties' designation of the first pay period after expiration of the agreement comports with their intent to suspend the County's promotion and pay increase schedule *only* for the term of the two-year MOU. Because the parties have limited the issue to whether the County was contractually obligated to make a one-time adjustment to employee classifications and wage rates, we need not and do not decide the separate issue of whether the County may lawfully impose a waiver of the statutory rights included in its Personnel Rules as opposed to exercising its duty to consult over a modification or elimination of the underlying Personnel Rules. (See, e.g., *California League, supra*, 87 Cal.App.3d 135, 140.)

Prior PERB Precedent Regarding Unilateral Imposition of Retroactive Economic Concessions

In addition to being consistent with existing judicial interpretations of the MMBA and with persuasive private-sector precedent, the rule announced today is consistent with long-standing PERB precedent. In *San Mateo, supra,* PERB Decision No. 94, a community college district facing likely budget cuts brought on by the passage of Proposition 13 unilaterally froze annual step increases paid to classified employees. In concluding that the possibility or even likelihood of budget reductions did not authorize unilateral action with respect to employee

wages, the Board observed that the school district had "disregarded the employees' vested contractual right to step increases," because "[t]he employees' lawful interest had accrued over time and was incorporated in the collective [bargaining] agreement." (*Id.* at p. 19, citing *California League, supra*, 87 Cal.App.3d 135.) Although the step increases at issue had yet to be paid at the time they were "frozen," the Board's reference to "vested" contractual rights and its reliance on *California League* makes clear that it considered the freeze an impermissible *retroactive* action, because it affected *deferred compensation* based on hours that employees had already worked.

In *Laguna Salada Union School District* (1995) PERB Decision No. 1103, the parties presented extensive argument on whether an employer may, after bargaining to impasse and exhausting any applicable impasse procedures, lawfully implement a retroactive pay cut. Rather than decide that issue, the Board concluded instead that the employer was not authorized to act unilaterally because the parties had never discussed *the specific methodology* for calculating the adjustment, such as whether the salary reduction would be taken from a single paycheck or spread over the course of several weeks or months. Although the Board's reasoning suggests that a retroactive reduction in pay or benefits may be permitted, where fully negotiated and included in a collective bargaining agreement, it thus does not speak to the separate issue of whether a retroactive reduction in wages or benefits may be imposed unilaterally, even after exhausting negotiations and impasse resolution procedures.

In *City of Pinole, supra,* PERB Decision No. 2288-M, the Board returned to the issue of unilaterally-imposed retroactive reductions in employee compensation. In *City of Pinole*, the

lawfully implement *any* policies that are reasonably comprehended within its pre-impasse proposals. (*City of Pinole, supra*, PERB Decision No. 2288-M, p. 13.)[25]

However, the passage cited from *Modesto* does not support the conclusion that, at impasse, an employer may impose *any* proposal, including a retroactive proposal for less favorable wages or benefits, so long as the reduction was "reasonably comprehended" by the employer's final pre-impasse proposals. In explaining the private-sector rule that imposed terms need not be "*absolutely identical*" in every respect to the employer's last offer, the appellate court in *Modesto* stated that, "While the employer has no license to grant a wage increase *greater* than any offered the union at the bargaining table, the employer may institute a wage increase identical with one which the union has rejected as too low." (*Id.* at pp. 900-901, original emphasis, citing *Katz, supra,* 369 U.S. 736, 745 and other private-sector authorities.) Neither the appellate court in *Modesto*, nor the *Katz* decision, nor any other private-sector authorities have held that an employer may unilaterally impose less favorable terms for work that *has already been performed.*

While adequate notice is a necessary precondition for lawfully imposing a LBFO at impasse, it is not sufficient. Private-sector authorities have long held that, even when an employer has bargained in good faith to impasse, it may not take unilateral action that disparages the collective bargaining process, interferes with employee choice, or undermines the authority of the representative. (*Toledo Typographical Union No. 63 v. NLRB*

[25] Alternatively, the *City of Pinole* Board affirmed dismissal of this allegation, because the charge failed to allege facts showing that any deduction from employee paychecks had actually occurred before the parties reached impasse. However, as we explained in *City of Sacramento* (2013) PERB Decision No. 2351-M, a unilateral change occurs when the employer makes a firm decision to implement the change, regardless of when or whether the change in policy is ever implemented or is later rescinded. (*Id.* at p. 27, disapproving of *City of San Diego (Office of the City Attorney)* (2010) PERB Decision No. 2103-M; see also *County of Sacramento* (2008) PERB Decision No. 1943-M, p. 12.)

(D.C. Cir. 1990) 907 F.2d 1220, 1222-25; *Central Metallic Casket Co.* (1950) 91 NLRB 572, 573-74; *NLRB v. Borg-Warner Corp., Wooster Div.* (1958) 356 U.S. 342; *Boise Cascade Corp.* (1987) 283 NLRB 462, 463, affd. (D.C. Cir. 1988) 860 F.2d 471.) PERB has similarly held that "not all terms and conditions contained within a last, best and final offer may lawfully be implemented by an employer," even though negotiations have reached a bona fide impasse. (*Rowland Unified School District* (1994) PERB Decision No. 1053, pp. 7, fn. 5, 12; see also *Los Angeles Unified School District* (2013) PERB Decision No. 2326, pp. 38-39; *San Mateo County Community College District* (1993) PERB Decision No. 1030, p. 18, fn. 11.) Providing adequate notice or otherwise complying with all procedural requirements will not make a policy or rule lawful, if it is inconsistent with the language or purposes of the MMBA or with external law. (*International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191, 199-202; *City of Imperial* (2007) PERB Decision No. 1917-M, pp. 18-19; *Berkeley, supra,* PERB Decision No. 2268, pp. 2-3, fn. 3.) Notice of an employer's proposal is thus a separate question, which cannot, by itself, determine the lawfulness of its implementation.

In *Saddleback Valley Unified School District* (2013) PERB Decision No. 2333 (*Saddleback*), the Board found nothing unlawful in a school district's unilateral imposition of *the equivalent of* a retroactive reduction in classified employee salaries, when the pay cut was applied *prospectively*, i.e., so as not to affect wages or benefits already earned when the cut was imposed. In *Saddleback*, an employer sought $4.57 million in negotiated concessions from the representative of its classified employees. During nine meetings, the parties were unable to agree on either the appropriateness of the $4.57 million figure or on any formula to get there. On June 25, 2010, the employer made its last, best and final offer which reiterated the $4.57 million in concessions to be achieved by, among other measures, a 7.39 percent pay cut to all classified employee salaries, effective July 1, 2010. However, the LBFO also stated that, "In

the event a later effective date is implemented for [the] salary decrease, an additional equivalent percentage . . . salary decrease per month will be applied to reflect the loss of savings."

During factfinding, the representative made four additional proposals, none of which would result in the $4.57 million in cost savings demanded by the employer. On August 31, 2010, the employer's governing board voted to impose its June 25 LBFO, which included the July 1, 2010 effective date for the pay cut, but which also included the language specifying that if the pay cut and other concessions were not implemented until a later date, then the employer would simply reduce employee salaries by an additional amount each month as necessary to arrive at the predetermined $4.57 million demanded by the employer. Although the pay cut ultimately imposed on August 31, 2010 was the equivalent of a retroactive reduction dating back to July 1, 2010, in accordance with the terms of the employer's June 25 LBFO, in actual fact, the money was subtracted from employee paychecks on a *prospective* basis. Thus, while the parties, the ALJ and the Board's decision in that case referred to the salary reduction imposed by the employer as applying "retroactively," the employer did not attempt to claw back wages or benefits already earned. While *Saddleback, supra,* PERB Decision No. 2333, thus involved an employer's demand for *the monetary equivalent of a retroactive pay cut*, it is factually distinguishable from *City of Pinole, supra,* PERB Decision No. 2288-M, in that no pay or benefits was subtracted for hours already worked, and from *Laguna Salada, supra*, PERB Decision No. 1103, in that the methodology for implementing the proposed pay cut was disclosed in the employer's LBFO.

More recently, in *City of San Jose, supra,* PERB Decision No. 2341-M, the Board held that a union had stated a prima facie case that the employer breached its duty to bargain in good faith by imposing a proposal that would retroactively impair vested rights of separating employees to unused sick leave compensation. Although *City of San Jose* cited to the Board's

decision in *City of Pinole*, because *City of San Jose* involved a dismissal without hearing, we remanded for further proceedings rather than address the issue of when, if ever, an employer may unilaterally impose reductions in employee wages or benefits for services already performed by the employees. Consistent with judicial interpretations existing at the time PERB assumed jurisdiction over the MMBA and with persuasive private-sector precedent, we hold that an employer may not unilaterally impose reductions in employee wages or benefits for services already performed. (*California League, supra,* 87 Cal.App.3d 135, 139-140; *R. E. Dietz Co., supra,* 311 NLRB 1259, 1266; *Harvstone Mfg. Corp, supra,* 272 NLRB 939, 942-943.)[26] Accordingly, we disapprove of *City of Pinole* as a departure from prior Board precedent to the extent it holds that an employer may impose economic concessions retroactively, so long as it has satisfied its obligation to provide notice and an opportunity to bargain.[27]

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[26] By contrast, a proposal for a retroactive pay *increase* for public employees is a mandatory subject of bargaining and is not prohibited as a payment of extra compensation under Article IV Section 17 of the California Constitution nor as a prohibited gift of public funds under Article XIII Section 25 of the California Constitution. (*San Joaquin County Employees' Assn., Inc. v. County of San Joaquin* (1974) 39 Cal.App.3d 83, 86.) The difference in treatment stems from the fact that only the employer, and not the union, may impose terms unilaterally at impasse. If the employer chooses not to accept a proposal to increase employee wages or benefits retroactively, then it is under no compulsion to implement such a proposal and cannot complain that less favorable terms of the employment contract were imposed retroactively without its consent.

[27] Our re-examination of this issue in *City of Pinole* does not affect any other issues raised by that case. Additionally, while PERB is not empowered to overrule judicial interpretations of the MMBA (MMBA, § 3509, subd. (b); see also *State of California (Department of Personnel Administration)* (2008) PERB Decision No. 1978-S, p. 9, citing *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455), the Legislature's 2000 amendment of MMBA former section 3505.4 (now section 3505.7) to clarify that imposition of an employer's LBFO does not result in a memorandum of understanding calls into question *Social Services Union v. Board of Supervisors* (1990) 222 Cal.App.3d 279 and similar decisions to the extent they make no distinction between terms imposed *unilaterally* at impasse with *contractual* terms established through *bi-lateral* negotiations. (MMBA, § 3505.7, former § 3505.4; *City of Santa Rosa* (2013) PERB Decision No. 2308-M, p. 5.)

Miscellaneous Issues Raised in the County's Briefing

Finally, we address several points raised in the County's response to SEIU's exceptions. First, the County is correct that the "Full Understanding and Re-opener" clauses in the parties' 2009-2011 MOU do not assist SEIU in this matter, as both clauses operate to limit or waive the subjects about which the parties may demand bargaining *during the term of the MOU.* Neither article includes language that would preclude bargaining over any subjects *during the negotiations for a successor agreement.* However, the fact that the parties were negotiating a successor MOU did not authorize the County to insist on re-negotiating its outstanding liabilities *under the previous* MOU. (*California League, supra*, 87 Cal.App.3d 135, 140.) The statutory duty to meet and confer over wages, hours, and other terms and conditions of employment pertains to *future* wages, hours and other terms and conditions of employment. (*Swift Adhesives, supra,* 320 NLRB 215, 216.) Unless prohibited by external law, parties are free to negotiate over concessions (*Mount Diablo Education Association (DeFrates)* (1984) PERB Decision No. 422, pp. 5-6), but the duty to negotiate over mandatory subjects of bargaining does not require them to re-negotiate terms and conditions included in a previous agreement, or authorize the employer to impose proposals that abrogate outstanding obligations under a previous agreement or alter the conditions of employment for services *already performed.* (*Swift Adhesives.*)

Second, the County argued, and the ALJ agreed, that *Fountain Valley, supra,* PERB Decision No. 625, was factually distinguishable, because it involved a mid-term modification rather than a unilateral change to the terms of an expired agreement. However, *Fountain Valley* is germane to this discussion for an entirely separate reason. It demonstrates that, depending upon the nature of the allegation, the charging party in a unilateral change case may not need to show that it was denied notice and opportunity to bargain, if the parties are

factual allegations were as follows.[24] The employer presented its LBFO on June 9, 2011. The LBFO included a proposal to shift pension contribution costs to employees, effective July 1, 2011. The parties were unable to agree on the issue before the July 1 effective date and did not conclude impasse resolution procedures until July 26, 2011. On July 29, 2011, the employer imposed its June 9 LBFO, including the proposal to shift pension costs to employees as of July 1, 2011. The employees' representative argued that the employer was not privileged to implement terms retroactive to July 1, because the parties did not exhaust impasse resolution procedures until almost four weeks later.

Rather than considering the retroactive nature of the employer's unilateral action on employee wages and benefits, the *City of Pinole* Board focused instead on whether the employer had provided adequate notice of the proposed change to the exclusive representative. Because the employer had presented its LBFO on June 9, some weeks before the effective date of the proposed reduction in employee benefits, the fact that the parties were still bargaining on July 1 did not, in the *City of Pinole* Board's view, preclude the employer from eventually implementing that proposal, once the parties had bargained in good faith to impasse and exhausted impasse resolution procedures. Citing *Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 900-901 (*Modesto*), the *City of Pinole* Board reasoned that, once the impasse resolution procedures had been exhausted, the employer may

[24] Because *City of Pinole* involved Board review of a dismissal without hearing, pursuant to PERB regulations and decisional law, the charging party's factual allegations were accepted as true for the purpose of determining whether the charge stated a prima facie case. (PERB Regs. 32620 and 32640; *Eastside Union School District* (1984) PERB Decision No. 466.)

operating under a contractually-imposed restriction on their ability to alter terms and conditions of employment. (See, *e.g.*, *City of Glendale, supra*, 15 Cal.3d 328, 335-337.) While the ALJ correctly noted that, unlike *Fountain Valley*, the present case does not involve a change that took effect during the term of the MOU, that observation does not address the separate question of whether the contractual rights embodied in Addenda B and C could be altered *retroactively*, even assuming the employer provided notice and opportunity to bargain.

Third, we reject the County's argument that "*any* limitation on [its] ability to negotiate wages in a successor MOU would run afoul" of the constitutional guarantee that a county's governing body "shall provide for the number, compensation, tenure, and appointment of [its] employees" (Cal. Const., art. XI, § 1, subd. (b), emphasis added.) According to the County, the MMBA may impose only *procedural* requirements on how a county sets employee compensation but it cannot affect wages in any *substantive* way. The County's statement of the law is correct; nothing in the MMBA's meet and confer requirement is designed to supersede the substantive provisions of a county's charter or local rules, nor to establish substantive terms and conditions of employment. (MMBA, § 3500; *Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, 601.) But that is not the issue here.

The County's argument ignores the distinction between an employer's *statutory* obligation to bargain over negotiable matters and any *contractual* obligation it may have incurred to perform, even after expiration of a collective bargaining agreement. The procedural obligations imposed by the MMBA are two-fold: (1) to maintain the status quo terms and conditions of employment until negotiations have resulted in impasse or agreement (*City of Stockton, supra,* 161 Cal.App.3d 813, 818-819; *The Finley Hosp.* (Sept. 28, 2012) 359 NLRB No. 9); and (2) to refrain from repudiating contractual obligations that expressly or impliedly become due and owing *following* expiration of the 2009-2011 MOU. (*California League,*

supra, 87 Cal.App.3d 135, 140; *City of Redding, supra*, 210 Cal.App.4th 1114, 1122.) Because we are concerned here with the County's repudiation of a *contractual* obligation to restore employees to the pre-existing promotion and salary structure upon expiration of the 2009-2011 MOU, we perceive no conflict between honoring the vested rights of employees agreed to by their employer, and the County's constitutional right to set compensation for its employees. The only *substantive* limitation on the County's ability to negotiate over employee wages is one voluntarily agreed to by the County itself, which it is not free to repudiate.

ORDER

Based on the foregoing findings of fact and conclusions of law and the entire record in this case and pursuant to the Meyers-Milias-Brown Act (MMBA), Government Code section 3509, the Public Employment Relations Board (PERB or Board) REVERSES the administrative law judge's (ALJ) proposed decision and finds that the County of Tulare (County) violated sections 3505 and 3506.5, subdivision (c), of the Government Code, and committed an unfair practice pursuant to section 3509, subdivision (b) of the Government Code, and PERB Regulation 32603, subdivision (c) (Cal. Code Regs., tit. 8, sec. 31001 et seq.), by failing and refusing to meet and confer in good faith with Service Employees International Union, Local 521 (SEIU) when the County repudiated the terms of Addenda B and C of the County's 2009-2011 Memorandum of Understanding with SEIU. The above conduct also violated section 3506.5, subdivisions (b) and (a), of the MMBA, by denying SEIU rights guaranteed to it by the MMBA, and by interfering with the rights of employees to join, form and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.

The County, its governing board and its representatives, shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and confer in good faith with SEIU, the exclusive representative of County employees, by unilaterally imposing provisions that impair the vested rights of employees in flexibly allocated classifications as set forth in the expired 2009-2011 MOU between the County and SEIU.

2. Denying SEIU rights guaranteed by the MMBA to represent employees.

3. Interfering with the rights of employees of the County 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.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICES OF THE MMBA:

1. Restore the prior status quo by rescinding the unilaterally imposed freeze on promotions for employees in flexibly allocated classifications and on merit step increases, as set forth in the County's Personnel Rules, and as incorporated by reference in Addenda B and C of the parties' expired 2009-2011 MOU.

2. Make whole the affected employees in flexible classifications by adjusting employee classifications and pay rates to the classification level and pay rate that would have occurred under the County's Personnel Rules in the absence of Addenda B and C of the parties' expired 2009-2011 MOU, and by granting employees such merit step increases as would have occurred under the County's Personnel Rules in the absence of Addenda B and C of the parties' expired 2009-2011 MOU, with interest at seven (7) percent per annum accruing from the first payroll period following expiration of the 2009-2011 MOU.

3. Within ten (10) workdays of service of a final decision in this matter, post at all work locations where notices to employees of the County are customarily posted,

copies of the Notice attached hereto as an Appendix, signed by an authorized agent of the County. Such posting shall be maintained for at least thirty (30) consecutive workdays. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the County to communicate with SEIU-represented employees in flexibly allocated classifications. The County, its governing board and its representatives shall take reasonable steps to ensure that the posted Notice is not reduced in size, defaced, altered or covered by any material.

4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of PERB, or the General Counsel's designee. The County shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on SEIU or its designated counsel.

Members Huguenin and Winslow joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. SA-CE-748-M, *Service Employees International Union, Local 521 v. County of Tulare*, in which all parties had the right to participate, it has been found that the County of Tulare (County) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3505 and 3506.5, subdivision (c), and committed an unfair practice pursuant to section 3509, subdivision (b), and PERB Regulation 32603, subdivision (c) (Cal. Code Regs., tit. 8, sec. 31001 et seq.) by failing and refusing to meet and confer in good faith with the Service Employees International Union, Local 521 (SEIU) and unilaterally repudiating the terms of Addenda B and C of the County's 2009-2011 Memorandum of Understanding (MOU) with SEIU. The above conduct also violated Government Code section 3506.5, subdivisions (b) and (a), by denying SEIU rights guaranteed to it by the MMBA, and by interfering with the rights of employees to join, form and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and confer in good faith with SEIU by unilaterally imposing provisions that impair the vested rights of employees to flex promotions and merit step increases as set forth in the expired 2009-2011 MOU between the County and SEIU.

2. Denying SEIU rights guaranteed by the MMBA to represent employees.

3. Interfering with the rights of employees of the County 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.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICES OF THE MMBA:

1. Restore the prior status quo by rescinding the unilaterally imposed freeze on flex promotions and merit step increases, as set forth in the County's Personnel Rules, and as incorporated by reference in Addenda B and C of the parties' expired 2009-2011 MOU.

2. Make whole the affected employees in flexible classifications by adjusting employee classifications and pay rates to the classification level and pay rate that

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.

would have occurred under the County's Personnel Rules in the absence of Addenda B and C of the parties' expired 2009-2011 MOU, and by granting employees such merit step increases as would have occurred under the County's Personnel Rules in the absence of Addenda B and C of the parties' expired 2009-2011 MOU, with interest at seven (7) percent per annum accruing from the first payroll period following expiration of the 2009-2011 MOU.

Dated: _____ COUNTY OF TULARE

By: _____
Authorized Agent

PROOF OF SERVICE

I declare that I am a resident of or employed in the County of Sacramento, California. I am over the age of 18 years and not a party to the within entitled cause. The name and address of my residence or business is Public Employment Relations Board, 1031 18th Street, Sacramento, CA 95811-4124.

On February 26, 2015, I served the **PERB Decision No. 2414-M** regarding: *Service Employees International Union Local 521 v. County of Tulare*, Case No. SA-CE-748-M on the parties listed below by:

__X__ placing a true copy thereof enclosed in a sealed envelope for collection and delivery by the United States Postal Service or private delivery service following ordinary business practices with postage or other costs prepaid.

___ facsimile transmission in accordance with the requirements of PERB Regulations 32090 and 32135(d).

__X__ electronic service (e-mail).

Erich W. Shiners, Attorney
Renne Sloan Holtzman Sakai
428 J Street, Suite 400
Sacramento, CA 95814

Sean D. Graham, Attorney
Kerianne R. Steele, Attorney
Weinberg, Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on February 26, 2015, at Sacramento, California.

Hanah E. Stuart
(Type or print name)

Hanah E. Stuart
(Signature)