PERB
California Public Employment Relations Board

Division of Administrative Law
1031 18th Street
Sacramento, CA, 95811-4124
Telephone: (916) 324-0143

February 28, 2023

Re: *Compton Firefighters, IAFF Local 2216 v. City of Compton*
Unfair Practice Case No. LA-CE-1449-M

Dear Parties:

Attached is the Public Employment Relations Board (PERB or Board) agent's Proposed Decision in the above-entitled matter.

Any party to the proceeding may file with the Board itself a statement of exceptions to the Proposed Decision. The statement of exceptions should be electronically filed using the "ePERB portal" accessible from PERB's website (https://eperb-portal.ecourt.com/public-portal/). (PERB Reg. 32110, subd. (a).)[1] Individuals not represented by an attorney or union representative, are encouraged to electronically file their documents using the ePERB portal; however, such individuals may submit their documents to PERB for filing via in-person delivery, US Mail, or other delivery service. (PERB Reg. 32110, subds. (a) and (b).) The Board's mailing address and contact information is as follows:

PUBLIC EMPLOYMENT RELATIONS BOARD
Attention: Appeals Assistant
1031 18th Street, Suite 200
Sacramento, CA 95811-4124
Telephone: (916) 322-8231

Pursuant to PERB Regulation 32300, the statement of exceptions must be filed with the Board itself within 20 days of service of this proposed decision. A document submitted through ePERB after 11:59 p.m. on a business day, or at any time on a non-business day, will be deemed "**filed**" the next regular PERB business day. (PERB Reg. 32110, subd. (f).) A document submitted via non-electronic means will be considered "**filed**" when the originals, including proof of service (see below), are actually received by PERB's Headquarters during a regular PERB business day. (PERB Reg. 32135, subd. (a); see also PERB Reg. 32130.)

The statement of exceptions must be a single, integrated document that may be in the form of a brief and may contain tables of contents and authorities, but may not exceed 14,000 words, including footnotes, but excluding the tables of contents and authorities. Requests to exceed the 14,000-word limit must establish good cause for exceeding

[1] PERB's regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

the limit and be filed with the Board itself and served on all parties no later than five days before the statement of exceptions is due. PERB Regulation 32300, subdivision (a), is specific as to what the statement of exceptions must contain. The statement of exceptions shall: (1) clearly and concisely state why the proposed decision is in error, (2) cite to the relevant exhibit or transcript page in the case record to support factual arguments, and (3) cite to relevant legal authority to support legal arguments. Exceptions shall cite only to evidence in the record of the case and of which administrative notice may properly be taken. (PERB Reg. 32300, subd. (c).) Non-compliance with the requirements of PERB Regulation 32300 will result in the Board not considering such filing, absent good cause. (PERB Reg. 32300, subd. (d).)

Within 20 days following the date of service of a statement of exceptions, any party may file with the Board a response to the statement of exceptions. The response shall be filed with the Board itself in the same manner set forth in this letter for the statement of exceptions (see paragraphs two and three of this letter). The response may contain a statement of any cross-exceptions the responding party wishes to take to the proposed decision. The response shall comply in form with the requirements of PERB Regulation 32300 set forth above, except that a party both responding to exceptions and filing cross-exceptions shall be permitted to submit up to 28,000 words total, including footnotes, without requesting permission. A response (with or without an inclusive statement of cross-exceptions) to such exceptions may be filed within 20 days. Such response shall comply in form with the provisions of PERB Regulation 32310.

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See PERB Regs. 32300, subd. (a) and 32093; see also PERB Reg. 32140 for the required contents.) Proof of service forms are available for download on PERB's website: www.perb.ca.gov/about/forms/. Electronic service of documents through ePERB or e-mail is authorized only when the party being served has agreed to accept electronic service in this matter. (See PERB Regs. 32140, subd. (b) and 32093.)

Any party desiring to argue orally before the Board itself regarding the exceptions to the proposed decision shall file with the statement of exceptions or the response thereto a written request stating the reasons for the request. Upon such request or its own motion the Board itself may direct oral argument. (PERB Reg. 32315.) All requests for oral argument shall be filed as a separate document.

An extension of time to file a statement of exceptions can be requested only in some cases. (PERB Reg. 32305, subds. (b) and (c).) A request for an extension of time in which to file a statement of exceptions with the Board itself must be in writing and filed with the Board at least three calendar days before the expiration of the time required to file the statement of exceptions. The request must indicate good cause and, if known, the position of each of the other parties regarding the request. The request shall be accompanied by proof of service of the request upon each party. (PERB Reg.

32132.)

Unless a party files a timely statement of exceptions to the proposed decision, the decision shall become final. (PERB Reg. 32305.)

Sincerely,

Shawn Cloughesy
Chief Administrative Law Judge

SPC

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

COMPTON FIREFIGHTERS, IAFF LOCAL 2216, Charging Party, v. CITY OF COMPTON, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-1449-M PROPOSED DECISION (February 28, 2023)

Appearances: Adams, Ferrone, and Ferrone, by Michael McGill, Attorney, for Compton Firefighters, IAFF Local 2216; Liebert, Cassidy, Whitmore, by Viddell Lee Heard, Attorney, for City of Compton.

Before Scott Miller, Administrative Law Judge.

INTRODUCTION

A complaint issued by the Public Employment Relations Board (PERB or Board) on behalf of Charging Party Compton Firefighters, International Association of Firefighters, Local 2216 (Local 2216) alleged that during negotiations for a successor memorandum of understanding (MOU), Respondent City of Compton (City) failed or refused to meet and confer in good faith in violation of the Meyers-Milias-Brown Act (MMBA) and PERB Regulations by, among other things, not responding to Local 2216's economic proposal or otherwise engaging in meaningful negotiations for almost a year and a half.[1] The City admitted most of the complaint's factual

[1] The MMBA is codified at Government Code section 3500 et seq., and PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

allegations, including that the parties did not engage in meaningful negotiations for the period at issue. However, it denies liability based on a business necessity defense. For reasons explained below, I sustain the complaint, order make-whole and other affirmative relief, and grant Local 2216's request for sanctions against the City.

PROCEDURAL HISTORY

On April 24, 2020, Charging Party Local 2216 filed an unfair practice charge with PERB, and on July 9, 2020, PERB's Office of the General Counsel issued a complaint (Complaint) thereon. The Complaint alleged that during successor negotiations occurring between October 25, 2018 and April 17, 2020, the City and its bargaining representatives engaged in various acts or omissions, including but not limited to, repeatedly changing bargaining representatives, cancelling bargaining sessions with little or no notice, failing or refusing to schedule bargaining sessions, showing up late and/or unprepared for negotiations, and failing to make counterproposals or engage in substantive discussion on the few occasions when the parties' representatives did meet. The Complaint alleged that the City had thereby failed and refused to meet and confer in good faith, in violation of MMBA sections 3505, 3506.5, subdivision (c), and 3509, subdivision (b), and PERB Regulation 32603, subdivision (c), with corresponding derivative violations of the representational rights of Local 2216 and unit members.

On July 29, 2020, the City answered the Complaint by admitting jurisdiction and most of the Complaint's factual allegations. However, the City's Answer denied liability and asserted various affirmative defenses, including that its actions were "justified due to circumstances beyond its control" and were "reasonable based upon

justifiable business reasons." The City's Answer also asserted that the Complaint "fail[ed] to state facts sufficient for [Local 2216] or its represented unit members to recover costs or attorneys' fees from [the City] under any theory."

After several unsuccessful attempts to conduct an informal settlement conference, the case was placed in abeyance on January 8, 2021. At the parties' request, PERB extended the abeyance on March 19, 2021 until September 10, 2021. On October 25, 2021, the parties participated remotely in an informal settlement conference but were unable to resolve the dispute. The matter was then transferred to PERB's Division of Administrative Law and set for formal hearing.

The formal hearing took place by videoconference on May 26, 2022. Both parties were represented by counsel and had the opportunity to examine and cross-examine witnesses, to present documentary evidence, and to be heard on the issues. Firefighter Paramedic and Local 2216 Vice President Daniel Salazar testified for Local 2216. Former City Budget Director and current Assistant City Manager Triphenia Simmons testified for the City. Following notice to the parties, official notice was taken of the contents of PERB's case file in this matter.

On September 16, 2022, the parties filed closing briefs, and the matter was deemed fully submitted for proposed decision.

FINDINGS OF FACT

A. Parties and Jurisdiction

The City is a "public agency" within the meaning of MMBA section 3501, subdivision (c), and PERB Regulation 32016, subdivision (a), and a charter city pursuant to the California Constitution. (Cal. Const., art. XI, §§ 3, 5.) The City's

governing body is an elected City Council. Pursuant to section 601 of the City's Charter, all powers conferred by the State Constitution on the City as a charter city are vested in the City Council, unless otherwise delegated under the Charter.[2]

Local 2216 is an "employee organization", a "recognized employee organization," and an "exclusive representative" within the meaning of MMBA section 3501, subdivisions (a) and (b), and PERB Regulation 32016, subdivision (b). Local 2216 represents the City's non-management, sworn Fire Department personnel, including employees in the classifications Firefighter, Fire Engineer, and Fire Captain. All Local 2216 members are employees of the City of Compton.

B. City Manager and City Controller

Pursuant to section 703 of the City's Charter, the City Council appoints a City Manager, who serves as the City's chief administrative and chief executive officer. Pursuant to section 706, the City Manager's powers and duties include appointing and removing the heads of most departments; preparing and submitting to the City Council a proposed annual budget and administering the budget after its adoption; preparing and submitting to the City Council at the end of each fiscal year a complete report on the finances and administrative activities of the City for the preceding year; keeping the City Council advised of the financial condition and future needs of the City; and making recommendations to the City Council on all matters affecting the City.

The City Council also appoints the City Controller who, unlike most department heads, reports to the City Council and not to the City Manager. Pursuant to section

[2] Pursuant to Evidence Code sections 451 and 452, and applicable authority, I take official notice of the City's Charter.

708 of the Charter, the City Controller's powers and duties include compiling the budget expense and capital estimates for the City Manager; supervising disbursement of all monies and expenditures; maintaining a general accounting system for all departments and offices of City government; auditing the City's assets; submitting to the City Council through the City Manager a monthly statement of all receipts and disbursements showing the financial condition of the City; submitting to the City Council a complete financial statement and report at the end of each year; and auditing and approving all bills, invoices, payrolls, demands or charges against the City before payment.

Triphenia Simmons worked as a Budget Officer in the City Manager's office from 2016 until 2019, when she was promoted to her current position as Assistant City Manager. In these positions, she was either directly responsible for or supervised the process of receiving requests from departments for their annual budgets, analyzing the expenditures to revenues, and preparing the annual budget report of the City Manager to the City Council.

Simmons worked in the City Controller's Office at some unspecified date before 2016. She did not work in the City Controller's Office at any point relevant to these proceedings. To prepare the City Manager's annual budget report, Simmons or her staff relied on information from the City Controller, including the projected costs and revenues of the various functions and services of City government for future years. According to Simmons, the Controller is also responsible for "costing" or projecting the

cost of future wages and benefits of a proposed collective bargaining agreement before its adoption by the City Council.[3]

Simmons testified that in addition to developing the City's annual budget, her duties as Assistant City Manager also included "working with the Controller to address a lot of outstanding audit findings" and "creating various policies to try to correct some longstanding mishaps" in City government.[4] According to Simmons, beginning in approximately 2018, Rafaela King was the City Controller. King went on administrative leave in 2020 and separated from City employment at some later date that is not in the record. Simmons testified that staffing turnover and vacancies in the Controller's Office during King's tenure "left a lack of leadership to perform a lot of functions, whether it was costing or audit completions." According to Simmons, between 2018 and 2020, various granting agencies, such as the Los Angeles County Metropolitan Transportation Authority, threatened to cut off grant funding for the City because the Controller was not performing necessary audits to demonstrate that these funds were being used properly.

[3] Neither witness in these proceedings had personal knowledge of negotiations between the City and Local 2216 before the 2018 successor negotiations at issue in this dispute, and no evidence was presented whether the City had ever costed Local 2216's proposals in prior negotiations.

[4] As discussed below, Simmons was not involved the successor negotiations at issue until sometime around mid-2020, i.e., *after* most of the period covered by the Complaint. The City also presented no evidence that any of the "mishaps" within the Controller's Office referenced in her testimony, any problems between the Controller's Office and the City Manager, or any corrective measures designed to address these "mishaps," were ever raised or discussed in negotiations with Local 2216 before April 17, 2020.

Simmons also testified about a "void for information" and how "the City Manager could not get certain things from the City Controller" during King's tenure. However, because the Controller reports directly to the City Council, the City Manager had no authority to direct King to provide information or do other things necessary for complying with the City's auditing and other obligations. Simmons testified that because of the Controller's failure to conduct audits, State officials designated the City as "one of the worst financially stable cities for a couple of years." In 2018, the City Council adopted a Corrective Action Plan, and State officials audited the City. This audit included various findings and required changes in how the City managed its accounting and finances. According to Simmons, as of May 26, 2022, the City was still working to comply with the Corrective Action Plan.

C. Bargaining History and 2016-2018 MOU Negotiations

Over the years, Local 2216 and the City have been parties to a series of MOUs. Before the present dispute arose, the most recent comprehensive MOU between the parties covered the period from July 1, 2014 through June 30, 2016. Among its provisions was Article 17 (Union Business), section B, which stated:

> "Pursuant to Section 3505.3 of MMB, up to four members of the negotiating team shall be allowed reasonable time off without loss of compensation or benefits, exclusive of Union business hours when formally meeting and conferring with the City on matters within the scope of representation, provided their release shall not result in engine companies being out of service."

The MOU contained no provision governing time spent by unit members preparing for or attending negotiations during their off-duty hours.

Negotiations for a successor to the 2014-2016 MOU began in October 2015 and continued for several years without resolution. As of October 2018, Local 2216's bargaining representatives included Salazar, Local President Tony Branson, and Political Action Committee Director Shon Halvorson, with Attorney Michael McGill serving as chief spokesperson. Attorney Clifton Albright of the law firm Albright, Yee & Schmit, served as the City's lead negotiator, and then-Assistant City Manager Mily Huntley was the City's other bargaining representative.

At a bargaining session held on October 10, 2018, the City presented as its last, best, and final offer, a proposed three-year extension of the expired 2014-2016 MOU. Because the proposed extension would be retroactive to the expiration of the previous agreement, it would expire in approximately nine months on June 30, 2019. According to Salazar, Albright represented that if Local 2216 would accept the City's offer, the parties could begin successor negotiations as early as the following week. Local 2216 accepted, and as part of that agreement, the parties met again on October 25, 2018 to begin successor negotiations for the now extended 2014-2016 MOU.

D. Successor MOU Negotiations 2018 to April 17, 2020

The Complaint alleged and the City admitted that from October 25, 2018 until April 17, 2020, the parties were meeting and conferring regarding a successor MOU. The parties began the 2018 successor negotiations with the same representatives identified above. In the following year and a half, the City would change its lead negotiator three times and make other changes to the composition of its bargaining team. These changes are detailed below.

At all times relevant to this dispute, Local 2216's bargaining representatives

remained the same. In addition to his services as Local 2216's chief negotiator, McGill is an attorney licensed to practice in California and represented Local 2216 in the current dispute before PERB.

Salazar, Branson, and Halvorson were members of Local 2216, i.e., employees of the City. According to Salazar, most bargaining sessions for these negotiations occurred when he was on duty, and pursuant to the terms of Article 17, section B, of the extended 2014-2016 MOU, he received compensation from the City at his regular rate of pay while attending those meetings. However, Salazar testified that it was difficult to schedule bargaining sessions at times when all three of Local 2216's employee representatives were on duty, and that some bargaining meetings were conducted outside of one or more of the employee representatives' working hours. According to Salazar: "Whatever scheduled date the City gave us, that's when we attended the meeting, on or off [duty]." Salazar testified, without contradiction, that the above-quoted language from Article 17 does not cover off-duty time and that he "[does not] get paid for anything that [he does] off duty." I infer from this testimony and from the absence of any contrary evidence that during the successor negotiations at issue, there was no contractual or other arrangement to compensate Salazar or Local 2216's other employee representatives for time spent preparing for or attending negotiations during their off-duty hours.

1. October 25, 2018: First Meeting

The parties' representatives met as scheduled on October 25, 2018 to begin negotiations for a successor MOU. At this initial meeting, they discussed ground rules for negotiations, and Local 2216's representatives identified approximately six or

seven, mostly economic, items that they wished to negotiate. The record does not disclose how long this meeting lasted, but it is undisputed that it ended due to time constraints before Local 2216 had finished presenting all the items it wished to negotiate. The parties agreed to meet again on November 13. Albright asked Local 2216 to provide a comprehensive "wish list" in advance of their next meeting, claiming this would expedite the discussion. There is no evidence that the parties' ground rules required written proposals be submitted in advance of meetings, and Local 2216 made no commitment to doing so at this time.

In one of the few disputed factual issues in this case, the parties' briefs offer conflicting accounts of the circumstances surrounding Albright's request. The City asserts that Albright "initially requested that the Union provide its 'wish list' of items all at once, rather than attempt to negotiate each item piecemeal." According to the City, Albright also noted "the parties would have been 'worse off' if they had attempted to negotiate each item separately." However, the City's brief misquotes the record of Albright's statement[5], and there is no other evidence to support the City's suggestion

[5] The only evidence of Albright's comment about the parties being "worse off" appeared in an e-mail message six months later, on May 21, 2019, and, as discussed below, it came in response to Local 2216's complaint that despite submitting the requested wish list, the City had still not agreed to meet and discuss it. Albright's message did not say anything about "attempt[ing] to negotiate each item separately." Notably, it also conceded that Local 2216's recital of the parties' negotiations thus far, including Albright's request for a wish list at their October 25 and November 13, 2018 meetings, was "accurate." The account of "piecemeal" bargaining offered in the City's brief is therefore not only without any evidentiary support; it is contrary to the authorized or party admissions of its own representative. (See Evid. Code, §§ 1220, 1222; *Regents of the University of California* (2021) PERB Decision No. 2783-H, p. 16, fn. 5; *United Teachers of Los Angeles (Raines, et al.)* (2016) PERB Decision No. 2475, p. 52, fn. 36, citing *Clark Equipment Co. v. Wheat* (1979) 92 Cal.App.3d 503, 523.)

that Local 2216 attempted to negotiate items "piecemeal" or "separately." Salazar, the only witness competent to testify on the subject, explained that Local 2216 preferred to present each item in person before sending a written proposal. According to Salazar, Local 2216's representatives were initially reluctant to follow Albright's suggestion, because they feared the City would reject a written proposal without first hearing Local 2216's explanation of the context or its reasons for the proposed item. Because Salazar's account is uncontradicted and is consistent with other evidence in the record, I credit it over the City's wholly unsubstantiated allegation that Local 2216 engaged in "piecemeal" bargaining.[6]

2. November 13, 2018: Second Meeting

The parties met for the second time on November 13, 2018. Local 2216 presented approximately four additional items that it wished to negotiate but again ran out of time. Salazar recalled that by the end of this meeting, Local 2216 had identified ten or perhaps eleven items that it wished to negotiate or renegotiate. Albright again requested that Local 2216 compile a complete wish list of economic items and e-mail it to the City's representatives before their next meeting "to give the City an opportunity to review it and [determine] the cost factor behind those requests."

After this meeting, Local 2216's bargaining representatives met to discuss

[6] Over the City's objection, Salazar also testified that Albright's suggestion differed from how Local 2216 had conducted its previous negotiations with the City, and the parties' briefs dispute this issue. Although Local 2216 initially declined to follow Albright's suggestion to submit a written wish list in advance of meeting, it is undisputed that Local 2216 agreed to do so at the following meeting. I therefore consider it unnecessary to determine whether Albright's suggested procedure deviated from any prior practice in the parties' negotiations.

Albright's suggested procedure. Despite some reluctance, Local 2216's representatives agreed to compile and provide the City's representatives with a comprehensive wish list in advance of the parties' next meeting, which was scheduled for December 20, 2018.

3. December 12, 2018: Local 2216 Provides Its Economic Proposal

On December 12, 2018, McGill e-mailed City representatives, explaining that Local 2216 had agreed to the City's suggestion and was providing a "formal written proposal for consideration and discussion at our upcoming meeting of December 20, 2018." Attached to McGill's message was a two-page, ten-item proposal identified as "Association Proposal #1." Local 2216's proposal would, among other things, create two vacation leave banks (one with a cap of 624 hours), increase vacation accrual; increase holiday pay by 3 percent; increase staffing from 22 to 25 employees per shift; increase education pay and several forms of premium pay special duty assignments[7]; and establish new bilingual and longevity pay bonuses. Some proposed items were enhancements to the previous agreement, while others would create entirely new benefits. At the hearing, the parties stipulated that at least 95 percent of the items in the Association's proposal would have some financial implications for the City.[8] For example, one item, proposed changes to Article 17

[7] As drafted, Proposal #1 included ten items. However, Item No. 6, "Article 26: Premium Pay," included several forms of premium pay, which accounts for the apparent discrepancy between the ten items included in the proposal and Salazar's testimony that by the end of the parties' second meeting, Local 2216 had already presented somewhere between ten and twelve items but had not yet presented its entire wish list.

[8] The City contends that Local 2216's proposal "consisted almost entirely of

(Union Business) of the extended MOU, dealt with an ostensibly non-economic subject, but nonetheless had fiscal implications in that it would add a more generous released time formula for Local 2216 officers attending union conferences. Other items, such as proposed language providing that "vacation time shall not be unreasonably denied," dealt with an ostensibly "economic" subject, though whether it would have any fiscal implications was unclear from the record.

4. December 18, 2018: Cancellation and Six-Month Hiatus in Meetings

The parties were scheduled to meet again on December 20, 2018. On December 13, 2018, Victoria Shin, an attorney working with Albright, e-mailed McGill to ask about moving the start time to 11 a.m. because of an unspecified scheduling conflict. McGill agreed but advised Shin that he "[had] to be on the road by 1[:00 p.m.]."

Paragraph 4(A) of PERB's Complaint alleged, and the City admitted, that on December 18, 2018, the City cancelled a negotiation session that was scheduled for December 20, 2018 and requested to postpone negotiations until January or early February 2019." According to Shin's message of that date to McGill, the City's representatives "believe[d] it would be in the parties[']] best interests [to] postpone [the] December 20, 2018 meeting to a later date in late January or early February" 2019, because they "want[ed] to have a productive and efficient meeting," which would

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items with a direct *and substantial* fiscal impact on the City's finances." (Emphasis added.) In the absence of the City's cost analysis, which lies at the center of this dispute, or of qualified testimony on the subject, I have no basis to determine whether the fiscal impact of any of Local 2216's proposed items would be "substantial." Accordingly, I make no finding on that issue.

"require some time to discuss [Local 2216's] requests with [the City] and discuss the financial feasibility of these demands." Shin's message asked McGill to suggest available dates in late January or early February 2019 to resume negotiations. McGill replied to Shin within an hour, indicating that Local 2216's representatives were "fairly wide open." McGill suggested instead that the City offer possible dates and that Local 2216 "can make it work." The City did not respond to McGill's message.

PERB's Complaint alleged, and the City admitted that as of January 2019, the City's representatives were not prepared to engage in meaningful discussion of Local 2216's proposal, claiming that the City Controller's office had not yet determined the financial costs of the proposal. There was no evidence that the City's representatives offered any reasons why the Controller had not yet completed this task.

5. January 28, 2019: Local 2216 Request for Bargaining Dates

Having received no response from the City to his request for potential bargaining dates, on January 28, 2019, McGill again e-mailed the City's representatives to obtain a date for negotiations. Shin replied the following day: "We are still evaluating your requests and need some more time to discuss the Union's requests with the City. We will let you know when we are available. Thanks."

6. April 18, May 3, and 8 2019: Local 2216 Requests Bargaining Dates

Paragraph 4(A) of the Complaint alleged, and the City admitted, that despite Local 2216's "multiple requests for resuming their negotiations," the City "delayed further until June 10, 2019 for a third bargaining session—nearly six months after Charging Party provided its initial bargaining proposal for a successor contract." The record establishes that on April 18, May 3, and May 8, 2019, McGill again contacted

Albright and Huntley via e-mail to request bargaining dates. McGill's April 18, 2019 message threatened litigation over a separate but related dispute with the City concerning allegations of unpaid overtime under the extended MOU. Responses from Huntley and Albright claimed the City Controller was too busy processing overtime claims to conduct the cost analysis need to conduct "meaningful negotiations." For example, in response to McGill's May 3, 2019 request, Albright wrote:

> "We were waiting for the Controller to complete payments to the firefighters so we could get budget numbers. As discussed, this will occur by the end of May. W[e] could set dates [for meeting], however, I can't be sure we will have the budget information necessary for meaningful negotiations. I'm hoping for budget information to be available mid to late June."

The City did not respond to McGill's May 8 request. Instead, on May 9, 2019, Huntley asked to schedule a meeting to negotiate with Local 2216 over proposed changes to the City's personnel rules.

On May 16, 2019, McGill responded to Huntley's request. His message recounted Local 2216's repeated and thus far unsuccessful efforts to schedule bargaining dates for a successor MOU and complained about the City's repeated delays. McGill also complained about the City's sudden urgency to schedule meetings to negotiate over the City's requested changes to its personnel rules, while Local 2216's proposal remained in limbo.

In the following days, McGill received messages from both Huntley and Albright. In a May 21, 2019 message, Albright admitted that the chronology of facts asserted in McGill's previous message was accurate and expressed his appreciation for Local 2216's patience. Albright's message again acknowledged: "Without the

financial information we are obtaining from the City, no meaningful negotiation can proceed. I am regularly checking with the City for status updates on the financial information we requested."

7. June 10, 2019: Third Meeting

On June 10, 2019, the parties met for their third bargaining session and for the first time since in six months. Huntley arrived approximately 30 minutes late. Salazar described the meeting as "very brief" and having accomplished nothing productive. It was undisputed that the City had no counterproposal, no formal response of any kind to Local 2216's pending proposal, and no questions or requests for Local 2216 to clarify any points about its proposal. The City's representatives said they were still awaiting a cost analysis from the City Controller, and Huntley advised Local 2216 that the City had approved overtime for staff in an effort to get the cost analysis done sooner. However, no anticipated date for completing this task or for responding to Local 2216's proposal was provided.

8. Late June/Early July 2019: MOU Extension Expires

On June 30, 2019, the side letter agreement extending the previous MOU expired. In the meantime, the parties had agreed to meet again on July 9, 2019. In preparation for this meeting, McGill sent several messages to the City's representatives asking about the agenda to determine whether the City had conducted its cost analysis and was now prepared to engage in meaningful negotiations. The City did not respond to McGill's messages.

9. July 9, 2019: Fourth Meeting

The parties met for the fourth time on July 9, 2019. In addition to Albright and Huntley, recently appointed City Manager Craig Cornwell was also present, though Albright remained, at least temporarily, the City's chief negotiator. Cornwell had previously served as City Attorney. At or about the same time, Damon Brown replaced Cornwell as City Attorney. Neither Cornwell nor Brown had previously attended or otherwise been involved in the City's negotiations with Local 2216.

Salazar testified that the July 9, 2019 meeting was again "very brief," lasing approximate five to ten minutes, and that "nothing" was accomplished. The City admitted that its negotiators "did not have the financial information needed to hold a meaningful negotiation" as of July 9, 2019.

10. Late July 2019: Albright Removed as the City's Chief Negotiator

On July 29, 2019, McGill e-mailed the City's representatives to propose August 26, 2019 as the next bargaining meeting. The City did not respond.

On August 8, 2019, McGill sent another e-mail message, again asking to set a date for negotiations. On August 9, 2019, Albright responded, stating he "w[ould] get dates to resume negotiations" but without addressing Local 2216's suggestion to meet on August 26, 2019.

Around this time, the City changed its entire negotiating team. Albright was relieved of his duties as the City's chief spokesperson, and Brown, the new City Attorney, took over that role, at least temporarily. Huntley left City employment, and Simmons was promoted to replace her as Assistant City Manager on July 24th, 2019. However, Simmons did not attend negotiations or otherwise become involved in the

City's negotiations with Local 2216 until sometime approximately one year later. In the meantime, Cornwell appears to have replaced Huntley as a member of the City's bargaining team. The parties agreed to meet again on August 28, 2019.

11. August 28, 2019: Fifth Meeting

The parties met for the fifth time on August 28, 2019. Brown served as the City's chief spokesperson. Cornwell also attended. The meeting lasted about 20 minutes. Brown stated that he and Cornwell had not been briefed by their predecessors and were unaware of Local 2216's proposal, which by this time had been awaiting a response from the City for more than nine months. Brown asked for some time to determine if he and Cornwell could locate any bargaining notes or other records of negotiations. McGill offered to forward to Brown Local 2216's pending proposal, along with e-mail correspondence and other information documenting the course negotiations thus far. On or about September 4, 2019, McGill forwarded Brown several chains of e-mail correspondence with Albright and Huntley. In printed format, the materials comprised approximately 23 pages.

Salazar's testimony and the documentary evidence presented at the hearing show that that the City's prior representatives did not brief Brown and Cornwell, and that the City either did not create or did not maintain bargaining notes or other records of negotiations.[9] Consequently, when Brown and Cornwell took over from Albright and

[9] PERB's Complaint alleged that during the August 28, 2019 meeting, the City's new representatives "again failed to make counter-proposals, failed to make a formal response, and had nothing to say relative to negotiations other than that the representatives were new to the process." The City's Answer neither affirmatively admitted nor denied this allegation, claiming it had insufficient information to respond. Although asserting insufficient information usually operates as a denial, under the

Huntley, Local 2216 essentially started negotiations from scratch, as evidenced by the voluminous e-mail correspondence and other information McGill forwarded to Brown in early September.

12. October 2, 2019: The City Changes its Chief Negotiator Again

Paragraph 4(D) of PERB's Complaint alleged, in part, and the City admitted as follows: "On October 2, 2019, Respondent again informed Charging Party that the Respondent's City Attorney was replaced by another chief negotiator. Specifically, on October 2, 2019, Brown sent a message to McGill, with Branson and Salazar copied, to introduce Jabari Willis, a partner with the law firm Atkinson, Andelson, Loya, Ruud & Romo, as the City's new chief negotiator in what Brown's message described as "the *upcoming* labor negotiations." (Emphasis added.) According to Brown's message, "Under Mr. Willis[']s] leadership, the City's team is *ready to begin* negotiating a new contract with Local 2216." (Emphasis added.)

Brown advised McGill that he should contact Willis directly "regarding any aspect of the bargaining process, including scheduling bargaining sessions." However, between October 9, 2019 and January 30, 2020, the parties did not meet. McGill replied to Brown's introductory message on October 9, 2019 by asking Willis what dates the City's representatives were available. Willis responded on October 14, 2019 that he "will be speaking with the City later this week regarding potential dates" and that he would follow up with McGill's office.

Having received no further response, on October 30, 2019, McGill asked Willis

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circumstances, this assertion tends to corroborate Salazar's testimony.

again for available dates. Willis responded a week later, on November 5, 2019, by saying that he was "still working with the City on potential dates" and the he "hope[d] to have some proposed dates by [the] beginning of next week."

On Dec 6, 2019, Willis wrote McGill acknowledging that "we need to schedule meetings regarding labor negotiations," and asking McGill for available dates "over the next couple of weeks and early January 2020" because "late December is difficult with holidays."

On December 18, 2019, McGill responded by proposing January 6, 2020 because Local 2216 was already scheduled to meet with Brown that day on separate issues. On December 23, 2019, Willis responded that he was out of town and unavailable on January 6, 2020 and asked for alternative dates in January.

On January 6, 2020, McGill wrote to ask Willis about meeting on January 21, 2020. Willis responded on January 21, 2020 by proposing either January 30 or 31 or February 6 or 7. McGill wrote back the following day to suggest January 31 at 11 a.m. McGill's message stated: "Also, just so we are on the same page, we made a proposal to the City over a year ago which has not been responded to. Just looking to be efficient when we meet." McGill also advised Willis that he could contact McGill at his cell number any time.

On January 30, 2020, McGill wrote to Willis to ask: "Are we confirmed for tomorrow at 11? Where we meeting at?" There is no record of any response. However, it is undisputed that the parties met on January 31, 2020.

13. January 31, 2020: Sixth Meeting

On January 31, 2020, the parties met for the sixth time. This was the first meeting in which Willis represented the City. Salazar could not recall who else was present for the City.

Paragraph 4(E) of the Complaint alleged, in part, that during this meeting, which "did not last long," the City's negotiator "conceded that [it] will have to review and 'cost-out' [Local 2216's] proposal that was re-submitted to [the City] on December 12, 2019."[10] In responding to paragraph 4(E), the City's Answer admitted that the parties' bargaining teams met on January 31, 2020, and that "one of the topics the parties discussed during the January 31, 2020 meeting was the City's need to conduct a proper costing analysis of Charging Party's proposals in order to effectively respond." According to Salazar, Willis asked for more time so that the City could conduct a cost analysis of Local 2216's proposal, which had now been in the City's possession for more than one year. The parties also agreed to meet again on February 20, 2020.

[10] The date appears to be in error, as the record demonstrates that more than three months earlier, on September 4, 2019, McGill had forwarded to Brown Local 2216's initial December 12, 2018 proposal and various e-mail correspondence between the parties' representatives on the subject. Neither party has objected or raised the issue, and pursuant to PERB Regulation 32645 and decisional law, I therefore disregard the error as inconsequential and not substantially affecting the rights of the parties. (See *Regents of the University of California* (1991) PERB Decision No. 891-H, p. 4.)

14. February 19, 2020: The City Cancels a Meeting Scheduled for the Next Day

On the afternoon of February 19, 2020, McGill sent an e-mail message to Willis to ask whether the meeting was confirmed for the following day at 10 a.m. Willis responded, in relevant part:

> "Thank you for following up. I spoke with the City this afternoon and it is still working on the cost analysis of your proposal. I don't know how productive tomorrow will be without this information. [¶] As such, I recommend we cancel tomorrow's meeting and look to meet on March 19 as scheduled." [¶] Please confirm receipt of this email. [¶] Thank you."

McGill responded: "Got it."

15. March 16 to 18, 2020: The City Cancels Another Meeting and Changes its Chief Negotiator Again

The parties were next scheduled to meet on March 19, 2020. On March 16, 2020, McGill wrote to Willis: "Just checking in for our 3/19 meeting. What's the plan?" Willis responded two days later: "They are cancelled - I apologize for late notice - I thought it had already been communicated to your team."

On March 18, 2020, Melanie Chaney, a partner with the law firm Liebert Cassidy and Whitmore, contacted McGill by e-mail. Her message read:

> "Dear Mike, [¶] I hope you are staying well and healthy. I am writing because I will be handling the Compton Fire table. I was just informed that you had a meeting scheduled for tomorrow. That meeting is off calendar. I will be in touch shortly with some potential dates to reschedule that meeting. I look forward to working with you. Please contact me anytime if you want to discuss. [¶] Best, [¶] MLC[.]"

16. April 17, 2020: Seventh Meeting

On April 17, 2020, the parties met for a seventh time since Local 2216 submitted its Proposal #1. Chaney and Cornwell represented the City. The meeting lasted approximately 20 to 30 minutes.

Paragraph 4(H) of PERB's Complaint alleged: "During an April 17, 2020 meeting, Respondent did not make any counter-proposals, had no formal response of any kind, and had nothing substantive to discuss or present. Respondent also confirmed that it had taken no[] steps in furtherance of negotiations and had not discussed or costed out Charging Party's proposals." In responding to this allegation, the City admitted "that it did not make any counterproposal at the April 17, 2020 meeting." The City's Answer did not address the remaining allegations in Paragraph 4(H), and I therefore deem those allegations admitted. (PERB Reg. 32644; Code Civ. Proc. § 431.20, subd. (a); *Regents of the University of California* (2018) PERB Decision No. 2601-H, pp. 13-14, and authorities discussed therein.)

Salazar recalled that the discussion at this meeting was, essentially, no different from previous meetings with the City's previous representatives, except that now the City was citing the COVID-19 pandemic and resulting economic uncertainty, and "everything that was associated with the pandemic" as a reason that conducting the long-awaited cost analysis "was [now] going to take a little bit longer." Simmons testified that at some point after the pandemic was underway, the City determined that its revenues were "a lot less" than what it had projected and budgeted for. However,

there was no evidence that this projection or any supporting data were ever provided to Local 2216 during negotiations.[11]

E. Post-April 2020 Negotiations: Local 2216's Proposal Remains Pending

In the ensuing months, and now years, since April 17, 2020, which was the last meeting encompassed by PERB's Complaint, the parties' representatives tentatively agreed to a City proposal for a successor MOU. However, Local 2216's membership rejected that tentative agreement. In the absence of an agreement, Local 2216 has reverted to its initial position, as set forth in its December 12, 2018 economic proposal. Local 2216 has considered withdrawing and revising that proposal to account for the passage of time and the need for additional cost of living adjustments. However, as of May 26, 2022, the date of the PERB hearing, Local 2216 had not formally withdrawn Proposal #1. The parties have yet to agree to a successor MOU.

F. The City's Decision to Prioritize Other Matters Over Costing Out Local 2216's Proposal and Engaging in "Meaningful" Negotiations

Simmons testified that she became involved in negotiations with Local 2216 "somewhere around the same time" that the City replaced Willis with Chaney. She was unable to specify any more precise date. There was no evidence that Simmons attended the April 17, 2020 negotiations, and the City effectively admitted that it had taken no steps to further negotiations as of that date. Accordingly, I find it more likely

[11] At the hearing, the City argued that it had no obligation to advise Local 2216 of the pandemic's anticipated impact on the City's finances and the City's willingness or ability to meet Local 2216's economic demands because the subject of the City's budget had been sufficiently covered in the media.

than not that anything Simmons may have done or witnessed regarding negotiations with Local 2216 occurred after the April 17, 2020 meeting.

Simmons testified that, at some point after her assignment to the firefighters' table, she saw a spreadsheet that included the "costing out of everything" in Local 2216's proposal, "with the exception of the salaries." Simmons could not recall whether she ever received a copy of this spreadsheet but testified that "if it's on [Cornwell's] computer, I'm sure we can go and find it." To her knowledge, the document was never completed, and its contents were never shared with Local 2216.

During cross-examination, Simmons offered the following account of the origins of this spreadsheet. She recalled a conversation with Cornwell and Chaney about Local 2216's December 2018 proposal, in which Cornwell said something to the effect of "Let's cost it out and see what it looks like." Simmons was "pretty sure" this conversation had occurred in 2020, though she could not recall a more specific date.[12] Based on the allegations in Paragraph 4(H) of the Complaint, and the City's corresponding admissions, I find that at the earliest, this conversation occurred

[12] This account appears to conflict with Simmons's subsequent testimony. During examination by the Administrative Law Judge (ALJ), Simmons testified that Cornwell "*had mentioned* that he had asked [the Controller] for the costing … after he [had] arrived in July of 2019, … and [that] he hadn't received it." (Emphasis added.) Simmons admitted that she "[didn't] know at what point in time [Cornwell had] asked her" for this information. She reiterated: "So, I don't know that timeline."

Even if evidentiary problems, such as lack of personal knowledge and uncorroborated hearsay, are resolved by treating this testimony as party or adoptive admissions, there remains a logical problem: If Cornwell had already asked the Controller to cost out Local 2216's proposal in 2019, it seems unlikely that he would have said to Chaney in 2020: "Let's cost it out and see what it looks like."

sometime after April 17, 2020 when Chaney and Cornwell "confirmed that [the City] had taken no[] steps in furtherance of negotiations and had not [yet] discussed or costed out Charging Party's proposals."

Simmons also recalled that Cornwell had only asked the Controller to conduct this costing analysis "once the audits were completed." Previously, Huntley had advised Local 2216 that the City could not conduct the costing analysis needed for meaningful negotiations because the Controller's Office was preoccupied with processing Local 2216's claims for unpaid overtime arising under the previous MOU. However, Simmons's testimony suggests that, apart from (or in addition to) any staffing shortages or "lack of leadership" in the Controller's Office, the City Manager also chose to prioritize completing the City's outstanding audit obligations before asking the Controller to begin conduct the costing analysis of Local 2216's proposal.

According to Simmons, after the City's audits were completed and Cornwell made his request to the Controller, there was some delay in obtaining even the incomplete spreadsheet information referenced by Simmons, due to a lack of cooperation from the Controller. Simmons testified: "Because it was taking so long [] for the Controller to give some of the information, [Cornwell] ordered the budget officer at the time – [whose] name was Mario Hernandez – to work with the Controller to make sure [Cornwell] saw the information." Again, Simmons could not recall a specific date when Cornwell gave this directive to Hernandez but believed that it was sometime in 2020.

As admitted in its Answer, the City had taken no steps to conduct the costing analysis as of April 17, 2020. It is also undisputed that Cornwell separated from City

employment in July 2021. I therefore find that sometime between these two dates, i.e., approximately a year and a half and possibly as much as two and a half years after receiving Local 2216's initial economic proposal, Cornwell asked the City Controller to cost that proposal and make the information available to "see what it looks like." Even after this request and continuing until at least May 26, 2020, the City has still either not completed its costing analysis or has refused to share the results of that analysis with Local 2216.

Consistent with its Charter, the City Manager does not set priorities for the Controller's Office nor dictate the order of tasks it will complete. Simmons testified:

> "In the past, the City has had very good relationships of City Managers and City Controllers working together. We went through a period of just so much turnover that there was a period where we didn't have people who worked well together. We are fortunately back to where we do have people working together …."

Simmons also testified that because the City Manager and Controller both report directly to the City Council, if there is a conflict between the two, then "there's … no action that the City Manager can take to make [the Controller] do anything," except to "go to [the City] Council and say, 'I'm requesting this information [and] I'm not getting it from the Controller.'" There was no evidence that Cornwell, nor any of his predecessors or successors in the City Manager's Office, ever requested that the City Council intervene and direct the Controller to complete the costing analysis and provide that information to the City Manager and the City's bargaining representatives.

ISSUE

Did the City, by the totality of its conduct, including but not limited to the acts and omissions alleged in paragraph 4(A)-(H) of PERB's Complaint, fail and refuse to meet and confer in good faith in violation of MMBA sections 3505, 3506.5, subdivision (c), and 3509, subdivision (b), and PERB Regulation 32603, subdivision (c), and, by the same conduct, also interfere with and deny the representational rights of employees and Local 2216, in violation of MMBA sections 3503, 3506, 3506.5, subdivisions (a) and (b), and 3509, subdivision (b) and PERB Regulation 32603, subdivisions (a) and (b).

CONCLUSIONS OF LAW

A. Legal Standard: Duty to Meet and Confer and Scope of the Complaint

The primary purpose of the MMBA is:

> "to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations."

(MMBA, § 3500.) The centerpiece of the statute is section 3505's bilateral meet and confer process, which requires local agencies and their representatives to meet and confer "personally," "promptly upon request," and "in good faith" regarding wages, hours, and other terms and conditions of employment with recognized employee organizations representing their employees. (*Boling v. Public Employment Relations Board* (2018) 5 Cal.5th 898, 913; *Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 780-781; *County of Merced* (2020) PERB Decision No. 2740-M, p. 18, fn. 13.) The MMBA does not require parties to make concessions or

reach agreement. (*City of Palo Alto* (2019) PERB Decision No. 2664-M, p. 5 (*Palo Alto*); *City of San Jose* (2013) PERB Decision No. 2341-M, p. 29 (*San Jose*).) However, meeting and conferring in good faith necessarily entails "exchang[ing] freely information, opinions, and proposals" with a genuine intent to resolve differences and explaining one's position in sufficient detail to permit mutual understanding. (MMBA, §§ 3500, 3505; *City of San Ramon* (2018) PERB Decision No. 2571-M, p. 7; *San Jose*, *supra*, p. 42.) PERB and judicial authorities also regard the duty to meet and confer *promptly* as "absolute." (*San Jose*, *supra*, p. 23; *Dublin Professional Fire Fighters, Local 1885 v. Valley Community Services District* (1975) 45 Cal.App.3d 116, 118.)

In determining whether a party has violated its duty to meet and confer in good faith, PERB uses either a "per se" test or a "totality of conduct" analysis, depending on the specific conduct involved. (*City of Arcadia* (2019) PERB Decision No. 2648-M, p. 34 (*Arcadia*).) Per se violations generally involve conduct that violates statutory rights or procedural norms for bargaining. (*Id*. at pp. 34-35.) By contrast, PERB uses the totality of conduct test for a residual category of conduct not designated as per se violations, including allegations of "bad faith" or "surface bargaining." (*Id*. at p. 35.)[13]

Although the same conduct may give rise to violations under both per se and surface bargaining theories, they are necessarily different theories and must be alleged as separate unfair practices in the complaint. (*County of Sacramento* (2020)

[13] PERB regards the phrases "totality of circumstances" and "totality of conduct" as interchangeable. (*County of Sacramento*, *supra*, PERB Decision No. 2745-M, p. 9, fn. 8.) While PERB frequently refers to bad faith bargaining under this test as "surface bargaining," that label does not limit the scope of the relevant factors to only those involving superficial bargaining conduct. (*Ibid*.)

PERB Decision No. 2745-M, pp. 11-12.) Omission of one theory does not foreclose consideration of the same or overlapping factual allegations under another theory, if the charging party: (1) moves to amend the complaint to add the separate theory, or (2) satisfies the requirements of PERB's unalleged violation doctrine. (*Id*. at p. 13.)

The parties disagree on the appropriate test or tests to use in this case. Local 2216's brief argues that the City's admitted failure even to meet for approximately six months after receiving Local 2216's proposal and its ongoing failure to counter or offer any substantive response to that proposal should be treated as a per se refusal to bargain pursuant to *Region 2 Court Interpreter Employment Relations Committee & California Superior Courts of Region 2* (2020) PERB Decision No. 2701-I and similar authorities. According to Local 2216, an employer's failure to offer *any* rationale for rejecting a proposal to constitute an outright or per se failure to bargain, and "it stands to reason that the [City's] failure to provide any proposal [or any response] at all … to Local 2216's proposal … is also a blanket refusal to bargain." Local 2216 therefore urges PERB to find a separate per se violation for the City's failure to respond to Local 2216's proposals *in addition to* an overall finding of bad-faith bargaining encompassing the entire course of the City's conduct in negotiations.

The City's brief denies liability but its repeated assertions that its representatives acted with subjective good faith indicate that it has understood the Complaint to allege a garden variety "bad faith" or "surface bargaining" claim rather than alleging any per se violation. For the following reasons, I agree with the City that the language of the Complaint contemplates a single, "bad faith" or "surface

bargaining" theory of liability subject to the totality of conduct test, and that, as drafted, it does not allege a separate or additional per se theory of liability.

Paragraph 4 of the Complaint included eight subparagraphs (A) through (H), which alleged various acts or omissions by the City and its representatives, including cancelling meetings, showing up late for meetings, frequently changing negotiators, and failing to respond to Local 2216's initial economic proposal. Subparagraph (A) alleged that on December 18, 2018, the City cancelled a bargaining session scheduled for December 20, 2018, and that, despite Local 2216's repeated requests, the City did not agree to meet again until nearly six months later on June 10, 2019. Subparagraph (H) alleged that during an April 17, 2020 meeting, the City "did not make any counter-proposals, had no formal response of any kind, and had nothing substantive to discuss or present." It further alleged that the City "confirmed that it had not taken steps in furtherance of negotiations and had not discussed or costed out [Local 2216's] proposals," despite having had them for almost a year and a half.

Standing alone, these allegations would be considered per se violations of the duty to meet and confer. (*San Jose*, *supra*, PERB Decision No. 2341-M, pp. 23-24.) However, paragraph 5 of the Complaint includes only one "count" or theory of liability, i.e., that, "[b]y the acts and conduct included in, but not limited to, those described in each subparagraph of paragraph 4, [the City] failed and refused to meet and confer in good faith." To treat the allegations in subparagraphs (A) or (H) as a separate, independent theory of liability would make the other conduct described in subparagraphs (B) through (G) surplusage.

Additionally, when a complaint alleging a bargaining violation uses the verbiage

"including but not limited to" or some variation thereof for the factual allegations, the Board has generally interpreted these words as indicating that the claim is to be analyzed under the totality of circumstances analysis. (*County of Sacramento*, *supra*, PERB Decision No. 2745-M, p. 12; *City of Davis* (2018) PERB Decision No. 2582-M, p. 12; *City of Roseville* (2016) PERB Decision No. 2505-M, p. 12 (*Roseville*).) Here, paragraph 5 of the Complaint alleged that "[b]y the acts and conduct *included in, but not limited to*, those described in each subparagraph of paragraph 4," the City "failed and refused to meet and confer in good faith." (Emphasis added.) Because this is the only bargaining violation alleged in the Complaint, I understand it to allege a "bad faith" or "surface bargaining" claim rather than a per se violation.

Local 2216 did not move to amend the Complaint to allege subparagraphs A and/or H as *both* indicia of bad faith bargaining *and* as one or more per se bargaining violations. Nor did it raise this issue in its opening statement or otherwise give notice of a per se theory of liability. Accordingly, I decline to consider any separate and unalleged per se violations raised for the first time in Local 2216's post-hearing brief. (*Roseville*, *supra*, PERB Decision No. 2505-M, p. 12; see also *County of Sacramento*, *supra*, PERB Decision No. 2745-M, pp. 11-14.)[14]

[14] "Under the unalleged violations doctrine, PERB may consider allegations not included in the charge or the complaint if: (1) the respondent had adequate notice and opportunity to defend against the unalleged matter; (2) the unalleged conduct is intimately related to the subject matter of the complaint and is part of the same course of conduct; (3) the matter has been fully litigated; (4) the parties had the opportunity to examine and be cross-examined on the issue; and (5) the unalleged conduct occurred within the same limitations period as those matters alleged in the complaint." (*County of Sacramento*, *supra*, PERB Decision No. 2745-M, p. 14, citing *Superior Court v. Public Employment Relations Bd*. (2018) 30 Cal.App.5th 158, 192-193.) Making an argument for the first time in a post-hearing brief is not sufficient notice of an

B. Prima Facie Case under the Totality of Conduct Test

PERB and federal cases often described surface bargaining as going through the motions of negotiations as an elaborate pretense with no real intent to reach agreement or resolve differences. (*Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M, p. 14 (*Fresno Co. IHSS*); *Muroc Unified School District* (1978) PERB Decision No. 80, p. 13 (*Muroc USD*); *N.L.R.B. v. Reed & Prince Manufacturing Company* (1953) 205 F.2d 131, 134-135.) The presence or absence of a party's subjective good faith is generally demonstrated not by its professions of good faith at the table or in PERB unfair practice proceedings, but from its contemporaneous conduct both at and away from the bargaining table. (*Arcadia*, *supra*, PERB Decision No. 2648-M, pp. 34-35; *San Jose*, *supra*, PERB Decision No. 2341-M, p. 22; see also *Gerawan Farming, Inc. v. Agricultural Labor Relations Board* (2020) 52 Cal.App.5th 141, 183.) PERB recognizes various forms of conduct that may serve as evidence of a party's lack of good faith in negotiations. These include refusing to make counterproposals or to explain one's bargaining position (*San Jose*, *supra*, PERB Decision No. 2341-M, p. 27; *Compton Community College District* (1989) PERB Decision No. 728, adopting proposed decision at p. 53); dilatory or evasive conduct at the table, such as cancelling, refusing to schedule, or failing to prepare for meetings (*Oakland Unified School District* (1983) PERB Decision No. 326, p. 34 (*Oakland USD*)); and frequently changing negotiators or failing to vest them with sufficient authority to engage in meaningful negotiations (*Chino Valley*

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unalleged violation. (*San Bernardino Public Employees Assn*. (2018) PERB Decision No. 2572-M, p. 12, citing *City of Clovis* (2009) PERB Decision No. 2074-M, p. 9.)

Unified School District (1999) PERB Decision No. 1326, pp. 5-6 (*Chino Valley*); *Oakland USD*, *supra*, PERB Decision No. 326, pp. 41-42; *Stockton Unified School District* (1980) PERB Decision No. 143, p. 27 (*Stockton USD*).)

Under the totality of conduct test, the ultimate question is whether the respondent's conduct, when viewed in its totality, was sufficiently egregious to frustrate negotiations. (*San Ramon*, *supra*, PERB Decision No. 2571-M, p. 7; *Muroc USD*, *supra*, PERB Decision No. 80, pp. 13-22.) A single indicator of bad faith, if sufficiently egregious, can provide the sole basis for finding that a party has failed to bargain in good faith. (*San Jose*, *supra*, PERB Decision No. 2341-M, pp. 18-19; *State of California (Department of Personnel Administration)* (1989) PERB Decision-739-S, pp. 4-5; *NLRB v. Truitt Mfg. Co*. (1956) 351 U.S. 149, 152-153 (*Truitt*).)

1. <u>The City's Admitted Refusal to Counter or Respond to Local 2216's Proposal Is Sufficiently Egregious by Itself to Constitute Bad-Faith Bargaining</u>

The mutual obligation to bargain requires a party to "meet and confer promptly upon request by either party and for a reasonable period of time *in order to exchange freely information, opinions, and proposals*. (MMBA, § 3505.) A party exhibits bad faith if it fails to counter or otherwise respond to a proposal affecting negotiable matters or fails to provide an adequate explanation for its inflexible position. (*San Ramon*, *supra*, PERB Decision No. 2571-M, p. 8; *City of Selma* (2014) PERB Decision No. 2380-M, p. 14; *San Bernardino City Unified School District* (1998) PERB Decision No. 1270, adopting proposed decision at pp. 85-86.) In *State of California (Department of Personnel Administration)* (1989) PERB Decision No. 739-S, the exclusive representative alleged that the State employer had failed to meet and confer in good faith by refusing to present a salary proposal or to respond meaningfully to the

representative's salary proposal until five months after receiving an initial proposal, more than three months after receiving a detailed salary proposal, and nearly two months after adoption of the annual budget. (*Id*. at pp. 2, 4.) PERB reversed the dismissal of the complaint on a prehearing motion and held that this single indicium of bad faith, the employer's failure for several months to counter or respond to a wage proposal, stated a prima facie case of bad-faith bargaining. (*Id*. at pp. 4-5.)

This issue requires little discussion. The City preconditioned "meaningful negotiations" on completing a costing analysis of Local 2216's economic proposal. The City then failed or refused to conduct that costing analysis for months and eventually years. During this time, the City's own representatives repeatedly acknowledged that no meaningful negotiations could occur without the costing information, but the City's bargaining representatives, the City Manager, the City Controller, and ultimately the City Council, all failed to take the necessary steps to conduct or complete the costing analysis and respond to Local 2216's proposal.

Even if not alleged or litigated as a per se violation, a party's protracted failure or refusal to schedule meetings or respond to proposals provides compelling evidence of its bad faith in negotiations because its natural and probable, even inevitable, consequence is to frustrate or impede the free exchange of information, opinions, and proposals and to prevent negotiations from proceeding based on mutual understanding. (MMBA, § 3505; *County of Riverside* (2014) PERB Decision No. 2360-M, p. 14 [good faith bargaining necessarily entails willingness to engage in "meaningful discussions"]; *Gonzales Union High School District Teachers Association, CTA/NEA* (1985) PERB Decision No. 480, adopting proposed decision at pp. 38-40

(*Gonzales*) [refusal to respond to proposals or schedule meetings during summer months]; see also *County of Merced*, *supra*, PERB Decision No. 2740-M, p. 18, fn. 13; *County of San Luis Obispo* (2015) PERB Decision No. 2427-M, p. 41 (*San Luis Obispo*).)

Given the overriding importance of wages, benefits, and other economic items in these negotiations, the City's unilateral, protracted, and complete suspension of negotiations was sufficient, *by itself*, to establish bad-faith bargaining. (*San Jose*, *supra*, PERB Decision No. 2341-M, pp. 23-24; *State of California (DPA)*, *supra*, PERB Decision No. 739-S, pp. 4-5; see also *El Dorado County Superior Court* (2017) PERB Decision No. 2523-C, pp. 10-11; *Truitt*, *supra*, 351 U.S. at pp. 152-153.) Because all meaningful discussion was preconditioned on completing the cost analysis, the City's unreasonable delay in conducting or completing that task was tantamount to a flat refusal to negotiate at all. (*San Jose*, *supra*, pp. 23-24.)[15]

The City's contention that it was willing to discuss other, non-economic items is both legally dubious and factually unsupported. A party's willingness to discuss other subjects, while refusing to negotiate over a mandatory subject of bargaining, is not a

[15] As discussed previously, when properly plead or explicitly raised in a manner that gives notice of the issue, a flat refusal to discuss a mandatory subject is appropriately considered as a per se bargaining violation. (*San Mateo County Community College District* (1993) PERB Decision No. 1030, pp. 12-13.) While in this case, there was insufficient notice of the issue as an *independent* unfair practice, I nonetheless consider the City's admitted failure to counter Local 2216's proposal or to explain its de facto rejection of that proposal to have sufficiently frustrated negotiations to constitute a prima facie violation of the City's bargaining obligation, independent of any other indicia of bad faith. (See *Fresno Co. IHSS*, *supra*, PERB Decision No. 2418-M, pp. 16-17 [conduct that would constitute a separate unfair practice, even if not alleged as such, may serve as evidence of bad faith].)

valid defense to a per se refusal to bargain allegation (*City of Torrance* (2008) PERB Decision No. 1971-M, pp. 24-27), and the City cites no PERB or other authority recognizing this assertion as a valid defense to bad-faith bargaining either (see *San Jose*, *supra*, PERB Decision No. 2341-M, p. 24, citing *Sierra Joint Community College District* (1981) PERB Decision No. 179, pp. 6-7). Among other things, this asserted defense is difficult to reconcile with the Board's repeated condemnation of "piecemeal" or "fragmented" bargaining tactics, because a failure or refusal to discuss even one mandatory subject of bargaining necessarily limits the range of possible "horse trades" or compromises that may even be proposed. (*San Jose*, *supra*, pp. 31-32, citing *City of Santa Rosa* (2013) PERB Decision No. 2308-M; see also *County of Sacramento*, *supra*, PERB Decision No. 2745-M, p. 22.)

Additionally, even if considered as an available defense to bad faith bargaining, the record in this case fails to support the City's assertion that it was in fact willing to discuss other, non-economic, subjects that did not depend on completing the long-awaited cost analysis. The only evidence on this subject was *the City's request* to negotiate over proposed revisions to its personnel rules. Local 2216 agreed to this request, but there was no evidence one way or the other that the City was willing to discuss either the approximately 5 percent of Local 2216's proposal that did not affect economic matters or some other, non-economic proposal from Local 2216 that is not in the record.

Accordingly, I conclude that the City's unreasonable delay in costing Local 2216's December 2018 proposal and its corresponding failure to counter or explain its de facto rejection of that proposal was sufficiently detrimental to good-faith

negotiations that, by itself, it states a prima facie case that the City failed to satisfy its duty to meet and confer in good faith under the MMBA.

Other indicia of bad faith in the record further support this conclusion.

2. Dilatory Tactics: Cancelling, Delaying, or Refusing to Schedule Meetings

Although the duty to meet and confer "promptly upon request by either party" is "absolute" (*Dublin*, *supra*, 45 Cal.App.3d at p. 118), neither the MMBA nor decisional law prescribe a cookie cutter timeline applicable to all times and all negotiations. What constitutes meeting "promptly" or "at reasonable times" is a question of fact that turns on the circumstances of each case. (*San Jose*, *supra*, PERB Decision No. 2341-M, p. 41; *University of California*, *Lawrence Livermore National Laboratory* (1995) PERB Decision No. 1119-H, adopting warning letter at p. 3.) Generally, a party must exercise reasonable diligence and treat its bargaining obligation as seriously as it would other business affairs of importance. (*County of Ventura* (2021) PERB Decision No. 2758-M, pp. 36-37; *Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, p. 19; *San Diego Unified School District* (2007) PERB Decision No. 1883, p. 6; *KFXM Broadcasting Co.* (1970) 183 NLRB 1187, 1201; *J. H. Rutter-Rex, Inc.* (1949) 86 NLRB 470, 506.) Parties to negotiations have an obligation to select representatives who will be reasonably available for negotiations.

Under California and federal precedent, "dilatory" tactics evidencing bad faith in negotiations may include repeated tardiness or extended unavailability for meetings, cancelling bargaining sessions with little or no notice, failing to adequately prepare for negotiations, or otherwise treating the bargaining obligation as a distraction from one's

other duties. (*San Jose*, *supra*, PERB Decision No. 2341-M, p. 42; *Compton Community College District*, *supra*, PERB Decision No. 728, adopting proposed decision at p. 53; *Beaumont Unified School District* (1984) PERB Decision No. 429, p. 9; *Gonzales*, *supra*, PERB Decision No. 480, adopting proposed decision at pp. 38-40; *Oakland USD*, *supra*, PERB Decision No. 326, p. 34; *Dublin*, *supra,* 45 Cal.App.3d at p. 118; see also *Camelot Terrace* (2011) 357 NLRB 1934, 1935; *Teamsters Local Union No. 122, Intern. Broth. of Teamsters* (2001) 334 NLRB 1190, 1231–1235; *Crane Co.* (1979) 244 NLRB 103, 111; *Reed & Prince Mfg. Co.* (1951) 96 NLRB 850, 852-53, enfd. (1st Cir. 1953) 205 F.2d 131, 135, cert. denied, (1953) 346 U.S. 887.)

A pattern of delay in negotiations is not excused by the bargaining representative's inexperience or ignorance of the law. (*Children of Promise Preparatory Academy* (2018) PERB Decision No. 2558, p. 27; *Arrow Sash & Door Co.* (1986) 281 NLRB 1108, 1112-1114.) An inability to meet and confer promptly because of other business demands is also not a valid defense. (*Gonzales*, *supra*, PERB Decision No. 480, adopting proposed decision at pp. 38-40; *Insulating Fabricators, Inc.* (1963) 144 NLRB 1325, 1328–1329, citing *"M" Sys., Inc.* (1960) 129 NLRB 527, 549.)

Here, the undisputed evidence and the City's admissions reveal that the City repeatedly cancelled meetings, often with little or no notice, resisted scheduling additional meetings, and was unprepared for any substantive negotiations on the few occasions when the parties did meet. The City's initial bargaining representatives–Albright, Shin, and Huntley–cancelled meetings in December 2018, January 2019, and February 2019 on short notice. Despite multiple requests from Local 2216, they did

not agree to meet again until June 2019–seven months after receiving Local 2216's economic proposal and almost eight months since the parties' last meeting.

These problems were not limited to one discrete period in negotiations nor to one set of City negotiators. Between October 9, 2019 and January 22, 2020, when Willis served as the City's (third) chief negotiator, Local 2216 made five requests to schedule negotiations. However, during this roughly four-month period, the City was available for only one meeting. Thereafter, the parties did not meet again for another five months, until late April 2020, when the City introduced its fourth chief negotiator.

In *Gonzales*, *supra*, PERB Decision No. 480, a union's negotiating team refused to schedule meetings for approximately three and one-half months over the summer. (*Id*., adopting proposed decision at p. 38-40.) There, the ALJ noted that "[a] party's insistence on delaying meetings, or scheduling meetings with long periods in-between, is usually taken as evidence of underlying bad faith." (*Id*., adopting proposed decision at pp. 39-40.) At some point after a party has failed to schedule meetings for an extended period, the unilaterally imposed hiatus in negotiations may be treated as a refusal to meet at all, i.e., as a per se violation of the duty to bargain. (*Ibid*.; see also *San Jose*, *supra*, PERB Decision No. 2341-M, pp. 20, 23-24.)

As with the City's protracted and ongoing failure to counter or respond to Local 2216's economic proposal, the City's chronic and lengthy periods of unavailability for meeting would perhaps be more appropriately treated as a per se violation of the duty to meet and confer "personally" and "promptly upon request." However, because this conduct has been alleged and litigated as evidence of bad faith in negotiations, I similarly conclude that, by itself, it was sufficiently detrimental to negotiations that it

constitutes a prima facie case of bad-faith bargaining, irrespective of other indicia of bad faith in this case.

The City contends that until it had completed costing out Local 2216's proposal, there was nothing of substance to discuss, and more frequent meetings were therefore unnecessary. This is hardly a defense. Local 2216 does not contest the need for costing out its proposal. All parties agree that the absence of a costing analysis was an impediment to meaningful negotiations. However, it was an impediment of the City's own making and within the City's ability to remove. The fact that the Controller was short staffed or had competing obligations to conduct audits or perform other duties under the Corrective Action Plan does not extinguish the City's bargaining obligation.

Through enactment of the MMBA, the Legislature made collective bargaining between local government agencies and employee organizations representing public employees a matter of statewide concern. (*City of San Diego* (2015) PERB Decision No. 2464-M, pp. 33-34, affirmed in relevant part sub. nom. *Boling*, *supra*, 5 Cal.5th 898; *Voters for Responsible Retirement*, *supra*, 8 Cal.4th 765, 780; *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, 600.) "Labor relations are urgent matters too" (*Insulating Fabricators, Inc.*, *supra*, 144 NLRB at pp. 1328–1329), and good-faith bargaining is not merely an option that the City may disregard when it becomes inconvenient or because the City has other competing legal or financial obligations. While an employer has no duty to reach agreement, it has an "absolute" or "unconditional" duty to meet and confer promptly and in good faith. (*San Jose*, *supra*, PERB Decision No. 2341-M, p. 23; see also *San Francisco Community College District* (1979) PERB Decision No. 105, pp. 10-11.)

The City's Charter provides, and Simmons's testimony confirms, that the City Controller is a department or agency *of the City* and that it is subject to the direction of the City Council. If the City's bargaining representatives or the City Manager were unable to obtain from the Controller the information needed to comply with the City's obligations under the MMBA, it was incumbent on them to go to the City Council to secure the directive needed to comply with the law. There is no evidence they did so. To the contrary, Simmons testified that Cornwell only decided to initiate (or reinitiate) the costing analysis sometime on or after mid-2020 and "once the audits were completed." By that time, the City had been in possession of Local 2216's proposal for more than a year and a half, well beyond the reasonable period required for a response *under any circumstances*.

Although plead and litigated as a single indicium of bad faith in support of the Complaint's bad faith bargaining claim, I conclude that the City's repeated cancellation of meetings and its protracted unavailability or unwillingness to schedule meetings were "sufficiently egregious to frustrate negotiations." This conduct provides compelling evidence that, to the extent the City bargained at all, it did so in bad faith. (*San Jose*, *supra*, PERB Decision No. 2341-M, p. 19; *Gonzales*, *supra*, pp. 38-39.)

3. Frequent Turnover in Negotiators/Lack of Authority

Parties to negotiations have the right to select and change their representatives any time during negotiations without repercussion or interference from other parties. (*Arcadia*, *supra*, PERB Decision No. 2648-M, p. 37; *Hartnell Community College District* (2015) PERB Decision No. 2452, p. 56; *Yolo County Superintendent of Schools* (1990) PERB Decision No. 838, adopting proposed decision at pp. 33.) Only where there is

"persuasive evidence that the presence of [a] particular individual would create ill will and make good-faith bargaining impossible" will the other party's representatives be excused from meeting and conferring with an individual selected as a party's representative. (*Anaheim Union High School District* (2015) PERB Decision No. 2434, p. 20, citing *KDEN Broadcasting Co*. (1976) 225 NLRB 25, 35, italics omitted; see also *Fitzsimons Mfg. Co*. (1980) 251 NLRB. 375, 379.)

A party may not, however, repeatedly change its representatives with the purpose or effect of frustrating or delaying negotiations. (*State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2078-S, p. 8; *Stockton USD*, *supra*, PERB Decision No. 143, p. 27.) If it is to amount to more than "merely going through the motions of negotiating" with no real intent to reach agreement, good-faith bargaining requires the parties to "make available, at all reasonable times, a person, or persons with authority to negotiate," i.e., someone to engage in *meaningful* negotiations. (*Gonzales*, *supra*, PERB Decision No. 480, adopting proposed decision at p. 38.) Thus, frequent turnover of negotiators may serve as evidence of bad faith, particularly where a change is accompanied by demands to renegotiate previously settled issues or where the party has taken no steps to ensure a smooth transition between its representatives. Such reversals, delays, or disruptions in negotiations coinciding with a change in representatives may be indicative of a failure to vest the representative with sufficient authority to engage in meaningful negotiations or of the party's failure to take the bargaining process seriously. (*Chino Valley Unified School District*, *supra*, PERB Decision No. 1326, pp. 5-6; *Oakland*, *supra*, PERB Decision No. 326, pp. 41-42; *Stockton USD, supra,*

p. 27; *Muroc USD*, *supra*, PERB Decision No. 80, p. 18.)

In *Muroc USD*, *supra*, PERB Decision No. 80, the Board found it "conceivable" that "too frequent a turnover in negotiators may delay and frustrate agreement particularly where each negotiator is ignorant of the prior negotiations." (*Id*. at p. 18.) At issue in *Muroc USD* were two such changes involving three negotiators. (*Ibid*.) However, other employer representatives, including its Assistant Superintendent and its Business Manager, were present at every bargaining session, and there was no evidence that the transitions delayed negotiations. Accordingly, the Board found "no evidence … that continuity in the negotiations was lost by the complained of changes" in bargaining representatives. (*Ibid*.)

Here, however, the facts are significantly different, and I reach the opposite conclusion. In the approximately one and one-half year between October 2018 and April 2020, the City fielded no fewer than four chief negotiators. There is no evidence that the City's various representatives created or maintained bargaining notes, briefed their successors, or took any other steps to ensure continuity in negotiations, even for the few occasions when substantive issues were discussed. There is no better illustration of this point than the fact that in September 2019, Local 2216 had to supply Brown, the incoming City Attorney, with e-mail correspondence and other records of past negotiations. Brown and the City's other representatives were unaware not only of Local 2216's pending proposal, but even of the City's own position that it had repeatedly promised to cost out and respond to that proposal.

Simmons's testimony provides further evidence of the City's failure to provide for continuity among its frequently changing negotiators. She testified regarding a

conversation with Cornwell and Chaney in 2020 during which Cornwell allegedly said something to the effect of "Let's cost it out and see what it looks like." If credited, this testimony suggests that, despite repeated promises, none of Cornwell's predecessors had in fact *even initiated* the process of costing out Local 2216's proposal. Or, assuming any steps had been taken in this regard, Cornwell's comment (as reported by Simmons) indicates that Cornwell was unaware of any prior efforts and that he intended to start the costing-out process from scratch. Simmons's testimony confirms that the City did not start (or restart) the long-awaited costing out process until mid-2020 and perhaps as late as mid-2021, somewhere between one and one-half and two and one-half years after receiving Local 2216's proposal.

The City's frequent reversals and delays in negotiations that coincided with changes in the City's negotiators demonstrate that the City failed to vest its representatives with sufficient authority to engage in meaningful bargaining and/or that it failed to take negotiations seriously by not taking bargaining notes, briefing newly appointed representatives, or otherwise providing for continuity between its representatives. This conduct provides further evidence that the City failed or refused to meet and confer with the good faith required by the MMBA.

C. The City's Emergency Circumstances or Business Necessity Defense

In answering the Complaint, the City asserted that its actions were "justified due to circumstances beyond its control" and were "reasonable based upon justifiable business reasons." The City's post-hearing brief similarly argues that the City was "in turmoil" at the time and its representatives were unable to obtain costing information regarding Local 2216's proposals "because the City Controller's Office was nearly

dysfunctional" due to staffing shortages and "was unable to assist the City negotiators"; because "the City as a whole and especially the Controller's Office were [so] preoccupied with a state-mandated audit and Corrective Action Plan that it had little time to focus on assisting City negotiators"; and because the "onset of the [COVID]-19 pandemic had a massive impact on the City's General Fund" and "set back City negotiators' effort" to obtain the necessary cost and financial information needed for productive negotiations.

The City's post-hearing brief frames these arguments as negating Local 2216's prima facie case. However, the City's allegations regarding dysfunction in the Controller's Office, competing obligations that the City prioritized over conducting a cost analysis, and the alleged effects of the COVID-19 pandemic are all "new" matters in that they do not appear in the Complaint and it is not necessary to prove or disprove them in order to state a prima facie case of bad faith or surface bargaining. (*Roseville*, *supra*, PERB Decision No. 2505-M, p. 12; *Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 812–813.) As such, I regard these "new" facts as affirmative defenses, even if not argued as such in the City's brief. (Code Civ. Proc., § 431.30, subd. (b)(2); *Goddard v. Fulton* (1863) 21 Cal. 430, 436 ["Whether matter is new is determined by the matter itself and not by the form in which it is pleaded"]; *Jetty v. Craco* (1954) 123 Cal.App.2d 876, 880 ["facts which constitute no part of the plaintiff's cause of action come clearly within the definition of 'new matter'" and are therefore affirmative defenses].)[16]

[16] In the alternative, even if considered as evidence offered to "negate" the "element" of bad faith, as detailed below, several problems are fatal to the City's case, including uncorroborated hearsay, testimony lacking personal knowledge of the

Having considered the evidence and arguments for the City's affirmative defenses, as explained below, I reject them as lacking both legal and factual support.

1. The City Has Cited No Legal Authority For a Business Necessity or Emergency Circumstances Defense to Bad Faith or Surface Bargaining

In very limited circumstances, PERB recognizes a "business necessity" or "emergency circumstances" defense, whereby an employer is temporarily excused from its bargaining obligations if faced with an actual and sudden emergency requiring immediate action. (*County of Sonoma*, *supra*, PERB Decision No. 2772-M, p. 50, fn. 15.) To prevail on this defense, the employer must show that: (1) it was faced with a financial or other actual emergency (i.e., *immediate*, not projected or future emergency) involving a sudden and unanticipated change in circumstances beyond the employer's control; (2) the nature of the emergency left no alternative to taking immediate action and allowed no time for meaningful negotiations; and, (3) the employer provided the employee's representative with notice and opportunity for bargaining at the soonest practicable time following any unilateral action. (*Ibid*.; *County of San Bernardino (Office of the Public Defender)* (2015) PERB Decision No. 2423-M, p. 54.)

As indicated in the above language, this test was developed in cases involving unilateral changes to negotiable matters, and it was intended to limit the scope of the defense to discrete employer actions, while preserving the bilateral nature of negotiations as much as possible. (*County of Sonoma*, *supra*, PERB Decision No. 2772-M, p. 50, fn. 25.) As the Board recently explained, the defense "does not

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subject, and reliance on matters that are chronologically and logically irrelevant.

completely extinguish a public employer's bargaining obligation" but "merely allows the employer to make the [unilateral] change so long as the employee organization is given notice and an opportunity to meet and confer 'at the earliest practicable time following the adoption of such ordinance, rule, resolution, or regulation.'" (*Ibid*.)

Here, the City's brief cites no authority–PERB or otherwise–recognizing a business necessity or emergency circumstances defense to bad-faith or surface bargaining, and I have also located no authority directly on point. In bad faith bargaining cases alleging regressive bargaining tactics, PERB allows a party to withdraw from a tentative agreement or to make proposals that move the parties further apart in response to a bona fide change in economic or legal circumstances without inferring bad faith. (*County of Tulare* (2020) PERB Decision No. 2697-M, pp. 5-6; *Temple City Unified School District* (2008) PERB Decision No. 1972, p. 13.) However, such conduct must be "accompanied by a credible, rationally supported explanation of [the] changed economic circumstances" to justify the parties' change in position, and the party must continue bargaining in good faith in all other respects. (*Palo Alto*, *supra*, PERB Decision No. 2664-M, p. 6, fn. 5; *Arcadia*, *supra*, PERB Decision No. 2648-M, p. 39; *Temple City USD*, *supra*, PERB Decision No. 1972, p. 13.) Additionally, the "changed economic circumstances" justification recognized in the above-cited cases has only been applied to conduct that would otherwise constitute regressive bargaining tactics, e.g., less favorable proposals or withdrawing from tentative agreements. I have located no cases applying this defense to other conduct or indicia of bad faith, such as refusing to offer proposals, refusing to meet promptly upon request, or repeatedly changing representatives without taking steps to

ensure continuity in negotiations. Nor have I located any case in which the limited "changed circumstances" justification applicable to regressive bargaining issues has been used to dismiss an entire bad faith bargaining claim relying on other indicia or categories of "bad faith" conduct, and the City's brief does not address the broader legal and policy implications of recognizing such a defense either in multi-factor bad faith bargaining cases generally or in the context of the present case.

An employer's unilateral action may have serious and far-reaching consequences on negotiations, but it is at least analytically limited to the negotiable subject(s) it affects. The nature of the employer action at issue therefore sets a definite and knowable limit to the scope of an asserted business necessity or emergency circumstances defense. As suggested above with regard to the business necessity defense to a unilateral change, the language of the test is designed to ensure that employer conduct that would otherwise be unlawful is excused in certain emergency circumstances, but *only* insofar as demonstrably necessary to the meet the limited circumstances of the "actual" and "immediate" emergency. (See, e.g., *Regents of the University of California* (1998) PERB Decision No. 1255-H, adopting proposed decision at p. 37 [earthquake was unanticipated and devastating, but hospital employer's use of non-bargaining unit personnel not justified where it did not correspond to the need for emergency medical personnel and continued long after earthquake's effects had subsided]; *Rio Hondo Community College District* (1983) PERB Decision No. 292, p. 18 [unilateral adoption of emergency resolution affecting employee leave policy in anticipation of imminent teachers strike not excused by business necessity because same result could have been achieved by enforcing

provisions of existing policy].)

Unlike a unilateral change, bad faith bargaining is determined by the totality of the parties' conduct over the entire course of their negotiations. (*Arcadia*, *supra*, PERB Decision No. 2648-M, p. 34.) Although one indicium can support an overall finding of bad faith, the ultimate question is whether the respondent's conduct, *when viewed in its totality*, was sufficiently egregious to frustrate negotiations or undermine the representative's authority. (*San Ramon*, *supra*, PERB Decision No. 2571-M, p. 7; *San Jose*, *supra*, PERB Decision No. 2341-M, p. 18-19; *Muroc USD*, *supra*, PERB Decision No. 80, pp. 13-22.)

The totality of conduct analysis thus presents conceptual problems of appropriately "matching" an asserted business necessity or emergency circumstances defense to the specific employer conduct alleged to constitute bad faith bargaining. For example, does a finding of "business necessity" authorize the respondent to engage in bad faith bargaining for the entirety of the negotiations in which this "defense" arises, and thereby preclude PERB from ordering as an appropriate remedy that the respondent return to the table and bargain in good faith on a prospective basis? Would authorizing a business necessity defense in the present case excuse only the City's protracted failure to conduct a costing analysis and its chronic cancellation and failure to schedule meetings? Or would it also excuse seemingly unrelated conduct, such as repeated delays in negotiations caused by the frequent turnover in the City's negotiators and the City's failure to take bargaining notes, to brief its negotiators, or to take other steps to ensure continuity in negotiations when switching negotiators? Given these unanswered questions, the lack of citation to authority or any discussion

in the City's brief, and the apparent absence of any PERB precedent directly on point, it is unclear whether a business necessity or emergency circumstances defense is even theoretically available for a bad faith or surface bargaining claim or by what standard or test it would be evaluated. Fortunately, I need not attempt to resolve these issues here because the factual assertions on which the City relies are unsupported by the record, and thus the defense, assuming it exists, necessarily fails anyway for lack of proof.

In the absence of briefing on the subject, I assume, solely for the purpose of this proposed decision, that any business necessity or emergency circumstances defense to surface bargaining would be modeled after the Board's existing test in unilateral change cases. It would require the party asserting the defense to show a sudden and actual emergency based on circumstances beyond its control and leaving no alternative course of action. Like other defenses to bargaining obligations, it would also require a prompt and sufficiently credible explanation of the asserted emergency, accompanied by good faith bargaining in all other respects. (*County of Sonoma*, *supra*, PERB Decision No. 2772-M, p. 50, fn. 25; see also *City of Selma*, *supra*, PERB Decision No. 2380-M, p. 16 [duty to see clarification before refusing to bargain over questionable subjects]; *Petaluma City Elementary School District/Joint Union High School District*, *supra*, PERB Decision No. 2485, pp. 22-23 [duty to promptly and clearly assert privacy, undue burden, or other defense before refusing to supply necessary and relevant information].) As with other affirmative defenses, the party asserting the defense bears the burden of proving its elements and cannot rely on the absence of competent, admissible, and persuasive evidence to prove its case.

(*Compton Community College District* (1989) PERB Decision No. 720, p. 17, fn. 13; *Regents of the University of California* (1983) PERB Decision No. 356-H, p. 18.)

2. The Record Does Not Show That the City Experienced an Actual, Sudden, and Unanticipated Financial or Other Emergency that Was Beyond its Control

California courts have long used the term "emergency" to denote "an unforeseen situation calling for immediate action" and have emphasized that, in addition to its "grave," "serious" or "urgent" nature, an emergency is "not synonymous with expediency, convenience, or best interests." (*Sonoma County Organization etc. Employees v. County of Sonoma* (1991) 1 Cal.App.4th 267, 276–277.) PERB has similarly held that establish a defense to bargaining based upon business necessity, the employer must establish an actual financial emergency which leaves no real alternative to the action taken and allows no time for meaningful negotiations before taking action. (*Calexico Unified School District* (1983) PERB Decision No. 357, p. 20, citing *San Francisco Community College District*, *supra*, PERB Decision No. 105.)

The City has introduced no evidence that it faced or declared an actual financial emergency during the period covered by the Complaint. Simmons testified that the City "took in 5.8 million dollar General Fund revenue hit" *following* the onset of the COVID-19 pandemic and that the City's tax consultant "gave us the anticipated losses that they expected we were going to … encounter." Preliminarily, the portion of this testimony concerned with the $5.8 million dollar revenue "hit" is irrelevant, since it concerned the period *after* April 2020, which lies outside the scope of conduct alleged in the Complaint. The remainder of this testimony relies solely on uncorroborated hearsay about what a tax consultant advised the City. As such, it is insufficient to support a factual finding. (PERB Reg. 32176; *County of Orange* (2018) PERB

Decision No. 2611-M, pp. 13, 20-21.)

Even aside from these evidentiary problems, the above testimony concerned the *projected* effects of the COVID-19 Pandemic, i.e., an "anticipated" rather than an "actual" financial emergency. However dire these projections, the consequences were still merely predicted. Under these circumstances, PERB has repeatedly rejected an asserted business necessity or emergency circumstances defense because there is not yet an "actual" financial or other emergency. (*City of Long Beach* (2012) PERB Decision No. 2296-M, pp. 26-28; *Anaheim Union High School District* (1982) PERB Decision No. 201, pp. 4-7, and cases discussed therein.)

Most importantly, whatever difficulties were experienced by the Controller's Office, by other City departments, or by the City as a whole, there is no evidence that they were the result of "circumstances beyond the employer's control." According to Simmons, the City's "mishaps" stemmed largely from the City Controller's failure over many years to conduct necessary audits. As indicated in the City Charter and confirmed by Simmons, the City Controller is not an independent agency but an arm of City government. Under Charter section 601, all powers conferred by the State Constitution on the City are vested in its City Council which, as Simmons also confirmed, gives direction to the Controller. The City cannot assert an emergency was caused by circumstances beyond its control based on the acts or omissions of one of its own departments or agencies.

Accordingly, I conclude that even if a business necessity or emergency circumstances defense is available for a surface bargaining claim, the City has failed to prove that its conduct was the result of a qualifying "sudden," "unanticipated"

financial or other "actual" emergency caused by circumstances beyond its control.

3. The City Has Not Shown that the Nature of Any Alleged Emergency Left No Alternative to Meaningful Negotiations

According to Simmons, the Controller's Office was the bottleneck in obtaining the costing information needed to conduct "meaningful negotiations." However, as discussed previously, the City's bargaining representatives and the City Manager were not entirely at the mercy of dysfunction in the Controller's Office. According to Simmons, the City Manager chose to wait until the Controller had completed outstanding audits before even asking the Controller to "cost it out and see what it looks like." The precise timing of this decision is uncertain, but it was mid-2020 or later, and thus at least a year and a half after the City was in receipt of Local 2216's proposal. Notwithstanding Simmons's testimony that the Controller's Office was short-staffed, the City has not shown that it put its other important affairs on hold for a year and half due to staffing shortages.

Additionally, as note already, the Controller is a department of the City and therefore subject to the directives of the City Council. There was no evidence that the City's bargaining representatives or the City Manager ever appealed to the City Council to redirect available staff or resources to the Controller's Office to complete the costing analysis.

Accordingly, the City has not shown that the nature of the alleged "emergency" left no alternative to its dilatory conduct or that the circumstances precluded the City from redirecting resources to obtaining the costing information and comply with its bargaining obligation. The fact that the City Council, the City Manager, or the City's representatives *chose* to prioritize other legal or financial obligations does not mean

there were no alternatives. In fact, it demonstrates the opposite.

4. The Record Does Not Show that the City Provided Local 2216 with Prompt Notice and Opportunity for Bargaining at the Soonest Practicable Time

According to the City's brief: "the evidence showed that the City was always candid about its reasons for asking to postpone negotiations, and City negotiators even offered to (and did) meet with the Union to discuss Union proposal[s] that did not have financial impacts."[17] The City also asserts that Local 2216 "offered no evidence of deception or delay on the part of City negotiators." The record not only fails to support these assertions; it contradicts these and similar claims by the City.

Simmons, the only witness for the City, became the Assistant City Manager in July 2019, but did not attend or become involved in negotiations with Local 2216 until mid-2020. By her own admission, the Controller did not report to the City Manager or the Assistant City Manager and, because Simmons did not work in the Controller's Office at any time relevant to these proceedings, it is unclear exactly what basis she had to testify regarding staffing shortages, dysfunction, "lack of leadership," or other problems *within* the Controller's Office. However, assuming she was competent to testify on these matters, Simmons also had no role in the negotiations with Local 2216 until after the period at issue in this dispute. She therefore lacked personal knowledge to testify about what allegedly occurred in any of the parties' negotiations up to and

[17] As discussed previously, the City's brief contains no citation to the record to support its claim that its representatives "did" meet with Local 2216 regarding any non-economic matters *proposed by Local 2216*. Other than the parties' initial discussion of ground rules, the only non-economic matter discussed that was referenced in the record was *the City's request* to bargain revisions to its personnel rules.

including their meeting on April 17, 2020, which she did not attend. In fact, there was no evidence that any of the City's representatives had ever advised Local 2216 of staffing shortages, a backlog of audits, the City's Corrective Action Plan, dysfunction and a lack of leadership in the Controller's Office, or any other issues between the Controller's Office and other branches of the City, including the City Manager's Office. Nor was there any evidence that the City's representatives had ever advised Local 2216 that any of the issues referenced in Simmons's testimony *had caused* the City's delay in obtaining the costing information needed for negotiations.

To the contrary, until at least mid-2019, the City's representatives had advised Local 2216 that they were unable to obtain costing information because the Controller's staff was busy working on processing unpaid overtime claims from the previous agreement. Simmons also admitted that the City Manager did not request the costing information from the Controller until sometime in mid-2020 or later and "once the audits were completed." However, there was no evidence that this decision to prioritize the City's unfinished audits over the costing analysis was ever disclosed to Local 2216 either.

Remarkably, the City's position is that it had no obligation to disclose these issues to Local 2216 either at the earliest opportunity *or at all*. Over a relevance objection interposed by Local 2216, I allowed the City to present Simmons's testimony regarding staffing and other difficulties experienced in the Controller's Office between 2018 and 2020. However, during this testimony and at other points in the hearing, I repeatedly advised counsel for the City that what I ultimately needed to hear was not just about what problems may have existed, but about what, if anything, was *actually*

communicated to Local 2216 as the reason for the City's delay in conducting the cost analysis and responding to Local 2216's proposal. Counsel for the City argued that the City had no obligation to inform Local 2216 of any competing obligations the City may have had nor that the City had made a choice to prioritize other obligations over its bargaining obligations under the MMBA.

During cross-examination, Salazar testified that he was aware that the City was subject to a State-imposed Corrective Action Plan pertaining to, among other things, the City's finances.[18] Counsel for the City then asked whether Salazar was "aware that coming up with and complying with that Corrective Action Plan was a priority for the City." Counsel for Local 2216 objected that the question called for speculation. I sustained the objection with the following explanation:

"[W]e don't have any foundation about what the City told the Union about the -- or if it told it anything. … I've gotten basically nothing on that from the direct examination, and now [counsel for the City] is … getting into whether Mr. Salazar even knows anything about the Controller's office. And so, … if there's some foundation here, maybe we can lay that. Like what the City maybe told the Union."

Counsel for the City responded: "I did ask him. And for the record, this was something that was reported in the media, so you don't have to have been told by the City directly. ¶ My question was, was he aware, and he said, yes, he was aware that

[18] Upon further examination, Salazar explained that he had read somewhere about the City's Corrective Action Plan, but that the City's negotiators had never mentioned it as a reason for the repeated delays in meeting or that it was a priority that somehow prevented the City from conducting and completing the long-awaited cost analysis.

the City was subject to a Corrective Action Plan. He says he's aware of it."

Counsel for the City similarly asserted that Salazar was aware of the COVID-19 pandemic, that it was irrelevant "whether he got [that knowledge] directly from the City or [from] news reports about a pandemic" and that "[t]he point is that a person understands that the pandemic hit in March of 2020." However, as with staffing shortages, neglected audits, and other "mishaps" in the Controller's Office, there was no competent witness testimony nor documentary evidence to indicate that the City's representatives had ever advised Local 2216 during the relevant period that the pandemic was a cause of the City's asserted inability to conduct the cost analysis needed for meaningful negotiations.

Moreover, as explained above, because of its timing, the COVID-19 pandemic is irrelevant here. The Complaint covers the period between December 12, 2018, when Local 2216 provided the City with its initial economic proposal, and the parties' meeting on April 17, 2020 when, for the first time, the City allegedly raised the potential impact of the pandemic on its finances. The pandemic is therefore *chronologically* irrelevant to the lengthy delay that occurred *before* the pandemic, which is the period covered by the Complaint.

The City's belated justification based on the pandemic is also *logically* irrelevant. Assuming the pandemic affected the City's revenues, that might be a reason why the City *could not afford* Local 2216's economic demands. However, that is not the issue presented here, since the duty to bargain does not require the parties to reach agreement or make concessions. Instead, it requires them to meet "promptly" and in person upon request, to "exchange freely information, opinions, and

proposals," and to explain their positions honestly and with sufficient detail to permit the negotiations to proceed based on mutual understanding. (MMBA, § 3505; *City of Glendale* (2020) PERB Decision No. 2694-M, pp. 64-65; *San Luis Obispo*, *supra*, PERB Decision No. 2427-M, pp. 29, 41; *Dublin Professional Fire Fighters, Local 1885*, *supra*, 45 Cal.App.3d at p. 118 ; see also *City of Davis*, *supra*, PERB Decision No. 2582-M, pp. 19-20, citing *NLRB v. Truitt Mfg. Co*. (1956) 351 U.S. 149, 152-153 [claims made in bargaining must be honest claims].) Whether the City could afford to meet Local 2216's economic demands is thus entirely separate from whether it was required *to respond* to those demands promptly, forthrightly, and with sufficient detail to allow the parties to reassess their positions and move forward.

The City has presented no evidence or logical reason to explain how the pandemic would affect its ability to conduct the costing analysis, regardless of whether the City accepted, rejected, or countered the contents of Local 2216's proposal. There is also no evidence that the City ever advised Local 2216 that the pandemic would somehow prolong the City's already unconscionable delay in conducting the long-awaited cost analysis and responding to Local 2216's demands. Under the circumstances, the COVID-19 pandemic cannot and does not excuse the City's failure *even to respond* to Local 2216's proposal.

In *San Francisco CCD*, *supra*, PERB Decision No. 105, one of the earliest PERB cases considering an employer's business necessity defense, the Board observed:

> "Even when [an employer] is in fact confronted by an economic reversal of unknown proportions, it may not take unilateral action on matters within the scope of representation but *must bring its concerns about these*

> *matters to the negotiating table*. An employer is under no obligation at any time to reach agreement with exclusive representative. The duty imposed by the statute is simply -- *but unconditionally* -- the duty to meet and negotiate in good faith on matters within the scope of representation."

(*Id*. at pp. 10-11, emphases added.) As in *San Francisco CCD*, *supra*, and other cases, the City's assertion of a business necessity "is a position for the negotiating table rather than an excuse for refusing to negotiate." (*Sutter Union High School District* (1981) PERB Decision No. 175, p. 7; see also *County of Sonoma*, *supra*, PERB Decision No. 2772-M, pp. 51-52; *City of Long Beach*, *supra*, PERB Decision No. 2296-M, pp. 26-28.)

For all the forgoing reasons, I reject the City's belated business necessity or emergency circumstances defense as legally dubious and factually unsupported.

CONCLUSION

Under PERB precedent, the presence or absence of a party's subjective good faith is generally inferred from its outward conduct both at and away from the table. (*San Jose*, *supra*, PERB Decision No. 2341-M, p. 22.) As discussed above, the evidence in this case is more than sufficient to establish a prima facie case of bad faith or surface bargaining, notwithstanding the evidence presented in the City's case in chief or any matters argued in the City's brief. Local 2216 was not required to prove that the City's "candid" admissions that it had not yet conducted a cost analysis were untrue or that City representatives were deliberately misleading about the need to cost out Local 2216's proposal. At the hearing, the parties agreed that costing the proposal was necessary and desirable. This case is therefore not about second-guessing the City's decision to cost Local 2216's December 2018 proposal.

Rather, the central issue in this case is the City's now years-old failure to conduct or finish its costing analysis and to respond to Local 2216's pending proposal. A pattern of delay that frustrates negotiations is not excused by the bargaining representative's inexperience, honest mistakes, or busy schedule (*Children of Promise*, *supra*, PERB Decision No. 2558, p. 27; *Gonzales*, *supra*, PERB Decision No. 480, adopting proposed decision at pp. 38-40; see also *Arrow Sash & Door Co.* (1986) 281 NLRB 1108, 1108-1109, 1112-1114) nor by the party's decision to prioritize other business, financial, or legal obligations over its duty to meet and confer promptly upon request (*San Jose*, *supra*, PERB Decision No. 2341, pp. 23-24; see also *San Diego USD*, *supra*, PERB Decision No. 1883, p. 6; *KFXM Broadcasting Co.*, *supra*, 183 NLRB at p. 1201). Parties to negotiations have an "absolute" obligation to select representatives who are available to meet "promptly" upon request and to engage in meaningful discussion. (MMBA, § 3505; *Dublin*, *supra*, 45 Cal.App.3d at p. 118.)

The City claims it saved the parties' time and resources by not meeting more frequently when it had nothing "meaningful" to discuss. However, for collective bargaining purposes, the City is one entity, and its governing body cannot claim a failure to supervise its Controller, its City Manager, or its bargaining representatives as a defense to bad faith bargaining. (*City of San Diego*, *supra*, PERB Decision No. 2464-M, pp. 34, 60.) Having raised no persuasive, or even colorable defense, the City is found to have violated its duty to meet and confer in good faith and derivatively to have interfered with and denied the representational rights of its firefighters and Local 2216, as alleged in PERB's Complaint. (*County of Santa Clara* (2021) PERB Order No. Ad-485-M, p. 9, fn. 8; *Bellflower Unified School District* (2021) PERB

Decision No. 2796, p. 2; see also *State of California (Department of Corrections & Rehabilitation)* (2012) PERB Decision No. 2282-S, p. 15.)

REMEDY

The Legislature has vested PERB with broad authority to investigate, adjudicate, and remedy unfair practices, as the Board deems necessary to effectuate the policies and purposes of the MMBA. (MMBA, § 3509, subds. (a), (b); Gov. Code, § 3541.3; *City of San Jose v. International Assn. of Firefighters, Local 230* (2009) 178 Cal.App.4th 408, 413–414; *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd*. (2005) 35 Cal.4th at p. 1077; *City of Pasadena* (2014) PERB Order No. Ad-406-M, p. 12.) Under PERB precedent, a "properly designed remedial order seeks a restoration of the situation as nearly as possible to that which would have obtained but for the unfair labor practice." (*Modesto City Schools* (1983) PERB Decision No. 291, pp. 67-68.) An appropriate remedy should compensate injured parties and affected employees for losses caused by the unfair practices and should withhold from the wrongdoer the fruits of its unlawful conduct. (*City of Pasadena*, *supra*, p. 13; *City of San Diego*, *supra*, PERB Decision No. 2464-M, pp. 40-42; *Carian v. Agricultural Labor Relations Bd*. (1984) 36 Cal.3d 654, 673-674.) In addition to these restorative and compensatory functions, a Board-ordered remedy should also serve as a deterrent to future misconduct, so long as the order is not a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act. (*City of San Diego*, *supra*, pp. 40-42; *City of Pasadena*, *supra*, pp. 12-13; *Oak Grove School District* (1986) PERB Decision No. 582, pp. 30-31; see also *Fallbrook Hosp. Corp. v. NLRB* (D.C. Cir. 2015) 785 F.3d

729, 735 [agency discretion at its zenith when choosing appropriate remedy].)

The City has been found to have failed to meet and confer in good faith in violation of MMBA sections 3505 and 3509, subdivision (b), and PERB Regulation 32603, subdivision (c), by: (1) failing to counter or otherwise respond to Local 2216's economic proposal of December 12, 2018; (2) repeatedly cancelling meetings and failing or refusing to meet promptly upon request and for reasonable periods of time; and, (3) failing to take its bargaining obligations seriously and/or failing to vest its bargaining representatives with sufficient authority to engage in meaningful negotiations by repeatedly changing its negotiators without taking reasonable steps to ensure continuity of negotiations. Bargaining violations necessarily also interfere with the rights of employees to be represented by their chosen employee organization and deny the employee organization's right to represent employees in their employment relations with the employer, in further violation of the MMBA and PERB Regulations. (*County of Santa Clara* (2021) PERB Order No. Ad-485-M, pp. 9-10; *Sacramento City Unified School District* (2020) PERB Decision No. 2749, p. 10.)

In addition to PERB's customary cease-and-desist order and notice posting, Local 2216 requests a bargaining order and make-whole relief, including reimbursement of Local 2216's bargaining team members for off-duty attendance at negotiation meetings. Local 2216 also seeks recovery of attorney's fees and costs as litigation sanctions against the City for its defense of this action."[19]

[19] Despite having notice at the hearing of each of the remedial measures being requested by Local 2216, the City's post-hearing brief does not address any issues related to an appropriate remedy.

A. Cease and Desist Order and Notice Posting

Ordering the respondent to cease and desist its unlawful conduct is a ubiquitous feature of Board-ordered remedies, including in bad faith and surface bargaining cases. (*City of Selma*, *supra*, PERB Decision No. 2380-M, p. 26; *Children of Promise*, *supra*, PERB Decision No. 2558, pp. 35, 37; see also *City of Commerce* (2018) PERB Decision No. 2602-M, p. 17.) An order to post physical and electronic notice is also an essential part of the Board's customary remedy for unfair practices. (*City of Sacramento* (2013) PERB Decision No. 2351-M, pp. 2, 43-46.) Such notice serves to declare the parties' respective rights and obligations and to inform affected employees of their rights under the statute and of the employer's willingness to comply with the law. (*Id*. at p. 44.) Finding nothing in the record or in the parties' briefs to suggest otherwise, I find PERB's standard cease-and-desist order and notice posting requirements are also appropriate here.

B. Bargaining Order and Other Affirmative Relief

In cases where the respondent has been found to have engaged in an overall course of bad faith or surface bargaining and the parties have not concluded negotiations, it is also customary to order the respondent, upon demand by the charging party, to promptly resume negotiations with the subjective good faith required by the PERB statutes. (*Children of Promise*, *supra*, PERB Decision No. 2558, p. 35; *Anaheim Union HSD*, *supra*, PERB Decision No. 2434, adopting proposed decision at p. 100; *Desert Sands Unified School District* (2004) PERB Decision No. 1682, p. 11; *Stockton*, *supra*, PERB Decision No. 143, pp. 33-34.)

As of the date of the hearing, the parties had not yet concluded their

negotiations. A bargaining order is therefore appropriate. In addition, other affirmative relief is appropriate and necessary to effectuate the bargaining order.

1. Completion and Production of the Costing Analysis

MMBA section 3509, subdivision (a), and Government Code section 3541.3, subdivision (i), also authorizes PERB to take any other action as the Board deems necessary to effectuate the policies and purposes of the statute, and I consider other affirmative relief necessary in the present case to ensure the effectiveness of the bargaining order. Since receiving Local 2216's economic proposal on December 12, 2018, the City's various representatives repeatedly maintained that no meaningful negotiations could occur until the City had conducted its cost analysis of Local 2216's proposed items. It would be pointless for PERB to order the City to return to the bargaining table to meet and confer in good faith, without also ordering as a precondition to such negotiations that the City complete and produce its long-awaited cost analysis.

The City's brief argues that production of its costing analysis is a "red herring" because Local 2216 never specifically requested that information, and the Complaint does not allege a failure or refusal to provide information. However, claims made in bargaining must be honest claims, and parties are entitled to some "reasonable proof" of the accuracy of what is said during the give-and-take of negotiations. (*Truitt*, *supra*, 351 U.S. at 152-153.) This necessarily includes information about the employer's financial status when relied on to accept, reject, or evaluate a bargaining proposal. (*Ibid*.) The City has already repeatedly acknowledged its intent to rely on its costing analysis to evaluate Local 2216's proposal. According to the City, if not for the

unavailability of that information, the City's representatives were always willing to engage in "meaningful" negotiations over Local 2216's proposal. Thus, whether the City provides the underlying data in spreadsheet form or explains what the data shows across the table is not an immediate concern here.[20] In either case, it is required to explain its position in sufficient detail to allow the negotiations to proceed based on mutual understanding. (*San Luis Obispo*, *supra*, PERB Decision No. 2427-M, p. 41.)

Accordingly, to "undo" the effects of the City's failure to timely conduct the cost analysis necessary to engage in meaningful negotiations, it is appropriate to order the City to conduct or complete and a cost analysis of Local 2216's pending economic proposal or, at Local 2216's request, an updated version thereof. (MMBA, § 3505; *Children of Promise*, *supra*, PERB Decision No. 2558, p. 36.) Within 10 days after this decision becomes final, or within 10 days after receiving an updated version of Local 2216's economic proposal, the City shall complete and, at Local 2216's request, promptly provide Local 2216 with the costing information necessary to engage in meaningful negotiations. (*Truitt*, *supra*, 351 U.S. at 152-153.)

2. Minimum Bargaining Schedule

PERB cannot always fully undo a party's prior delays in negotiations. In the present case, for example, no PERB remedy can fully recreate the economic

[20] There is some irony in the City's repeated requests that Local 2216 provide its proposed items in written format and in advance of the parties' meeting and its apparent position here that good faith negotiations are best served by the City explaining its financial position verbally rather than providing the underlying data in spreadsheet form. However, I leave it to the parties' ground rules and Local 2216's discretion to determine whether to request the results of the City's long-awaited costing analysis in printed form.

conditions that existed before the COVID-19 pandemic. However, PERB has authority to craft a remedy that will help prevent or minimize future delays, while balancing all competing interests. (*County of Ventura* (2018) PERB Decision No. 2600-M, p. 44, fn. 50; *Noahs Ark Processors, LLC* (Jan. 27, 2021) 370 NLRB No. 74 [ordering minimum bargaining schedule to remedy respondent's repeated failure to schedule and attend negotiations].) An appropriate remedy necessarily requires some consideration of the interest of justice and ensuring that a respondent does not benefit by fortuitous changes in the economic climate that would likely have had no bearing on the parties' negotiations, if the respondent had promptly bargained in good faith, as required by law.

At the high-water mark, the City agreed to schedule (and sometimes even attend) bargaining sessions at a rate of approximately once per month. It is reasonable to suppose that the City can resume at least this modest schedule without undue burden or delay. The City shall be ordered at Local 2216's request to meet *at least* once per month in person for successor negotiations until such time as those negotiations result in impasse or agreement, or until Local 2216 withdraws its request for this minimum bargaining schedule or until PERB finds that Local 2216 has failed and refused to meet and confer in good faith, whichever occurs first. (*Salinas Valley Memorial Healthcare System* (2015) PERB Decision No. 2433-M, pp. 35-36 [charging party's improper conduct in negotiations may preclude PERB from considering liability or ordering remedy under equitable principles]; *Gonzales*, *supra*, PERB Decision No. 480, adopting proposed decision at pp. 61-62 [same].) If, after reaching an impasse, negotiations are revived due to changed circumstances, Local 2216 shall have the option of renewing this once/monthly minimum frequency meeting schedule.

C. Local 2216 and Affected Employees Are Entitled to Make-Whole Relief

Backpay and other monetary awards are part of the PERB's broad remedial authority and flexibility to "undo" whatever harm was caused by the respondent's unfair practices. (*City of San Gabriel* (2020) PERB Decision No. 2751-M, pp. 32-34; *Sonoma County Superior Court* (2017) PERB Decision No. 2532-C, p. 40; see also *State of California (Correctional Health Care Services)* (2021) PERB Decision No. 2760-S, pp. 35-36, 43-48.)

1. Reimbursement of Local 2216's Bargaining Costs

In *Frontier Hotel & Casino* (1995) 318 NLRB 857, enfd. in relevant part sub nom. *Unbelievable, Inc. v. NLRB* (D.C. Cir. 1997) 118 F.3d 795, the National Labor Relations Board (NLRB) found that the employer had "engaged in deliberate and egregious bad-faith conduct aimed at frustrating the bargaining process" by, among other things, meeting with the unions on only three or four occasions but refusing to engage in meaningful discussion of any of union proposals. To compensate the aggrieved unions for "the useless expenditure of … resources in their attempts to bargain," the NLRB ordered the employer to reimburse their negotiating costs. On petition for review, the Circuit Court of Appeals for the District of Columbia affirmed the NLRB's remedial order.

In *Camelot Terrace* (2011) 357 NLRB 1934, the employer's representatives similarly approached negotiations with the union as if it were "an interference with their normal work." (*Id*. at p. 1395.) Among other things, the employer's representatives "sought to restrict the dates and times when the parties met to negotiate"; "consistently reject[ed] the Union's requests to schedule more frequent and longer sessions";

"canceled meetings the day before they were scheduled to occur"; and "typically ended [bargaining sessions] prematurely" by "refus[ing] to answer the Union's questions or offer proposals," thereby "rendering further bargaining impossible." (*Ibid*.)

The NLRB found that the "aggravated unlawful conduct" of the employer in *Camelot Terrace*, "infected the core" of the bargaining process, "directly caused the Union to waste considerable resources on protracted and futile bargaining," and "deprived the Union of any real opportunity to achieve contracts that would be acceptable to unit employees," as evidenced by the fact that the only tentative agreement reached was not ratified by the affected employees. (*Camelot Terrace*, *supra*, 357 NLRB at p. 1937.) Relying on the reasoning of *Frontier/Unbelievable*, the NLRB concluded that its "traditional remedies [were] insufficient to eliminate the deleterious effects of the [employer's] conduct" and that: "Only by ordering the reimbursement of the Union's negotiating expenses can the [NLRB] reasonably restore the Union's previous financial strength and consequent ability to carry out effectively its responsibilities as the employees' representative." (*Ibid*.)

I consider reimbursement of Local 2216's bargaining costs appropriate here as well. However, I do so for only some of the reasons relied on by the NLRB in the *Frontier*/*Unbelievable* and *Camelot Terrace* cases cited above.

Although PERB does not appear to have yet decided a case awarding a charging party its bargaining costs, it has cited the above line of NLRB cases favorably and for the more general proposition that upon a finding of liability in unfair practice proceedings, injured parties and affected employees are entitled to be made whole. (*Palo Alto*, *supra*, PERB Decision No. 2664-M, p. 8, fn. 6.) This general proposition is

not controversial. PERB has long held that, as part of an appropriate remedy, injured parties and affected employees are entitled to compensation for all out-of-pocket expenses caused by the respondent's unfair practices. (*Temple City Unified School District* (1990) PERB Decision No. 841, pp. 13-14; see also *Bellflower Unified School District* (2022) PERB Decision No. 2544a, pp. 33-41.) In fact, PERB has previously awarded make-whole relief in a case involving bad faith bargaining as determined by the totality of circumstances. (*Regents of the University of California* (2010) PERB Decision No. 2094-H, pp. 31-34, 36-38, superseded by Gov. Code, § 3563.3, Stats. 2011, Ch. 539. The Legislature has since removed PERB's authority to award strike damages, the kind of make-whole relief at issue in *Regents*. However, neither the Legislature nor the courts have disturbed the underlying analysis in *Regents* or rejected the general principle that other kinds of losses incurred because of another party's failure or refusal to bargain in good faith are compensable by PERB as make-whole monetary awards. (*Sacramento City USD*, *supra*, PERB Decision No. 2749, pp. 12-13, fn. 6; see also 7 Witkin, Summary 11th Const Law § 162 (2022) [administrative adjudication and restitution, i.e., make-whole relief, does not offend Judicial Powers Clause, as recognized by *McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 359].)

In addition to returning the parties to the status quo ante, a backpay or other make-whole award "ensures that employees are not effectively punished for exercising their statutorily protected rights" and "also provides a financial disincentive and thus a deterrent against future unlawful conduct." (*City of San Diego*, *supra*, PERB Decision No. 2464-M, p. 41, citing *City of Pasadena*, *supra*, PERB Order No. Ad-406-M, p. 13.)

The above private sector cases are in accord with PERB on this point. As the NLRB explained in the *Frontier* decision:

> "[A]n order requiring the respondent to reimburse the charging party for negotiation expenses is warranted both to make the charging party whole for the resources that were wasted because of the unlawful conduct, and to restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table."

(*Frontier*, *supra*, 318 NLRB at p. 859.)

However, where PERB appears to diverge from the *Frontier/ Unbelievable* line of cases is in the latter's treatment of make-whole relief as "extraordinary" rather than the norm. Notwithstanding a union's financial injury in bad faith or surface bargaining cases, private-sector cases hold that reimbursement of bargaining costs is only appropriate for "unusually aggravated misconduct" and "substantial unfair labor practices" that "have infected the core of a bargaining process to such an extent that their 'effects cannot be eliminated by the application of traditional remedies.'" (*Frontier Hotel & Casino*, *supra*, 318 NLRB at p. 859, citing *NLRB v. Gissel Packing Co.* (1969) 395 U.S. 575, 614.) PERB precedent, on the other hand, appears to make no such distinction. PERB's rule is that an appropriate remedy should make injured parties and affected employees "whole" by awarding reimbursement of all out-of-pocket expenses caused by the respondent's unfair practices. (*Sacramento City USD*, *supra*, PERB Decision No. 2749, p. 15; *San Diego*, *supra*, PERB Decision No. 2464-M, pp. 46-47; *Omnitrans* (2009) PERB Decision No. 2030-M, p. 33; *San Ysidro School District* (1997) PERB Decision No. 1198, pp. 5-6; *Temple City Unified School District* (1990) PERB Decision No. 841, pp. 13-14.) The Board has recently affirmed that a make-

whole award should be tailored "to expunge the actual consequences" of an unfair practice, including restoration of "the economic status quo that would have obtained but for the respondent's wrongful act." (*County of Kern and Kern County Hospital Authority* (2019) PERB Decision No. 2659-M, p. 26, citing *City of Pasadena*, *supra*, PERB Order No. Ad-406-M, p. 13.) Union staff time is a recoverable bargaining cost under this "make-whole" standard. (*Sacramento City USD*, *supra*, p. 15.)

Although the Board has considerable discretion to grant or withhold backpay or other monetary awards (see, e.g., Gov. Code, § 3541.5, subd. (c); *Sonoma County Superior Court*, *supra*, PERB Decision No. 2532-C, pp. 40-41; *Mt. San Antonio Community College Dist. v. PERB* (1989) 210 Cal.App.3d 178, 189), it appears to have done so based on the facts of each case and not by establishing as a prerequisite that the respondent's conduct first be designated "unusually aggravated", "egregious," "flagrant" or similar term of condemnation. (*County of Kern and Kern County Hospital Authority*, *supra*, pp. 25-26; see *City of Pasadena*, *supra*, PERB Order No. Ad-406-M, pp. 13-14 [where some injury is established, reasonable doubts as to precise amount of damages resolved against respondent]; cf. *California School Employees Association (Williams)* (2019) PERB Decision No. 2643, pp. 6-7 [PERB does not presume damages in duty of fair representation cases because of problems of assigning comparative fault between the union and the employer].) Bargaining costs are designed to compensate a negotiating party for losses incurred as a direct result of another parties' failure or refusal to meet and confer in good faith, as required by MMBA section 3505 and analogous provisions in each of the other PERB statutes. As such, they are allowable in administrative proceedings as "out-of-pocket expenditures

incurred or economic harm suffered by one party in consequence of another party's violation of a law or regulation the agency is empowered to enforce." (*Walnut Creek Manor v. Fair Employment & Housing Com.* (1991) 54 Cal.3d 245, 263, 266.) Bargaining costs are not punitive damages, and notwithstanding NLRB precedent, I see no point here in requiring Local 2216 to prove a heightened "despicable conduct" standard only to receive compensation for having been denied the bare minimum "good faith" negotiations required by the statute. (cf. Civ. Code, § 3294.)

I am also unaware of any PERB decisions in which the Board has found liability but then distinguished between "substantial" and "insubstantial" unfair practices as a basis for granting or withholding make-whole relief. (See, e.g., *City & County of San Francisco* (2021) PERB Decision No. 2757-M, p. 14 [finding of unfair practice liability "creates a presumption that employees suffered some financial loss as a result of the employer's unlawful conduct"].) Accordingly, I consider it unnecessary to determine whether the City's unfair practices in this case were "egregious," rose to the level of "unusually aggravated misconduct," or "infected the core" of the bargaining process. (cf. *Camelot Terrace*, *supra*, 357 NLRB at pp. 1936–1937; *Frontier Hotel & Casino*, *supra*, 318 NLRB at p. 859.) For awarding make-whole relief, it is enough that the City's unlawful conduct caused Local 2216 to waste quantifiable staff time and resources scheduling and attending "negotiations" that, by the City's admission, were not "meaningful." (*Walnut Creek Manor v. FEHC*, *supra*, 54 Cal.3d at pp. 263, 266.)

The parties met five times between December 2018, when Local 2216 submitted its Proposal #1, until April 2020. Despite repeated requests, they did not meet more frequently until about July 2020 after the City had changed representatives

and was fielding its fourth chief negotiator. The five meetings that did occur were pointless. This is not a contested issue. The City's Chief Negotiator stated in an e-mail to Local 2216: "Without the financial information we are obtaining from the City, no meaningful negotiation can proceed." At the PERB hearing, both sides also agreed on the importance of the City conducting a cost analysis before responding to the Union's proposal. However, the cost analysis upon which "meaningful negotiation" depended was either never conducted or never finished and, as of the hearing, the City had still made no substantive response to Local 2216's pending proposal.

Based on the above findings, the City shall be ordered to reimburse Local 2216 for reasonable bargaining costs incurred between December 12, 2018 and April 17, 2020 because of the City's unfair practices. By way of illustration and not limitation, such costs may include staff salaries, travel expenses, and per diems for time spent scheduling, traveling to and from, and attending meaningless bargaining sessions, or as otherwise according to proof.

2. Reimbursement of Local 2216's Employee Representatives for Wasted Meeting, Travel, and Preparation Time

Under PERB precedent, "an unfair practice finding creates a presumption that employees suffered some financial loss as a result of the employer's unlawful conduct." (*City & County of San Francisco*, *supra*, PERB Decision No. 2757-M, p. 14.) Once liability is established, the charging party can prove the amount of damages in PERB compliance proceedings. (PERB Reg. 32980; *Regents of the University of California* (2021) PERB Decision No. 2755-H, p. 56.) At issue here is whether Local 2216's employee representatives, Salazar, Branson, and Halvorson, are also entitled

to be made whole, including reimbursement for time spent preparing for or attending "negotiations" that the City knew at the time to be pointless.

Local 2216 argues that each of the bargaining meetings that were held were "a waste of time" because the City never responded to Local 2216's proposal, and no "meaningful" bargaining ever occurred. According to Local 2216, the City should be ordered to make Local 2216's bargaining team members whole, by compensating them for their off-duty attendance at negotiation meetings.

Local 2216 also points out that for those bargaining sessions that occurred when one or more of Local 2216's employee representatives were on duty, the ambulance or fire engine to which they were normally assigned were put out of service due to insufficient staffing. Local 2216 contends that the City's dilatory conduct thereby had the doubly negative effect of wasting the employees' time and jeopardizing public safety by decreasing the City resources available for responding to fires or medical emergencies. Local 2216 has requested that PERB order "all appropriate relief" in this case, but it has not specified an appropriate remedy that would address the diminution of fire protection, emergency medical response, or other public safety resources.

Pursuant to the terms of Article 17, section B, of the 2014-2016 MOU and its side letter extension, up to four employee representatives on Local 2216's bargaining team were granted released time without loss of compensation "when formally meeting and conferring with the City on matters within the scope of representation, provided their release [did] not result in engine companies being out of service." According to this provision, Local 2216's employee representatives were compensated at their regular rate of pay for all time spent formally meeting and conferring during

their regular work hours. Salazar testified that most of the bargaining sessions at issue occurred when he was on-duty, and that he was paid for that time. However, he also testified that it was difficult to find a meeting time when all three employee representatives were on duty, and that some meetings were held at times when one or more of Local 2216's employee representatives were off-duty.

Although I have found no PERB decision directly on point, in similar circumstances, the NLRB has awarded employee representatives "lost wages" for time spent in "negotiations" made useless by the employer's bad-faith or surface bargaining. In one such case, the NLRB reasoned as follows:

> "As a result of Respondent's [unlawful] conduct, the employee members of the negotiating committee did not receive the compensatory benefit of good-faith bargaining for which they sacrificed their wages. Since the Respondent never had any intention to bargain in good faith, it deliberately deprived the employees of their wages as well as of this anticipated benefit. Therefore, we believe it is appropriate that, in order to make these employees whole, they be reimbursed for wages lost while attending those past negotiating sessions … ."

(*M.F.A. Milling Co.* (1968) 170 NLRB 1079, 1080, enforced in relevant part sub nom. *Local Union 676, AFL-CIO v. N.L.R.B.* (D.C. Cir. 1972) 463 F.2d 953; see also *Nexstar Broad., Inc. d/b/a Koin-TV & Nat'l Assn of Broad. Employees & Technicians, the Broad. & Cable Television Workers Sector of the Communications Workers of Am., Local 51, AFL-CIO* (July 27, 2022) 371 NLRB No. 118, fn. 6 [citing other NLRB cases and disputing dissenting member's view that awarding reimbursement of employee bargaining representatives' lost wages is a "truly extraordinary" remedy].)

I agree with Local 2216 that by failing to bargain in good faith, the City has wasted the employees' representatives' off-duty time, and that they are entitled to be made whole for having spent their own time preparing for and attending meetings that the City admitted would not involve "meaningful" negotiations. (*M.F.A. Milling Co.*, *supra*, 170 NLRB at p. 1080; *Grill Concepts Services, Inc. d/b/a the Daily Grill & Unite Here Local 11* (Dec. 16, 2022) 372 NLRB No. 30, slip op. at pp. *1, *5; *Wellman Indus., Inc.* (1980) 248 NLRB 325, 330.)

At the hearing and in its post-hearing brief, the City argued that it was always willing to discuss other matters not encompassed by Local 2216's economic proposal. According to the City, Local 2216's employee representatives are not entitled to compensation because any time spent in negotiations could have been devoted to other matters Local 2216 wished to raise. I reject this argument as contrary to both the record and PERB precedent.

Albright, the City's chief negotiator for much of the period under consideration, acknowledged that "[w]ithout the financial information we are obtaining from the City, *no meaningful negotiation can proceed*." Willis, the City's third chief negotiator, expressed similar doubt about "how productive" a meeting scheduled for February 20, 2020 would be without the cost analysis information, and asked to cancel the meeting. The City's contention that the parties could have used meeting time to discuss other, non-economic matters is contradicted by the contemporaneous admissions of its own representatives and by the overwhelming evidence in the record. Other than the discussion of ground rules at their initial meeting, and a discussion of revisions to the City's personnel rules, as requested by the City, there is

no evidence of any substantive discussions at any of the five meetings that occurred between December 12, 2018 and April 17, 2020.

Moreover, PERB precedent prohibits one party from insist[ing] on negotiating certain subjects in isolation from others, or [from] seek[ing] to impose arbitrary limits on the range of possible compromises a party may consider." (*San Jose*, *supra*, PERB Decision No. 2341-M, p. 29.) While not formulated as a "proposal," the City's conduct in this case, including its years-long failure to conduct the costing analysis needed to conduct "meaningful negotiations," effectively accomplished the same result. Under the circumstances, Local 2216 could not seek to "horse trade" or link any of the economic items in its Proposal #1 with ostensibly "non-economic" items. It also could not negotiate over those items in Proposal #1, such as its Union Business proposal, that included both "economic" and "non-economic" aspects. The City's willingness to negotiate over the approximately 5 percent of Local 2216's proposal that did not require a costing analysis rings hollow. Far from demonstrating the City's good faith, it emphasizes why make-whole relief is both appropriate and necessary here to expunge the consequences of an unfair practice and restore "the economic status quo that would have obtained but for the respondent's wrongful act." (*County of Kern and Kern County Hospital Authority*, *supra*, PERB Decision No. 2659-M, p. 26.)

To make Local 2216's employee representatives whole for time lost in meaningless negotiations, the City shall be ordered to compensate employees with backpay at their regular rate of pay for reasonable off-duty time spent preparing for, traveling to and from, and attending the parties' meetings on June 10, 2019, July 9, 2019, August 28, 2019, January 31, 2020, and April 17, 2020.

Some PERB cases involving unilateral changes that resulted increased employees' work hours or reduced duty-free time at work have award compensatory time off either instead of backpay or as a preferred option, with backpay serving as a secondary option if the parties cannot agree on how to implement the compensatory time award. (*Mark Twain Union Elementary School District* (2003) PERB Decision No. 1548; *Cloverdale Unified School District* (1991) PERB Decision No. 911, pp. 25-26; *Fountain Valley Elementary School District* (1987) PERB Decision No. 625, p. 12; C*orning Union High School District* (1984) PERB Decision No. 399, pp. 14-16.) The reasoning of these cases is best summed up as follows: while hours can be properly translated into dollars, the direct and immediate result of the employer's conduct was that employees were required to work extra hours without corresponding pay, and that the most appropriate way to make affected employees whole is therefore to order the employer to provide aggrieved employees with a corresponding amount of paid time off. (C*orning*, *supra*, PERB Decision No. 399, p. 10.)

I decline to order compensatory time off here for several reasons. First, neither party has requested compensatory time as an appropriate remedy. Local 2216 has specifically asked PERB to make its bargaining team members whole "by compensating them for their off[-]duty attendance at negotiation meeting[s]," while the City has expressed no view on this or most other remedial issues. Second, because of great differences workplaces and working conditions, PERB's cases awarding compensatory time have usually left it to the parties to bargain over how to implement the award. (See *Mark Twain*, *supra*, PERB Decision No. 1548, pp. 6-7, 9, and cases cited above.) However, perhaps the last thing the parties to this dispute need is

another issue to negotiate, given that they have yet to reach agreement on a successor MOU, despite more than four years of negotiations. Third, and relatedly, the circumstances for each of Local 2216's employee representatives will be entirely peculiar to each employee. Unlike the unilateral change cases cited above, there is no identifiable "formula" or change in policy at issue that would give any uniform guidance on how much compensatory time off or backpay each employee would be owed. It would be akin to conducting "negotiations" over a group of employees filing their individual tax returns. Rather than direct the parties to negotiate over such an individualized set of issues and risk further delay or distraction from their successor negotiations, I consider it appropriate here for each employee translate lost time, as described above, into dollars and to allow the parties to resume MOU negotiations.

I find Local 2216's diminished public safety argument less persuasive as a matter appropriate for a PERB remedy. Public employees take pride in their work and understandably do not wish to be perceived by the public as providing a substandard service. (See *County of Santa Clara* (2013) PERB Decision No. 2321-M, p. 23, citing *San Mateo County Community College District* (1979) PERB Decision No. 94, p. 16; see also *Alum Rock Union Elementary School District* (1983) PERB Decision No. 322, p. 14.) Public employees also have a legitimate concern in matters affecting their own health and safety *as employees*. (*County of Sonoma* (2021) PERB Decision No. 2772-M, p. 45, citing *International Assn. of Fire Fighters, Local 188, AFL-CIO v. Public Employment Relations Bd*. (2011) 51 Cal.4th 259, 275.)

However, the organization, necessity, and level of services to be provided are managerial prerogatives under the MMBA, which "tends to mandate decision

bargaining only for those topics that fall within the general ambit of traditional labor relations rather than primarily relating to public safety." (*County of Sonoma*, *supra*, PERB Decision No. 2772-M, p. 39, fn. 19; see also MMBA, § 3504; *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 637; *County of Santa Clara* (2019) PERB Decision No. 2680-M, pp. 101-11.) Local 2216 has identified no legal authority or viable theory in which reduced fire protection or other emergency services to the public or a diminished image of public safety employees resulting from such reduction in services are compensable injuries for public employees or their representatives under the PERB statutes. Accordingly, to the extent Local 2216 seeks backpay or other make-whole relief for bargaining sessions that caused a diminution of the City's public safety services, I deny the request.

D. Litigation Costs

In addition to the above standard remedies, PERB may order a party, its attorney or other representative, or both, to pay reasonable legal expenses, including attorney's fees and litigation costs incurred by another party because of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay as defined by Section 128.5 of the Code of Civil Procedure. (EERA, § 3541.3, subds. (i) and (n); see also Government Code, § 11455.30, Law Revision Commission Comments; *Sacramento City USD*, *supra*, PERB Decision No. 2749, pp. 14-15; *Palo Alto*, *supra*, PERB Decision No. 2664-M, p. 7.) Bad-faith litigation tactics may include filing, pursuing, or opposing, any claim, defense, motion, or other action or tactic without arguable merit and with no discernible purpose other than to delay the

proceedings. (*Bellflower USD* (2019) PERB Order No. Ad-475, p. 14; *Lake Elsinore*, *supra*, PERB Order No. Ad-446a, pp. 5-6.)

To obtain reimbursement of litigation costs as sanctions against an opposing party, the moving party must demonstrate that the claim, defense, motion, or other action or tactic was "frivolous" or "without arguable merit" and pursued in "bad faith." (Gov. Code, § 11455.30; *Sacramento City USD*, *supra*, PERB Decision No. 2749, p. 11; *Lake Elsinore*, *supra*, PERB Order No. Ad-446a, p. 5; *City of Alhambra* (2009) PERB Decision No. 2036-M, p. 19 (*Alhambra*); *City of Alhambra* (2009) PERB Decision No. 2037-M, p. 2.) To determine whether a claim, defense, motion, or other action is frivolous, PERB examines whether it is so manifestly erroneous that no prudent representative would have filed or maintained it. (*Lake Elsinore*, *supra*, PERB Order No. Ad-446a, p. 5 and cases cited therein). In *Lake Elsinore*, for instance, the Board found that the employer's request for reconsideration was without even arguable merit where it failed to comply with PERB regulations and decisional law directly on point, and it included no serious argument for extending, modifying, or reversing existing law or for establishing new law. (*Ibid*.)

Here, the City admittedly postponed negotiations for approximately a year and a half because its Controller's Office was short staffed and because its City Manager chose to prioritize completing financial audits over promptly meeting and conferring over Local 2216's economic proposal as required by the MMBA. Thereafter, the City claims the COVID-19 pandemic provides an additional excuse for failing to conduct or complete the long-awaited costing analysis need for "meaningful negotiations" with Local 2216 to begin. There is no competent, non-hearsay evidence that they City

advised Local 2216 of these asserted justifications for the City's years-long failure and refusal to meet and confer. There is also no evidence that the City's bargaining representatives or City Manager ever approached the City Council about staffing shortages or any other problems in the Controller's Office ostensibly preventing it from conducting or completing the costing analysis.

Aside from evidentiary problems, including uncorroborated hearsay and lack of personal knowledge, the City's position amounts to asserting that it may choose to ignore its meet-and-confer obligations under the MMBA without consequences simply because it has other legal or financial obligations. The City's brief cites no legal authority for this position, and it conflicts with the basic premise of the MMBA and PERB precedent. (MMBA, § 3500; *Sutter Union*, *supra*, PERB Decision No. 175, p. 7; [respondent's assertion of business necessity "is a position for the negotiating table rather than an excuse for refusing to negotiate"].) PERB must seek whenever possible to harmonize its statutes with the provisions of external law, but it is not authorized to ignore violations of the rights and obligations guaranteed by the MMBA simply because a party has other competing legal or financial obligations. (*City of San Diego*, *supra*, PERB Decision No. 2464-M, p. 30, affirmed in relevant part sub. nom. *Boling*, *supra*, 5 Cal.5th 898.) The City's brief also includes no serious argument based in law, policy, or logic for extending, modifying, or reversing existing law or for establishing new law.

The City's asserted "defense" is without arguable merit, and under the circumstances, appears intended solely to cause unnecessary delay. According to the testimony of the Assistant City Manager, the City Controller has completed the outstanding audits that prevented it from conducting the cost analysis of Local 2216's

proposal before 2020. However, as of the date of the hearing, it has not conducted or completed the cost analysis needed to conduct meaningful negotiations. The unconscionable and unexplained delay compels an inference of bad faith not only for the underlying conduct of the City but also in its defense against this action. Accordingly, in addition to reimbursing Local 2216 for its bargaining costs, the City shall also be ordered to pay Local 2216's reasonable litigation costs.

E. Interest

All monetary amounts owed under this proposed decision and order shall be augmented by interest at a rate of 7 percent per annum in accordance with PERB precedent. (*State of California (Correctional Health Care Services)*, *supra*, PERB Decision No. 2760-S pp. 48-49, fn. 31.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, PERB has found the CITY OF COMPTON (City) to have violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq., by engaging in bad faith or surface bargaining during negotiations with Compton Firefighters, International Association of Firefighters Local 2216, the exclusive representative of the City's nonsworn Fire Department employees, between December 12, 2018 and April 17, 2020.

Pursuant to section 3509 of the MMBA and section 3541.3 of the Government Code, it is hereby ORDERED that the City, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Engaging in bad faith or surface bargaining during successor negotiations with Local 2216;

2. Interfering with the rights of employees to be represented by Local 2216 in their employment relations with the City; and

3. Denying Local 2216 its right to represent employees.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Promptly conduct or complete a costing analysis of Local 2216's Proposal #1 of December 2018 or an updated version thereof as necessary, and upon request, furnish Local 2216 with a copy of such costing analysis.

2. Upon request by Local 2216, promptly and personally meet and confer with Local 2216 regarding a successor memorandum of understanding at least once per month until such time as negotiations result in a successor memorandum of understanding, negotiations reach a bona fide impasse, Local 2216 rescinds its request for this bargaining schedule, or PERB finds Local 2216 to have failed or refused to meet and confer in good faith;

3. Reimburse Local 2216 for reasonable costs and expenses incurred in successor negotiations occurring between December 12, 2018 through and including April 17, 2020. By way of illustration and not limitation, such expenses may include staff salaries, travel expenses, and per diems;

4. Make whole employee representatives who served on Local 2216's bargaining team between December 12, 2018 through and including May 17, 2020 for financial losses suffered as a result of the City's bad faith and

surface bargaining, including but not limited to compensation at the employees' regular rate of pay with the City for reasonable time spent preparing for and attending negotiations;

5. Reimburse Local 2216 for reasonable litigation expenses incurred in litigating the present dispute before PERB;

6. All monetary amounts owed shall be augmented by interest compounded at a rate of 7 percent per annum; and,

7. Within 10 workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the City of Compton Fire Department are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the City, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. The Notice shall also be posted by electronic message, intranet, internet site, and other electronic means customarily used by the City to communicate with Fire Department employees. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.[21]

[21] In light of the COVID-19 pandemic, the City shall notify PERB's Office of the General Counsel (OGC) in writing if, due to an extraordinary circumstance such as an emergency declaration or shelter-in-place order, a majority of employees at one or more work locations are not physically reporting to their work location as of the time the physical posting would otherwise commence. If the City so notifies OGC, or if Local 2216 requests in writing that OGC alter or extend the posting period, require additional notice methods, or otherwise adjust the manner whereby employees receive notice, OGC shall investigate and solicit input from all parties. OGC shall provide amended instructions to the extent appropriate to ensure adequate publication of the Notice, such as directing the City to commence posting within 10 workdays after a majority of

8. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent 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 Local 2216.

RIGHT OF APPEAL

A party may appeal this proposed decision by filing with the Board itself a statement of exceptions within 20 days after the proposed decision is served. (PERB Reg. 32300.) If a timely statement of exceptions is not filed, the proposed decision will become final. (PERB Reg. 32305, subd. (a).)

The statement of exceptions must be a single, integrated document that may be in the form of a brief and may contain tables of contents and authorities, but may not exceed 14,000 words, excluding tables of contents and authorities. Requests to exceed the 14,000-word limit must establish good cause for exceeding the limit and be filed with the Board itself and served on all parties no later than five days before the statement of exceptions is due. PERB Regulation 32300, subdivision (a), is specific as to what the statement of exceptions must contain. Non-compliance with the requirements of PERB Regulation 32300 will result in the Board not considering such

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employees have resumed physically reporting on a regular basis; directing the City to mail the Notice to all employees who are not regularly reporting to any work location due to the extraordinary circumstance, including those who are on a short term or indefinite furlough, are on layoff subject to recall, or are working from home; or directing the City to mail the Notice to those employees with whom it does not customarily communicate through electronic means. (*City of Culver City* (2020) PERB Decision No. 2731-M, p. 29, fn. 13.)

filing, absent good cause. (PERB Reg. 32300, subd. (d).)

The text of PERB's regulations may be found at PERB's website: www.perb.ca.gov/laws-and-regulations/.

A. Electronic Filing Requirements

Unless otherwise specified, electronic filings are mandatory when filing appeal documents with PERB. (PERB Reg. 32110, subd. (a).) Appeal documents may be electronically filed by registering with and uploading documents to the "ePERB Portal" that is found on PERB's website: https://eperb-portal.ecourt.com/public-portal/. To the extent possible, all documents that are electronically filed must be in a PDF format and text searchable. (PERB Reg. 32110, subd. (d).) A filing party must adhere to electronic service requirements described below.

B. Filing Requirements for Unrepresented Individuals

Individuals not represented by an attorney or union representative, are encouraged to electronically file their documents as specified above; however, such individuals may also submit their documents to PERB for filing via in-person delivery, US Mail, or other delivery service. (PERB Reg. 32110, subds. (a) and (b).) All paper documents are considered "filed" when the originals, including proof of service (see below), are actually received by PERB's Headquarters during a regular PERB business day. (PERB Reg. 32135, subd. (a).) Documents may be double-sided, but must not be stapled or otherwise bound. (PERB Reg. 32135, subd. (b).)

The Board's mailing address and contact information is as follows:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street, Suite 200
Sacramento, CA 95811-4124

Telephone: (916) 322-8231

C. Service and Proof of Service

Concurrent service of documents on the other party and proof of service are required. (PERB Regs. 32300, subd. (a), 32140, subd. (c), and 32093.) A proof of service form is located on PERB's website: www.perb.ca.gov/about/forms/. Electronic service of documents through ePERB or e-mail is authorized only when the party being served has agreed to accept electronic service in this matter. (See PERB Regs. 32140, subd. (b), and 32093.)

D. Extension of Time

An extension of time to file a statement of exceptions can be requested only in some cases. (PERB Reg. 32305, subds. (b) and (c).) A request for an extension of time in which to file a statement of exceptions with the Board itself must be in writing and filed with the Board at least three calendar days before the expiration of the time required to file the statement of exceptions. The request must indicate good cause and, if known, the position of each of the other parties regarding the request. The request shall be accompanied by proof of service of the request upon each party. (PERB Reg. 32132.)

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. LA-CE-1449-M, *Compton Firefighters, IAFF Local 2216 v. City of Compton*, in which all parties had the right to participate, it has been found that the City of Compton (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq. As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Engaging in bad faith or surface bargaining during successor negotiations with Compton Firefighters, International Association of Firefighters, Local 2216 (Local 2216);

2. Interfering with the rights of employees to be represented by Local 2216; and

3. Denying Local 2216 its right to represent employees in their employment relations with the City.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE DILLS ACT:

1. Promptly conduct or complete a costing analysis of Local 2216's Proposal #1 of December 2018 or an updated version thereof as necessary, and upon request, furnish Local 2216 with a copy of such costing analysis.

2. Upon request by Local 2216, promptly and personally meet and confer with Local 2216 regarding a successor memorandum of understanding at least once per month until such time as negotiations result in a successor memorandum of understanding, negotiations reach a bona fide impasse, Local 2216 rescinds its request for this bargaining schedule, or PERB finds Local 2216 to have failed or refused to meet and confer in good faith;

3. Reimburse Local 2216 for reasonable bargaining costs incurred in successor negotiations occurring between December 12, 2018 through and including April 17, 2020. By way of illustration and not limitation, such expenses may include staff salaries, travel expenses, and per diems;

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4. Make whole employee representatives who served on Local 2216's bargaining team between December 12, 2018 through and including May 17, 2020 for financial losses suffered as a result of the City's bad faith and surface bargaining, including but not limited to compensation at the employees' regular rate of pay with the City for reasonable time spent preparing for and attending negotiations; and,

5. Reimburse Local 2216 for reasonable litigation expenses incurred in litigating the present dispute before PERB; and

6. Pay interest on all monetary amounts owed at the rate of 7 percent per annum.

Dated: _____ City of Compton

By: _____
Authorized Agent

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

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, Sacramento Regional Office, 1031 18th Street, Sacramento, CA, 95811-4124.

On February 28, 2023, I served the Cover Letter and Proposed Decision regarding *Compton Firefighters, IAFF Local 2216 v. City of Compton*, Case No. LA-CE-1449-M on the parties listed below by

____ I am personally and readily familiar with the business practice of the Public Employment Relations Board for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Sacramento, California.

____Personal delivery.

_X_Electronic service (e-mail).

Michael A. McGill, Attorney
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Los Angeles, CA 90045
Email: lheard@lcwlegal.com

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on February 28, 2023, at Sacramento, California.

Michelle L Bacigalupi
(Type or print name)


(Signature)