RENÉE MAYNE
Arbitrator, Mediator
Labor-ADR
Post Office Box 1827
Sacramento, California 95812
916-245-0625

PERB CASE NO. LA-IM-282-M
FACTFINDER CASE NO. 19-07-27FF

FACTFINDING PROCEEDINGS PURSUANT TO

THE MEYERS-MILIAS-BROWN ACT

PLEASANT VALLEY RECREATION AND PARK DISTRICT

and

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 721

Issue: Impasse in 2018 Successor Contract Negotiations

NEUTRAL FACTFINDER PANEL CHAIR RECOMMENDATION

November 25, 2019

FACTFINDING PANEL

Factfinder for the Union:	Factfinder for the Employer:	Neutral Factfinder Panel Chair:
Rebecca Yee General Counsel SEIU Local 721	Pam K. Lee Attorney, Partner Aleshire & Wynder, LLP	Renée Mayne Arbitrator, Mediator

APPEARANCES

For the Union:

Juhyung Harold Lee
Attorney
Rothner, Segall & Greenstone
510 South Marengo Avenue
Pasadena, California 91101

For the Employer:

Colin J. Tanner
Partner, District Counsel
Aleshire & Wynder LLP
18881 Von Karman Avenue, Suite 1700
Irvine, California 92612

TABLE OF CONTENTS

INTRODUCTION 3

ISSUE AT IMPASSE 3

GOVERNING STATUTE 4

SUMMARY OF FACTS 4

POSITION OF THE UNION 12

POSITION OF THE EMPLOYER 12

NEUTRAL FACTFINDER PANEL CHAIR DISCUSSION 12

NEUTRAL FACTFINDER PANEL CHAIR RECOMMENDATION 15

INTRODUCTION

This factfinding arose due to an impasse in collective bargaining under the State of California Meyers-Milias-Brown Act (MMBA) Government Code Section 3505.4 between the Pleasant Valley Recreation and Park District (District, Employer) and the Service Employees International Union Local 721 (SEIU, Union).

Under the procedures of the California Public Employment Relations Board (PERB), Renée Mayne was appointed by the parties to serve as the Neutral Factfinder Panel Chair. Pam K. Lee was appointed by the District as the Panel Member to represent the Employer, and Rebecca Yee was appointed by SEIU as the Panel Member to represent the Union.
(PERB letter July 23, 2019)

The parties agreed all procedural requirements of the impasse had been met, and the dispute was properly before the Factfinding Panel to issue their recommendations to resolve the impasse. The factfinding hearing convened on October 8, 2019, at the District's administrative office at 1605 E. Burnley Street, Camarillo, California. The parties had full opportunity to present and submit relevant exhibits and evidence, and to discuss and argue the issues in dispute. The factfinding record was closed on October 25, 2019, following the Neutral Factfinder Panel Chair's receipt of the post-hearing briefs.

ISSUE AT IMPASSE

The parties stipulated at the factfinding hearing that their tentative agreement for a successor contract was ratified by the Union on February 14, 2019. However, the District's Board of Directors rejected the tentative agreement at their meeting on March 6, 2019, because the agreement did not contain "at-will status" for District employees. At-will status is the sole issue at impasse, and the outcome of this issue could lead to new provisions or elimination of others. The successor agreement hinges on the resolution of at-will status. (Union Ex. A:7; District Ex. 3)

GOVERNING STATUTE

The MMBA Government Code Section 3505.4(d) sets forth the criteria to be used in the factfinding process.

> In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following criteria:
>
> (1) State and federal laws that are applicable to the employer.
>
> (2) Local rules, regulations or ordinances.
>
> (3) Stipulations of the parties.
>
> (4) The interests and welfare of the public and the financial ability of the public agency.
>
> (5) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies.
>
> (6) The consumer price index for goods and services, commonly known as the cost of living.
>
> (7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
>
> (8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.

SUMMARY OF FACTS

The Pleasant Valley Recreation and Park District is an independent special district located in Camarillo, California, and it is governed by a Board of Directors. SEIU Local 721 and the District have a relatively new collective bargaining relationship. In April 2014, PERB certified the bargaining unit following a settlement agreement between the District and SEIU. The parties negotiated their first Memorandum of Understanding (MOU) during the 2014-2015 fiscal year, which was then adopted on August 3, 2015. Their three-year labor agreement expired on June 30, 2018. (District Brief p.6, October 7, 2019; District Ex. 12; Union Ex. B)

The SEIU Chief Negotiator, Aram Agdaian, testified at the factfinding hearing that to expedite the first labor negotiation between the Union and the District in 2014, he used another park district MOU as the proposed template for the first contract with the District.

Following their first three-year labor contract, the parties began negotiating their successor agreement in February 2018. After six negotiation meetings, on August 14, 2018, the Union believed the parties had reached an agreement on all issues. According to the Union's negotiation tracking chart, all issues in negotiation between the parties had been resolved, either with a tentative agreement or the withdrawal of the proposal. (Union Exs. C-D)

After the Union thought the parties had a tentative agreement ready for ratification, the District raised a new issue: at-will employment for all represented employees. Agdaian testified the District raised at-will employment after the parties had concluded their negotiations and after he asked the District when it would ratify the agreement. The District's General Manager and Chief Negotiator, Mary Otten, rebutted that the parties had other issues beside at-will employment that remained outstanding at the August 14, 2018 negotiation. Those issues were maintenance of membership, probationary and performance evaluations, and a me-too clause. (Union Ex. C)

The District held firm that the at-will status of employees must be stated in the contract, or provisions contrary to at-will employment be deleted. (District Ex. 24)

The District also maintained this was not a change in terms and conditions of employment because the employees were already at-will and did not have property rights to their jobs. The District said their position was documented in the revised Employee Manual (Manual) dated 2016, which contained the same language as the previous 2012 version, both in Article 1 General Information, Section D. At-Will Employment:

> District personnel are employed on an at-will basis. Employment at-will may be terminated with or without cause and with or without notice at any time by the employee or the District. Nothing in this manual shall limit the right to terminate at-will employment. No Superintendent, Manager, Supervisor, or employee of the District has the authority to enter into an agreement for employment for any specified period of time or to make an agreement for employment on other than at-will terms. Only the Board of Directors of Pleasant Valley Recreation and Park District have the authority to make any such agreement with the General Manager, which is binding only if it is in writing and signed by both parties.

(District Ex. 10:118; 11:196)

The District asserted that it formally noticed SEIU in writing of the proposed changes to the 2012 Employee Manual, and that the Union failed to respond to that notification. However, there was insufficient information provided by the parties to prove or disprove the District's claim.

The expired MOU did not contain any language or reference to at-will employment. A review of the 2016 Employee Manual and the previous 2012 version showed that new employees were required to sign a form that they received the Manual and acknowledge their employment is at-will. The District communicated to SEIU that its members refused to sign the at-will form.

In an email communication dated September 6, 2018, between the attorneys for the District and the Union, the District's counsel, Colin Tanner, explained that the District previously tried to have SEIU members acknowledge that they were still at-will, but the Union members refused to sign the acknowledgement with that language in it. Kathryn Drewry, the District's Human Resource Specialist testified at the hearing that the District no longer formally notifies applicants through their recruitment materials that the positions are at-will. (District Ex. 24:467)

Drewry confirmed the Union's contention that the issue of at-will employment for all the District's represented employees was first raised by the District at their August 14, 2018 negotiation. Thereafter, on August 27, 2018, the District sent a written at-will proposal to SEIU that stated: "District personnel are employed on an at-will basis and nothing in this MOU shall limit the right to terminate such at-will employment."

The Union emphatically rejected this proposal on August 29, 2018.

(Union Ex. D:8-9; District Exs. 1, 10:186, 11:278, 24:471)

The District sent the Union its next at-will bargaining proposal on October 18, 2018. Included in that proposal were other changes to support the at-will language the District had proposed. Specifically, the District proposed to delete from the MOU two existing provisions: Article 15 *Disciplinary Action,* and Article 20 *Performance and Probationary Evaluations*. (District Ex. 20)

The Union argued that the District was bargaining in bad faith to raise a new issue, and a very contentious one, after months of negotiating and reaching a tentative agreement. The Union asked the District to drop the at-will employment proposal and ratify the purported agreement reached on August 14, 2018, and the District refused. In an attempt to resolve the dispute, the Union reluctantly continued negotiating with the District regarding at-will status for bargaining unit employees. (Union Brief pp.4-5, October 7, 2019)

On February 14, 2019, the parties reached a written tentative agreement on all issues, this time including at-will contract language:

> The District and SEIU agree that there exists a current dispute over whether represented employees are at-will employees. The parties agree that by executing this Tentative Agreement, each party still continues to maintain its separate position relative to this dispute and do not intend to otherwise waive rights to defend its positions or to contest the other's positions under the terms of the Tentative Agreement or MOU or in a court of law. Further, the parties agree to meet and confer within the ninety (90) days of the District's Board approval of this Tentative Agreement to attempt to resolve this dispute and add any additional provisions that might be mutually agreed upon in this regard, including but not limited to a disciplinary appeal process provision. If the parties cannot resolve this dispute, they agree to submit this matter to fact-finding and mediation. If the parties are still in disagreement after fact-finding and mediation have concluded, the parties agree to submit this dispute to binding arbitration. (Union Ex. E:4; District Ex. 2:49)

The District and Union signed the tentative agreement, and the Union ratified it. The District then submitted the agreement to the District's Board of Directors at their March 6, 2019 meeting.

Following their discussion regarding at-will employment at the District, the Board unanimously rejected the agreement. Their rationale was that the negotiation was incomplete without settling the at-will issue. (Union Ex. E; District Ex. 3)

Harold Lee, counsel for SEIU in this dispute, presented the Union's side in the negotiation stalemate to the Board at their meeting on September 4, 2019. In response, one Board member maintained that District employees had been at-will for at least 20 years. Another said the Board first learned in August 2018 that there were issues that needed to be corrected with the District's at-will language in the expired MOU and the proposed successor contract. (District Ex. 3)

After the Union's presentation at the September 2019 Board meeting, General Manager Otten told the Board members that the parties finalized the details of individual tentative agreements reached at the August 14, 2018 negotiation, and she sent them to their counsel for review. Around that same time, the District staff was informed by their counsel that there was inconsistent language regarding at-will employment. The staff proceeded to correct this with a new proposal, leading to further negotiations with SEIU. (District Ex. 3)

A review of the expired MOU revealed that there is contract language inconsistent with at-will employment. The grievance procedure in the MOU, Article 8 Section A., provided the right to grieve District actions that affect terms and conditions of employment:

> A "grievance" shall mean a written allegation by an employee(s) or Union concerning dispute arising out of the interpretation or application of the specific terms of this MOU and/or written employment policy, rules and regulations which affect conditions of employment. An authorized Union representative may file a "grievance" on behalf of all employees to avoid a multiplicity of grievances over the same dispute.
>
> (Union Ex. B:4; District Ex. 1:4)

The expired MOU had a provision for disciplinary actions in Article 15:

> A. For the purposes of this Article, actions including discharge, demotion for cause, suspension without pay, being place on probation, and written warnings, admonitions, and reprimands shall be defined as disciplinary action.
>
> B. When disciplinary action is taken, the District, upon request of the employee, will furnish the employee and SEIU copies of any documents or written statements considered by the District in justifying its actions.
>
> C. Employees shall retroactively accrue vacation and sick leave credits if discharged or suspended without pay as a result of disciplinary action and the action is later revoked by the District.
>
> (Union Ex. B:8; District Ex. 1:8)

Performance and probationary evaluations were extensively addressed in the MOU Article 20:

> A. All original and promotional appointments to positions in the classified service shall be tentative and subject to a probationary period of one (1) year from the date of appointment. The purpose of the probationary period is to train, observe, and evaluate the employee on conduct, performance, attitude, adaptability and job knowledge.

Article 20, Sections A.1-4 and B through D described the timing and process for probationary evaluations. (Union Ex. B:10-11; District 1:14-15)

The MOU also contained a procedure that governed layoffs in Article 35. The language expressly stated that regular employees were to be laid off after seasonal, temporary, and probationary employees. However, regular employees who were disciplined within six months immediately prior to the layoff, would be laid off before regular employees with a clean employment record. Bumping rights were also provided in the MOU.

(Union Ex. B:22-23; District Ex. 1:26-27)

The District said that Article 20 referred to a classified service that did not exist, and any contract language which implied due process rights for employees was an error and incorrect. However, the District's 2016 Employee Manual, in Article 2 Section I. *Probationary Period - New Hires and Promotional Appointments*, also referred to a classified service:

> All original and promotional appointments to positions in the classified service shall be tentative and subject to a probationary period of one (1) year from the date of the appointment to the position. The purpose of the probationary period is to train, observe, and evaluate the employe[e].
>
> (District Ex. 11:202)

The Manual also addressed disciplinary actions in Article 6 Section C., where it stated in part, "The District's disciplinary policy in no way limits or alters the at-will employment relationship." Though, Article 6 Section C.4 went on to state, "An employee may be discharged for cause at any time by the appointing authority." The 2016 Manual's disciplinary action section did not refer represented employees to their 2015-2018 MOU. (District Ex. 11:246)

Evidence admitted into the factfinding record showed that early in successor negotiations, on May 7, 2018, the District proposed that part-time, seasonal, temporary, and restricted employees working no more than 960 hours per year would be considered at-will. The Union rejected that proposal, and the District's bargaining notes indicated that it withdrew the at-will language by the June 13, 2018 negotiation session. The Union's bargaining notes indicated the parties reached a tentative agreement on this portion of Article 20 on August 18, 2018. (Union Ex. C:14; District Ex. 14:299; 16:379)

In an attempt to resolve what appeared to be an intractable dispute, the District made a new proposal to the Union on April 10, 2019. The proposal stated that 20 current, specifically named employees, would be covered by a civil service system with due process rights. However, all current part-time, seasonal, temporary, and restricted employees would be at-will, as well as all new employees hired after the effective date of the MOU. (District Exs. 4, 5:67-69)

The April 10, 2019 proposal also excluded disciplinary actions from the grievance procedure, instead offering an alternative appeal process. A new provision was also introduced, requiring a contract reopener to update the District's Employer-Employee Relations Resolution.

Further, the District newly proposed a promotional probationary period for the 20 named employees covered by the proposed civil service system. SEIU rejected the District's proposal in its entirety on April 29, 2019, and on that same day, the Union filed for impasse with PERB. (District Exs. 4:60-65, 5:67-69)

On May 13, 2019, the District emailed the Union a bargaining proposal for a one-year successor MOU. This proposal was to replace the three-year MOU the parties tentatively agreed upon on February 14, 2019, and subsequently was rejected by the Board of Directors.

The District's proposed one-year agreement withdrew the parties' prior tentative agreement for 2% salary increases on July 1 in 2018, 2019, and 2020. Instead, the District offered a 2% equivalent lump-sum payment that would not increase the salary schedule. The District also withdrew its previous tentative agreement to contribute 70% toward the cost of employees' selected health plans. An increase in employee work clothing payments was also withdrawn. As to the at-will issue, the District's proposal stated that the parties "agree that there exists a current dispute over whether represented employees are at-will employees."
(Union Brief p.9, October 7, 2019; District Ex. 6:71-84)

SEIU subsequently withdrew its April 29, 2019 declaration of impasse in order to give the parties ample time to participate in voluntary mediation. Their efforts to resolve the dispute through mediation were unsuccessful, and the Union re-declared impasse on June 27, 2019. (District Ex. 7)

The parties each submitted into evidence their surveys of park districts and indicated in charts those districts that maintained at-will status for their respective employees. Both surveys showed that the districts with union-represented employees did not have at-will status, although most were not unionized. (Union Ex. G; District Ex. 30:492)

POSITION OF THE UNION

SEIU said their union is not in the business of accepting or promoting at-will status for its members. The Union negotiated the first labor contract for the newly represented District employees with appeal rights in the grievance procedure. Then, the Union bargained in good faith twice to reach a tentative agreement that would lead to the second contract.

The Union requested the Factfinding Panel resolve this dispute by either recommending the tentative agreement reached by the parties on August 14, 2018, or the last tentative agreement dated February 14, 2019.

POSITION OF THE EMPLOYER

The District's position is that there was no tentative agreement on August 14, 2018. The Board of Directors rejected the February 14, 2019 tentative agreement because the language did not satisfactorily resolve the issue of at-will status for represented employees at the District. The District had always maintained employment at-will, although there was language within the 2012 and 2016 Manuals and the first labor contract that were inconsistent with at-will employment status. These were inadvertent errors by staff and not the position of the Board.

The District requested the Factfinding Panel make recommendations to resolve this dispute in a manner that promotes a successful labor-management relationship into the future.

NEUTRAL FACTFINDER PANEL CHAIR DISCUSSION

The most persuasive evidence admitted into the factfinding record was the District's proposals for at-will employment. Early in the successor negotiations, in May 2018, the District proposed at-will status for part-time, seasonal, temporary, and restricted employees. Then the District withdrew the proposal in June 2018. However, later in August 2018, the District reintroduced a proposal for at-will employment, this time for all SEIU represented employees.

The formal written proposal represented an erosion of the represented employees' rights embodied in the first contract and the terms of the purported August 2018 tentative agreement.

Also persuasive was the depth and breadth of the District's changes in its proposals between August 2018 and May 2019. With each successive District proposal to affirm at-will employment status for all, or some of the bargaining unit members, beginning with its first written proposal on August 27, 2018, the Neutral Factfinder Panel Chair finds that the District's proposals appeared to be intended to increasingly apply pressure on the Union. The District's final proposal withdrew the parties' negotiated tentative agreements for economic benefits except a 2% equivalent lump sum payment off the salary schedule.

The Union did not file for impasse with PERB in August 2018 when the District held that the negotiation was incomplete. Instead, the Union continued negotiating the at-will issue with the District in attempting to resolve the contract negotiations for their second MOU. When the District's Board of Directors unanimously rejected the parties' February 14, 2019 tentative agreement, the Board said the new labor agreement was not complete without settling at-will employment. The Neutral Factfinder Panel Chair finds that the Union bargained in good faith while twice attempting to reach a complete tentative agreement with the District that could be ratified by their members and the District's Board of Directors.

When employees choose to be represented by a union, it is not uncommon for the employer to experience a period of learning about labor relations and an adjustment in many employment practices. In this case, the District's administrators said they were new to working with a union, and they were unaware of the requirement to formally notify a union regarding proposed changes in terms and conditions of employment. The adjustment period also represents a change for the members of an elected governing board.

The Neutral Factfinder Panel Chair viewed the video clips provided by the District. There were two videos, the first of which covered the March 2019 Board meeting agenda item regarding the parties' February 2019 tentative agreement. The second video showed the presentation of SEIU's counsel at the September 2019 Board meeting. Based upon the members' comments and questions at both meetings, it appeared the Board might not have been aware of the scope of the inconsistencies in employment practices at the District.

The Neutral Factfinder Panel Chair finds that this dispute is not due to the mistakes of one party, or both parties, but stems from historical actions that led to the cluster of issues the parties must resolve. Notwithstanding the District Board's rationale for rejecting the February 14, 2019 tentative agreement, the Neutral Factfinder Panel Chair also finds that it is unreasonable to send the parties back into successor contract negotiations and expect that they could resolve the at-will dispute when the District's 2016 manual contains conflicts with at-will employment. Most important, the February 14, 2019 tentative agreement provided for an orderly method of resolving the parties' dispute regarding whether the District's represented employees are at-will. The Neutral Factfinder Panel Chair recommends the parties settle the labor contract before meeting and conferring over the District's policy inconsistencies.

The District requested that the Factfinding Panel's recommendations foster more successful labor-management relations in the future. The Union asked the Factfinding Panel to recommend either of the two tentative agreements dated August 14, 2018 and February 14, 2019 to settle the contract.

Because the parties continued to negotiate after the District disputed that there was a first tentative agreement, the Neutral Factfinder Panel Chair recommends the last tentative agreement the parties had negotiated.

NEUTRAL FACTFINDER PANEL CHAIR RECOMMENDATION

In accordance with Government Code Section 3505.4(d)(1-8), the Neutral Factfinder Panel Chair recommends the District's Board of Directors approve the parties' February 14, 2019 tentative agreement.

This Factfinding Report is respectfully submitted to the Pleasant Valley Recreation and Park District and the Service Employees International Union Local 721.

Renée Mayne — November 25, 2019

RENÉE MAYNE
Neutral Factfinder Panel Chair

Date

Factfinder for the Employer:

Pam K. Lee, Attorney and Partner with Aleshire & Wynder LLP, provided the District's concurrences and dissents with the recommendations contained in this Factfinding Report in the attached letter.

Factfinder for the Union:

Rebecca Yee, General Counsel for SEIU Local 721, provided the Union's concurrence with the recommendations contained in this Factfinding Report in the attached letter.

Pam K. Lee
ALESHIRE & WYNDER, LLP
18881 Von Karman Ave., Suite 1700
Irvine, CA 92612
949-223-1170

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FACTFINDING PROCEEDINGS PURSUANT TO

THE MEYERS-MILIAS-BROWN ACT

PLEASANT VALLEY RECREATION AND PARK DISTRICT and SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 721 Issue: Impasse in 2018 Successor Contract Negotiations	FACTFINDER FOR THE EMPLOYER'S PARTIAL CONCURRENCE/DISSENT November 25, 2019

FACTFINDING PANEL

Factfinder for the Union:	Factfinder for the Employer:	Neutral Factfinder Panel Chair:
Rebecca Yee General Counsel SEIU Local 721	Pam K. Lee Attorney, Partner Aleshire & Wynder, LLP	Renée Mayne Arbitrator, Mediator

APPEARANCES

For the Union:

Juhyung Harold Lee, Esq.
Rothner, Segall & Greenstone
510 South Marengo Avenue
Pasadena, California 91101

For the Employer:

Colin J. Tanner, Esq.
Aleshire & Wynder LLP
18881 Von Karman Avenue, Suite 1700
Irvine, California 92612

As the factfinding panel member appointed by the Employer, Pleasant Valley Recreation and Park District ("District"), I submit the following in response to the recommendations issued by the Neutral Factfinding Panel Chair, Renée Mayne, in the Factfinding Report ("Report"). In so doing, I concur in part, and dissent in part, as provided below.

I concur with most of the Summary of Facts, as well as the positions of the parties, presented in the Report. The Report correctly identifies that the at-will status is the main issue to be resolved as part of the factfinding process and related ancillary issues.

I dissent to the finding in the Report that the August 2018 District proposal represented an erosion of the represented employees' rights embodied in the 2015-2018 MOU and any purported August 2018 tentative agreement, implying that the employees at the time were part of some civil service system created by the District or had a property interest to continued employment. (Report, p. 13.) For rights to be allegedly eroded, they must have been clearly conferred in the first place, which did not occur here.

The Report asserts that the District attempted to change the non-at-will status of the employees starting in August 2018 during successor MOU negotiations. (Report, pp. 12-13.) That assertion assumes that the District had already established a civil service system in the first place, or that the District employees were not at-will prior to August 2018. The evidence in the record and the testimony at the Factfinding Hearing, however, do not substantiate this assumption. Given the faulty assumption and premise, the findings of the Report therefore become equally flawed.

At-Will Status

Prior to the District employees becoming unionized in 2014, the evidence is undisputed that the employees were employed on an at-will basis. The then-effective 2012 Employee Manual stated that all District employees are employed at-will, and only the Board of Directors of the District may make any agreement for employment on other than at-will status, and only with the General Manager. (District Exs. 10:118; 11:196.) When the Employee Manual was updated in 2016, the language on at-will status in the Employee Manual did not change.

A civil service system in which public employees retain a property interest in employment is ***not automatically created*** simply by virtue of being a public agency.[1] Rather, "property interests…are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." (*Bd. of Regents v. Roth* (1972) 408 U.S. 564, 577.) In other words, the employee must have a legally enforceable right to employment protected by due process. This right only exists when:

[1] The civil service system for the federal government was established in 1871. (5 U.S.C. § 2101.) The civil service system for the State of California began in 1913, 42 years after the federal government, and 63 years after becoming a state. (Stats. 1913, ch. 590, p. 1035.) Moreover, throughout the State, civil service systems of local public agencies are created by statute or regulation. (See, e.g., Los Angeles County Charter, Art. IX "Civil Service"; Los Angeles City Charter, Art. X "Civil Service"; City of Camarillo Municipal Code § 2.24.030 "Competitive Service".)

(i) there is a statute or regulation that gives the employees a property interest;
(ii) there is a written contract stating the employee has a property interest; or
(iii) the employer's past practices give the employee a property interest.
(*Perry v. Sindermann* (1972) 408 U.S. 593, 601-02.)

There is no evidence in the record that the District ever adopted any civil service system for its employees by statute or regulation. District Human Resources Specialist Kathryn Drewry and District General Manager Mary Otten both testified at the Factfinding Hearing that there is no resolution, ordinance, or any other District regulation establishing such a system to create a property interest to continued employment.

With respect to a written contract, when the Service Employees International Union Local 721 ("Union") and District were negotiating the inaugural 2015-2018 MOU, Union representative Aram Agdaian testified during the Factfinding Hearing that the 2015-2018 MOU was modeled after another park district's existing MOU. He also admitted that he did not at that time review or read through the District's then in effect 2012 Employee Manual to determine or verify the employment status of the employees the Union represented. It is clear from Agdaian's testimony that he simply assumed that by virtue of the Union organizing some of the District's employees that they automatically achieved some form of property interest in their jobs, which is contrary to law, as Union rights and benefits must be negotiated. A property interest in employment is not created by the mere fact that public employees become a bargaining unit or are represented by a union. (*Cf., Bishop v. Wood* (1976) 426 U.S. 341, 344.)

It is also clear that the District representatives assumed the exact opposite – that the District employees are employed at-will and maintain that status even with the execution and effectiveness of the 2015-2018 MOU. The 2015-2018 MOU contains a reference to the "classified service" in Article 20, section A. (Union Ex. B:10; District Ex. 1:14) However, nowhere in the 2015-2018 MOU is "classified service" defined. Likewise, the term "classified service" is not mentioned in any District resolution or ordinance. Drewry testified that she did not understand or know what the term "classified service" meant, and Otten testified she had only heard "classified service" in reference to school districts. Agdaian could not explain it either. Thus, simply the inclusion of the term "classified service" once in the 2015-2018 MOU does not create a civil service system or an intent to create one.

Furthermore, with respect to the term of art, "probationary period," being included in Article 20 of the 2015-2018 MOU, the purpose of such a period is "to train, observe, and evaluate the employee on conduct, performance, attitude, adaptability, and job knowledge." (Union Ex. B:10-11; District 1:14-15.) There is no reference to permanent employment thereafter where an employee has a property interest to their job. Likewise, the change in the 2016 Employee Manual to include both an "introductory period" and a "probationary period" is not indicative that the District intended to change the status of the employees from at-will status to permanent status as part of a civil service system. Drewry testified that she thought "introductory period" and "probationary period" were interchangeable terms, where an employee who does not pass the "introductory period" or "probationary period" would simply not receive a merit step increase. Agdaian testified that he did not know what happens after a "probationary period" purportedly ends.

The inclusion of the disciplinary action language in Article 15 of the 2015-2018 MOU also does not definitively indicate that the parties intended to create a civil service system or property interest to continued employment such that due process is required prior to any adverse employment action. Article 15 merely defines what disciplinary actions are, and that when disciplinary action is taken, copies of documents used in the disciplinary action will be provided to employees. There is no provision in Article 15 or anywhere else in the 2015-2018 MOU, the 2012 Employee Manual, or the 2016 Employee Manual that provides for due process rights prior to an adverse employment action. The provisions in Article 15 simply require that an employee receive a copy of the documents used in the discipline – it does not provide for any pre-discipline hearing, appeal, or other type of due process. Thus, Article 15 cannot establish that the employment status of the District employees changed from at-will to something else.

The inclusion of a grievance procedure in the 2015-2018 MOU is also not indicative of the creation of a civil service system in which employees have a interest to continued employment. Unionized employees in the private sector who are employed at-will and do not have a property interest in continued employment also have grievance procedures in their bargaining agreement. (*Johnson v. Hydraulic Research & Mfg. Co* (1977) 70 Cal.App.3d 675; *Hayes v. National Football League* (C.D. Cal 1973) 469 F.Supp. 252.) Significantly, an employee being disciplined for performance issues, who otherwise has no dispute arising out of the interpretation or application of the 2015-2018 MOU or other District rule or policy, could not use the grievance procedures under Article 8[2] of the 2015-2018 MOU to assert that such procedure provides for pre-discipline due process rights, since the grievance procedure would be inapplicable.

Lastly, with respect to the District's past practice, there is no evidence in the record that the District followed due process procedures prior to disciplining or taking adverse employment action against any employee belonging to the purported civil service system, or that any employee with a purported property interest asserted due process rights prior to any adverse employment action. The reference mentioned by the Union is to previous employee Bryan Astrachan, but the evidence is clear that Mr. Astrachan was properly separated from employment without procedural due process, even if he were part of any civil service system or had an property interest in employment, since he had worked only 205 hours and was not entitled to any quarterly performance review prior to separation. (Union Ex. F.)

Furthermore, the fact that the District no longer lists at-will employment status when advertising for employment positions is not indicative that employment with the District was anything but at-will. Also, the fact that the District originally included in its 2016 Employee Manual employee acknowledgement form a statement of at-will employment status, but staff later unilaterally deleted such statement in the acknowledgement form (while still retaining it in the 2016 Employee Manual itself), does not indicate that the District intended to do away with at-will status of its employees or to form a civil service system.

[2] Article 8, section A of the 2015-20128 MOU states: "A 'grievance' shall mean a written allegation by an employee(s) or Union concerning dispute arising out of the interpretation or application of the specific terms of this MOU and/or written employment police, rules and regulations which affect conditions of employment." (Union Ex. B:4; District Ex. 1:8.)

In sum, although the there is language referencing a "classified system," with additional references to a "probationary period," and "disciplinary action," such language does not constitute an "understanding" between the parties that they both intended to create a civil service system or a property interest for District employees in continued employment. Simply put, there was a mutual mistake of fact at the time of contracting between the parties such that both had a misconception about a basic assumption regarding the employment status of the District employees. Such a mutual mistake means there was no meeting of the minds, and the contract must be void at the outset. "If both parties are mistaken, and neither is at fault or both are equally to blame, the mistake may prevent formation of the contract." (1 Witkin, Summary of Cal. Law 11th (2019), Contracts, § 259; *Balistreri v. Nevada Livestock Production Credit Ass'n* (1989) 214 Cal.App.3d 635, 641-42 [there was a mutual mistake in the identity of an encumbered property regarding a deed of trust securing a loan, and the court found there was no meeting of the minds as to the material matter of the encumbered property, based on a mutual mistake, and no contract was formed].)

Accordingly, because there was no meeting of the minds, the parties could not have formed, through the 2015-2018 MOU or any other Employee Manual, a civil service system or established a property interest with respect to District employees. Therefore, the District employees remain employed on an at-will status.

Conclusion

Notwithstanding on the foregoing conclusion that the District employees are employed on an at-will status because there was no meeting of the minds based on a mutual mistake of fact in the 2015-2018 MOU contract formation, I recommend that the District's Board of Directors ***continue to pursue the District's April 10, 2019 proposal***, which includes ***all of the proposals in the February 14, 2019 tentative agreement***, as well as establis***hes a civil service system for all full-time District employees*** and creates a due process procedure prior to any disciplinary action for all employees within the civil service system who have a property interest to continued employment.

I believe that the April 10, 2019 District proposal provides for an equitable resolution to this very complex situation and fundamental question, considering that both parties initially negotiated in good faith for the 2015-2018 MOU and continued to act in good faith during the successor MOU negotiations. To recommend approval of any earlier proposal, including the February 14, 2019 tentative agreement, will only further delay resolution of the main issue of at-will employment and due process property rights, leading to further labor stalemates, unfair practice charges, and a protracted legal battle in court, which the District cannot financially sustain.

Respectfully submitted,

Pam K. Lee, District Panel Member

LOCAL 721
SEIU
SERVICE EMPLOYEES INTERNATIONAL UNION, CTW, CLC

November 25, 2019

Re: Neutral Factfinder Panel Chair Recommendation
PERB Case No. LA-IM-282-M

I concur in the findings and recommendation issued by the Neutral Factfinding Panel Chair regarding the instant dispute between the Pleasant Valley Recreation and Park District ("District") and the Service Employees International Union, Local 721 ("Union").

In cases involving the discharge of public employees, "whether the employee has a constitutionally protected property interest in his continued employment" is typically measured by "the rules and tacit understandings of the parties." (*Mendoza v. Regents of University of California* (1978) 78 Cal.App.3d 168, 174, emphasis omitted.) Accordingly, the parties are not required to reach a formal agreement to establish that Union-represented employees maintain property rights in their continued employment with the District. Nor must the District have established a formal civil service system. Rather, as the Neutral Factfinding Panel Chair correctly found, in light of the numerous indications in the current memorandum of understanding, the parties' past practices, and the parties' negotiating conduct and proposals, the District's proposal to establish that all Union-represented employees are at-will employees constitutes an erosion of their existing terms and conditions of employment.

Because the Neutral Factfinding Panel Chair's findings and recommendation are otherwise well supported by the governing statutory factors set forth in Government Code section 3505.4, subdivision (d), I concur in those findings and recommendation.

Respectfully submitted,

/s/ Rebecca Yee

RebeccaYee
Factfinder for the Union