STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1021, Charging Party, v. COUNTY OF SAN JOAQUIN, Respondent.	Case No. SA-CE-804-M PERB Decision No. 2490-M June 30, 2016

Appearances: Weinberg, Roger & Rosenfeld by Matthew J. Gauger and Anthony J. Tucci, Attorneys, for Service Employees International Union Local 1021; Office of the County Counsel by Kimberly D. Johnson, Deputy County Counsel, for County of San Joaquin.

Before Winslow, Banks and Gregersen, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by Service Employees International Union Local 1021 (SEIU) to the proposed decision (attached) of a PERB administrative law judge (ALJ) dismissing the complaint and SEIU's unfair practice charge. The complaint, as amended at the hearing, alleged that the County of San Joaquin (County) violated the Meyers-Milias-Brown Act[1] (MMBA) and PERB regulations[2] by unilaterally eliminating a practice in the County's District Attorney's office of providing flexible schedules for bargaining-unit employees with child care

[1] The MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

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

responsibilities, and by failing or refusing to provide SEIU with necessary and relevant information regarding the policies and procedures of the County's District Attorney's office.

The ALJ dismissed the unilateral change allegation after concluding that SEIU had failed to establish the existence of a flexible schedule past practice that was known to and historically accepted by both parties. Alternatively, the ALJ reasoned that, even if an established practice of allowing flexible work schedules had existed, as alleged in the complaint, the parties' Memorandum of Understanding (MOU) authorized the County to change employees' schedules without notice or opportunity for bargaining. The ALJ also dismissed the allegation that the County had failed or refused to provide SEIU with information about the District Attorney's office policies and procedures, after concluding that SEIU had failed to put on any evidence that the County had not provided the requested information.

SEIU excepts to the ALJ's findings that SEIU failed to prove either the existence of an established practice whereby employees who arrived late to work because of child care responsibilities were permitted to make up the missed time during their lunch break, and to the ALJ's finding that the parties' MOU authorized the County to act unilaterally to change employee schedules. SEIU also excepts to the credibility determinations used by the ALJ to resolve conflicting testimony on whether the County had known about or followed a flexible scheduling practice as alleged in the complaint. SEIU also excepts to the ALJ's finding that the record contained no evidence demonstrating that the County never produced the information requested by SEIU. The County has filed no exceptions and urges the Board to adopt the ALJ's proposed decision in its entirety.

We have reviewed SEIU's exceptions and supporting brief, the County's response, the proposed decision and the entire record in light of applicable law. Based on this review, we conclude that the ALJ's factual findings are supported by the record and that her conclusions of law are well-reasoned and in accordance with applicable law. We therefore adopt the proposed decision as the decision of the Board itself, subject to the following discussion of SEIU's exceptions.

DISCUSSION

1. Whether SEIU Proved the Existence of a Flexible Schedule Practice

SEIU argues that, since at least 2008, the County knew that a significant number of bargaining-unit employees were arriving late to work and making up the time at lunch. The County's answer to the complaint admitted that that some employees had arrived at work up to 30 minutes past their 8:00 a.m. shift start time to drop their children off at school, and had shortened their lunch period or worked late to make up the time. However, the County denied that this arrangement constituted a policy or that it was permitted and it averred that this arrangement was permitted by Sylvia Isordia (Isordia), a Senior Legal Technician and the immediate supervisor of the District Attorney's clerical employees, without management's knowledge or consent. The uncontradicted evidence established that the County's written polices required the District Attorney's clerical employees to report to work at 8:00 a.m. It also established that Isordia, as their lead, could approve employee requests for time off, but did not have authority to approve schedule changes.

Consequently, SEIU's case turned not on establishing the existence of a flexible scheduling practice, since that issue was admitted in the County's pleadings. Rather, the key

factual issue in dispute was whether anyone in management above Isordia knew about and permitted the flexible scheduling practice, as alleged in the complaint.

District Attorney James Willett (Willett) was not called as a witness and Assistant District Attorney Edward Busuttil (Busuttil) testified that neither he nor Willett had direct supervision over the District Attorney's clerical employees. Busuttil testified, without contradiction that Millie James (James), who is an administrative assistant and Willett's personal assistant, is the "ultimate supervisor" of the District Attorney's clerical staff and that only James could approve a modified schedule on an ongoing basis. (Reporter's Transcript (R.T.), 97:13-15; 99:16-17; 114:7-9.) Busuttil and James denied knowing that clerical employees were coming to work late and making up time during lunch or consenting to this practice. (R.T., 55:5; 14-15; 98:28; 114:7-9; 133:22-134:15.) As noted by the ALJ, much of Isordia's testimony about her discussions with James concerning modified work schedules was not about the practice of permitting employees to drop off their children before work and make up time during their lunch, but about modified schedules legally mandated by the federal Family Medical Leave Act (FMLA). In other instances, Isordia's testimony was too uncertain to determine whether she ever made this distinction when speaking with James about the fact that some clerical employees were on a modified schedule.

Like Isordia, SEIU's other witness, steward Melanie Crutchfield (Crutchfield), offered general testimony about what she routinely observed as an employee working in the department, but had no direct personal knowledge of any conversations or other communications with James or other department managers in which the flexible scheduling practice, as opposed to modified schedules pursuant to FMLA requirements, was discussed. The following passage from Crutchfield's direct examination is typical:

Q You said you started with the DA's office in 2006?

A Correct.

Q Did that practice exist in 2006?

A As far as I know.

(R.T., 18:13-16.)

In her capacity as a department steward, Crutchfield testified that approval of a modified schedule went up and back down the chain of command (R.T., 42:4; 43:16-23), but she offered no testimony of any first-hand conversations that would confirm that James, Busuttil or Willett knew, not only that employees were arriving to work late and making up the time on their lunches, but that they were doing so ***because of*** their morning child care responsibilities. When asked how she was aware of the existence of the practice outside the restitution unit where Crutchfield worked, Crutchfield similarly testified:

> As an employee of the office, just being aware that some employees would come in and work at 8:30. They would be working through lunch. Most of the time, it was just that allowance, like you would just notice that someone was not coming in until 8:30, and there didn't seem to be a problem with it.

(R.T., 19:25-20:2, see also 23:17-27 and 41:6-13.)

SEIU's exceptions and supporting brief argue that "[t]he ultimate purpose as to why employees arrived late to work is irrelevant," since, regardless of the reason, management knew the practice was widespread and permitted it to continue. However, as the ALJ observed, the reason management approved a modified schedule is relevant to whether the County's managers knew that employees were late for work ***because of*** their morning child care responsibilities as opposed to FMLA-mandated reasons.

Because we agree with the ALJ that SEIU has not shown that the County knew of and condoned a practice of permitting employees who arrived late to work because of child care responsibilities to make up time during their lunch breaks, we need not and do not adopt her alternative finding that the parties' MOU authorized the County to act unilaterally to change employee hours.

2. The ALJ's Credibility Determinations

SEIU also excepts to the ALJ's credibility determinations as failing to identify the specific information relied on and as unsupported by the record as a whole. We disagree. The Administrative Procedures Act provides that if the factual basis for an agency decision includes a determination based substantially on the credibility of a witness, the decision shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination. (Gov. Code, § 11425.50, subd. (b).)[3] However, SEIU's exceptions and supporting brief mischaracterize the specific factual issue in dispute for which the ALJ made credibility determinations. The disputed issue was not whether, over the course of several years, numerous clerical employees arrived to work up to 30 minutes late and then made up the time during their lunch breaks. Rather, the issue in dispute was whether management knew and approved or condoned this practice to accommodate employees' morning child care responsibilities as opposed to FMLA-mandated reasons.

[3] Government Code section 11425.10, which incorporates by reference section 11425.50, sets forth the mandatory minimum requirements for administrative adjudicative proceedings in California. While administrative agencies may opt in or out of other portions of the Administrative Procedure Act, the Administrative Adjudication Bill of Rights set forth in section 11425.10 is mandatory for all agency adjudicative proceedings, including PERB unfair practice proceedings. (*City of Torrance* (2009) PERB Decision No. 2004, pp. 5-6.)

Isordia estimated that from approximately 2008 until Isordia's position was eliminated in 2012, as many as ten of the District Attorney's approximately 35 clerical employees were on a modified schedule for the reasons alleged in the complaint. (R.T., 113:10-17.) The County's answer to the complaint admitted as much and Busuttil also admitted that he knew some clerical employees were having trouble getting to work at the scheduled start time of 8:00 a.m. Busuttil and James denied knowing or consenting to this practice. (R.T., 55:5, 14-15, 98:28, 114:7-9, 133:22-134:15.) Busuttil testified that, until 2012, when Isordia's position was eliminated and two other clerical employees took over her lead duties, he was unaware of any "side agreements" that permitted clerical employees to come to work after 8:00 a.m. because they needed to drop off their children at school and then to allow them to make up the missed time during their lunch breaks. (R.T., 98:3-17; 105:5-6.)

Thus, the ALJ made credibility determinations to resolve conflicting evidence ***not*** about whether the practice existed or was widespread, ***but*** whether management knew about and condoned it. On this issue, we agree with the ALJ's credibility determinations and her reasoning. For the most part, Isordia's testimony that James had approved employee requests for modified schedules was based on hearsay evidence. Isordia testified that when employees asked for a modified schedule to accommodate their morning child care responsibilities, she instructed them to speak with James, but Isordia was apparently not herself a party to these discussions and James denied having approved modified schedules for these employees. (R.T., 133:22-134:15.) In the one instance in which, according to Isordia, James called Isordia and said that she had approved a modified schedule for Delores Prisock, the ALJ correctly observed that Isordia's testimony was typically imprecise, particularly about whether an

employee's schedule was modified for FMLA or other reasons, and James's testimony was more consistent and definite. (R.T., 120:4-5.)

In addition, the record as a whole supports this credibility determination. Periodically, James sent e-mails in which she reminded the clerical staff of the 8:00 a.m. start time and the department's expectation that employees would arrive to work on time. If, as Isordia testified, nearly one-third of the staff was on a modified schedule with the knowledge and consent of management, it seems unlikely that James would send such blanket reminders without some acknowledgement of the widespread exception. Accordingly, we find no error in the ALJ's decision to credit James's testimony over that of Isordia where the two conflicted.

3. Whether SEIU Established that the County Failed to Provide Information

The exclusive representative is entitled to all information that is necessary and relevant to discharge its duty of representation. (*Stockton Unified School District* (1980) PERB Decision No. 143 (*Stockton*), p. 13; *NLRB v. Truitt Mfg. Co.* (1956) 351 U.S. 149, 152-153.) PERB uses a liberal, discovery-type standard, similar to that used by the courts, to determine the relevance of an information request. (*Regents of the University of California (Davis)* (2010) PERB Decision No. 2101-H, p. 32; *Trustees of the California State University* (1987) PERB Decision No. 613-H, adopting proposed dec. at p. 13; *NLRB v. Acme Industrial Co.* (1967) 385 U.S. 432, 438, fn. 6.)

Information pertaining to unit employees' wages, hours, or working conditions is "so intrinsic to the core of the employer-employee relationship that it is considered presumptively relevant and must be disclosed unless the employer can establish that the information is plainly irrelevant or can provide adequate reasons why it cannot furnish the information." (*Stockton, supra*, PERB Decision No. 143, p. 13; *Chula Vista City School District* (1990) PERB Decision No. 834, p. 53; *Teleprompter Corp. v. NLRB* (1st Cir. 1977) 570 F.2d 4, 8; *State of California*

(Departments of Personnel Administration and Transportation) (1997) PERB Decision No. 1227-S, p. 6.)

As with other kinds of allegations, to prevail on a refusal to provide information allegation, the charging party has the burden of proving the material facts by a preponderance of the evidence. (PERB Reg. 32178.)

The record establishes that, on April 6, 2012, Field Representative William R. Petrone (Petrone) made a written request for "[a] copy of all policies and procedures that are currently being utilized by the District Attorney office in respect to the day to day operations of the department." Petrone's correspondence explained that SEIU was requesting this information "in consideration of the fact that many of our represented members in your department have complained to the Union that policies, changes in policies, working procedures, etc, are given verbally and not provided to the employees in writing." (ChargingParty Ex. 3.) To the extent the information requested by SEIU— policies and procedures governing the day-to-day operations of the District Attorney's office — pertains immediately to the wages, hours and working conditions of the department's clerical employees, or is necessary to monitor and administer a collective bargaining agreement, or to investigate a potential grievance arising from employee complaints, it is presumptively relevant. (*City of Burbank* (2008) PERB Decision No. 1988-M, pp. 4, 14-15; *Town of Paradise* (2007) PERB Decision No. 1906-M, p. 5; *State of California (Department of Veterans Affairs)* (2004) PERB Decision No. 1686-S, p. 2.) Absent a valid defense, an employer's refusal to provide such information upon request is a per se violation of the duty to meet and confer in good faith. (*City of Burbank, supra*, PERB Decision No. 1988-M, p. 8.)

SEIU argues that because James admitted on cross-examination that she never searched for any written policies responsive to SEIU's request for written workplace policies, SEIU met its burden to establish that the County failed or refused to provide necessary and relevant information. However, because there is no evidence whether the County provided the requested information, SEIU has not established by a preponderance of the evidence that the County failed to provide necessary and relevant information.

ORDER

The complaint and underlying unfair practice charge in Case No. SA-CE-804-M are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Winslow and Gregersen joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1021, Charging Party, v. COUNTY OF SAN JOAQUIN, Respondent.	UNFAIR PRACTICE CASE NO. SA-CE-804-M PROPOSED DECISION (06/18/2014)

Appearances: Weinberg, Roger & Rosenfeld by Matthew J. Gauger, Attorney, for Service Employees International Union, Local 1021; Kimberly D. Johnson, Deputy County Counsel, for County of San Joaquin.

Before Robin W. Wesley, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, a union alleges the employer unilaterally eliminated a flexible schedule practice that allowed employees to arrive late to work so they could drop their children at school and make up the time by working through their lunch break. The union also alleges the employer failed to provide necessary and relevant information. The employer denies committing any unfair practices.

On August 29, 2012, the Service Employees International Union, Local 1021 (SEIU) filed an unfair practice charge against the County of San Joaquin (County). SEIU filed an amended charge on December 14, 2012. The County filed position statements in response to the original and the amended charge.

On January 18, 2013, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint that alleged the County unilaterally eliminated the flexible schedule policy without providing notice and an opportunity to meet

and confer. This conduct is alleged to have violated the Meyers-Milias-Brown Act (MMBA)[1] sections 3503, 3505, 3506, 3506.5(a), (b), and (c). The County is thereby alleged to have committed an unfair practice under MMBA section 3509(b) and PERB Regulation[2] 32603(a), (b), and (c).

On February 6, 2013, the County filed an answer to the complaint, admitting that before April 12, 2012, some employees arrived late to work after dropping their children at school and shortened their lunch breaks to make up time, but denying that this arrangement was done with the consent or knowledge of the County and did not constitute its policy or was permitted. The County denied other substantive allegations and asserted affirmative defenses.

The parties participated in a settlement conference on March 12, 2013, but the matter was not resolved.

A formal hearing was held on May 21, 2013. At the end of the hearing, SEIU moved to amend the complaint to allege that the County failed to provide necessary and relevant information. Without objection from the County, the motion to amend was granted. The case was submitted for decision following receipt of post-hearing briefs on July 22, 2013.

FINDINGS OF FACT

SEIU is an exclusive representative within the meaning of PERB Regulation 32016(b). The County is a public agency within the meaning of Government Code section 3501(c) and PERB Regulation 32016(a).

[1] The MMBA is codified at Government Code section 3500 et seq. All statutory references are to the Government Code, unless otherwise stated.

[2] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

SEIU represents the Office and Office Technical bargaining unit, which includes clerical employees in the District Attorney's Office. SEIU and the County are parties to a Memorandum of Understanding (MOU) effective December 5, 2011 through June 30, 2013. MOU section 5.2 states:

> 5.2. Working Hours
>
> In accordance with the Board of Supervisors' policy, a department head may change the working hours of individual employees to accommodate functional needs of the department so long as no change is made in the regular hours of the department.

MOU section 20 states:

> 20. SUPERSESSION AND MODIFICATION CLAUSE
>
> Except as may hereinafter be agreed to in writing, and except for the San Joaquin County Employer-Employee Relations Policy, this Memorandum of Understanding contains the sole and entire agreement between the parties. It supersedes any and all other previous Memoranda of Understanding between the parties and incorporates by reference all such previous memoranda between the designated representatives of members of this representation unit and the County and also supersedes and incorporates by reference any and all Resolutions and Board orders adopted by the San Joaquin County Board of Supervisors which were adopted to implement any Memorandum of Understanding between the designated representatives of members of this representation unit and the County; other terms and conditions of employment not specified herein shall remain as they are for the term of this Memorandum of Understanding except that where the language of such Memoranda, Resolutions, Board Orders or such other terms and conditions of employment not specified herein conflicts with, or is different from, the language contained in this Memorandum, this Memorandum shall prevail and apply. The parties acknowledge and agree that neither of them has made any representations with respect to the subject matter of this agreement or any representations including the execution and delivery hereof except such representations as are specifically set forth herein. No waiver or modification of this agreement or any covenant, condition or limitation herein contained shall be valid unless in writing and duly executed by the parties hereto; no officer, employee or agent of the County has any authority to

> waive or modify this agreement or any covenant, condition or limitation herein contained without the express approval of the San Joaquin County Board of Supervisors or its designee.

(Emphasis added.)

County ordinance 2-3000 states:

> County officers shall keep their offices open for the transaction of business continuously from 8:00 a.m. until 5:00 p.m. each day of the week, except Saturday, Sunday and regular holidays, unless otherwise prescribed by resolution of the Board of Supervisors.

San Joaquin County Work Rules state, in part:

> 4. Work Hours
> Employees shall begin work on time and devote their assigned work hours to carrying out their jobs. Rest breaks, meals and time off shall be taken at times authorized by the employee's department head (or designee).

Sylvia Isordia (Isordia) was first employed by the District Attorney's office in 1984 as a Legal Technician II. Isordia promoted to a Senior Legal Technician, and between 2001 and 2012 she supervised a unit of clerical employees located on the second floor of the District Attorney's office. Isordia's clerical supervisor position is in the bargaining unit.

Millie James (James), employed by the District Attorney's office for 29 years, is the Administrative Assistant to District Attorney James Willett (Willett). Her office is located on the fifth floor. Clerical supervisors report to James.

Isordia testified that since at least 2008, there were clerical employees who came to work a few minutes late and made up time by taking shorter lunch breaks. At one time, Isordia supervised 35 employees.[3] She estimated that about ten of those employees were coming to

[3] There are clerical employees assigned to other units. Since fiscal year 2011-2012, the number of clerical positions has been reduced to 28 full-time positions for the entire District Attorney's office.

work late, some because they dropped their children at school before work and others for medical reasons.[4]

As a supervisor, Isordia was responsible for making sure that work got done and that clerical support was available to assist the attorneys. Isordia also had the authority to approve time off, although she was not authorized to approve modified schedules. Isordia stated that when employees approached her requesting a modified schedule she told them they needed to talk to James.

James testified that since she started working for the District Attorney's office, the work hours for clerical employees have been 8:00 a.m. to 5:00 p.m. Since at least 2008, James was aware that there were times when tardiness was an issue in the clerical unit. During staff meetings, James received complaints that some clerical employees were tardy, socializing too much, or were taking long lunches.

Periodically, James asked Isordia to talk to employees about their tardiness, remind them of the work hours, and make sure employees were engaging in professional behavior. For example, on July 2, 2008, James wrote in an email to Isordia:

> I have been receiving complaints from attorneys regarding the clerical staff. Here they are:
>
> No one comes to work on time. Between 8:00 am – 8:30 am they say it's a ghost town. Staff is sitting around visiting a lot, even when supervisors or Chiefs are around, it doesn't seem to matter. People are taking long lunches. Work is not getting completed as should. [sic.] . . . Please get the word out that employees need to be working 8:00 am – 5:00 PM, with two breaks, and a one hour lunch.

[4] Isordia herself had an approved modified schedule under the Family and Medical Leave Act (FMLA) [29 USCS §§ 2601 et seq.], in which she arrived at work up to one hour late. FMLA modified schedules are not at issue in this case.

Isordia confirmed that some employees arrived late, while others arrived on time. Isordia stated that she spoke to James after receiving this email to remind her that some people had a modified schedule.

On February 1, 2011, after observing that clerical employees were again excessively tardy, Isordia sent an email to the clerical employees in her unit, stating, in part:

> A reminder to all
>
> Your work hours are from 8 to 5. Breaks are 15 minutes in the morning and afternoon not to be taken before 9:30 am and 2 pm.
>
> [¶…¶]
>
> **If you are late I expect you to turn in a time off slip marked vacation that same morning and also indicate on the sign in sheet your time. The same is for the lunch hour. Tardiness can not [sic] be made up at lunch time.

Isordia testified that around this time she, "probably reminded [James] of the people that were on a modified schedule."

Isordia testified that James approved flexible schedules for about ten clerical employees. While there are documents approving FMLA modified schedules, Isordia acknowledged there is no documentation of James's approval of flexible schedules for clerical employees. Isordia stated that James verbally told her of the approvals.

Melanie Crutchfield (Crutchfield) works as a paralegal in the District Attorney's office. She was elected as a job steward in February 2012. Crutchfield testified she was aware of the flexible schedule practice because she observed that some clerical employees came to work late and worked through lunch. She stated management would know about the practice because they could make the same observation.

James denied approving or knowing about flexible schedules that allowed employees to arrive late to drop their children at school and make up the time during lunch. She testified that Isordia told her that employees were arriving tardy to work. James also stated that she was aware that some employees, like Isordia and Kelly Foreman, had modified schedules under the FMLA.

In or around early 2012, Isordia was laid off and bumped to the Legal Technician II classification. Mary Borges (Borges) and Terri Booth were assigned as the lead workers for the clerical employees. After Borges became lead worker, she informed James that some employees had been granted special arrangements by Isordia that allowed them to arrive late after dropping their children at school and then make up the time during their lunch break.

Assistant District Attorney Edward Busuttil (Busuttil) learned of the special arrangements from James. Prior to this time, Busuttil was aware that some employees had trouble getting to work on time, but he did not know that there were side agreements granting some employees flexible schedules to get their children to school.

On March 28, 2012, during a staff meeting for clerical employees, Borges informed employees that the work hours were 8:00 a.m. to 5:00 p.m., and that no allowances would be made. At this time, three employees regularly arrived at work after 8:00 a.m. Borges told them they had two weeks to make arrangements to be at work on time. A new clerical rotation schedule was also discussed at the staff meeting.

On March 29, 2012, SEIU Field Representative William Petrone (Petrone) submitted a demand to bargain over the clerical rotation schedule. On April 6, Petrone demanded to bargain "Working hours of employees represented by SEIU Local 1021." In a separate letter to Willett, dated April 6, Petrone requested, "A copy of all policies and procedures that are

currently being utilized by the District Attorney [sic.] office in respect to the day to day operations of the department."

In late April or early May 2012, Petrone and Crutchfield met with Willett, Busuttil, and James to discuss the change in working hours. Petrone demanded that the flexible schedule practice be restored. Willett said the work hours were 8:00 a.m. to 5:00 p.m., and the department needed employees to arrive on time to accommodate custodies and to be available to assist attorneys. Willett told Petrone he would consider a proposal for a different work time schedule. SEIU did not submit a proposal.

At the time of the hearing, four or five clerical employees regularly came to work after 8:00 a.m., including Isordia under her FLMA claim. These employees are not allowed to make up time by working through their lunch break and must use leave credits to cover their late arrival.

ISSUES

1. Did the County unilaterally eliminate a flexible schedule practice without providing notice and an opportunity to meet and confer?

2. Did the County fail or refuse to provide necessary and relevant information?

CONCLUSIONS OF LAW

SEIU contends a practice was established over many years that grants employees a flexible schedule that allows them to arrive late after dropping their children at school and make up time by working during the lunch break. SEIU asserts the County was aware of the practice and approved flexible schedules. SEIU claims that MOU section 20 precludes changes in past practices and that the County changed the flexible schedule practice without providing notice and an opportunity to bargain.

The County asserts there was no established practice because it was not aware of any such practice and it did not approve flexible schedules. Further, even if there was an established practice, MOU section 5.2 allows the County to "change the working hours of individual employees."

MMBA section 3505 requires a public agency and a recognized employee organization to "meet and confer in good faith regarding wages, hours, and other terms and conditions of employment." In determining whether a party has violated MMBA section 3505 and PERB Regulation 32603(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (*Stockton Unified School District* (1980) PERB Decision No. 143.)

Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer breached or altered the parties' written agreement or its own established past practice; (2) such action was taken without giving the other party notice or an opportunity to bargain over the change; (3) the change was not merely an isolated breach of the contract, but amounts to a change in policy (i.e., it has a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. (*San Joaquin County Employees Association v. City of Stockton* (1984) 161 Cal.App.3d 813; *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802; *Grant Joint Union High School District* (1982) PERB Decision No. 196; *Walnut Valley Unified School District* (1981) PERB Decision No. 160; *County of Santa Clara* (2013) PERB Decision No. 2321-M.)

It is undisputed the County did not give SEIU notice and an opportunity to bargain over the change in some clerical employees' working hours. The change also had a continuing

impact on bargaining unit employees' working hours because employees were no longer allowed to arrive late and make up work time during lunch. Further, hours of work is expressly identified as a negotiable subject within the scope of representation. (MMBA §3504; *Los Angeles Community College District* (1982) PERB Decision No. 252.)

SEIU contends there was an established flexible schedule practice. An established policy may be embodied in the terms of a collective bargaining agreement or, where a contract is silent or ambiguous, it may be determined from past practice or bargaining history. (*Grant Joint Union High School District*, *supra*, PERB Decision No. 196; *Rio Hondo Community College District* (1982) PERB Decision No. 279.) For a past practice to be binding it must be (1) unequivocal, (2) clearly enunciated and acted upon, and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. (*County of Sonoma* (2012) PERB Decision No. 2242-M; *Desert Sands Unified School District* (2010) PERB Decision No. 2092; *Hacienda La Puente Unified School District* (1997) PERB Decision No. 1186; *State of California (Department of Personnel Administration)* (2004) PERB Decision No. 1601-S; *Riverside Sheriff's Association v. County of Riverside* (2003) 106 Cal.App.4th 1285, 1291.) PERB has also described an enforceable past practice as one that is "regular and consistent" or "historic and accepted." (*Hacienda La Puente Unified School District*, *supra*, PERB Decision No. 1186.) Parties need not formally adopt a practice for it to be binding. (*West Covina Unified School District* (1993) PERB Decision No. 973.)

The Board found an established practice that was known to the employer in *San Jacinto Unified School District* (1994) PERB Decision No. 1078. There, the shift hours for maintenance workers were 7:00 a.m. to 3:30 p.m. During football season, maintenance workers could volunteer to work football games as overtime assignments beyond their regular

work day. The district changed the maintenance workers' hours on game days to noon to 9:00 p.m., removed the voluntary nature of the assignment, and eliminated the opportunity for overtime. Similarly, in *West Covina Unified School District*, supra, PERB Decision No. 973, when employees promoted into lead positions, they were expressly authorized to drive work vehicles to and from home. The Board found the district unilaterally changed a well-known established practice when it stopped employees from taking the vehicles home.

In *County of Sonoma* (2008) PERB Decision No. 1962-M, the Board found that the union failed to demonstrate an established practice of the employer obtaining a medical exam by a county physician before putting an employee on unpaid medical leave. The Board held that the testimony of the union witness claiming that the procedure was always followed was not credited over that of the county witness. In *Riverside Sheriff's Association v. County of Riverside, supra*, 106 Cal.App.4th 1285, the court denied the union's claim that the county changed its practice of granting salary step increases to employees place on disability leave. The court held that while some employees were granted step increases while on leave, the union failed to establish that granting the step increase was a uniformly applied practice.

In the present case, Crutchfield testified that she observed clerical employees arriving late and working during lunch. Crutchfield's observation is insufficient to demonstrate an established practice. Employees could have been tardy or had approved leave for appointments. Further, there is no evidence in the record about the lunch break schedule. It cannot be determined whether employees were working thorough their lunch break to make up time simply because they were at their desks in the middle of the day.

The record contains conflicting testimony concerning whether James knew about and approved flexible schedules for ten clerical employees. Isordia testified that she had no

authority to approve flexible schedules, instead she sent employees seeking such schedules to James. Isordia testified that James told her of the approved flexible schedules.

James acknowledged that at times employees were tardy to work. She repeatedly directed Isordia to remind employees of the work and break schedules. James denied approving or knowing there were flexible schedule arrangements that allowed employees to arrive late to work.

The Board has held that credibility determinations may be made based on factors including demeanor, selective memory on cross-examination, inherently unbelievable testimony, bias, prior consistent or inconsistent statements, and the capacity to perceive, recollect, or communicate, among other factors. (Evid. Code, §780; *Palo Verde Unified School District* (2013) PERB Decision No. 2337; *Regents of the University of California* (1984) PERB Decision No. 449-H; *Santa Clara Unified School District* (1985) PERB Decision No. 500.)

Isordia's testimony was imprecise and uncertain in comparison with James's testimony. Isordia testified about "modified" schedules that at times included both flexible schedules to drop children at school and alternate schedules for medical reasons. Isordia testified she "probably" reminded James employees were on a modified schedule, making it unclear which type of schedule she spoke to James about. Further, although stating that James told her that flexible schedules had been approved, Isordia acknowledged there was no documentation to support the approvals as there was for FMLA modified schedules.

James's answers were certain. James knew tardiness was an issue and repeatedly asked Isordia to remind employees that work hours were 8:00 a.m. to 5:00 p.m. James's testimony

was unequivocal that she did not know of or approve flexible schedules. James's testimony is credited over Isordia's testimony.

The burden is on SEIU to demonstrate that both parties knew there was a long-standing practice in which the County would grant employees flexible schedules that allowed them to arrive late to work and make up the time during their lunch break. (*San Francisco Unified School District* (2009) PERB Decision No. 2057.) James did not know of the practice and did not approve flexible schedules. While there is documentation approving FMLA modified schedules, there are no writings, documents, or emails demonstrating that flexible schedules had been approved. The evidence does not demonstrate that the County was aware of and had utilized such a practice to approve flexible schedules. Thus, a flexible schedule practice was not "readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties." Accordingly, SEIU has failed to establish by a preponderance of the evidence that there was an established flexible schedule practice that allowed employees to arrive late to work after dropping their children at school and make up time by working through their lunch break.

Even assuming there was an established practice that was known to and accepted by both parties, the County asserts the MOU allows the County to change working hours. MOU section 5.2, states:

> In accordance with the Board of Supervisors' policy, a department head may change the working hours of individual employees to accommodate functional needs of the department so long as no change is made in the regular hours of the department.

Where contractual language is clear and unambiguous, there is no need to go beyond the plain language of the contract to ascertain its meaning. (*City of Riverside* (2009) PERB Decision No. 2027-M; *Marysville Joint Unified School District* (1983) PERB Decision

No. 314.) A waiver of the right to negotiate over a particular subject must be clear and unmistakable, and must indicate an intentional relinquishment of the right to bargain. *(County of Santa Clara* (2013) PERB Decision No. 2321-M; *Amador Valley Joint Union High School District* (1978) PERB Decision No. 74; *California State Employees' Assn. v. Public Employment Relations Bd.* (1996) 51 Cal.App.4th 923, 937-938.) Thus, "a contract provision which cedes to the employer unilateral control over a particular, clearly identified matter will operate as a waiver of the exclusive representative's bargaining right as to that matter." (*Grossmont Union High School District* (1983) PERB Decision No. 313.) A past practice, even one of long duration, does not trump a clear, established policy. *(Marysville Joint Unified School District, supra,* PERB Decision No. 314.)

MOU section 5.2 provides that the County may change individual employee's working hours to accommodate the functional needs of the department. The language is clear and unambiguous on its face, and demonstrates that SEIU waived its right to bargain over the County's decision to change individual employee's working hours. In 2012, after Borges became the lead worker, the County learned that three employees regularly arrived late. The employees were immediately advised that the work hours are 8:00 a.m. to 5:00 p.m. If there was a valid past practice that allowed the employees to arrive after 8:00 a.m., the MOU authorized the County to change their hours to report to work at 8:00 a.m. Under Section 5.2, SEIU ceded unilateral control over changes to employee work hours to the County. Thus, the County did not breach its duty to meet and confer with SEIU over the decision to change employee work hours.

Information Request

SEIU contends the County failed or refused to provide necessary and relevant information regarding policies and procedures utilized by the District Attorney's office.

A recognized employee organization is entitled to all information that is "necessary and relevant" to the discharge of its duty to represent bargaining unit employees. (*Stockton Unified School District*, *supra*, PERB Decision No. 143.) Information pertaining immediately to a mandatory subject of bargaining is presumptively relevant. (*Ibid.*) An employer's failure or refusal to provide such information violates the duty to bargain in good faith unless the employer can supply adequate reasons why it cannot provide the information. (*Ibid.*; *Town of Paradise* (2007) PERB Decision No. 1906-M; *State of California (Departments of Personnel Administration and Transportation)* (1997) PERB Decision No. 1227-S; *County of Sierra* (2007) PERB Decision No. 1915-M.)

At the conclusion of the hearing, SEIU moved to amend the complaint to allege the County failed or refused to provide necessary and relevant information regarding policies and procedures utilized by the District Attorney's office.[5] The only evidence in the record regarding this allegation is that SEIU requested the information. There is no evidence whether the County did or did not provide the requested information. SEIU has not established by a preponderance of the evidence that the County failed to provide necessary and relevant information. (PERB Regulation 32178; *State of California (Board of Equalization)* (2012) PERB Decision No. 2237-S.) Therefore, this allegation is also dismissed.

PROPOSED ORDER

Based on the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. SA-CE-804-M, *Service Employees International Union Local 1021 v. County of San Joaquin*, are hereby DISMISSED.

[5] SEIU did not address this allegation in its post-hearing brief.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960
E-FILE: PERBe-file.Appeals@perb.ca.gov

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)