STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CITY OF SANTA MARIA FIREFIGHTERS ASSOCIATION, Charging Party, v. CITY OF SANTA MARIA, Respondent.	Case No. LA-CE-1210-M PERB Decision No. 2736-M June 30, 2020

Appearances: Adams, Ferrone & Ferrone by Stuart D. Adams, Attorney, for City of Santa Maria Firefighters Association; Liebert Cassidy Whitmore by Che Johnson and Bryan Rome, Attorneys, for City of Santa Maria.

Before Banks and Krantz, Members.

DECISION[1]

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by respondent, City of Santa Maria (City), and cross-exceptions by charging party, City of Santa Maria Firefighters Association (Association), to an administrative law judge's (ALJ) proposed decision (attached).[2]

[1] Pursuant to Government Code section 3509, subdivision (a), and section 3541.3, subdivision (k), the Board has delegated this case for decision to a two-member panel of the Board. Unless otherwise specified, all further statutory references are to the Government Code.

[2] The Association initially filed exceptions but PERB's Appeals Assistant administratively rejected them as untimely, which the Association's appeals. Upon review we have determined to treat the Association's late-filed exceptions as timely

The underlying unfair practice charge and complaint alleged that the City violated the Meyers-Milias-Brown Act (MMBA)[3] when it failed to meet and confer before deciding to open a recruitment for Fire Captains to outside candidates, rather than restricting the recruitment to current employees of the City's Fire Department (Department) in accordance with established past practice. Additionally, the complaint alleged that the City retaliated against certain employees when it initiated formal disciplinary investigations of their protected activities, specifically their efforts to publicize the Association's dispute with the City over the recruitment and encourage others not to apply for the positions.

In the proposed decision, the ALJ concluded that the City violated the MMBA by retaliating against employees and by failing to bargain over the negotiable impacts of the decision to open the recruitment to outside candidates. The City excepts to these conclusions, contending it did not breach its legal duties under the MMBA. Additionally, the proposed decision concluded that the City's decision to run an open promotional recruitment was outside the scope of representation and therefore not subject to the meet and confer requirements of the MMBA. The Association excepts to this conclusion, contending that the City had a duty to meet and confer before deciding to alter promotional standards or procedures for Captains.

Having reviewed the record and the parties' arguments, we conclude that the proposed decision's factual findings are substantially correct and adopt them as the

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cross-exceptions, pursuant to PERB Regulation 32310. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

[3] The MMBA is codified at Government Code section 3500 et seq.

findings of the Board itself. We also agree with and adopt the proposed decision's conclusions that the City failed to engage in meaningful effects bargaining before opening the Captain recruitment to outside candidates, and that its decision to initiate disciplinary investigations constituted unlawful retaliation against employees because of their protected activities. However, in light of *County of Orange* (2019) PERB Decision No. 2663-M (*Orange*), which issued after the proposed decision and overruled *City of Alhambra* (2010) PERB Decision No. 2139-M (*Alhambra*) to the extent it held that changes to promotional criteria were outside the scope of representation, we reverse the proposed decision's conclusion that the City had no duty to meet and confer over its decision to run an open recruitment. We conclude instead that the City's failure to negotiate over the decision constituted a discrete violation of the MMBA.

FACTUAL SUMMARY

Since we adopt the proposed decision's findings of fact, it is necessary to provide only a brief factual summary to contextualize our discussion of the parties' exceptions. By the following summary, we do not disturb those findings, but we do add to them from the record evidence where necessary for purposes of addressing certain of the parties' arguments.

The Association represents a bargaining unit of Firefighters, Engineers, and Captains, all of whom are sworn public-safety employees of the City.[4] Its executive board (E-board) consists of President Anthony Morales (Captain), 1st Vice President

[4] The unit also contains non-sworn classifications, like fire marshal, but such persons are not relevant to this matter.

Chad Wennerstrom (Captain), 2nd Vice President Jill Hoover (Engineer/acting Captain), 3rd Vice President Clint McIntosh (Engineer), and Secretary/Treasurer Anthony James Tevas (Firefighter), all of whom are employees of the Department. Within the Department, the Firefighter classification is the entry-level position, while the Engineer and Captain classifications are considered promotional. The Department operates with three-person crews consisting of a Firefighter, an Engineer, and a Captain who acts as the frontline supervisor during calls.

It takes considerable work and training to qualify to become a Captain. For instance, those wishing to promote from Engineer to Captain must complete the Captain's task book, which details the skills, training, and education that a candidate must demonstrate to the training chief in order to qualify for consideration. A candidate cannot complete the entire task book in one effort. Rather the tasks are set up sequentially, each building on the prior one, and the whole book requires significant study and skill to complete. For this reason, Engineers wishing to promote to Captain must devote considerable time to the undertaking, all while fulfilling their normal duties.

A. The City Unilaterally Opens the Captain Positions to Outside Candidates

Before the events giving rise to this case, the City always promoted Captains from within the bargaining unit and never permitted outside candidates to compete for these positions. (Similarly, the City always selected unit Firefighters to become Engineers.) Indeed, the City's Fire Chief, Leonard Champion, who has worked for the Department since 1990, admitted that he had never known the City to open such promotional recruitments to persons outside the Department. This practice of

promoting Captains from within the rank-and-file ensured that only persons with significant, actual experience with the specific and unique characteristics of the Department would lead firefighters in their dangerous and critical public-safety work. Likewise, the practice protected promotional opportunities for existing employees and ensured that those who served the longest had the best opportunity to advance their careers.

The City was faced with vacancies in the Captain classification beginning in or around 2016. On March 28, 2016, Champion's predecessor and interim Fire Chief, Scott Kenley, raised with Morales the possibility of running an "open" recruitment for the position of Captain and altering the Captain's job description to permit candidates to demonstrate competency by passing a probationary period instead of completing the Captain's task book. These changes would allow people who were not already employees of the Department to apply for the position. Kenley cited low interest and few applications among internal candidates as the reasons for the idea. After Morales informally discussed the matter with Kenley, the Department ultimately chose to continue its practice of selecting Captains from among the rank-and-file and retained completion of the Captain's task book as a prerequisite in the job description. These informal discussions between Kenley and Morales did not commence, much less complete, collective bargaining negotiations over any proposed decision or the effects thereof. Rather, they were in the nature of an informal tête-à-tête. And since both parties came away satisfied, the Association had no reason to proceed to full-fledged negotiations over the matter.

Nevertheless, shortly after Champion assumed leadership of the Department, the issue of vacancies resurfaced. On January 17, 2017, at a regularly scheduled labor-management meeting, Champion disclosed that the Department had three vacant positions for Captain and that there did not appear to be adequate interest among employees eligible for promotion. Champion noted that many engineers were turning down "move-ups," where an engineer works out-of-class as an acting Captain after completing a task book to become qualified. The fact that engineers had declined opportunities to practice the duties of a promotional position before applying indicated to him that engineers lacked sufficient interest to become Captains. The Association suggested there should be greater out-of-class pay to attract candidates willing to work as acting Captains and stated that if the City wished to open the recruitment to external candidates, that would require a meet-and-confer process. However, as discussed immediately below, the City proceeded to unilaterally announce its decision to run an open recruitment.

On January 25, 2017,[5] Champion e-mailed members of the E-board regarding the Captain recruitment, announcing his decision to "look outside" the Department because of the lack of promotional interest from rank-and-file engineers. Unlike his predecessor, however, Champion claimed the Captain's job description required no changes to permit outside applicants, because the existing description allowed all who possessed "the 'education, training and/or experience to demonstrate knowledge, skills, and abilities' to meet the minimum requirements" for Captain to apply for the job.

[5] The proposed decision misstates the date as occurring in 2018.

Champion also announced that the City would open or "fly" the Captain's job on February 22, 2017, but he invited the Association "to meet and discuss the impacts of this decision" before that date.

On February 1, 2017, members of the Association's E-Board met with the City to discuss Champion's e-mail. In response to Champion's invitation discuss the impacts of an open recruitment, the E-Board prepared a letter outlining their concerns that the parties discussed during the meeting. The letter first enumerated the reasons the Association believed employees did not accept acting-Captain status:

> "1. Seniority—lose it when you promote
>
> "2. Less [overtime] opportunities
>
> "3. Not able to work at ARFF[6] anymore
>
> "4. Extra work load, responsibility [without] adequate pay raise (not proportionate to Captain to [Battalion Chief])
>
> "5. Another year of probation as well as a daunting task book
>
> "6. The complexity of the testing process, when you can just act for similar pay."

Next, the Association enumerated its concerns with outside candidates:

> "1. How can [outside candidates] be an effective leader when they don't know how [the City's Department]

[6] "ARFF" typically refers to the Aircraft Rescue & Firefighting Division, which provides firefighting and other emergency services to area airports. (See, e.g., *County of Sacramento* (2014) PERB Decision No. 2393-M.)

operates or how we connect with our community members—it simply isn't something that can be read in a week or learned during a recruitment process[.]

"2. At what step/pay grade would they come in?

"3. What retirement formula do they come in at?

"4. Seniority—a brand new Captain could come in and have more seniority than a 20-year veteran?

"5. Do they have to go through an academy? If so, how much time and money are we going to spend on bringing them up to speed? Aren't we better off using those resources to empower our own people to promote?

"6. Can they work down? As a firefighter or an engineer? Do they have to do those taskbooks? Could they drive our engines?

"7. Would they have applicable experience for respected stations? If they don't have wildland experience, would they be able to go station 3 or 5? No truck experience, can they work at station 1?

"8. Would they come in with a CPAT? [7]

"9. Would we allow two people from the outside to work together? Example: an outside Captain and Engineer are

[7] "CPAT" is the Candidate Physical Ability Test. (Health & Safety Code § 13159.15.)

working on an engine leaving the Firefighter as they only person that knows the department and the city.

"10. Why are they leaving their current job? What issues are they running from?

"11. Will they go through a 'Lateral Captain Taskbook'?"

The Association also made it clear that it opposed the recruitment of outside candidates for safety reasons: "Trusting your leader is of the upmost importance on any crew, because we trust our lives with each other- and those relationships are built over the years, not just because someone passed a promotional test."

Champion believed that many of these issues were legitimate and amenable to negotiations, however he remained convinced that the decision to fly the position to the public was a managerial prerogative not subject to the meet and confer requirements of the MMBA. At the conclusion of the meeting, Champion offered to speak directly to the Engineers who were eligible for promotion to gauge their interest, without opposition from the E-Board.

After speaking with those Engineers, many of whom were serving as acting-Captains, Champion determined that only one was strongly interested in applying for one of the three permanent Captain's positions. He therefore requested and received approval from the City's human resources department to run an open recruitment for the positions. On February 6, 2017, Champion informed Morales that the City was going to fly the positions. Morales responded by demanding to bargain the matter and Champion requested a legal opinion from the Association's counsel to justify its position.

On February 10, 2017, and before the Association had a chance to furnish the requested legal opinion, Champion announced to the bargaining unit that the City was opening the recruitment to the public. This announcement surprised the Association not only because its counsel was working on a legal opinion,[8] but also because Champion had previously stated he was going to fly the position on February 22.

B. The Association Requests Publication of a "Do Not Apply" Communication

In response to this action,[9] Morales spoke with an official of the Association's statewide federation, the California Professional Firefighters (CPF), who offered to prepare a "Do Not Apply" communication for distribution to CPF leaders across California. The purpose of this communication was to alert firefighters throughout the state to the fact that the City's publicly posted Captain positions were the subject of a bargaining dispute between the Association and the City. As the name implies, a Do Not Apply communication also seeks to encourage members of CPF-affiliated unions to show solidarity with their fellow firefighters by refraining from applying for disputed positions.

On or about February 21, 2017, CPF e-mailed a "Do Not Apply" communication to firefighters on its membership list, which stated, in part:

> "**URGENT – PLEASE POST: DO NOT APPLY TO SANTA MARIA FIRE DEPARTMENT**

[8] The Association provided the promised legal opinion on February 13, 2017.

[9] As discussed below, when the Association sought to introduce evidence that the action was unilateral, i.e., that the City did not provide the Association notice and an adequate opportunity to meet and confer before deciding to open the recruitment to non-employees, the City cut short the Association's questioning via a stipulation that effectively narrowed the City's defenses to just two: arguing that the decision was outside the scope of representation and/or consistent with past practice.

> "**Outside Search for Captain Ignores Past Practice and Qualified Internal Candidates**"

(Emphasis in original.)

Morales did not author or review the communication; he saw it only after CPF sent it to him and every other member on CPF's e-mail list. Once he received it, Morales was concerned that the communication could be misconstrued to mean that the City was passing up qualified rank-and-file candidates. Morales contacted CPF to request certain revisions to clarify the nature of the bargaining dispute. CPF promptly sent a second communication:

> "**Outside Search for Captain At Odds With Past Practice**
> [¶]
> "**Brothers and Sisters:**
>
> "The Santa Maria Fire Department has chosen to recruit for fire captain by opening the position to outside candidates. The effort to search outside is not in accordance with long-standing past practice to promote from within.
>
> "Currently there are highly qualified internal candidates for the captain's post.
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> "Recruiting outside candidates for this position would be a direct affront to a long-standing principle and a blow to morale.
>
> "Local 2020 respectfully ask[s] for your help and support by **not applying for the captain's post in Santa Maria** and further asks that you help get the word out to our affiliated brothers and sisters and post on union bulletin boards.
>
> "**Please DO NOT APPLY in Santa Maria Fire Department.**"

(Emphasis in original.)

Champion was shocked by the "Do Not Apply" communication and believed it was disingenuous. On February 22, 2017, he sent a communication to the Association laying out the legal position for the City's decision to take unilateral action to fly the Captain positions. Among other contentions, Champion claimed that the City's long, uninterrupted history of promoting Captains from within the ranks did not create a binding past practice and that its actions were justified by the management rights clause in the parties' memorandum of understanding (MOU).

Champion also sent a similar communication to all bargaining unit members, expressing his belief that the Association had brought discredit to the Department by its decision to seek the assistance of CPF. Champion also claimed the City's Municipal Code authorized him to open the recruitment process to the public without having to bargain with the Association. Specifically, Champion cited Section 2-20.09.1 of the Municipal Code, which states that the City "shall schedule open or promotional recruitments based on vacancies or anticipated vacancies to meet the need in the City service," and that "[o]pen recruitments may be scheduled when it is not practical to fill vacancies by promotion or when specifically requested by the appointing authority." Finally, although at hearing he acknowledged the legitimacy of many of the Association's concerns about outside candidates, Champion dismissed those concerns in his letter to employees as "purely emotional."

By the close of the application period, the City received between 14 and 16 applications from outside applicants for the open Captain positions. Champion said four of them were deemed qualified and invited to take a written examination to be held on or around March 16, 2017. One of the four external applicants who had been

invited to the examination notified the Department beforehand that he would not be able to appear for the test. The other three external applicants did not appear for the examination on March 16 without prior notice or explanation. Neither Champion nor anyone else from the City contacted them to inquire about their failure to appear for the exam.

Ultimately, three internal candidates took the examination, passed it, and were promoted to the position of Captain.

C. The City's Investigation of the Association's E-Board

Despite this successful conclusion to the recruitment, Champion decided to investigate the E-Board's involvement in creating and distributing the "Do Not Apply" communication, which he believed might have been created or distributed in violation of City rules. Specifically, Champion testified he needed to determine the Association's intent in sending the communication, whether it had been prepared on City-time or with City-equipment, and that everything was "done above board."

Thus, on or around March 17, 2017, i.e., the day after the Captain examination, the City's Director of Human Resources and Records, Jayne Anderson, issued all five members of the Association's E-board an individually addressed memorandum notifying them of a fact-finding investigation by an independent, third-party investigator "regarding the publication of a post discouraging external applicants from applying for employment with the City[.]" Significantly, the memorandum warned that **"[t]he subject matter during this interview may lead to discipline against you**. Failure to attend the meeting will be considered an act of insubordination and can be an

independent basis for disciplinary action, up to and including dismissal." (Emphasis in original.)

The City separately questioned each E-Board member. Before beginning the investigative interrogation, the City's investigator required the E-Board members to sign an Administrative Investigation Advisement Form, acknowledging that they were the subject of an investigation that could lead to discipline. According to the transcripts of the interviews,[10] the City's investigator inquired about the identity of the persons within the Association and CPF responsible for the "Do Not Apply" communication, the conversations surrounding the publication of the communication, and the Association's intent and motivation for communicating with firefighters around the state in this fashion.

About six weeks after these interrogations, Champion issued a confidential memorandum notifying the E-Board members of the completion of the fact-finding investigation into the communication. Champion noted the purpose of the investigation had been (1) to find out if Department employees were "directly or indirectly" involved in the publication of the communication, and (2) if the communication "had any impact on the City's ability to recruit candidates for a Fire Captain position, and if so, what impacts." After reviewing the investigator's findings, the City concluded that the E-Board members were directly involved in sending the "Do Not Apply" communication, but also that there was insufficient basis to believe

[10] These transcripts were attached as Exhibit 13 to the investigator's final report and made part of the record in these proceedings pursuant to the parties' stipulation.

"the recruitment was detrimentally affected" as a result. Consequently, none of the E-Board members received formal discipline.

DISCUSSION

Although the Board reviews exceptions to a proposed decision de novo, to the extent that a proposed decision adequately addresses issues raised by certain exceptions, the Board need not further analyze those exceptions. (*County of Santa Clara* (2019) PERB Decision No. 2629-M, p. 6.) The Board also need not address alleged errors that would not impact the outcome. (*Ibid*.) With these principles in mind, we address whether: (1) the City had a duty to give the Association notice and an opportunity to bargain before deciding to permit non-employees to apply for the Captain positions, and (2) the City's decision to investigate the Association's E-Board constituted unlawful retaliation against protected conduct.

A. The City's Decision to Open the Recruitment to Non-Employees Constituted an Unlawful Unilateral Change.

California's labor relations statutes contemplate bilateral decision-making as to subjects within the scope of representation, though an employer has the right to impose new terms after bargaining in good faith, without committing unfair practices, from "inception through exhaustion of statutory or other applicable impasse resolution procedures." (*City of Glendale* (2020) PERB Decision No. 2694-M, p. 60; *City of San Ramon* (2018) PERB Decision No. 2571-M, p. 6; *Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M, pp. 54-55; *City of San Jose* (2013) PERB Decision No. 2341-M, p. 40.) The gravamen of any unilateral action is exclusion of employees through their chosen representative from participation in the decision-making process. Whether a unilateral action is the

creation, implementation or enforcement of policy, or a change to existing policy as contained in a written agreement, in written employer rules or regulations, or in an unwritten established past practice, our statutes require an employer contemplating a change in policy concerning a matter within the scope of representation to provide the exclusive representative notice and an opportunity to bargain. (*Pasadena Area Community College District* (2014) PERB Decision No. 2444, p. 12.)

Thus, a unilateral change violates the statutory duty to bargain in good faith if (1) the employer took action to change existing policy; (2) the policy change concerned a matter within the scope of representation; (3) the action was taken without giving the exclusive representative notice or opportunity to bargain over the change; and (4) the change has a generalized effect or continuing impact on terms and conditions of employment. (*City of Davis* (2016) PERB Decision No. 2494-M, p. 18, citing *Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262, p. 9.)

Here, we focus only on the first two elements. The City inexplicably has submitted numerous arguments as to the third element, even though it waived those arguments in front of the ALJ.[11] In order to deter gamesmanship, as well as for other

[11] When the Association sought to introduce evidence that the action was unilateral, i.e., that the City did not provide the Association notice and an adequate opportunity to meet and confer before deciding to open the recruitment to non-employees, the City's counsel stated that if the Association's purpose "is to get to the point that the City did not meet and confer over . . . the decision to allow external applicants [to] apply for the fire chief position, . . . We will stipulate that we did not meet and confer over that issue." Later, when the Association once more sought to introduce such evidence, the City's counsel again relied on the stipulation to keep such testimony out. And still later, when the Association sought to introduce evidence that it did not receive adequate advance notice of the City's decision, the ALJ and

equally strong reasons of judicial economy, we do not consider arguments the City waived. (*Los Angeles County Superior Court* (2018) PERB Decision No. 2566-C, p. 12 [Board is justified in declining to review an exception raising an issue that was not presented to the ALJ, and such considerations are even stronger when the excepting party affirmatively waived the issue].) As to the fourth element, the City did not except to the proposed decision's conclusion that its action had a continuing impact on the bargaining unit's terms and conditions of employment, and we concur with that conclusion.

1. Past Practice

A charging party can establish a change in policy with evidence of (1) changes to the parties' written agreements; (2) changes in established past practices; or (3) newly created policies, or application or enforcement of an existing policy in a new way. (*County of Monterey* (2018) PERB Decision No. 2579-M, p. 10.) Here, the Association's evidence focused both on the parties' existing past practice and the City's application of its Municipal Code to allow the first-ever open recruitment for Captain positions. On exceptions, the City contends that no past practice required it

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counsel for both parties again acknowledged there was no need for such testimony, since that was covered by the parties' stipulation. Consistent with these stipulations, the City's brief to the ALJ argued only the first two elements of the unilateral change test. In other words, since the City stipulated that it did not give adequate notice or meet and confer, it is unnecessary to consider its argument that the Association "failed to request bargaining." But even absent the stipulation, the City's argument would fail because the Association clearly sought to bargain over the proposed decision to open the recruitment and the impacts of such a change. Indeed, the Association' February 1 letter outlining its concerns came in response to Champion's request that the Association "meet and discuss the impacts" of the proposal to fly the Captain positions.

to maintain an internal Captain recruitment and that the Municipal Code gave it explicit authority to open the recruitment to non-employees. We reject both contentions.

Simply stated, a binding past practice is one which is "unequivocal, clearly enunciated and acted upon, and readily ascertainable *over a reasonable period of time* as a fixed and established practice accepted by both parties," or which is "regular and consistent" or "historic and accepted." (*County of Orange* (2018) PERB Decision No. 2611-M, pp. 10-11, fn. 7, citing *County of Riverside* (2013) PERB Decision No. 2307-M, p. 20.) Here, it is undisputed that the City always promoted Captains from within the rank-and-file and never permitted non-employees to compete for such positions. Indeed, Champion himself, who has worked for the Department since 1990, admitted this has always been true.[12] Such a longstanding status quo has all the attributes of a binding, unwritten past practice.

The City attempts to counter this undisputed evidence of past practice by asserting that its Municipal Code authorized it to conduct external recruitments. Certainly, section 20.09.1 of the City's Municipal Code purports to authorize the City to conduct an open (external) or promotional (internal) recruitment "when specifically requested by the appointing authority," as was the case here. But a local ordinance does not relieve the City of its statutory bargaining obligation, because "[l]abor relations in the public sector are matters of statewide concern subject to state legislation in contravention of local regulation." (*Huntington Beach Police Officers'*

[12] Additionally, in response to a request from its investigator for historical information about past Captain recruitments, the City furnished records showing that it recruited only internal candidates since 2012.

Assn. v. City of Huntington Beach (1976) 58 Cal.App.3d 492, 503.) In other words, the City may not enforce its Municipal Code in a manner that frustrates the declared polices and purposes of the MMBA, which favor bilateral negotiation of subjects within the scope of representation.

We also reject the City's contention that it was privileged under *Marysville Joint Unified School District* (1983) PERB Decision No. 314 (*Marysville*) to apply its Municipal Code in a manner that contradicted established past practice. As the ALJ noted in the attached proposed decision, at p. 18, *Marysville* deals only with clear and unambiguous contractual waivers found in negotiated memoranda of understanding and does not apply to a unilaterally adopted employer ordinance, which cannot constitute a waiver. (*City of Culver City* (2020) PERB Decision No. 2731-M, pp. 14-20.) The City thus misapprehends the law when it argues that the Municipal Code left it with discretion to hold its first open Captain recruitment without any bargaining obligation. Notably, if a union has not waived its right to bargain, then the MMBA imposes a bargaining obligation on the employer prior to exercising discretion on a negotiable topic. (*County of Kern* (2018) PERB Decision No. 2615-M, pp. 6-7.)[13]

[13] The City argues that in the past it held open recruitments for other positions but had no need to do so for Captains, because there were always internal applicants willing and able to apply. However, this points precisely to the reasons the MMBA requires bargaining in advance of a decision to change an established practice: the mediating impacts of meeting and conferring could lead the Association to convince its members to apply, or convince the City to sweeten the incentive to do so by fixing employees' loss of seniority or other issues. (Cf. *Lucia Mar Unified School District* (2001) PERB Decision No. 1440, adopting proposed decision at pp. 42-43 & 45 [personnel problems are particularly amenable to negotiation, and neither the employer nor PERB may assume such negotiations may fail; the law "does not

In its briefing to the Board, the City acknowledges *Marysville* held that "where *contractual* language is clear and unambiguous, it is unnecessary to go beyond the plain meaning of the *contract* itself to ascertain its meaning," and similarly cites *Rio Hondo Community College District* (1982) PERB Decision No. 279 for the proposition that "even if an employer has not chosen to enforce its *contractual* rights in the past," this "does not mean that, ipso facto, it is forever precluded from doing so." (emphasis supplied.) The City therefore shifts its argument from contractual waiver to waiver by conduct. But the City cannot allege facts showing such a waiver, such as that it provided an opportunity to bargain and the Association declined. (*City of Culver City*, *supra*, PERB Decision No. 2731-M, p. 18.) The City instead claims the Association waived its right to bargain over changes to future recruitment practices merely because it "was aware of the provisions of the Municipal Code, yet nevertheless elected not to act on that knowledge." Given that Captain recruitment has always been internal-only, if there is any party whose conduct arguably shows conscious acquiescence to the status quo, it would be the City, not the Association. There was no reason for the Association to take any action given the established practice of considering only internal applicants for Captain positions and the City's duty to bargain before implementing its policy in a new way that changed the practice.

2. Promotional Opportunities Are within the Scope of Bargaining

As noted, the proposed decision relied on *Alhambra*, *supra*, PERB Decision No. 2139-M, for its conclusion that promotional opportunities like the ones at issue

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mandate success, but only requires a good faith effort by the parties to reach agreement"].)

here were not within the MMBA's scope of representation. However, in *Orange*, *supra*, PERB Decision No. 2663-M, the Board overruled *Alhambra* on this point and held that changes to promotional procedures or criteria are within the scope of representation because they are among the decisions that directly affect the employment relationship. (*Id*. at pp. 7 & 12-15 [explaining that *Alhambra* was inconsistent with other PERB and appellate precedent, and misapplied the test set forth in *International Assn. of Fire Fighters, Local 188, AFL-CIO v. PERB* (2011) 51 Cal.4th 259, 272-273 (*Richmond Firefighters*).) This case falls squarely within that holding and illustrates the significance of promotional procedures and opportunities to the employment relationship.

Under the MMBA, the scope of representation includes all matters relating to employment conditions and employer-employee relations, including wages, hours, and other terms and conditions of employment. (MMBA, § 3504.) Fundamental managerial decisions regarding the merits, necessity, or organization of public services, however, are outside the scope of representation and therefore not subject to the MMBA's meet-and-confer requirement. (*Ibid*.)

From this statutory language, the Supreme Court has distilled three categories of managerial decisions: (1) "decisions that 'have only an indirect and attenuated impact on the employment relationship' and thus are not mandatory subjects of bargaining," such as advertising, product design, and financing; (2) "decisions directly defining the employment relationship, such as wages, workplace rules, and the order of succession of layoffs and recalls," which are "always mandatory subjects of bargaining" and (3) "decisions that directly affect employment, such as eliminating

jobs, but nonetheless may not be mandatory subjects of bargaining because they involve 'a change in the scope and direction of the enterprise' or, in other words, the employer's 'retained freedom to manage its affairs unrelated to employment.'" (*Richmond Firefighters*, *supra*, 51 Cal.4th at pp. 272-273.)

If the decision at issue is in the first or second category, that is the end of the inquiry, and a decision in the second category is bargainable irrespective of whether it has a significant and adverse consequence on employees. (*Orange*, *supra*, PERB Decision No. 2663-M, p. 7, citing *County of Orange* (2018) PERB Decision No. 2594-M, p. 19 [noting, for instance, that even a wage increase, which benefits employees, is bargainable].)[14] If the matter is in the third category, we apply a balancing test, under which bargaining is required only if "the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business." (*Id*., quoting *Richmond Firefighters*, *supra*, 51 Cal.4th at p. 273.)

In *Orange*, we explained that changes to promotional procedures and criteria usually fall in the second *Richmond Firefighters* category, because they directly define the employment relationship. (*Orange*, *supra*, PERB Decision No. 2663-M, pp. 7-8.)[15]

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[14] See Zerger, ed. (2nd ed. 2019) California Public Sector Labor Relations § 8.02[2] ["By explaining that decisions directly defining the employment relationship are always mandatory subjects of bargaining, *Richmond Firefighters* . . . instructs that PERB and the courts need not ask whether such a decision has a 'significant and adverse effect' on wages, hours, or other terms and conditions of employment, nor balance that effect against the employer's need for unencumbered decisionmaking."]

[15] In the alternative, *Orange* held that even to the extent promotional criteria fall into the third category of decisions—and the balancing test therefore applies—the benefits to collective bargaining and labor relations outweigh the burden placed on management. (*Orange, supra*, PERB Decision No. 2663-M, pp. 13-15.)

For example, in a landmark case, the Supreme Court held that a union's proposals about vacancies and promotions were mandatory subjects of bargaining because they concerned job security and opportunities for advancement and therefore related directly to the terms and conditions of the represented employees' employment. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 618 (*Vallejo*).) Following *Vallejo*, the Court of Appeal stressed the importance of promotional opportunities to current employees in finding that promotional procedures are an important "condition of employment." (*International Association of Fire Fighters Union v. City of Pleasanton* (1976) 56 Cal.App.3d 959, 971 (*Pleasanton*).) The Board, for its part, has cited to *Vallejo* and *Pleasanton* in noting that promotional criteria and procedures fall within the scope of representation. (*City of Riverside* (2009) PERB Decision No. 2027-M, p. 14.)

The facts of this case well illustrate why promotional opportunities are bargainable, as the City's decision to open the recruitment to outside candidates related directly to the bargaining unit's terms and conditions of employment. In addition to the subjects identified in our prior cases, including seniority, opportunity for advancement, etc., the decision to recruit an outside candidate to lead bargaining unit firefighters implicated matters of safety. As the Association made clear in its letter of February 1, 2017, a firefighting crew must have confidence in its frontline leaders, who regularly make life-or-death decisions in emergencies. Introducing an outsider who is unfamiliar with, inter alia, the crews, the City's hazards, and the peculiarities of the Department could well lead to significant safety risks. The Supreme Court has long recognized that workplace safety is firmly within the scope of representation.

(*Richmond Firefighters*, *supra*, 51 Cal.4th at p. 275, citing *Vallejo*, *supra*, 12 Cal.3d at p. 619 [questions of employee safety are within the scope of representation].) These considerations support the precedential rule set forth in *Orange* and our conclusion here that the Association was entitled to bargain about the City's decision to alter and curtail promotional opportunities by holding its first ever open recruitment for Captain.

Of course, we are mindful of the City's concerns about persistent vacancies in the Captain rank. However, the duty to bargain is not a fetter or snare for the unwary. Rather, as noted *ante*, bargaining provides a valuable opportunity to air different perspectives and thereby improve labor relations, and one can never predict the outcome of such efforts in advance. If such bargaining had failed, the City would have had the power to implement its last proposal on the matter. Even when it is necessary for an employer to impose after impasse, the parties' efforts in exhausting their bargaining obligations are far from wasted, since it leaves employees knowing that they had the full opportunity for input.[16]

B. The City's Investigation of the Association's E-Board Constituted Retaliation.

The proposed decision concluded that the City retaliated against the Association's five E-Board members when it investigated protected activities, namely the publication of the "Do Not Apply" communication. The City excepts to this conclusion, contending that the first version of the communication was not protected

[16] The City has not attempted to argue that it was excused from bargaining by a compelling operational necessity that left insufficient time for negotiations. (See *Calexico Unified School District* (1983) PERB Decision No. 357, adopting proposed decision at p. 20.)

because it falsely stated that the City had ignored qualified internal candidates, that it was published with actual malice, and that both versions of the communication disrupted the Department's operations by dissuading qualified outside candidates from applying. Alternatively, the City argues that there was insufficient evidence of nexus between the communication and the decision to investigate the E-Board members, and that the investigations did not amount to an adverse action.[17] Finally, the City argues that it had legitimate, non-retaliatory reasons to conduct the investigation.[18] Like the ALJ, we reject these contentions. Although the proposed decision adequately addresses them, we supplement the proposed decision with limited further analysis regarding the protected status of the communication and the adverse nature of the investigation.

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[17] When we refer to the City's investigations, we include by extension the City's threat of discipline. Although a threat and an investigation can constitute separate adverse actions (*Chula Vista Elementary School District* (2018) PERB Decision No. 2586, p. 25 (*Chula Vista*)), in this case we do not disturb the ALJ's decision to follow the parties' lead and consider them in an integrated fashion.

[18] We reject this exception because the City has already admitted it initiated the investigations in response to the "Do Not Apply" communication. As in *Chula Vista*, *supra*, PERB Decision No. 2586, the employer investigated employees for a written communication which itself provided all the information the employer needed to determine that the E-Board members maintained the MMBA's protection. (*Id*. at p. 32 ["Under these circumstances, an appropriate action would have been to seek legal advice regarding the protected status of the [communication], and not to demand that [the employee] appear in person for questioning."].) Thus, our analysis turns entirely on (1) whether the communications at issue are protected or unprotected, and (2) whether the City's investigation was an adverse action. (*Rancho Santiago Community College District* (1986) PERB Decision No. 602, pp. 11-12 & 14 [where employer explicitly states that it disciplined employee as a result of employee statements, there is no question as to motivation and PERB's task is to determine whether the statements were statutorily-protected].)

1. The "Do Not Apply" Communication Was Protected

The MMBA guarantees public employees "the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." (MMBA, § 3502; *International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191, 197-198.) Among these rights is the right to communicate with fellow workers and other persons for the purpose of publicizing a labor dispute. Indeed, "there is no more fundamental right" afforded employees under PERB-enforced statutes than the right to communicate with others about working conditions." (*Los Angeles Community College District (Perez)* (2014) PERB Decision No. 2404, p. 11, fn. 5.) On this basis, we conclude that the "Do Not Apply" communication was presumptively protected because its central purpose was to apprise others of a workplace dispute and to enlist their support.

Moreover, the MMBA protects even those communications that criticize management or working conditions, unless it is shown by clear and convincing evidence that the employees published a false statement with actual malice. (*Chula Vista*, *supra*, PERB Decision No. 2586, pp. 16-17 & fn. 8; see also *County of Riverside* (2018) PERB Decision No. 2591-M, pp. 6-7.) Under *Chula Vista*, a party asserting that presumptively protected speech is in fact maliciously false must prove that

> "(1) the employee's statement was false and (2) the employee made the statement 'with knowledge of its falsity, or with reckless disregard of whether it was true or false.' [(*Sutter Health v. UNITE HERE* (2010) 186 Cal.App.4th 1193, 1209 (*Sutter Health*); *Triple Play Sports Bar and Grille* (2014) 361 NLRB 308, 312.)] This standard focuses on the employee's subjective state of mind, not on whether

> a reasonable person would have investigated before making the statement. (*Sutter Health*, *supra*, 186 Cal.App.4th at pp. 1210-1211.) Even gross or extreme negligence as to the statement's truth is insufficient to prove the actual malice necessary to strip employee speech of statutory protection. (*Id.* at p. 12-11.)

Here, the City's case rests on a single word in the first communication—"Outside Search for Captain Ignores Past Practice and Qualified Internal Candidates." (Emphasis supplied.) But the word "ignores" does not come even close to meeting the exacting "clear and convincing" standard for proving that E-Board members made a false statement with actual malice. First, the word does not render the statement false. Rather, the City did ignore past practice, and in doing so it arguably ignored the protests and concerns of the qualified internal candidates who asked the City to address those perceived unfair features of the City's approach that disincentivized existing City employee from applying. Second, even if the reference to internal candidates was ambiguous, i.e., susceptible to a false interpretation, that would be insufficient to constitute clear and convincing evidence that the E-Board members made a false statement with actual malice. In fact, the Association took immediate steps to clarify the matter by issuing a second version of the communication that removed all ambiguity, thus demonstrating nothing like a reckless disregard for the truth. Since the City can at most show only simple negligence on the part of the E-Board, its arguments are insufficient to rob the communication of its protected status even assuming for the sake of argument that it was false or misleading.

Finally, the City's claim that the communication disrupted its operation by preventing qualified outside candidates from applying is belied by the results of its own

investigation, which found no basis for any such conclusion. In any event, to one degree or another, many protected concerted activities are undertaken for the purpose of disrupting the employer's unfair practices and operations. In the absence of evidence that such activities "create a substantial and imminent threat to the health or safety of the public" (*County Sanitation Dist. No. 2 v. Los Angeles County Employees Assn.* (1985) 38 Cal.3d 564, 586) there is no basis to believe that a communication like the one at issue here was rendered unprotected by its alleged success.

We conclude, therefore, that both versions of the "Do Not Apply" communication were protected by the MMBA.

2. The Investigations Constituted Adverse Actions

The City argues that the investigations were mere fact-finding exercises and were not adverse employment actions. We disagree. The initiation of an investigation may be considered an adverse action against the investigated employee, regardless of whether disciplinary action actually results. (*City of Torrance* (2008) PERB Decision No. 1971-M, pp. 16-17 (*Torrance*); *State of California (Department of Youth Authority)* (2000) PERB Decision No. 1403-S, p. 32; *California Union of Safety Employees (Coelho)* (1994) PERB Decision No. 1032-S, p. 12 (*CUSE*).) The ultimate question is whether a reasonable person experiencing the same circumstances as the employee would consider the action to have an adverse employment impact. (*Chula Vista, supra,* PERB Decision No. 2586, p. 25.) The question often turns on the degree of adversity present in the investigation and thus depends on the facts of any given case. (*Service Employees International Union, Local 221 (Gutierrez)* (2012) PERB Decision No. 2277-M, p. 9.) Here, we believe the investigations were freighted with

sufficient adversity to constitute adverse actions for purposes of establishing retaliation.

The investigations involved a high degree of formality, reflected by the fact that the City expressly notified the E-Board members on multiple occasions that they faced the possibility of discipline, as well as the fact that the investigation lasted several months and resulted in a lengthy written report. (*CUSE*, *supra*, PERB Decision No. 1032-S at p. 6; *Torrance*, *supra*, PERB Decision No. 1971-M, p. 16.) We reject the City's assertion that its disciplinary warnings were necessitated by the Firefighters Procedural Bill of Rights or were an empty formality. (Gov. Code, § 3250 et seq.) The warnings were serious in their appearance, and the fact that a statute may have required the warnings is insufficient to reassure reasonable employees that an investigation into their protected activity will leave untarnished their future promotion prospects, ability to obtain desired assignments, and other employment conditions.

While these facts alone are sufficient to support the ALJ's finding that the investigation constituted adverse action, the content of the City's questions further supports this finding.[19] In *City of Commerce* (2018) PERB Decision No. 2602-M, p. 6, the Board held that even in those limited instances in which an employer may lawfully interview employees about their protected activities,[20] the employer must abide by the

[19] No party has asked us to determine whether, pursuant to our unalleged violation test, we may consider whether these questions constitute a separate interference claim, and we decline to do so sua sponte. We therefore find only that the City interfered with protected rights in a derivative fashion when it retaliated against protected activities, as alleged in the complaint.

[20] See, e.g., *Chula Vista*, *supra*, PERB Decision No. 2586, pp. 29-32 [employer may ask about protected activities only if a facially valid complaint legitimately calls

following safeguards enumerated in *Johnnie's Poultry Company* (1964) 146 NLRB 770, enf. den. (8th Cir. 1965) 344 F.2d 617:

> "[T]he employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees."

(*Id*. at pp. 774-775, footnotes omitted.)

Here, the investigations sought to determine not only if the E-Board members had produced the "Do Not Apply" communication during work time or with City resources, which might have been legitimate subjects for inquiry if the City had a uniformly enforced policy prohibiting such conduct, but also the subjective motivations and intent underlying the communication. Moreover, the City asked E-Board members about their conversations with each other and CPF staff, all of which concerned protected activities. Such questions were out-of-bounds because employees have the right to keep confidential their union activities, including their participation in activities for mutual aid and protection. (See, e.g., *Guess?, Inc.* (2003) 339 NLRB 432, 434.) Questions like these that are designed to uncover protected activities have a chilling

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into question whether employees lost legal protection via their own misconduct, the alleged misconduct was not simply a written communication that can be assessed without further investigation, and the employer promptly ceases the investigation and notifies all affected employees regarding its outcome if it acquires information indicating that the alleged conduct was protected].

effect on the exercise of employee rights. (*County of Merced* (2014) PERB Decision No. 2361-M, p. 11.) Thus, the City's failure to tailor its questions as described in *City of Commerce*, *supra*, PERB Decision No. 2602-M, and its failure to offer the required assurances described above, further supports our conclusion that its investigation was objectively adverse and constituted unlawful retaliation.

ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, it has been found that the City of Santa Maria (City) violated the Meyers-Milias-Brown Act (MMBA or Act) (Gov. Code, § 3500 et seq.). The City violated MMBA sections 3503, 3505, 3506, and 3506.5, subdivisions (a), (b), and (c), and therefore committed unfair practices under MMBA section 3509, subdivision (b), and Public Employment Relations Board (PERB or Board) Regulation 32603, subdivisions (a), (b), (c), when it (1) failed to provide notice and an opportunity to bargain over the decision and foreseeable effects of the decision to permit non-employees to compete for vacant Captain positions; and (2) initiated an investigation into the conduct of each of the members of the Santa Maria Firefighters' Association (Association) E-Board in response to his or her protected concerted activity and protected communications.

Pursuant to MMBA section 3509, subdivision (b), it is hereby ORDERED that the City, its governing body, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Deciding to conduct, or implementing, an "open" recruitment for vacant Captain positions without providing the Association with advance notice and an opportunity to meet and confer over the decision and its foreseeable impacts.

2. Retaliating against members of the Association E-Board because of their protected concerted activities and communications.

3. Denying bargaining unit employees the right to be represented by the Association.

4. Denying the Association the right to represent its members.

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

1. Provide the Association with advance notice and an opportunity to meet and confer in good faith over the decision and foreseeable effects of any decision to run an “open” recruitment for vacant Captain positions.

2. Destroy and rescind from employees’ personnel files any and all documentation connected to the investigation against members of the Association’s E-Board.

3. Within 10 workdays following the date this decision is no longer subject to appeal, post at all work locations where notices to City employees in the bargaining unit represented by the Association 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 employees in the bargaining units

represented by the Association. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.[21]

4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. The City shall provide reports, in writing, as directed by the General Counsel or his designee. All reports regarding compliance with this Order shall be concurrently served on the Association.

Member Krantz joined in this Decision.

[21] In light of the ongoing COVID-19 pandemic, Respondent 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 Respondent so notifies OGC, or if Charging Party requests in writing that OGC alter or extend the posting period, require additional notice methods, or otherwise adjust the manner in which 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 Respondent to commence posting within ten workdays after a majority of employees have resumed physically reporting on a regular basis; directing Respondent 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 Respondent to mail the Notice to those employees with whom it does not customarily communicate through electronic means.

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-1210-M, *City of Santa Maria Firefighters' Association v. City of Santa Maria*, in which all parties had the right to participate, it has been found that the City of Santa Maria 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. Deciding to conduct, or implementing, an "open" recruitment for vacant Captain positions without providing the City of Santa Maria Firefighters' Association (Association) with advance notice and an opportunity to meet and confer over the decision and its foreseeable impacts.
2. Retaliating against members of the Association E-Board because of their protected concerted activities and communications.
3. Denying bargaining unit employees the right to be represented by the Association.
4. Denying the Association the right to represent its members.

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

1. Provide the Association with advance notice and an opportunity to meet and confer in good faith over the decision and foreseeable effects of any decision to run an "open" recruitment for vacant Captain positions.
2. Destroy and rescind from employees' personnel files any and all documentation connected to the investigation against members of the Association's E-Board.

Dated: _____ City of Santa Maria

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.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CITY OF SANTA MARIA FIREFIGHTERS' ASSOCIATION, Charging Party, v. CITY OF SANTA MARIA, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-1210-M PROPOSED DECISION (March 29, 2019)

Appearances: Adams, Ferrone & Ferrone by Stuart Adams, Attorney, for City of Santa Maria Firefighters' Association; Liebert Cassidy Whitmore by Che Johnson, Attorney, for City of Santa Maria.

Before Valerie Pike Racho, Administrative Law Judge.

INTRODUCTION

In this case, a union representing public employees alleges that a public agency violated its duty to meet and confer in good faith under the Meyers-Milias-Brown Act (MMBA)[1] by changing a long-standing past practice of running internal promotional examinations, and by retaliating against union officials because of their protected concerted activities and communications with the leadership of other unions and employees represented by other unions. The public agency denies all violations.

PROCEDURAL HISTORY

On July 28, 2017, the City of Santa Maria Firefighters' Association (SMFA or Union) filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) against the City of Santa Maria (City) alleging a failure to meet and confer on a matter within

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

the scope of representation and retaliation against Union board members for their protected concerted activity in violation of the MMBA.

On September 18, 2017, the City filed a position statement responding to SMFA's allegations.

On December 26, 2017, PERB's Office of the General Counsel issued a Complaint alleging that the City's conduct violated MMBA sections 3503, 3505, 3506.5, subdivisions (a), (b), and (c) and PERB Regulations.[2]

On January 5, 2018, the City filed its Answer to the Complaint, admitting certain facts but denying all material allegations of wrongdoing and alleging various affirmative defenses.

On January 16, 2018, PERB conducted an informal settlement conference. The dispute was not resolved.

On April 9 and 10, 2018, a formal hearing was held. The parties agreed to a staggered briefing schedule.

The case was fully submitted for proposed decision on August 3, 2018, upon receipt of the final closing brief.

FINDINGS OF FACT

The Parties and Jurisdiction

The City is a public agency within the meaning of MMBA section 3501, subdivision (c), and is therefore within PERB's jurisdiction. SMFA is an exclusive representative of an appropriate bargaining unit of City firefighter employees within the meaning of PERB Regulation 32016, subdivision (b). As relevant here, the positions of firefighter, engineer, and captain are included within SMFA's bargaining unit. The Union's executive board (E-board)

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

consists of President Anthony Morales (captain), 1st Vice President Chad Wennerstrom (captain), 2nd Vice President Jill Hoover (engineer/acting captain), 3rd Vice President Clint McIntosh (engineer), and Secretary/Treasurer Anthony James Tevis[3] (firefighter).

The Fire Department's Recruitment for Captain in 2016

In March 2016, then-interim chief Scott Kenley first raised the possibility with SMFA of running an "open" recruitment for the position of captain, which would allow people who were not already employees of the fire department to apply for the position.[4] Kenley cited low interest and applications among internal candidates as the reasons for the idea. The fire department had never allowed external applicants to compete for the promotional positions of engineer and captain within the bargaining unit. In contrast, the entry level position of firefighter had traditionally been subject to open recruitment, as well as upper management positions that are outside of the bargaining unit, including battalion chief, deputy chief, and chief.

Morales discussed the issue with Kenley informally, explaining that SMFA was opposed to opening up the recruitment to outsiders. Kenley informed Morales that he did not believe the decision required a formal meet-and-confer process, but he was open to discussion and input from SMFA. Morales confirmed that no formal bargaining over the issue took place, and the parties were able to resolve the issue without executing a side letter or memorandum of understanding. Ultimately, the fire department ran a recruitment for the captain position that

[3] According to the Reporter's Transcript, Mr. Tevis spelled his last name with an "a," i.e., "Tevas," but the charge documents and hearing exhibits, which include official fire department correspondence, note the spelling of his last name as "Tevis." I therefore conclude that Tevis is the correct spelling.

[4] Kenley did not testify.

year that was not open to outside applicants. A sufficient number of internal applicants applied, passed their examinations, and were promoted to the position of captain.

The Fire Department's Recruitment for Captain in 2017

1. Initial Discussions

Leonard Champion was appointed as chief sometime before January 17, 2017.[5] On that date, the parties held a Labor-Management meeting. The fire department had 10 open positions to fill at the time, at least three of which were for captain. Champion raised concerns during the meeting that there did not appear to be adequate interest among eligible employees for the captain positions. Champion noted that many engineers were turning down "move-ups," where an engineer works out-of-class as an acting captain after completing a task book to become qualified.[6] The fact that engineers were passing up the opportunity to become familiar with the duties of a promotional position before applying indicated to him that there was a lack of interest in promoting by current staff. SMFA again opposed the plan to hold an open recruitment for captain. Morales suggested that to incentivize move-ups, there should be greater out-of-class pay. Hoover also attended the meeting. She was not too worried about the issue because she did not think the fire department would ever follow through with an open recruitment for captain.

On January 25, 2018, Champion e-mailed members of the E-board regarding the captain recruitment. On this date, several E-board officers were attending a union conference. Chris Mahon, a district representative of California Professional Firefighters (CPF), which is a

[5] Champion was a career employee of the fire department before becoming chief. All members of the E-board had worked with him for years and knew him well.

[6] A task book refers to a series of duties that must be successfully performed before an employee is deemed qualified to test for the next higher position.

statewide affiliate organization of the International Association of Fire Fighters (IAFF), was also attending the conference. SMFA is affiliated with both CPF and IAFF. SMFA is one of 40 locals assigned to Mahon. He provides consultation and advice to local affiliates over labor representation issues. Mahon was present when Morales received Champion's e-mail. Champion stated that because of his continuing concerns regarding an inadequate candidate pool he was contemplating running an open captain recruitment with a target date of February 22, 2017 for the posting. Champion wrote, "If the Executive Board would like to meet and discuss the *impacts* of this decision, please let me know by February 1, 2017." (Emphasis added.)

Mahon told Morales to try to set up a meet and confer session right away with Champion. If Champion was then still inclined to run an open recruitment, Mahon suggested that CPF could issue a statewide "Do Not Apply" alert to its members. Mahon described CPF leadership alerts as "internal member communications" that are used to inform all locals across the state regarding issues that CPF deems to be of statewide concern. A "Do Not Apply" alert is an example of this type of communication. It is used when there is an external recruitment over which a local has not reached an agreement with management. Mahon testified that external recruitment for the promotional position of captain is rare in a full-time department like Santa Maria. It is of concern to CPF and locals because it reduces the opportunity for promotion for existing employees. CPF considers the issue to be a mandatory subject of negotiations. Part of the aim of such an alert is to make applicants aware of potential violations of law in the hiring process. CPF considers the subject of open promotional recruitments to be an issue of statewide concern because if more employers start doing it unchecked then MMBA violations may become more commonplace. Champion confirmed

that it is unusual and "a big deal" for the fire department to make such a decision. He said it had always been the preference and practice of the department, before this instance, to limit recruitment for captain positions to existing employees.

2. February 1, 2017 Meeting

SMFA officers met with Champion on February 1, 2017. They prepared a letter outlining their concerns over the proposed open recruitment that the parties discussed during the meeting. The letter first addressed why SMFA believed that employees were passing on the acting captain status, stating:

> Why don't we look at the reasons why current eligible engineers have decided not to take the current test:
>
> 1. Seniority—lose it when you promote
> 2. Less [overtime] opportunities
> 3. Not able to work at ARFF[7] anymore
> 4. Extra work load, responsibility [without] adequate pay raise (not proportionate to Captain to [Battalion Chief])
> 5. Another year of probation as well as a daunting task book
> 6. The complexity of the testing process, when you can just act for similar pay

Next, SMFA highlighted a number of issues causing it concern should the fire department hire an outside captain:

> 1. How can they be an effective leader when they don't know how SMFD operates or how we connect with our community members—it simply isn't something that can be read in a week or learned during a recruitment process[.]
> 2. At what step/pay grade would they come in?
> 3. What retirement formula do they come in at?
> 4. Seniority—a brand new Captain could come in and have more seniority than a 20-year veteran?
> 5. Do they have to go through an academy? If so, how much time and money are we going to spend on bringing them up to speed? Aren't we better off using those resources to empower our own people to promote?

[7] This acronym was not defined in the record.

6. Can they work down? As a firefighter or an engineer? Do they have to do those taskbooks? Could they drive our engines?
7. Would they have applicable experience for respected stations? If they don't have wildland experience, would they be able to go station 3 or 5? No truck experience, can they work at station 1?
8. Would they come in with a CPAT[8]?
9. Would we allow two people from the outside to work together? Example: an outside Captain and Engineer are working on an engine leaving the Firefighter as they only person that knows the department and the city.
10. Why are they leaving their current job? What issues are they running from?
11. Will they go through a "Lateral Captain Taskbook"?

Like Kenley, Champion stated that the decision to open the captain recruitment was not subject to formal meet and confer. Champion contended that it was a management right to run an open recruitment. He did not cite or mention the City's Municipal Code as providing the authority. None of the SMFA witnesses were familiar with the particulars of the Municipal Code as it applied to the City's hiring practices but all were aware that the code supplied relevant procedures. Wennerstrom attended the meeting and said that Champion listened to SMFA's concerns as outlined in the letter, but Champion did not really address the issues. Champion testified that he told SMFA representatives that "a lot of these items are negotiable items that would have to be handled with the City," and also noted that he lacked "direct control" over those matters. Morales testified that they left the meeting with the understanding that Champion would talk directly to the engineers who were eligible to apply for captain to gauge the employees' interest in the positions. There is nothing in the record to suggest that SMFA objected to Champion communicating directly with employees.

[8] This acronym was not defined in the record.

3. Champion's Communications with Employees and SMFA after the February 1 Meeting

Champion testified about his conversations with engineers after meeting with SMFA on February 1, 2017. He wanted eligible engineers to answer three basic questions—will they test; if so, will they put their "best foot forward"; and if offered the position, will they accept? He communicated with all of the employees within three days of the February 1 meeting, trying to make clear that he was not pressuring anyone to take the examination. Three engineers told him flatly they were not interested in the position and would not test. One said he would take the test and put forth maximum effort but would not accept the position if it was offered to him. Two candidates answered affirmatively to all of Champion's questions, but also stated that they would only do it to prevent an outside hire. One candidate was very strongly interested in the position. Hoover told Champion she was only 70 percent likely to apply and wished that there was more time to make the decision.[9]

After Champion communicated with each of the eligible engineers, he was still concerned that there were too few internal candidates genuinely interested in promoting. He then sought and received approval from the City's human resources department to run an open recruitment for captain. On the evening of February 6, 2017, Champion e-mailed Morales to inform SMFA of his decision. Morales responded that the issue was within the scope of representation and therefore required meeting and conferring. Champion requested that Morales obtain a written legal opinion from SMFA regarding its position. This was the first point that Champion understood SMFA to be making a formal request to bargain. He

[9] Out of the employees who were questioned by Champion, only Hoover testified. Champion's testimony about the statements of the others is considered only for how the conversations influenced Champion's state of mind.

considered the preceding discussions over the issue to have been an informal process. Morales said he would work on obtaining a legal opinion from SMFA's attorney.

According to Champion, he was told around February 9, 2017, that SMFA's legal counsel was still drafting its response regarding the matter being within the scope of representation. Someone from human resources also informed Champion around this date that since the recruitment was going to be open, more time was required for the application period. On February 10, 2017, having still not received SMFA's legal opinion, Champion determined to proceed with the posting of the position. Champion testified that he notified each member of the E-board at their work and personal e-mail addresses that the position was to be flown that day. However, the parties stipulated that Champion did not directly notify SMFA that the position was going to advertised to outside applicants before the posting was publicized. Hoover testified that she learned of the posting from friends who work at another local fire department and she called Morales with the news. Morales and Wennerstrom also testified that they learned about the posting from external sources. SMFA officers were surprised that the posting had been flown on February 10, instead of February 22, as Champion had previously stated.

4. Morales Asks CPF to Issue a "Do Not Apply" Alert

Around February 18 or 19, 2017, Morales contacted CPF representative Mahon with the news that Champion had posted the open recruitment and therefore did not appear to be willing to meet and confer with SMFA. Mahon suggested going forward with the "Do Not Apply" alert (hereafter, "alert") and Morales agreed. Morales was the only E-board member that communicated with CPF about the alert. CPF staff were responsible for the format and content of the alert. Morales saw it for the first time on February 21, 2017, which appears to

be the date it was issued publicly. He was immediately concerned by some of the wording. The alert stated, in part:

> URGENT – PLEASE POST: DO NOT APPLY TO SANTA MARIA FIRE DEPARTMENT
>
> Outside Search for Captain Ignores Past Practice and Qualified Internal Candidates

(Emphasis in original.)

Morales thought that the latter statement above could imply that the fire department was not permitting qualified internal candidates to test for the position, which was incorrect. Morales immediately tried without success to reach Mahon. Morales then promptly made contact with someone else at CPF and asked for the alert to be revised. Within hours, a corrected version was issued by CPF stating in relevant part, "Outside Search for Captain At Odds With Past Practice."[10] The alert continued:

> Brothers and Sisters:
>
> The Santa Maria Fire Department has chosen to recruit for fire captain by opening the position to outside candidates. The effort to search outside is not in accordance with long-standing past practice to promote from within.
>
> Currently there are highly qualified internal candidates for the captain's post.
>
> Recruiting outside candidates for this position would be a direct affront to a long-standing principle and a blow to morale.
>
> Local 2020 respectfully ask[s] for your help and support by **not applying for the captain's post in Santa Maria** and further asks that you help get the word out to our affiliated brothers and sisters and post on union bulletin boards.

[10] The text from the previous version in all capital letters remained unchanged in the updated alert.

Please DO NOT APPLY in Santa Maria Fire Department.

(All emphasis in original.) The alert was issued under Morales's name as the president of SMFA.

5. Champion's Reaction to the Alert

Champion found out about the alert from the president of another local firefighters' union on or around the date it was issued by CPF. He testified that he was shocked that SMFA had decided to air their dispute statewide. He also believed that the alert did not paint an accurate picture of all the facts with which he was dealing, especially the low interest among the qualified internal candidates. Morales, Wennerstrom, and Hoover all testified that the purpose of alert was not to discourage outside applicants from applying, but to get Champion to the bargaining table. Hoover explained that having worked with Champion for many years before he was chief, they knew Champion was familiar with the work of CPF. They believed that Champion would understand the seriousness of the issue once he saw the alert and be more willing to negotiate. Morales said that he had intended to send it to Champion directly, but Champion had already seen it and contacted him about it before he had the chance to do so.

On February 27, 2017, Champion issued a lengthy memorandum to employees with verbatim copies of both versions of the alert embedded within the document. Champion explained his view of the events that led to the decision to run an open recruitment for captain and summarized all communications and meetings with SMFA over the issue. Champion stated that the alert brought "discredit" to the fire department and that he had a "professional obligation to set the record straight." Champion cited City "Municipal Code Section 2-20.09.1" as authorizing open recruitments. In reference to the meeting with SMFA on February 1, 2017, Champion stated that "[t]he arguments presented by Local 2020 leadership

were purely emotional and provided no substantive facts[.]" In his testimony, however, Champion conceded that most of the concerns raised by SMFA in its February 1 letter were legitimate.

6. The City's Personnel Rules

The City's hiring policies are embodied in its Municipal Code. Relevant here, Municipal Code Section 2-20.09.1, subdivisions (b)(1) and (2), states in part:

> (b) Recruitment Process: The City Manager shall schedule open or promotional recruitments based on vacancies or anticipated vacancies to meet the need in the City service[.]
>
> (1) Open Recruitments: Open recruitments may be scheduled when it is not practical to fill vacancies by promotion or when specifically requested by the appointing authority, with the approval of the City Manager. Open recruitments shall be open to all applicants who meet the minimum requirements for the position in accordance with these chapters.
>
> (2) Promotional Recruitments: Promotional recruitments are open to all City employees who [] meet the minimum requirements for the position in accordance with these chapters.

7. The Captain Testing Process

The fire department received between 14 and 16 applications from outside applicants for the open captain positions. Champion said four of them were deemed qualified and invited to take a written examination to be held on or around March 16, 2017. One of the four external applicants who had been invited to the examination notified the fire department beforehand that he would not be able to appear for the test. The other three external applicants did not appear for the examination on March 16 without prior notice or explanation. Champion did not contact them to ask why that they did not take the test. He also did not believe that anyone else from the fire department or City contacted the external applicants to inquire in that regard.

There were around six internal applicants. Up to four of them were deemed qualified to take the written examination. According to Champion, three of the internal candidates took the examination, passed it, and were promoted to the position of captain.

The Investigation of the E-board

On or around March 17, 2017, the next day after the captain examination was held, all five members of the E-board were served with an individually addressed memorandum notifying of a fact-finding investigation by an independent, third-party investigator "regarding the publication of a post discouraging external applicants from applying for employment with the City[.]"[11] E-board members were advised of the date, time, and location of their interviews and informed it would be recorded. They were instructed to fully cooperate with the investigator and to turn over any relevant documentary or photographic evidence to him. The memoranda also warned that, "**The subject matter during this interview may lead to discipline against you.** Failure to attend the meeting will be considered an act of insubordination and can be an independent basis for disciplinary action, up to and including dismissal." (Emphasis in original.) E-board members were informed of their right to have a representative of their choice present during the interview as long as the representative was not also "a person subject to the same investigation." If legal counsel was to be the member's representative, extra notice to the City was requested so that it may arrange to have its own legal counsel attend the interview.

The interviews were originally scheduled for April 4, 2017, but did not happen until May 22, 2017. Tevis, McIntosh, Hoover, and Morales were separately interviewed by the

[11] The memoranda all used the same language in substance.

investigator and represented by SMFA's legal counsel.[12] Each of them was notified that he or she was "a subject of this investigation." The substantive questions centered on who prepared the alert, CPF's role in the situation, whether the interviewee had any knowledge that the alert had successfully discouraged external applicants from completing the application process, and whether there had been any negative impacts on fire department operations.

On July 6, 2017, Champion issued a confidential memorandum addressed to Morales, Wennerstrom, Hoover, McIntosh, and Tevis to notify them of the completion of the fact-finding investigation into the alert. Champion noted the purpose of the investigation had been (1) to find out if fire department employees were "directly or indirectly" involved in the publication of the alert, and (2) if the alert "had any impact on the City's ability to recruit candidates for a Fire Captain position, and if so, what impacts." During his testimony, Champion stated that he and the City wanted to ascertain the intent of the E-board members in sending the alert and to ensure everything was done "above board," meaning whether it had been prepared on City time or with City resources. Champion concluded in the memorandum:

> After a careful review of the evidence, while you admittedly had knowledge of the directive to issue the publication, the City is unable to reach the ultimate conclusion that the recruitment was detrimentally affected by your actions. Therefore, that allegation is deemed unsubstantiated.

Morales, Wennerstrom, Hoover, McIntosh, and Tevis all testified that the investigation process, lasting from March to July, significantly added stress to an already stressful job. Hoover asked human resources director Jayne Anderson if the investigation could lead to discipline up to and including termination and Anderson confirmed that it could. The City did not refute Hoover's testimony. Champion also confirmed that discipline could have resulted

[12] Wennerstrom was travelling that day. He was told the interview would be rescheduled, but it never was and therefore he did not sit for one.

for any person who was a subject of the investigation. Morales, Wennerstrom, and Hoover testified about being subjected to multiple personnel investigations since being appointed to the E-board. They believed that SMFA officials were being targeted by the City.

ISSUES

1. Did the City fail and refuse to bargain over the decision and/or the effects of the decision to run an open recruitment for a promotional position within the bargaining unit?

2. Did the City retaliate against members of the E-board by (1) notifying them that they would be investigated, which could lead to discipline being taken against them, and (2) subjecting them to an investigatory interview because of their involvement or suspected involvement in the drafting and public dissemination of the alert?

CONCLUSIONS OF LAW

1. Failure and Refusal to Bargain

    a. Unilateral Change

Public agencies and recognized employee organizations each have a duty to meet and confer in good faith over matters within the scope of representation, as defined in MMBA section 3504. (MMBA, § 3505.) Unilateral changes to negotiable subjects are "per se" violations of the duty to bargain and violate MMBA Section 3506.5, subdivision (c). (*City of Livermore* (2014) PERB Decision No. 2396-M, p. 20.) To establish a prima facie case for an unlawful unilateral change, the charging party must show by a preponderance of the evidence that: (1) the employer took action to change existing policy; (2) the policy change concerned a matter within the scope of representation; (3) the action was taken without giving the exclusive representative notice or opportunity to bargain over the change; and (4) the change has a generalized effect or continuing impact on terms and conditions of employment. (*Fairfield-*

Suisun Unified School District (2012) PERB Decision No. 2262, p. 9,[13] citing *Grant Joint Union High School District* (1982) PERB Decision No. 196, p. 10; *Walnut Valley Unified School District* (1981) PERB Decision No. 160, p. 5; see also *Vernon Fire Fighters, Local 2312 v. City of Vernon* (1980) 107 Cal.App.3d 802, pp. 822-823.)

The parties stipulated to the lack of notice to SMFA regarding Champion's decision to move forward with the external recruitment. The City maintains that it had the right to make the decision at issue; PERB has found that such a stance satisfies the fourth element above. (*City of Davis* (2016) PERB Decision No. 2494-M, p. 24.) The City disputes, however, that there was a change in policy. The parties were also instructed to brief whether the decision at issue was a matter within the scope of representation under *City of Alhambra* (2010) PERB Decision No. 2139-M. These disputed elements of the unilateral change analysis are discussed below.

i. Change to Existing Policy

A change in policy generally falls into one of three categories: (1) changes to the parties' written agreements; (2) changes in established past practices; or (3) newly created policies, or application or enforcement of an existing policy in a new way. (*County of Monterey* (2018) PERB Decision No. 2579-M, p. 10; *City of Davis* (2016) PERB Decision No. 2494-M, pp. 30-31; *Pasadena Area Community College District* (2015) PERB Decision No. 2444, p. 12, fn. 6 (*Pasadena CCD*).) A policy may be established by written agreement, *written employer rules or regulations*, or regular and consistent past practice. (*Salinas Valley*

[13] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act (NLRA) and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 616-617 (*City of Vallejo*).)

Memorial HealthCare System (2017) PERB Decision No. 2524-M, p. 17 (*Salinas Valley*); *Pasadena CCD*, *supra*, PERB Decision No. 2444, p. 12; emphasis added.)

Under *Marysville Joint Unified School District* (1983) PERB Decision No. 314 (*Marysville*), where an employer's past practice is to provide benefits that are more generous than the terms of a collective bargaining agreement, such benefits may be lawfully modified unilaterally as long as the modification merely results in enforcement of the actual terms of the written agreement. (*Id.* at pp. 9-10.) At issue in that case was a contractual 30-minute lunch period, but a longstanding past practice of allowing employees to take a 55-minute lunch period. When the employer began enforcing the 30-minute lunch period, the union objected that it was a unilateral change to past practice. The Board disagreed, stating:

> The mere fact that an employer has not chosen to enforce its contractual rights in the past does not mean that, ipso facto, it is forever precluded from doing so. *Accordingly, we find that the Association, by agreeing to a contractual provision which plainly permitted the District to grant teachers a lunch period of 30 minutes or longer at its discretion, waived its right to negotiate* over the District's reduction of the lunch period to 30 minutes.

(*Id.* at p. 10, citation omitted; emphasis added.) The written terms to be enforced must be clear and unambiguous on their face in order for this principle to apply. (*Id.* at p. 9.)

Here, City Municipal Code Section 2-20.09.1, subdivisions (b)(1) and (2), states in part:

> (b) Recruitment Process: The City Manager shall schedule *open or promotional recruitments* based on vacancies or anticipated vacancies to meet the need in the City service[.]
>
> (1) Open Recruitments: Open recruitments may be scheduled when it is not practical to fill vacancies by promotion *or when specifically requested by the appointing authority*, with the approval of the City Manager. Open recruitments shall be open to all applicants who meet the minimum requirements for the position in accordance with these chapters.

> (2) Promotional Recruitments: Promotional recruitments are open to all City employees who[]meet the minimum requirements for the position in accordance with these chapters.

(Emphasis added.) The City argues that despite never having before run an open recruitment for promotional captain positions, it nevertheless acted consistently with the written policy above as Champion sought and received approval from the City to run an open recruitment for the positions when he determined that the internal candidate pool and interest level was not adequate to keep it strictly promotional. Accordingly, the City contends that its decision to act unilaterally should be excused under *Marysville* because it does not amount to a change in policy.

The City does not cite any PERB or court decision, and I am not aware of any, which applies the *Marysville* rule to employer action that is consistent with its own written rule or regulation. Vital to the Board's conclusion in *Marysville* was that by agreeing to a contractual provision setting a 30-minute lunch period, the union "waived its right to negotiate" over the employer's decision to cease a longer lunch break and revert to the contractual term. (*Marysville*, *supra*, PERB Decision No. 314, p. 10.) The facts here do not align with those in *Marysville*. There is no showing that SMFA negotiated over the terms of the City's Municipal Code regarding recruitments. Thus, SMFA could not waive a right to negotiate over the reversion to a term that it had never agreed to in the first place. Therefore, I decline to apply *Marysville* to these facts. (See also, *County of Riverside* (2013) PERB Decision No. 2307-M, pp. 24-25.)

It is undisputed that the fire department had never before run an open recruitment for the promotional position of captain, despite former chief Kenley having briefly entertained the idea in the past but abandoning it. Rather, captain recruitments had always been limited to

existing fire department employees and treated as a promotion for unit engineers. Thus, the facts here adequately demonstrate a change in past practice.

ii. Scope of Representation

MMBA section 3504 defines the scope of representation as:

> The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.

The Board recently clarified standards for determining whether a subject is within the scope of representation under the MMBA. In *County of Orange* (2018) PERB Decision No. 2594-M, the Board noted its long adherence to the test for negotiability set forth in *Claremont Police Officers Association v. City of Claremont* (2006) 39 Cal.4th 623 (*Claremont*) and applied by the Board in *Alhambra*, *supra*, PERB Decision No. 2139-M.[14] At issue in *County of Orange* was an employer's unilateral adoption of an "Openness in Negotiations" ordinance and whether some disputed provisions of the ordinance were properly considered ground rules for negotiations, which have traditionally been found to be within the scope of representation by PERB. The Administrative Law Judge acknowledged the Board's precedent

[14] *Claremont* set forth the following three-part test to analyze the scope of representation: "First, we ask whether the management action has 'a significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees.' [] If not, there is no duty to meet and confer. [] Second, we ask whether the significant and adverse effect arises from the implementation of a fundamental managerial or policy decision. If not, then [] the meet-and-confer requirement applies. [] Third, if both factors are present [] we apply a balancing test. The action 'is within the scope of representation only if the employer's need for unencumbered decisionmaking in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question.'" (39 Cal.4th at p. 638.) The Court acknowledged that *First National Maintenance Corporation v. NLRB* (1981) 452 U.S. 666 (*First National*) "applied a similar balancing test." (*Claremont*, *supra*, at p. 637.)

regarding ground rules negotiability, but determined that the issue had not before been analyzed in an MMBA case; thus, he applied the *Claremont* test as adopted in *Alhambra* to answer the question. The Board responded as follows:

> In *Alhambra*, *supra*, PERB Decision No. 2139-M, the Board described *Claremont* as establishing "the test to determine whether a matter is within the scope of representation under the MMBA." (*Id.* at p. 13.) In that case, the issue was whether the minimum qualifications for a bargaining unit position was within the scope of representation. **Applying *Claremont*, the Board determined it was not**.
>
> A year after *Alhambra* issued, the California Supreme Court again clarified the test for determining the scope of bargaining under the MMBA. (*International Assn. of Fire Fighters, Local 188, AFL-CIO v. PERB* (2011) 51 Cal.4th 259, 272-273 (*Richmond Firefighters*).) The Court observed that there are three distinct categories of managerial decisions, each with its own implications for the scope of representation: (1) "decisions that 'have only an indirect and attenuated impact on the employment relationship' and thus are not mandatory subjects of bargaining," such as advertising, product design, and financing; (2) "decisions directly defining the employment relationship, such as wages, workplace rules, and the order and succession of layoffs and recalls," which are "*always* mandatory subjects of bargaining" (emphasis added); and (3) "decisions that directly affect employment, such as eliminating jobs, but nonetheless may not be mandatory subjects of bargaining because they involve 'a change in the scope and direction of the enterprise' or in other words, the employer's 'retained freedom to manage its affairs unrelated to employment.'" (*Ibid*.) The Court explained that the *First National Maintenance* balancing test applies only to the third category of managerial decisions[.]
>
> [¶…¶]
>
> By explaining that decisions directly defining the employment relationship are always mandatory subjects of bargaining, *Richmond Firefighters* provides an important clarification of the limits of *Claremont*. It is not necessary to ask whether such a decision has a "significant and adverse effect" on wages, hours, or other terms and conditions of employment, nor is it necessary to balance that effect against the employer's need for unencumbered decisionmaking.

> [¶…¶]
>
> Thus, under *Richmond Firefighters*, a balancing test applies only to employer decisions that directly affect employment, such as eliminating jobs, but also involve '"a change in the scope and direction of the enterprise' or, in other words, the employer's 'retained freedom to manage its affairs unrelated to employment.'" (*Richmond Firefighters*, *supra,* 51 Cal.4th 259, 273 [other citation and quote omitted].) **To the extent *Alhambra*, *supra*, PERB Decision No. 2139-M, conflicts with *Richmond Firefighters* on this point—specifically, by suggesting that the *Claremont* test *always* applies to determine whether a matter is within the scope of representation under the MMBA—we disavow it.** [Footnote omitted.]

(*County of Orange*, *supra*, PERB Decision No. 2594-M, pp. 18-20; italics in original; bold emphases added.)

The Board noted that although *Claremont* is still good law, the Supreme Court's more recent treatment of the subject in *Richmond Firefighters* requires that the type of balancing analysis used in *First National*, which is the same test used in *Claremont*, only be applied to "some managerial decisions, not those directly defining the employment relationship." (*County of Orange*, *supra*, PERB Decision No. 2594-M, p. 20, fn. 10.)

Notably, the only part of the *Alhambra* decision that the Board specifically repudiated in *County of Orange* is the notion that *Alhambra* requires in every instance that the three-part *Claremont* test be applied when the scope of representation is at issue under the MMBA. The Board did not overturn the rest of the *Alhambra* decision or disturb its conclusions regarding minimum qualifications being outside the scope of representation, despite the Board's adherence to the *Claremont* balancing test in that case in reaching its conclusion. Thus, the remainder of the *Alhambra* decision is still good law.

In *Alhambra*, the employer, without negotiating with the union, eliminated certain certification requirements in a classification specification for the promotional position of fire captain in an effort to increase the number of eligible applicants. (*Alhambra*, *supra*, PERB Decision No. 2139-M, p. 4.) The union argued that the unilateral modification of the classification specification had a significant and adverse impact on unit employees' working conditions because it "potentially increases the number of candidates eligible to compete for the position of fire captain, thereby making it more difficult for those candidates who possess all of the required certifications to obtain positions because they have to compete against a greater number of candidates." The Board rejected the union's argument, finding that the new specification did not impose new eligibility requirements, grant preferences, nor affect the *opportunity* of employees with certificates to compete for and obtain the promotional position, and thus there was no "significant impact on the working conditions of bargaining unit employees." (*Id.* at pp. 14-15.)

The Board also rejected the idea that increasing candidate pools for promotional positions is inherently damaging to current employees' interests, stating:

> [T]he mere fact that the modified qualifications will result in a broader pool of eligible candidates is not adverse to the wages, hours, or working conditions of bargaining unit employees. The record contains no evidence that any current employee without the certifications was promoted over a candidate meeting the certification requirements, as the City has not yet implemented the change. Thus, any asserted adverse impact is purely speculative. *Even if there were such a showing, however, we do not find the expansion of the minimum qualifications to allow additional candidates to compete to be an adverse impact.* It is generally recognized that *competition for jobs in the public sector is desirable* to promote efficiency and prevent patronage in the public service. (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168.) Further, this policy is recognized by and consistent with the City Charter, which promotes competitive employment opportunities. A policy that merely increases competition

> without imposing any additional requirements or burdens on bargaining unit employees is not adverse.

(*Alhambra*, *supra*, PERB Decision No. 2139-M. at p. 15; emphasis added; internal footnotes omitted.) Thus, increasing competition for promotional positions does not negatively impact existing employees' working conditions.

The Board also distinguished cases finding that policies affecting procedures for promotion are negotiable citing, *City of Vallejo*, *supra*, 12 Cal.3d at p. 618, *International Association of Fire Fighters Union v. City of Pleasanton* (1976) 56 Cal.App.3d 959, 971 (*City of Pleasanton*), and *Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375 at pp. 45-47 (*Healdsburg*).

In *City of Vallejo*, the Court's decision did not describe the "vacancies and promotions" proposal over which a union sought to compel arbitration; nevertheless, the Court concluded that it concerned firefighters' job security and opportunities for advancement, similar to negotiable union hiring hall arrangements in the private sector, and therefore found it related to terms and conditions of employment. (*City of Vallejo*, *supra*, 12 Cal.3d at p. 618.) The Court in *City of Pleasanton* concluded that a unilateral change in the location and time period of the postings of promotional positions by the employer should have been subject to negotiations because it amounted to "a substantial change in the procedure to be followed" and therefore was "an equally important 'condition of employment' according to the broad meaning of the term as used in the [MMBA] and the liberal judicial construction required of it." (*City of Pleasanton*, *supra*, 56 Cal.App.3d at p. 971.) In *Healdsburg*, the Board concluded that provisions that changed procedures for employees to apply for promotions and granted preference to employees for filling vacancies inside of the unit were within scope, but

proposals over classification and reclassification of positions, and over the employer granting preference to unit employees for filling vacancies outside of the unit were not. (*Healdsburg*, *supra*, PERB Decision No. 375, pp. 45-47.) The Board in *Alhambra* stated that unlike the facts in those cases, the change in job qualifications at issue did not affect the promotional opportunities of bargaining unit employees. (*Alhambra, supra*, PERB Decision No. 2139-M, p. 17.) The Board also noted that none of those cases addressed whether the establishment of job qualifications is within the scope of bargaining, and so they were not dispositive of that issue. (*Ibid*.)

Returning to the instant matter, SMFA argues that *Alhambra* is distinguishable because the promotional recruitment in that case was limited to internal candidates, and although the employer's decision to loosen minimum qualifications had the effect of broadening the candidate pool, it actually increased promotional opportunities on whole for that bargaining unit. SMFA finds this to be a salient difference from the present case, arguing that the Board in *Alhambra* did not consider the effects of an external promotional recruitment on employees. SMFA argues that the City's decision to open the promotional recruitment to external candidates created issues beyond increased competition, such as, the potential for hiring candidates who lack the insider "corporate knowledge" of the City and the fire department raising safety and other concerns.[15] As discussed below, these arguments do not persuade departure from the rationale in *Alhambra*.

[15] As discussed more fully in the next section of the proposed decision, I view these concerns as foreseeable effects of the employer's decision to open the promotional recruitment, because they would only come to fruition if the opened recruitment actually resulted in an external recruit being hired as a captain. They have no bearing on employees' participation in the recruitment process itself, however.

Even though a change in minimum qualifications is not directly at issue here as was the case in *Alhambra*, the core issue is the same—an increased number of candidates being able to compete for a promotional position because of an employer's change in recruitment practices. Thus, the Board's rationale in *Alhambra* is applicable to this situation. CPF representative Mahon testified that external captain recruitments, which are rare in "full-time paid personnel" departments, like the City's, are a concern to CPF because they reduce promotional opportunities for existing employees. Hoover similarly testified that allowing external candidates to test for captain reduced promotional opportunities for existing employees, especially those who had not yet completed their task books to qualify for the examination but were close to doing so.

Contrary to SMFA's argument, the Board's analysis in *Alhambra* does not turn on the fact that the increased competition for open promotional positions was restricted to internal employees. Rather, the focus of the analysis was that the qualification changes did not result in any change to *procedural requirements* for employees to apply and compete for the promotional positions. As noted above, courts and PERB have concluded that new or additional procedural requirements in the process for employees to compete for open positions are within the scope of representation. (*City of Pleasanton*, *supra*, 56 Cal.App.3d at p. 971; *Healdsburg*, *supra*, PERB Decision No. 375, pp. 45-47.) Whereas in *Alhambra*, the recruitment for fire captain increased competition but did not impose any additional requirements or burdens on unit employees who desired to apply for the position. For this reason the Board concluded that the changes at issue were outside scope under the first prong of *Claremont*. (*Alhambra*, *supra*, PERB Decision No. 2139-M, pp. 15-17.) Similarly here, the record does not indicate that any new procedural requirements or burdens were imposed on

employees to apply and test for captain. Rather, once employees applied, the candidate pool may have included a greater number of applicants than it would have if the recruitment had remained purely internal. The mere fact that competition for a promotional position may be increased, without additional procedural hurdles for employees to cross, does not, under *Alhambra*, show that the decision to run an external recruitment affected a matter within the scope of representation.

Since the decision to run an open promotional recruitment was outside the scope of representation, the City did not violate the MMBA by failing to bargain over the decision to proceed with that course of action. However, as discussed below, that is not the end of the inquiry.

b. The City Failed to Bargain Over Foreseeable Effects of a Non-Negotiable Decision

In *County of Santa Clara* (2013) PERB Decision No. 2321-M, the Board provided an in-depth treatment of the parties rights and obligations vis-à-vis effects bargaining, where an employer had imposed a non-negotiable change in staffing levels without notice to the union. The Board first explained the policies behind requiring effects bargaining over non-negotiable decisions:

> An employer violates the duty to bargain in good faith when it fails to afford a union reasonable advance notice and an opportunity to bargain before it either: (1) reaches a firm decision to establish or change policy within the scope of representation, (*Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 900) or (2) implements a new or changed policy not within the scope of representation but having a foreseeable effect upon matters within the scope of representation. (*Claremont*.) [] And implementing a new or changed policy not itself within the scope of representation (e.g., staffing levels) but having a foreseeable effect(s) on employee wages, hours or other terms and conditions of employment (e.g., safety or workload), likewise violates the employer's duty to

> bargain in good faith where implemented without notice and opportunity to bargain over the foreseeable effect(s). [Citations omitted.] In both instances the harm is the same: matters relegated by statute to bilateral decisions are instead determined unilaterally.
>
> [¶…¶]
>
> An employer's unilateral change implemented without prior notice or opportunity to negotiate over the decision or the foreseeable effects within the scope of representation disrupts and destabilizes employer-employee relations and is inconsistent with the goals of our statutes to improve both employer-employee relations and communications between public employers and their employees.
>
> [¶…¶]
>
> The rule requiring effects bargaining arises from balancing the need of employers to make unfettered decisions about the direction of the enterprise with the rights of employees, through their exclusive representatives, to a voice in workplace matters related to wages, hours and terms and conditions of employment. In other words, effects bargaining is not a stepchild of decision bargaining. It is just as important as bargaining over a decision to alter terms and conditions of employment.

(*County of Santa Clara*, *supra*, at pp. 21-24.)

Citing *Compton Community College District* (1989) PERB Decision No. 720 (*Compton CCD*), the Board stated that an employer is permitted to implement before agreement or impasse only where: (1) the implementation date was not arbitrary but based on an immutable externally-established deadline, or on an important managerial interest such that delay would effectively undermine the employer's ability to make the decision in the first instance; (2) notice to the union of both the decision *and implementation date* was given sufficiently in advance to allow for *meaningful meeting and conferring before implementation*; and (3) the employer met and negotiated in good faith on implementation and effects before the implementation and thereafter as to those subjects not resolved by the implementation itself.

(*County of Santa Clara, supra*, PERB Decision No. 2321-M, p. 25, fn. 16; emphasis added.)

The Board noted:

> In sum, our decisions establish the expectation that an employer will give notice and an opportunity to bargain over reasonably foreseeable effects within the scope of representation before implementing a managerial decision.
>
> This principle is undermined by a rule that excuses an employer which fails to provide a union both notice and an opportunity to request bargaining before implementing a change with negotiable effects. *Compton CCD* in particular is eviscerated if the employer faces no potential liability for failing to give advance notice and an opportunity to request effects bargaining.

(*County of Santa Clara*, *supra*, at p. 26; emphasis in original.) The Board then overruled several decisions, specifically, *State of California (Department of Corrections & Rehabilitation, Avenal State Prison)* (2011) PERB Decision No. 2196-S and *Sylvan Union Elementary School District* (1992) PERB Decision No. 919, which stood for the proposition that an employer's duty to bargain over effects only arose upon a union's specific request for effects bargaining, regardless of a failure by the employer to give proper notice. (*County of Santa Clara, supra*, at p. 30.)

In conclusion, the Board announced the following rules applicable to the duty to bargain over negotiable effects:

> 1. The employer has a duty to provide reasonable notice and an opportunity bargain before it implements a decision within its managerial prerogative that has foreseeable effects on negotiable terms and conditions of employment. A "reasonable" notice is one which is "clear and unequivocal" [citations omitted] and which "clearly informs the employee organization of the nature and scope of the proposed change." [Citation omitted.]
>
> 2. Once having received such advance notice, the union must demand to bargain the effects or risk waiving its right to do so. The union's demand must identify clearly the matter(s)

within the scope of representation on which it proposes to bargain, and clearly indicate the employee organization's desire to bargain over the effects of the decision as opposed to the decision itself. [Citations omitted.]

3. Having received such advance notice and an opportunity to bargain, a union's failure to demand effects bargaining may waive the right to bargain the reasonably foreseeable effects. [] Waiver remains, however, an affirmative defense. Where a union alleges that the employer did not provide reasonable notice and an opportunity to bargain prior to the employer's implementation of a change in a non-negotiable policy having a reasonably foreseeable impact on a matter within the scope of representation, a prima facie case of a failure to bargain in good faith is established. The union need not allege as well that it made a demand to bargain such effects as a condition to seeking PERB enforcement of its right to be free of an employer's failure to provide notice and an opportunity to bargain effects. The employer may raise an affirmative defense of waiver or otherwise challenge the union's claim that the employer did not provide sufficient notice of the change.

4. Where an employer implements the change without giving the union reasonable notice and opportunity to bargain over foreseeable effects on matters within the scope of representation, it acts at its own peril. If the employer is ultimately found to have had a duty to bargain over effects and thus to have provided the union reasonable pre-implementation notice and an opportunity to bargain, its implementation without giving such notice and an opportunity to bargain constitutes a refusal to bargain. [Citations omitted.]

   We conclude that, facing a unilateral change or fait accompli, a union has a choice. It may proceed to PERB via an unfair practice charge without first making a demand to bargain effects. Or, it may demand effects bargaining. If the union does demand bargaining over effects of a decision already implemented without the required notice, the employer must respond pursuant to its duty established in *Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375, at pp. 9-10 (party objecting that proposal is beyond scope of representation *must make good faith effort at clarification* by voicing its specific reasons for believing

> proposal is outside the scope of representation and entering into negotiations on those aspects of proposal which, after clarification, it views negotiable*; failure to seek clarification in itself violates the duty to negotiate in good faith and will result in an order requiring the objecting party to return to the negotiating table to seek clarification*). [Citation omitted.]

(*County of Santa Clara, supra*, PERB Decision No. 2321-M, pp. 30-32; underscore in original; italics added.)

Turning back to these facts, Champion initially notified SMFA of his intent to run an open recruitment on January 25, 2017. He told Morales that, like former chief Kenley, he did not consider the decision to run the open recruitment to be subject matter that required formal negotiations. He invited SMFA representatives to let him know by February 1, 2017, if the Union desired to negotiate over effects. They did so, providing a detailed letter before the meeting that outlined concerns regarding the open recruitment that can be broadly characterized as covering topics of legitimate concern to employees such as safety, seniority, and work load, among others. Champion admitted that many of the items that SMFA presented to him *in response to his invitation to the Union to bargain over effects* were matters that were outside of his unilateral control and would have required the input of City representatives in *formal negotiations*. It is important to note that Champion told SMFA before this meeting that the open recruitment would not be posted before February 22, 2017. SMFA agreed at the meeting's conclusion that Champion could speak directly to unit engineers to gauge their interest in applying for the promotion. After he did, he informed SMFA that he was still unconvinced of sufficient internal interest and would move forward with the open recruitment. This was on or about the evening of February 6, 2017. He maintained his stance on the decision being outside scope and asked for a written legal opinion

from the union outlining its contrary position. Up until this point, the parties' dealings conformed to the standards discussed above in *County of Santa Clara*, *Compton CCD*, and *Healdsburg.*

Within days, however, things went awry. On or about February 9, 2017, Champion learned both that the Union's legal opinion was not yet finished, and an open recruitment required a "longer application period." Apparently, Champion believed he needed to move forward with posting the recruitment immediately based on this latter information, but that is not entirely clear from the record. The open recruitment was posted the next day. However, two important things did not occur before posting the recruitment: (1) Champion did not inform SMFA that the implementation date of the non-negotiable decision had been moved up to February 10; and (2) effects bargaining was not completed, despite a previous express invitation to engage in the process and notification from the Union of a litany of foreseeable effects.

Regarding the first point, SMFA lacked adequate notice of implementation. Under *Compton CCD* and *County of Santa Clara*, a union is entitled to advance notice of both the decision and the *implementation date* so there is *time for meaningful negotiations* before the decision is put into effect. Because neither Champion nor other City representatives informed SMFA that the previously announced date for implementation had been considerably advanced, SMFA did not have proper notice and an opportunity to bargain over effects. Under the Board's guidance in *County of Santa Clara*, the implementation before such notice and opportunity constitutes a refusal to bargain. (*County of Santa Clara*, *supra*, PERB Decision No. 2321-M, p. 31.)

Regarding the second point, the fire department's implementation before completing effects bargaining is also not excused under the parameters in *Compton CCD*, *supra*, PERB Decision No. 720, pp. 14-15, first, because there is no evidence of an "immutable externally-established deadline" or an "important managerial interest" such that delay would effectively undermine the employer's ability to make the non-negotiable decision. Champion's vague testimony that someone in human resources told him that a longer application period was required for an external recruitment is uncorroborated hearsay and, without an applicable exception to the hearsay rule, is insufficient to establish a factual finding. (PERB Reg. 32176; *Palo Verde Unified School District* (2013) PERB Decision No. 2337, p. 19 (*Palo Verde*).) Moreover, Champion's testimony on this issue does not explain why the longer period could not have commenced after bargaining obligations with SMFA were extinguished.

Additionally, as discussed above, notice of the implementation date was insufficient for meaningful negotiations to have had time to occur. Furthermore, the February 1, 2017 meeting did not extinguish the obligation or waive SMFA's right to participate in impacts negotiations. Champion acknowledged in his testimony that neither agreement nor impasse was reached over SMFA's letter outlining concerns that were provided in response to his invitation to SMFA to bargain over negotiable effects of the decision to run an external promotional recruitment. Champion also acknowledged that most of those items would have required City negotiators' involvement in formal bargaining. Yet, there is no evidence that Champion shared SMFA's concerns with the City or that formal effects bargaining took place.

Finally, although SMFA was, before implementation, maintaining its right to bargain over the decision itself, due to inadequate notice of the implementation date, such a stance cannot be considered a waiver of SMFA's right to bargain over foreseeable effects. If the

parties had continued to clarify their positions over negotiability, as Champion rightly had started doing by requesting SMFA's legal position in writing, then they may have come to an understanding regarding decision versus effects bargaining. Unfortunately, Champion abruptly and without notice to SMFA decided to proceed with implementation before the parties had finished clarifying their positions. The "failure to seek clarification in itself violates the duty to negotiate in good faith and will result in an order requiring the objecting party to return to the negotiating table to seek clarification." (*County of Santa Clara*, *supra*, PERB Decision No. 2321-M, p. 32; *Healdsburg*, *supra*, PERB Decision No. 375, pp. 9-10.)

For all of these reasons, the City violated its duty to bargain in good faith under the MMBA by failing to give adequate notice to SMFA of its decision to implement a non-negotiable decision, thereby depriving SMFA of an opportunity to bargain over foreseeable effects of the decision.

2. Retaliation

To demonstrate that an employer discriminated or retaliated against employees in violation of MMBA sections 3506 and 3506.5, subdivision (a), and PERB Regulation 32603, subdivision (a), the charging party must show that (1) employees exercised rights under the MMBA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against employees; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210, pp. 6-8 (*Novato*); *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416, 424.)

Once the charging party establishes a prima facie case, the burden shifts to the employer to prove it would have taken the same adverse action even if employees had not

engaged in protected activity. (*Novato*, *supra*, PERB Decision No. 210, p. 14; *Martori Brothers Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 729-730 (*Martori Bros.*); *Wright Line* (1980) 251 NLRB 1083, p. 10.) To prevail, the employer must show that it had an alternative non-discriminatory reason for taking the adverse action and that it acted because of this alternative non-discriminatory reason, not because of employees' protected activity. (*Palo Verde*, *supra*, PERB Decision No. 2337, pp. 12-13.)

The facts in this case clearly establish that management knew of the employees' alleged protected conduct and also acted in direct response to it.[16] Although Hoover, Wennerstrom, McIntosh, and Tevis had very little to no input regarding the decision to ask CPF to run the alert, even an employer's mistaken belief that employees participated in protected activities is sufficient to establish a violation. (*Simi Valley Unified School District* (2004) PERB Decision No. 1714, p. 15.) Where an employer stated in its disciplinary memorandum that it was being issued "in response to" an employee's letter, which the Board had determined was protected speech, the Board considered that direct evidence of unlawful motive. Examination of circumstantial evidence of motivation is not necessary in such a case. (*Alisal Union Elementary School District* (1998) PERB Decision No. 1248, p. 6.) Similarly, the fire department's decision here to launch an investigation into its employees' conduct stemmed directly from the public issuance of an alleged protected communication. The knowledge and

[16] The City contends in its brief at the time the investigation was initiated, management did not know "for sure" that the E-board was involved, which is why an investigation commenced. Therefore, the City argues that the knowledge element is not met. The argument is baseless. The alert was issued under Morales's name as President of SMFA. Moreover, Champion's February 27, 2017 memorandum to employees, which issued several weeks before the investigation notices, states: "It has come to my attention that *the leadership of Local 2020* has posted the following disingenuous communication to the [] CPF and instructed all Local Presidents to distribute to CPF members." (Emphasis added.) Thus, it is clear that management was aware of the alleged protected conduct by employees before it took alleged adverse actions against them.

nexus elements of the prima facie case are thus sufficiently demonstrated and do not require further discussion. The disputed elements of whether public dissemination of the alert was protected by the MMBA and whether the investigation was an adverse action are discussed in turn below.

a. Protected Communications

MMBA section 3502 states that "public employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." This right is enforced by shielding the ability of employees to communicate freely with each other over working conditions without fear of employer reprisal. In recognition of this premise, the Board noted "there is no more fundamental right" afforded employees under PERB-enforced statutes than the right to communicate with others about working conditions." (*Los Angeles Community College District (Perez)* (2014) PERB Decision No. 2404, p. 11, fn. 5.) Protected activity in this regard is also not limited to association with employees of the same employer, or with employees represented by the same organization. An appellate court found that although California's public sector labor relations statutes do not contain the NLRA's "other mutual aid and protection" language, there is no cause for the public sector to depart from federal authorities' conclusions that "association with, and assistance to, employees outside the bargaining unit is an integral part of normal organizational activities and therefore is protected from employer reprisal." (*McPherson v. PERB* (1987) 189 Cal.App.3d 293, 309-311 (*McPherson*).)

The general rule regarding employee speech and conduct is that they are protected under PERB-enforced statutes when related to matters of "legitimate concern to employees as

employees so as to come within the right to participate in the activities of an employee organization for the purpose of representation on matters of employer-employee relations." (*Rancho Santiago Community College District* (1986) PERB Decision No. 602, p. 12 (*Rancho Santiago*).) Disputes over wages, hours, and other working conditions are among those most likely to cause ill feelings and strong responses; thus, parties are afforded wide latitude to engage in "uninhibited, robust, and wide-open debate" during those disputes. (*City of Oakland* (2014) PERB Decision No. 2387-M, p. 23; other citations omitted.) Accordingly, employee speech that is related to employer-employee relations will generally not lose its statutory protection unless it is so "opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice as to cause substantial disruption of or material interference" with the employer's operations. (*Id.* at p. 24; *Rancho Santiago*, p. 13.) The Board generally considers speech protected "even if defamatory and even if erroneous, unless it can be shown that such speech was made with malice and with knowledge it was false." (*Rocklin Teachers Professional Association, CTA/NEA (Romero)* (1995) PERB Decision No. 1112, warning ltr., p. 4, citing *State of California (Department of Transportation)* (1983) PERB Decision No. 304-S.) A party claiming that employee speech lost statutory protection because it was false and defamatory must demonstrate "actual malice" with clear and convincing evidence. (*Chula Vista Elementary School District* (2018) PERB Decision No. 2586, pp. 16-17 and fn. 8 (*Chula Vista*).)

Employees' appeals to the public that are detrimental to and disparaging of an employer's business or services and which do not directly tie into employees' interests in terms and conditions of employment or an ongoing labor dispute have been considered unprotected under the NLRA. (*NLRB v. Local Union 1229, Intl. Brotherhood of Elec. Workers* (1953) 346

U.S. 464, 476-478.) However, PERB has consistently held that "peaceful picketing, including distribution of leaflets or other materials to advertise grievances or solicit support from employees and the public are among the statutorily-guaranteed rights of employees and employee organizations." (*Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, p. 43; other citations omitted.) To wit, the Board found that the distribution of leaflets to attendees of a graduation ceremony that criticized the employer's fiscal management and hiring policies was not impermissibly disloyal to the employer and the activity retained statutory protection because the leaflets also touched on labor relations concerns. (*Mt. San Antonio Community College District* (1982) PERB Decision No. 224, pp. 4-7. (*Mt. San Antonio*).) Similarly, a court relied on *Mt. San Antonio* to conclude that organizing teachers at a charter school who issued a letter to parents that was highly critical of the charter school's management and educational policies were engaged in protected activity despite that the letter did not expressly tie the teachers' criticisms to their working conditions. (*California Teachers Assn. v. PERB* (2009) 169 Cal.App.4th 1076, 1091-1092 (*CTA*).)

Employees who are also union officials are often placed in uncomfortable positions during their representational advocacy because they are likely to have to take positions that are contrary to those of their own employer. Recognizing this tension, the Board stated:

> We recognize that while seeking to resolve divergent and often conflicting interests, representatives of both unions and employers may resort occasionally during representational meetings to intemperate speech or less than civil conduct. It is for this reason that *party representatives are afforded significant latitude in their representational speech and conduct*, which serves the ultimate goal of accommodating divergent interests and resolving conflicts.

(*State of California (Department of Corrections & Rehabilitation)* (2012) PERB Decision No. 2282-S, p. 7, emphasis added (*CDCR*).) The Board further noted that an employer who would discipline an employee "for speech or action" while the employee acted as a representative of the union "must take care not to punish protected activity. To justify such discipline, an employer must demonstrate that the employee's speech or actions were so disruptive as to shed the protective status such activity otherwise enjoys." (*Ibid*.)

Returning to these facts, the City argues that the alert was not protected by the MMBA under the *Rancho Santiago* standard because it was defamatory and disruptive to the fire department's operations. The City claims it was defamatory because the first version of the alert implied that the fire department was not considering internal applicants, which was not true. The City claims the alert was disruptive because its language shows that SMFA intended to discourage outside applications for the fire captain position despite that SMFA knew there was inadequate interest among existing employees. Neither argument is persuasive.

First, regarding the notion that the first version of the alert stated something that was untrue, I note that it was not an explicit misstatement of fact and it was promptly corrected. Even it had been patently false, under the *Chula Vista* standard discussed above, a clear and convincing showing of malicious intent with knowledge of falsity is required before reaching the conclusion that a communication is defamatory and therefore unprotected. There are no facts showing that Morales, the only E-board member who provided substantive information to CPF regarding the preparation of the alert acted with actual malice. To the contrary, he was conscientious in his attention to the accuracy of the alert and acted quickly to correct language that could have been misconstrued. Therefore, the alert cannot be considered false and defamatory.

Second, there is no clear evidence that the alert caused a material disruption to fire department operations. Champion testified that he did not contact the no-show applicants to ascertain the reason they did not appear for the examination. He also stated that he did not believe any other manager had done so and no such evidence was presented. If the City had a factual basis for its conclusion that the alert was responsible for the no-shows they did not reveal it. Thus, it is purely speculative to suppose that the reason that the external candidates did not appear was because they were influenced by the alert or that they even knew about it. The record also shows that the fire department had a sufficient number of qualified individuals who completed the application process and who were later selected to fill the vacant captain's positions. A material disruption simply is not demonstrated by this record.

SMFA asked members of other unions affiliated with CPF to respect SMFA's preference that recruitment for captains remain internal. Under the court's rationale in *McPherson*, employees seeking assistance in labor relations matters from employees in other unions, as SMFA did here, "is an integral part of normal organizational activities and therefore is protected from employer reprisal." (*McPherson*, *supra*, 189 Cal.App.3d 293, 311.) The alert in this case also referenced the parties' dispute over the interpretation of past practice regarding promotional recruitments, which tied it more closely to working conditions than the public appeals in *Mt. San Antonio* and *CTA*, and those were statutorily protected. In short, this is not a close call. The categories of unprotected speech outlined in *Rancho Santiago* simply are not demonstrated. Morales's request on behalf of the E-board that CPF prepare and disseminate the alert to CPF-affiliated locals was protected activity.

b. Adverse Action

In determining whether an employer's action is adverse, the Board uses an objective test and will not rely upon subjective reactions of the employee. (*Chula Vista*, *supra*, PERB Decision No. 2586, pp. 24-25.) "The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact of the employee's employment." (*Id*. at p. 25, quoting *Newark Unified School District* (1991) PERB Decision No. 864, pp. 11-12.) The reasonable person test applies equally when the employer's alleged adverse action is a warning of a possible future action. (*Chula Vista* at p. 25.) A threatened adverse action is a separate potential unfair practice from the completed action. (*San Diego Unified School District* (2017) PERB Decision No. 2538, p. 11 (*San Diego*), citing *Regents of the University of California* (2004) PERB Decision No. 1585-H; *Monterey Peninsula Unified School District* (2014) PERB Decision No. 2381, p. 35.)

i. Employer Investigations as Adverse Actions

The initiation of an investigation into alleged employee misconduct by the employer may be considered an adverse action against the investigated employee, regardless of whether disciplinary action actually results. (*City of Torrance* (2008) PERB Decision No. 1971-M, pp. 16-17 (*Torrance*); *State of California (Department of Youth Authority)* (2000) PERB Decision No. 1403-S, p. 32 (*Dept. of Youth Authority*); *California Union of Safety Employees (Coelho)* (1994) PERB Decision No. 1032-S, p. 12 (*CAUSE-Coelho*).) This is true for investigations initiated at the behest of management (*Torrance*, *supra*, PERB Decision No. 1971, p. 16), and those that were undertaken as a result of complaints against the employee made by another employee or third parties, including by representatives of the union. (*Dept. of Youth*

Authority, *supra*, PERB Decision No. 1403-S, proposed dec., p. 16; *CAUSE-Coelho*, *supra*, PERB Decision No. 1032-S, p. 5.)

The determination of whether an employer's investigation rises to the level of an adverse action is made on a case-by-case basis on the facts presented. (*Service Employees International Union, Local 221 (Gutierrez)* (2012) PERB Decision No. 2277-M, p. 9 (*SEIU-Gutierrez*).) In *SEIU-Gutierrez*, the union's request to management to investigate an employee's alleged on-duty, anti-union activities did not result in a finding of adverse action, because the investigation consisted entirely of one phone call by management to the investigated employee, after which the matter was completely dropped on the same day. (*Id.* at p. 7.) The Board concluded that no employee would reasonably fear disciplinary action based on the very limited response of the employer to the union's allegations against him. (*Id.* at pp. 7-9.)

In contrast, in *Torrance*, the investigation was found to be adverse because the employee was threatened that sustained allegations could lead to discipline. (*Torrance*, *supra*, PERB Decision No. 1971-M, p. 16.) Similarly, in *Dept. of Youth Authority*, the adverse investigation consisted of formal witness interviews over a long period and the allegations involved misconduct against students. (*Dept. of Youth Authority*, *supra*, PERB Decision No. 1403-S, p. 37.)

In *CAUSE-Coelho*, a union's attorney filed a written complaint against a safety officer employed by the state's department of fish and game. The facts giving rise to the union's complaint were as follows. After the employee had sued the union in small claim's court, a heated verbal altercation ensued outside of the court house between the union's attorney and the employee. The union alleged that the employee potentially represented a threat to the

safety of the union's staff members because of the way the employee had behaved toward the union's attorney. The employer's investigation consisted of formal interviews and a lengthy written report, but the charges were not sustained against the employee. The Board found that such action by the union was adverse to the employee, because "a reasonable person [would] be concerned about the potential adverse effect of the complaint and ensuing investigation on his employment relationship. The fact that the complaint and investigation did not result in action being taken against Coelho by his employer does not eliminate the adverse nature of CAUSE's conduct." (*CAUSE-Coelho*, *supra*, PERB Decision No. 1032-S, p. 12.)

Thus, where the investigation into alleged misconduct by the employee is conducted in a formal and serious manner by the employer, the more likely it is to be found to be adverse to the investigated employee's interests.

In this case, the investigation into the conduct of the E-board employees was formal and serious because (1) it was assigned to an outside investigator; (2) employees were compelled to attend a recorded interview and to fully cooperate under threat of insubordination; and (3) they were advised in writing that their responses could lead to discipline, including possible termination.[17] The process also spanned several months before E-board members were finally cleared of wrongdoing, during which time a cloud of suspicion hung over their heads. Thus, the investigation process here was very different from the insubstantial one in *SEIU-Gutierrez*, and very similar to those in the other cases cited above, where formal investigations were adverse to employment interests despite them not culminating in disciplinary action against the investigated employees. A reasonable employee in these circumstances would find the investigation to be adverse to his or her employment.

[17] At least one E-board member, Hoover, was also verbally notified that this most serious level of discipline could result from the investigation.

Likewise, as the threat of future adverse action may constitute a separate unfair practice from the completed action (*San Diego*, *supra*, PERB Decision No. 2538, p. 11, and the cases cited therein), it was reasonable for employees to fear future discipline in this case upon receiving notice of the compulsory investigation that expressly threatened such action. (*Chula Vista*, *supra*, PERB Decision No. 2586, p. 25.)

For all of the reasons stated above, SMFA has demonstrated a prima facie case of retaliation by the City because of the E-board's protected conduct under the MMBA. The burden of proof shifts now to the City to prove it had a non-retaliatory reason and acted for that reason, and not because of the employees' protected conduct. (*Palo Verde*, *supra*, PERB Decision No. 2337, pp. 12-13.)

c. Burden Shift

Where there is evidence that the respondent's adverse action was motivated by both lawful and unlawful reasons, "the question becomes whether the [adverse action] would not have occurred 'but for' the protected activity." (*Martori Bros.*, *supra*, 29 Cal.3d 721, 729-730.) The "but for" test is "an affirmative defense which the respondent must establish by a preponderance of the evidence." (*McPherson*, *supra*, 189 Cal.App.3d 293, 304.)

In assessing the evidence, PERB's task is to determine whether the respondent's "true motivation for taking the adverse action was the employee's protected activity." (*Regents of the University of California* (2012) PERB Decision No. 2302-H, p. 3, citations omitted (*UC Regents*); see also *Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C, p. 23.) Further, PERB "weighs the respondent's justifications for the adverse action against the evidence of the respondent's retaliatory motive." (*Baker Valley Unified School District* (2008) PERB Decision No. 1993, p. 14.) If PERB determines that a respondent's action was

not taken for an unlawful reason, it has no authority to also determine whether the action was otherwise justified or proper. (*City of Santa Monica* (2011) PERB Decision No. 2211-M, p. 17.)

Even where there is direct evidence of unlawful motivation, a respondent may prove that the employee's protected activity was not the true motivation for its action, which is sufficient to defeat the prima facie case. (*UC Regents*, *supra*, PERB Decision No. 2302-H, p. 4.) In that case, although the employer specifically referenced the employee's protected conduct as part of its written grounds for termination, there was sufficient evidence of performance concerns that showed the employer would have taken the same course of action, regardless of the protected conduct. (*Id.* at proposed dec., p. 33.)

A different result was reached in the *CDCR* case, however. In that instance, there was no basis offered by the employer for disciplining the steward other than her conduct toward the manager during the two disciplinary meetings at issue. The Board stated:

> CDCR reasons that such conduct as forms the basis for the discipline was not protected, and violated its conduct standards for employees, thus providing a lawful basis for the discipline. Were its initial premise correct, that would be so. However, we have determined that the conduct forming the basis of the discipline is protected. Thus, there is no unprotected conduct to serve as a lawful basis for the discipline, and [the employee's] discipline is seen to arise from, and only from, [the employee's] protected conduct.

(*CDCR*, *supra*, PERB Decision No. 2287-S, p. 14.) Thus, the Board found that the employer could not meet its burden to defeat the prima facie case in such a circumstance. (*Ibid*.)

In its brief, the City does not advance a non-discriminatory reason for its decision to investigate the E-board. Rather, it contends its course of action was justified under the circumstances, because of the alert's "potential to sabotage the City's Fire Captain recruitment

by rendering the candidate pool so small that the vacant positions could not be filled." The City also notes that if the positions had remained unfilled, it would have created a "middle-management vacuum." Setting aside the facts that the City did not show that the alert was responsible for the no-show applicants, and that three internal candidates actually filled the positions, so there was no hiring deficit, the City has not and cannot show that its action was motivated by any other reason than the E-board members' protected conduct.

This is not the situation contemplated by *Martori Bros.*, where there are both lawful and unlawful reasons motivating the action at issue. Thus, there no need to apply a "but for" analysis or to weigh the employer's justifications for its actions against the evidence of unlawful motive to discover its true motivation. Rather, this is a situation like in *CDCR*, where the employer there presumed that the punished conduct was unprotected but was incorrect in that regard.

Since the City has not shown an alternative, non-discriminatory reason for its actions, it cannot defeat the charging party's prima facie case. As such, the City violated MMBA section 3506.5, subdivision (a) when it notified the E-board employees of a pending investigation and followed through with that investigation. This conduct also concurrently violated subdivision (b) and interfered with SMFA's right to represent employees. Such interference with SMFA's rights is especially notable here, as the City's actions against the entire E-board not only reasonably discourages SMFA officers from continuing to represent the bargaining unit, but also sends a bleak message to employees that their chosen bargaining representatives suffer reprisals because of their exercise of MMBA-protected rights.

REMEDY

MMBA section 3509, subdivision (b), authorizes PERB to order "the appropriate remedy necessary to effectuate the purposes of this chapter." (*Omnitrans* (2010) PERB Decision No. 2143-M, p. 8.) This includes the authority to order an offending party to cease and desist from conduct that violates the MMBA, as well as to take affirmative actions designed to effectuate the statute's purposes. (*Torrance*, *supra*, PERB Decision No. 1971-M, pp. 28-29).

It has been determined that the City failed to provide notice and an opportunity to bargain over the foreseeable effects of a non-negotiable decision in violation of MMBA sections 3505 and 3506.5, subdivision (c). This same conduct also interfered with the rights of bargaining unit employees to be represented by SMFA and with SMFA's right to represent its unit employees in violation of MMBA section 3506.5, subdivisions (a) and (b). In effects bargaining cases, the Board does not typically order the employer to rescind a decision that it was not required to bargain over. (*Sutter County In-Home Supportive Services Public Authority*, *supra*, PERB Decision No. 1900-M, pp. 17-18 [regarding the effects of non-negotiable decision to require background checks for caregiver employees]; *Oak Grove School District* (1986) PERB Decision No. 582, pp. 29-31 [regarding the effects of a non-negotiable decision to increase students' instructional time].) Rather, the more appropriate remedy is to order the employer to cease and desist from violating the duty to meet and confer in good faith, and to negotiate, upon demand, over the effects of the new policy. (*Ibid*.; see also, *Bellflower Unified School District* (2014) PERB Decision No. 2385, pp. 12-14.) The same remedy is warranted here.

It has also been determined that the City committed unfair practices in violation of MMBA section 3506.5, subdivision (a), when it initiated an investigation into the conduct of each of the members of the SMFA E-board in response to his or her protected concerted activity and protected communications with the leadership of other unions and employees represented by other unions. This conduct also necessarily interfered with SMFA's right to represent its members under MMBA section 3506.5, subdivision (b). The City is therefore ordered to cease and desist from retaliating against employees for their protected activities. An ordinary remedy for such a violation is to restore the status quo ante by rescinding documentation connected to the violation. (*Jurupa Unified School District* (2015) PERB Decision No. 2458, proposed dec., p. 52.) Thus, the City is ordered to destroy and rescind from employees' personnel files any and all documentation connected to the investigation against members of the SMFA E-Board.

It is also appropriate to order the City to post a notice incorporating the terms of this order at all locations where notices to unit employees are usually posted. Posting of such a notice, signed by an authorized representative of the City, provides employees with notice that the City acted in an unlawful manner, must cease and desist from its illegal action, and will comply with the order. In addition to physical posting of paper notices, the notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the City to communicate with its employees in the bargaining unit represented by SMFA. (*City of Sacramento* (2013) PERB Decision No. 2351-M, pp. 44-45.) It effectuates the purposes of the MMBA to inform employees of the resolution of this controversy. (*Omnitrans*, *supra*, PERB Decision No. 2143-M, p. 9.)

PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, it has been found that the City of Santa Maria (City) violated the Meyers-Milias-Brown Act (MMBA or Act) (Government Code, § 3500 et seq.). The City violated MMBA sections 3503, 3505, 3506, and 3506.5, subdivisions (a), (b), and (c), and therefore committed unfair practices under MMBA section 3509, subdivision (b), and Public Employment Relations Board (PERB or Board) Regulation 32603, subdivisions (a), (b), (c), when it (1) failed to provide notice and an opportunity to bargain over the foreseeable effects of a non-negotiable decision; and (2) initiated an investigation into the conduct of each of the members of the Santa Maria Firefighters' Association (SMFA) E-board in response to his or her protected concerted activity and protected communications with the leadership of other unions and employees represented by other unions.

Pursuant to MMBA section 3509, subdivision (b), it is hereby ORDERED that the City, its governing body, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing to bargain in good faith with SMFA over the foreseeable impacts of the decision to run an "open" recruitment for a promotional position.

2. Retaliating against members of the SMFA E-Board because of their protected concerted activities and communications with the leadership of other unions and with employees represented by other unions.

3. Denying bargaining unit employees the right to be represented by SMFA.

4. Denying SMFA the right to represent it members.

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

1. Upon request by SMFA, meet and negotiate in good faith over the foreseeable effects of the decision to run an "open" recruitment for a promotional position.

2. Destroy and rescind from employees' personnel files any and all documentation connected to the investigation against members of the SMFA E-Board.

3. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations in the City where notices to bargaining unit employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the City, indicating that the City will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that this Notice is not reduced in size, altered, defaced or covered with any other material. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the City to communicate with its employees in the bargaining unit represented by SMFA.

RIGHT TO APPEAL

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) 327-9425
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, subdivision (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).)