STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 721, Charging Party, v. COUNTY OF RIVERSIDE, Respondent.	Case No. LA-CE-702-M PERB Decision No. 2307-M March 1, 2013

Appearances: Weinberg, Roger & Rosenfeld by Alan Crowley, Attorney, for Service Employees International Union, Local 721; Zappia Law Firm by Day B. Hadaegh, Attorney, for County of Riverside.

Before Martinez, Chair; Huguenin and Winslow, Members.

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Service Employees International Union, Local 721 (SEIU) from the dismissal of its unfair practice charge. The charge, as amended, alleged that the County of Riverside (County) violated the Meyers-Milias-Brown Act (MMBA)[1] by unilaterally changing the policy regarding compensation paid to employees on approved union released time. The Office of the General Counsel found that certain of the allegations were untimely and the remaining allegations failed to state a prima facie case of unlawful unilateral change.

The Board has reviewed the record in its entirety and given full consideration to SEIU's appeal and the County's response thereto. Based on this review, the Board reverses the

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

dismissal of the charge and remands this case to the Office of the General Counsel for issuance of a complaint for the reasons discussed below.

BACKGROUND[2]

SEIU is the exclusive representative for approximately 6,000 employees employed by the County, a public agency. SEIU and the County are parties to a memorandum of understanding (MOU) effective July 1, 2010 through June 30, 2011.

In January 2011, the parties began preparations for successor agreement negotiations. In March 2011, negotiations for the nine bargaining units commenced. During the 2011 negotiations, the County released employees to attend negotiations. As alleged, "[t]he established practice between the parties is that employees released for negotiations were paid their regular wages, including any differentials or special pay premiums, in the same manner as if the time were actually worked at their work site." The charge alleges that this was the practice for many years and it applied to SEIU-represented employees "released for union activities, such as collective bargaining."

By letter dated February 11, 2011, SEIU's Regional Director, Steve Matthews provided Brian McArthur, director of employee relations with the County's Human Resources office, with a document entitled "Notice of Demand to Cease and Desist Unilateral Changes." This letter included a list of unilateral changes alleged to have been made by the County, including changes "made to the method and manner by which Union release time is utilized."

On March 11, 2011, Larry Grotefend (Grotefend), captain in the Dispatch Center of the County's Sheriff's Department, sent an e-mail to Wendy Thomas (Thomas), an employee in

[2] This summary includes relevant undisputed facts provided by the County. (*Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M.) The County's written responses were made under penalty of perjury in compliance with PERB's regulatory scheme. (PERB Reg. 32620, subd. (c) [any written response to a charge must be signed under penalty of perjury by the party or its agent with the declaration that the response is true and complete to the best of the respondent's knowledge and belief; PERB Regulations can be found at Cal. Code Regs., tit. 8, sec. 31001 et seq.].)

the Sheriff's Department, approving released time requested by SEIU on Thomas' behalf for collective bargaining sessions on March 10, 14 and 15, 2011. The e-mail stated:

> These functions are considered collective bargaining opportunities for Wendy Thomas; therefore there will be no loss in pay to the employee providing the Department also approves the employee's attendance to this union function.
>
> [¶ . . . ¶]
>
> FOR PAYROLL PURPOSES:
>
> The employee's timesheet should be reported with the approved hours utilizing the SEIU time reporting code UNSEU.

By e-mail dated March 15, 2011, Grotefend responded to an inquiry from Thomas regarding shift differential pay for Educational Training. The e-mail stated:

> The direction the Department has received from County HR is: "As to the shift differential, the County's position is that employees off work for union release time are not eligible to receive any."
>
> Sheriff's payroll made the following changes to your 344.
>
> "Attached please find a copy of Wendy Thomas's 344 for PP05 on which the shift differential was adjusted and paid to her due to being absent from work to attend Educational Training."
>
> On 2/15 the Z01 was reduced to 2.0 hours as the training was held between 1600 and 2000. On 2/20 all Shift Differential was removed as she indicated the entire 12 hour shift under the UNSEU code, and did not work any hours of her scheduled shift.

In March 2011, the County began paying employees engaged in negotiations base wages only, instead of full wages including differentials or special pay premiums they would have earned but for their participation in formal negotiations.[3] During active negotiations, on March 15, 2011, the County made an initial proposal to amend the provision of the MOU

[3] The amended charge identifies grievance meetings, Regional Council meetings, and Education and Training Release Time meetings as three other types of union activities, in addition to formal negotiations, for which the County stopped paying employees their full wages in March 2011.

governing shift differentials to add "Union Release Time" to the list of leave categories exempt from the application of shift differentials. That list included vacation, sick leave, holiday pay, call and standby duty.

The County asserts that it did not know how SEIU members had been paid in the past when released for formal negotiations. The bargaining history, as alleged, however, is that SEIU and the County negotiated agreements in 2009 and 2010; that SEIU had 10 to 15 employees on its bargaining team; and that the County paid full wages including differentials or special premium pay to employees on union released time. SEIU alleged that because new released time provisions were negotiated in 2009 and 2010, the County had to have known how employees were being paid.

On March 17, 2011, a grievance petition was filed with the County on behalf of "All SEIU represented classifications" by Thomas with Communications Manager Heather Woods in the Sheriff's Department. The grievance states, in pertinent part:

> Citing direction received from County HR, Sheriff's payroll implemented unilateral changes, absent a Meet & Confer process, to the payment of shift differentials for SEIU represented employees using the time reporting code of UNSEU for participation in union activities. Shift differentials were removed from the grievant on two (2) separate occasions in PP#05-2011 under the justification that shift differentials would now only be applied to, and hence paid for, regular hours actually worked at the grievant's worksite and not for hours worked during paid release time for participation in union activities. . . . Release time for union activities has a separate payroll time reporting code for tracking purposes only. It is reported and compensated as regular hours worked on the pay advice.[4]

[4] The amended charge explains that in late Fall 2010, the County informed SEIU that employees released for union meetings would be required to identify such activities on their timesheets by a time-tracking code called UNSEU. As alleged, the County stated that it would not bargain with SEIU about implementation of the UNSEU time-tracking codes because the coding was not going to reduce employee compensation.

On April 25, 2011, the grievance was denied at Step 1 with the following notation: "Denied pursuant to guidance of HR." After a Step 2 meeting on May 24, 2011, the County denied the grievance in a decision dated June 9, 2011. The County's position as stated in the decision was as follows:

> [S]hift differential pay is intended to compensate employees for evening and night shift work where they are performing their regularly assigned duties. The language has historically been interpreted in that manner, and was never intended to compensate employees for time spent performing union activities, mandatory meetings, or educational training that go beyond the regularly scheduled work hours.
>
> [¶ . . . ¶]
>
> As of January of 2010, a new payroll code was created to track time spent by County employees participating in union activities. Prior to this code being created, if an employee was away from the office participating in union activities on county time, the time was reported as regular hours worked. With the inception of the new time reporting code, the supervisor/manager can easily decipher between regular hours worked and union activity hours. In the grievant's case, the manager/supervisor was able to readily discern that the hours were spent at contract negotiations which formed the basis for the denial of the premium pay because she was not actually working in her regular capacity of dispatch operator.

The County's conclusions in the Step 2 decision were based on two grounds. First, the County asserted that to be eligible for the shift differential under the MOU, the employee must satisfy two factors: "(1) they must be working their regularly scheduled shift and (2) they must qualify for the differential." The phrase "regularly scheduled shift" in the MOU "is interpreted to imply that work performed in the normal course of her shift is eligible for differential pay." Second, the County asserted that SEIU's "long-standing past practice" claim fails because the grievance procedure is not the proper forum for such disputes; PERB has exclusive initial jurisdiction over violations of the MMBA; and, even if jurisdiction were not an issue, "in order

for a past practice argument to prevail, there must be mutual awareness of a binding practice."

As to this final point, the Step 2 decision states:

> A party may not be bound by that which it did not know to exist and therefore has neither accepted nor condoned. The department clearly was unaware of the practice and ceased the improper payment once it came to their attention.

The Step 2 decision concludes:

> Grievance is therefore denied on the basis that the MOU is clear in defining perimeters [sic] for paying shift differential, union activities and past practices have dictated proper application.

The County's response to the amended charge states that "all of the grievances regarding the payment of [the] shift differential" were moved to Step 3 of the grievance procedure. Step 3 involves advisory arbitration. The MOU provides that the Board of Supervisors shall either accept or reject the decision of the arbitrator, or accept only a part. The decision of the Board of Supervisors is final.

The MOU states, in pertinent part:

> ARTICLE 4
> WORKWEEK, OVERTIME AND PREMIUM PAY
>
> Section 1. Workweek
>
> [¶ . . . ¶]
>
> Section 2. Overtime
>
> [¶ . . . ¶]
>
> Section 3. Premium Pay
>
> A. Call Duty – General. . . .
>
> [¶ . . . ¶]
>
> B. Minimum Overtime on Call-Back. . . .
>
> [¶ . . . ¶]

C. Shift Differentials

1. Applicability of Shift Differentials. Shift differentials do not apply to vacation, sick leave, holiday pay, call or standby duty. The hourly rate for each shift differential is payable in tenths of an hour. Employees who work day shift between the hours of 7:00 a.m. to 6:00 p.m. shall not be entitled to a shift differential.

   Classes not eligible for shift differentials. Employees in positions of all the following classes shall not be paid a night shift differential:

   Physician I, II, III Psychiatrist I, II, III Psychiatrist IM, IIM, IIIM

2. Evening Shift – General. County employees whose classes are not specifically mentioned below, working their regularly scheduled shift that ends after 6:00 p.m. and who perform work between the hours of 3:00 p.m. and 11:30 p.m., shall be paid a night differential of sixty cents ($0.60) per hour for the time actually worked between 3:00 p.m. and 11:30 p.m.[5]

[¶ . . . ¶]

ARTICLE 31
UNION RIGHTS

[¶ . . . ¶]

Section 2. Separate Payroll Deduction and Time Reporting Codes

[¶ . . . ¶]

B. Release Time. The County agrees to provide SEIU with two (2) separate payroll codes for union related release time. The County shall provide SEIU with monthly reports on the use of the UNSEU time reporting code (TRC), by employee name, county employee identification number, job class title and department.

[5] The language of the MOU regarding the evening shift differential is included as one example of the types of differentials provided for in this section. The other types include night shift differential, command post shift differential, specialty differential, preceptor differential, bilingual differential, psychiatrist differential, professional engineer differential, inconvenience differential, female prisoner search and meal service differential, POST certification differential, hazardous materials management specialist differential, equipment operator differential, class "A" or "B" license differential and certification differential.

The following payroll code shall be established for use:

SEIUP – Release Time to be reimbursed by SEIU Local 721

[¶ . . . ¶]

Section 6. Education and Training Release Time

The County agrees to release SEIU represented employees for Union related education and training activities not to exceed an aggregate total of twenty (20) minutes per represented employee per calendar year. Time spent training Stewards in the grievance procedure through the providing of release time to prepare for grievance/administrative interviews and Skelly hearings, will be charged to this Article/Section. The parties agree that up to fifty percent (50%) of this bank may be used for Steward activities.

Section 7. Stewards

[¶ . . . ¶]

There shall be no union activity on County time or premises except as provided for in this MOU. A Steward is permitted to represent SEIU in grievances, administrative interviews, or Skelly hearings, consistent with the representational rights granted by the *Meyers-Milias-Brown Act*. Stewards shall not be permitted to request preparation time pursuant to this Article. A Steward will not absent him/herself from his/her work without first obtaining the permission of the Department/District. . . .

Except as outlined below, the Steward will not be paid his/her regular wages while conducting steward business but will be permitted to use accumulated vacation and/or compensatory time, provided the use of such time does not result in the payment of overtime during the workweek in question. County will not pay for, nor shall the Steward be entitled to make any claim for, time spent on steward business during the Steward's non-regular working hours or for time spent on other union matters including, but not limited to, arbitration, PERB hearings, court, or depositions.

[¶ . . . ¶]

Section 10. Release Time for SEIU Local 721 Regional Council Meetings

Up to eight (8) County employees, who are authorized representatives of SEIU Local 721, shall be entitled to be released on one (1) regularly scheduled shift per month for the purpose of

traveling to and attending the monthly meeting. Any hours used to attend such meetings which are in excess of those provided under the provisions of this section shall be taken without pay or charged against the appropriate representative's paid leave banks.

SEIU agrees to provide the County with a minimum of two (2) month's advance notice for release time under this provision.

It is not the intent of this provision to create any additional overtime obligations to the County.

Section 11. Release Time for SEIU Local 721 Executive Board Meetings

Up to five (5) County employees, who are elected or appointed to the position of SEIU Local 721 Vice President, At-Large Vice President, Treasurer, Secretary, or Executive Board member shall be entitled to be released on one (1) regularly scheduled shift per month for the purpose of traveling to and attending the monthly meeting. Any hours used to attend such meetings under the provisions of this section shall be taken as an approved leave of absence charged against the appropriate representative's paid leave banks or the employee may remain on the County payroll and SEIU shall be obligated to reimburse the County based on actual costs for salary and benefits. The County will provide the Union with a detailed breakdown of these costs and said funds shall be paid by the Union upon receipt of bill.

[¶ . . . ¶]

Section 12. Release Time for the President of SEIU Local 721

The Union shall have the option to cause the County to release an employee elected or appointed to the position of President of SEIU Local 721 for full time work with the Union, while remaining on the County payroll. SEIU shall be obligated to reimburse the County. The reimbursement amount for the presidential leave shall be based on actual costs for salary and benefits with a detailed breakdown of these costs provided to the Union at least on a quarterly basis. Said funds shall be paid by the Union upon receipt of bill.

Upon return to full time work with the County, the employee shall only be entitled to return to their established classification and rate of pay. The County is not obligated to return the employee to their previous work assignment.

SEIU agrees to provide the County with a minimum of two (2) month's advance notice for release time under this provision.

The unfair practice charge was filed on June 28, 2011, and amended on February 24, 2012. On April 10, 2012, the Office of the General Counsel dismissed the charge. SEIU filed a timely appeal on May 4, 2012, and the County filed a timely opposition on May 24, 2012.

THE DISMISSAL OF THE UNFAIR PRACTICE CHARGE

The Office of the General Counsel dismissed the charge on the following grounds. New factual allegations in the amended charge regarding the County's failure to pay shift differentials or special pay premiums for union activities apart from formal negotiations, specifically grievance representation meetings, Regional Council meetings and Education and Training Release Time meetings, were dismissed as untimely. Similarly, new allegations in the amended charge regarding implementation of the UNSEU time-tracking code were also dismissed as untimely. The Office of the General Counsel concluded that even if these allegations were timely, they failed to state a prima facie violation.

The remaining allegations were dismissed for failure to state a prima facie case of unlawful unilateral change. Regarding the element of change in policy, the Office of the General Counsel concluded that the charge failed to identify any language in Article 31 of the MOU that requires the County to grant, let alone pay for, released time for negotiations; and to the extent the County paid any wages to the employees on released time for negotiations, the County was paying more than the MOU required, citing *Marysville Joint Unified School District* (1983) PERB Decision No. 314 (*Marysville*). The allegations of past practice were dismissed as conclusory. Regarding the element of generalized impact versus isolated breach, the Office of the General Counsel concluded that the charge failed to show what the County said when it stopped paying premium wages to some employees and therefore it was unclear whether the County's action was based on facts unique to a few employees.

SEIU'S APPEAL

SEIU argues that the Office of the General Counsel erred in failing to analyze MMBA section 3505.3, which requires public agencies to allow employee representatives of an employee organization reasonable time off to meet and confer "without loss of compensation or other benefits." SEIU also argues that the allegations as a whole are sufficient to state a prima facie case of unlawful unilateral change. SEIU further argues that the allegations dismissed as untimely relate back to the initial charge. Specifically, SEIU contends that while the initial charge does not set forth other types of union activities subject to released time apart from formal negotiations, they are set forth in Article 31 of the MOU, a copy of which was attached to the initial charge and referenced therein. Also, the allegations in the amended charge about the time-tracking code, UNSEU, were included to clarify the mechanism used by the County to stop paying full wages including shift differentials or special pay premiums to employees on union released time.[6]

THE COUNTY'S OPPOSITION TO SEIU'S APPEAL

The County's opposition to the appeal incorporates arguments made in response to the initial charge and the amended charge. According to the County, the MOU is clear and unambiguous. Article 4, Section 3(C) "clearly provides that shift differentials exclusively apply to 'employees working their regularly scheduled shift.'" Article 4, Section 3(C)(1) reinforces the County's position that only employees who are "actually working" qualify for shift differentials and other premium pay because shift differentials are not applicable to

[6] The appeal also takes issue with an "insinuation" in the dismissal letter that the amended charge was untimely filed. SEIU counters with a copy of an e-mail string between counsel for SEIU and a Board agent concerning the timeframe for filing the amended charge, attached as exhibit 5 to the appeal. Because the dismissal letter summarized and analyzed the allegations in the amended charge, rather than rejecting the amended charge as untimely filed, it is unnecessary to further address this issue. In raising this issue, SEIU asked the Board to compare exhibit five to exhibit nine, but there were only five exhibits filed with the appeal.

employees who are on vacation, sick leave, holiday pay, call or standby duty. Even if PERB finds that the MOU is ambiguous, argues the County, SEIU has failed to establish the elements of a binding past practice of paying shift differentials or special pay premiums to employees on union released time; or, that if such payments were made, they were made intentionally or were not a mere inadvertent oversight.

Further, the County contends that the new allegations in the amended charge are untimely in that they do not relate back to the initial charge. The County also contends that SEIU failed to exhaust its administrative remedy, citing to Educational Employment Relations Act (EERA)[7] section 3541.5, subdivision (a)(2), which prohibits PERB from issuing a complaint against conduct arguably also prohibited by the contract until the grievance machinery has been exhausted by settlement or binding arbitration.[8]

The County makes one new argument on appeal. The County asserts that SEIU's appeal does not comply with PERB Regulation 32635, subdivision (a), which requires that the charging party identify specific errors made by the Board agent in the dismissal.

DISCUSSION

The County's procedural arguments regarding the sufficiency of the appeal and deferral of the charge lack merit. We dispose of them briefly here before proceeding to a discussion of the two main issues on appeal, i.e., whether the new allegations in the amended charge are timely and whether the charge allegations are sufficient to state a prima facie violation of the MMBA. First, the County is correct to point out that the appeal does not identify the page of

[7] EERA is codified at section 3540 et seq.

[8] In its opposition to the appeal filed on May 24, 2012, the County notes that 13 days after the appeal was filed, on May 17, 2012, SEIU's grievance concerning the shift differential issue proceeded to advisory arbitration.

the dismissal to which the appeal is taken. To satisfy the requirements of PERB Regulation 32635, subdivision (a), the appeal must sufficiently place the Board and the respondent "on notice of the issues raised on appeal." (State Employees Trade Council United (2009) PERB Decision No. 2069-H; City & County of San Francisco (2009) PERB Decision No. 2075-M.) SEIU's appeal meets this standard. Therefore, the appeal is not subject to denial for failure to comply with PERB Regulation 32635, subdivision (a).

In addition, the charge is not subject to deferral. Under the MMBA, deferral to arbitration is governed by PERB Regulation 32620, subdivision (b)(6), which empowers a Board agent to first place a charge in abeyance if the dispute is subject to final and binding arbitration pursuant to a collective bargaining agreement, and then to dismiss the charge at the conclusion of the arbitration process unless the charging party demonstrates that the settlement or arbitration award is repugnant. The dispute here is subject to *advisory* arbitration, not *final and binding* arbitration and, therefore, deferral to arbitration is not appropriate under the plain meaning of the regulation. An unfair practice charge will not be dismissed unless the underlying dispute is subject to final and binding arbitration.

I. Timeliness of the New Allegations in the Amended Charge

PERB Regulation 32620, subdivision (b)(5), requires dismissal of a charge or any part thereof if it is determined that the charge is based upon conduct occurring more than six months prior to the filing of the charge. A charging party bears the burden of demonstrating that the charge is timely filed. (*County of Sonoma* (2012) PERB Decision No. 2242-M.) The statute of limitations is an element of the charging party's prima facie case. (*Long Beach Community College District* (2009) PERB Decision No. 2002.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.)

The statute of limitations for new allegations contained in an amended charge begins to run based upon the filing date of the amended charge (*Sacramento City Teachers Association (Marsh)* (2001) PERB Decision No. 1458) unless the new allegations in the amended charge relate back to the original allegations in the initial charge. (*Sacramento City Teachers Association (Franz)* (2008) PERB Decision No. 1959.) An amended charge relates back to the initial charge only when it clarifies facts originally alleged in the initial charge or adds a new legal theory based on facts originally alleged in the initial charge. (*Ibid.*)

Here, the amended charge was filed on February 24, 2012. The limitations period for new allegations contained in the amended charge extends back six months from the date of filing to August 24, 2011. The new allegations concern conduct that allegedly occurred in March 2011, so therefore these allegations would fall outside the limitations period, unless an exception applies.

The new allegations in the amended charge can be broken down into two categories: (1) allegations concerning the time-tracking code, UNSEU; and (2) allegations concerning union released time for activities apart from formal negotiations, specifically grievance representation meetings, Regional Council meetings and Education Training Release Time meetings. Regarding the first category of new allegations, these allegations were offered for background information.[9]

Regarding the second category of new allegations, the initial charge allegations make no mention of grievance representation meetings, Regional Council meetings or Education

[9] Evidence may be admitted for background. (See *Service Employees International Union, Local 1021 (Sahle)* (2012) PERB Decision No. 2261-M [citing *Local Lodge No. 1424, International Association of Machinists, AFL-CIO v. National Labor Relations Board* (1960) 362 U.S. 411,416 for the principle that events occurring prior to the limitations period may be utilized to shed light on the true character of matters occurring within the limitations period].

Training Release Time meetings.[10] The focus of the initial charge allegations is on formal negotiations. Section (d) of the initial charge describes the charge as follows:

> SEE ATTACHED. (COUNTY'S UNILATERAL CHANGE IN TERMS AND CONDITIONS OF EMPLOYMENT REGARDING RELEASE PAY FOR NEGOTIATIONS)

Section (d) of the amended charge describes the charge as follows:

> SEE ATTACHED RE: FAILURE TO PAY FULL COMPENSATION FOR EMPLOYEES WHEN MEETING AND CONFERRING WITH EMPLOYER AND UNILATERAL CHANGE IN TERMS AND CONDITIONS OF EMPLOYMENT REGARDING RELEASE PAY FOR OTHER TYPES OF UNION RELATED RELEASE TIME.

In support of its argument that the new allegations in the amended charge relate back to the original allegations in the initial charge, SEIU asserts that while the initial charge does not identify the other types of union released time apart from formal negotiations, the initial charge references and includes a copy of Article 31 of the MOU. PERB Regulation 32615, subdivision (a)(5) requires that a unfair practice charge contain "[a] clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The Board has long required that a charge include all the material facts necessary to establish a prima facie case. *(Los Angeles Unified School District* (1984) PERB Decision No. 473.) Requiring a Board agent to discern the material facts not from the charge itself but from a copy of the labor agreement attached to the charge does not meet this standard. (See, e.g., *Regents of the University of California* (2004) PERB Decision No. 1592-H [Board affirmed dismissal of charge directing Board agent to review attached documents for more information about the charge].)

[10] It is, however, noted that the e-mail from Grotefend responding to an inquiry from Thomas regarding shift differential pay for Educational Training Release Time was attached as an exhibit to the initial charge and referenced in Allegation No. 9. Allegation No. 9 refers to "collective bargaining" as only one example of union activities for which an employee may be released from regular work duties.

Although SEIU's relation back argument is of no avail, the doctrine of equitable tolling is conclusive on the timeliness issue. The doctrine of equitable tolling applies to cases under the MMBA. (*Solano County Fair Association* (2009) PERB Decision No. 2035-M.) Under the doctrine of equitable tolling, the statute of limitations is tolled during the period of time the parties are utilizing a non-binding dispute resolution procedure if the following elements are met: (1) the procedure is contained in a written agreement negotiated by the parties; (2) the procedure is being used to resolve the same dispute that is the subject of the unfair practice charge; (3) the charging party reasonably and in good faith pursues the procedure; and (4) tolling does not frustrate the purpose of the statutory limitations period by causing surprise or prejudice to the respondent. (*Long Beach Community College District, supra,* PERB Decision No. 2002.)

Based on the allegations of the charge and supporting documentation, the elements of equitable tolling are met. The dispute resolution procedures utilized by the parties are contained in a written agreement negotiated by the parties. The procedures are being used to resolve the same dispute that is the subject of the unfair practice charge.[11] SEIU reasonably and in good faith has pursued the procedure. And, based on the nature of the charge, there is no basis on which to conclude that tolling would frustrate the purpose of the statutory limitations period by causing surprise or prejudice to the County.

[11] The grievance describes the dispute, not as limited in scope to formal negotiations, but more broadly to encompass "the payment of shift differentials for SEIU represented employees using the time reporting code of UNSEU for participation in union activities." The grievance refers to "hours worked during paid release time for participation in union activities." Similarly, the County responded to the grievance in broad terms, noting that the "language has historically been interpreted in that manner, and was never intended to compensate employees for time spent performing union activities, mandatory meetings, or educational training that go beyond the regularly scheduled work hours."

The grievance was filed on March 17, 2011, the same month in which the conduct underlying the charge is alleged to have occurred. The County's response to the amended charge states that "all of the grievances regarding the payment of the shift differential" were moved to Step 3 of the grievance procedure. At the time the amended charge was filed, the parties were still utilizing the grievance procedure. The statute of limitations was equitably tolled from March 17, 2011, until at least the filing of the amended charge. Accordingly, we conclude that the new allegations in the amended charge are timely under the doctrine of equitable tolling.

II. The Sufficiency of the Charge Allegations

a. Unlawful Unilateral Change

MMBA section 3505 requires the governing body or other representative of a public agency to meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of recognized employee organizations. PERB Regulation 32602, subdivision (c), makes it an unfair practice under the MMBA for a public agency to refuse or fail to meet and confer in good faith with an exclusive representative as required by MMBA section 3505.

In determining whether a party has violated MMBA section 3505 and PERB Regulation 32603(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (*Stockton Unified School District* (1980) PERB Decision No. 143.) It is well-settled that an employer who makes a pre-impasse unilateral change in an established negotiable policy violates its duty to meet and confer in good faith. (NLRB v. Katz (1962) 369 U.S. 736.) Such unilateral changes are inherently destructive of employee rights and are a failure per se of

the duty to negotiate in good faith. (*Hacienda La Puente Unified School District* (1997) PERB Decision No. 1187 (*Hacienda*).)

In order to establish a prima facie case of unlawful unilateral change, the charging party must satisfy certain criteria. Those criteria are: (1) the employer took action to change policy; (2) such action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) the action was not merely an isolated incident or breach of the contract, but had a generalized effect or continuing impact on the terms and conditions of employment of bargaining unit employees; and (4) the change in policy concerns a matter within the scope of representation. (*Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262; *Grant Joint Union High School District* (1982) PERB Decision No. 196 (*Grant*); *Walnut Valley Unified School District* (1981) PERB Decision No. 160.)

An established policy may be embodied in the terms of the parties' collective bargaining agreement. (*Grant, supra,* PERB Decision No. 196.) Although PERB lacks jurisdiction to adjudicate claims involving solely the violation of an agreement (see *City of Long Beach* (2008) PERB Decision No. 1977-M), PERB may interpret contract language as necessary to decide unfair labor practices. (*County of Sonoma* (2011) PERB Decision No. 2173-M.) When the Board interprets contract language, traditional rules of contract interpretation apply. (*Ibid.*) Thus, the Board relies primarily on the plain meaning of the contract language when attempting to discern its meaning. (*County of Ventura (Office of Agricultural Commissioner)* (2011) PERB Decision No. 2227-M citing *County of Ventura* (2007) PERB Decision No. 1910-M.) "Where contractual language is clear and unambiguous, it is unnecessary to go beyond the plain language of the contract to ascertain its meaning."

(*County of Sonoma, supra,* PERB Decision No. 2173-M, citing Civ. Code § 1638, *City of Riverside* (2009) PERB Decision No. 2027-M; *Marysville Joint Unified School District* (1983) PERB Decision No. 314.)

Here, the MOU does not address the issue whether an employee is entitled to payment of a shift differential or special pay premiums when utilizing union released time.[12] Under the provision of the MOU entitled "Applicability of Shift Differentials," shift differentials do not apply to only five types of paid time. They are "vacation, sick leave, holiday pay, call or standby duty." Under that same provision, there are only nine classes of employees not eligible for shift differentials, namely "Physician I, II, III" "Psychiatrist I, II, III," and "Psychiatrist IM, IIM, IIIM." If the parties had agreed at the time they entered into the MOU that employees on union released time would not be eligible for shift differentials, that agreement is not expressed in this provision on the applicability of shift differentials.

Section 2(b) under Article 31 of the MOU governs separate payroll deductions and time reporting codes for union released time. The provision requires the County to provide SEIU with two payroll codes for union released time. It also provides that released time reported under the time code SEIUP shall be reimbursed by SEIU, but the provision otherwise does not address the issue of how union released time is to be paid. Other sections of Article 31 governing specific types of union released time do. For example, under section 11, released time for SEIU Executive Board meetings "shall be taken as an approved leave of absence charged against the appropriate representative's paid leave banks or the employee may remain on the County payroll and SEIU shall be obligated to reimburse County based on actual costs

[12] Released time is time during the workday during which an employee is excused from work to participate in negotiations. (*Anaheim Unified High School District* (1981) PERB Decision No. 177.

for salary and benefits." Reimbursement by SEIU is also required by section 12 governing released time for the President to work full time for SEIU. By contrast, there are no provisions containing any requirements as to how the various types of union released time at issue in this matter – collective bargaining, grievance representation meetings, Education and Training Release Time meetings and Regional Council meetings – are to be paid. We therefore conclude that the MOU is silent on this issue.

Where a contract is silent or ambiguous, an established policy can also take the form of an established past practice or bargaining history. (*Rio Hondo Community College District* (1982) PERB Decision No. 279; *Compton Community College District* (1990) PERB Decision No. 790.) The Board has described an established past practice in a number of similar ways. The Board has stated that it must be 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. (*County of Placer* (2004) PERB Decision No. 1630-M, citing *Hacienda La Puente Unified School District* (1997) PERB Decision No. 1186; see also *Riverside Sheriffs' Assn. v. County of Riverside* (2003) 106 Cal.App.4th 1285, 1291.) In addition, PERB has described an enforceable past practice as one that is "regular and consistent" or "historic and accepted." (*Hacienda La Puente Unified School District*, *supra*, PERB Decision No. 1186.) PERB has also held that a past practice is established through a course of conduct or as a way of doing things over an extended period of time. (*Pajaro Valley Unified School District* (1978) PERB Decision No. 51 (*Pajaro Valley*); *Cajon Valley Union School District* (1995) PERB Decision No. 1085.)

The amended charge alleges that the practice of paying shift differentials or special pay premiums to employees on union released time was in place for "many years." A new payroll

time reporting code, UNSEU, enabled the County to begin to "track time spent by County employees participating in union activities," according to the County's Step 2 grievance decision. The new code allowed the County to differentiate between time spent on union released time and regularly scheduled work time. Subsequent to the creation of this code, in March 2011, during collective bargaining for a successor agreement, the County stopped paying employees their full wages, including any applicable shift differentials or special pay premiums, for time spent engaged in certain released time activities, namely collective bargaining, grievance representation meetings, Education and Training Release Time meetings and Regional Council meetings.

In response to the grievance, the County argued that SEIU's past practice claim fails in part because the "department clearly was unaware of the practice and ceased the improper payment once it came to their attention." SEIU counters that the County had to have known how it was paying its employees on union released time given that new released time provisions were negotiated in 2009 and 2010. On this point, during negotiations for a 2011 successor agreement, the County proposed amending the provision of the MOU governing shift differentials to add "Union Release Time" to the list of leave categories exempt from the application of shift differentials. The County's desire to change the terms of the contract provides support, if only inferential, for SEIU's allegations that a policy of paying employees on union released time full wages including shift differentials or special pay premiums had hitherto been in place, a policy that the County subsequently sought to change.[13] Based on all of the above, we conclude that the charge alleges a course of conduct or way of doing things over an extended period of time, as articulated by the Board in *Pajaro Valley, supra*, PERB

[13] Even if there were not this inference, the issue of employer knowledge is a disputed fact, which at this stage of the proceedings is resolved in SEIU's favor. (*Sacramento City Unified School District* (2010) PERB Decision No. 2129-E [conflicting issues of material fact must be resolved by a trier of fact via PERB's formal hearing process].)

Decision No. 51, sufficient to demonstrate an established past practice, thus satisfying the first criteria of the prima facie case.

The remaining criteria are also satisfied. As alleged, the County implemented a change in policy regarding payment of shift differentials or special pay premiums to employees on union released time without giving SEIU notice or an opportunity to bargain over the change. The County does not dispute that it did not follow meet and confer procedures. An alleged policy of reducing the compensation of employees on union released time has a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment, namely wages. The alleged change therefore constitutes a change in policy rather than an isolated breach. Last, the change in policy concerns a matter within the scope of representation. (See, e.g., *Anaheim Union High School District* (1981) PERB Decision No. 177 [paid release time is negotiable because it relates to wages].) Therefore, we conclude that the elements of an unlawful unilateral change have been satisfied for prima facie purposes.

In response to the charge, the County contends that the MOU controls, and is not trumped by past practice. It also contends that to the extent the Board finds the terms of the MOU to be ambiguous, SEIU has failed to allege sufficient facts constituting an established past practice.

For the reasons discussed above, we reject the County's argument that the MOU "clearly provides that shift differentials exclusively apply" only to employees who are "actually working." For support, the County relies on the section of the MOU governing the applicability of the shift differentials, which provides that "[s]hift differentials do not apply to vacation, sick leave, holiday pay, call or standby duty." The County appears to equate union released time with being absent from work, and concludes that in either case, employees are

not "actually working" and therefore are not eligible for shift differentials or special pay premiums. There are several problems with this argument. First, presumably there was nothing to prevent the parties from including union released time in the finite list of exclusions, but as written, union released time is not explicitly exempted from the application of shift differentials. Second, union released time is of a categorically different nature of paid time than vacation, sick leave, holiday pay, call or standby duty. Employees on union released time are physically at the worksite, but have been released from their regularly assigned duties by the County for a designated period of time. They are not at home, on vacation or otherwise free to attend to personal or other non-work related business. Therefore, union released time is not comparable to vacation, sick leave, holiday pay, call or standby duty. While true that employees on union released time are not performing their regular duties, they are participating in union activities related to the workplace.

The County also points to language in the MOU setting forth the various types of shift differentials in arguing that shift differentials only apply to employees working their "regularly scheduled shift." While regularly assigned *duties* are necessarily performed during regularly scheduled *shifts*, the County's conflation of the two concepts is rejected. Notwithstanding any shift changes necessary to accommodate the scheduling of collective bargaining sessions, employees on union released time are excused from their regularly assigned duties. By agreeing to the phrase "regularly scheduled shift," we discern no intent by the parties to deny employees the shift differentials or special pay premiums they would have received but for their participation in collective bargaining. At a minimum, this phrase, as it applies to the determination of eligibility for shift differentials or special pay premiums, is sufficiently ambiguous, and therefore warrants an examination of SEIU's past practice claim. In addition,

the County points to language in the MOU stating that union stewards are not required to be paid their regular wages. The charge allegations, however, do not concern union stewards.[14] Finally, the County points to the absence of "union release time" in Article 4 in the listing of shifts for which a shift differential is required to be paid. Union released time is not a type of shift. We do not, therefore, find its absence in this section relevant.

In furtherance of its point that the MOU controls, the County argues that to the extent the County paid more than the MOU requires, the Board's decision in *Marysville, supra,* PERB Decision No. 314, controls. The County relies on the following statement in the *Marysville* decision: "[t]he 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."

In *Marysville, supra,* PERB Decision No. 314, PERB held that the language of an existing agreement established a maximum break time for teachers such that assignment of noon-duty supervision outside that time limit was not a unilateral change, despite the employer's historical practice of not assigning such duty during teachers' "free" time. Because the language of the contract was found to be sufficiently unambiguous, the employer was within its rights to enforce the terms of the agreement limiting the break time to that prescribed by the agreement.

Marysville, supra, PERB Decision No. 314, stands for the principle that if a contract provision is unambiguous and there is no subsequent mutual agreement to alter it, the employer

[14] Section 7 of Article 31 sets forth the County's pay obligations owed to stewards conducting "steward business." That provision states that stewards are permitted to represent SEIU in grievances. We recognize that the amended charge includes "grievance representation meetings" as one of the four types of union released time activities in addition to collective bargaining, Regional Council meetings and Education and Training Release Time meetings that are the subject of this charge. In remanding this matter for issuance of a complaint, compensation issues relating to stewards' participation in grievance meetings are expressly excluded from this order given the clear and unambiguous terms of the MOU.

is entitled to enforce the terms of the contract despite its prior failure to do so. *Marysville* is distinguishable. As discussed above, unlike the Board in *Marysville*, we do not find the MOU to be sufficiently unambiguous. We find it to be silent, or at best sufficiently ambiguous, on the question whether employees are entitled to their full wages including shift differentials or special pay premiums when utilizing union released time.

We turn to the County's second argument, i.e., to the extent the MOU is ambiguous, SEIU failed to establish a binding past practice. The County contends that any payments above base wages made in the past to employees on union released time were not intentional but rather a mere isolated instance or inadvertent oversight. At the charge processing and investigation stage of the proceedings, the essential facts alleged in the charge are assumed to be true. Conflicting issues of material fact must be resolved by a trier of fact via PERB's formal hearing process. (*Sacramento City Unified School District* (2010) PERB Decision No. 2129-E.) The County's assertions regarding past payments for union released time are disputed facts that cannot be resolved at this stage of the proceedings. The County will have ample opportunity to rebut SEIU's claims at a formal hearing before a PERB administrative law judge.

None of the cases cited by the County on this point persuade us to uphold the dismissal. In *Regents of the University of California* (2010) PERB Decision No. 2109-H, the union argued that there were two established past practices. One involved a policy of enforcing the medical verification requirement only for employees who previously abused their sick leave and the other involved a policy of not rescinding vacation leave once it was approved. Regarding the sick leave policy, the Board found that the collective bargaining agreement addressed the issue of sick leave verification. The Board further found that to the extent the

employer previously failed to enforce the contract, it was not precluded from doing so under *Marysville, supra,* PERB Decision No. 314. Regarding the vacation policy, the Board found that there were no facts supporting the union's allegation of a change. In contrast, we find that the MOU here is silent on the disputed issue, and that while SEIU may or may not prevail at a formal hearing, it has at least alleged sufficient facts to support a prima facie case that the County changed a policy embodied in a past practice of paying employees their full wages including shift differentials or special pay premiums for when utilizing union released time.

In *Riverside Sheriff's Assn. v. County of Riverside, supra,* 106 Cal.App.4th 1285, 1290-1291, the union argued that there had been a policy of automatically granting step increases to employees on work-related illness or disability leave. Adopting PERB's standard for determining an established past practice, the court held that the union failed to demonstrate an unequivocal, regular and consistent practice of automatic step increases, pointing to the fact that in the past such step increases had been both granted and denied. Here, SEIU alleges that the practice was unequivocal, regular and consistent and nothing in the factual presentation of the charge suggests otherwise.

Omnitrans (2008) PERB Decision No. 1996-M (*Omnitrans*) involved a complaint alleging a change in the union leave policy. The union argued that "authorized union business" under the terms of the contract permitted employees to take union paid business leave for any purpose whatsoever, as long as it was authorized by the union. The union also argued that this interpretation was consistent with past practice in that *Omnitrans* never restricted the type of activity for which union leave could be used. *Omnitrans* argued that "authorized union business" did not extend to any business unrelated to *Omnitrans* and its employees, and that in approving leave requests for authorized union business, it did not know

that such leave was being used for union activity unrelated to *Omnitrans*. The chief executive officer and general manager of *Omnitrans* made the discovery when he saw on the front page of the newspaper a photograph of an *Omnitrans* employee picketing a county building on behalf of workers not employed by *Omnitrans*. The Board found that *Omnitrans* never "knowingly" granted union paid leave for purposes unrelated to *Omnitrans*, and once it discovered that the union was using employees on union paid leave for purposes related to other employers, it stopped this practice.

In arguing that SEIU has failed to establish a binding past practice, the County is relying on the word "knowingly" in the following statement in *Omnitrans*: the employer "did not knowingly approve union paid release time for non-*Omnitrans* related activities as claimed by ATU." The County contends that to the extent the County made payments of full wages including shift differentials or special pay premiums to employees on union released time, it did not do so "knowingly."

The County's reliance on *Omnitrans, supra,* PERB Decision No. 1996-M, is misplaced. Accepting the facts as alleged to be true, prior to March 2011, the County paid full wages including shift differentials or special pay premiums to employees whom the County released from their regular duties to engage in union released time activities. While the County appears not to have differentiated between wages earned for performance of regular duties and wages earned for participation in approved union released time activities for time reporting and payroll purposes, this does not mean that this practice was not "knowingly" followed by the County as that word was intended by the Board in *Omnitrans*. In *Omnitrans*, once the employer granted a union leave request, the employer had no reason to question whether such leave was being used consistently with its understanding of authorized uses. Here, in contrast,

the County does not argue that union released time is being used inappropriately, or that the County did not approve the union released time requests for the very uses to which they were applied. Moreover, given the County's authority to approve leave requests and its control over the administrative payroll system, the County's argument that its wage payments to employees were not made knowingly is not persuasive. The County had the means and the opportunity, not to mention the responsibility as a public employer, to be cognizant at all times of how it pays its employees and what it pays its employees for.

Based on the foregoing, we conclude that SEIU has alleged sufficient facts demonstrating for prima facie purposes an established past practice. While the County disputes SEIU's allegations of an established past practice, it will have every opportunity at trial to present its evidence and make its case. At this stage of the proceedings, disputed facts are resolved in favor of the charging party.

b. Independent Statutory Violation Arising Under MMBA Section 3505.3

SEIU is correct that the Office of the General Counsel did not analyze MMBA section 3505.3 in dismissing the charge. In processing an unfair practice charge, the Board's regulations do not empower the Office of the General Counsel to rule on the ultimate merits of a charge. (*Eastside Union School District* (1984) PERB Decision No. 466.) As the Board stated, "where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." We construe this language to mean that a complaint may be issued to test a viable theory of law. (*City of Pinole* (2012) PERB Decision No. 2288-M.)

The right of an employee organization to released time is statutorily guaranteed. MMBA section 3505.3 provides in full:

> Public agencies shall allow reasonable number of public agency employee representatives of recognized employee organizations reasonable time off without loss of compensation or other

> benefits when formally meeting and conferring with representatives of the public agency on matters within the scope of representation.

A similar statutory provision can be found in EERA section 3543.1, subdivision (c).[15] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.) There is longstanding Board precedent under EERA holding that the right to released time is both a mandatory subject of bargaining and a statutory right. (See *San Mateo Federation of Teachers AFT Local 1493, AFL-CIO v. San Mateo County Community College District* (1993) PERB Decision No. 1030 (*San Mateo*).) The main issue addressed in the decisions under EERA concerns the reasonableness of the amount of released time and the number of representatives released.[16] As to the tension between released time being both a statutory right and also a negotiable matter, the Board stated:

> The Board further concluded that the "Legislature considered the matter of released time too important to the statutory scheme to be left either to the employer's discretion or entirely to the vagaries of negotiations." Thus, there exists in section 3543.1(c) a "minimum released-time standard . . . against which the parties' good faith in negotiating on the subject could be measured."

(*San Mateo* quoting *Anaheim Union High School District, supra,* PERB Decision No. 177.)

MMBA section 3505.3 similarly establishes a minimum statutory guarantee that is not negotiable. The determination of the number of representatives to be released and the amount

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[15] EERA section3543.1, subdivision (c) provides: "A reasonable number of representatives of an exclusive representative shall have the right to receive reasonable periods of released time without loss of compensation when meeting and negotiating and for the processing of grievances.

[16] Reasonableness under EERA section 3543.1, subdivision (c) is a question of fact which must be determined based on the circumstances of each case. (*Sierra Joint Community College District* (1981) PERB Decision No. 179.)

of released time to be provided is couched in terms of reasonableness whereas the determination of compensation or other benefits is not. The determination of reasonableness relative to the number of representatives and amount of time will necessarily vary depending on the factual circumstances of each case.[17] In contrast, the determination of "loss" of compensation or other benefits is measureable.

In *Anaheim Unified High School District*, one of the issues before the Board involved the costs of released time. The district argued that released time costs may be passed along for reimbursement by the employee organization. The Board disagreed:

> Thus, the employer's policy is little short of an evasion of its statutory obligation specifically and unequivocally imposed by the Act. . . . Ironically, the employer's policy would not only permit it to circumvent its statutory obligation but would place on the employees, *the intended beneficiaries of section 3543.1(c)*, the burden of financing the employer's obligation. The District's policy does not simply ignore the Act, it reverses its very meaning.

(*Anaheim Unified School District, supra,* PERB Decision No. 177, emphasis added.)

Although the policy involved here does not entail a pass-on of all costs of released time, the same reasoning applies. The statutory purpose of released time is to ensure effective representation for employees in negotiations by lessening the burden on employee organizations whose effectiveness may otherwise be limited by time constraints. (*San Mateo, supra,* PERB Decision No. 1030.) A policy that shifts costs onto employees by denying them the pay they would have received but for collective bargaining frustrates this purpose.

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[17] Factual circumstances to be considered include the reasonable needs of the employer, the number of hours spent in negotiations, the number of employees on the employee organization's negotiating team, the progress of the negotiations, etc. The amount of released time must be appropriate to the circumstances of the negotiations. (See *Magnolia School District* (1977) EERB* Decision No. 19 [an employer's policy is not reasonable "if the policy is unyielding to changed circumstances"].) (*Prior to 1978, PERB was known as the Educational Employment Relations Board (EERB).)

Turning to the facts here, SEIU alleged that in March 2011, the County changed its policy regarding payment of wages to employees released from their regular duties to engage in formal negotiations. Prior to March 2011, as alleged, the County paid employees released for formal negotiations their full wages including shift differentials or special pay premiums. With the alleged change in policy, the County began paying employees released for formal negotiations just their base wages, which did not include shift differentials or special pay premiums.

As stated above, MMBA section 3505.3 requires public agencies to allow reasonable time off for formal negotiations "without loss of compensation or other benefits." In construing the meaning of this phrase, we are guided by the fundamental rules of statutory construction. A court should ascertain the intent of the Legislature to effectuate the purpose of the law; and if the language of the statute is clear and unambiguous, then the intent of the Legislature is reflected in the plain meaning of the statute. (*Reid v. Google* (2010) 50 Cal.4th 512, 527.) As the California Supreme Court confirmed:

> "Under settled canons of statutory construction, in construing a statute we ascertain the Legislature's intent in order to effectuate the law's purpose. [Citation.] We must look to the statute's words and give them 'their usual and ordinary meaning.' [Citation.] 'The statute's plain meaning controls the court's interpretation unless its words are ambiguous.' [Citations.] 'If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy.' [Citation.]" (*Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 387-388 [97 Cal.Rptr.3d 464, 212 P.3d 736].)

By reducing employees' pay from full wages to base wages when they are excused from their regular duties to engage in formal negotiations, a loss in compensation or other benefits occurs. The way in which employees' time is compensated affects not only the

computation of take-home pay, but often such benefits as retirement credits and seniority. The County argues that no loss occurred because employees engaged in formal negotiations still are entitled to wages of some kind, i.e., their base wages. "Loss" within the meaning of this statutory directive, however, must be measured by an objective standard, rather than left to the discretion of one party to decide.[18]

The Board has described the right to released time as the right of an employee "to continue to receive *full* compensation." (*Anaheim Unified School District, supra,* PERB Decision No. 177, emphasis added.) With this description in mind, we construe "loss" within the meaning of MMBA section 3505.3 as measured against the amount of pay the employee would have earned if the employee had not been "formally meeting and conferring with representatives of the public agency on matters within the scope of representation."[19] To construe it otherwise would exact a penalty on employees for engaging in formal negotiations,

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[18] One perhaps unintended consequence of the County's position is that it would tend to encourage only those employees working in shifts not eligible for shift differentials or special premium pay to participate in formal negotiations. Often, these employees have less seniority and therefore cannot bring to negotiations the same depth of experience in the workplace as more senior employees. Negotiations are enhanced when each side has unfettered choice in selecting their choice of representative. (See *Yolo County Superintendent of Schools* (1990) PERB Decision No. 838, citing *San Ramon Valley Unified School District* (1982) PERB Decision No. 230 [neither the union nor the employer may dictate the opposing parties' choice of representative].)

[19] The determination of "loss" under this interpretation of the statute does not turn on when formal negotiations are scheduled to occur. Regardless of the timing of formal negotiations, if an employee is entitled to be paid shift differentials or special pay premiums for working his or her regularly scheduled shift, then under MMBA section 3505.3, the employee is entitled to the same pay for time spent in formal negotiations on approved union released time. Otherwise, that employee would suffer a "loss of compensation or other benefits" in violation of MMBA section 3505.3. On the other hand, if the employee is not entitled to be paid shift differentials or special pay premiums for working his or her regularly scheduled shift, this interpretation of loss would not apply regardless of whether formal negotiations are scheduled to coincide with shifts that carry shift differentials or special pay premiums because no "loss of compensation or other benefits" within the meaning of MMBA section 3505.3 occurs.

and create a chilling effect on the exercise of protected employee rights, i.e., participation in organizational activities.

We find that our interpretation of MMBA section 3505.3 is consistent with the underlying public policy embodied in the MMBA to "promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations." (§ 3500, subd. (a).) This policy is not served by a compensation system that deters employees from engaging in collective bargaining. The requirements of MMBA section 3505.3 extend only to formal negotiations, not to other types of union activity. Through the enactment of this provision, the Legislature expressed its intention that formal negotiations be accorded a certain statutorily protected status by guaranteeing that employees suffer "no loss in compensation or other benefits" as a consequence of exercising their statutorily protected rights.

Thus, we conclude that SEIU has stated a prima facie violation of MMBA section 3506.5, subdivision (b), which prohibits a public agency from denying to employee organizations the rights guaranteed by this chapter.[20] By causing employees to suffer "a loss in compensation or other benefits" under MMBA section 3505.3 for participating in formal negotiations, the County denied to SEIU rights guaranteed by this section.

CONCLUSION

The charge sets forth sufficient facts to state a prima facie case of an unlawful unilateral change that occurred in March 2011 when the County began paying base wages instead of full wages including any applicable shift differentials and other premium pay to

[20] A denial of released time rights is a (b) violation. (*Gilroy Unified School District* (1984) PERB Decision No. 471; *Muroc Unified School District* (1978) PERB Decision No. 80; *Magnolia School District, supra,* PERB Decision No. 19.)

employees released from their regular duties for the following union activities: collective bargaining negotiations, grievance meetings, Regional Council meetings and Education and Training Release Time meetings. By its unilateral decision to change the past practice on released time, the County failed and refused to meet and confer in good faith in violation of MMBA section 3505.

The charge also sets forth sufficient facts to state a prima facie case of an independent statutory violation arising under MMBA section 3505.3 by the County's conduct in paying base wages instead of full wages including applicable shift differentials or special pay premiums to employees released from their regular duties for formal negotiations. By this conduct, the County denied to SEIU rights guaranteed by this section.

ORDER

The Board REVERSES the Office of the General Counsel's dismissal in Case No. LA-CE-702-M and REMANDS the case to the Office of the General Counsel for issuance of a complaint consistent with this Decision.

Members Huguenin and Winslow joined in this Decision.