

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**



DAVIS PROFESSIONAL FIREFIGHTERS
ASSOCIATION, LOCAL 3494,

Charging Party,

v.

CITY OF DAVIS,

Respondent.

Case No. SA-CE-833-M

PERB Decision No. 2494-M

June 30, 2016

Appearances: Carroll, Burdick & McDonough, by Gary M. Messing, Jason H. Jasmine, and Lina Balciunas Cockrell, Attorneys, for Davis Professional Firefighters Association, Local 3494; Best Best & Krieger, by Stacy N. Sheston and Kimberly E. Hood, Attorneys, for City of Davis

Before Martinez, Chair; Winslow and Banks, Members.

DECISION

WINSLOW, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions by Davis Professional Firefighters Association, Local 3494 (Local 3494) to a proposed decision by an administrative law judge (ALJ) dismissing an unfair practice complaint against the City of Davis (City). The complaint alleged that the City discriminated and retaliated against Fire Captain, Local 3494 President and Chief Negotiator Robert "Bobby" Weist (Weist) by denying his same-day request for vacation leave on March 13, 2013, and issuing him a performance improvement plan (PIP) on April 9, 2013. The complaint also alleged that the City unilaterally changed terms and conditions of employment by issuing the PIP. These acts allegedly violated the Meyers-Milias-Brown Act

(MMBA)¹ sections 3503, 3505, 3506, 3506.5, subdivisions (a), (b), and (c), and 3509, subdivision (b), and PERB Regulation 32603, subdivisions (a), (b), and (c).² The complaint also alleged derivative violations of interference with and denial of Local 3494's right to represent bargaining unit employees and interference with unit employees' right to be represented by Local 3494.

After notice of formal hearing issued, Local 3494 moved to amend the complaint to allege that the City unilaterally changed its policy regarding vacation leave of less than 24 hours by denying Weist's same-day vacation request. On July 21, 2014 the motion was granted and an amended complaint issued.

Following a two-day hearing, the ALJ dismissed both the unilateral change and discrimination/retaliation allegations concerning Weist's same-day vacation request and the City's issuance of a PIP to Weist.

The Board has reviewed the entire record in this matter, including the hearing transcript and exhibits, Local 3494's exceptions and supporting brief, and the City's response. We affirm the ALJ's dismissal of the retaliation allegation concerning the same-day vacation request and the City's issuance of a PIP to Weist, as well as the unilateral change allegation concerning the same-day vacation request, although for somewhat different reasons than the ALJ, as further explained below. However, we reverse the ALJ's dismissal of the unilateral change allegation concerning the City's issuance of a PIP to Weist, as further explained below.

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

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

FACTUAL SUMMARY

Jurisdiction

The City is a public agency within the meaning of MMBA section 3501, subdivision (c). Local 3494 is an exclusive representative of an appropriate unit of employees under PERB Regulation 32016, subdivision (b), and Weist is a public employee within PERB jurisdiction under MMBA section 3501, subdivision (d).

Background

The fire department is a 24-hour-per-day, 7-day-per-week operation, with shifts A, B, and C. Nine crews/engine companies work at three fire stations (31-downtown, 32, 33). The fire bargaining unit includes firefighter I and II, and fire captain. Division chiefs, deputy chief(s), and fire chief are not represented.

Weist has been a full-time firefighter with the City since March 11, 1985, rising through the ranks to firefighter II, and ultimately to fire captain in 2007. He has been Local 3494 president for 27 years, and also served as vice president and a member of the Local 3494 board. Since 1986, Weist has been on the Local 3494 bargaining team and has been lead negotiator since the 1990s for five to ten multiple-year contracts.³ He has filed five to ten grievances as Local 3494 president.

In 2012, Shawn Kinney (Kinney) and Bruce Fry (Fry) received promotions to division chief. During the events relevant to this case, Kinney was training officer/chief and supervised B shift at fire station 31-downtown, while Fry was administrative chief, supervising Weist and his crew on shift A at station 31-downtown.

³ Weist is also a vice president of the California Professional Firefighters Association, staff representative for International Association of Firefighters, and field representative for Carroll, Burdick & McDonough, negotiating contracts and handling grievances.

Rose Conroy (Conroy), the last full-time City fire chief, retired in November 2009, but worked as an annuitant until mid-February 2010. Several interim fire chiefs who were retired annuitants from other fire departments, followed for two years. In early 2013, City Police Chief Landy Black (Black) and Assistant Chief Steve Pierce (Pierce) were assigned to lead a combined public safety department, with Black responsible for daily operations and Pierce overseeing administrative functions of police and fire. In January 2014, a management merger of the University of California, Davis (UCD) and City fire departments took effect, and UCD Fire Chief Nathan Trauernicht (Trauernicht) became chief.

In April 2013, the City council approved fire crew size reductions effective July 1. City fire department crews were reduced from four (one fire captain, three firefighters) to three (one fire captain, two firefighters), decreasing the bargaining unit from 46 to 32 employees. Weist had been publically critical of the proposed reductions for eight to nine months before the City council's approval.

The 2009-2012 memorandum of understanding (MOU) for the fire bargaining unit expired June 30, 2012. Negotiations for a successor agreement were unsuccessful, and impasse was declared in March or April 2013.⁴

Weist's Protected Activity

In addition to holding leadership positions, handling grievances, and serving on the bargaining team for Local 3494, Weist also protested to the City council on behalf of Local 3494 concerning the crew size reductions and the combining of the police and fire departments into a single public safety department. Weist asserted to the City manager and City council

⁴ Agreement continued to elude the parties despite mediation and factfinding. The City imposed its last, best and final offer (LBFO) in December, 2013.

that general law cities required a fire chief to head the fire department, relying on Government Code section 38611.

In April or May 2013, Local 3494 took a vote of no-confidence in Chiefs Black and Pierce based on the crew reductions. However, the City did not learn of this vote until July 15, 2013, when Local 3494 sent a memorandum to City Hall signed by all unit employees, including Weist, expressing no-confidence.

March 13, 2013 Denial of Same Day Vacation Leave

Section 10, Annual Vacation Leave, of the expired 2009-2012 MOU governed vacation accrual, scheduling, and the maximum number of personnel who may take leave per shift.

Section 10 F.1, Scheduling and Carryover, provides:

The times during the year when an employee may take vacation shall be determined by the Fire Chief with due regard for the wishes of the employee and particular regard for the needs of the service.

Weist and Conroy testified to their belief that this language means the fire chief can deny or postpone previously approved vacations only in emergencies.⁵ Weist explained that it is rollover language from prior contracts.

Employees earn vacation days based on years of service. There are two master selection periods each year in which employees request vacation by seniority. After the second period, requests for scheduled vacation of less than 24 hours must be submitted no sooner than 14 days before the proposed date. Two firefighters and one fire captain per shift are allowed

⁵ Conroy served on bargaining teams and was Local 3494 secretary-treasurer for several terms while in the bargaining unit.

vacation at the same time.⁶ Captains and acting captains are authorized to approve vacation and forward the paperwork to the fire chief/designee.

During the 16 years Conroy was fire chief, same-day vacation leave requests for partial day absences could exceed the contractual maximums in non-emergency situations upon timely submission of the required fire department form. Same day vacation requests were never denied, according to Conroy.

The expired 2009-2012 MOU was silent on the subject of employee training, but Section 01-01 of the City Fire Department Policy and Procedures,⁷ issued by Conroy on May 16, 2001, requires a minimum of 20 hours per month in-service training (IST) to be completed by company officers/fire captains, and assigned personnel/firefighters. The policy is in a department operations manual binder at each fire station. According to Conroy, on-duty fire personnel were expected and required to attend scheduled training.

The City fire department is in the West Valley Yolo County consortium with four other departments.⁸ Division/Training Chief Kinney worked with the UCD training chief to develop and coordinate specialized training in movement, evolutions,⁹ and use of large equipment for the multiple agencies at a Woodland hospital before it was demolished. Seven evening

⁶ Section 10(P)(1) of the expired MOU states: “No more than two Firefighters and one Captain per shift shall be permitted on vacation at any one time.”

⁷ Section 21 of the expired MOU states: “All items not governed by this agreement, but which are subject to the obligation to Meet and Confer, shall be regulated by the existing CITY Personnel Resolution, Fire Department Operations Manual and other existing regulations and practices.”

⁸ Those other departments are the cities of West Sacramento, Woodland, UCD, and California Office of Emergency Services (OES).

⁹ Kinney described “evolutions” as “a series of exercises that accomplish the job.” (Reporter’s Transcript (R.T.) Vol. I, 174:22-23)

sessions were scheduled from 5:00 p.m. to 8:00 p.m. on March 10 through 22, 2013. City fire personnel attending this training were notified one week in advance. Weist and his crew were scheduled for training on March 13.

Weist reported for his 24-hour shift at 8:00 a.m. on March 13, 2013. He was having trouble breathing and was out of his inhaler medication, so he completed a same-day vacation leave request to go to the doctor that afternoon. Weist was the Station 31-downtown fire captain in charge of scheduling for all three fire stations on A Shift, and approved his own same-day vacation request after determining no other captain would be absent. He put the completed request form in Chief Kinney's mailbox before noon, seeking to leave at 3:30 p.m. According to Weist, he did not ask to use sick leave because his accrued vacation hours "were higher than they should have been" and "[t]hey either tell you when you can take off or they just pay you for them . . ." (R.T. Vol. I, p. 47.) Weist testified that when he submitted the vacation request, he was not aware that he and his crew were scheduled for the multi-agency training that night.

Kinney received Weist's same day vacation request after 3:00 p.m. on March 13. He had heard Weist loudly complaining about the training as "BS" earlier that day.¹⁰ Kinney reviewed the 2009-2012 MOU, and conferred with Pierce about Weist's vacation request. Kinney expressed to Pierce that he (Kinney) did not think they should grant the request because the consortium training was an important and unique opportunity, and Weist and his crew were deficient in training. After discussing whether the MOU allowed denial of the request, and whether Weist and his crew could be rescheduled for another training session, Pierce agreed with Kinney's recommendation to deny Weist's vacation request.

¹⁰ Weist admitted that he probably complained about the training once he knew about it.

When Kinney informed Weist that his vacation request was denied, Weist told him that he was sick and had to go to the doctor. Kinney told Weist he should go home if he was sick. After arranging for coverage, Weist left the station, went to the doctor, and obtained an inhaler and medical note. Weist's leave was covered by his sick leave, so he lost no pay or benefits for his March 13 absence.

The March 13, 2013, consortium training was cancelled because of a fire in Woodland to which City fire station 32 crew responded and rendered assistance. One of Weist's crew attended a subsequent training session. Sixteen City fire department employees did not attend any of the seven multi-agency training sessions, while 24 participated.

As of March 13, 2013, Weist had completed 71.5 of the required 120 IST training hours as of the six month/half year report.¹¹

Kinney and Pierce knew that Weist was the long-time Local 3494 president, but both denied that Weist's activities as a union officer or his advocacy on issues played any part in the recommendation, discussions, or decision to deny his same-day vacation request on March 13, 2013.¹²

No other City fire department employee requested same day vacation leave on a scheduled consortium training day in March 2013.¹³

¹¹ Weist testified that in March 2013, he did not know 20 IST hours were required each month. However, Conroy testified that company officers promoted after May 2001, including Weist, were expected to be aware of training requirements because the May 2001 policy changes were distributed and discussed at monthly officers meetings.

¹² Pierce was not part of any discussions or decisions on reducing the fire department crew size, management merger with UCD, or contract negotiations between the City and fire bargaining unit.

¹³ Weist later submitted a same-day vacation request on a day another consortium training was scheduled and held at UCD. Fry approved it.

April 9, 2013 PIP

The MOU contains no provision regarding performance evaluations. However, City Performance Evaluation/Development Policy section 5.04, incorporated into the MOU by Article 21, requires that each employee be evaluated at least annually under City-wide/universal and position performance standards. The policy applies to all City departments.

Prior to April 2013, Weist's last performance evaluation was in March 2009. In early 2013, the City manager convened a meeting and directed each department head to ensure employee performance evaluations were current. Melissa Chaney (Chaney), the City's director of human resources, provided a list of employee names and due dates to each department head at the meeting. Pierce and Fry developed a schedule for evaluation due dates of City fire department personnel. Fry distributed the employee evaluation due dates each month to fire captains, division chiefs, and to Pierce.

After supervising Weist and his crew for four to five months, Fry prepared a performance evaluation for Weist for the period covering March 11, 2012 to March 11, 2013. Fry gave a draft to Pierce who provided feedback. When they discussed administrative functions needing improvement in Weist's performance as fire captain,¹⁴ Pierce recommended that Fry issue a PIP with the evaluation. Fry had not seen a PIP before, so Pierce provided examples and feedback.

¹⁴ These included completion of 20 IST hours each month by Weist and his crew; timely completion of logs and reports on station maintenance, incidents, and apparatus checkouts; and timely performance of quarterly fire prevention inspections.

On April 5, 2013, Fry gave Weist his annual evaluation and they discussed it.¹⁵ The evaluation stated that Fry and Weist would discuss and develop a PIP to improve deficient areas to an acceptable standard.

Fry gave Weist a PIP memorandum entitled “Notification of Unacceptable Performance/Opportunity to Improve,” on April 9, 2013 and they discussed it. The memorandum identified seven standards expected of a fire captain that, according to the memorandum, Weist did not meet.¹⁶ According to the PIP, Weist would receive written monthly evaluations for the next six months. Fry would then assess his overall performance. The PIP would end if all standards were met; if not, it would be extended. Weist was required to meet all fire captain performance standards for one year. The PIP also stated that if he failed to meet those standards, a recommendation for discipline would result.

Fry did not prepare any monthly written evaluations of Weist during the first six months of the PIP period or anytime thereafter, although he did discuss performance areas with Weist and sent e-mails to him. Fry believed that Weist was making progress. Pierce discussed

¹⁵ According to the evaluation, as of that date, Weist had completed 89 of the 240 required IST hours; two of his crew completed 161 and 184.25 hours; one firefighter exceeded it with 292 hours. Daily logs were not completed twice in March 2013; there were limited entries in all areas, and no entries on others. Incident reports were open back to February 23. There were no March apparatus checkouts. No fire inspections were completed in two quarters; overall completion was 31 percent. Station maintenance and appearance needed improvement.

¹⁶ These standards included: twenty training hours each month completed by Weist and his crew, entered on the daily log; complete accurate daily logs of personnel and apparatus; complete checkoff forms that all equipment was checked and maintained; complete assigned fire prevention inspections before the end of each quarter and sign inspection directory; complete daily cleaning; complete employee evaluations by due dates; and review City and inter-department e-mails at start and end of shift.

Weist's performance with Fry each month until Pierce left the fire department at the end of 2013. Each time, Fry reported improvement.¹⁷

On May 19, 2014, Fry gave Weist his annual evaluation covering the period of March 11, 2013 to March 11, 2014, and they discussed it. Weist was rated as meeting universal performance standards in overall performance. He had met three of four position performance standards, and had improved in timely completion of all reports and fire prevention inspections. His crew met the fire department training goals, but his own training hours still needed improvement.

On May 27, 2014, Trauernicht notified Weist that the PIP was terminated based on his current evaluation showing acceptable performance as a fire captain. Trauernicht noted the areas needing improvement, but expressed confidence that with Weist's commitment to excellence, those areas would be resolved.

No PIPs have been issued to fire department bargaining unit employees except Weist. Conroy did not know what a PIP was. Chaney testified that PIPs were used in other City departments. Their purpose was to give information, direction and feedback to an employee on the specific areas where they need improvement, and establish measurable goals that can be achieved during a set period of time. Performance evaluations, PIPs, and follow-up documents are placed in the employee's official personnel file (OPF) maintained by the human resources division. There is no provision in the City Personnel Rules or expired MOU limiting the

¹⁷ At the end of 2013, Fry sent Pierce a draft memo/e-mail recommending extension of Weist's PIP. Between Thanksgiving and Christmas, Pierce, Fry, and incoming Trauernicht discussed whether to extend or end the PIP. About the same time, Fry told Weist that they (Pierce and Black) wanted the PIP to go away; Weist responded "it won't do anything" because the instant unfair practice charge had been filed. The draft recommending the extension of the PIP was never given to Weist.

length of time that performance evaluations and PIPs remain in the OPF, or for their removal from the OPF.

Chaney learned about the PIP issued to Weist when the human resources division received the 2013 evaluation and the PIP for his OPF shortly after the documents were given to Weist. Referring to the threat of discipline in the PIP, Chaney testified that “A PIP itself is not disciplinary. The issue I have had with this PIP was the language in there. That’s not normal language for a regular PIP.” (R.T. Vol. II, p. 158). There have been no PIPs issued to fire department employees before or after Weist’s.

It is undisputed that the City did not provide Local 3494 written notice of and an opportunity to bargain over vacation leave policy or performance evaluation procedures before it denied Weist’s vacation leave on March 13, 2013 or issued him a PIP on April 9.

RELEVANT MOU PROVISIONS

The parties’ expired MOU was effective December 16, 2009 to June 30, 2012. Section 10(F)(1), “Scheduling and Carryover,” provides:

The times during the year when an employee may take vacation shall be determined by the Fire Chief with due regard for the wishes of the employee and particular regard for the needs of the service.

Section 10(P)(1) states:

No more than two Firefighters and one Captain per shift shall be permitted on vacation at any one time.

Section 10(S), “Scheduling Vacation After Selection Period,” states in relevant part:

Individuals who wish to select additional vacation after the second selection period, may do so providing they meet the following conditions:

[¶ . . . ¶]

2. Request for scheduling vacation of 24 hours or less shall be submitted no sooner than 14 days before the proposed vacation day.

There are no provisions in the MOU or the incorporated City policies regarding PIPs.

PROPOSED DECISION

The ALJ framed the issues for resolution as follows:

- (1) Did the City discriminate or retaliate against Weist by denying his same day vacation leave request on March 13 and issuing him a PIP on April 9, 2013?
- (2) Did the City make unlawful unilateral changes in policy or practice in its vacation leave and performance evaluation procedures when it denied Weist's same day vacation leave request on March 13 and issued him a PIP on April 9, 2013?

Discrimination/Retaliation

Applying *Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*) and *County of Riverside* (2011) PERB Decision No. 2184-M,¹⁸ the ALJ determined that it was undisputed that Weist had engaged in protected activities for 27 years as Local 3494's president and lead negotiator, and that the City was well aware of these activities.

However, the ALJ considered whether Weist had suffered any adverse action to be a closer question. In her view, the denial of same-day vacation leave and the issuance of the PIP were both one-time, isolated occurrences and/or of limited duration. In support of this conclusion, the ALJ noted that Weist was not required to attend the multi-agency training after his vacation request was denied, but was authorized to use sick leave and did not lose any pay.

¹⁸ To demonstrate a violation of MMBA section 3506 and PERB Regulation 32603(a) a charging party must show: (1) the employee exercised rights under the MMBA; (2) the employer had knowledge of the exercise of those rights; (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employee because of the exercise of those guaranteed rights.

Recently, the City approved another same day vacation request submitted by Weist on a day consortium training was scheduled. The PIP was terminated in May 2014 by the new fire chief after being in effect less than a year. According to the ALJ, whether either or both actions had any impact, much less an adverse one, on Weist's employment was "debatable."

Nevertheless, the ALJ continued with the *Novato* analysis and concluded ultimately that even if Local 3494 had established a prima facie case for retaliation, the City had met its affirmative defense by demonstrating that it had acted because of alternative non-discriminatory reasons. The ALJ relied on the fact that both Kinney and Pierce concurred in denying Weist's same day vacation leave request because the March 2013 consortium training would be valuable for him and his crew, and Weist and his crew had not completed required IST training hours.

With respect to the issuance of the PIP, the ALJ noted that Pierce (who had not participated in any City decisions on issues where Weist advocated for Local 3494) suggested that the PIP be given to Weist after Pierce reviewed his alleged performance deficiencies that were documented in his annual evaluation. No other PIPs were issued to other fire captains because none exhibited performance problems. According to the ALJ, both actions would have occurred regardless of Weist's protected activity, and she therefore dismissed these claims.

Unilateral Change/Past Practice

The ALJ correctly cited PERB's test for determining whether an employer's unilateral change in terms and conditions of employment has violated the MMBA.

According to the ALJ, both the denial of Weist's same-day vacation request and the issuance of the PIP were one-time occurrences which were not repeated and in the case of the

PIP, was cancelled. They were therefore, in the ALJ's opinion, isolated breaches of the MOU or practice that did not have a generalized effect or continuing impact on terms and conditions of employment. The ALJ also noted that although PIPs had never been used by the Fire Department, they were routinely used in other bargaining units pursuant to the City's performance evaluation policy. For these reasons, the ALJ dismissed the unilateral change allegations.

LOCAL 3494'S EXCEPTIONS

Local 3494 excepts to the ALJ's dismissal of both the unilateral change and discrimination/retaliation allegations concerning Weist's same-day vacation request and the City's issuance of a PIP to Weist, and to various factual findings on which the ALJ's legal conclusions are based.

Unilateral Changes

Local 3494 excepts to the ALJ's conclusion that it failed to establish that the City made unlawful unilateral changes in either the same-day vacation policy or by issuing a PIP to Weist. Local 3494 also excepts to the ALJ's conclusion that both of these incidents were one-time occurrences and therefore were isolated breaches of the contract that did not have a generalized effect or continuing impact on employment conditions. Relying on *Hacienda-La Puente Unified School District* (1997) PERB Decision No. 1186 (*Hacienda*), Local 3494 argues that the City took both actions based on its belief that it had a right to do so without negotiating, and that it will use that justification in the future. According to Local 3494, the City asserted that Section 10(F)(1) of the MOU gave the City discretion to deny Weist his same-day vacation under the circumstances of March 13, 2013. The City also claimed that it had a right to issue PIPs pursuant to the City's performance evaluation policy and because PIPs

are routinely used by other City departments. According to Local 3494, the City's actions reflect policy changes undiminished by the fact that only one employee was affected in this instance.

To demonstrate the past practice regarding same-day vacation requests, Local 3494 points to the testimony of Conroy and Weist that the fire chief has exercised his or her discretion to deny same-day vacation requests only during times of public emergency, a policy that was admitted by the City, according to Local 3494. With respect to the PIP, Local 3494 points to the fact that the Fire Department never issued a PIP before or since delivering one to Weist. Moreover, the City admitted that the PIP issued to Weist differed from PIPs issued in other City departments because its language threatened punitive action, indicating a unilateral change in past practice, according to Local 3494.

Discrimination

Local 3494 excepts to the ALJ's conclusion that denying Weist's same-day vacation request and issuing the PIP to Weist had only a "debatable" impact on Weist's employment as a City Fire Captain. (Exceptions, p. 5.) Local 3494 excepts to the ALJ's finding that no evidence existed of Pierce's anti-union animus towards Weist, and that Pierce did not participate in any City decisions on issues where Weist advocated for Local 3494. Local 3494 argues that Pierce ordered or sanctioned Kinney and Fry's denial of Weist's same-day vacation request, despite Pierce's knowledge that other employees were behind in their training hours and his lack of confirmation that those employees would be attending the March 2013 consortium training. Local 3494 also argues that Pierce knew of Weist's outspoken challenge to the authority of the police department to run the fire department.

With regard to the denial of Weist's same-day vacation request, Local 3494 excepts to the ALJ's finding that the denial was not adverse because the City eventually authorized Weist to use sick leave for the day in question. According to Local 3494, the denial of Weist's request took away employees' assurance that they could leave during a shift for any reason, as long as there was no public emergency.

With regard to the PIP, Local 3494 argues that Pierce ordered or sanctioned Fry's issuance of the PIP, which it argues constitutes "punitive action" under Fireman Bill of Rights (FBOR) Government Code sections 3251(c)¹⁹ and 3253²⁰ because the PIP threatens future disciplinary action. Local 3494 also argues that the PIP's placement in Weist's personnel file could impact Weist's merit increases, subsequent evaluations, and promotional opportunities.

CITY'S RESPONSE

In its response, the City asserts that the proposed decision properly dismissed the unfair practice charge and complaint. The City avers that its denial of Weist's same-day vacation request was not an unfair practice because it was consistent with the MOU, which reserves to the City discretion to grant or deny leave in consideration for the interests of the City. According to the City, Local 3494's dispute over the interpretation of the MOU's vacation-leave policy is no more than a contract interpretation dispute subject to the MOU's grievance process, not an unfair practice violation.

¹⁹ Government code section 3251, subdivision (c) states in relevant part: "'Punitive action' means any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment."

²⁰ Government code section 3253 enumerates the conditions under which interrogations shall be conducted when any firefighter is under investigation and subjected to interrogation by his or her commanding officer, or any other member designated by the employing department or licensing or certifying agency, that could lead to punitive action.

The City also asserts that its use of a PIP is an established City-wide tool utilized in conjunction with performance reviews to aide employees in correcting performance, not an impermissible deviation from past practice. The City also contends that it did not retaliate against Weist for his protected activities, and that it would have taken the same action regardless of Weist’s protected activities.

DISCUSSION

A. Unilateral Change

In *Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262, PERB described the elements of an unlawful unilateral action:

To prove up a unilateral change, the charging party must establish that: (1) the employer took action to change policy; (2) the change in policy concerns 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; (4) the action had a generalized effect or continuing impact on terms and conditions of employment.

(*Id.* at p. 9.)

An established policy may be embodied in the terms of the parties’ MOU or collective bargaining agreement. (*Grant Joint Union High School District* (1982) PERB Decision No. 196, p. 8.) Although PERB is without authority to enforce the terms of a negotiated agreement, it may interpret contract language as necessary to decide the alleged unfair practices, applying traditional rules of contract interpretation. (See, e.g., *County of Sonoma* (2011) PERB Decision No. 2173-M, p. 16 [“Where contractual language is clear and unambiguous, it is unnecessary to go beyond the plain language of the contract itself to ascertain its meaning”].)

Where contractual language is silent or ambiguous, however, past practice or bargaining history may embody the established policy. (*County of Riverside* (2013) PERB Decision No. 2307-M, p. 20; *Rio Hondo Community College District* (1982) PERB Decision No. 279, p. 17.) To establish the existence of a binding past practice, it must be shown that the purported practice is (1) unequivocal, (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. (*Trustees of the California State University* (2007) PERB Decision No. 1886-H; *Riverside Sheriff's Association v. County of Riverside* (2003) 106 Cal.App.4th 1285; *Hacienda, supra*, PERB Decision No. 1186.) It must be “regular and consistent” or “historic and accepted.” (*Desert Sands Unified School District* (2010) PERB Decision No. 2092; *County of Placer* (2004) PERB Decision No. 1630-M.)

An employer does not make an unlawful unilateral change if its actions conform to the terms of the parties’ agreement. (*Marysville Joint Unified School District* (1983) PERB Decision No. 314 (*Marysville*); *County of Ventura (Office of Agricultural Commissioner)* (2011) PERB Decision No. 2227-M, warning letter at p. 2.) The mere fact that an employer has chosen not to enforce its contractual rights does not mean it is forever precluded from doing so. (*Marysville*, at p. 10; *County of Placer, supra*, PERB Decision No. 1630-M, p. 5.)

Given the limitation of Government Code section 3541.5, subdivision (b) of PERB’s authority to enforce contracts,²¹ the Board and courts have established in numerous cases that an alleged unlawful change must be more than an isolated breach of contract or practice, but instead must constitute a change of policy that had a generalized effect or continuing impact

²¹ Government Code section 3541.5, subdivision (b) provides: “The Board shall not have the authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of any agreement that would not also constitute an unfair practice under this chapter.”

upon terms and conditions of employment of bargaining unit members. (*Grant, supra*, PERB Decision No. 196); *County of Riverside, supra*, PERB Decision No. 2307-M, p. 18; *City of Riverside* (2009) PERB Decision No. 2027-M, p. 9; *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802; *San Joaquin County Employees Assn. v. City of Stockton* (1984) 161 Cal.App.3d 813.)

Because the proposed decision in this case does not adequately distinguish between conduct with a generalized effect and continuing impact and an isolated breach of contract, we review some of our cases in an attempt to clarify that distinction.

PERB has found an unlawful policy change, as opposed to an isolated breach of contract, where an employer unilaterally establishes a policy that represents a conscious or apparent reversal of a previous understanding. (*Regents of the University of California* (2014) PERB Decision No. 2398-H, p. 31 [employer imposed its own interpretation on side letter intended to distinguish criteria for designating instructors as lecturers or adjunct professors]; *Regents of the University of California* (1991) PERB Decision No. 907-H [unilateral creation of a hiring ratio not based on agreed-upon criteria constituted an unlawful alteration of terms of agreement]; *Regents of the University of California (Davis)* (2010) PERB Decision No. 2101-H [employer's interpretation of contract provision regarding transfer of unit work that was overly narrow and contrary to the intended meaning of the contract was unlawful contract repudiation].)

In *Moreno Valley Unified School District* (1995) PERB Decision No. 1106, PERB found that an employer unilaterally changed policy, rather than merely breaching an agreement, when it involuntarily and permanently changed the shift of two janitorial employees. Involuntary shift changes had never occurred before, and the employer defended

its actions based on its interpretation of the management rights clause in the contract. PERB rejected the employer's claim that the management rights clause waived the union's right to bargain over the shift change. (*Id.* at proposed dec. p. 13.) In a similar vein, PERB found that a unilateral change in an employee's shift violated the duty to bargain in good faith in *Hacienda, supra*, PERB Decision No. 1186. In rejecting the employer's defense that the change was merely an isolated breach of contract, the Board's majority opinion stated:

We agree with this assessment, [that the district's actions had a generalized and continuing effect on terms and conditions of employment] since the District took this action based on the belief that it had a contractual right to make shift changes without negotiating, and there is no evidence to suggest that the District would have refrained from changing more employees' shifts pursuant to the management rights clause.

(*Id.* at p. 4.) Chairman Caffrey's concurrence adds a helpful observation to this conclusion:

The District's action was based on its *incorrect belief* that the management rights clause . . . gave it the right to unilaterally change the shifts of bargaining unit members. While only one employee's shift was unilaterally changed, . . . it is clear that the change in policy has the generalized and continuing impact on bargaining unit members of exposing them to similar unilateral shift changes.

(*Id.* at p. 10, emphasis added.)

In the cases where PERB determined that the contract violation also constituted an unfair practice, the employer had unilaterally changed a term and condition of employment by interpreting a contract term that would have waived the union's right to negotiate the change, and that interpretation was deemed by PERB to be incorrect. In *Hacienda, supra*, PERB Decision No. 1186 and *Moreno Valley, supra*, PERB Decision No. 1106 the employer had never before changed shifts involuntarily, and had not previously asserted that the management rights clause gave it the right to do so. Similarly, in each of the *Regents* cases, the employer

determined unilaterally that it would impose a new interpretation of a written agreement without negotiating with the union. See also *County of Riverside* (2003) PERB Decision No. 1577-M, holding that the employer's assertion that the issue of promotions was not grievable had a generalized and continuing effect on working conditions, especially where the employer had previously permitted a grievance over a promotion denial. These actions cannot be described as mere isolated breaches of the contract.

These cases differ from those in which PERB has determined that the dispute is an isolated contract breach. For example, in *Eureka City School District* (1985) PERB Decision No. 528, the Board held that a dispute over whether a union security clause applied to temporary teachers was not a change in policy with a generalized effect or continuing impact. In explaining the difference between a policy change with a generalized effect or continuing impact versus a dispute over contract interpretation, the Board stated:

The contract language is ambiguous with respect to temporary employees, and no evidence was introduced . . . which would definitively demonstrate a mutual understanding or intent of the parties. These circumstances do not reflect any policy change, and thus do not constitute an independent violation of the Act.

The District did not clearly repudiate any prior understanding, agreement, or practice, but merely interpreted the meaning of contract language in a reasonable way, albeit differently than did the Association. Thus, the District's action did not undermine the basic policy underlying the Act, which is the fostering of the negotiation process.

(*Id.* at pp. 5-6.)

Grant, supra, PERB Decision No. 196, also illustrates the difference between a change in policy with a generalized effect and an isolated breach of contract. Three contractual provisions were in dispute in that case: transfer rights, contingency pay, and continuation of benefits after layoff. The transfer article provided that vacancies shall be open to all

bargaining unit members. After posting several vacancies in accordance with the agreement, the district began posting a notice informing unit members that they may not apply for vacancies if they have already been notified of a new assignment for the following school year. PERB determined that this action was a change in policy because it directly conflicted with the unambiguous terms of the contract and had a continuing impact on the bargaining unit by excluding certain teachers from consideration for vacancies.

In contrast, the other two disputes in *Grant, supra*, PERB Decision No. 196 did not rise to a change in policy with a generalized effect or continuing impact on working conditions. The contingency pay article provided that after a review of non-categorical and non-restricted fund balances, unit members would receive 60 percent of any excess funds, subject to deduction for contingent liabilities, and maintenance of a certain level of a general reserve and a reserve for legal actions against the district. A dispute arose regarding how much money was allocated to the surplus income, due to a disagreement about the meaning of various contingency funds not subject to inclusion in the final “pot.” PERB determined that this dispute was not an unfair practice because it was limited to a difference over the application of the contract. The district did not dispute its contractual obligation, but claimed it correctly implemented the calculation for determining the relevant surplus. Finally, the dispute concerning the continuation of benefits was easily dispatched because the unambiguous provision in the contract did not support the union’s claim that laid off employees were entitled to paid benefits until the contract expired.

Thus, an alleged violation of a contract will also be an unfair practice where the employer seeks to add new terms or impose an unjustified interpretation to the agreement, as in the *Regents* cases discussed earlier, or as with the transfer article in *Grant, supra*, PERB

Decision No. 196. Likewise, if the employer denies a contractual obligation where it once acknowledged one, as in *County of Riverside, supra*, PERB Decision No. 2307-M or unjustifiably asserts rights under a management rights clause, as in *Hacienda, supra*, PERB Decision No. 1186, an unfair practice has occurred. But where the parties simply dispute the meaning of contract language and there has been no repudiation of any prior mutual understanding or assertion that the union waived its right to negotiate a change in terms and conditions of employment, the dispute is more accurately characterized as an isolated breach of an agreement that is not also a violation of EERA.

With these principles in mind, we turn now to Local 3494's exceptions to the ALJ's dismissal of its unilateral change claims.

Denial of Weist's Same-day Vacation Request

The parties' main dispute regarding this issue is whether the City's denial of Weist's same-day vacation request was an unlawful unilateral change, or whether the MOU permitted the City to exercise its discretion to deny the leave. The parties' dispute is whether the denial of the same-day request was an action that had a generalized effect or continuing impact on terms and conditions of employment, or was instead simply an isolated breach of an agreement or policy.

As noted earlier, the ALJ justified dismissing Local 3494's complaint over the City's denial of Weist's same-day vacation request on the ground that it was a one-time occurrence. While we agree this allegation should be dismissed, simply describing this as a one-time occurrence without further analysis is not an adequate reason for dismissal. As the ALJ pointed out, the duration of the unilateral act does not necessarily determine whether there was a unilateral change. (*San Jacinto Unified School District* (1994) PERB Decision No. 1078.) Nor

does a temporary change immunize an employer from a finding that it has unlawfully changed working conditions. (*Trustees of the California State University (San Marcos)* (2004) PERB Decision No. 1635-H.) Nor does the fact that only one employee was immediately affected determine whether there was a unilateral change, as even a change to a vacant bargaining unit position may be negotiable. (*Arcata Elementary School District* (1996) PERB Decision No. 1163, pp. 5-9. See also *County of Santa Clara* (2016) PERB Decision No. 2431-M, p. 19.)

On its face, the relevant MOU provision gives broad discretion to the City to determine when an employee may take vacation: “The times during the year when an employee may take vacation shall be determined by the Fire Chief with due regard for the wishes of the employee and particular regard for the needs of the service.” (MOU, section 10(F)(1)). Another subsection of the vacation article provides a procedure for requesting vacation leave of 24 hours or less, but there is no language indicating that the City is to use different criteria when granting or denying vacation requests of 24 hours or less than what is described in Section 10(F)(1).²² In other words, in determining any vacation leave requests, including those of less than 24 hours, the fire chief is required to give “due regard for the wishes of the employee and particular regard for the needs of the service.”

Local 3494 argues that past practice establishes a particular definition for the phrase “particular regard for the needs of the service” in MOU section 10(F)(1), viz., the City may deny same-day vacation requests only when a public emergency requires all firefighters on duty. Internal departmental needs, such as training, have never been used as a reason to deny a same-day vacation request, according to Local 3494. In support of this assertion, Local 3494

²² Subsection (P)(1) of Section 10 states that no more than two firefighters and one captain per shift shall be permitted on vacation at any one time. Weist’s request for vacation on March 13 did not run afoul of this restriction.

cites to the testimony of Pierce and Kinney that historically, the Fire Department has granted same day vacation leave requests, under the proper conditions, i.e., that the absence would not leave the shift short more than two firefighters and/or one captain. Local 3494 also cites to Weist's testimony that based on his participation in numerous bargaining sessions, it was his understanding that section 10(F)(1) referred to emergency situations only.

Despite the testimony that no same-day vacation leave requests had been denied unless the shift was left short-handed, Local 3494 did not establish the requisite elements of a binding past practice that altered the plain meaning of the MOU. There is no evidence that the parties established a mutually accepted and understood practice limiting the City's discretion to deny same day vacation leave requests only to public emergencies. Local 3494 would essentially have us alter 10(F)(1) to read:

The times during the year when an employee may take vacation shall be determined by the Fire Chief with due regard for the wishes of the employee and particular regard only for immediate public emergencies.

We do not find that forbearance by the City establishes that it intended to give up the discretion Section 10(F)(1) confers upon it. By its plain meaning, the phrase "particular regard for the needs of the service" does not prohibit the City from taking into account factors other than public emergencies when granting or denying same day vacation requests, e.g., whether or not the requesting employee has an important training scheduled that day, and whether or not the employee (or his or her crew) had a deficiency in training hours.

This case is on all fours with *Marysville, supra*, PERB Decision No. 314, wherein the Board determined that a longstanding practice granting teachers a longer lunch period than what was provided by the collective bargaining agreement did not prevent the employer from reverting to the plain meaning of the agreement. The plain meaning of the contract was not

superseded by the past practice. Rejecting the union’s argument that the agreement merely formalized the preexisting practice of granting a longer lunch period, the Board observed that this claim is undercut “by the very fact that it agreed to a contract provision establishing a lunch period of a lesser duration.” (*Id.* at p. 10.) The Board also re-affirmed the principle: “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.” (*Ibid.*)

In this case, the plain meaning of the MOU grants the City considerable discretion regarding vacation requests, and that discretion is not limited to situations involving a public emergency. Although Weist himself testified as to his understanding, derived from numerous bargaining sessions, that the City could deny vacation requests only in the case of public emergencies, Local 3494 presented no evidence of bargaining history that showed the parties actually discussed the meaning of this provision and reached a mutual understanding of how it would be applied.²³ As in *Marysville, supra*, PERB Decision No. 314, the City apparently never exercised the discretion granted to it by the MOU until the events leading to this unfair practice charge, having granted every same-day vacation request until Weist’s.²⁴

²³ Local 3494 points to Weist’s testimony that Section 10(F)(1) of the MOU “refers to emergency situations” and gives the Chief “the right to deny vacation or postpone vacation while we’re in an emergency situation. You can’t be derelict of your duties and walk away because you have vacation at that time.” (R.T. Vol. I, p. 76.) Local 3494 characterizes Weist’s testimony as “evidence of . . . the bargaining history . . .” (Exceptions, p. 4.) However, Weist nowhere testifies that such an interpretation was discussed by the parties at the bargaining table. Weist only testified that the MOU section “had been discussed on multiple occasions . . . along the lines that [he] just . . . testified.” (R.T. Vol. I, p. 77.) This testimony is vague as to who was involved in the discussions, when and how often the discussions occurred, the circumstances under which the discussions occurred, and what exactly was discussed, and is therefore insufficient to establish the intent of the bargaining parties or binding past practice between the parties.

²⁴ We find this evidence less than compelling, because there was no indication that the City was ever presented with a situation similar to Weist’s, namely the scheduling of an

Nor are we persuaded toward a different conclusion by Conroy's testimony that she did not believe the department had the discretion to deny a vacation request solely due to its conflict with scheduled training, even if the individual was behind in his or her training requirements. This testimony does not alter our conclusion regarding the plain meaning of the MOU for two reasons. First, neither Conroy nor any other witness offered any evidence regarding the expressed intent of the parties at the bargaining table when they negotiated the MOU Section 10(F)(1) language. Second, her testimony that it was not a practice to deny vacation requests because training was scheduled on the requested day does not resolve the key question: whether the parties had established a past practice of restricting the City's discretion to deny vacation requests only for public emergencies. Simply because Conroy placed a particular meaning on section 10(F)(1), and presumably did not enforce the City's rights under that section, does not foreclose the City from exercising rights clearly granted to it by the plain meaning of the MOU. Local 3494 has therefore failed to prove an established past practice by the City of unconditionally granting same-day vacation requests on scheduled training days.

Having determined that the City acted in accordance with a reasonable interpretation of the MOU and its conduct therefore did not constitute a change in policy, we need not address whether the denial of Weist's vacation leave request had a generalized effect or continuing impact on terms and conditions of employment. The City did not violate the MMBA by denying Weist's same-day vacation request under the circumstances of this case.

Issuance of the PIP

Local 3494 avers that the ALJ erred in concluding that the PIP was not an unlawful unilateral change because it was a one-time occurrence, was subsequently rescinded, and

important multi-jurisdictional training opportunity coupled with an individual who had a significant training hours deficit.

because the other departments in the City had used PIPs consistently. We agree with Local 3494 and for the following reasons conclude that the City violated the MMBA section 3506.5, subdivision (c) by issuing the PIP to Weist.

This Board has recently reaffirmed that unlawful unilateral actions may fall into three general categories: (1) changes in written agreements; (2) changes in established past practice; and (3) newly created, implemented or enforced policy. (*Pasadena Area Community College District* (2015) PERB Decision No. 2444, p. 12, fn. 12; *Gonzales Union High School District* (1993) PERB Decision No. 1006, adopting ALJ's proposed dec., pp. 20-21.) The ALJ dismissed the allegation that the City's use of the PIP violated the duty to bargain in good faith without analysis of whether this was a change or a new policy, but based simply on a conclusion that it was a one-time occurrence and was thus an isolated breach of contract or practice which had no generalized effect or continuing impact on working conditions.

Since it is not controverted that the Fire Department had never utilized PIPs before, Local 3494 has established that issuing the PIP to Weist represented a newly-created or enforced policy in this bargaining unit.

The PIP issued to Weist touches on two negotiable subjects—procedures for evaluation and disciplinary procedures. PERB has determined that both are within the scope of representation. (*Rio Hondo Community College District* (2013) PERB Decision No. 2313, pp. 14-15; *Trustees of the California State University (San Marcos)*, *supra*, PERB Decision No. 1635, pp. 2-3; *Compton Community College District* (1990) PERB Decision No. 798. See also *Ampersand Publ'g, LLC* (2012) 358 NLRB 1415, 1473, *affm'd by Ampersand Publ'g, LLC d/b/a Santa Barbara News-Press & Graphic Commc'ns Bhd. of Teamsters* (2015) 362 NLRB No. 26 ["Employee performance evaluations, especially those that have the potential to

affect the amount of bonus an employee might receive, are important and mandatory subjects of bargaining”].)

The National Labor Relations Board (NLRB) has also held that unilaterally implementing a new system for policing and implementing employee discipline violated the duty to bargain in good faith. (*The Trading Post* (1976) 224 NLRB 980, 983; *Racho, Inc.* (1982) 265 NLRB 235, 257 [new formalized system of issuing written warnings and discipline unlawfully changed informal system]; *NLRB v. Amoco Chems. Corp.* (5th Cir. 1976) 529 F.2d 427, 431; *Migali Industries* (1987) 285 NLRB 820, 820-821 [institution of a system of progressive discipline constitutes change in mandatory subject of bargaining].)

In *El Paso Electric Co.* (2010) 355 NLRB 428, enfd. by *El Paso Electric. v. NLRB* (5th Cir. 2012) 681 F. 3d 651 (*El Paso*), the NLRB considered whether the employer violated the National Labor Relations Act when it unilaterally implemented performance improvement plans to correct violations of work rules. Previously the employer had used PIPs to correct performance issues only, but had never issued them to employees who had attendance or tardiness problems. In *El Paso* the PIP, like the one used by the City in this case, contained the warning that if the employee’s performance did not improve within a specified period of time, the employee could face discipline. The PIP in *El Paso* could also affect the employee’s eligibility for a raise or bonus. Under these circumstances, the NLRB found that the PIP essentially placed recipients on probation and was therefore part of a new disciplinary scheme that could lead to adverse action. The new policy of issuing PIPs to correct conduct such as tardiness and absenteeism was therefore a mandatory subject of bargaining.

We find *El Paso, supra*, 355 NLRB 428 persuasive authority, along with PERB precedent holding that discipline and evaluation procedures are mandatory subjects of

bargaining. The PIP issued to Weist in this case was a new disciplinary instrument or procedure because it threatened him with discipline if he did not conform to the requirements of the PIP. It also represented a change in the evaluation procedure. Weist's supervisors had concluded during the preparation of his evaluation that several aspects of his work performance needed improvement, including record-keeping and complying with training requirements, and they determined that it would be appropriate in this case to communicate management's expectations in writing concerning Weist's perceived underperformance in the form of the PIP. The PIP is essentially an augmentation of the evaluation process in that it continues the evaluation process in a formalized way for the duration of the PIP. Weist was directed to meet with Fry on a monthly basis for the purpose of reporting or otherwise demonstrating that he was complying with the benchmarks outlined in the PIP, something he would not have been required to do, absent the PIP.

In contrast with the same-day vacation policy, there is no provision in the MOU that gives the City discretion to impose a new evaluation tool without bargaining with Local 3494. The MOU makes no provision for PIPs or even evaluations. Section 21 of the MOU, "Other Provisions," states: "All items not governed by this agreement, but which are subject to the obligation to Meet and Confer, shall be regulated by the existing CITY Personnel Resolution, Fire Department Operations Manual and other existing regulations and practices." The City Personnel Resolution and Fire Department Operations Manual are silent as to PIPs. Section 21, read with the broad language quoted above from the City Resolution does not constitute a clear and unequivocal waiver of Local 3494's right to negotiate over evaluation procedures. (*City of Milpitas* (2015) PERB Decision No. 2443-M at p. 20 [waiver is

disfavored and must be clear and unmistakable]; *San Jacinto Unified School District, supra*, PERB Decision No. 1078.)

Nor may the City rely on the practice in other departments to establish a binding past practice permitting it to implement PIPs in the Fire Department. What occurs in other departments with other bargaining units is irrelevant to working conditions in the Fire Department. There was no evidence that Local 3494 knew about the use of PIPs in other departments, so it cannot be said that this was a mutually accepted past practice.

There is also no question that the City's issuance of the PIP had a generalized effect or continuing impact upon terms and conditions of employment of bargaining unit members, because the City asserts that it has the legal right to issue PIPs to firefighters. As the City itself argues, "The City's use of a PIP is an established City-wide tool utilized in conjunction with performance reviews to aide employees in correcting performance [¶ . . . ¶] The circumstances here demonstrate why a written PIP is such a valuable tool . . ." (City's Response to Charging Party's Statement of Exceptions at pp. 7, 9. See, e.g., *County of Santa Clara, supra*, PERB Decision No. 2431-M at p. 19 ["Under PERB precedent, even if an employer's action affects only one employee, it nonetheless has a generalized effect or continuing impact on the unit members' terms and conditions of employment if based on the employer's assertion of a contractual or other legal right to act unilaterally; *County of Riverside, supra*, PERB Decision No. 1577-M, p. 6; *Hacienda La Puente Unified School District (1997)* PERB Decision No. 1186, p. 4.]")

The City therefore violated EERA by unilaterally issuing the PIP to Weist.

B. Discrimination/Retaliation

To establish a prima facie case of retaliation in violation of MMBA section 3506.5, subdivision (a), the charging party must show that: (1) the employee exercised rights guaranteed by the MMBA; (2) the employer had knowledge of the employee's exercise of those rights; (3) the employer took action against or adverse to the interest of the employee; and (4) the employer acted because of the employee's exercise of the guaranteed rights. (*Novato, supra*, PERB Decision No. 210; *County of San Joaquin (Health Care Services)* (2003) PERB Decision No. 1524-M.) Because it is uncontested that Weist exercised rights guaranteed by the MMBA and that the City was aware of his protected conduct, the only issues to be decided in determining whether Local 3494 established a prima facie case is whether the City took adverse action against him and whether it had an unlawful motive in taking such actions.

Unlawful motive is “the specific nexus required in the establishment of a prima facie case” of retaliation. “[D]irect proof of motivation is rarely possible, since motivation is a state of mind which may be known only to the actor. Thus, . . . unlawful motive can be established by circumstantial evidence and inferred from the record as a whole.” (*Novato, supra*, PERB Decision No. 210, at p. 6; *Carlsbad Unified School District* (1979) PERB Decision No. 89; *Republic Aviation Corp. v. NLRB* (1945) 324 U.S. 793; *Radio Officers' Union v. NLRB* (1954) 347 U.S. 17, 40-43.)

To assist with assessing circumstantial evidence of unlawful motive, PERB has developed a set of “nexus” factors. Although the timing of the employer's action in close temporal proximity to the employee's protected activity is an important factor, it does not, without more, demonstrate the necessary nexus between the employer's action and

the protected activity. (*Moreland Elementary School District* (1982) PERB Decision No. 227; *California Teachers Association, Solano Community College District* (2010) PERB Decision No. 2096 (*Solano CCD*); *Regents of the University of California (Davis)* (2013) PERB Decision No. 2314-H.)

Along with suspicious timing, facts establishing one or more of the following factors must also be present for a prima facie case: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104); (3) the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786 (*McFarland USD*)); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive (*North Sacramento School District* (1982) PERB Decision No. 264; *Novato, supra*, PERB Decision No. 210).

An illegal purpose harbored by a discriminating employer may be inferred from the circumstances surrounding the adverse action. These may include anti-union animus exhibited

by the employer or its agents; the pretextual nature of the ostensible justification; or other failure to establish a business justification. In such cases, the Board is free to draw inferences from all the circumstances, and need not accept an employer's self-serving declarations of intent, even if they are uncontradicted. (*Palo Verde Unified School District* (2013) PERB Decision No. 2337 (*Palo Verde*), p. 12; *NLRB v. Walton Mfg. Co.* (1962) 369 U.S. 404 (*Walton Mfg.*); *NLRB v. Mark Coal Co.* (9th Cir. 1963) 322 F.2d 311 (*Mark Coal*); *Royal Packing Co. v. Agricultural Labor Relations Bd.* (1980) 101 Cal.App.3d 826.)

Upon proof that anti-union animus played a part in the employer's decision to act, the burden then shifts to the employer to prove that its actions would have been the same notwithstanding the employee having engaged in protected activity and the employer's antiunion animus. (*McFarland, supra*, PERB Decision No. 786, *affd.*, *McFarland Unified School Dist. v. Public Employment Relations Bd.* (1991) 228 Cal.App.3d 166; *Martori Brothers Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 729-730; *Wright Line* (1980) 251 NLRB 1083.) In such cases the employer has both the burden of going forward with the evidence and the burden of persuasion. (*Palo Verde, supra*, PERB Decision No. 2337; *Hunter Douglas, Inc.* (1985) 277 NLRB 1179; *Hyatt Regency Memphis* (1989) 296 NLRB 259.) The employer must prove that it had both an alternative non-discriminatory reason for its challenged action, and that the challenged action would have occurred regardless of the employee's protected activity and the employer's anti-union animus. (*Chula Vista Elementary School District* (2011) PERB Decision No. 2221 (*Chula Vista*).

Local 3494 excepts to the ALJ's equivocal observation: "Whether either or both actions [denial of vacation and issuance of the PIP] had any impact, much less an adverse one, on Weist's employment as a City Fire Captain is debatable." (Proposed dec. at p. 21) Local

3494 contends that each is an adverse action. We agree, although we uphold the ALJ's ultimate conclusion that the City did not violate the MMBA by taking these adverse actions against Weist. With regard to the denial of the same-day vacation request, Local 3494 failed to prove the element of nexus between Weist's protected activity and the City's adverse actions. Furthermore, with regard to both adverse actions, the employer proved it had acted because of a legitimate non-discriminatory basis.

1. Denial of same-day vacation request

a. Adverse action

Contrary to the ALJ, we find that the City's denial of Weist's vacation request, thus compelling him to use sick leave, adversely impacted Weist's terms and conditions of employment, albeit only slightly. MOU Section 5(H) provides that unused sick leave may be accumulated. Additionally, MOU Section 5(I) states, in relevant part:

[U]pon retirement under P.E.R.S. (Public Employees Retirement System), unused sick leave shall be treated as additional time in service for the purpose of computing retirement benefits. If the employee has reached the maximum retirement benefit, then the CITY agrees to pay the employee for half of their accrued sick leave at the time of retirement.

The sick leave that Weist was compelled to use was therefore unavailable to be "treated as additional time in service for the purpose of computing retirement benefits."²⁵ (MOU Section 5(I).) For this reason, the City's denial of Weist's vacation request was an adverse action.

²⁵ No evidence was presented showing that employees were forbidden to use vacation leave for medical appointments.

b. Nexus

Local 3494 argues that the City's unilateral change in past practice in denying the same-day vacation request evidences retaliatory motivation. However, since we have concluded there was no change in past practice, we reject this proposition.

Local 3494 also argues that it proved discriminatory motivation by introducing evidence that Pierce disparately treated Weist and departed from established procedures and standards in denying his same-day vacation request. Local 3494 points to Pierce's testimony that he approved the denial of the request because he believed Weist's training hours were low, but that he knew other employees were also behind in their training hours and never confirmed whether those employees would be attending the training. Pierce acknowledged that he did not know that close to half the Department would be missing the training.

Pierce's testimony does not evidence disparate treatment or departure from established practice. Besides Weist, no employee (with or without a training hour deficit) made a same-day vacation request for any day of the consortium training. Thus, no employee was similarly situated to Weist. The City's Department Training Policy mandated that all firefighters are expected to complete a minimum of 20 hours of training per month, and fire captains promoted after the City issued the training policy, including Weist, were expected to be aware of the type of training requirements established in the policy, according to Conroy. When Weist's vacation request was denied on March 13, 2013, his supervisors, including Kinney and Pierce, knew that he was significantly deficient in his training hours.²⁶

²⁶ Weist was approximately 50 hours short for the six-month period in which he was expected to have completed 120 hours of training. Two of Weist's crew members who were also deficient in training hours had nearly or more than twice as many training hours as Weist.

Although there were other firefighters who did not attend any of the consortium training days and who were deficient in their training hours, those employees did not request same-day vacation leave on training days. Nor does the record indicate whether they were on sick leave or other leave. Therefore this evidence does not support a finding of disparate treatment of Weist, because these other training-deficient employees were not similarly situated to Weist.

Even if Pierce was not aware that close to half of the department would be missing the consortium training, Local 3494 does not explain how this fact constitutes evidence of discriminatory motivation, because as explained above, there was no showing that these other employees were similarly situated to Weist, i.e., that they asked for vacation on the same day the consortium training was scheduled and that they had a significant deficit in their training hours.

Local 3494 also claims that the City made a cursory investigation of Weist's allegedly low training hours and the necessity of the consortium training. Local 3494 does not cite to the record for this allegation, so we need not address it. (PERB Regulation 32300, subdivision (d)(3).)

Local 3494 cites to *Rio Hondo Community College District* (1982) PERB Decision No. 226 (*Rio Hondo*) in support of its argument that the City departed from established procedures and standards in denying Weist's same-day vacation request. However, the facts in *Rio Hondo* are distinguishable, since in that case, the employer provided no reason for denying an employee's leave request, either at the time of the denial or at any time thereafter. (*Id.* at p. 5.) By contrast, the City has consistently stated that its reason for denying Weist's same-day vacation request was his scheduled training that day.

Even though the evidence shows that the City's denial of Weist's vacation request closely followed some of his protected activity, the proximity in time between the protected activity and the adverse action goes to the strength of the inference of unlawful motive, but is not determinative by itself. (*Solano CCD, supra*, PERB Decision No. 2096.) There is no evidence of any other factors, such as disparate treatment, that would tend to show that the City denied his leave in retaliation for those protected activities. However, even if Local 3494 had established a nexus, we conclude that the City met its burden in establishing its affirmative defense, viz., that it had acted because of a legitimate non-discriminatory reason.

Legitimate Non-Discriminatory Motivation For Taking Adverse Action

Local 3494 argues that the City's claimed justification for denying Weist's same-day vacation request was outweighed by evidence of its retaliatory motive. It points to Kinney's testimony that he thought Weist's vacation request should be denied:

because I thought this training was extremely important. I thought Captain Weist was deficient in his training as was his crew. This was a unique opportunity to provide outstanding training for both Captain Weist and for his crew.

(R.T. Vol. I, p. 178:14-18.) However, this sheds no light on the existence of an improper motive. If anything, it suggests the opposite, i.e., that the City had a legitimate reason for denying Weist's same-day vacation request on the day this training was scheduled.

Local 3494 challenges the notion that the training was unique, pointing to Kinney's testimony that the March 2013 training was a multi-night process with "the same training each time." (R.T. Vol. I, p. 174:24-175:4.)

However, Kinney later testified that:

It's a crew working together, and I thought it was extremely important that the captain who was supposed to be in charge of

this team was there to be part of this evolution as well, or these evolutions.

(R.T. Vol. I, p. 179:21-24.)

Kinney further explained:

Well, that's the huge challenge, is that City of Davis has a different work schedule than everybody else. And one, we're trying to do this with all these cooperating fire departments for very little money. So it's a huge challenge to do that, and one of the things that we do in order to make this work is that we move engine companies from one city to another to actually cover that city so we can free up resources to go do the training and stuff.

(R.T. Vol. I, p. 180:3-10.)

Kinney later testified that he believed his denial of Weist's same-day vacation request was justified by MOU Section 10(F)(1):

I thought it was extremely important that Captain Weist train with his crew, help prepare his crew and himself. And as I testified earlier to, this opportunity for training wasn't something that just comes frequently. In fact, I don't think we've ever had this type of training, this extensive an opportunity to practice ever, and I'm sure that he hasn't been able to accomplish this type of training since. So I thought it was super important that we do this. And back to the needs of the service, I thought that, with what we do --we're all hazards [sic] -- and the demands placed on us, I just -- I think we really need to prepare ourselves as best we can.

(R.T. Vol. I, pp. 184:20-185:2.)

Pierce testified that he based his decision to deny Weist's request in part on the fact that delaying Weist's scheduled training would have necessitated paying him overtime to train with another team or another shift.

Pierce also testified that the absence of 16 firefighters from the consortium training did not impact how significant he considered the training to be:

because the consortium, the training consortium, which is a group of agencies in Yolo County, they don't frequently get to train

together, and firefighters, because of mutual aid and automatic aid agreements, frequently cross jurisdictional lines, meaning City of Davis goes to Woodland and Woodland comes to West Sac and so on. And so the need to actually meet each other, see each other, see how each other operates is an important concept, whether it's one shift or every single employee.

And, of course, the more people you can include, the better it is. So you don't necessarily cancel it and say that the training wasn't valuable merely because some parties didn't get to attend.

(R.T. Vol. II, p. 49:7-19.)

As this testimony indicates, the City had a legitimate interest in having Weist train with his own crew.

Local 3494 also points to Fry's testimony that he had no concerns about Weist or his crew's ability to function effectively as firefighters as proof that the training was not as important as the City claims. (R.T. Vol. II, p. 109:5-15.) However, when asked if training "was really more of a paperwork problem than a service to the community problem" (*Id.* at p. 109:16-18), Fry disagreed, testifying that:

Training is very valuable in several areas. One, we maintain our skill levels to do our job. Secondly, it allows us to meet standards such as OSHA standards and standards that are set forth by the JAC committee and by the NFPA²⁷ and other associations that we are held to accountability by. Some aspect of your statement is correct, but some -- More importantly, the safety of our firefighters is what my priority is, and I know it's Bob's as well.

(*Id.* at p. 109:19-27.)

The City's interest in ensuring its firefighters are properly trained, regardless of the skill level and competence of the firefighters, is a legitimate one. Taken as a whole, the evidence demonstrates that the City met its burden of showing that it had a legitimate, non-

²⁷ Neither JAC nor NFPA are identified in the record.

discriminatory reason for denying Weist's same-day vacation request and that it acted based on that reason, as opposed to an improper motive.

2. PIP

a. Adverse action

The ALJ concluded the PIP was a “one-time, isolated occurrence[] and/or of limited duration,” because “[t]he PIP was terminated in May 2014 by the new Fire Chief after less than a year in effect.” (Proposed dec. at p. 21.) Thus, it was not an adverse action, according to the ALJ. We disagree. The PIP threatened future discipline if Weist failed to meet performance standards, and for this reason alone it was an adverse action. (*City of Long Beach* (2008) PERB Decision No. 1977-M; *Los Angeles Unified School District* (2007) PERB Decision No. 1930, proposed dec. at p. 11 [“These memoranda, although not disciplinary in themselves, threatened [Charging Party] with disciplinary action, and a reasonable person would find them to have an adverse impact on [Charging Party]’s employment”].)

The PIP’s placement in Weist’s personnel file could have aggregated the severity of discipline imposed by the City during the PIP’s effective period had Weist been subject to discipline during that period. The fact that, in hindsight, Weist was not actually subject to discipline during that period is irrelevant. We must determine whether the act was adverse at the time the City issued the PIP. From that temporal reference point, the fact that the PIP could aggregate the severity of discipline in the future constituted an adverse impact on Weist’s employment. (See, e.g. In *Dep’t of Health & Human Servs.*, 22 F.L.R.A. 91, 109-10 (June 6,

1986) [Federal Labor Relations Authority (FLRA) held that an employer’s threat to issue a PIP to an employee due to the employee’s union activities constituted an unfair labor practice].)²⁸

Furthermore, Chaney testified that there is no provision for removal of a PIP or an evaluation document from an employee’s official personnel file in the fire department, and the PIP remains in Weist’s personnel file. Thus, the stigma of performance deficiency presumably follows Weist for the remainder of his career, regardless of future performance. This fact supports the conclusion that the PIP is an adverse action.

The City argues that the PIP was not an adverse action, relying on *Turturici v. City of Redwood City* (1987) 190 Cal.App.3d 1447, in which the court held that a supervisor’s negative comments in an employee’s performance evaluation that “merely recommends discipline as a future conditional event” (*Id.* at p. 1449) did not constitute “punitive action” so as to trigger the employee’s rights to an administrative appeal under the Public Safety Officers Procedural Bill of Rights Act (POBR). (Gov. Code, § 3300 et seq.) However, that case is of little value to us, since an employer’s action that may not rise to the level of “punitive action” under POBR may indeed rise to the level of an “adverse action” under the MMBA.²⁹

²⁸ The FLRA is a federal agency that administers the Federal Service Labor Management Relations Statute, 5 U.S.C. Sec. 7101 et seq., a statute applicable to federal employees and their federal agency employers. Although the decisions of the FLRA should not be treated as binding precedents upon the Board in California, they may on occasion prove suggestive or even persuasive. (See, e.g., *Regents of the University of California* (1983) PERB Decision No. 283-H at p. 15 [“Although the definition of ‘employee’ under the Federal Labor Relations Act differs from our own, we find the rationale expressed by the Authority persuasive”].)

²⁹ Under Government Code section 3303, “punitive action means any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment.” There is no similar restriction on what may constitute an “adverse action” under MMBA.

Nexus

We agree with the ALJ that the nexus element of timing is present since Weist engaged in protected activity for 27 years as Local 3494 president and engaged in contract negotiations in proximity to the March and April 2013 adverse actions.

However, contrary to the ALJ, we also find that Local 3494 met its burden of proving at least one other nexus element. The PIP issued to Weist threatened him with discipline if he did not meet the required standards contained in it. Chaney, the City's director of human resources, parks, and community services, testified that "A PIP itself is not disciplinary. The issue I have had with this PIP was the language in there. That's not normal language for a regular PIP." (R.T. Vol. II, p. 158.) Therefore, the City deviated from its procedures by including the disciplinary threat in Weist's PIP.

In light of this finding, the burden shifts to the City to prove it would have issued the PIP for a legitimate, non-discriminatory reason even absent Weist's protected activity.

b. Legitimate Non-Discriminatory Motivation For Taking Adverse Action

We find that the City has proven its affirmative defense that it would have issued the PIP for a legitimate, non-discriminatory reason even absent Weist's protected activity. PERB has held that an employer proves its affirmative defense when it demonstrates that it has "both an alternative non-discriminatory reason for its challenged action, and that the challenged action would have occurred regardless of the employee's protected activity" (*Palo Verde Unified School District, supra*, PERB Decision No. 2337, p. 13, emphasis added; *Regents of the University of California* (1984) PERB Decision No. 470-H, proposed dec. at p. 51) and when the adverse action is "justified by criteria wholly unrelated to the employees' protected activity" (*Rio Hondo Community College District* (1982) PERB Decision No. 272 at p. 5).

The City has met its burden because of its legitimate and substantial concern that one of its fire chiefs who supervised a crew of six firefighters was significantly deficient in training hours as established by an objectively reasonable and generally applicable policy; was not timely completing logs and reports on station maintenance, incidents, and apparatus checkouts; and was not timely performing quarterly fire prevention inspections. The City has therefore met or exceeded Local 3494's prima facie case with equally or more persuasive affirmative evidence demonstrating that it would have taken the same action despite Weist's protected activity.

Local 3494 alleges that the PIP was a pretext for retaliation because it was issued four days after the Fire Department gave Weist his performance evaluation for the same alleged areas of needed improvement, despite there being no indication that Weist needed clarification of what the Fire Department expected of him. However, the terms of the PIP indicate that it served a different, if complementary, purpose to the evaluation, specifically by enumerating various future steps to remedy the past deficiencies indicated by the evaluation. The evaluation itself (Charging Party Exh. 7) states on p. 3:

I am requesting that you [sic] to review the performance feedback, [the] records attach [sic] and the job description and we will discuss and develop of [sic] a Performance Improvement Plan to move the areas I have listed as deficiencies to meets standard in the next few months. I am setting the date of April 5th [for] our first discussion on the development of the plan.

Local 3494 points to City's failure to follow the terms of the PIP as proof that the PIP served no clarification purpose. However, the City's diligence or lack thereof in enforcing the PIP does not, by itself, shed any light on the City's motivation for issuing the PIP in the first place.

ORDER

Based on the foregoing findings of fact and conclusions of law, the entire record in this case and pursuant to the Meyers-Milias-Brown Act (MMBA), Government Code section 3509, the Public Employment Relations Board (PERB or Board) DISMISSES the allegations that the City of Davis (City) retaliated against Robert Weist (Weist) by denying a same-day vacation request and issuing an April 9, 2013 performance improvement plan (PIP) to Weist, and that the City unilaterally changed terms and conditions of employment by denying a same-day vacation request.

PERB hereby REVERSES the administrative law judge's (ALJ's) dismissal of the allegation that the City unilaterally changed terms and conditions of employment by issuing a performance improvement plan (PIP) to Robert Weist (Weist) and finds that the City violated Government Code sections 3503, 3505, and 3506.5, subdivisions (a), (b) and (c), and PERB Regulation 32603, subdivisions (a), (b), and (c), by failing and refusing to notify and to meet and negotiate in good faith with Davis Professional Firefighters Association, Local 3494 (Local 3494) over the City's decision to unilaterally implement a policy of issuing PIPs, and thereby interfering with the rights of bargaining unit employees to be represented by Local 3494, and by denying Local 3494 rights guaranteed to it by the MMBA.

The City, its governing board and its representatives, shall:

A. CEASE AND DESIST FROM:

1. Unilaterally implementing a policy of issuing performance improvement plans (PIP).
2. Interfering with the rights of bargaining unit employees to be represented by Local 3494.

3. Denying Local 3494 rights guaranteed by the MMBA to represent employees.

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

1. Rescind the April 9, 2013 “Notification of Unacceptable Performance/Opportunity to Improve” and PIP issued to Weist, and remove all copies from any and all of Weist’s personnel and other files.
 2. Make Weist whole for any loss in compensation and benefits he may have suffered as a result of the City’s issuance of the PIP. Such payment shall include interest at a rate of 7 percent per annum.
 3. Upon request, meet and confer with Local 3494 over the use of PIPs for bargaining unit members.
 4. Within ten (10) workdays of service of a final decision in this matter, post at all work locations where notices to employees in the City are customarily posted, copies of the Notice attached hereto as an Appendix, signed by an authorized agent of the City. Such posting shall be maintained for at least thirty (30) consecutive workdays. 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 firefighter bargaining unit. The City, its governing board and its representatives shall take reasonable steps to ensure that the posted Notice is not reduced in size, defaced, altered or covered by any material.
4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of PERB, or the General Counsel’s designee, The City shall provide

reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on Local 3494.

Chair Martinez and Member Banks joined in this Decision.



**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. SA-CE-833-M, *Davis Professional Firefighters Association, Local 3494 v. City of Davis*, in which all parties had the right to participate, it has been found that the City of Davis 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. Unilaterally implementing a policy of issuing performance improvement plans (PIP).
2. Interfering with the rights of bargaining unit employees to be represented by Local 3494.
3. Denying Local 3494 rights guaranteed by the MMBA to represent employees.

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

1. Rescind the April 9, 2013 "Notification of Unacceptable Performance/Opportunity to Improve" and PIP issued to Weist, and remove all copies from any and all of Weist's personnel and other files.
2. Make Weist whole for any loss in compensation and benefits he may have suffered as a result of the City's issuance of the PIP. Such payment shall include interest at a rate of 7 percent per annum.
3. Upon request, meet and confer with Local 3494 over the use of PIPs for bargaining unit members.

Dated: _____

CITY OF DAVIS

By: _____

Authorized Agent

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