STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 521, Charging Party, v. COUNTY OF MONTEREY, Respondent.	Case No. SF-CE-1336-M PERB Decision No. 2579-M July 20, 2018

Appearances: Weinberg, Roger & Rosenfeld by Robert E. Szykowny, Attorney, for Service Employees International Union Local 521; Office of the County Counsel by Charles J. McKee, County Counsel, and Janet L. Holmes, Deputy County Counsel, for County of Monterey.

Before Banks, Shiners and Krantz, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Service Employees International Union Local 521 (Local 521) from the dismissal of its unfair practice charge. The charge, as amended, alleged that the County of Monterey (County) violated the Meyers-Milias-Brown Act (MMBA or Act)[1] and PERB Regulations[2] by unilaterally adopting and then revising an attendance policy affecting Local 521-represented employees in the County's Emergency Communications Department. The Office of the General Counsel dismissed the charge after determining that Local 521 had failed to allege sufficient facts to demonstrate that the County had changed any policy.

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

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

On appeal, Local 521 reiterates its allegations before the Office of the General Counsel that the County's conduct satisfies each of the elements of PERB's test for unilateral changes and further asserts that, in dismissing the charge, the Office of the General Counsel erroneously resolved various material factual disputes, misapplied PERB precedent governing unilateral implementation of a policy where none previously existed, and effectively adopted a pleading standard more stringent than that authorized by PERB Regulations and decisional law. In opposition to the appeal, the County argues that Local 521's appeal both fails to comply with the requirements of our regulations and is without merit, and urges us to affirm the dismissal.

The Board itself has reviewed this matter in full, including the charge and amended charge, the warning and dismissal letters, the appeal, and the County's response to the appeal. Based on our review, we reverse the dismissal and remand to the Office of the General Counsel to issue a complaint alleging that the County unilaterally altered terms and conditions of employment by creating new policies affecting employee attendance in the Emergency Communications Department.

SUMMARY OF FACTUAL ALLEGATIONS

Local 521 is the exclusive representative of two County bargaining units, Unit J and Unit F. Local 521 and the County are parties to a separate memorandum of understanding (MOU) for each unit. At all times relevant to this dispute, both MOUs were in effect. The MOUs contain no attendance policy, but do contain materially identical provisions governing such subjects as sick leave and sick leave verification, leave with and without pay, discipline, and performance evaluations. Each MOU also contains a Management Rights clause and a Full Understanding, Modification, Waiver section, which bars the County from changing

negotiable matters not referenced in the MOU without first meeting and conferring in good faith and demonstrating operational necessity.

On March 20, 2015, Local 521 learned that the County had recently adopted a "Revised Attendance Policy" affecting employees in the Emergency Communications Department. According to the charge, the attendance policy purports to be a revision of a similar policy first adopted by the County on October 23, 2012. Local 521 alleges that it had no actual or constructive notice of the original 2012 version of the policy until it learned of the revised version on March 20, 2015, after the County had implemented the revised policy.

The amended charge alleges that the original and revised versions of the attendance policy "significantly altered existing practices with regard to attendance" by implementing "new rules on attendance, tardiness, and procedures for taking leave," as well as "new bases for discipline." The amended charge identifies seven specific changes allegedly resulting from implementation/revision of the policy, and an accompanying declaration by Local 521 Internal Organizer Jay Donato (Donato) states that, with respect to each of these seven alleged changes, "there was no established past practice." Donato, who has represented Emergency Communications Department employees since 2009, declares that before the original and revised attendance policies, there was no policy requiring employees to log onto their computers before the start of their shifts, no policy requiring employees to provide a doctor's note for every absence of three or more days, no policy prohibiting employees from using accrued sick leave for medical and dental appointments during working hours, no policy of placing employees on leave without pay because they had not produced a doctor's note upon returning to work from sick leave, and no policy of adjusting an employee's seniority for sick leave use without sufficient accrued sick leave to cover the absence, or for allegedly "excessive" absenteeism.

THE DISMISSAL

In dismissing the amended charge for failure to state a prima facie case of a unilateral change, the Office of the General Counsel determined that the amended charge failed to allege sufficient facts to demonstrate an actual conflict between the MOUs and the attendance policy. In particular, the Office of the General Counsel determined that the MOUs "expressly authorize the County to require a doctor's note for absences of three days or more," and that otherwise nothing in the MOUs prohibited the County from instituting a blanket policy requiring a doctors' note for all absences of three days or more. The dismissal letter reasoned that, because the MOUs authorize the County to issue and enforce rules and regulations and contain no provisions that conflict with those of the Emergency Communications Department attendance policy, the fact that the County had not previously exercised its full authority under the MOUs did not make its decision in this case an unlawful unilateral change.

The Office of the General Counsel offered similar reasoning for each of the other unilateral changes alleged in the amended charge. While the MOUs set forth certain procedures for employee discipline, they include no specific causes for discipline, other than that discipline be "for cause." The Office of the General Counsel thus reasoned that there was no conflict between the MOUs' silence on the subject and the attendance policy's provisions converting any three-day absence without a doctor's note to leave without pay and subjecting employees to discipline for more than two occurrences of tardiness within any six-month period. Similarly, because the amended charge cited no MOU provisions specifically allowing employees to use accrued sick leave for medical or dental appointments, or specifically prohibiting adjustments to the seniority of employees whose absences management deems excessive or unauthorized, the amended charge failed to identify any actual conflict between the MOUs and the attendance policy to support a unilateral change allegation.

The Office of the General Counsel also considered but rejected the possibility that the County's attendance policy conflicted with an established past practice. The charge and supporting materials asserted that there was "no established practice," which the Office of the General Counsel characterized as a "legal conclusion." According to the dismissal letter, absent facts "establishing either what the [Emergency Communications] Department's policy was, or that the [Emergency Communications] Department previously lacked any policy whatsoever on these subjects," the charge must be dismissed for failure to state a prima facie case of a departure from an established past practice.

ISSUES ON APPEAL

Although the appeal reiterates the charge allegations for each element of PERB's test for unilateral changes, it appears the issues on appeal are limited to: (1) whether the charge alleged facts establishing that the County's adoption and/or revision of the attendance policy caused any actual change in policy, and (2) whether the County has alleged undisputed facts establishing an affirmative defense as a matter of law. As to the first of these issues, Local 521 argues that the Office of the General Counsel erred by characterizing statements in Donato's declaration as "legal conclusions," rather than factual allegations establishing the non-existence of an established past practice with respect to each of the seven unilateral changes identified in the amended charge.

Alternatively, Local 521 contends that the Office of the General Counsel erred by resolving a material factual dispute over whether the Emergency Communications Department "previously lacked" any policy for the seven subjects identified as unilateral changes. Local 521 also contends that, although the dismissal letter cited *Regents of the University of California* (2012) PERB Decision No. 2300-H for the proposition that a unilateral change occurs if an employer implements a new policy where it previously had no policy, the Office of the General Counsel misapplied this precedent. Local 521 notes that Donato's declaration clearly alleges, with respect to each of the seven subjects in dispute, that "there was no established past practice" in the Emergency

Communications Department, and argues that this information should be sufficient to demonstrate that adopting the departmental attendance policy constituted a change in policy. According to the appeal, it appears the Office of the General Counsel requires some "magic formula" for alleging that no policy previously existed, and, in the absence of any indication in the warning letter, this undisclosed special pleading requirement conflicts with PERB Regulations and decisional law, which require only a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." (PERB Reg. 32615, subd. (a)(5).)

As to whether the County has alleged undisputed facts establishing an affirmative defense as a matter of law, the appeal reiterates the charge allegations and the statements in Donato's declaration that Local 521 had no knowledge of either the original or revised attendance policy until March 20, 2015. Although the County's position statement asserted that "a discussion took place with [Local 521] sometime during the creation of the [original] policy," Local 521 asserts that during the pre-complaint investigation of an unfair practice charge, the Office of the General Counsel is not authorized to resolve a material factual dispute, such as whether the County ever provided Local 521 notice of the original attendance policy in 2012 or the revisions thereto in 2015.

In opposition to the appeal, the County argues that the MOUs expressly authorized the County to adopt and revise the Emergency Communications Department attendance policy, that the 2015 revisions were in fact proposed and adopted with Local 521's knowledge and agreement, and that, despite direction from the Office of the General Counsel's warning letter, Local 521 failed to allege sufficient facts to demonstrate that the revisions to the attendance policy constituted a unilateral change in policy.[3] The County also argues that this controversy has been mooted

[3] The County's opposition also asserts that Local 521's appeal should be summarily rejected for non-compliance with PERB Regulation 32635, because the appeal fails to state the specific issues of procedure, fact, law or rationale to which the appeal is taken, fails to identify

because, after the unfair practice charge was filed, the parties entered into an agreement approving the attendance policy on a prospective basis. The County contends the unfair practice charge should have been withdrawn and, failing that, it was properly dismissed.

DISCUSSION

Standard of Review for Dismissal/Refusal to Issue a Complaint

When deciding appeals, the Board reviews the matter de novo and is free to reach different factual and legal determinations than those in the decision being appealed. (MMBA, § 3509, subd. (a); Gov. Code, § 3541.3, subds. (i), (n); *Beverly Hills Unified School District* (2008) PERB Decision No. 1969, pp. 7-8.) On review of a dismissal without hearing, we assume the truth of the charging party's factual allegations and consider them in the light most favorable to the charging party. (*San Juan Unified School District* (1977) EERB[4] Decision No. 12, p. 5; *Golden Plains Unified School District* (2002) PERB Decision No. 1489, p. 6 (*Golden Plains*);

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the page or part of the dismissal to which each appeal is taken, fails to state the grounds for each issue, and fails to demonstrate good cause to support the appeal. However, the County cites no specific example from the appeal, nor any authority other than the language of the regulation itself to support these contentions. While the appeal consists largely of a reiteration of the charge allegations, it does, at various points, also identify and assert specific errors of law and procedure underlying the dismissal, such as the resolution of certain factual disputes or application of a pleading standard that is inconsistent with PERB Regulations and decisional law. Although the appeal is incorrectly captioned "Exceptions," by arguing that the Office of the General Counsel reached the wrong conclusion based on the factual allegations, i.e., incorrectly applied the law to the factual allegations included in the charge, the appeal does substantially comply with the requirement that an appeal place the Board and the respondent on notice of the issues. (*Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, p. 16 (*Petaluma*); see also *Santa Ana Unified School District* (2017) PERB Decision No. 2514, p. 2 [disregarding party's designation as "exceptions" and accepting the filing as an appeal where the contents substantially comply with the requirements of PERB Regulation 32635, subdivision (a), governing appeals from dismissal without hearing].)

[4] Before January 1, 1978, PERB was known as the Educational Employment Relations Board or EERB.

Trustees of the California State University (2017) PERB Decision No. 2522-H, p. 6 (*Trustees of CSU*).)

In *Eastside Union School District* (1984) PERB Decision No. 466 (*Eastside*), the Board held that while PERB's Regulations authorize the agency to determine if an unfair practice has been committed, they do not empower Board agents to rule on the ultimate merits of a charge during the initial investigation of the charge. (*Id*. at pp. 6-7.) The Board explained that where the investigation of an unfair practice charge "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." (*Ibid.*; see also PERB Regs. 32620, 32640, 32644.)

The rule is the same when the sufficiency of an unfair practice allegation turns on the interpretation of a contract or other legal instrument. (*County of Santa Clara* (2015) PERB Decision No. 2431-M, pp. 4, 21-23; *National Union of Healthcare Workers* (2012) PERB Decision No. 2249a-M, pp. 8-9; *San Francisco Unified School District and City and County of San Francisco* (2004) PERB Decision No. 1721, pp. 11-12.) Although a Board agent must accept the plain language of a contract, statute, or local rule where its meaning is clear and unambiguous on its face (*City of Riverside* (2009) PERB Decision No. 2027-M, p. 11; see also *Glendora Unified School District* (1991) PERB Decision No. 876; *Butte Community College District* (1985) PERB Decision No. 555), where there is a non-frivolous dispute over its meaning, the parties must be afforded the opportunity to offer evidence in support of their respective interpretations at a formal hearing. (*County of Santa Clara*, *supra*, PERB Decision No. 2431-M, pp. 21-22, citing *Saddleback Community College District* (1984) PERB Decision No. 433, pp. 2-4; *Fullerton Joint Union School District* (2004) PERB Decision No. 1633,

pp. 5-6.) For the initial investigation of an unfair practice charge, the appropriate question is not which of two competing interpretations of a legal instrument is the more plausible, but whether the language in dispute is reasonably susceptible to the charging party's interpretation and whether that interpretation supports a viable, i.e., non-frivolous, theory of liability under the applicable PERB-administered statute. (*County of Santa Clara*, *supra*, PERB Decision No. 2431-M, pp. 21-23; *County of San Joaquin* (2003) PERB Decision No. 1570-M, p. 6; see also *City of Pinole* (2012) PERB Decision No. 2288-M, pp. 11-12 and *City of San Jose* (2013) PERB Decision No. 2341-M, p. 49.)

Applicable Law Governing Unilateral Changes

The MMBA obligates public agencies and their designated representatives to "meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of . . . recognized employee organizations," and to "consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action." (MMBA, § 3505; *Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 780–781.) An employer commits a per se violation of its duty to meet and confer when it fails to afford the employees' representative reasonable advance notice and meaningful opportunity to bargain before reaching a firm decision to create or change a policy affecting a negotiable subject. (*County of Santa Clara* (2013) PERB Decision No. 2321-M, pp. 17-18; *City of Sacramento* (2013) PERB Decision No. 2351-M, pp. 28-29.)

To state a prima facie case of a unilateral change, the charging party must allege facts demonstrating 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; and (4) the

action had a generalized effect or continuing impact on terms and conditions of employment. (*County of Santa Clara, supra*, PERB Decision No. 2321-M, p. 21; *Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262 (*Fairfield-Suisun*).)

Because our statutes contemplate bilateral decision-making as to subjects within the scope of representation, the gravamen of any unilateral action is exclusion of employees through their chosen representative from participation in the decision-making process, whether the change in policy involves the creation, implementation or enforcement of a new policy, or a change to existing policy as contained in a written agreement, in written employer rules or regulations, or in an unwritten established past practice. (*Pasadena Area Community College District* (2015) PERB Decision No. 2444, p. 12 (*Pasadena Area CCD*), and authorities cited in fn. 12.) Thus, PERB has long recognized three categories of unlawful unilateral actions: (1) changes to the parties' written agreements; (2) changes in established past practice; and (3) newly created policy or application or enforcement of an existing policy in a new way. (*Ibid*.; *Regents of the University of California*, *supra*, PERB Decision No. 2300-H, pp. 20, 25-27; cf. *City of Davis* (2016) PERB Decision No. 2494-M and *Marysville Joint Unified School District* (1983) PERB Decision No. 314 (*Marysville*).)

This appeal involves the latter of these categories: newly-adopted policies where previously none existed. The amended charge alleges that the original and revised attendance policies "significantly altered existing practices with regard to attendance" by implementing "new rules on attendance, tardiness, and procedures for taking leave," as well as "new bases for discipline." Further, for each of the seven subjects in dispute, the amended charge alleged that before implementation and/or revision of the attendance policy, "there was no policy" in the Emergency Communications Department regarding that particular subject.

We consider the four elements of the test for unilateral changes.

Matters within the Scope of Representation

The scope of representation under the MMBA includes "all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment," but not including "consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." (MMBA, § 3504; *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, 812–816.) Although the County contends that its attendance policy was not subject to meeting and conferring, there is no serious question that it concerns negotiable matters.[5] Following federal authorities, California courts and PERB have held that rules of conduct which subject employees to discipline are within the scope of representation both as to the criteria for discipline and as to the procedures to be followed. (*City of Vernon*, *supra*, 107 Cal.App.3d at p. 816; *Fairfield-Suisun*, *supra*, PERB Decision No. 2262, p. 12; *Trustees of the California State University* (2003) PERB Decision No. 1507-H, pp. 3-4.)[6] The Revised Attendance Policy provides that absenteeism which management determines is excessive "may lead to disciplinary action up to and including termination." Because the County's attendance policy subjects employees to

[5] As discussed below, the County's argument is not that the attendance policy is excluded from the *statutorily-defined* scope of representation, but that it was not subject to any meet and confer requirement by virtue of *contractual* language waiving Local 521's right to meet and confer over the adoption or enforcement of workplace rules. PERB's designation of a subject as negotiable is a *statutory* designation, and such subjects do not lose their designation as negotiable simply because they are included within a collective bargaining agreement. (*City of Folsom* (2015) PERB Order No. Ad-423-M, p. 4.)

[6] When interpreting the MMBA, it is appropriate to take guidance from administrative and judicial authorities interpreting the National Labor Relations Act (29 U.S.C. § 151 et seq.), the California Agricultural Labor Relations Act (Lab. Code, § 1148 et seq.), and other California labor relations statutes with parallel provisions, policies and/or purposes. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 615-617; *Moreno Valley Unified School Dist. v. Public Employment Relations Bd.* (1983) 142 Cal.App.3d 191, 196; *Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1089–1090.)

discipline, it is a negotiable term or condition of employment, irrespective of the particular subject it concerns. (*City of Vernon, supra,* 107 Cal.App.3d at pp. 816–817.)

The attendance policy is also negotiable by virtue of its contents, which affect statutorily-enumerated subjects of bargaining. PERB and the National Labor Relations Board (NLRB) have held that policies governing employee attendance, including policies for investigating potential sick leave abuse, and requirements for employees returning to work following an absence, are within the scope of representation, as they relate directly to employee wages and hours. (*San Bernardino City Unified School District* (1998) PERB Decision No. 1270, adopting, in relevant part, proposed dec. at pp. 5-6, 52; *NLRB v. Katz* (1962) 369 U.S. 736, 744; *Fry Foods, Inc.* (1979) 241 NLRB 76, 93.) The attendance policy also provides that "excessive absenteeism" or "regular patterns of absences," as defined in the policy, may result in various consequences short of discipline, including suspension of an employee's shift trade privileges and voluntary overtime assignments, or a reduction in departmental seniority. When read together with other provisions of the policy, it appears that each instance in which an employee fails to provide a doctor's note upon returning to work counts as one day of "unauthorized absence," and that a period of unauthorized absence "which exceeds three (3) working days *either consecutively or cumulatively* in a sixty (60) day period" shall result in the employee's termination for job abandonment. (Emphasis added.) Each of these provisions directly affects employee wages and hours and are therefore negotiable. The "Attendance Performance Standards" section of the policy also affects job performance, and therefore employee evaluations, grievance procedures and wages, which are all negotiable matters. (*Walnut Valley Unified School District* (1983) PERB Decision No. 289,

p. 9; *Trustees of the California State University (San Marcos)* (2004) PERB Decision No. 1635-H, p. 2.)

While not "mandatory" in the sense of subjecting employees to discipline, the provision in the attendance policy suggesting that, as "a courtesy," employees should "arrive and prepare for work 10 minutes early" is also negotiable insofar as it affects the start time of the work day and the length and amount of employees' duty-free time at work, and thus hours of work. (*Petaluma, supra*, PERB Decision No. 2485, p. 39; *Salinas Union High School District* (2004) PERB Decision No. 1639, p. 3.)

Generalized Effect and Continuing Impact

Nor is there any question that Local 521 has alleged sufficient facts to satisfy the "generalized effect or continuing impact" element of the test for a unilateral change. Under PERB precedent, the continuing impact or generalized effect requirement is satisfied if the respondent asserts that its conduct was authorized by contract, statute or other legal authority (*County of Riverside* (2003) PERB Decision No. 1577-M, p. 6; *Hacienda La Puente Unified School District* (1997) PERB Decision No. 1186, p. 4), or that a change in policy is generally applicable to future situations (*Fairfield-Suisun, supra*, PERB Decision No. 2262, p. 15; *Pasadena Area CCD, supra*, PERB Decision No. 2444, pp. 15-16; see also *Modesto City Schools and High School District* (1985) PERB Decision No. 552, p. 8; and *Jamestown Elementary School District* (1990) PERB Decision No. 795, p. 6). The amended charge alleges, and the County's verified position statement admits, that the original and revised attendance policies are applicable to Local 521-represented employees in the Emergency Communications Department.

Without Notice and Opportunity to Bargain

An employer violates its duty to bargain in good faith when it fails to afford the employees' representative reasonable advance notice and meaningful opportunity to bargain before reaching a firm decision to establish or change a policy within the scope of representation, or before implementing a new or changed policy not within the scope of representation but having a foreseeable effect on matters within the scope of representation. (*City of Sacramento, supra*, PERB Decision No. 2351-M, pp. 28-30; *Victor Valley Union High School District* (1986) PERB Decision No. 565, p. 5.) Although the parties devote considerable discussion to this issue, it is not clear that the issue is properly before us. The dismissal letter states, "it appears [Local 521] was provided a copy of the October 23, 2012 version of the attendance policy," and Local 521's appeal argues that the Office of the General Counsel erred by resolving a material factual dispute over whether the County provided notice of the original attendance policy in 2012. However, the above statement in the dismissal letter and the discussion in the warning letter concern Donato's request, in March 2015, for a copy of the previously adopted version of the policy.

Contrary to what is asserted in the appeal, the Office of the General Counsel does not appear to have resolved a factual dispute over whether Local 521 had received a copy of the original attendance policy *in 2012* when the policy was first adopted. Although the warning letter recites PERB's six-month statute of limitations and the charging party's burden to allege facts demonstrating the timeliness of its charge, there is otherwise no indication that the charge was dismissed as untimely, or for failure to allege sufficient facts to establish that it had no notice of the 2012 or 2015 versions of the policy before their implementation.

Moreover, to the extent the issue of adequate notice is properly raised in this appeal, it is fairly easily resolved at this stage of the proceedings. The amended charge and Donato's accompanying declaration allege that Local 521 only learned of the attendance policy on March 20, 2015, i.e., *after* it was implemented in 2012 and revised on March 16, 2015. Although the County disputes this chronology and alleges that it communicated extensively with Local 521 about the attendance policy before its implementation and/or revision,[7] at this stage of the proceedings, we treat the charging party's factual allegations as true and consider them in the light most favorable to the charging party. (*Golden Plains*, *supra*, PERB Decision No. 1489, p. 6; *Trustees of CSU*, *supra*, PERB Decision No. 2522-H, p. 6.) Where there is a material factual dispute, the merits of the charging party's factual allegations should not be determined by ex parte statements but by a hearing in which all parties have a full and fair opportunity to present evidence in support of their positions. (*Riverside Unified School District* (1986) PERB Decision No. 562a, p. 6 (*Riverside*); *Eastside*, *supra*, PERB Decision No. 466, p. 8; see also PERB Regs. 32170, 32180, 32207, 32212.) Because Local 521 has alleged that it had no knowledge of the original or revised versions of the attendance policy until after it had been implemented and revised, it has sufficiently alleged that it had no notice or opportunity to bargain for purposes of a unilateral change allegation.

Whether Implementation and/or Revision of the Attendance Policy Effected a Change in Policy

As discussed previously, absent a clear and unmistakable waiver of the union's right to bargain, an employer may not unilaterally add new terms to an existing collective bargaining agreement or adopt or enforce new rules of conduct where previously none had existed. (*Regents of the University of California*, *supra*, PERB Decision No. 2300-H, pp. 20, 25-27.)

[7] The County's contrary allegations are discussed below with respect to its waiver defenses.

This prohibition extends to the enforcement of existing rules. An employer's more stringent enforcement of an existing policy constitutes a different term or condition of employment for which notice and opportunity to bargain is necessary. (*Venture Packaging* (1989) 294 NLRB 544, 550; *Fry Foods, Inc.*, *supra*, 241 NLRB 76, 93; *Master Slack* (1977) 230 NLRB 1054, 1055-1056.) Whether termed a new system engrafted over the old, or simply a stricter enforcement of the existing rules, an employer is not privileged to make unilateral changes in the disciplinary system. (*Acme Die Casting* (1992) 309 NLRB 1085, 1104, abrogated on other grounds, as recognized by *Office Depot* (2000) 330 NLRB 640, 643.) Thus, an employer may not, without providing notice and meaningful opportunity to bargain, adopt a more stringent or harsher standard for enforcing its existing rules, such as a "zero tolerance" application of a rule where previously it had exercised discretion or followed principles of progressive discipline. (*Fairfield-Suisun, supra*, PERB Decision No. 2262, pp. 12-13; see also *Hyatt Regency Memphis* (1989) 296 NLRB 259, 263–264, enforced (6th Cir. 1991) 939 F.2d 361; *Sevakis Indus., Inc.* (1978) 238 NLRB 309, 311-312, enforced (6th Cir. 1980) 652 F.2d 600; *Intermountain Rural Elec. Assn & Intern. Broth. of Elec. Workers, Local 111, AFL-CIO* (1991) 305 NLRB 783, 787–788.)

Policy Suggesting or Requiring Employees to Log onto Computers Before their Start Time

The amended charge alleges that by requiring or suggesting that employees be at their workstations, logged into the system, and prepared to work at their scheduled start time, the attendance policy requires employees to be working before the actual start time of their shift, whereas previously there was no such policy. The MOUs contain no language on this subject and Local 521 alleges that previously, "there was no policy" on this subject in the Emergency

Communications Department. Contrary to the dismissal letter, these allegations sufficiently allege a change in policy for the purpose of stating a prima facie case of a unilateral change.

At the center of this dispute is the parties' disagreement over the meaning of the MOUs. The County argues that because the Management Rights clause authorizes it to "issue and enforce rules and regulations," the Emergency Communications Department attendance policy was not subject to any meet and confer requirement. For its part, Local 521 argues that various provisions of the attendance policy affecting attendance and tardiness, seniority, sick leave use and verification, and discipline either are not covered by the MOUs or exceed the County's authority to act unilaterally under the MOUs. On appeal, Local 521 also points out that the MOUs' Full Understanding[,] Modification, Waiver section mandates that negotiable matters "which are not referenced in the [MOU] and which are subject to the meet and confer process shall continue without change unless modified subject to the meet and confer process," and only as "warranted by operational necessity."[8]

At the very least, the MOUs are not clear and unambiguous regarding the County's authority to act unilaterally to adopt or revise attendance policies. Because we are not concerned at this stage of the proceedings with which of these two conflicting interpretations is the more plausible, but only with whether Local 521 has advanced a viable interpretation of the MOUs which support its unfair practice allegations, a complaint must issue to allow the parties an opportunity to present evidence and argument in support of their respective claims and/or

[8] Although the Full Understanding[,] Modification, Waiver provisions were not expressly referenced in the amended charge, they were included as part of the exhibits to the original and amended charges and the Board has held that, as part of its de novo review of appeals from dismissal, it may consider new legal arguments based on the same evidence presented to the Board agent. (*State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2013-S, pp. 2-3; see also *Beverly Hills USD*, *supra*, PERB Decision No. 1969, pp. 7-8; cf. PERB Reg. 32635, subd. (b); *Hartnell Community College District* (2015) PERB Decision No. 2452, pp. 4, fn. 4, 27-29 (*Hartnell CCD*).)

defenses. (*Eastside*, *supra*, PERB Decision No. 466, pp. 6-7; *County of Santa Clara*, *supra*, PERB Decision No. 2431-M, pp. 21-23; *Riverside*, *supra*, PERB Decision No. 562a, p. 6.)

Policy Requiring a Doctor's Note for Every Absence of Three Days or More

In determining that Local 521 had not alleged sufficient facts to state a prima facie case, the Office of the General Counsel first noted that under the MOUs, the "County may require medical certification or other substantiating evidence of illness for absences of three (3) consecutive scheduled work days for which sick leave is sought." The Office of the General Counsel interpreted this language as authorizing the County to require a doctor's note for every absence of three or more days and then reasoned that Local 521 had not met its burden of demonstrating an "actual conflict" between the language of the MOUs and either the original or the revised attendance policy. According to the dismissal letter, because "[n]othing in these provisions [of the MOUs] prohibits the County from instituting a blanket policy of requiring a doctor's note for all absences of three days or more. Thus, the fact that the County has exercised its authority under these MOU provisions does not establish a unilateral change." As support for this conclusion, the dismissal cites *City of Davis*, *supra*, PERB Decision No. 2494-M and *Marysville*, *supra*, PERB Decision No. 314 for the proposition that an employer does not make an unlawful unilateral change if its actions conform to the terms of the parties' agreement, even if the employer has not previously exercised the full extent of its discretion under its contractual rights. It is well settled that an employer who has chosen not to enforce its contractual rights is not forever precluded from doing so. (*Marysville*, *supra*, PERB Decision No. 314, p. 10; *County of Placer* (2004) PERB Decision No. 1630-M, p. 5; *County of Ventura (Office of Agricultural Commissioner)* (2011) PERB Decision No. 2227-M, warning letter at p. 2.)

However, we do not read the MOUs as clearly and unambiguously authorizing the County to adopt and/or revise the policies at issue in this appeal. Under generally accepted principles of statutory construction and contract interpretation, the word "shall" ordinarily carries a mandatory sense that drafters typically intend and that courts typically uphold, while the word "may" is ordinarily construed as permissive. (*Santa Clara County Correctional Peace Officers' Association, Inc. v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1036; *County of Tulare* (2015) PERB Decision No. 2414-M, pp. 20-21; SHALL, Black's Law Dictionary (10th ed. 2014).) Recognizing this distinction is particularly appropriate when both terms are used in close proximity in a particular context in order to give a "reasonable, lawful and effective meaning to all the terms" of a contract, as required by Civil Code section 1641. (*Los Angeles Superior Court* (2010) PERB Decision No. 2112-I, adopting dismissal letter at p. 2; *Tarrant Bell Property, LLC v. Superior Court* (2011) 51 Cal.4th 538, 542.)

Here, section 20.2 of the MOUs governing administration of sick leave provides that "[e]xcept for the changes in accrual rates set forth in [section] 18.1 the administrative procedures for sick leave *shall* continue as in effect as of July 1, 1983," while section 20.6 governing verification of sick leave provides that the "County *may* require medical certification or other substantiating evidence of illness for absences of three (3) consecutive scheduled work days for which sick leave is sought." (Emphases added.) Additionally, "Verification of sick leave *may* be requested of employee within a reasonable amount of time before, during, or upon the employee's return to work." (Emphasis added.) Moreover, whereas the provisions of the MOUs contain permissive or discretionary language regarding when the County may require medical certification or substantiating evidence, the departmental attendance policy provides that, "A doctor's note *shall* be required for any absence exceeding three consecutive days including

qualified Family Sick Leave," and that, "Absences exceeding three days require a doctor's note" and it is the employee's responsibility to provide it to the Supervisor or Training Coordinator, depending upon whether the employee is tenured or probationary, before returning to work.

The dismissal letter's reliance on PERB's *Marysville* line of cases is thus questionable, as *Marysville*, *supra*, PERB Decision No. 314 assumes that the contract language at issue clearly authorizes the complained-of conduct. Here, however, Local 521 argues that the MOUs use of the discretionary "may" contemplates various possible courses of action, and not the complete absence of discretion contemplated by the attendance policy's *requirement* that a doctor's note be provided for *every* absence of three or more days. While we make no pronouncement on the correctness of Local 521's interpretation of the MOUs at this stage of the proceedings, the distinction between what the County "may" do under the MOU and what it "shall" or must do under the attendance policy is at least not frivolous.

Further, Local 521 alleges that there has been no policy or practice consistent with the action required by the newly-adopted attendance policy. The Office of the General Counsel also concluded that Donato's declaration "does not provide facts establishing either what the Department's policy was [before March 2012], or that the Department previously lacked any policy whatsoever on these subjects." According to Local 521, the Office of the General Counsel incorrectly characterized these statements in Donato's declaration as "legal conclusions" when they actually state the "non-existence" of a past practice. We agree.

When a charge alleges the existence of a past practice, the charging party must specifically identify and describe the practice allegedly altered by a unilateral change. However, as the appeal points out, when, as here, the charging party alleges the employer has established a new policy where none previously existed, "[t]here is no way to more specifically allege the non-existence of something than to state it did not exist." By requiring Local 521 to demonstrate the existence of

a prior practice or policy, the dismissal letter seems to ignore the well-recognized possibility that a unilateral change may occur if the employer has adopted a new policy where previously there was none, or has adopted a stricter enforcement of an existing policy.

Policy Subjecting Employees to Discipline for Two or More Tardy Occurrences in Six Months

The amended charge alleges that adoption and/or revision of the attendance policy changed terms and conditions of employment by subjecting employees to discipline if they arrive or return to work late more than twice within any six-month period. It further alleges that until March 16, 2015, "there was no policy" on this subject in the Emergency Communications Department.

Similar to the above analysis, the MOUs contain no language expressly authorizing or prohibiting this or any other attendance standard and thus, there is a material factual dispute as to whether the MOUs authorize or prohibit the County from acting unilaterally to create and enforce such a policy. Accordingly, a complaint should issue to permit Local 521 to test its theory as to the meaning of the MOUs. (*County of Santa Clara*, *supra*, PERB Decision No. 2431-M, p. 20; see also *City of Pinole*, *supra*, PERB Decision No. 2288-M, pp. 11-12.)

Policy Prohibiting Use of Sick Leave for Scheduling Medical and Dental Appointments

The amended charge alleges that adoption and/or revision of the attendance policy changed terms and conditions of employment by prohibiting employees from scheduling medical and dental appointments during working hours, whereas previously, there was no such prohibition. To the extent the MOUs address this subject, they provide that, "Except for the changes in accrual rates set forth in 18.1 the administrative procedures for sick leave shall continue as in effect as of July 1, 1983." No facts were presented regarding whether the administrative procedures for sick leave in effect since July 1, 1983 involve scheduling advance

medical or dental appointments, and the warning and dismissal letters do not discuss this language. The inference most favorable to the charging party's case is that the administrative procedures in effect since July 1, 1983, do not include a prohibition against using sick leave for scheduling medical or dental appointments, and Local 521 alleges that before the adoption and/or revision of the attendance policy, "there was no policy" in the Emergency Communications Department.

The amended charge sufficiently alleges that the County changed policy by adopting such a prohibition and, as with the other provisions, a complaint must issue so that the parties can present evidence and argument in support of their respective claims and defenses, including their conflicting interpretations of whether the MOUs permit the County to act unilaterally to "issue and enforce" such a rule, or require that, subject to operational necessity, the County first complete the meet and confer process.

Policy Imposing Leave Without Pay for Unauthorized Absence When a Doctor's Note is Not Provided Upon an Employee's Return to Work or as Requested by the Supervisor

The amended charge alleges that the County changed terms and conditions of employment by imposing a new requirement for sick leave verification, including a provision in the attendance policy that would treat an absence as "unauthorized" and converted into leave without pay whenever an employee fails to provide a doctor's note upon the first day of returning to work or on the date requested by the supervisor. The MOUs provide for leave without pay but not under the circumstances covered by this policy. Additionally, Local 521 alleges that, before adoption and/or revision of the attendance policy, "there was no policy" on this subject in the Emergency Communications Department.

Accordingly, the amended charge sufficiently alleges that the County changed policy by adopting a rule that would treat an absence as unauthorized and convert the absence to leave

without pay if the employee does not provide a doctor's note upon his or her first day back to work, or as otherwise requested by the supervisor. The complaint should include this allegation so that the parties can present evidence and argument in support of their respective claims and defenses, including their conflicting interpretations of whether the MOUs permit the County to act unilaterally to "issue and enforce" such a rule, or require that, subject to operational necessity, the County first complete the meet and confer process.

Policies Adjusting Departmental Seniority for the Number of Unpaid Leave Hours Used and for "Abuse" of Sick Leave, as Determined by Management

The amended charge alleges that the County changed terms and conditions of employment by adopting two policies whereby employees' departmental seniority would be reduced by the number of unpaid leave hours used, and for "abuse" of sick leave, as determined by management, whereas previously there were no such policies. To the extent they provide for seniority, the MOUs contain no language authorizing such seniority reductions and, according to Local 521, before adoption and/or revision of the attendance policy, there was no such policy in the Emergency Communications Department.

The amended charge sufficiently alleges that the County changed policy by adopting these provisions of the Emergency Communications Department attendance policy and a complaint should issue which includes these allegations.

Because It Involves Disputed Facts, No Waiver Defense Can be Established as a Matter of Law

Although the charging party's factual allegations are accepted as true during the initial investigation of a charge and on Board review of a dismissal/refusal to issue a complaint, a charge must be dismissed when the respondent has established an affirmative defense as a matter of law based on undisputed facts. (*Metropolitan Water District of Southern California* (2009) PERB Decision No. 2055-M, p. 4, fn. 4; *Long Beach Community College District*

(2003) PERB Decision No. 1568, p. 15.) The County's opposition to the appeal asserts two theories of waiver as a defense to the charge: waiver by contract and waiver by inaction. First, the County asserts that the MOUs vest it with broad discretion to determine the mode of operations, to issue and enforce rules and regulations, and to conduct administrative functions efficiently, and that it therefore acted lawfully when implementing and revising the Emergency Communications Department's Attendance Policy. Section 8 (Management Rights) of the MOUs provide, in relevant part, that the County reserves all rights, powers and authorities to, among other things, "direct its employees; take disciplinary action; . . . issue and enforce rules and regulations; maintain the efficiency of governmental operations; determine the methods, means and personnel by which the County operations are to be conducted;" and "exercise complete control and discretion over its work and fulfill all of its legal responsibilities." However, a general reservation of rights does not operate as a waiver of the negotiability of any subject not specifically mentioned and thus, even the language reserving the County's right to "issue and enforce rules and regulations" does not necessarily constitute a clear and unmistakable waiver of the negotiability of attendance policies. (*Amador Valley Joint Union High School District* (1978) PERB Decision No. 74, pp. 8-9.)

Moreover, Section 41 (Full Understanding, Modification, Waiver) of the MOUs provides in relevant part that, "Existing matters within the scope of representation which are not referenced in the Memorandum of Understanding and which are subject to the meet and confer process shall continue without change unless modified subject to the meet and confer process." Attendance policies are not a matter referenced anywhere within the MOUs. Section 41 further provides that during the term of the MOU, "unless changes are warranted by operational necessity," the County does not intend or anticipate making "any change, modification or

cancellation of wages, hours, and [sic] working conditions which are subject to meet and confer and which are presently in effect or contained in this Memorandum." At minimum, there is a viable, i.e., non-frivolous, interpretation of the MOUs whereby implementation or revision of an attendance policy during the life of the MOUs remains subject to both operational necessity and meeting and conferring. Thus, while we do not decide the ultimate merits of the County's waiver by contract defense, we conclude that because it turns on disputed interpretations of contract language, it is insufficient to warrant dismissing the charge at this stage of the proceedings, and that a complaint should issue to allow the parties to present bargaining history or other relevant evidence to resolve their competing interpretations of the MOUs. (*County of Santa Clara*, *supra*, PERB Decision No. 2431-M, p. 23; see also *Eastside*, *supra*, PERB Decision No. 466, p. 7.)

The County's opposition to the appeal also asserts that it "communicated extensively with Local 521 during the revision process," and thereby fully satisfied any notice obligations under MMBA section 3505 and applicable decisional law. According to the County, Local 521 was aware of the proposed revisions to the 2012 attendance policy, and in March 2016, before filing the present appeal, Local 521 "*concurred with the revisions to the Attendance Policy*," as demonstrated by an exhibit attached to the County's opposition. (Emphasis in original.) The exhibit contains what purport to be a series of e-mail communications between representatives of the County and Local 521, culminating in a message from Donato on March 10, 2016, in which he states that "based on the statements from Brian [Local 521] concurs on the policies discussed."

There are, however, at least two problems with this correspondence. First, it does not appear anywhere in the position statements the County filed during the Office of the General

Counsel's investigation. By its own account, the County had received Donato's March 10, 2016, communication allegedly approving the attendance policy well before it submitted its May 27, 2016, position statement in response to the amended charge, though the position statement makes no mention of this document. Our regulations provide that absent a showing of good cause, a charging party may not present new information or supporting evidence on appeal. (PERB Reg. 32635, subd. (b); *Hartnell CCD, supra*, PERB Decision No. 2452, pp. 27-28.) The purpose of this regulation "is to require the charging party to present its allegations and supporting evidence to the Board agent in the first instance, so that the Board agent can fully investigate the charge before deciding whether to issue a complaint or dismiss the case." (*South San Francisco Unified School District* (1990) PERB Decision No. 830, p. 5.)

Our regulations contain no similar restriction on the evidence or supporting information a respondent may submit for the first time in support of its opposition to an appeal from dismissal. However, PERB adheres to a policy against piecemeal litigation (*City of Pasadena* (2014) PERB Order No. Ad-406-M, p. 15; *Brawley Union High School District* (1983) PERB Decision No. 266a, pp. 3-4), and, while not directly on point, it has also held that an affirmative defense not raised by the respondent at the charge processing stage cannot provide the basis for dismissal, even if the pertinent facts are undisputed. (*County of Santa Clara, supra*, PERB Decision No. 2431-M. p. 20.)

We need not decide this issue here, because the newly-submitted exhibit to the County's opposition suffers from another defect. Although the e-mail correspondence contained therein refers to sick leave and other matters contained in the attendance policy, the document actually included as part of the exhibit is neither the original nor the revised version of the attendance policy at issue in this appeal, but the Emergency Communications

Department's separate Policy No. 1505 governing employee rest periods and breaks. Given this mismatch between the contents of the e-mail correspondence and the policy attached to it, and Local 521's allegation that it had no knowledge of the attendance policy or its revision until March 20, 2015, in the present procedural posture, any waiver defense to the amended charge cannot be established as a matter of law based on undisputed facts. (*Metropolitan Water District of Southern California*, *supra*, PERB Decision No. 2055-M, p. 4, fn. 4; see also *County of Santa Clara*, *supra*, PERB Decision No. 2431-M, pp. 20-21.) A complaint must issue to allow the parties to present evidence and argument in support of their respective claims and defenses.

ORDER

The dismissal of the unfair practice charge in Case No. SF-CE-1336-M is hereby REVERSED and the matter REMANDED to the Office of the General Counsel for issuance of a complaint alleging that the County of Monterey unilaterally implemented and/or revised its attendance policy affecting employees in the Emergency Communications Department, as alleged in the amended charge and in accordance with this Decision.

Members Shiners and Krantz joined in this Decision.