STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

HEALTH CARE WORKERS UNION LOCAL 250, Charging Party, v. SUTTER COUNTY IN-HOME SUPPORTIVE SERVICES PUBLIC AUTHORITY, Respondent.	Case No. SA-CE-211-M PERB Decision No. 1900-M April 25, 2007

Appearances: Weinberg, Roger & Rosenfeld by Bruce A. Harland, Attorney, for Health Care Workers Union Local 250; Office of the County Counsel by Robert A. Muller, Attorney, for Sutter County In-Home Supportive Services Public Authority.

Before Duncan, Chairman; Shek and Neuwald, Members.

DECISION

SHEK, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Sutter County In-Home Supportive Services Public Authority (IHSS) to a decision by an administrative law judge (ALJ). In the proposed decision, the ALJ found that IHSS's decision to implement the Criminal Background Check Policy and Procedure (background check, or policy) was outside the scope of bargaining, but that IHSS's refusal to negotiate the effects of its policy constituted a violation of the Meyers-Milias-Brown Act (MMBA),[1] sections 3503, 3505, 3506 and PERB Regulation 32603(a), (b)

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

and (c).[2] The ALJ thereupon ordered IHSS to suspend implementation of its criminal background check policy until its effects had been negotiated.

The Board has reviewed the entire record in this matter, including but not limited to the ALJ's proposed decision, IHSS's statement of exceptions and supporting brief, and the response of the Health Care Workers Union Local 250 (Local 250). As discussed in the decision below, the Board agrees that the decision to implement background checks was outside the scope of bargaining, based upon the managerial prerogative. Additionally, we find that the details of the policy that are primarily related to public safety, and to the quality and nature of public services, as discussed below, are outside the scope of bargaining based upon the managerial prerogative. The Board finds, however, that the effects that are primarily related to wages, hours, and terms and conditions of employment, as delineated below, are within the scope of bargaining.

PROCEDURAL HISTORY

This action was commenced on January 30, 2004, when Local 250 filed an unfair practice charge, alleging that IHSS made an unlawful unilateral change. The Office of the General Counsel of the Board followed on June 3, 2004, by issuing a complaint against IHSS. The complaint alleged that IHSS failed to meet and confer prior to implementing the policy, requiring a criminal background check and fingerprinting for in-home supportive services providers who elected to be included in a registry for referral to care recipients, in violation of MMBA sections 3503, 3505 and 3506 and PERB Regulation 32603(a), (b) and (c). The matter was not settled at the conclusion of an informal conference on June 22, 2004. The parties submitted a joint stipulation of facts and exhibits in lieu of a hearing on

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

November 24, 2004. Following the filing of briefs, the matter was submitted for decision on January 24, 2005. The ALJ issued the proposed decision on May 11, 2005.

FINDINGS OF FACTS

Local 250 is an exclusively recognized representative, within the meaning of PERB Regulation 32016(b), of an appropriate unit which includes some in-home supportive service providers in Sutter County. IHSS is a public agency within the meaning of Government Code section 3501(c) and PERB Regulation 32016(a). IHSS is statutorily deemed to be the employer of all in-home supportive services personnel in Sutter County, including those who are members of Local 250, for the purpose of negotiating wages, benefits, and other terms and conditions of employment. (Welf. & Inst. Code sec. 12301.6(c)(l).) At all times in question, IHSS and Local 250 had been negotiating over other wages, terms, and conditions of employment for all IHSS providers, but had not reached a Memorandum of Understanding.

The Criminal Background Check Policy and Procedure

State law authorizes each county to establish an authority to provide in-home supportive services[3] to aged, blind, or disabled persons. (Welf. & Inst. Code secs. 12300,

[3]Section 12300(b) defines "supportive services" as follows:

> Supportive services shall include domestic services and services related to domestic services, heavy cleaning, personal care services, accompaniment by a provider when needed during necessary travel to health-related appointments or to alternative resource sites, yard hazard abatement, protective supervision, teaching and demonstration directed at reducing the need for other supportive services, and paramedical services which make it possible for the recipient to establish and maintain an independent living arrangement.

Additionally, Section 12300(c) and (d) state that the following "personal care services" shall be allowed where services are provided in the recipient's home.

12301.6.) IHSS is such an authority. The law requires an authority created under this section to establish a registry of providers, and to investigate the "qualifications and background of potential personnel." (Id, sec. 12301.6(e)(l)(2).[4]) The statute does not delineate the scope of the background investigation.

By a separate state law, any recipient of services from an in-home supportive services provider is entitled to receive from the Department of Justice (DOJ) a copy of the criminal record of the provider to determine whether the provider has been convicted or incarcerated within the last ten years as a result of specified criminal convictions. (Welf. & Inst. Code sec. 15660.) The law requires counties to notify any recipient of, or applicant for in-home supportive services, that a criminal record check on the providers is available and can be performed by the DOJ, upon his or her "annual redetermination," substitution of providers, or application for in-home supportive services.

On December 9, 2003, IHSS implemented its policy, which apparently combines Welfare & Institutions Code sections 12301.6(e) and 15660, by mandating a criminal

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(1) Assistance with ambulation.
(2) Bathing, oral hygiene, and grooming.
(3) Dressing.
(4) Care and assistance with prosthetic devices.
(5) Bowel, bladder, and menstrual care.
(6) Repositioning, skin care, range of motion exercises, and transfers.
(7) Feeding and assurance of adequate fluid intake.
(8) Respiration.
(9) Assistance with self-administration of medications.

[4]As provided in Section 12301.6(e), the six functions of the IHSS are to: (1) establish a registry of providers and (2) investigate the qualifications and background of potential personnel, (3) establish a system for referral of providers to recipients, (4) provide training for providers and recipients, (5) perform "any other functions related to the delivery of in-home supportive services, and (6) ensure that the requirements of the personal care option of Subchapter 19 (commencing with Section 1396) of chapter 7 of Title 42 of the United States Code are met.

background check for all providers who elect to be included in the Section 12301.6(e)(l) registry. As described in the joint stipulation of facts,

> The Policy applies to elective 'registry applicants.' It requires those who opt to join the registry to submit to a criminal background check through the Department of Justice as a condition for listing on the registry. Under the Policy, those registry applicants who fail the criminal background check would not be included in the registry, but have the right to appeal. Providers may elect not to join the registry and recipients of care may hire or fire providers who are not members of the registry.

IHSS did not have a criminal background check policy and procedure affecting in-home supportive services providers before December 9, 2003.

The policy stated that in-home supportive services providers who have been convicted of any of the following violations at any time, including pleas of no contest, would be excluded from the registry:

> A. Sexual offense against a minor.
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> B. Violation of sexual battery; willfully harm or injury to child, endangering person or health; cruel or inhuman corporal punishment or injury resulting in a traumatic condition of a child; infliction of pain or mental suffering or endangering health of elder or dependent adults; theft or embezzlement of property.
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> C. Offenses that include drug violations.
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> D. Offenses against property, including but not limited to, theft, robbery, burglary, embezzlement, or extortion.
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> E. Offenses where inclusion or continued participation in the Registry would, in the judgment of the Public Authority, subject an IHSS consumer to risk of harm, or otherwise undermine the functioning of the Registry. A criminal conviction per se will not be an absolute bar to the Registry. The Public Authority will consider such things as number of convictions, the nature and gravity of the convictions, the recentness of the convictions, evidence of rehabilitation, and the relationship between any specific criminal conviction and the sensitive, personal, and confidential relationship of providers and the special vulnerability of consumers to possible harm. The Public Authority shall determine on a case-by-case basis whether any applicant's

convictions render the applicant unsuitable for inclusion to [sic] the Registry.

(Policy, Penal Code references omitted.)

The lists of offenses in the IHSS policy and Welfare & Institutions Code section 15660 are partially duplicative, but not identical.

The parties stipulated that IHSS adopted the policy without prior notice to Local 250 and without having afforded Local 250 an opportunity to meet and confer over the decision to implement the policy or the effects of the policy.

DISCUSSION

The issues in the present case are whether IHSS made an unlawful unilateral change by adopting the criminal background check policy without meeting and conferring with Local 250, and whether the implementation of the policy was within the managerial prerogative and thus outside the scope of bargaining under the MMBA.

IHSS argues in its exceptions that there was no change in past practice, and thus no unilateral change, because, contrary to the ALJ's statement,[5] there had been no elective registry prior to the establishment of the background check. IHSS further argues that the effects of the decision, as well as the decision itself, should be exempt from bargaining as a management prerogative.

Local 250 responds to IHSS's exceptions by contending that the ALJ properly found that there was a change in past practice, and that the effects of the background check were within the scope of representation.

In reviewing exceptions to an ALJ's proposed decision, the Board reviews the entire administrative record as well as the parties' appellate papers. PERB reviews the record de

[5]IHSS alleges in its exceptions that it adopted the registry and the background check policy simultaneously, and that the ALJ's finding that the registry existed prior to the implementation of the policy was in error.

novo, and is free to draw its own conclusions from the record apart from those made by the ALJ. (Woodland Joint Unified School District (1990) PERB Decision No. 808a; Santa Clara Unified School District (1979) PERB Decision No. 104.) The Board ordinarily gives deference to an ALJ's factual findings, which incorporate credibility determinations based on considerations such as witness demeanor and appearance. (Beverly Hills Unified School District (1990) PERB Decision No. 789.)

In determining whether a party has violated Government Code section 3505 and PERB Regulation 32603(c) by making a unilateral change, PERB utilizes either the "per se" or "totality of the conduct" test, depending upon the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations.[6] (Vernon Fire Fighters v. City of Vernon (1980) 107 Cal.App.3d 802 [165 Cal.Rptr. 908]; Walnut Valley Unified School District (1981) PERB Decision No. 160; San Joaquin County Employees Association v. City of Stockton (1984) 161 Cal.App.3d 813 [207 Cal.Rptr. 876]; Grant Joint Union High School District (1982) PERB Decision No. 196.)

The stipulated record established that the employer's action amounted to a change in policy that had a continuing impact on the terms and conditions of employment, and a breach of an established past practice of not having a background check. IHSS's exception arguing that there was no change in past practice because there had been no elective registry prior to

[6]In this case, the parties stipulated that IHSS implemented the policy without giving Local 250 a prior opportunity to negotiate.

the establishment of the background check is without merit. Even given the lack of a preexisting registry, IHSS's creation of such a registry and its unilateral implementation of the background check would constitute a change in past practice. IHSS further argues that the policy has no generalized effect or continuing impact upon existing terms and conditions of bargaining unit members, because it is an elective registry. The Board finds that it is irrelevant whether the registry applies to all providers or only to registry applicants, because both would use the registry as the means of obtaining future clients. IHSS's adoption of the background check therefore constituted a unilateral change of its past practice.

The ALJ, however, found that the decision to adopt the policy was within the managerial prerogative, and hence not negotiable. Neither party excepted to this conclusion.

IHSS also excepts to the ALJ's finding that the effects of the policy are subject to bargaining. Local 250 had argued that the following issues, which might arise upon implementation of the background check, should be subject to bargaining:

> 1. How will information on a person's criminal record, if any, be handled? Will it be made public? Will it be provided directly to the prospective homecare client? What measures does the employer propose to appropriately protect the confidentiality of such information and workers' good reputation in the community? If it is to be provided to clients, will the clients be bound in any way by whatever confidentiality standards the Public Authority as an agency plans to impose on itself?
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> 2. To whom will the requirement apply? Will bargaining unit members who have been employed for more than 20 years with exemplary work records be terminated or grand fathered in?
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> 3. Will IHSS workers be required to pay a fee out of their own pockets for the background checks? If so, what does the employer propose the fee will be? What happens in cases in which this fee reduces a provider's pay below minimum wage?
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> 4. What will be a worker's appeal rights if s/he believes they have been incorrectly identified as having been convicted of a given crime?

> 5. What will be a worker's appeal rights if s/he seeks to present extenuating circumstances which should influence the employer's decision to exclude them from the registry or from employment?
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> 6. What categories of offenses are reportable? What categories of offenses result in automatic exclusion from the registry/employment? The PA's[7] policy proposes answers to this question, but, for example, those answers include overly broad language such as 'offenses that include drug violations,' and 'Offenses where inclusion or continued participation in the registry would, in the judgment of the PA, subject an IHSS consumer to risk of harm, or otherwise undermine the functioning of the Registry.'

The ALJ found that these issues had "little or nothing to do with public safety," and held that these "effects" were subject to bargaining. The ALJ stated,

> All of these queries concern matters within the terms and conditions of employment and do not impinge on IHSS' legitimate concerns over public safety. Therefore, they do not 'include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order,' as this term is used in section 3504.

Upon review, however, the Board finds that the following four issues from Local 250's list fall within the managerial prerogative: (1) the categories of reportable offenses; (2) the categories of offenses that will result in exclusion from the registry; (3) to whom the background checks will apply; and (4) disclosure of the providers' disqualification for and/or exclusion from the registry to care recipients. These items are integral to the policy. As discussed below, they fall within the managerial prerogative and are outside the scope of bargaining.

The managerial prerogative is based upon MMBA section 3504, which defines the scope of representation to include the following:

[7]"PA" stands for Public Authority.

> all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the 'merits, necessity, or organization of any service or activity provided by law or executive order.' (Emphasis added.)[8]

In determining whether the criminal background check policy was within the scope of bargaining under the MMBA, we apply the balancing test stated in the California Supreme Court decision in Claremont Police Officers Assn. v. City of Claremont (2006) 39 Cal.4th 623 [47 Cal.Rptr.3d 69] (Claremont). In that decision, the Court set forth the following test to determine whether a management action and its effects are within the scope of bargaining:

> In summary, we apply a three-part inquiry. First, we ask whether the management action has 'a significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees.' [Building Material & Construction Teamsters' Union v. Farrell (1986) 41 Cal.3d 651, 660 [224 Cal.Rptr. 688] (Building Material).)] If not, there is no duty to meet and confer. (See sec. 3504; see also ante , at p. 632.) Second, we ask whether the significant and adverse effect arises from the implementation of a fundamental managerial or policy decision. If not, then, as in

[8]The court in Holliday v. City of Modesto (1991) 229 Cal.App.3d 528 [280 Cal.Rptr. 206] (Holliday) discussed the management prerogative as follows:

> In Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507, 526 P.2d 971], the Supreme Court attempted to 'reconcil[e] the two vague, seemingly overlapping phrases of the statute: "wages, hours and working conditions," which, broadly read could encompass practically any conceivable bargaining proposal; and "merits, necessity or organization of any service" which, expansively interpreted, could swallow the whole provision for collective negotiation and relegate determination of all labor issues to the city's discretion.' (Id, at p. 615.) The Supreme Court observed that 'the Legislature included the limiting language not to restrict bargaining on matters directly affecting employees' legitimate interests in wages, hours and working conditions but rather to forestall any expansion of the language of "wages, hours and working conditions" to include more general managerial policy decisions.' (Id, at p. 616.) (Holliday. at p. 535.)

> Building Material, the meet-and-confer requirement applies. (Building Material, supra, 41 Cal.3d at p. 664.) Third, if both factors are present—if an action taken to implement a fundamental managerial or policy decision has a significant and adverse effect on the wages, hours, or working conditions of the employees—we apply a balancing test. The action 'is within the scope of representation only if the employer's need for unencumbered decisionmaking in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question.' (Building Material, supra, 41 Cal.3d at p. 660.) In balancing the interests to determine whether parties must meet and confer over a certain matter (§ 3505), a court may also consider whether the 'transactional cost of the bargaining process outweighs its value.' [(Social Services Union v. Board of Supervisors, 82 Cal. App. 3d 498, 505 [147 Cal.Rptr. 126].)] (Claremont, supra, at p. 638.)

The Court in Claremont upheld the concept of effects bargaining; i.e., even if an employer's decision to make a change is within the managerial prerogative, the effects of that decision may be subject to bargaining if they are not also within the managerial prerogative. (Id, at pp. 633-35.)

Under the first prong of the Claremont test, the Board finds that the background check has a significant and adverse impact on the terms and conditions of employment, based upon evidence in the record that in-home supportive service providers use the registry as the means of obtaining future clients.

Additionally, under the second prong of the Claremont test, the record undisputedly shows, and we therefore find that the significant and adverse effect arises from the implementation of a fundamental managerial or policy decision. Fundamental managerial decisions are those that "directly affect the quality and nature of public services." (Building Material, supra, at p. 664.) On the other hand, decisions that primarily affect wages, hours, and other terms and conditions of employment would be subject to bargaining. In this case, the decision to implement the background check, and the four policy details cited above, directly affect the quality and nature of public services.

Under the third prong of the Claremont test, to determine whether the details and effects of the policy are within the scope of bargaining, we must weigh the employer's need for unencumbered decisionmaking in managing its operations against the benefit to employer-employee relations of bargaining about the action in question.

In this case, the public services provided by IHSS have an important public safety component. Welfare & Institutions Code section 12301.6(e) expressly authorizes IHSS to investigate the qualifications and background of providers. Additionally, in Welfare & Institutions Code section 15670, the Legislature expressed the intent to protect the vulnerable population of in-home supportive services recipients.[9]

Courts have held that matters relating to public safety are within the managerial prerogative. In San Jose Peace Officer's Assn. v. City of San Jose (1978) 78 Cal.App.3d 935 [144 Cal.Rptr. 638], the court held that a regulation governing the circumstances under which a police officer would be permitted to discharge a firearm fell within the managerial prerogative because of its fundamental public safety purpose. Similarly, in Berkeley Police Assn. v. City of Berkeley (1977) 76 Cal.App.3d 931 [143 Cal.Rptr. 255], the Court of Appeal held that a

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[9] This section authorized the Department of Social Services to implement a system of criminal background checks for in-home supportive services providers. (Welf. & Inst. Code Sec. 15670(g).) According to the legislative findings and declarations in the statute, "[i]nstances of elder and dependent adult abuse are on the rise, with the majority of the abuse occurring in the home of elderly or dependent person by noncertified Caregivers." (Welf. & Inst. Code Sec. 15670(a).) "This state has a responsibility to protect these persons and to see that they are safeguarded from individuals who may pose a threat to their well-being." (Welf. & Inst. Code Sec. 15670(b).) Additionally:

> Criminal background checks of individuals who provide personal care services to elder and dependent adults, while not ending all occurrences of abuse, will serve as a factor in reducing some of these occurrences and giving senior citizens, dependent adults, and their families a sense of security that care is not being administered by individuals with dangerous criminal backgrounds.
> (Welf. & Inst. Code sec. 15670(c).)

police review procedure implemented by the police chief[10] was a matter of police-community relations, and was thus a managerial policy decision outside of the scope of representation. However, an overall public safety purpose will not exempt a management action from bargaining where the evidence indicates that the action relates primarily to worker safety or other terms or conditions of employment. In Holliday. at p. 538, the court held that a drug testing requirement for firefighters was subject to bargaining because it related primarily to worker safety or other terms or conditions of employment, and the record lacked evidence of a public safety purpose.

IHSS argues that the details and effects of the decision should be exempt from bargaining as a management prerogative because the policy is based upon the "critical" public safety goal of protecting vulnerable members of society - elderly, disabled, and adults dependent on in-home supportive personnel. We agree that the employer has a strong interest in implementing the background checks in this case, to comply with state statutes and to protect vulnerable recipients of in-home supportive services.

In response, Local 250 argues that the details and effects of the decision to implement the background check had little to do with public safety, and were more related to conditions of employment. We also agree that the providers have a strong interest in avoiding wrongful denial of placement on the registry, and in maintaining the confidentiality of their backgrounds.

In balancing the employer's and employees' interests with regard to criminal background checks, two federal decisions are instructive. In Exxon Company USA (1996) 321

[10]The procedure allowed: (1) a member of a citizens' police review commission to sit in at department hearings regarding citizens' complaints against officers, and (2) a department representative to attend commission meetings to present the department's position and to provide information from department investigations.

NLRB 896 [153 LRRM 1017], the National Labor Relations Board (NLRB) addressed a case in which the parties had bargained over background checks for employees who sought placement in positions that were designated as critical for safety.[11] The background checks in that case were audits of employees' drug and alcohol use compliance statements, performed by comparing such statements against local court records. The union in that case brought a charge alleging that the employer failed to provide certain information relating to the background checks, including the names of the employees whose records were audited. The NLRB ordered the parties to conduct further bargaining over the background checks and information disclosure, emphasizing the importance of bargaining over such matters.

Additionally, in United Food & Commercial Workers Int'l Union, Local 588 v. Foster Poultry Farms (9th Cir. 1995) 74 F.3d 169 [151 LRRM 2607], the Ninth Circuit held that the effects of a drug testing policy were bargainable despite the fact that the Department of Transportation (DOT) mandated drug testing for commercial motor vehicle operators. The court upheld an arbitrator's award requiring the defendant to reinstate two discharged employees (drivers) and to bargain over such matters as discipline, reassignment, and rehabilitation.[12] Pursuant to the above authorities, the effects of background checks on wages, hours, and terms and conditions of employment are undoubtedly subject to bargaining.

Based upon the discussion above, the Board finds that it is within IHSS's management prerogative to determine the details of the policy that are primarily related to public safety, and

[11]When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507].)

[12]During rulemaking, the DOT had expressly stated that the effects of the mandatory drug testing (including issues such as termination, reassignment, hiring of temporary drivers to fill a position, or policies regarding a driver's absence) would be subject to collective bargaining. (Id., at p. 175.)

the quality and nature of public services. The details that fall outside the scope of bargaining are those that are essential to the policy itself, rather than effects on wages, hours, or terms and conditions of employment. Such details include, but are not limited to, the following: (1) the categories of reportable offenses, (2) the categories of offenses that will result in exclusion from the registry, (3) to whom the background checks will apply, and (4) disclosure of the providers' disqualification for and/or exclusion from the registry to care recipients. Under the Claremont balancing test, the employer's need for unencumbered decisionmaking in managing its operations in these matters outweighs the benefit to employer-employee relations of bargaining. According to the provisions of the Welfare & Institutions Code cited earlier, it is the IHSS's duty to screen in-home supportive services providers based upon their background and qualifications. Recipients of in-home supportive services who obtain a referral from the IHSS registry have a right to expect that registered providers do not have a criminal background. It is within IHSS's managerial discretion to determine the types of past violations that would be reportable, or that would preclude a provider from inclusion on the registry. Similarly, it is within the employer's managerial discretion to determine to whom the requirements apply. Finally, it is within the IHSS's discretion to determine the terms of disclosure of a provider's disqualification for and/or exclusion from the registry to a care recipient. These issues are outside the scope of bargaining because they relate directly to ensuring the safety of care recipients.

In contrast, the Board finds that the effects of the policy on traditional terms and conditions of employment, including but not limited to the following, are within the scope of bargaining: how a person's criminal record will be handled, aside from the non-bargainable issue of disclosure to care recipients (e.g., bargainable issues would include the extent of the information related to the criminal background checks given to the care recipients, whether to

allow public disclosure, and what confidentiality requirements may be included); whether applicants will be required to pay a fee; and the procedures for providers to appeal any decisions excluding them from the registry (e.g., based upon considerations such as meritorious past service, or errors in making the determination). While we hold that appeal procedures should be bargainable, we hold that the ultimate decision as to whom to include in the registry falls within the managerial prerogative. Under the balancing test, the benefits to the employer-employee relationship of bargaining the matters discussed above outweigh the employer's need for unencumbered decisionmaking.

We intend this decision to be construed narrowly. The negotiability of criminal background check policies should depend upon the facts and circumstances of each situation. The vulnerability of in-home supportive services recipients makes this an extraordinary case in which we would apply the managerial prerogative to exclude certain details of the policy from the scope of bargaining.

CONCLUSION

The Board holds that IHSS's adoption of the criminal background check policy constituted a unilateral change of past practice. However, the Board holds that the decision to adopt the policy, and certain details of the policy, as discussed above, are outside the scope of bargaining based upon the managerial prerogative. The Board finds that IHSS's refusal to negotiate the effects of its background check on wages, hours, and terms and conditions of employment, as discussed above, denied Local 250 the right to represent the members of its bargaining unit in their employment relationship with the employer, in violation of MMBA sections 3503 and 3505, and PERB Regulation 32603(b). In addition, we find that IHSS derivatively interfered with the rights of bargaining unit employees to be represented by an

employee organization of their choice, a violation of MMBA section 3506 and PERB Regulation 32603(a).

ORDER

Based on the foregoing findings of fact and conclusions of law and the entire record in this matter, the Public Employment Relations Board (PERB) finds that the Sutter County In-Home Supportive Services Public Authority (IHSS) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3505, and 3506, as well as PERB Regulation 32603(a), (b) and (c).

Pursuant to MMBA section 3509(a) and (b), it is hereby ORDERED that IHSS, and its administrators and representatives shall:

A. CEASE AND DESIST FROM:

1. Refusing to meet and confer in good faith with the Health Care Workers Union Local 250 (Local 250) over the subject of the effects of IHSS's decision to require all of its caregiver employees to submit to a criminal background check prior to inclusion in the provider registry. The effects subject to bargaining include, but are not limited to, the following: how a person's criminal record will be handled, aside from the non-bargainable issue of disclosure to care recipients; whether applicants will be required to pay a fee; and the procedures for workers to appeal any decisions excluding them from the registry. The following issues are not subject to bargaining: (1) the categories of reportable offenses, (2) the categories of offenses that will result in exclusion from the registry, (3) to whom the background checks will apply, and (4) disclosure of the providers' disqualification for and/or exclusion from the registry to care recipients.

2. Denying to Local 250 rights guaranteed to it by the MMBA.

3. Imposing or threatening to impose reprisals, discriminating or threatening to discriminate against, or otherwise restraining or coercing in-home Caregivers, because of their exercise of rights guaranteed by the MMBA.

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

1. Negotiate the effects of IHSS's background check policy with Local 250, in accordance with paragraph A.1, above.

2. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all IHSS sites were notices are customarily placed for employees, copies of the notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of IHHS, indicating that it will comply with the terms herein. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the Notice is not reduced in size, altered, defaced, or covered by any other material.

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. IHSS 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 250.

It is further Ordered that all other aspects of the charge and complaint are hereby DISMISSED.

Chairman Duncan and Member Neuwald joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

In Unfair Practice Case No. SA-CE-211-M, Health Care Workers Union Local 250 v. Sutter County In-Home Supportive Services Public Authority, the Public Employment Relations Board (PERB) has found that the Sutter County In-Home Supportive Services Public Authority (IHSS) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3505, and 3505, and PERB Regulation 32603(a), (b) and (c).

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Refusing to meet and confer in good faith with the Health Care Workers Union Local 250 (Local 250) over the subject of the effects of IHSS's decision to require all of IHSS's caregiver employees to submit to a criminal background check prior to inclusion in the provider registry. The effects subject to bargaining include, but are not limited to, the following: how a person's criminal record will be handled, aside from the non-bargainable issue of disclosure to care recipients; whether applicants will be required to pay a fee; and the procedures for workers to appeal any decisions excluding them from the registry. The following issues are not subject to bargaining: (1) the categories of reportable offenses, (2) the categories of offenses that will result in exclusion from the registry, (3) to whom the background checks will apply, and (4) disclosure of the providers' disqualification for and/or exclusion from the registry to care recipients.

2. Denying to Local 250 rights guaranteed to it by the MMBA.

3. Imposing or threatening to impose reprisals, discriminating or threatening to discriminate against, or otherwise restraining or coercing in-home Caregivers, because of their exercise of rights guaranteed by the MMBA.

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

Negotiate the effects of the background check policy with Local 250, in accordance with paragraph A.1, above.

Dated:_____ SUTTER COUNTY IN-HOME SUPPORTIVE SERVICES PUBLIC AUTHORITY

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.