OVERRULED IN PART by County of Orange (2019) PERB Decision No. 2663-M & County of Orange (2018) PERB Decision No. 2594-M

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ALHAMBRA FIREFIGHTERS ASSOCIATION, LOCAL 1578, Charging Party, v. CITY OF ALHAMBRA, Respondent.	Case No. LA-CE-263-M PERB Decision No. 2139-M October 26, 2010

Appearances: Paul Curtis, Vice President, for Alhambra Firefighters Association, Local 1578; Burke, Williams & Sorensen by Kelly A. Trainer, Attorney, for City of Alhambra.

Before Dowdin Calvillo, Chair; McKeag and Wesley, Members.

DECISION

WESLEY, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by both the City of Alhambra (City) and the Alhambra Firefighters Association, Local 1578 (Association) to the proposed decision of an administrative law judge (ALJ). In the proposed decision, the ALJ determined that the City violated sections 3503, 3505 and 3506 of the Meyers-Milias-Brown Act (MMBA)[1] by unilaterally changing the minimum qualifications of a class specification without prior notice and without affording the Association an opportunity to meet and confer over the decision to change the policy.

The Board has reviewed the proposed decision and the record in light of the parties' exceptions and supporting briefs, and the relevant law. Based on this review, the Board

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

reverses the proposed decision and finds the Association failed to establish that the change fell within the scope of representation.[2]

BACKGROUND

The Association is the exclusive representative of the bargaining unit that includes the classifications of fire fighter, fire engineer and fire captain. Robert F. D'Ausilio (D'Ausilio) has been the president of the Association since 1992.

The City is a public agency within the meaning of MMBA section 3501(c). Richard Bacio (Bacio) has been the City's assistant city manager/personnel director since 1993. Vincent Kemp (Kemp) has been the City's fire chief since 2002 and has held other fire-related positions with the City, including deputy fire chief, division fire chief, training officer and battalion chief. Kemp was first hired by the City in 1977.

City Charter, Article XXIVa. (Civil Service), section 192d provides:

> All applicants for office, places or employment in the classified civil service of said city, shall be subject to examinations which shall be public, competitive and free to all United States citizens, subject to reasonable regulations and limitations of the civil service commission which are not in conflict with Federal or State law. Such examinations shall be practical in character, and shall relate to those matters which will fairly test the relative capacity of the persons examined to discharge the duties of the position to which they seek to be appointed, and may include tests of physical qualifications, health and manual skill. Appropriate notice of all examinations, according to rule adopted by said civil service commission, shall be given.

(Emphasis added.)

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[2] The City's request for oral argument pursuant to PERB Regulation 32315 is denied. (PERB regs. are codified at Cal. Code Regs., tit. 8, sec. 31001 et seq.) The Board has historically denied requests for oral argument when an adequate record has been prepared, the parties had ample opportunity to present briefs, and the issues before the Board are sufficiently clear to make oral argument unnecessary. (*Antelope Valley Health Care District* (2006) PERB Decision No. 1816-M; *Monterey County Office of Education* (1991) PERB Decision No. 913.) These criteria are met in this case.

City Municipal Code section 2.48.070 states in part:

> (B) *Adoption of the plan.* Before the classifi-cation [sic] plan, or any part thereof, shall become effective, it shall first be approved by the City Council. Upon adoption, provisions of the plan shall be observed in the handling of all personnel actions. The plan may be amended or revised as necessary in the same manner as originally established.

The City's Employer-Employee Relations Resolution (EERR) provides in part:

> SECTION FIVE: CITY RIGHTS. Except as otherwise specifically provided in this Resolution, or amendments or revisions thereto, and subject to the rights of an affected employee, personally or through his authorized representative under Government Code Sections 3500 et seq., the City has and retains the sole and exclusive rights and functions of management, including, but not by this enumeration intended to be limited to the following:
>
> M. To establish and determine job classifications.

The fire captain class specification states that the incumbent shall have the ability to:

> Effectively direct the work of others and exercise good judgment in emergency situations; analyze fire and EMS[3] situations and direct fire fighters to take effective courses of action; direct and engage in safe work practices in accordance with established policy; provide effective and proper oral and written directions under stressful situations/conditions; perform physically demanding work in hazardous conditions; interpret and explain laws, regulations and rules, as well as department policies and procedures; maintain appropriate flow of communication and chain of command; identify and inform superiors of sensitive issues/situations; meet the public in situations requiring diplomacy and tact; use and care for fire station, fire response vehicles and other equipment; . . . plan, direct, and assist in all of the activities of fire fighting, emergency medical and fire department operations; supervise and train subordinates effectively and tactfully, and work cooperatively with other city employees and the public; drive a fire apparatus safely and skillfully in accordance with traffic laws and ordinances.

[3] Emergency medical services.

Around June 1998, the city council approved a revised class specification for the position of fire captain. The revised specification added the requirement that incumbents in the class possess and maintain a valid Emergency Medical Treatment-1 (EMT-1) or Emergency Medical Treatment-Paramedic (EMT-P) certificate. The City did not negotiate the revised specification with the Association.

In September 1999, Bacio and the city manager asked the city council to approve a proposed amended class specification for the position of fire captain. The proposed specification was placed on the city council's agenda for September 27, 1999. The proposed specification contained additional certification requirements among the minimum qualifications for fire captain and stated in part:

> **Special Requirements/Licenses and Certifications**
> Possession of and ability to maintain the appropriate valid California Drivers License is required. Possession of and ability to maintain a valid Emergency Medical Treatment-1 or Emergency Medical Treatment-P Certificate.
>
> Possession of and ability to maintain a[n] Alhambra Fire Department Fire Engineer Certification.
>
> Completion of two (2) courses from the required eight (8) courses of the Fire Officer Certification through the State [Fire] Marshal[] Certification Program at time of application.
>
> Required changes: Effective January 1, 2001 will require completion of six (6) courses of the Fire Officer Certification through the State Fire Marshal[] Certification Program. Effective January 1, 2002 possession of the Fire Officer Certification through the State Fire Marshal[] Certification [Program] and Driver/Operator 1A and 1B Certification.

The evidentiary record is unclear as to what action, if any, was taken by the city council on this proposed change. Although Bacio testified that no class specification changes occurred between June 1998 and December 12, 2005, these proposed September 1999 changes were included in later employment opportunity announcements (April 3, 2000 and July 25, 2005) to

fill fire captain vacancies that were sent through the City's internal mail system for posting at the each fire station.[4] The announcements were not sent to the Association.[5]

Kemp testified that the establishment of the Alhambra Fire Department Fire Engineer certification was so that the department could provide structured training to candidates interested in becoming fire engineers, including testing the operator's ability to drive/operate a fire apparatus and operate the pumping and hydraulics equipment. The Driver/Operator 1A/1B certification covered the subject of hydraulics and pump operations and the overall responsibilities of a driver/operator of the fire apparatus. Kemp expected candidates who applied for the fire engineer examination to have already obtained a Driver/Operator 1A/1B certification along with the City of Alhambra certification. The State Fire Marshal Fire Officer certification required the completion of ten classes, two of which were required by State law.

The City has never notified any bargaining unit representative, including the Association, of any changes to job classifications. Bacio believed EERR section 5.M gave the City the right to change job classifications without meeting and conferring with the exclusive representative.

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[4] In its exceptions, the Association contends that there was no evidence that the announcements were posted at any station. We do not make any finding as to whether or not the announcements were actually posted, only that they were distributed to the stations for posting.

[5] The Association contends that the evidence in the record does not establish that the 1999 class specification was adopted by the city council, and that the last approved class specification was the 1998 specification. The City contends that the adoption of the 1999 specification is established by documents, submitted by way of its post-hearing request for judicial notice, showing that the matter was placed on the city council's September 27, 1999 consent agenda. Whether or not the city council approved the September 27, 1999 revised specification, it is apparent that the provisions of that specification were implemented when the City posted these requirements on the fire captain employment opportunity announcements. To the extent the Association seeks to challenge the 1999 class specification, any such challenge is untimely. (*Coachella Valley Mosquito & Vector Control Dist. v. Public Employment Relations Bd.* (2005) 35 Cal.4th 1072.)

At its meeting on December 12, 2005, the city council approved additional changes to the fire captain class specification proposed by the City. The proposed class specification stated in part:

> **SPECIAL REQUIREMENTS/CERTIFICATIONS:**
> Possession of and ability to maintain the following: valid California Driver's License; valid EMT-1 or EMT-P certificate; California State Fire Marshal's Fire Officer Certificate. Currently hold the position of Fire Engineer or possession of and ability to maintain an Alhambra Fire Department Fire Engineer Certification and Driver/Operator 1A and 1B including above certifications and licenses.

The proposed specification thus eliminated the requirement that candidates for fire captain possess and maintain an Alhambra Fire Department Fire Engineer certification and Driver 1A and 1B certification for current fire engineers employed by the City. All other candidates (including current fire fighters who wished to bypass the fire engineer classification and promote directly into the position of fire captain), would have to obtain the required certificates in order to compete in the fire captain examination.[6] Both Bacio and Kemp testified that the intent of the change was to expand the pool of eligible candidates to include more current fire engineers in the fire captain selection process. Since current fire engineers were already performing the duties covered by these certifications, Kemp believed it was "ridiculous" to exclude some of the senior fire engineers whom he believed to be "very promotable" and had been performing the duties for which others only had certifications.

At the time he proposed the change, Kemp knew that approximately seven fire engineers did not have the Driver/Operator 1A/1B certification.[7] Later, in May 2006, Kemp determined that only ten out of the 18 fire engineers in the department possessed the State Fire

[6] All candidates, including current fire engineers, would still have to have a California Driver's License, valid EMT-1 or EMT-P certificate and a California State Fire Marshal's Fire Officer certificate.

[7] This included the Association's President, D'Ausilio.

Marshal's Fire Officer certification. Of the seven fire engineers who did not have the Driver/Operator 1A/1B certification, only three had the fire officer certification. Thus, as of May 2006, the December 12, 2005 change in the class specification would have allowed only those three current fire engineers who possessed the fire officer certification but who did not have the Driver/Operator 1A/1B certification to compete for the position of fire captain.[8]

Association President D'Ausilio was present at the December 12, 2005 meeting of the city council when the change in the class specification was approved. The City did not give prior notice to the Association of the change. After it was approved, D'Ausilio asked the city manager why the item had not been negotiated. The city manager relayed D'Ausilio's concern to Bacio.

On December 21, 2005, the City and the Association were in negotiations for a successor contract. During that negotiation session, Bacio informed the Association's negotiating team that the change in the fire captain class specifications was only to change the "and" to an "or" to allow more City employees to compete in the selection process.

On February 28, 2006, Bacio sent D'Ausilio a letter stating:

> This letter will commemorate our discussion on the above subject as a Meet and Consult item during the Meet and Confer of December 21, 2005 when we discussed the Fire Captain Job Classification change.
>
> This change will broaden the applicant pool for the position to allow more individuals to participate in this selection process. Only licenses and certifications were changed and not the job functions.

[8] The evidentiary record does not clearly indicate whether all of the fire engineers possessed the City of Alhambra's Fire Engineer certification or whether they possessed all of the other certification requirements, such as a California driver's license and EMT certificates. However, it appears that these certificates were prerequisites for employment in the fire engineer class, and there does not appear to be any contention that the modification affected eligibility based on these requirements.

> The change was as follows: possession of and ability to maintain the following: valid California Driver's License; valid EMT-1 or EMT-P certificate; California State Fire Marshal's Fire Officer Certificate; currently hold the position of Fire Engineer **OR** possession of and ability to maintain an Alhambra Fire Department Fire Engineer Certification and Driver/Operator 1A and 1B including, [sic] above certifications and licenses.
>
> Should you wish to respond, please do so in writing, no later than March 15, 2006.

(Bolding and capitalizing in original.)

Bacio termed the discussion as a "Meet and Consult item" because the subject did not fall within the scope of representation and was not considered by the City to be bargainable. D'Ausilio did not respond to the letter by March 15, 2006, but instead filed the instant unfair practice charge on March 29, 2006.

The City never implemented the December 12, 2005 change in the class specification due to D'Ausilio's inquiry over why the City had not met and conferred over this change. No recruitment had taken place under the new specification.

On November 2, 2006, after the hearing before the ALJ but before the submission of post-hearing briefs, Bacio sent a memo to the city council requesting that it rescind its December 12, 2005 action changing the fire captain class specifications. The matter was placed on the city council's November 6, 2006 meeting agenda, but the record does not indicate what action the city council took, if any.[9]

ALJ's Proposed Decision

The ALJ found that the City's approval of the December 12, 2005 change to the fire captain class specification was a unilateral change that did not fall within "regular and

[9] On December 18, 2006, before the post-hearing briefs were filed with the ALJ, the City requested the ALJ take judicial notice of staff reports and meeting agendas for the September 27, 1999 and November 6, 2006 meetings of the city council. The Association opposed the request for judicial notice as untimely. The ALJ granted the request for judicial notice.

consistent past patterns of changes in the conditions of employment." (*Pajaro Valley Unified School District* (1978) PERB Decision No. 51 (*Pajaro Valley*).)[10] Rather, the ALJ found that the subject fell within the scope of representation. Thus, the ALJ concluded, the implementation of the modification to the December 12, 2005 class specification violated the MMBA.

Exceptions

Both parties filed exceptions to the ALJ's proposed decision. In its exceptions, the City contends: (1) the ALJ erred in failing to find that the 1999 changes to the fire captain class specification were approved by the city council; and (2) the December 2005 change to the fire captain class specification did not have a significant and adverse effect on terms or conditions of employment.[11]

In its exceptions, the Association contends: (1) the ALJ erred in taking judicial notice of the September 27, 1999 and November 6, 2006 agendas of the city council; and (2) some of the ALJ's factual findings were erroneous.

DISCUSSION

Request for Judicial Notice

The Association asserts that the ALJ improperly granted the City's post-hearing request for judicial notice because: (1) the late submission does not meet the requirements for consideration under PERB Regulation 32320; (2) "[t]he City already established the last

[10] In *Pajaro Valley*, PERB recognized the existence of a "dynamic status quo" against which an alleged unilateral change may be judged: "the 'status quo' against which an employer's conduct is evaluated must take into account the regular and consistent past patterns of changes in the conditions of employment." The ALJ rejected the defense in this case because the City's exercise of discretion was not marked by any regularity, consistency or pattern. (*Regents of the University of California* (1983) PERB Decision No. 356-H.)

[11] The City did not appeal the ALJ's conclusion that the City's actions were not authorized under a past practice theory. Accordingly, that issue is not before the Board. (PERB Reg. 32300(c) ["An exception not specifically urged shall be waived."].)

approved Specification during the hearing as the June 1998 Specification"; and (3) the Association first learned of the September 1999 specification when the City submitted its post-hearing brief.

PERB Regulation 32320(a)(2) sets forth the authority of the Board itself to order the record re-opened for the taking of further evidence and provides that the Board may "[a]ffirm, modify or reverse the proposed decision, order the record re-opened for the taking of further evidence, or take such other action as it considers proper." Regulation 32320(a) does not address the taking of judicial notice by an ALJ. PERB Regulation 32170(a) authorizes the ALJ conducting the hearing to "[i]nquire fully into all issues and obtain a complete record upon which the decision can be rendered." The requested documents were either presented to the city council or part of the city council's agenda, were not reasonably subject to dispute, and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.[12] Additionally, they were provided one month before the record was closed upon submission of final briefs, thereby affording the Association the opportunity to review and address the documents in its closing brief. Accordingly, the Board finds that the ALJ acted within the scope of his authority under PERB Regulation 32170(a) and concurs with the ALJ's decision to grant the motion for judicial notice.

Unilateral Change

The Association carries the burden of proof as to all elements set forth in a unilateral change allegation. (*Riverside Sheriff's Assn. v. County of Riverside* (2003) 106 Cal.App.4th 1285, 1291.) To establish an unlawful unilateral change under the MMBA, the Association must establish: (1) the employer breached or altered the parties' written

[12] C.f. Evid. Code, § 452(h), permitting a court to take judicial notice of facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

agreement or its own established past practice; (2) such action was taken without giving the other party notice or an opportunity to bargain over the change; (3) the change was not merely an isolated breach of the contract, but amounts to a change in policy (i.e., it has a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. (*Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802; *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; *Grant Joint Union High School District* (1982) PERB Decision No. 196.)

It is clear that the City altered the minimum qualifications for the fire captain classification without giving the Association notice or an opportunity to bargain.[13] Given our conclusion, *infra*, that the change in class specifications does not have a significant and adverse effect on the wages, hours and working conditions of bargaining unit employees, we need not address whether the change has a continuing effect on terms and conditions of employment, and therefore was a change in policy. The primary issue before us is whether the change concerned a matter within the scope of representation.[14]

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[13] The City's power to establish job classifications is not inconsistent with the meet and confer requirements of the MMBA. (*Building Material and Construction Teamsters' Union, Local 216 v. Farrell* (1986) 41 Cal.3d 651, 665 (*Building Material*).)

[14] Although the complaint alleges that the City made a unilateral change with respect to the eligibility of fire fighters as well as fire engineers, the record does not reflect that any change occurred in 2005 affecting the eligibility of fire fighters to compete in the fire captain examination; the only change expanded the pool of eligible candidates to allow current fire engineers to compete without having some of the certifications required of other candidates, while still requiring fire fighters seeking to promote directly to fire captain to possess all of the certifications.

Scope of Representation

MMBA section 3504 provides:

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

In *Building Material*, the California Supreme Court held that a matter is subject to bargaining under the MMBA if it has a significant effect on the wages, hours and other terms and conditions of employment of bargaining unit employees and an adverse effect on the bargaining unit. (*Id.* at p. 659.) A subject that meets this standard may nonetheless be excluded from the scope of representation pursuant to the "merits, necessity, or organization" language of section 3504. Thus, the Court stated:

> Even when the action of an employer has a significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees, the employer may yet be excepted from the duty to bargain under the 'merits, necessity, or organization' language of section 3504. If an action is taken pursuant to a fundamental managerial or policy decision, it 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.

Applying these standards, the Court in *Building Material* determined that the elimination of one and one-half truck driver positions within the bargaining unit and transfer of the duties of those positions outside the bargaining unit had a significant and adverse effect on a bargaining unit member whose half-time position was eliminated and who was offered a full-time position in a different location with different hours that would have required him to quit a lucrative part-time position elsewhere. The Court further determined that the decision to

transfer bargaining unit work did not fall within the "fundamental managerial policy" exception under section 3504.

In *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623 (*Claremont*), the court refined its analysis first articulated in *Building Material* and established the following three-part test to determine whether a matter is within the scope of representation under the MMBA:

> 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*, *supra*, 41 Cal. 3d at p. 660.) If not, there is no duty to meet and confer. (See § 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 *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* (1978) 82 Cal. App. 3d 498, 505].)

(*Claremont*, 39 Cal.4th at p. 638.)

We apply the *Claremont* test to the facts of this case.

1. Significant and Adverse Effect

A significant and adverse effect on working conditions has been found in cases involving the transfer of work out of the bargaining unit (*Building Material*). In addition, the Board has found adoption of a background check requirement for in-home supportive service

providers to have a significant and adverse impact on the terms or conditions of employment. (*Sutter County In-Home Supportive Services Public Authority* (2007) PERB Decision No. 1900-M.)

Other types of changes, however, have not been found to have a significant and adverse effect on the wages, hours, or working conditions of bargaining unit employees. For example, in *Claremont*, the court found that implementation of a tracking system to determine whether police officers had engaged in racial profiling did not have a significant and adverse effect on the officers' working conditions, where the tracking system required officers to collect slightly more information when preparing citations or arrest reports. (See also, *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2008) 166 Cal.App.4th 1625 [policy prohibiting police officers involved in shootings from consulting with legal counsel or in groups did not have a significant and adverse effect on working conditions, finding that right to "huddle" in a group with counsel is not a necessary component of a peace officer's working conditions].)

In this case, the Association argues that the modification of the class specification for fire captain has a significant and adverse impact on the working conditions of bargaining unit employees because it potentially increases the number of candidates eligible to compete for the position of fire captain, thereby making it more difficult for those candidates who possess all of the required certifications to obtain positions because they have to compete against a greater number of candidates. We find this impact neither significant nor adverse. The modified class specification merely expands the pool of eligible candidates to include current employees who are already performing the duties covered by the designated certifications. This modification imposes no new eligibility requirements, does not grant any preference to current fire engineers, and does not affect the opportunity of candidates with certificates to compete for

and obtain fire captain positions. Thus, there is no significant impact on the working conditions of bargaining unit employees.

Moreover, the mere fact that the modified qualifications will result in a broader pool of eligible candidates is not adverse to the wages, hours, or working conditions of bargaining unit employees. The record contains no evidence that any current employee without the certifications was promoted over a candidate meeting the certification requirements, as the City has not yet implemented the change. Thus, any asserted adverse impact is purely speculative. Even if there were such a showing, however, we do not find the expansion of the minimum qualifications to allow additional candidates to compete to be an adverse impact. It is generally recognized that competition for jobs in the public sector is desirable to promote efficiency and prevent patronage in the public service. (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168.)[15] Further, this policy is recognized by and consistent with the City Charter, which promotes competitive employment opportunities.[16] A policy that merely increases competition without imposing any additional requirements or burdens on bargaining unit employees is not adverse.

Our conclusion is not altered by the Board's decision in *Alum Rock Union Elementary School District* (1983) PERB Decision No. 322 (*Alum Rock*). In *Alum Rock*, PERB considered whether a proposed school district classification plan was within the scope of representation under the Educational Employment Relations Act (EERA).[17] Applying the test applicable to cases under EERA as set forth in *Anaheim Union High School District* (1981) PERB Decision

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[15] The competitive examination has been characterized as "the cornerstone of the merit principle" of public sector employment. (*California State Personnel Bd. v. California State Employees Assn.* (2005) 36 Cal.4th 758, 765.)

[16] See City Charter, Article XXIVa, section 192d, *supra*.

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

No. 177 (*Anaheim*), the Board held that "[t]he creation of a new classification is necessarily related to the wages, hours and terms and conditions of that new classification and to transfer and promotional opportunities for incumbent employees in existing classifications." The Board further held, however, that the decision to create or abolish a classification is negotiable only where that decision amounts to a decision to transfer duties from one classification to another. Thus, an employer need not negotiate a decision to create a classification to perform a function not previously performed, or to abolish a classification and cease engaging in the activity previously performed by employees in that classification.

With regard to class specifications, the Board in *Alum Rock* stated:

> [A]n employee's actual job duties and qualifications are related to wages, hours, evaluation and other matters within the scope of representation and any change in job specifications that results in a change of such duties or qualifications is also related to matters within scope.

The Board concluded, however, that the record in *Alum Rock* failed to indicate that the change in job specifications resulted in any actual change in job duties, qualifications, or any other term or condition of employment. Rather, the specifications were revised to more accurately describe the duties actually being performed, provide a consistent format, and eliminate non-job-related sex-based references and qualifications having a discriminatory effect. Therefore, the Board found the changes not to be within scope.

We do not read *Alum Rock* as standing for the proposition that any change in the job qualifications set forth in a class specification is necessarily within the scope of bargaining. Rather, we conclude that *Alum Rock* must be read in conjunction with the *Claremont* test, such that a change in job qualifications may be within scope if it has a significant and adverse effect on wages, hours and working conditions, and also meets the remaining two elements of the *Claremont* test. The change in qualifications in this case has no such effect. Similar to *Alum*

Rock, the revised qualifications in this case take into account the duties actually being performed by current fire engineers that are covered by the certifications. This change in qualification is not significant or adverse, and therefore is not within the scope of bargaining.

We also distinguish cases finding certain policies affecting promotional procedures to be negotiable. See, e.g, *Fire Fighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608, 618 (*City of Vallejo*) (proposal on "vacancies and promotions" concerned fire fighters' job security and opportunities for advancement and was therefore related to terms and conditions of employment); *International Association of Fire Fighters Union, Local1974 v. City of Pleasanton* (1976) 56 Cal.App.3d 959 (city was required to negotiate a change in the notice time for posting promotional job announcements); *Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375 (provisions altering procedures for applying for promotions and granting bargaining unit employees preference in filling vacancies within the unit was within scope under the *Anaheim* test, but proposals concerning the classification and reclassification of positions and requiring the employer to grant preference to unit members in filling jobs outside the unit were not).

Each of these cases involved changes to the procedures for obtaining promotions available to bargaining unit employees. None addressed the issue of whether the establishment of job qualifications is within the scope of bargaining. Therefore, they are not dispositive of the issue in this case. For the reasons set forth above, we find that a change in minimum qualifications to expand the pool of eligible candidates does not affect the promotional opportunities of bargaining unit employees in this case and is therefore not a significant and adverse effect on the wages, hours, or working conditions of the bargaining unit.

2. Fundamental Managerial or Policy Decision

Because we find that the policy change did not result in a significant or adverse effect, we need not address the remaining elements of the *Claremont* test. However, were we to do so, we would reach the same conclusion. Even where a change in policy affects terms and conditions of employment, an employer may be excused from the obligation to bargain under the MMBA when the employer's action is a "fundamental managerial or policy decision" that falls outside the scope of representation. (*Claremont*; *Building Material.*) As noted by the Court in *Building Material*, "Federal and California decisions both recognize the right of employers to make unconstrained decisions when fundamental management or policy choices are involved." (*Building Material*, 41 Cal. 3d at p. 663.) Thus, "the phrase in section 3504 excepting the 'merits, necessity, or organization' of government services from the scope of representation was intended to incorporate this 'general managerial policy' exception from the federal cases into the MMBA." (*Id.*, citing *City of Vallejo.*)

Neither PERB nor the courts have addressed the specific issue of whether the establishment of minimum qualifications is a "fundamental managerial or policy decision" under the MMBA. Several decisions have held, however, that decisions that affect the provision of services to the public are included within the scope of management's discretion. (See, e.g., *Berkeley Police Assn. v. City of Berkeley* (1977) 76 Cal.App.3d 931 [decision to allow a member of the citizen's policy review commission to attend police department hearings on citizens' complaints and to send a member of the department to review commission meeting]; *San Jose Police Officer's Assn.v. City of San Jose* (1978) 78 Cal.App.3d 935 [policy limiting the use of deadly force by police to situations in which a life was at stake].) In *San Francisco Fire Fighters Local 798 v. Board of Supervisors of the City and County of San Francisco* (1992) 3 Cal.App.4th 1482 (*San Francisco Fire Fighters*),

the elimination of a city's practice of filling vacancies from promotional civil service lists before they expired was found to be a fundamental policy decision where the decision was made, in part, due to a federal court consent decree that established a procedure for integrating the upper ranks of the fire department and required the city to conduct a series of court-supervised promotional examinations.[18] In contrast, in *Building Material*, the Court concluded that a decision to transfer bargaining unit work to nonunit employees was not a fundamental managerial or policy decision because it had no effect on the services provided by the employer, but directly affected the employee wages, hours, and working conditions.

Decisions in other jurisdictions have also recognized that the determination of minimum job qualifications is a matter of fundamental managerial prerogative that is not within the scope of bargaining. (See, e.g., *Fraternal Order of Police Rose of Sharon Lodge No. 3 v. Pennsylvania Labor Relations Bd.* (Pa. Commw. Ct. 1999) 729 A.2d 1278 [decision to reduce minimum seniority requirements for promotion was directly related to the city's managerial prerogative in selection and direction of personnel and not subject to bargaining]; *Levitt v.Board of Collective Bargaining* (N.Y. Sup. Ct. 1988) 140 Misc.2d 727, 733 ["it is generally conceded that the establishment of qualifications for employment or promotion . . . is ordinarily done by management in fulfillment of its fundamental goals and, as a managerial prerogative, it is a matter exempt from collective bargaining"], *aff'd,* (N.Y. App. Div. 1st Dep't 1991) 171 A.D.2d 545 ["The law is clear that a public employer does not have to bargain over employee qualifications"]; *Pa. State Troopers Assn. v. Pennsylvania Labor Relations Bd.* (Pa. Commw. Ct. 2002) 809 A.2d 422 [state police department has no duty to bargain over weight assigned to written and oral components of promotional examination, which pertain to

[18] The decision to cease filling vacancies from promotional lists was made out of concern that senior fire captains would retire at the last minute to benefit nonminority candidates on the promotional list, thereby making fewer positions available for minority candidates.

job qualifications and are a matter of managerial policy]; *Fraternal Order of Police State Conference of Liquor Law Enforcement Lodges v. Commonwealth of Pennsylvania* (2001) 32 PPR (LRP) P32, 083 ["the ultimate selection of candidates for positions including evaluation of qualifications and standards for promotion remain managerial prerogative within the employer's right to select, direct and discipline personnel"]; *Bridgewater v. P.B.A. Local 174* (App.Div. 1984) 196 N.J. Super. 258 [elimination and reformation of physical agility test is nonnegotiable and within employer's right to determine qualifications].)[19] While not binding on PERB, these decisions are instructive in that they draw a distinction between promotional procedures, which are bargainable, and job qualifications, which are not.

In this case, the determination of minimum qualifications for the position of fire captain affects the health and safety services provided by the City to the public. Kemp's stated reason for wanting to allow senior fire engineers to be eligible to compete for fire captain positions was that several experienced fire engineers lacked some of the required certifications but were nonetheless performing the duties covered by those certifications and were "very promotable." The City has a strong interest in hiring qualified employees to provide fire safety and protection services to the public. Thus, the determination of minimum qualifications has an effect on public services and is a fundamental managerial or policy decision.

[19] While not identical to the MMBA, the Pennsylvania and New York City labor relations statutes contain similar language defining the scope of bargaining to include wages, hours, and other working conditions. The New Jersey statute requires negotiation over "grievances, disciplinary disputes, and other terms and conditions of employment." The New York City statute also contains express language reserving to management the right to determine the standards of selection for employment, while the New Jersey statute exempts employee performance standards and criteria from negotiation. Notwithstanding these statutory differences, we find these decisions illustrative of the general principle that job qualifications are within the scope of management's discretion.

3. Balancing Test

Even assuming the City's change in policy had a significant and adverse effect on working conditions and was not a fundamental managerial or policy decision, the City's decision to change the class specifications for fire captain is within the scope of bargaining only if the employer's need for unencumbered decision making is outweighed by the benefit to employer-employee relations of bargaining over the decision. (*Claremont*; *San Francisco Fire Fighters* [city's need for unencumbered decision making to protect the integrity of the integration process outweighed the benefit from bargaining about the issue, where only one employee was denied promotion].) This standard is not met in this case, as there is no evidence that bargaining over the expansion of the candidate pool for fire captains would outweigh the City's need to determine the qualifications necessary to provide public fire protection services to its citizens. Accordingly, the charge and complaint must be dismissed.

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-263-M are hereby DISMISSED.

Chair Dowdin Calvillo and Member McKeag joined in this Decision.