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

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| SANTA CLARA COUNTY CORRECTIONAL PEACE OFFICERS' ASSOCIATION,<br><br>Charging Party,<br><br>v.<br><br>COUNTY OF SANTA CLARA,<br><br>Respondent. | Case No. SF-CE-804-M<br><br>PERB Decision No. 2321-M<br><br>July 25, 2013 |

Appearances: Mastagni, Holdstedt, Amick, Miller & Johnsen by Jeffrey R. A. Edwards, Attorney, for Santa Clara County Correctional Peace Officers' Association; Office of the County Counsel by Cheryl A. Stevens, Deputy County Counsel, for County of Santa Clara.

Before Martinez, Chair; Huguenin and Winslow, Members.

DECISION[1]

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on an appeal by the Santa Clara County Correctional Peace Officers' Association (Association or CPOA) from the partial dismissal of an unfair practice charge filed on January 12, 2011, against the County of Santa Clara (County) under the Meyers-Milias-Brown Act (MMBA).[2]

[1] PRECEDENTIAL DECISION. PERB Regulation 32320(d) provides, in pertinent part: "Effective July 1, 2013, a majority of the Board members issuing a decision or order pursuant to an appeal filed under Section 32635 [Board Review of Dismissals] shall determine whether the decision or order, or any part thereof, shall be designated as precedential." Having met the following criteria enumerated in the regulation, "(3) Modifies, clarifies or explains existing law or policy" and "(5) Addresses a legal or factual issue of continuing interest," the decision herein is designated as precedential. (PERB Regs. are codified at Cal. Code Regs., tit. 8, § 31001 et seq.)

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

The Association alleged in its initial and amended charge, ten separate MMBA violations. The PERB Office of the General Counsel issued a complaint with respect to several of these allegations, and dismissed the remainder. The Association appeals the dismissal of only three allegations, to wit, that the County: (1) unilaterally imposed background evaluation requirements on currently-employed correctional officers; (2) unilaterally changed work shifts for Lieutenants; and (3) unilaterally changed staffing levels at the Main Jail.[3]

We have reviewed the record and the dismissal in light of the Association's appeal, the County's response thereto, and the relevant law. Based on this review, we shall reverse the dismissal of two of the allegations, and will remand the matter for issuance of a complaint.

We turn first to the procedural history, then the Association's allegations and their disposition by the Office of the General Counsel, and finally our discussion and disposition of the legal issues.

## PROCEDURAL HISTORY

On January 12, 2011, the Association filed a charge alleging that the County violated the MMBA by making various unilateral changes; dealing directly with employees; failing to provide requested information; denying CPOA's statutory right of access; discriminating against CPOA's president because of his protected activity; making misrepresentations; and proposing illegal subjects of bargaining.

On September 7, 2011, the Office of the General Counsel issued a letter warning the Association that the charge failed to state a prima facie case with respect to all allegations except allegations of unilateral change in work schedules for internal affairs sergeants and for transportation unit employees.

[3] We consider only these issues in this appeal. (PERB Reg. 32635 [PERB Regs. are codified at Cal. Code Regs., tit. 8, § 31001 et seq.].)

On October 31, 2011, the Association filed an amended charge re-alleging with more specificity its allegations and adding yet another alleged unilateral change.

On January 9, 2012, the Office of the General Counsel issued a complaint alleging that the County had violated the MMBA by: (1) unilaterally changing work schedules of internal affairs sergeants and Lieutenants; (2) failing to provide information concerning background evaluations; and (3) discriminating against the Association president for engaging in protected activity.

Also on January 9, 2012, the PERB Office of the General Counsel dismissed the charge with respect to all allegations, including unilateral work schedule changes for Lieutenants,[4] except those on which it issued a complaint as described above.

On February 21, 2012, the Association appealed the partial dismissal.

## INTRODUCTION

Our discussion below addresses charge allegations. We presume that the facts alleged are true.[5] We do so because when assessing whether a charge dismissal is appropriate, we

[4] We address this discrepancy between the January 9, 2012 partial dismissal letter issued by the Office of the General Counsel and the complaint issued by that office on the same date. In investigating unfair practice charges, the Board has the power to "take any action and make any determinations in respect of these charges or alleged violations as the board deems necessary to effectuate the policies of" the MMBA. (Gov. Code §§ 3509(a), 3541.3.) Thus, we have the power to resolve the apparent discrepancy between the partial dismissal letter and the complaint issued in this case. We note from the case file that during the hearing on the complaint, CPOA and the County determined not to litigate the claim regarding the alleged unilateral changes of work schedules. The parties stipulated to striking paragraphs 3 through 8 of the complaint corresponding to both the lieutenant and the internal affairs sergeant work schedule changes. Accordingly, on the basis of the parties' own disposition of the issue, we conclude that it would effectuate the policies of the MMBA for us to treat this claim as withdrawn.

[5] At this stage of the proceedings, we assume as we must that the essential facts alleged in the charge are true. (*San Juan Unified School District* (1977) EERB Decision No. 12 (*San Juan*) [prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.]; *Trustees of the California State University (Sonoma)* (2005) PERB Decision No. 1755.)

view a charging party's allegations in the light most favorable to the charging party. If this matter goes to hearing, the Association will bear the significant burden of proving its allegations through persuasive competent testimony and authenticated documentary evidence.

We organize our decision as follows: we first provide the relevant background facts, then a summary of the Association's essential claims, the conclusions reached thereon by the PERB Office of the General Counsel, the contentions of the parties on appeal, and finally our own assessment and disposition of the legal issues.

## CPOA ALLEGATIONS

### Factual Background

PERB's Office of the General Counsel described the relevant background facts as follows:

> The County and CPOA are signatories to a Memorandum of Understanding (MOU) in effect from June 2, 2008 to May 29, 2011. MOU section 26 is a zipper clause whereby the County and CPOA agree there is no duty to bargain regarding proposed changes to the MOU.
>
> County Ordinances A-25-414 and A-25-415 provide that where the parties reach an impasse in negotiations, they may take the matter to mediation.
>
> Prior to 1988, the County jail was operated by the County's Sheriff's Office. Since 1988, the jail has been operated by the County's Department of Corrections (DOC). Correction Officers (COs) for the County's jails have historically been considered employees of the DOC, not of the Sheriff's Office. Therefore, these employees were not peace officers as defined by Penal Code section 830.1.
>
> In 1997, following litigation, the Sheriff's Office and the DOC entered into an agreement whereby COs were transferred to the Sheriff's Office, made 'deputies of the sheriff' and assigned to the DOC. Subsequently, they were still DOC employees and not peace officers as defined by Penal Code section 830.1.
>
> In or around June 2010, the CPOA asked the County to support its legislative proposal to amend Penal Code section 830.1(c).

> Sheriff Laurie Smith (Sheriff Smith) spoke at a CPOA Board of Directors' meeting regarding the matter. Under the proposed statutory amendment, COs represented by CPOA could be reclassified as Correction Deputies and acquire status as a 'peace officer' as defined by Penal Code section 830.1. In order to complete the reclassification, the COs would have to meet certain job requirements of peace officers. Sheriff Smith stated that if the Penal Code section were amended, COs already employed by the County would need only a limited criminal history background check in order to be approved to reclassify as Correction Deputies.
>
> CPOA and the County agreed to support the legislative change. Effective January 1, 2011, Penal Code section 830.1(c) was amended. The effect of the amendment was to allow COs in Santa Clara County to be considered peace officers.

(Partial Warning Letter, September 7, 2011.)

The County's Proposed Changes

In or about June 2010, the County decided to merge some divisions of the Sheriff's Office and the Department of Corrections (DOC). On July 1, 2010, the Sheriff's Office took over the operation of the County jails, including supervision of Correction Officers (COs) represented by the CPOA.

In late June 2010, representatives of the Sherriff's Office presented to CPOA the County's proposal for background investigations of COs seeking to qualify as peace officers under the anticipated legislative amendment to the Penal Code. In addition, the County proposed changes to the work schedules of Lieutenants and other COs.

In July and August 2010, further meetings were held between County and CPOA representatives to review the County's proposed changes in work schedules, the County's proposal for background investigations of COs seeking peace officer status, and the

Association's pending requests for information and documents.[6] During a meeting in July 2010, County representatives informed CPOA that the County would implement its work schedule changes for Lieutenants on August 1, 2010, subject to any agreements the parties might make. On August 2, 2010, CPOA explained that it could not make any counter proposals until it received documents and information it had requested. On August 11, 2010, the County announced it would postpone its implementation of the Lieutenants work schedule change until October 1, 2010. On August 23, 2010, CPOA urged the County to defer implementing proposed work schedule and background investigation changes until January 2011, the anticipated effective date of the then-recently passed- legislation authorizing peace officer status for the COs. On August 24, 2010 the parties met, but again reached no agreement. On September 7, 2010, the Association formally rejected the County's proposed changes in work schedules.

CPOA's Essential Allegations/PERB Office of the General Counsel Disposition

1. Background Investigations

A. CPOA Allegations

In July 2010, the Sheriff's Office distributed to individual COs, a written evaluation process that described the procedure for conducting background investigations on COs who might seek peace officer status. The County provided a copy of the evaluation process to CPOA. The County and CPOA discussed the proposed process on several occasions during their July and August meetings, but reached no agreement. Although the County proffered changes to its initial proposal, its final proposal included a background investigation, criminal history check, and psychological examination.

[6] The nature of these meetings is disputed: CPOA characterizes the meetings as "informational" only, while the County asserts that these meetings satisfied the County's obligations to meet and confer. It is undisputed that no agreements were reached.

On December 15, 2010, despite having no agreement, the Sheriff's Office implemented its proposed background evaluation process, issuing a memo to COs announcing the commencement of the background evaluation process. The memo stated:

> The Sheriff's Office will be conducting background evaluations for Correctional Officers beginning Monday, December 20, 2010. Correctional Officers that successfully complete the background process will be moved into peace officer status, per 830.1(c) PC. Background evaluations will be done on a **volunteer basis**, and Correctional Officers may volunteer to undergo the background evaluation by calling [name omitted] at [telephone number omitted] beginning December 20. For calls after normal business hours, please leave your name, badge #, Team, and Facility.

(Emphasis in original.)

CPOA's amended charge alleges that, in December 2010, after the Sheriff's Office announced that the evaluation process would be voluntary, members of the command staff "informed numerous employees, while they were on duty, that employees who did not volunteer to participate in the Evaluation Process would not be eligible for promotion and would not be eligible for assignments that heretofore had been open to all employees, including, but not limited to, academy training officer." The amended charge further alleges that, during a meeting on January 3, 2011, to discuss the evaluation process, Sheriff Laurie Smith (Sheriff Smith) told employees on the night shift at the Main Jail that, unless they participated in the evaluation process, they "won't have a job because they would not be able to work in the same position they currently hold." In addition, a declaration by CPOA President Everett Fitzgerald (Fitzgerald) in support of the CPOA charge alleges that Sheriff Smith stated that the evaluation process was voluntary at the present time but would become mandatory and that employees moved into the new position will be on probation and subject to dismissal without cause. On March 1, 2011, the County established the new

employment classification of correction deputy for the purpose of reclassifying COs newly eligible for limited peace officer status under Penal Code section 830.1(c).

2. General Counsel Disposition

The Office of the General Counsel relied on PERB's traditional test for assessing whether an employer's action constitutes a "per se" unilateral change.[7] Applying this test, the Office of the General Counsel determined that CPOA failed to allege facts demonstrating that the new background evaluations constituted a change in policy having a current impact on COs, or that the new background evaluations were mandatory for COs or otherwise fell within the scope of representation so as to require decision bargaining.

For its scope analysis, the Office of the General Counsel relied on the Board's decision in *Sutter County In-Home Supportive Services Public Authority* (2007) PERB Decision No. 1900-M (*Sutter County*). In *Sutter County* the Board applied the balancing test articulated in *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623 (*Claremont*) in

[7] Partial Warning Letter, September 7, 2011, states:

> In determining whether a party has violated Government Code section 3505 and PERB Regulation 32603(c), PERB utilizes either the 'per se' or 'totality of the conduct' test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (*Stockton Unified School District* (1980) PERB Decision No. 143.) 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. (*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.) [Fns. omitted.]

the setting of an In-Home Supportive Services (IHSS) agency. In *Claremont*, the Court articulated its test as follows:

> 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 § 3504; see also *ante*, at p. 7 [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 [147 Cal.Rptr. 126].)]

(*Claremont,* at p. 638.)

Applying *Claremont*, the Board held in *Sutter County* that the agency's adoption of a background check policy as a condition precedent for would-be service providers to be placed on the agency's referral registry primarily implicated concerns over public safety and the nature and quality of public services. Thus, concluded the Board, the content of the background check policy and its adoption were not within the mandatory scope of representation under MMBA, and only certain effects of the background check policy were negotiable. The Board issued a remedial bargaining order as to those effects.

Likening the background evaluations required here to those in *Sutter County*, the PERB Office of the General Counsel concluded that the two types of background evaluations were "directly analogous" and voluntary. Thus, reasoned the Office of the General Counsel, the background evaluations here, like those in *Sutter County*, implicated only concerns of public safety and or the nature or quality of public services, were within managerial prerogative and fell outside the scope of representation under MMBA.

In addition, the Office of the General Counsel determined that even if the new background evaluations for COs were deemed to be within the scope of representation, the parties' zipper clause excused the County from meeting and conferring.

Staffing Change at Main Jail

1. CPOA Allegations

On or about October 4, 2010, without notice to, or meeting and conferring with, CPOA, the County reduced staffing at the Main Jail from 75 on-duty officers, to 65 on-duty officers during days, and 63 on-duty officers during nights. On or about December 29, 2010, again without notice to, or meeting and conferring with, CPOA, the County further reduced staffing at the Main Jail during days to 55 on-duty officers. The amended charge alleges that the reduction in staffing "directly affects safety of [inmates and] employees and reduces the opportunities for inmates to participate in rehabilitation programs mandated by the Board of Supervisors." The Fitzgerald declaration alleges that "[t]he inmate population has continued to be raised in both facilities from a ration [sic] of 64 inmates to one officer to a number to exceed 70 in most housing units." (Emphasis in original.)

2. General Counsel's Disposition

The Office of the General Counsel concluded that staffing levels at the jail were a managerial prerogative, relying on *The Regents of the University of California (Lawrence*

*Livermore National Laboratory)* (1997) PERB Decision No. 1221-H (*Lawrence Livermore*) (University's decision to reduce number of security officers held non-negotiable). Thus, reasoned the Office of the General Counsel, the decision to reduce jail custodial staff would be non-negotiable as a managerial prerogative. As to any obligation to negotiate over effects, the Office of the General Counsel then concluded:

> A union seeking to bargain over effects of a managerial decision must specifically demand bargaining over effects and must clearly identify the negotiable effects proposed to be bargained. (*Trustees of the California State University* [2009] PERB Decision No. 1876a-H.) Although CPOA states that this change directly affects safety of represented employees, CPOA does not allege that it made any demand of the County to bargain effects, including employee safety.
>
> Because the claimed unilateral change [staffing level decision] does not involve a mandatory subject of bargaining, no prima facie case is stated.

## CPOA'S APPEAL

CPOA raises the following arguments on appeal:

(1) The imposition of a background evaluation requirement on current employees as a condition of continued employment triggered a duty to meet and confer.

(2) The amended charge alleged sufficient facts to state a prima facie violation of the duty to meet and confer over safety impacts resulting from the reduction in staffing at the Main Jail.

## THE COUNTY'S RESPONSE

The County responds to CPOA's arguments as follows:

(1) The decision to implement a voluntary background evaluation process for the purpose of identifying those individuals eligible for peace officer status is within management's prerogative and not subject to bargaining. The charge fails to allege facts showing that any correctional officer has suffered or will suffer any negative action based on

the outcome of the background check or a decision not to voluntarily participate in the process. The evaluation process does not affect wages, hours or conditions of employment, and therefore is not subject to bargaining.

(2) The uncontroverted evidence submitted by the County demonstrates that CPOA, not the County, failed to meet and confer over the effects of the County's restructuring, and the County's decision on staffing levels is within management's prerogative.

DISCUSSION

We take up now the legal issues presented by CPOA's allegations and the dismissal of CPOA's allegations by the PERB Office of the General Counsel. Following a brief discussion of our standard of review, we address each of the CPOA's three allegations which are the subject of this appeal.

Standard of Review

When reviewing the sufficiency of a charge, we treat the allegations of the charge as true. (*Golden Plains Unified School District* (2002) PERB Decision No. 1489; *San Juan.*) It is not the function of the Board agent to judge the merits of the charging party's dispute. (*Saddleback Community College District* (1984) PERB Decision No. 433; *Lake Tahoe Unified School District* (1993) PERB Decision No. 994.) Disputed facts or conflicting theories of law should be resolved in other proceedings after a complaint has been issued. (*Eastside Union School District* (1984) PERB Decision No. 466, at pp. 6-7.)

Unilateral Change: The Per Se Refusal to Bargain

The appeal presents allegations that the County imposed unilateral changes in terms and conditions of employment constituting "per se" refusals to meet and confer in good faith. The Office of the General Counsel stated the Board's test for a per se refusal to bargain. (See fn. 6

above.) In *Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262, we stated a more nuanced formulation of this test, on which we will rely in our analysis below:

> To prove up a unilateral change, the charging party must establish that: (1) the employer took action to change policy; (2) the change in policy concerns a matter within the scope of representation; (3) the action was taken without giving the exclusive representative notice or opportunity to bargain over the change; (4) the action had a generalized effect or continuing impact on terms and conditions of employment. (*Walnut Valley Unified School District* (1981) PERB Decision No. 160; *Grant Joint Union High School District* (1982) PERB Decision No. 196.

Background Evaluations

1. Change in Policy, Having Generalized Effect or Continuing Impact

The PERB Office of the General Counsel concluded that CPOA's allegations were insufficient to demonstrate an impact rising to the level of a change in policy. We disagree.

The charge alleges that: (1) the County had a past practice of conducting background checks prior to hiring COs; (2) the County breached this past practice by requiring current COs to undergo further background evaluations in order to obtain peace officer positions with the Sheriff's Office; (3) the new evaluations were a mandatory requirement for continuing employment; (4) COs who did not volunteer to participate in the background evaluation process would not be eligible for promotional opportunities and assignments previously available to them; and (5) Sheriff Smith told COs that, unless they participated in the evaluation process, they "won't have a job because they would not be able to work in the same position they currently hold."[8]

The Board has previously found that the imposition of background checks amounts to a change in policy and that the change in policy has a continuing impact on the terms and

[8] The County disputes these statements and asserts they were based solely upon hearsay. However, at this stage the charging party's burden is not to produce evidence, but merely to allege facts that, if proven true in a subsequent hearing, would state a prima facie violation. (*Oakland Unified School District* (2009) PERB Decision No. 2061.)

conditions of employment and breaches an established past practice of not having a background check. (*Sutter County*.) We conclude that the charge alleges sufficient facts to meet two elements of a prima facie case of a unilateral change, namely: (1) a change in policy and (2) a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment.

2. Concerning a Matter Within the Scope of Representation

The Office of the General Counsel determined that imposition of background checks for current COs is not within the MMBA scope of representation. We disagree.

We look first at the scope of representation under MMBA, and then assess the Office of the General Counsel's conclusion in light thereof that the imposition of background checks upon current COs is a managerial prerogative and not within the scope of representation under MMBA.

The MMBA states that 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." (MMBA § 3504.)

In *Sutter County*, the Board applied the *Claremont* balancing test, concluding that the employer's need for unencumbered decision making in managing its operations (providing supportive services to individuals in the unsupervised environment of the individual's own home) predominated as to some aspects of its background check policy over the benefit to employer-employee relations of bargaining over the requirement for a background evaluation for potential service providers. Significant to the Board's determination in *Sutter County* were the two elements: express statutory directives obliging the employer to investigate the

qualifications and background of prospective service providers; and judicial determinations holding public safety issues to be within managerial prerogative under MMBA.[9] Also of significance were decisions holding that drug testing protocols and their effects on employee terms and conditions of employment were negotiable, despite claims of managerial prerogative grounded in public safety.[10] Notably the Board observed: "[A]n 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." (*Sutter County*, at p. 13.)

Ultimately, the Board in *Sutter County* ruled that several aspects of the background check policy were, on balance, within the employer's managerial prerogative,[11] and several were subject to bargaining.[12] Significantly, however, the Board expressly limited its scope of representation analysis in *Sutter County* to the facts of that case, stating:

> 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

[9] *San Jose Peace Officers' Assn. v. City of San Jose* (1978) 78 Cal.App.3d 935; *Berkeley Police Assn. v. City of Berkeley* (1977) 76 Cal.App.3d 931.

[10] *Exxon Co. USA* (1996) 321 NLRB 896; *United Food & Commercial Workers International Union, Local 588 v. Foster Poultry Farms* (9th Cir. 1995) 74 F.3d 169.

[11] Outside the scope of bargaining were: categories of reportable offenses, categories of offenses that will result in exclusion from the registry of providers, persons to whom the background check requirement would apply, and disclosure to care recipients of a provider's disqualification or exclusion from the registry. (*Sutter County*, at p. 15.)

[12] Subject to bargaining were: handling of a person's criminal record (other than disclosure to care recipients), confidentiality and privacy interests of providers, fees for applicants, and appeal procedures for decisions excluding an applicant from the registry. (*Sutter County*, at pp. 15-16.)

> an extraordinary case in which we would apply the managerial prerogative to exclude certain details of the policy from the scope of bargaining.

(*Sutter County,* at p. 16.)

We conclude that the facts here vary substantially from those in *Sutter County*, and this distinction informs our balancing of interests under *Claremont*. We explain.

External law: In *Sutter County*, external law required the IHSS Public Authority agency to investigate the qualifications and background of persons wishing to be included on the provider registry. Investigating qualifications and background of potential providers is one of the six statutorily-defined functions of an IHSS agency. (Welfare & Inst. Code § 12301.6(e).) Moreover, an IHSS agency must notify service recipients that a Department of Justice (DOJ) criminal record check is available to them and can be performed by the DOJ upon the provider's "annual redetermination." By contrast, there appears no similar requirement that the County undertake a background check on current COs as a condition of their continued employment.

Prior background check: In *Sutter County*, the individual IHSS providers had not previously been subjected to a criminal background check. By contrast, the charge alleges that each CO had been subjected already to a background investigation, including a criminal background check, upon initial employment. While Government Code section 1031 requires that peace officers meet six minimal standards including being of good moral character, as determined by a thorough background investigation, and to be physically and mentally fit, as determined by an examination by a physician and/or a psychologist, at least one court of appeal has held that these Government Code section 1031 background checks are limited to applicants for peace officer positions. (*Hulings v. State Dept. of Health Care Services* (2008) 159 Cal.App.4th 1114, 1123 [new background investigation is not triggered when former peace

officer exercises his mandatory right to reinstatement].)[13] Thus, unlike the statutory requirements imposed on IHSS providers in *Sutter County,* in the circumstances before us it is uncertain that the County here is even permitted, let alone required, to conduct a background check on current COs.

Environment for Service Delivery: In *Sutter County*, the in-home recipients received services in the unsupervised, one-on-one environment of their private home or apartment. By contrast, the county jail is a public facility, and the environment for service delivery generally is not private, as COs routinely interact with prisoners in groups or in situations in which interactions can be observed.

We concur with the Board's observation in *Sutter County* that "the negotiability of criminal background check policies should depend on the facts and circumstances of each situation." (*Id.*, p. 16.) Unlike *Sutter County*, in this case we conclude that both the decision and its effects are within the scope of representation because the sole purpose of the background evaluations is to confer peace officer status on current employees and not to enhance public safety or effect a change in the quality or nature of public services. We therefore decline the County's invitation to extend the Board's ruling in *Sutter County*, that background checks are a matter of managerial prerogative, to the very different facts alleged here.

Rather, we hold that where an employer imposes on employees, who have already undergone a background evaluation as a condition of employment, a further such evaluation as a condition of continued assignment to the employee's present position, the employer's

[13] In *Pitts v. City of Sacramento* (2006) 138 Cal.App.4th 853, 856, the court noted that a public agency was required to conduct a Government Code section 1031 investigation "at the time of hire, prior to transfer between agencies, and also possibly when an employee changes positions within the same agency." (Emphasis added.)

decision implicates primarily employee working conditions, including reassignment, discipline and job security, rather than the merits, necessity or organization of any service or activity. As such, we conclude that the County's alleged decision to impose the additional background check as a condition of continued assignment to the employee's current position, as well as the reasonably foreseeable effects thereof, are within the scope of representation under the MMBA.

3. Without Notice or an Opportunity to Bargain Over the Change

CPOA alleges that the County provided notice of a proposed new "voluntary" background evaluation procedure, discussed it with CPOA, and prior to reaching agreement and without use of impasse procedures, unilaterally implemented the procedure. Upon implementation the County explained to employees that the procedure would be mandatory. We conclude that CPOA has sufficiently alleged that the County failed to afford CPOA notice or an opportunity to bargain over the new background evaluation procedure which was implemented, to wit, a mandatory procedure.

To summarize our discussion of CPOA's prima facie case, we conclude that CPOA has alleged prima facie that by imposing a mandatory, new background evaluation procedure upon existing employees who had already been subjected to a similar procedure prior to initial employment, the County made a unilateral change in derogation of its MMBA duty to meet and confer with CPOA over the decision itself as well as the foreseeable effects thereof on matters within the scope of representation.

Nonetheless, the PERB Office of the General Counsel determined that even if the County had an obligation to meet and confer over the new background evaluation procedures, that it was excused therefrom by the zipper clause in the parties' memorandum of

understanding (MOU) which preserved the County's right to act unilaterally on a matter not referred to in the MOU. We disagree.

A waiver of the right to negotiate over a particular subject must be clear and unmistakable, and the evidence must indicate an intentional relinquishment of the right to bargain. (*Amador Valley Joint Union High School District* (1978) PERB Decision No. 74; *California State Employees' Assn. v. Public Employment Relations Bd.* (1996) 51 Cal.App.4th 923, 937-938.) If the contract language is ambiguous, we consider extrinsic evidence, including bargaining history, to aid in interpretation. (*Clovis Unified School District* (2002) PERB Decision No. 1504.) Public policy disfavors finding a waiver based on inference and places the burden of proof on the party asserting the waiver. (*Long Beach Community College District* (2003) PERB Decision No. 1568.)

The parties' MOU provides in section 26 at page 44, in pertinent part:

> The parties, for the term of this agreement, voluntarily and unqualifiedly agree to waive the obligation to negotiate with respect to any practice, subject or matter not specifically referred or covered in this agreement even though such practice, subject or matter may not have been within the knowledge of the parties at the time this agreement was negotiated and signed. If during the term of this agreement, a new matter, subject, or practice arises which is not referred to in this Agreement and the County desires to take action to deal with such new matter, subject, or practice, the Association shall be given prior, written notice of the proposed County action and shall have the right to meet and confer on the subject, including the right to resort to all available impasse procedures pursuant to the Employee-Management Relations Ordinance, in the absence of agreement on such proposed action, the County reserves the right to take action by Management direction.

This language (1) limits the parties' right to negotiate on matters "not specifically referred to or covered in this agreement" and (2) preserves CPOA's right to negotiate and engage in impasse procedures in respect to "a new matter, subject, or practice" not referred to in the

agreement as to which the County "desires to take action to deal with such new matter, subject, or practice."

We conclude that the zipper clause relied upon by the Office of the General Counsel does not clearly and unmistakably waive CPOA's right to meet and negotiate over adoption of the new background evaluation policy. In fact, it supports our conclusion that the CPOA did not waive its right to bargain in its distinction between old and new matters.

In sum, we conclude that CPOA has alleged prima facie that the County violated MMBA when in or about December 2010 the County unilaterally imposed a new and mandatory background evaluation policy on current employees.

Staffing Levels

The charge alleges that, on October 4, 2010, the County reduced staffing at the Main Jail from 75 on-duty officers to 65 on-duty officers during days, and 63 during nights and that the staffing at the Main Jail as of December 29, 2010, was 55 on-duty officers during days, reflecting a further reduction in the staffing level.

CPOA alleges further that the change in Main Jail staffing foreseeably impacted safety and workload of COs, that these impacts are within the scope of representation under the MMBA, and that the County implemented the change in Main Jail staffing without providing CPOA notice thereof.[14]

Safety and workload effects of a change in staffing levels are matters within the scope of representation. (*State of California (Department of Consumer Affairs)* (2004) PERB Decision No. 1711-S [safety conditions]; *Regents of the University of California* (2010) PERB Decision No. 2094-H [workload].)

[14] The Office of the General Counsel determined that staffing levels are a non-negotiable managerial prerogative. (*Lawrence Livermore.*) CPOA does not challenge here this determination.

What remains is to determine whether CPOA's allegation, that the County imposed without notice to CPOA a change to staffing levels foreseeably impacting safety and workload, states a prima facie violation of MMBA.

The PERB Office of the General Counsel concluded that CPOA failed to allege that it demanded to negotiate over the safety and workload effects of the County's Main Jail staffing change.[15] Factually, the charge does allege that a demand was made, though it does so in an in-artful and clumsy manner. More fundamentally, however, we disagree that an employee organization must demand to bargain effects where the employer has failed in its duty to notify the organization prior to implementing a change in working conditions. We look first at our unilateral change case law, and then explain our conclusion that where a unilateral change is alleged, a bargaining demand is not a necessary element of the prima facie case.

An employer violates the duty to bargain in good faith when it fails to afford a union reasonable advance notice and an opportunity to bargain before it either: (1) reaches a firm decision to establish or change a policy within the scope of representation, (*Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 900.) or (2) implements a new or changed policy not within the scope of representation but having a foreseeable effect upon matters within the scope of representation. (*Claremont.*) Thus, making a firm decision to establish or change a policy on employee wages, hours or other terms and conditions of employment, without affording the union notice and an opportunity to

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[15] Partial Warning Letter, September 7, 2011:

> "A union seeking to bargain over effects of a managerial decision must specifically demand bargaining over effects and must clearly identify the negotiable effects proposed to be bargained. (*Trustees of the California State University* (2009) PERB Decision No. 1876a-H.) Although CPOA states that this change directly affects safety of represented employees, CPOA does not allege that it made any demand of the County to bargain effects, including employee safety."

bargain, violates the employer's duty to bargain in good faith. And implementing a new or changed policy not itself within the scope of representation (e.g., staffing levels) but having a foreseeable effect(s) on employee wages, hours or other terms and conditions of employment (e.g., safety or workload), likewise violates the employer's duty to bargain in good faith where implemented without affording the union notice and an opportunity to bargain over the foreseeable effect(s). (*Mt. Diablo Unified School District* (1983) PERB Decision No. 373; *Newman-Crows Landing Unified School District* (1983) PERB Decision No. 223; *NLRB v. Transmarine Navigation Corporation* (9th Cir 1967) 380 F.2d 933, 939-940.) In both instances the harm is the same: matters relegated by statute to bilateral decisions are instead determined unilaterally.

To challenge a unilateral change a union need not plead or prove that it demanded to bargain. An employer's unilateral action renders bargaining futile. (*State of California (Department of Personnel Administration)* (1999) PERB Decision No. 1313-S (*DPA*) and cases cited therein.) The customary remedy is an order to bargain upon request, coupled with restoration of prior status quo which is necessary to enable good faith bargaining under conditions akin to those preceding the unilateral change.

An employer may claim that the union waived its right to bargain. (Stockton Police Officers' Assn. v. City of Stockton (1988) 206 Cal.App.3d 62, 66.) Waiver is an affirmative defense, is disfavored and must be clear and unmistakable. (*San Francisco Community College District* (1979) PERB Decision No. 105; *Los Angeles Community College District* (1982) PERB Decision No. 252.)

An employer's unilateral change implemented without prior notice or opportunity to negotiate over the decision or the foreseeable effects within the scope of representation disrupts and destabilizes employer-employee relations and is inconsistent with the goals of our

statutes to improve both employer-employee relations and communications between public employers and their employees. We explain.

We first review why a unilateral change is a per se violation of the duty to bargain and so inimical to the purposes of our collective bargaining statutes. In *San Mateo County Community College District* (1979) PERB Decision No. 94 (*San Mateo CCD*), at pp. 14-17, the Board eloquently recounted the reasons unilateral changes are "disfavored." They have a destabilizing and disorienting impact on employer-employee affairs:

> "An employer's single-handed assumption of power over employment relations can spark strikes or other disruptions at the work place. Similarly, negotiating prospects may also be damaged as employers seek to negotiate from a position of advantage, forcing employees to talk the employer back to terms previously agreed to. This one-sided edge to the employer surely delays, and may even totally frustrate, the process of arriving at a contract."

Unilateral changes undermine the principle of exclusive representation because they derogate the union's ability to act effectively on behalf of unit members. Such changes also upset the delicate balance of power between management and employee organizations painstakingly established by our statutes. "[T]he bilateral duty to negotiate is negated by the assertion of power by one party through unilateral action on negotiable matters." (*San Mateo CCD,* at p. 16.)

Especially in the context of public sector bargaining, "when carried out in the context of declining revenues, an employer's unilateral actions may also unfairly shift community and political pressure to employees and their organizations, and at the same time reduce the employer's accountability to the public." (*Id.*)

We believe these considerations apply no less to negotiable effects arising from non-negotiable decisions. The rule requiring effects bargaining arises from balancing the need of employers to make unfettered decisions about the direction of the enterprise with the rights of

employees, through their exclusive representatives, to a voice in workplace matters related to wages, hours and terms and conditions of employment. In other words, effects bargaining is not a stepchild of decision bargaining. It is just as important as bargaining over a decision to alter terms and conditions of employment.

Once an employer takes unilateral action on a matter in which the decision is within the scope of bargaining, the union is excused from demanding to bargain over that fait accompli. (*DPA*, at pp. 6-7 [when a unilateral change has already been implemented or once a firm decision has already been made, the union does not waive its right to bargain by not pursuing negotiations]; *Morgan Hill Unified School District* (1986) PERB Decision No. 554a; *Arcohe Union School District* (1983) PERB Decision No. 360; *Arvin Union School District* (1983) PERB Decision No. 300; *Los Angeles Community College District* (1982) PERB Decision No. 252.) In the face of unilateral implementation, a demand to bargain is futile and not required as a condition to pursuing a charge seeking restoration of the status quo so bargaining may proceed on a level playing field. A contrary rule would require the union to "bargain from a hole." As the Board explained in *San Francisco Community College District* (1979) PERB Decision No. 105 (*San Francisco CCD*), at p. 17: "Once the [employer] acted unilaterally, the [union] was not obligated to continuously reiterate its demand for negotiations . . . . Requiring [the union] to pursue negotiations from this changed position would be tantamount to requiring it to recoup its losses at the negotiations table."

Although the changes discussed in *San Francisco CCD* were to wages and leaves of absence—where the decision itself was negotiable—the same principle applies equally to the situation where the union is presented with a unilateral, unnoticed imposition of a management decision over which only effects are negotiable. In both instances the unannounced change

destabilizes labor relations and undermines our statutes which favor bilateral decision-making on matters within the scope of representation.

In *Oakland Unified School District* (1985) PERB Decision No. 540, the Board held that an employer is obligated to give notice and an opportunity to bargain the effects of its decisions that have an impact on matters within the scope of representation. In *Newark Unified School District, Board of Education* (1982) PERB Decision No. 225, at p. 5, the Board held: "while an employer is free to determine that a [non-negotiable decision] is required, it may not, in the absence of agreement or the completion of negotiations, unilaterally implement in-scope effects that are inconsistent with . . . contract provisions, policies, or established practices."

Our decision in *Compton Community College District* (1989) PERB Decision No. 720 (*Compton CCD*) reinforces this rule, requiring advance notice and the opportunity to bargain, and permitting implementation before agreement or impasse only in certain limited circumstances.[16] (See also, *Salinas Valley Memorial Healthcare System* (2012) PERB Decision No. 2298-M; *Santee Elementary School District* (2006) PERB Decision No. 1822.) In *Sutter County,* the Board issued a bargaining order after concluding that the employer had violated the MMBA by unilaterally changing a past practice (imposing background checks) without providing the union with notice and opportunity to negotiate effects prior to implementation. The union in *Sutter County* did not demand to bargain over effects,

[16]In *Compton CCD,* the Board held that implementation was permissible prior to completing negotiation over effects where an employer showed that: (1) the implementation date was not arbitrary but based on an immutable externally-established deadline, or on an important managerial interest such that delay beyond the chosen date would undermine the employer's right to make the decision at all; (2) the employer gave the union notice of the decision and implementation date sufficiently in advance of the implementation date to allow for meaningful meeting and conferring prior to the implementation; and (3) the employer met and negotiated in good faith on implementation and effects prior to the implementation, and thereafter as to those subjects not resolved by virtue of the implementation.

presumably because it learned of the change only after it was unilaterally implemented. Nonetheless, the Board ordered bargaining over these effects. In sum, our decisions establish the expectation that an employer will give notice and an opportunity to bargain over reasonably foreseeable effects within the scope of representation before implementing a managerial decision.

This principle is undermined by a rule that excuses an employer which fails to provide a union both notice and an opportunity to request bargaining before implementing a change with negotiable effects. *Compton CCD* in particular is eviscerated if the employer faces no potential liability for failing to give advance notice and an opportunity to request effects bargaining.

The Board most recently addressed this issue in *State of California (Department of Corrections & Rehabilitation, Avenal State Prison)* (2011) PERB Decision No. 2196-S (*Avenal*). In that case, the employer unilaterally implemented changes in its practice concerning searches of correctional employees, instituting a random search policy, among other things. No notice or opportunity to bargain was provided to the union, which was placed on notice of the actual change only when random searches of employees commenced. The unfair practice charge alleged, inter alia, that the employer unlawfully imposed a policy change subject to effects bargaining without providing the union notice and the opportunity to bargain. The charge was dismissed by a Board agent. On review, the Board majority ruled that the employer's duty to bargain effects arose only upon a union's request to do so. The dissent argued there should be a single standard for assessing unilateral changes, regardless of whether the decision itself is negotiable or whether only effects are within scope, that an employer's duty to provide notice and an opportunity to request bargaining before implementing a change should apply equally to decision and effects bargaining, and because the employer failed to

provide notice of the policy change the union's duty to request effects bargaining never arose. (See also, Chairperson Hesse's dissent in *Sylvan Union Elementary School District* (1992) PERB Decision No. 919 (*Sylvan*), arguing that the union's obligation to demand to bargain effects never arose because of the employer's failure to give notice and an opportunity to bargain prior to the implementation of the change.)

In *Avenal* the Board majority acknowledged our case law requiring an employer to give a union "reasonable notice and an opportunity to bargain over the 'reasonably foreseeable' negotiable effects" of a non-negotiable decision. Nonetheless, the Board majority ruled that a prima facie case of refusal to bargain the effects of a non-negotiable decision turned on the union demonstrating that it made "a valid request to bargain the negotiable effects of the employer's decision" which must "clearly identify negotiable areas of impact" and "clearly indicate" the union's "desire to bargain over the effects of the decision," and that absent "such an identification, the employer has no duty to bargain." (*Avenal*, at pp. 8-9) For this conclusion, the Board majority relied on *State of California (Department of Corrections)* (2006) PERB Decision No. 1848-S (*Department of Corrections*), *County of Riverside* (2010) PERB Decision No. 2097-M (*Riverside*) and *Sylvan*. We review these decisions.

In *Department of Corrections*, the Board adopted as its own the Board agent's partial dismissal. The union alleged that during a bargaining session for a successor agreement, and without prior notice, departmental officials announced immediate reductions in staffing levels having safety impacts upon the employees. The allegation was dismissed because the union failed to allege in addition that it had made an effects bargaining demand.

In *Riverside*, the Board reversed an administrative law judge's (ALJ) decision holding that the County had unlawfully changed its policy of recognizing for salary purposes certain "hot skills" acquired by employees. Reversing the ALJ, the Board found that the union had

"actual" notice (i.e., advance knowledge) of the proposed change and had thus "waived" the right to bargain over effects by failing to make a timely demand.

In *Sylvan*, the Board majority affirmed an ALJ's conclusion that the union had "actual" notice (i.e., advance knowledge) of a proposed policy change and had thus "waived" the right to bargain over effects by failing to make a timely demand. The dissent concluded that the union had received notice only after the decision had been implemented by the employer's announcement thereof to impacted individual employees. The dissent reasoned that absent notice to the union, the union had no obligation to interpose a bargaining demand.

On the issue of "actual notice" the Board in both *Riverside* and *Sylvan* cited *Regents of the University of California* (1987) PERB Decision No. 640-H (*Regents*). In *Regents* it was undisputed that the union received notice of a reorganization plan prior to the challenged implementation. Moreover, the Board held that those aspects of the reorganization plan which had been implemented had no negotiable effects.

In *Regents* the Board relied on *Victor Valley Union High School District* (1986) PERB Decision No. 565 (*Victor Valley*). There the Board articulated its "actual notice" standard as an element of the affirmative defense of waiver. We restate here relevant portions of that discussion:

> A waiver of the right to bargain must be 'clear and unmistakable,' evidencing an intentional relinquishment of rights under the Act. [Los Angeles Community College District (1982) PERB Decision No. 252; San Francisco Community College District (1979) PERB Decision No. 105.] Prior to arriving at a firm decision to make a change in a matter within the scope of representation, an employer must provide the exclusive representative of its employees with notice of the proposed change and a reasonable opportunity to negotiate over the change. Arcohe Union School District (1983) PERB Decision No. 360; Arvin Union School District (1983) PERB Decision No. 300; Los Angeles, supra.
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> Relying on common law agency principles, the Board has previously held that notice to employees not holding any official

position in the employee organization is insufficient. See, e.g., Arcohe, supra, and Los Angeles, supra. We take this opportunity to further clarify the character of the notice required prior to making a change in a matter within the scope of representation.

Notice of a proposed change must be given to an official of the employee organization who has the authority to act on behalf of the organization. The notice must be communicated in a manner which clearly informs the recipient of the proposed change. Even in the absence of formal notice, proof that such an official had actual knowledge of the proposed change will suffice. Notice must be given sufficiently in advance of a firm decision to make a change to allow the exclusive representative a reasonable amount of time to decide whether to make a demand to negotiate. What constitutes a 'reasonable amount of time' necessarily depends upon the individual circumstances of each case. As waiver is an affirmative defense, an employer asserting a waiver of the right to bargain properly bears the burden of proving that the exclusive representative failed to request bargaining despite receiving sufficient notice of the intended change.[17]

In the present case, it was not proven that any official of the Association was given formal notice or had actual knowledge of the proposed change in instructional minutes. While Don Wilson was a member of the Association's bargaining team for the 1984-86 contract, it was not shown that he had assumed his duties prior to the District's firm decision on December 27, 1983, nor that he had the requisite authority to act on behalf of the Association. Though the Association received agendas for the District board's December 13 and 27 meetings, the District failed to demonstrate that the agendas clearly informed the Association of the proposed increase in instructional minutes.[18] There was no evidence that any Association representative attended either meeting.

(*Victor Valley*, at pp. 4-6.)

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[17] "Walnut Valley Unified School District (1983) PERB Decision No. 289; Brawley Union High School District (1982) PERB Decision No. 266; NLRB v. Transportation Management Corp. (1983) 462 U.S. 393; Witkin, California Evidence (2nd Ed.) p. 180; California Evidence Code section 500."

[18] "Citing Arvin, supra, the ALJ concluded that references in District board agendas do not constitute sufficient notice to employee organizations. We find this reading of Arvin to be too broad. Arvin involved the mere posting of agendas at various school sites. An agenda may suffice if it is delivered to a proper official and is presented in a manner reasonably calculated to draw attention to any item(s) reflecting a proposed change in a matter within the scope of representation."

For the reasons set forth below, we overrule *Avenal*, *Sylvan* and other Board decisions holding that a union must first demand to bargain effects as a precondition to enforcing an employer's duty to provide a union reasonable advance notice and an opportunity to bargain over the reasonably foreseeable effects within the scope of representation of an otherwise non-negotiable decision. We explain.

We believe the better rule, one which is more consistent with our statutes, including without limitation MMBA, and much of our jurisprudence, is stated as follows:

1. The employer has a duty to provide reasonable notice and an opportunity to bargain before it implements a decision within its managerial prerogative that has foreseeable effects on negotiable terms and conditions of employment. A "reasonable" notice is one which is "clear and unequivocal" *Lost Hills Union Elementary School District* (2004) PERB Decision No. 1652, Proposed Decision at p. 6, citing with approval *Bottom Line Enterprises* (1991) 302 NLRB 373, 374 and which "clearly inform[s] the employee organization of the nature and scope of the proposed change." (*Santee Elementary School District* (2006) PERB Decision No. 1822 (*Santee*); *Victor Valley*.)

2. Once having received such advance notice, the union must demand to bargain the effects or risk waiving its right to do so. The union's demand must identify clearly the matter(s) within the scope of representation on which it proposes to bargain, and clearly indicate the employee organization's desire to bargain over the effects of the decision as opposed to the decision itself. (*Trustees of the California State University* (2012) PERB Decision No. 2287-H (*Trustees CSU*); *Rio Hondo Community College District* (2013) PERB Decision 2313 (*Rio Hondo*); *County of Sacramento* (2013) PERB Decision No. 2315.)

3. Having received such advance notice and an opportunity to bargain, a union's failure to demand effects bargaining may waive the right to bargain the reasonably foreseeable

effects. (*Santee* [effects not foreseeable at the time of the employer's notice may be subject of effects bargaining demand at a later time when they become known and knowable].) Waiver remains, however, an affirmative defense. Where a union alleges that the employer did not provide reasonable notice and an opportunity to bargain prior to the employer's implementation of a change in a non-negotiable policy having a reasonably foreseeable impact on a matter within the scope of representation, a prima face case of failure to bargain in good faith is established. The union need not allege as well that it made a demand to bargain such effects as a condition to seeking PERB enforcement of its right to be free of an employer's failure to provide notice and an opportunity to bargain effects. The employer may raise an affirmative defense of waiver or otherwise challenge the union's claim that the employer did not provide sufficient notice of the change.

4. Where the employer implements the change without giving the union reasonable notice and an opportunity to bargain over foreseeable effects on matters within the scope of representation, it acts at its own peril. If the employer is ultimately found to have had a duty to bargain over effects and thus to have provided the union reasonable pre-implementation notice and an opportunity to bargain, its implementation without giving such notice and an opportunity to bargain constitutes a refusal to bargain. (*Sierra Joint Community College District* (1981) PERB Decision No. 179; *Sutter County*.)

We conclude that, facing a unilateral change or fiat accompli, a union has a choice. It may proceed to PERB via an unfair practice charge without first making a demand to bargain effects. Or, it may demand effects bargaining. If the union does demand bargaining over effects of a decision already implemented without the required notice, the employer must respond pursuant to its duty established in *Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision

No. 375, at pp. 9-10 (party objecting that proposal is beyond scope of representation must make good faith effort at clarification by voicing its specific reasons for believing proposal is outside the scope of representation and entering into negotiations on those aspects of proposal which, after clarification, it views as negotiable; failure to seek clarification in itself violates the duty to negotiate in good faith and will result in an order requiring the objecting party to return to the negotiating table to seek clarification). (See also *Jefferson School District* (1980) PERB Decision No. 133, at p. 11.)

We hold that a union's duty to request effects bargaining arises upon an employer's providing notice and an opportunity to bargain. Where an employer implements without providing the requisite notice and bargaining opportunity, the gravamen of the employer's conduct is its exercise of dominion over employment conditions without first providing the union notice and an opportunity to bargain. This conduct by itself violates the employer's statutory duty to meet and confer, whether or not the union thereafter makes a demand for effects bargaining.

We hold that CPOA has alleged, prima facie, that the employer violated its duty to bargain in good faith by unilaterally reducing staffing levels without giving CPOA prior reasonable notice and an opportunity to bargain over the reasonably foreseeable effects within the scope of representation of this non-negotiable decision.[19]

ORDER

The unfair practice charge in Case No. SF-CE-804-M is hereby REMANDED to the Office of the General Counsel for issuance of a complaint consistent with our decision herein, in regard to allegations that the County of Santa Clara unlawfully: (1) unilaterally changed a

[19] We distinguish our recent decisions in *Trustees CSU* and *Rio Hondo*. There the employers did provide advance notice and a bargaining opportunity to the unions. And the unions did demand to bargain effects, which the employers refused.

policy regarding the imposition of background evaluation requirements on currently employed correctional officers; and (2) implemented a decision to change staffing levels at the Main Jail without providing advance notice and an opportunity to bargain its reasonably foreseeable effects.

Chair Martinez and Member Winslow joined in this Decision.