

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



MONTEBELLO CITY EMPLOYEES
ASSOCIATION,

Charging Party,

v.

CITY OF MONTEBELLO,

Respondent.

Case No. LA-CE-904-M

PERB Decision No. 2491-M

June 30, 2016

Appearances: Andrew T. Lotrich, Staff Representative, for Montebello City Employees Association; Liebert Cassidy Whitmore by Christina C. Rentz, Attorney, for City of Montebello.

Before Winslow, Banks and Gregersen, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by the Montebello City Employees Association (Association) to the proposed decision (attached) of a PERB administrative law judge (ALJ). The complaint alleged that in or around October 2013, the City of Montebello (City) changed its policy by requiring part-time unclassified Clerical Assistants¹ to perform the duties of the Administrative

¹ As discussed in the proposed decision, at page 3, following the Association's unfair practice charge, PERB's complaint described the classification as "Administrative Assistant" rather than Clerical Assistant and the Association made no motion to amend the complaint. However, both parties understood that the complaint allegations and the issues actually litigated involved Clerical Assistants represented by the Association and, accordingly, the ALJ exercised his authority to amend the complaint *sua sponte* to replace all references to "Administrative Assistant" with "Clerical Assistant." Neither party has excepted to this amendment to the complaint and, for the reasons discussed below, we conclude that the ALJ acted properly, notwithstanding our decision in *City of Inglewood* (2015) PERB Decision No. 2424-M. As discussed at pages 14-16 of the proposed decision, the ALJ also considered an unalleged theory of liability, namely whether the City also unilaterally changed its policy by requiring Clerical Assistants to perform the duties of the Clerk Typist position.

Secretary classification, and that the City made this change in policy without affording the Association notice or opportunity to meet and confer over the decision and/or its effects on negotiable matters, in violation of the Meyers-Milias-Brown Act (MMBA)² and PERB regulations.³ At the hearing, the Association also put on evidence that the City had changed its policy some years earlier by requiring Clerical Assistants to perform the duties of Clerk Typists. Although not alleged in the complaint, the ALJ considered this allegation after determining that each of the requirements of PERB's unalleged violations doctrine had been satisfied. The ALJ also granted the City leave to amend its answer to assert a statute of limitations defense to address this newly-added theory.

On the merits, the ALJ found that the Association had failed to prove all of the elements of PERB's test for a unilateral change, whether as alleged in the complaint or for the unalleged theory of liability concerning the separate Clerk Typist classification. Specifically, the ALJ found the evidence insufficient to establish that any change in policy had occurred. Alternatively, he found that any change that had occurred had been, at most, an isolated breach or departure from the status quo with no generalized effect or continuing impact on bargaining unit members' terms and conditions of employment. The Association excepts to these findings and to the ALJ's dismissal of the complaint and underlying unfair practice charge for failure to prove each of the elements of a unilateral change. The City takes no exception to the proposed decision and urges the Board to adopt it.

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

³ PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

The Board has reviewed the Association's exceptions and supporting brief, the City's response, the proposed decision and the entire record in light of applicable law. Based on this review, we conclude that the ALJ's findings of fact are adequately supported by the record and that his conclusions of law were well-reasoned and in accordance with applicable law. We therefore adopt the proposed decision as the decision of the Board itself subject to the discussion below of issues raised by the Association's exceptions.

FACTUAL BACKGROUND

The facts of this case involve Selene Garcia (Garcia) and Desiree Sicairos (Sicairos) who worked as Clerical Assistants for the City for approximately ten and seven years, respectively, until both left City employment in 2014. At the hearing, the Association presented evidence that Garcia and Sicairos had been assigned and had performed certain duties, which were not specifically listed in the Clerical Assistant job description and which, according to the Association, were more appropriate to either the Clerk Typist or Administrative Secretary classifications.

The job descriptions for the Clerical Assistant, Clerk Typist and Administrative Secretary include considerable overlap in the duties of these three positions. The salient differences concern the level of difficulty of the duties performed and thus the nature and degree of supervision required. The Clerical Assistant works under direct supervision on "average to difficult" clerical, accounting and/or technical tasks, while the Clerk Typist works under general supervision on "difficult, technical" office support tasks. The Administrative Secretary also performs "difficult" secretarial, office and administrative support tasks, but these are also described as "confidential" and, unlike the Clerical Assistant or Clerk Typist, the Administrative Secretary position reports directly to a department head or the City Administrator.

According to her undisputed testimony, Garcia performed most of her job duties from the beginning until the end of her employment. These duties included tasks associated with the Clerk Typist position and Administrative Secretary position. As the result of a reorganization, in 2010 Garcia was transferred from her position in the Street Maintenance division of the Municipal Services Department to the Golf Course, where she reported to the Assistant Director of Parks and Recreation. At that time, Garcia also began collecting money, issuing receipts and preparing agendas. While the Clerical Assistant job description indicates that the incumbent “may collect monies and issue receipts,” it makes no mention of preparing agendas.⁴ In fact, the more difficult duties assigned to a Clerk Typist indicate that the incumbent for that position “may *assist* in the preparation of agendas for distribution.” (Emphasis added.) After her reassignment to the Golf Course, Garcia also began taking minutes which, in one form or another, is listed as a function of all three positions.

Sicairos similarly testified that she performed most of her job duties from the beginning of her employment with the City in 2007 until her retirement in 2014. In 2010, Sicairos began working in the Parks and Recreation Department under the supervision of the Municipal Services Department head, a reporting relationship indicative of an Administrative Secretary and Sicairos testified that she performed various duties associated the Administrative Secretary position in addition to other duties associated with Clerk Typist position. In 2012, Sicairos again relocated, this time to City Hall, where she reported to the Director of Public Works.

⁴ Although the proposed decision, at page 6, described collecting money and issuing receipts as Clerk Typist duties, these duties are also expressly included in the Clerical Assistant job description, as summarized at page 4 of the proposed decision. To the extent this characterization was an oversight by the ALJ, it further bolsters his finding that no change in policy occurred and/or that only minimal out-of-class work was ever assigned to Garcia or Sicairos.

In October 2013, Sicairos and an Association representative met with Sicairo's boss to request that she be reclassified because she was performing the duties of the Administrative Secretary position for a department head. After consulting with the City Manager, Sicairos' boss denied this request and the Association filed a grievance.

In November 2013, the City denied the Association's grievance, asserting that Sicairos had never been required to perform Administrative Secretary duties and that the City did not have money budgeted for an additional Administrative Secretary position. However, the City also moved Sicairos back to her previous position in Parks and Recreation and replaced her with an Administrative Secretary. Because the Parks and Recreation director position was vacant, Sicairos reported to the assistant director until her retirement in 2014.

The Association appealed the denial of the Sicairos grievance to the Civil Service Commission and, shortly thereafter, the Commission denied the appeal as well, asserting that as an unclassified, limited hourly employee, Sicairos lacked standing to have a grievance processed by the Civil Service Commission. In January 2014, the Association appealed again to the Civil Service Commission, after adding Garcia to the grievance. The result of that appeal was not part of the record.

THE PROPOSED DECISION

The ALJ expressed doubt that the City's conduct constituted a change in policy, given that the only affected employees to testify admitted that they had performed most of the ostensibly out-of-class duties since the beginning of their employment or, for a limited number of duties in Sicairos' case, since 2010. (Proposed dec., p. 13.) Additionally, the ALJ found that some of the duties at issue, while not specifically enumerated in the Clerical Assistant job description, nonetheless overlapped with or were reasonably related to duties included in the Clerical Assistant job description and were therefore not out-of-class duties.

Alternatively, the ALJ concluded that, even assuming a change in policy had occurred through the assignment of out-of-class duties to Garcia and/or Sicairos, the Association had not established that such change was more than an isolated breach of the parties' Memorandum of Understanding (MOU), or that it entailed a generalized effect or continuing impact on terms and conditions of employment. (Proposed dec., p. 13.) Although Sicairos reviewed her boss's calendar and reminded him of his appointments during the time she worked at City Hall, this assignment lasted for only about two months until the issue was raised through the Association's grievance and Sicairos was transferred back to Parks and Recreation in November 2013.

DISCUSSION

ALJ's Authority to Amend the Complaint *Sua Sponte* to Correct an Error or Defect

Before addressing the Association's exceptions, we take this opportunity to address the ALJ's *sua sponte* amendment to the complaint to conform to the evidence and issues presented at hearing. As part of PERB's broad statutory authority to investigate and remedy unfair practice allegations, our regulations expressly recognize that a Board agent may "disregard any error or defect in the complaint that does not substantially affect the rights of the parties" (PERB Reg. 32640, subd. (a); see also MMBA, § 3509, subds. (a) and (b); EERA,⁵ § 3541.3, subds. (g), (i) and (n).) The Board has repeatedly held that, with adequate notice, an amendment to a complaint that merely reflects the allegations in the original unfair practice charge or the issues actually litigated is appropriate, even in the absence of motion to amend, because it does not substantially affect the rights of the parties. (*San Diego Unified School District* (1991))

⁵ The Educational Employment Relations Act (EERA) is codified at section 3540, et seq.

PERB Decision No. 885, pp. 62-63; *County of Riverside* (2010) PERB Decision No. 2097-M, pp. 6-9; *State of California (Department of Social Services)* (2009) PERB Decision No. 2072-S, pp. 3-4; *Compton Unified School District* (2003) PERB Decision No. 1518, p. 3; *Eastside Union School District* (1992) PERB Decision No. 937, pp. 4-5.)

In *City of Inglewood, supra*, PERB Decision No. 2424-M, the Board considered whether an ALJ, in the absence of a motion, may add to or alter the unfair practice theories identified in the complaint at the outset of the hearing. The Board explained that, under PERB's procedural rules and precedent, the Office of the General Counsel is the division within PERB authorized to issue unfair practice complaints which, in turn, determine which claims should be pursued at hearing and the legal theories supporting those claims. (*Id.* at pp. 11-13; see also *County of Fresno* (2010) PERB Decision No. 2125-M, p. 4, fn. 4; *Barstow Unified School District* (1996) PERB Decision No. 1138a, p. 10.) *City of Inglewood* was thus concerned about the division of authority within PERB and, specifically, with whether an ALJ may *direct* the parties to litigate an issue not included in the complaint. It was strictly within that factual and procedural context that the Board observed that, “[o]nce issued, an unfair practice complaint may be amended, ... only on motion of the charging party.” (*Id.* at p. 12.)

Indeed, *City of Inglewood, supra*, PERB Decision No. 2424-M, recognized that otherwise ALJs have “considerable authority” and nothing in the decision was intended to change long-standing practice and procedure before PERB or to diminish an ALJ's authority to amend a complaint *sua sponte* to correct or disregard errors or defects (PERB Reg. 32640, subd. (a)), to join necessary parties (*City of Inglewood, supra*, at p. 7; PERB Reg. 32164), to “[i]nquire fully into all issues and obtain a complete record upon which the decision can be rendered”; or “[r]egulate the course and conduct of the hearing.” (PERB Reg. 32170, subds. (a), (d)); see also *City of Santa Clara* (2016) PERB Decision No. 2476-M, p. 10; *Palo Verde Unified School*

District (2013) PERB Decision No. 2337, p. 34.) After a matter has been submitted, an ALJ may also consider matters beyond the four corners of the complaint, including additional factual allegations or theories of liability, so long as the criteria for unalleged violations have been met. (*Tahoe-Truckee Unified School District* (1988) PERB Decision No. 668 (*Tahoe-Truckee*), pp. 5-10; *City of Inglewood, supra*, at p. 14.)

In accordance with the requirements of *Tahoe-Truckee* and other applicable authority, we find that the ALJ properly exercised his authority to amend the complaint to correct an error or defect and to consider the unalleged theory of liability that the City unilaterally altered its policy by assigning Clerk Typist duties to Clerical Assistants.

Legal Standard and the Appropriateness of PERB's Test for Unilateral Change Allegations

To prove 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; and (4) the action had a generalized effect or continuing impact on terms and conditions of employment. (*County of Santa Clara* (2013) PERB Decision No. 2321-M, p. 13.) As discussed below, the Association's exceptions focus primarily on whether the ALJ erred in finding that elements (1) and (4) above were not met. However, because it concerns a more fundamental issue of the appropriateness of the above test, we begin with an alternative argument raised in the Association's supporting brief, which is that the ALJ erred by not analyzing the City's conduct under PERB's totality of conduct test either in addition to, or instead of, the above test. For several reasons, we are not persuaded by this argument.

The statutory duty to meet and confer in good faith involves *both* a set of procedures for meeting and negotiating and a bona fide intention to discuss and, where possible, reach

agreement. (*General Electric Co. (New York, N.Y.)* (1964) 150 NLRB 192, 194, *affd.* (2d Cir. 1969) 418 F.2d 736; *Dublin Professional Fire Fighters, Local 1885 v. Valley Community Services Dist.* (1975) 45 Cal.App.3d 116, 118; *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, 823-824; *Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9, 25.) As we explained in *Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M, *per se* violations generally involve conduct that violates the statutory rights or procedures for bargaining. They are a failure to meet and confer, irrespective of the offending party's intent. By contrast, the totality of conduct test, which is used for surface bargaining allegations, examines the respondent's outward conduct to determine its state of mind, i.e., whether it had a subjective intent to reconcile differences and reach agreement when meeting and conferring. (*Id.* at pp. 13-14; see also Higgins, *Developing Labor Law*, 6th Ed., Vol. I: Ch. 13.II.A, p. 892.) Although both are bargaining violations, they typically rely on different kinds of evidence because they involve a failure to comply with different components of the statutory language: a unilateral change is a failure to meet while bargaining in bad faith is a failure to do so with the requisite state of mind. (*Fresno Co. IHSS Public Authority, supra*, PERB Decision No. 2418-M, pp. 13-14)

The two theories also entail different remedies. Because the Board does not dictate the substantive terms of collective bargaining agreements or require a party to agree to any proposal, in surface bargaining cases it generally does not order retroactive relief, such as back pay or damages, for the loss of economic benefits that might have been obtained had the employer bargained in good faith. (*City of Pasadena* (2014) PERB Order No. Ad-406-M, pp. 13-14; see also *Frankl v. HTH Corp.* (9th Cir. 2011) 650 F.3d 1334, 1363.) By contrast, in addition to a cease-and-desist order and posting requirement, the appropriate remedy for an employer's unlawful unilateral change will typically include an order to rescind the new or changed policy

and an award for back pay or other losses suffered by employees or the union as a result of the unlawful conduct. (*California State Employees' Assn. v. Public Employment Relations Bd.* (1996) 51 Cal.App.4th 923, 946; *City of Sacramento* (2013) PERB Decision No. 2351-M, pp. 48-51.)

In determining whether a party has violated its duty to meet and confer in good faith, PERB utilizes both a “per se” and a “totality of the conduct” analysis, depending on the specific conduct involved and its effect on the negotiating process. (*Muroc Unified School District* (1978) PERB Decision No. 80 (*Muroc*), pp. 13-14; *Pajaro Valley Unified School District* (1978) PERB Decision No. 51, pp. 4-5.) Under long-standing PERB and private-sector precedent, a unilateral change to negotiable subjects is regarded as a species of per se violations of the bargaining obligation because of its incompatibility with the bi-lateral scheme for collective bargaining and its inherently destabilizing and detrimental effect on the bargaining relationship, *irrespective of intent*. (*County of Santa Clara, supra*, PERB Decision No. 2321-M, pp. 22-23; *San Mateo County Community College District* (1979) PERB Decision No. 94, pp. 14-17; see also *NLRB v. Katz* (1962) 369 U.S. 736, 742-743.)

Admittedly, the standard verbiage used in the proposed decision and in Board decisions too numerous to cite is potentially misleading. Before enumerating the requirements for stating a prima facie case for a unilateral change violation, our cases say that: “Unilateral changes are considered ‘per se’ violations if certain criteria are met.” (*City of San Juan Capistrano* (2012) PERB Decision No. 2238-M, adopting dismissal letter at p. 2; *Desert Sands Unified School District* (2010) PERB Decision No. 2092, p. 18) One possible interpretation of this language, and apparently the one urged here by the Association, is that, if the enumerated criteria are not met, then a unilateral change violation may still be found not as a per se violation but under

PERB's "totality of conduct" test.⁶ However, we are aware of no persuasive authority, PERB or otherwise, analyzing a unilateral change allegation under the totality of circumstances test and we can discern no logical or sound policy reason for doing so.

California Public Sector Labor Relations, Ch. 10, § 10.05[6] (Mathew Bender) suggests that "some courts have also discussed unilateral changes in terms of indicia of bad faith as part of an overall 'totality of the circumstances' evaluation." The sole authority cited is *Stationary Engineers v. San Juan Suburban Water Dist.* (1979) 90 Cal.App.3d 796 (*Stationary Engineers*), disapproved of on other grounds by *County Sanitation Dist. No. 2 v. Los Angeles County Employees Assn.* (1985) 38 Cal.3d 564 (*County Sanitation*). At issue in that case was whether public employees, who had been discharged for going on strike, were entitled to return to work and to damages when their reason for striking was to protest the public employer's bad faith in negotiations. Declining to follow federal authority, the appellate court held that, under the MMBA, public employees have no statutory or other right to strike and thus, no protection for striking, even if shown that the strike's purpose was to protest their employer's unfair labor practices. The central holding of the case is no longer good law.⁷

⁶ As discussed below, our cases hold that independent, contemporaneous unfair practices committed at or away from the bargaining table, including unilateral changes to negotiable matters, may serve as evidence of bad faith in negotiations, i.e., in support of a bad faith or surface bargaining allegation. (*City of San Jose* (2013) PERB Decision No. 2341-M, p. 23; *Muroc, supra*, PERB Decision No. 80, p. 13.) However, that does not appear to be the Association's argument here. In any event, to provide probative evidence of bad faith, the separate unfair practice would typically need to be established, or at least its prima facie elements must be met, if the separate allegation were no longer timely. (See, e.g., *City of Oakland* (2014) PERB Decision No. 2387-M, pp. 34-42.) The fact that some, but not all of the elements of a separate unfair practice allegation were met would not give rise to an inference of bad faith in support of a surface bargaining allegation.

⁷ In *County Sanitation*, the California Supreme Court disapproved of *Stationary Engineers* to the extent it held that all strikes by public employees are illegal and in decisions interpreting EERA and later the MMBA,

In the alternative, the appellate court held that “no worthy grievance existed” to provoke the strike and then proceeded to discuss the various evidence of the public employer’s bad faith, including the union’s allegation that the employer had made several pre-impasse unilateral changes affecting negotiable subjects. According to the appellate court, these changes “did not show lack of good faith” on the part of the employer, because “they were taken with prior written notice and [the union] did not appear to discuss the issues.” (*Stationary Engineers, supra*, 90 Cal.App.3d at 802.)

The case thus does not support the Association’s contention that a unilateral change may be established by showing the absence of good faith through the totality of circumstances test. Rather, the court’s discussion accepts, as does PERB, that independent, contemporaneous unfair practices committed at or away from the bargaining table, including unilateral changes to negotiable matters, may serve as evidence of bad faith in negotiations, i.e., in support of a surface bargaining allegation. (*City of San Jose, supra*, PERB Decision No. 2341-M, p. 23; *Muroc, supra*, PERB Decision No. 80, p. 13.) However, because the union had notice and waived its opportunity for bargaining, no unlawful unilateral change occurred and, consequently, no independent unilateral change allegation could support a finding of bad faith for the union’s surface bargaining allegation.

Here, neither the complaint nor underlying unfair practice charge, nor the evidence or the parties’ briefing, suggested that a surface bargaining allegation was at issue either as an alternative or in addition to the unilateral change theories set forth in the complaint and litigated by the parties. Finding no legal authority or policy justification in support of the Association’s contention, we conclude that after determining that the record did not establish all of the elements of PERB’s test for a unilateral change, the ALJ properly dismissed the

complaint without evaluating the evidence for a bad faith or surface bargaining allegation that was never alleged or litigated.

We now turn to the Association's exceptions as to the two elements of a unilateral change for which the ALJ found insufficient evidence.

Whether the Evidence Established that a Change in Policy Occurred and Whether any Change Had a Generalized Effect or Continuing Impact on Terms and Conditions

The remainder of the Association's supporting brief argues that the ALJ incorrectly found that the City's conduct was an isolated breach of the parties' MOU and/or that any change in employees' duties had no generalized effect or continuing impact on terms and conditions of employment. Although they involve separate elements of PERB's test for unilateral changes, the Association's exceptions also tend to overlap in substance. Exception Nos. 2, 3, 6, and 8 challenge the ALJ's finding that no change in policy occurred, while Exception Nos. 1, 4, 5, and 7 focus on whether the City's conduct had a generalized effect or continuing impact on terms and conditions of employment. Exception No. 9 also focuses on the ALJ's overall determination that the complaint and charge must be dismissed for, among other things, a failure to prove this element of PERB's test for unilateral changes.

An isolated breach of contract or a departure from an established practice is insufficient to state a prima facie case of a unilateral change because it fails to establish that the violation has a generalized effect or continuing impact on the terms and conditions of employment of employees. (*Grant Joint Union High School District* (1982) PERB Decision No. 196 (*Grant*), p. 9; *Victor Valley Union High School District* (1985) PERB Decision No. 487, pp. 25-33.) However, where an employer has unilaterally deviated from contractual terms in a way that has a "generalized effect or continuing impact upon the terms and conditions of bargaining unit employees," such action may amount to a failure to negotiate in violation of the statutory duty to bargain. (*Colusa Unified School District* (1983) PERB Decision No. 296, p. 5.)

Notwithstanding *Grant* and similar cases, the Association argues that the ALJ ignored PERB precedent, which recognizes that the continuing impact or generalized effect criterion is satisfied when the employer argues that it has a legal right to act unilaterally with respect to the subject in dispute. (Association Supporting Brief, p. 7.) The Association argues that the City asserted that it has a legal right to act unilaterally in assigning duties outside the scope of the Clerical Assistant job description because, when provided with an opportunity to remove the contested duties through the grievance process, the City refused to do so. According to the Association's supporting brief, the City's denial of the grievance demonstrates that the additional, out-of-class duties were intended to remain in effect indefinitely and to apply to multiple employees in multiple departments. (Association Supporting Brief, p. 6.) It also argues that the generalized effect and continuing impact requirement is met because the City's answer to the complaint asserted as an affirmative defense that its actions were reasonable and based on justifiable business considerations.

Relying on *Jamestown Elementary School District* (1990) PERB Decision No. 795 (*Jamestown*), the Association argues that the ALJ looked only at the number of employees affected by the employer's conduct rather than considering whether that conduct had a continuing impact, irrespective of the number of employees affected. (Association Supporting Brief, pp. 5-6.) The Association argues that undisputed testimony established that the City's changes to employee job duties were an ongoing requirement of the positions, and that the additional duties were considered in the evaluation and potential discipline of employees. (Association Supporting Brief, p. 7.) The Association contends that once it provided evidence that the employer's change affected multiple employees in multiple departments and was ongoing, the burden of proof shifted to the employer to prove that the changes were only an isolated breach of the agreement. (*Id.* at p. 3.)

The Association's statement of the law is correct. The continuing impact or generalized effect requirement is satisfied when "the action is based upon the employer's belief that it had a contractual [or other] right to take the action without negotiating with the union." (*County of Riverside* (2003) PERB Decision No. 1577-M, p. 6; see also *Hacienda La Puente Unified School District* (1997) PERB Decision No. 1186, p. 4.) By asserting it has a legal right to act under the circumstances, the employer is essentially asserting a right to repeat the conduct in dispute. Thus, even an employer's one-time action affecting only one employee may have a generalized effect or continuing impact on negotiable terms and conditions of employment, if the employer asserts that it was legally authorized to act unilaterally under the circumstances. (*County of Santa Clara* (2015) PERB Decision No. 2431-M, p. 19; *Hacienda La Puente, supra*, PERB Decision No. 1186, p. 4; see also *Modesto City Schools and High School District* (1985) PERB Decision No. 552, p. 8; and *Jamestown, supra*, PERB Decision No. 795, p. 6.)

The Association is also correct that in *Jamestown* and other cases, PERB has declined to set a minimum number of employees who must be affected for an employer's action to have a generalized effect or continuing impact. (*State of California (Department of Mental Health)* (1990) PERB Decision No. 840-S, p. 5.) In appropriate circumstances, PERB has even found a unilateral change violation when *no employees* were immediately affected by the change, as when an employer unilaterally sets compensation or changes the hours for a newly-created or otherwise vacant bargaining-unit position. (*Norris School District* (1995) PERB Decision No. 1090, adopting proposed dec. at pp. 15-19; *Lake Elsinore School District* (1987) PERB Decision No. 646, p. 5; *Huntington Beach Union High School District* (2003) PERB Decision No. 1525, p. 2.)

However, these cases are not applicable here. The City's answer admitted some facts, denied the material allegations and asserted various affirmative defenses, including that at all

times relevant, its actions “were in conformity with all applicable laws, regulations, policies, and labor agreements.” However, as the Association acknowledges in its briefing before the Board, the City never provided any testimony or other evidence to establish a justifiable business interest or that the change was only for a limited time and affecting a limited number of employees. (Association Supporting Brief, p. 7.) Aside from its assertion of a boilerplate defense in its answer, there is no indication that the City has ever argued that it was authorized by statute, contract or other legal authority to assign duties that properly belong to the Clerk Typist or Administrative Secretary job descriptions to Garcia, Scicairos or any other Clerical Assistant. When Scicairos raised the matter with her supervisor in or about October 2013, the supervisor agreed that Scicairos was performing out-of-class duties, but could not approve a reclassification for budgetary reasons. (Charging Party Ex. 12.) The Association appealed this decision and the City denied the grievance, by reiterating that it had never asked Scicairos to perform the duties of an Administrative Secretary, and by asserting that under the City’s Administrative Policy V-B-40, limited hourly, unclassified employees in the Clerical Assistant classification have no standing to have grievances processed through the civil service grievance process.⁸ On the record before us, there is insufficient evidence to conclude that the City has asserted a legal right to act unilaterally, and we must therefore reject the Association’s contention that the generalized effect or continuing impact requirement is established by the City’s denial of the Association’s grievance or other conduct.

The Association also argues that, because the City did not specifically assert in its answer to the complaint an affirmative defense that its conduct amounted, at most, to an isolated breach

⁸ The Association has not alleged and the parties have not litigated whether the City may lawfully deny the Association the right to bring grievances in its own name on behalf of the employees it represents, including unclassified employees in the Clerical Assistant job title. We therefore decline to reach that issue.

of the agreement, the ALJ erred by not shifting the burden to the City and, consequently, in finding that the Association had not established whether the City's conduct had a generalized effect or continuing impact on terms and conditions of employment. We disagree.

The elements of PERB's test for a unilateral change, including the requirement that a change have a generalized effect or continuing impact, are part of the charging party's prima facie case. (*County of Santa Clara, supra*, PERB Decision No. 2321-M, pp. 12-13; *County of Riverside* (2013) PERB Decision No. 2307-M, p. 18.) Unless the respondent has stipulated to, or otherwise admitted facts that remove an issue from controversy, the charging party must put on competent and probative evidence as to each element of its prima facie case. (PERB Reg. 32178; *SEIU-United Healthcare Workers West Local 2005 (Hayes)* (2011) PERB Decision No. 2168-M, pp. 2-4; cf. PERB Reg. 32207; *Regents of the University of California* (2012) PERB Decision No. 2302-H, adopting proposed dec. at p. 15.) Failure to prove any element by a preponderance of the evidence will result in dismissal, regardless of whether the respondent asserts or proves any affirmative defense.

It is not the City's burden to show that its conduct was only an isolated breach of the MOU or that it affected only one employee for a short period of time. Rather, it was the Association's burden to prove that the City's conduct amounted to a change in policy with a generalized effect or continuing impact on terms and conditions of employment, which it failed to do here.

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-904-M are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Winslow and Gregersen joined in this Decision.



STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

MONTEBELLO CITY EMPLOYEES
ASSOCIATION,

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CITY OF MONTEBELLO,

Respondent.

UNFAIR PRACTICE
CASE NO. LA-CE-904-M

PROPOSED DECISION
(April 24, 2015)

Appearances: Andrew Lotrich, Field Representative, for Montebello City Employees Association; Liebert Cassidy Whitmore by Jeffrey Freedman, Attorney, for City of Montebello Before Kent Morizawa, Administrative Law Judge.

In this case, an exclusive representative alleges that a public employer made a unilateral change to the job duties of Clerical Assistants in violation of the Meyers-Milias-Brown Act (MMBA).¹ The employer denies any violation.

PROCEDURAL HISTORY

On March 5, 2014, the Montebello City Employees Association (MCEA) filed an unfair practice charge against the City of Montebello (City). On September 26, 2014, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint alleging that the City unilaterally changed the job duties of Administrative Assistants without first meeting and conferring with MCEA in violation of MMBA sections

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

3503, 3505, 3506, 3506.5, subdivisions (a), (b), and (c), and 3509, subdivision (b), and PERB Regulation 32603, subdivisions (a), (b), and (c).²

On October 17, 2014, the City answered the complaint denying any violation of the MMBA or PERB regulations and setting forth its affirmative defenses. On October 29, 2014, the parties participated in an informal settlement conference, but the matter was not resolved.

Formal hearing was held on February 9, 2015. At the close of MCEA's case-in-chief, the City made a motion to dismiss the case and a motion to amend its answer to include the affirmative defense that the allegations in the complaint are barred by the statute of limitations. The motion to dismiss the case was denied, and the motion to amend the answer was taken under submission.

The matter was submitted for proposed decision when post-hearing briefs were filed on April 9, 2015.

Motion to Amend the Answer

The City seeks to amend its answer to include the statute of limitations as an affirmative defense. It asserts that it did not include the statute of limitations as an affirmative defense in its original answer based on the way MCEA pled the facts in its charge and how the Office of the General Counsel ultimately drafted the complaint. Both of those documents suggest that MCEA intended to argue that the City's unlawful conduct occurred in close proximity to October 2013. However, the evidence MCEA presented at hearing dealt exclusively with events that occurred several years prior to October 2013. Under these circumstances, it is appropriate to permit the City to amend its answer in order to address what is essentially a new set of facts for which MCEA seeks to hold the City liable. Amending the

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

answer also does not prejudice MCEA since it is the one who introduced these new facts in its case-in-chief, and it demonstrated at the hearing that it anticipated the City's request to amend its answer. Accordingly, the City's motion is granted.

Amending the Complaint to Correct an Error

The evidence presented at hearing was with regard to whether two Clerical Assistants were required to perform the job duties of the Administrative Secretary classification. As the City noted in its April 17, 2014 position statement, MCEA's unfair practice charge erroneously labels these two Clerical Assistants as "Administrative Assistants." The complaint makes the same error. There is no dispute here that this case involves the alleged unilateral change to the duties of Clerical Assistants; not Administrative Assistants. In fact, from the record it is unclear whether the City even maintains an Administrative Assistant job classification. Therefore, I am exercising my authority to amend the complaint to replace all references to Administrative Assistant with Clerical Assistant. (*San Diego Unified School District (1991)* PERB Decision No. 885 [a Board agent, on his or her own motion, has the authority to amend a complaint to correct an error].)

FINDINGS OF FACT

The Parties

MCEA is the exclusive representative of an appropriate unit of employees within the meaning of PERB Regulation 32016, subdivision (b).

The City is a public agency within the meaning of MMBA section 3501, subdivision (c), and PERB Regulation 32016, subdivision (a).

Job Classifications At Issue

At issue in this case are the Clerical Assistant, Clerk Typist, and Administrative Secretary job classifications. The Clerical Assistant job description defines the position as follows:

Under supervision, to perform a variety of average to difficult clerical, account and/or technical work assignments including the preparation of reports, records and correspondence; to provide information to the public in support of the assigned function; and to perform other job related work as required.

It then lists the following as an example of duties:

Performs a variety of office support assignments including typing, document preparation, proofreading and checking of materials for accuracy, checking data and updating technical records and reports relating specifically to the assigned department, and filing of same; checks, files and maintains financial records and documents; may serve as a cashier and balance daily receipts; may perform a variety of accounting functions from the processing of accounts payable/receivable to preparing bank deposits and customer accounts; maintains and updates client and customer information; checks and tabulates statistical or financial information; may collect monies and issue receipts; answers the telephone and assists the general public with scheduling appointments and providing assistance in the completion of department forms, applications, or law enforcement complaints or provision of account information; types written correspondence and documents from oral direction, rough drafts, copy, or notes; manually or with the use of electronic devices takes minutes of meetings and transcribes accordingly; operates office equipment and computers and checks records accordingly; processes incoming and outgoing mail; takes service requests and refers to proper personnel for action; maintains records of and orders inventory of office support supplies and materials; may operate dispatch radio to receive and relay calls; may operate vehicle to deliver and pick up materials; may be required to work weekends, evenings, and/or holidays.

The Clerk Typist job description defines the position as follows:

Under general supervision to perform a variety of difficult, technical office support; report and records preparation and

maintenance duties in support of an assigned City function; to provide information to the public and other City staff in support of the assigned function; and to perform related work as required

It then lists the following as an example of duties:

Performs a variety of office assistance assignments including typing, document preparation, proofreading, filing, checking data, and updating records; answers the telephone and assists the public with scheduling appointments and giving information and assistance as required; types letters, memoranda, or other documents from oral direction, rough drafts, copy, or notes; takes fast notes or uses electronic device and accurately transcribes minutes of business transacted at meetings; may assist in the preparation of agendas for distribution; may collect monies and issue receipts; operates office equipment and computers; sorts and files documents and records; maintains a variety of background information and files; sorts and distributes incoming and outgoing mail; prepares reports; issues and accepts applications and permits; helps maintain and update client and customer information; checks and tabulates statistical information; takes service requests and refers to proper personnel for action; performs a variety of office support assignments; maintains and orders inventory of office support supplies and materials; may answer telephone and dispatch radio to receive and relay calls; may operate vehicle to deliver and pick up materials.

The Administrative Secretary job description defines the position as follows:

Under general direction to perform a variety of difficult confidential, secretarial, office, and administrative support work for a City Department Director or the City Administrator; to coordinate the office support work for an assigned Department; to provide information to the public and other City employees on the functions, policies, and administrative procedures of the Department; and to perform related work as required.

It then lists the following as an example of duties:

Performs difficult confidential, secretarial, office, and administrative support assignments for a Department Head or the City Administrator; establishes and maintains filing systems; coordinates processing of employee evaluations and personnel action forms; provides work coordination for Department office support functions; organizes information and assists with the

preparation and distribution of reports; may take minutes and maintain records of Department staff meetings and public meetings of elected and appointed officials; answers the telephone and receives office visitors providing a variety of information about the policies and services of the assigned Department; responds to citizen complaints or refers persons to other appropriate City personnel; maintains appointments calendars and makes travel arrangements for Department staff; assists with the preparation and monitoring of the Department budget; coordinates submission of Department time cards, office equipment and supply requests to City accounting; reviews and prioritizes Department mail and refers some items to other departments; assists with studies, projects, surveys, and special events planning; may perform some Deputy City Clerk functions; may assist with investment and City Treasurer functions; may perform some notarial acts; operates office equipment, including standard office software programs.

Selene Garcia

Selene Garcia worked for the City from June 1, 2004, through December 31, 2014, as a Clerical Assistant in the Street Maintenance division of the Public Works Department. At the time, the Public Works Department was part of the larger Municipal Services Department, which also included other divisions such as Parks & Recreation and the Golf Course. In May 2010, as a result of the City's reorganization of the Municipal Services Department, Garcia was physically relocated from the Public Works facility to the Golf Course where she reported to Assistant Director of Parks & Recreation Martha Balderrama.

Garcia testified that during her entire time with the City, she performed most of the duties of a Clerk Typist, including typing letters and memoranda from oral direction and maintaining a variety of background information and files. Some Clerk Typist duties, such as collecting money, issuing receipts, and preparing agendas, she did not perform until her relocation to the Golf Course.

Garcia also testified that during her entire time with the City, she performed most of the duties of an Administrative Secretary, including establishing and maintaining file systems, coordinating and processing employee evaluations and personnel action forms, and organizing information and assisting with the preparation of reports. Some Administrative Secretary duties, such as taking minutes and preparing agendas, she did not perform until her relocation to the Golf Course. Others, such as making travel arrangements and performing notarial acts, she did not perform at all during her time with the City.

Desiree Sicairos

Desiree Sicairos worked for the City from February 7, 2007, through October 2014 as a Clerical Assistant. In 2010, she began working in the Parks and Recreation Department under the supervision of Norma Salinas, the head of the Municipal Services Department. At this time, Sicairos worked alongside Administrative Secretary Patricia Angulo. Sicairos testified that during her entire time with the City, she performed most of the duties of a Clerk Typist, including answering the telephone, assisting the public, and preparing reports. Some Clerk Typist duties, such as collecting money, issuing receipts, and accepting applications and permits, she did not perform until her relocation to Parks & Recreation.

Sicairos also testified that during her entire time with the City, she performed most of the duties of an Administrative Secretary, including coordinating the submission of department timecards, reviewing and prioritizing department mail, and assisting with studies, projects, surveys, and special events planning. Some Administrative Secretary duties, such as coordinating and processing employee personnel action forms and assisting with the preparation and monitoring the department budget, she did not perform until her relocation to

Parks & Recreation. Others, such as assisting with investment and City Treasurer functions, she did not perform at all during her time with the City.

When Salinas retired in 2012, the City split the Municipal Services Department into two separate departments, Public Works and Parks & Recreation. In September 2013, Sicairos was moved to City Hall and began working directly for Danilo Batson, the new Director of Public Works. Angulo remained in Parks & Recreation where she worked for Balderrama, who remained the Assistant Director of the department.³

On October 7, 2013, Sicairos and her union representative met with Batson to discuss her job duties. Sicairos stated she should be reclassified as an Administrative Secretary because she was performing the job duties of that position directly for a department head. Batson responded that he would confirm with his supervisor and get back to her. Sometime thereafter, Batson spoke to the City Manager regarding Sicairos' request. After that meeting, Batson informed Sicairos that her request was denied.

On October 23, 2013, MCEA filed a grievance demanding Sicairos be reclassified as an Administrative Secretary. On November 20, 2013, the City denied the grievance, asserting it never required Sicairos to perform the duties of an Administrative Secretary and in any event the City did not allocate money in its budget for that position. After denying the grievance, the City moved Sicairos from City Hall back to the Parks & Recreation building and moved Angulo from Parks & Recreation to City Hall. After the switch, Angulo worked directly for Batson and Sicairos worked directly for Balderrama.

³ The director position was vacant.

On November 21, 2013, MCEA appealed the City's decision to the Civil Service Commission. On November 25, 2013, the City denied the appeal on the basis that as a limited hourly employee Sicairos lacked standing to file such an appeal.

On January 24, 2014, MCEA filed another appeal to the Civil Service Commission, this time including Garcia in the grievance. The record does not contain any further correspondence between the parties regarding MCEA's grievance.

ISSUES

1. Are MCEA's claims barred by the statute of limitations?
2. Did the City unilaterally implement a negotiable change without meeting and conferring with MCEA by requiring Clerical Assistants to perform the job duties of Administrative Secretaries?
3. Should the allegation that the City unilaterally changed the job duties of Clerical Assistants by requiring them to perform the duties of Clerk Typists be considered as an unalleged violation? If so, was there a violation?

CONCLUSIONS OF LAW

Statute of Limitations

PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint*

Community College District (1996) PERB Decision No. 1177.)⁴ In the case of a unilateral change, the statute of limitations begins to run on the date that the charging party has actual or constructive notice of the respondent's clear intent to implement a unilateral change in policy, provided that nothing subsequent to that date evinces a wavering of that intent. (*Cloverdale Unified School District* (1991) PERB Decision No. 911.) Despite the City's assertion to the contrary, at hearing the respondent bears the burden of demonstrating that the charge was filed outside the six-month limitations period. (*Los Angeles Unified School District* (2014) PERB Decision No. 2359.)

Garcia and Sicairos testified that they began performing the duties of Clerk Typists and Administrative Secretaries well before six months prior to when MCEA filed its charge. However, an employee's knowledge of a proposed change to the terms and conditions of employment cannot be imputed to the union absent evidence that the employee has the capacity to act in an official capacity on behalf of the union. (*Regents of the University of California (Davis)* (2010) PERB Decision No. 2101-H; *Victor Valley Union High School District* (1986) PERB Decision No. 565.) The City did not establish that Garcia or Sicairos possess the requisite authority to act on behalf of MCEA. Therefore, their knowledge alone is insufficient to trigger the statute of limitations.

MCEA asserts that it first became aware of the alleged unilateral change in October 2013 when Sicairos approached the union about filing an out-of-class grievance. The City did not establish that MCEA knew or should have known of the alleged unilateral change prior to that date. In fact it presented no evidence regarding when, if ever, it informed MCEA of any

⁴ When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

changes to Garcia or Sicairos' job duties or when MCEA should have known of any changes. Thus, City did not meet its burden to establish that the allegations in the complaint are untimely.

Unilateral Change

In determining whether a party has violated MMBA section 3505 and PERB Regulation 32603, subdivision (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 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. (*County of Santa Clara* (2013) PERB Decision No. 2321-M; *Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262.)

MMBA section 3504 defines the scope of representation of recognized employee organizations as:

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.

Following precedent under EERA, the Board has found that the assignment of job duties is not a mandatory subject within the scope of representation if the newly assigned duties are

reasonably related to existing duties. (*City & County of San Francisco* (2004) PERB Decision No. 1608-M; *City & County of San Francisco (International Airport)* (2007) PERB Decision No. 1932-M.)

Generally, the Clerical Assistant and Administrative Secretary positions both require the incumbent to provide office support to his or her department. The difference between the two is that the Administrative Secretary performs difficult, confidential assignments and does so with minimal supervision whereas the Clerical Assistant performs easier tasks under direct supervision. Of the three positions at issue, the Administrative Secretary job classification requires the most skill and experience, which is why the Administrative Secretary classification is reserved for administrative staff working directly for a Department Director or the City Administrator.

Although some of the duties of a Clerical Assistant match up with those of an Administrative Secretary or are reasonably comprehended within a Clerical Assistant's job duties, there are a number that are not. For example, Garcia and Sicaïros testified that they coordinated the processing of confidential employee evaluations and personnel action forms and assisted with the preparation and monitoring of their departmental budgets. These duties require a significantly higher degree of difficulty and autonomy than would not be expected of a Clerical Assistant and are not reasonably related to the job duties of a Clerical Assistant. Accordingly, their imposition on Clerical Assistants constitutes a matter within the scope of representation.

However, MCEA did not establish that the imposition of duties had a generalized effect or continuing impact on the terms and conditions of employment. The Board has held that an isolated change to the status quo does not amount to an unlawful unilateral change. (*Grant*

Joint Union High School District (1982) PERB Decision No. 196; *State of California (Department of Corrections and Rehabilitation, Ventura Youth Correctional Facility)* (2010) PERB Decision No. 2131-S.) While a charging party need not show that an employer's action affected all bargaining unit members, it must still establish that a disputed action is in the nature of a change in policy. (*Jamestown Elementary School District* (1990) PERB Decision No. 795.)

Garcia and Sicairos were the only Clerical Assistants to testify. From their limited testimony, MCEA draws the inference that the City changed policy by requiring all Clerical Assistants to perform the job duties of Administrative Secretaries. However, there is not enough evidence in the record to permit that inference. As an initial matter, it is unclear whether there was even a change in policy given that Garcia and Sicairos were admittedly performing Administrative Secretary job duties from the beginning of their employment with the City. Even assuming a change in policy, MCEA did not establish that the change was more than an isolated breach. Although MCEA's brief asserts that the City's reliance on a Management Rights clause to support the imposition of Administrative Secretary job duties on Garcia and Sicairos demonstrates more than an isolated breach, the record does not support that assertion. None of the City's correspondence refers to a Management Rights clause, nor did the City's witness testify about such a clause giving them the authority to assign new job duties that fall within the scope of representation and are subject to bargaining. Instead, the evidence presented at hearing shows that the change to Sicairos and Garcia's job duties was an isolated breach where two employees were working out of class.

Based on the above, MCEA has failed to establish that the City implemented an unlawful unilateral change when it required Garcia and Sicairos to perform some of the duties of the Administrative Secretary job classification.

Unalleged Violation

MCEA alleges that the City implemented an unlawful unilateral change when it required Clerical Assistants to perform the work of Clerk Typists. However, this allegation is not included in the complaint nor did MCEA move to amend the complaint to seek its inclusion. Therefore, to constitute a source of liability for the City, this allegation must meet the requirements for an unalleged violation. (*West Contra Costa Healthcare District* (2010) PERB Decision No. 2145-M.)

The Board has the authority to review unalleged violations when the following criteria are met: (1) adequate notice and opportunity to defend has been provided to respondent; (2) the acts are intimately related to the subject matter of the complaint and are part of the same course of conduct; (3) the unalleged violation has been fully litigated; and (4) the parties have had the opportunity to examine and be cross-examined on the issue. (*County of Riverside* (2010) PERB Decision No. 2097-M; *Fresno County Superior Court* (2008) PERB Decision No. 1942-C.) The unalleged violation must also have occurred within the applicable statute of limitations period. (*County of Riverside, supra*, PERB Decision No. 2097-M.)

All of the criteria for an unalleged violation are met in this case. The issue is timely in light of the City's failure to meet its burden to show otherwise. MCEA was clear in its case-in-chief that it intended to litigate the issue of Clerical Assistants being required to perform the job duties of Clerk Typists, and the City did not raise any objection to the introduction of evidence regarding that issue, either at the hearing or in its closing brief. The issue is also

intimately related to the subject matter of the complaint, which asserts that the City unilaterally changed the job duties of Clerical Assistants by requiring them to perform the work of a higher level classification. Both parties also questioned Garcia and Sicairos in great detail regarding their job duties, including those that arguably fall within the ambit of a Clerk Typist. The issue has also been fully litigated, with the City giving it full treatment in its closing brief. Accordingly, a decision will be reached on the merits.

The Clerical Assistant and Clerk Typist job classifications are fundamentally similar in terms of the kinds of duties they to perform. Despite some slight variations in verbiage, most of the job duties for each classification are identical. For example, both are required type documents from oral direction, rough drafts, copy, or notes; both are required to process incoming and outgoing mail; and both are required to perform a variety of office support assignments. What separates the two classifications is the degree of difficulty of assignments and the level of supervision. The Clerk Typists classification is a higher level classification that requires the incumbent to perform more difficult tasks with less supervision.

When Garcia and Sicairos were asked at the hearing whether they performed a specific Clerk Typist job duty, they responded only with a “yes.” They did not provide any detail that would allow one to conclude that they were performing those duties as a Clerk Typist and not as a Clerical Assistant. For example, how were those duties more difficult than what would be required of a Clerical Assistant? Accordingly, for the job duties that explicitly overlap between the two positions, there is insufficient evidence to conclude that Garcia and Sicairos were performing them at the level of a Clerk Typist.

Despite the significant overlap of job duties, there are some Clerk Typists job duties that do not completely align with the Clerical Assistant job description. For example, the

Clerk Typist is required to prepare agendas for meetings and issue and accept applications for permits. These duties require more discretion and autonomy than expected of a Clerical Assistant and are not reasonably related to the existing job duties of that position. Therefore, the assignment of these duties is a matter within the scope of representation.

However, MCEA did not establish that the City made a policy decision to alter the job duties of Clerical Assistants by requiring them to perform some of the duties of Clerk Typists. Again, it is unclear whether the City changed any job duties at all given Garcia and Sicairos' admission that they began performing Clerk Typists duties from the beginning of their employment with the City. There is also insufficient evidence to suggest that any change was more than an isolated breach. Therefore, MCEA has failed to establish that the City implemented an unlawful unilateral change when it required Garcia and Sicairos to perform some of the duties of the Clerk Typist job classification.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. LA-CE-904-M, *Montebello City Employees Association v. City of Montebello*, are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960
E-FILE: PERBe-file.Appeals@perb.ca.gov

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered “filed” when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered “filed” when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)