STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 721, Charging Party, v. COUNTY OF RIVERSIDE, Respondent.	Case No. LA-CE-702-M PERB Decision No. 2573-M June 25, 2018

Appearances: Weinberg, Roger & Rosenfeld, by Alan Crowley, Attorney, for Service Employees International Union, Local 721; The Zappia Law Firm, by Edward P. Zappia and Brett M. Ehman, Attorneys, for County of Riverside.

Before Banks, Winslow and Krantz, Members.

DECISION

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by both parties to a proposed decision (attached) by an administrative law judge (ALJ). The County of Riverside (County) excepts to the ALJ's conclusions that the County violated the Meyers-Milias-Brown Act (MMBA)[1] by: (1) unilaterally changing a past practice of paying shift differentials for time employees were released from their regular duties for collective bargaining and other union activities; and (2) failing to provide released time for collective bargaining without loss of compensation, as required by section 3505.3. Service Employees International Union, Local 721 (SEIU or Local 721) excepts to the ALJ's refusal to consider an allegation that the County denied special assignment pay to Sharon Schilb (Schilb), an employee represented by SEIU.

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

The Board itself has reviewed the administrative hearing record in its entirety and considered the parties' exceptions, cross-exceptions, and responses thereto. Based on this review, we conclude that, except where noted below, the ALJ's factual findings are adequately supported by the evidentiary record and her conclusions of law are well reasoned and in accordance with applicable law. We therefore adopt the proposed decision as the decision of the Board itself as modified and supplemented by the discussion below.[2]

PROCEDURAL HISTORY

SEIU's unfair practice charge was originally dismissed by the Office of the General Counsel for failure to state a prima facie case. On appeal by SEIU, the Board reversed and remanded for issuance of a complaint. (*County of Riverside* (2013) PERB Decision No. 2307-M.)

The County filed a timely answer to the complaint denying the substantive allegations and asserting multiple affirmative defenses. An informal settlement conference was held, but the matter was not resolved.

On December 16, 2013, the ALJ conducted a formal hearing. During the hearing, the ALJ granted SEIU's unopposed motion to amend the complaint to withdraw and add certain allegations. The parties also stipulated to the admission of a number of joint exhibits. This included the entire evidentiary record (transcripts and exhibits) from a two-day advisory arbitration hearing before Arbitrator Walter F. Daugherty. The parties agreed to treat the testimony from that hearing as if it were produced in the PERB hearing. The County also

[2] Along with its exceptions, the County requested oral argument. The Board typically denies such requests when an adequate record has been prepared, the parties had ample opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear as to make oral argument unnecessary. (*Antelope Valley Health Care District* (2006) PERB Decision No. 1816-M; *Arvin Union School District* (1983) PERB Decision No. 300.) Because these criteria are met here, we deny the request for oral argument.

introduced 28 exhibits of its own, without objection from SEIU. Finally, the parties stipulated that if Wendy Thomas (Thomas), an SEIU representative and County employee, were called to testify, she would have said that she was Local 721's lead negotiator in 2011, and that Local 721 member Schilb told her that Schilb could no longer participate on Local 721's bargaining team because she did not receive certain premium pay while in bargaining. The County did not waive any hearsay, relevance, or other objections to this stipulation.

Following the hearing, each party submitted an opening brief and a reply brief. After the ALJ issued the proposed decision, the County filed a timely statement of exceptions, to which SEIU filed a timely response and statement of cross-exceptions.

SUMMARY OF FACTS

The following summary incorporates the ALJ's factual findings, as modified based on our review of the County's exceptions to those findings.

SEIU and the County have historically negotiated a single memorandum of understanding (MOU) that applies to all SEIU-represented bargaining units. The 2010-2011 MOU, which was in effect at the time of the events alleged in this case, contained a grievance procedure culminating in advisory arbitration. It also included the following provisions relevant to this case.

Article 4, Section 3 of the MOU covers various forms of "premium pay," which entitles eligible employees to extra salary based on special assignments or duty. One type of premium pay described in this section is shift differentials. There is a $.60 evening shift differential and a $1.20 night shift differential for time "actually worked" during the specified hours.

Under MOU Article 4, Section 3, subdivision (C), "[s]hift differentials do not apply to vacation, sick leave, holiday pay, call or standby duty." Furthermore, "[e]mployees who work

[*sic*] day shift between the hours of 7:00 a.m. and 6:00 p.m. shall not be entitled to a shift differential." The cited provisions are substantially similar to both prior and subsequent versions of that MOU.

The other type of premium pay at issue in this case is set out in Article 4, Section 3, subdivision (E), of the MOU. That provision describes "Special Assignments" differentials for nursing personnel certified for and assigned to certain specialties, such as the Emergency Room, Operating Room, Neonatal Intensive Care Nursery, or Psychiatry. Under Article 4, Section 3, subdivision (E)(2), employees who possess the required qualifications for the assignment and are "working in the designated units" are eligible for the differential.

Article 31 of the MOU also describes various "Union Rights." Relevant to this case are the released time provisions of Article 31, Section 6. Under this section, Local 721 has what the parties refer to as a "Release Time bank" of time, providing Local 721 with 20 minutes of released time per represented employee per calendar year. Because of the size of Local 721's membership, it had around 2,000 hours in the released time bank annually. According to the MOU, "[t]ime spent training Stewards in the grievance procedure through the providing of release time to prepare for grievances/administrative interviews and Skelly hearings, will be charged to this Article/Section."

The MOU allows Local 721 representatives to take one shift of County-paid released time per month for monthly regional union meetings. There are also provisions for Local 721 executive board members to attend their monthly meetings and for Local 721's president to take full-time leave of absence to perform union functions. Costs for those last two types of time are paid by the County, but reimbursed by Local 721. All subsequent versions of the MOU contain substantially similar provisions. None of the versions of the MOU admitted into

the record specify how released time for negotiations is handled. Nor does any iteration of the MOU expressly discuss whether employees using released time qualify for shift differentials or other premium pay.

The County's Practice Regarding Claiming Shift Differentials

The MOU does not specify how shift differentials are reported to the County. In practice, eligible employees claim shift differentials on their regular timesheets during each two-week payroll period. Until 2010, employees recorded hours worked using the "REG" payroll code and then specified how much of that time qualified for a differential by using payroll code "Z."

Employee timesheets are reviewed by the employee's direct supervisor for accuracy. Timesheets are then separately reviewed by department management and then again by the payroll office, which is part of the County's Human Resources (HR) department. The record showed that HR commonly issued payroll corrections because of errors on timesheets or elsewhere in the process. However, the record also showed that the payroll office had limited capacity to review all timesheets in the short time available to complete payroll processing each pay period.

The County's Practice Regarding Requesting Released Time

Union representatives request released time directly from HR. If a request is granted at that level, HR e-mails the union representative's supervisor for department-level approval. The supervisor then checks to make sure there is no operational need warranting denial. Thomas's June 2009 released time request illustrates how the system operates. She made the request to HR, which approved it and sent an e-mail to Thomas's supervisor, Sheriff's Department Captain Larry Grotefend (Grotefend), stating:

> The above named employee[s] have been approved release time to attend an SEIU Bargaining Task Force Session, [and] if necessary, allow up to one hour of travel time to and from your work location. This meeting is considered a SEIU Bargaining Task Force Session opportunity for the above named employee[s]; therefore there will be no loss in pay to the employee[s]. As an FYI, there should be NO overtime for employee[s] working day shift and then going to the task force meetings. The approval by Human Resources is in accordance with the MOU between the parties.

County HR has sent department supervisors similar e-mail messages with slightly different wording and with the phrase "there will be no loss in pay to the employee[s]" underscored. Once the request is approved by both HR and the Union representative's supervisor, the employee is permitted to use released time for the event. In or around 2009, employees on released time were instructed to record it on their timesheets under the REG code, the same payroll code used for actual hours worked. The payroll office has no role in tracking released time. HR does track released time, primarily for the purposes of determining whether the time should be deducted from the released time bank or whether the time was reimbursable to the County.

The UNSEU Payroll Code

In late 2009 or early 2010, the County created a new payroll code, "UNSEU," for Local 721 representatives to report released time on their timesheets. Local 721 initially opposed use of the code because its purpose was not made clear. Later, during joint labor-management meetings, County representatives explained that the code was intended to track released time via the payroll system in order to reconcile the MOU's released time bank. Under the practice in place at the time, with all released time reported under the REG code, the County was unable to determine from looking at timesheets whether the employee was performing their

regular work duties or using released time. Released time was only tracked manually by HR through reviewing individual requests.

When it introduced the UNSEU code, the County stated that it did not consider the code to be subject to negotiations, because the County did not intend to make any changes to employees' compensation. The subject of shift differentials and other premium pay was not discussed at the time.

SEIU eventually withdrew its opposition to the code, and it was implemented around March 2010. The code was later incorporated into the 2010-2011 MOU. This new MOU language, like that before it, also did not specify whether employees using released time are eligible for shift differentials or other forms of premium pay.

Employees' Use of Released Time and Claims for Shift Differentials in 2009 and 2010

The record includes testimony from two SEIU-represented employees—Thomas and Kevin Luke (Luke)—regarding their claims for shift differentials while released from their regular duties. Vicki Pounders (Pounders), who oversees the payroll process in the Sheriff's Department, also testified.

Pounders explained that each timesheet is reviewed by as many as three people—the employee's supervisor or manager, a timekeeper, and a member of Pounders's staff. Pounders testified that she believed supervisors and managers generally focused their review on overtime reporting, rather than "the intricacies of specialty pays, shift differentials, things like that."[3] Pounders also testified that the timekeeper reviews the timesheet, but "[w]hether they review it for accuracy or just enter what they see is a different matter." Pounders testified that her staff in the Sheriff's Department's payroll unit does review timesheets for accuracy, but due

[3] Thomas—who is herself a supervisor—also testified that supervisors do not receive specific training on payroll reporting.

to limited resources, they were only able to review about half of the more than 4,000 employee timesheets for each pay period during 2010 and 2011.

Pounders further testified it was not her intent to pay shift differentials for employees on released time. She admitted the County had likely done so before 2010, because it was not possible to determine from viewing a timesheet whether an employee claiming a shift differential was on duty or on released time. The only way to do so would have been to compare the timesheet to any requests for released time.

Pounders also testified that shift differentials do not apply when employees take bereavement leave. Thomas agreed.

1. Thomas

At the times relevant to this case, Thomas was employed as a communications supervisor in the County Sheriff's department. Thomas became active in SEIU beginning in 2008. She was one of between 12 and 15 members of SEIU's negotiating team for the 2009-2010 MOU. Thomas testified that she requested and received released time for negotiation sessions whenever the meetings occurred during her regularly scheduled shift. Under the practice described above, HR e-mailed each negotiating team member's supervisor for department-level approval. In Thomas's case, the e-mail was sent to Grotefend.

Thomas testified that she claimed a shift differential whenever she was assigned to a qualifying shift, and was never denied any differentials while using released time during the 2009 negotiations.[4] That is, her claim for shift differentials were paid by the County during this period. Although the parties agreed to new released time provisions during those

[4] Thomas clarified that while on released time, if the bargaining session lasted beyond her scheduled hours of work, she would participate in bargaining from that point on without overtime pay, shift differential, or compensation of any kind.

negotiations, the parties did not discuss whether employees using released time qualify for shift differentials or other premium pay. Thomas said that she believed other SEIU negotiators also were paid differentials during this time, but there was no evidence to what extent SEIU's negotiators qualified for or claimed shift differentials and to what extent those individuals notified Thomas of whether they were paid for such differentials. Thomas reported only that no one informed her that they had not been paid appropriate shift differentials. Thomas noted that she and the other bargaining team members frequently talked about issues related to released time. Thomas also testified to claiming a shift differential for released time for Union education and training activities, labor-management committee meetings, and grievance representation during 2009, provided her released time corresponded to a shift that would otherwise qualify for the differential pay. The County also paid these claims.

In 2010, Thomas was mostly scheduled for the day shift. She testified, however, that she continued claiming shift differentials for part of her shift so long as her shift included hours described in the shift differential provisions of the MOU. For instance, although she worked daytime hours in 2010, she was frequently assigned to work from 6:00 a.m. to 4:30 p.m. On those occasions, Thomas claimed and was paid one and a half hours of shift differential for the hours between 6:00 a.m. and 7:30 a.m.

Thomas also described a trip to Washington D.C. in March 2010 for Union training, for which the County granted her released time. Thomas was released from six of her shifts, two of which qualified for a shift differential. She claimed shift differentials for those two eligible shifts during her released time, and the County paid them.[5]

[5] Thomas also described other Union education/training activities for which she requested and received released time, and claimed and was paid shift differentials in 2010.

Thomas was also involved in successor MOU negotiations in 2010. She said that she used released time to participate in those negotiations and that she claimed a shift differential anytime she was assigned a 6:00 a.m. to 4:30 p.m. shift. Thomas said that the County paid for her claimed shift differentials throughout 2010, even when she was using released time.

Thomas's testimony is corroborated by her payroll records. Between April 2010, when Thomas began using the UNSEU code, through January 2011, these documents show nine instances where she claimed a shift differential for a period of time she also claimed to have been granted released time. All of those instances were when Thomas was working a day shift from 6 a.m. to 4:30 p.m., and she generally claimed 1.5 hours of night shift differential for the hours between 6 a.m. and 7:30 a.m.[6] She did so without incident on July 15 and August 24, 2010.

Thomas then claimed the 1.5 hour shift differential for August 30-31 and September 1, 2010. Pounders questioned this in an e-mail to other County staff, noting that Thomas had been released for a union training scheduled from 8 a.m. to 5 p.m. each of those days, that she stated she worked from 6 a.m. to 4:30 p.m., and that she claimed 1.5 hours of shift differential. Pounders asked, "Is this acceptable?" William Berkley (Berkley), of the County's human resources department, responded that the County's position was that employees were not entitled to a shift differential for those hours because they came at the beginning of the day shift. Berkley added: "If it has been paid in the past—it was a mistake and should not be done going forward. Nor should retroactive corrections be made as the matter has only recently been the subject of much debate." Berkley did not address the issue of Thomas being on released time for those shifts.

[6] On August 24, she claimed 3.5 hours. It is not clear why from the timesheet, and Thomas did not testify about these specific instances.

There is no evidence that the County communicated this position to SEIU or any employees, including Thomas. Despite this exchange between Pounders and Berkley, Thomas continued to claim the 1.5 hours of shift differential when her day shift began at 6 a.m., regardless of whether she worked or was released. She claimed the differential for these hours 65 times between October 2010 and January 2011, including four times (October 6, October 13, November 10, 2010, and January 20, 2011) when she was released from her entire shift. Thomas's pay stubs for October 6, November 10, 2010, and January 20, 2011 are in evidence, and show that she received her shift differentials for those dates.

Thomas next claimed shift differentials for time she was released on February 15 and February 20, 2011. In both instances, she was scheduled to work night shifts. Those shift differentials were not paid.

2. Luke

Luke was employed by the County Department of Public Social Services. Luke was on SEIU's bargaining team in 2009 and 2010. Until July 2010, Luke worked shifts on Friday, Saturday, and Sunday that qualified him for a shift differential. Luke testified that on two or three occasions during this time period, he was granted released time for negotiations or union education activities and claimed the shift differential. Luke admitted that he never examined his pay warrants to confirm that he received his claimed shift differentials, but did not recall ever being informed that a shift differential had been denied. Luke's timesheets do not show any instances where he used the UNSEU code and claimed a shift differential. There was also

at least one instance when it appears Luke was eligible for shift differential while on released time, but did not claim the differential on his timesheet.[7]

3. Other Employees

The record includes the timesheets of employees Marlo Clemons (Clemons), a registered nurse, and Danny de la Pena (de la Pena), a respiratory care practitioner. There was no evidence—testimonial or otherwise—that either of these individuals were SEIU representatives, but their timesheets show several instances where they claimed shift differentials while on released time reported using the UNSEU time code. De la Pena used the UNSEU code to show he was released from his entire shifts on January 20 and May 17, 2011, and claimed shift differentials both days.[8] Clemons was similarly released from her entire shift on January 20, April 14, April 20, and June 7, 2011. Clemons also claimed a shift differential on October 28, 2010, a date on which she received released time for her entire shift, but did not use the UNSEU code on her timesheet. Each timesheet is signed by a supervisor under penalty of perjury, but there is no evidence whether the shift differentials were paid to the employees.[9]

Documentation also showed that another employee, Dolores Gonzalez (Gonzalez), a registered nurse, claimed a shift differential for time spent on released time for union training on December 7, 2010, using the UNSEU time code. This differential was apparently removed

[7]Specifically, Luke's timesheet indicated 12 hours of released time each day on Friday June 4, Saturday June 5, and Sunday June 6, 2010, with no shift differentials. His other timesheets show that on days he did not use the UNSEU code, he typically claimed the shift differential for parts of those shifts.

[8] Shift differentials claimed on May 25 and May 26, 2011, which were shifts de la Pena was released for negotiations, are crossed out.

[9] The County claims that Clemons failed to claim a shift differential twice when she was released for bargaining, but it is not clear that Clemons would have been entitled to it under SEIU's version of the past practice. On both occasions, Clemons worked her regular shift the following day and did not claim a shift differential.

by a human resources technician who stated in an e-mail that Gonzalez was not eligible for the differential "while in training."

The record also includes a chart, introduced by the County, concerning the released time taken for an employee, Mark Grays (Grays), during negotiations in 2010. The chart identifies three instances where Grays was released from his night shift to participate in negotiations, but states that he did not claim any "specialty pay." Thomas identified Grays as a member of SEIU's bargaining team in 2010 who may have been eligible for shift differentials.

The 2011 Negotiations

Thomas was Local 721's chief negotiator in the 2011 successor MOU negotiations, which began in January of that year. She was assigned to the graveyard shift for at least part of that year. According to Thomas, because she was assigned to work hours between 11:00 p.m. and 7:30 a.m., the assignment qualified for a night shift differential under the MOU. Although negotiations were typically scheduled for daytime hours—when Thomas was not scheduled to work—she requested and received released time for the shift before each negotiation session because she would be otherwise unable to rest between working and participating in bargaining. Thomas also claimed a night shift differential for released time used in 2011. In January 2011, the County paid Thomas's claimed shift differentials, even on days when she was using released time. Luke also participated on the Union's negotiating team in 2011. However, during that time Luke was not assigned to a shift eligible for differential pay; thus, he did not claim any shift differential during his released time for negotiations in 2011.

In February 2011, during successor MOU negotiations, the County stopped paying shift differentials for employees using released time. According to Thomas, in a negotiation session around that time, County Employee Relations Director Brian McArthur, informed Local 721

that "they didn't intend to pay them" and that "[t]hey weren't going to pay shift differential for Union time." Thomas inquired about this with her supervisor, Grotefend. In an e-mail, dated March 15, 2011, Grotefend explained that he received direction from HR that '"the County's position is that employees off work for union release time are not eligible to receive any [shift differential pay]."' On May 25, 2011, County HR representative Cherie Pearson confirmed that Thomas's shift differentials claimed for time reported under the UNSEU code were removed.

Before March 2011, HR's notifications to department supervisors of approved released time requests noted that "there will be no loss in pay to the employee[s]." After March 2011, some of HR's released time notifications to departments stated, "there will be no loss in *regular* compensation," although some continued to use the "no loss in pay" language. (Emphasis added.)

On March 15, 2011, the County passed a proposal across the negotiating table that expressly listed released time among the other forms of leave ineligible for shift differentials. Local 721 rejected that proposal. Local 721 proposed modifying the shift differential provisions in the MOU to expressly require employees to be paid for shift differentials while taking released time if the shifts otherwise qualified for a differential. The County rejected that position. Both proposals were ultimately withdrawn before the parties ratified their successor MOU.

Advisory Arbitration Decisions Regarding Premium Pay

Local 721 filed multiple grievances over union representatives who were denied claimed premium pay while using released time. On January 23, 2012, Arbitrator Jill Klein (Klein) ruled on a grievance involving Schilb, a Licensed Vocational Nurse II. Klein concluded that Schilb was not entitled to a "specialty assignment" differential while using released time for bargaining because the plain language of the MOU in effect at the time required that Schilb be "working in the designated units" identified as qualifying for specialty assignment differential.

On October 1, 2012, Arbitrator Walter Daugherty issued an advisory decision finding that that the County violated an established past practice regarding the payment of shift differentials by rejecting various claims by Thomas in 2011. Both the Klein and the Daugherty decisions expressly declined to reach the issue of whether the denial of differentials violated MMBA section 3505.3.

DISCUSSION

I. The Unalleged Violation

SEIU's sole exception is to the ALJ's dismissal of the unalleged violation regarding Schilb. The ALJ determined that PERB's unalleged violation test was not met in this case, finding that the issue was not "actually litigated" and that the County had no opportunity to cross-examine witnesses on it. The only evidence on this issue was an advisory arbitration decision and a stipulation that Thomas would testify to a statement made to her by Schilb regarding Schilb's unwillingness to participate in negotiations.

We need not address whether the unalleged violation test was satisfied, because the allegations regarding Schilb are untimely. When the unalleged violation arises from the same

facts as the allegations in the complaint, the unalleged violation is timely. (*City of Roseville* (2016) PERB Decision No. 2505-M, p. 28.) When the unalleged violation is a matter that was alleged in the unfair practice charge but omitted from the complaint, the unalleged violation is timely if the charge was timely filed. (*Fresno County Superior Court* (2008) PERB Decision No. 1942-C, p. 14.)

The unalleged violation in this case does not arise from the same facts as the allegations in the complaint. According to the advisory arbitration decision, Schilb was informed in March 2010 that she would no longer receive special premium pay while on released time for negotiations. The complaint in this case alleges that the County began denying shift differentials and special premium pay a year later—in March 2011.

Nor was the unalleged violation included in the unfair practice charge. Neither the original charge nor the amended charge includes any reference to Schilb or any denial of compensation in 2010. Therefore, the timeliness of the allegation regarding Schilb must be established separately from the allegations included in the charge and complaint.

The Schilb matter concluded with the advisory arbitration decision, dated January 23, 2012. The earliest mention of Schilb in this case occurred at the formal hearing on December 16, 2013. There, SEIU's attorney stated that the requested make whole remedy would not only include those individuals who were denied shift differentials and special pay premiums in March 2011, but would also "go back a bit further to one of the particular individuals named Ms. Schilb." Although SEIU argues for the application of equitable tolling, this would apply only to the period of time while the matter was pending in advisory arbitration. (*County of Santa Barbara* (2012) PERB Decision No. 2279-M, p. 12.) SEIU has not offered any basis for tolling the statute of limitations from January 23, 2012 through

December 16, 2013. Therefore, we affirm the dismissal of this allegation on the grounds that it is untimely.

II. The Unilateral Change

The ALJ concluded that the County unilaterally changed a past practice of paying shift differentials to employees on released time. In the process, the ALJ rejected the County's arguments that past practice could not be examined because the MOU was clear and unambiguous. The County excepts to these threshold determinations, as well as the ultimate conclusion that there was a binding past practice.[10] We disagree with the County's exceptions on each point and affirm the ALJ.

Whether the MOU is Clear and Unambiguous

In our previous decision in this case, we rejected the County's argument that the MOU's shift differential provisions were clear and unambiguous. Although we acknowledged that the shift differentials are to be paid for hours "actually worked," we noted that there is a specific provision enumerating the types of leave to which shift differentials do not apply. (*County of Riverside*, *supra*, PERB Decision No. 2307-M, p. 22-23.) That provision states that "[s]hift differentials do not apply to vacation, sick leave, holiday pay, call or standby duty"—thus omitting any type of union released time. We further noted that:

> [U]nion released time is of a categorically different nature of paid time than vacation, sick leave, holiday pay, call or standby duty. Employees on union released time are physically at the worksite, but have been released from their regularly assigned duties by the County for a designated period of time. They are not at home, on vacation or otherwise free to attend to personal or other non-work related business.

[10] The ALJ also rejected the County's argument that the MOU's zipper clause precludes consideration of the alleged past practice. The County did not renew this argument in its exceptions, and it is not before us. (PERB Reg. 32300, subd. (c) [PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.].)

(*Id.* at p. 23.) Therefore, we concluded that the MOU was "silent, or at best sufficiently ambiguous, on the question whether employees are entitled to their full wages including shift differentials or special pay premiums when utilizing union released time." (*Id.* at p. 25.)

In support of its argument that the MOU is clear and unambiguous, the County argues that the list of exclusions "cannot have been regarded as exhaustive by either side, as it omits reference to several types of leave, including bereavement leave, comp time, jury duty and [Family and Medical Leave Act] hours, not just union release time," and Thomas acknowledged that shift differentials do not apply to bereavement leave. (Exceptions, p. 5.)[11] Rather than compelling a finding that the MOU is clear and unambiguous, the fact that the list of exclusions was not intended to be exhaustive simply means the MOU is *also* silent on whether shift differentials apply to these other types of leave. Moreover, since bereavement leave falls within the same general category as vacation, sick leave, and holiday pay, the fact that shift differentials do not apply to bereavement leave does not assist the County.

Therefore, we find no basis to disturb our conclusion in *County of Riverside, supra*, PERB Decision No. 2307-M, that the MOU is not clear and unambiguous. We next examine whether the evidence presented established a past practice.

The Test for Past Practice

In our prior decision in this case, we summarized the various ways the Board has described the standard for establishing a past practice:

> The Board has stated that it must be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. (*County of Placer* (2004) PERB

[11] The County does not cite any evidence regarding whether shift differentials apply to the other types of leave listed.

> Decision No. 1630-M, citing *Hacienda La Puente Unified School District* (1997) PERB Decision No. 1186; see also *Riverside Sheriffs' Assn. v. County of Riverside* (2003) 106 Cal.App.4th 1285, 1291.) In addition, PERB has described an enforceable past practice as one that is "regular and consistent" or "historic and accepted." (*Hacienda La Puente Unified School District*, *supra*, PERB Decision No. 1186.) PERB has also held that a past practice is established through a course of conduct or as a way of doing things over an extended period of time. (*Pajaro Valley Unified School District* (1978) PERB Decision No. 51 (*Pajaro Valley*); *Cajon Valley Union School District* (1995) PERB Decision No. 1085.)

(*County of Riverside*, *supra*, PERB Decision No. 2307-M, p. 20.)

There is no dispute in this case that employees claimed and received shift differentials consistently over a period of several years. However, the County advances several arguments for why this fact does not support a binding past practice.

The County argues that any past practice is undermined by the apparent failure of some employees to claim shift differentials to which they would have been entitled under the asserted past practice. There is evidence that Luke failed to do so on one timesheet. The County also points to a chart regarding Grays, which the ALJ refused to rely on to make a finding of fact. The ALJ found the Grays chart to be uncorroborated hearsay, and the ALJ therefore applied PERB Regulation 32176, which provides that hearsay evidence "is admissible but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." In its exceptions, the County relies on the parties' stipulation that the Grays chart is admissible. We decline to decide whether the ALJ erred in her evidentiary ruling, as any such error would not change the outcome of this case and was therefore non-prejudicial. Even viewing the Grays chart in the light most favorable to the County, and adding in the isolated other instances in which the County may have declined to

pay shift differentials to employees on released time, such evidence would not undermine the finding of a past practice.

The Grays chart lists the dates Grays was released to participate in negotiations, and recites "no specialty pay" for dates when he was released from the night shift. The chart would establish that there were at most three instances, each appearing on a different timesheet, where Grays was released from a night shift for purposes of bargaining but did not receive "specialty pay." Along with Luke, then, there were four timesheets that were incorrect according to the past practice asserted by SEIU. The County claims that if such a practice had existed, the County would have noticed and corrected the failure to claim the differentials when the employees' timesheets were audited by the payroll unit. This argument is unpersuasive. The instances where a claim was paid far outnumber the few instances where no claim was made. "A practice need not be universal to constitute a term or condition of employment, as long as it is regular and longstanding." (*Sunoco, Inc.* (2007) 349 NLRB 240, 244.)

We also reject the County's reliance on evidence that a shift differential was removed from Gonzalez's timesheet for a shift where she was released for union training. The County claims that this is evidence of a policy of not paying shift differentials. It is, however, hardly conclusive. This is the only instance of a shift differential being removed from an employee's timesheet prior to the alleged unilateral change. Just as a single instance is not sufficient to create a past practice (*Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, p. 27), a single instance in which a past practice was not followed is not sufficient to defeat the past practice (*Sunoco, Inc.*, *supra*, 349 NLRB 240, 244).

We also reject the County's argument that it was not aware of the asserted past practice. A significant aspect of the burden of establishing a clear and unequivocal past practice is showing that the other party was aware of it. Thus, when there is no evidence that the employer's representatives have knowledge of a past practice, the Board does not find it to be binding. For instance, in *County of San Joaquin* (2016) PERB Decision No. 2490-M, the ALJ found that a past practice concerning employee schedules was not binding where it was not known to anyone other than the lead employee, who had no authority to change employee schedules. We affirmed. Similarly, the Board found no binding practice in *Omnitrans* (2008) PERB Decision No. 1996-M, in which the union alleged there was a past practice of allowing employees to use union business leave to organize and negotiate for employees of another employer. There was no evidence that the employer was ever told that this was the purpose of the leave. By contrast, in *Omnitrans* (2009) PERB Decision No. 2030-M, the Board found a binding practice where there was evidence that union representatives were openly conducting union business in a particular area of the employer's facilities, and the managers' denials that they were aware of this were not credible.

The record before us contains sufficient evidence that County officials were aware that employees received shift differentials for times they were released from their duties for union activities. There was undisputed evidence that supervisors and managers were aware of the times employees were released and of the times employees claimed shift differentials. Before March 2010, this awareness came from the fact that the supervisors and managers approved the released time and then later approved the timesheets. And after the UNSEU code was implemented in March 2010, the fact that employees were claiming shift differentials while on released time would have been evident from reviewing the timesheets alone.

The County argues that its supervisors and managers cannot be held to have been aware of these claims of shift differentials. The County relies on Pounders's testimony that she did not believe the supervisors and managers were checking for this issue, and on Thomas's testimony that supervisors were not trained on payroll reporting. There are two problems with this argument. First, there was no testimony from the supervisors or managers who approved the timesheets in question. Pounders' belief about what those individuals were aware of is not probative, while Thomas's testimony that they did not receive training does not answer the question of what the supervisors or managers knew. Second, since the supervisors or managers signed the relevant timesheets, it is presumed that they were familiar with the contents of those documents, regardless of whether they actually reviewed the timesheet or were aware of the legal significance of its contents.[12] It is possible that no single County official was personally aware of the numerous instances making up the past practice in this case. However, as we held in *County of Riverside*, *supra*, PERB Decision No. 2307-M, the County had "the responsibility as a public employer, to be cognizant at all times of how it pays its employees and what it pays its employees for." (*Id*. at p. 28.) The County may not defeat the creation of a binding past practice by failing to train its managers and supervisors or by failing to devote adequate resources to auditing employee timesheets.

We also reject the County's argument that the past practice is not binding because the shift differential payments over several years were a mistake. Preliminarily, there is no

[12] There was also undisputed evidence that Pounders personally was aware of at least one instance when Thomas claimed a shift differential while on released time. Pounders brought this to the attention of other County representatives. While the conclusion of these internal discussions was that the payment was improper—for reasons entirely unrelated to union released time—there is no indication that the County took further action to investigate whether there were other instances of shift differentials on released time, nor does it appear that the County even informed Thomas of its position at that time.

evidence to support this argument. There is evidence of inconsistency, and there is evidence of inattention and lack of resources. But the payments were not contrary to the MOU's shift differential provisions, which do not state whether they apply to released time. Nor were they contrary to any other County policy that is in evidence. The only support for the argument that the payments were a mistake is the testimony of Pounders, who did nothing more than deny that it was her intent to pay shift differentials for released time.[13] This does not reflect an affirmative policy that shift differentials would not be paid for released time. Thus, it appears that in the absence of a clear policy, a practice developed by which employees claimed shift differentials while on released time, and the County did not object. This merely describes one of the ways a past practice may originate in the first place—to fill a gap where there is no policy or the policy is unclear—not a "mistake."

Even if there were evidence that the County's actions over several years were nothing more than a mistake, this would not excuse a unilateral change to an otherwise enforceable past practice. Except where a past practice conflicts with an MOU's clear and unambiguous terms (*Marysville Joint Unified School District* (1983) PERB Decision No. 314), past practices are neither less binding nor less important than the terms of an MOU (*San Francisco Fire Fighters Local 798 v. Board of Supervisors* (1992) 3 Cal.App.4th 1482, 1490 ["Changes in existing and acknowledged practices are subject to the meet and confer requirement, even if those practices are not formalized in a written agreement or rule"]). Ensuring that past practices are binding benefits both parties in a bargaining relationship. While a union may, as in this case, attempt to show a unilateral change to a past practice, an employer may also rely on a past practice as a defense to a unilateral change allegation. (See, e.g., *Salinas Valley*

[13] According to the transcript, Pounders was asked, "Was it your intent to pay employees shift differential pay for Union release time?" She responded, "No."

Memorial HealthCare System (2017) PERB Decision No. 2524-M, p. 20 [no unilateral change where employer's actions were consistent with past practice developed with prior exclusive representative]; *Temple City Unified School District* (1989) PERB Decision No. 782, p. 14 [no unilateral change where exclusive representative "acquiesced to the development of [the] past practice"].)

We also take guidance from decisions of the National Labor Relations Board (NLRB), which have held that a past practice may be found even where the employer's actions were indisputably the result of a mistake. (*Garden Grove Hosp. & Med. Ctr.* (2011) 357 NLRB 653, 658.) The NLRB has held that benefits that were initially granted by mistake become binding past practices when maintained over a sufficient period of time. (See, e.g., *ibid.* [practice maintained for 9 months]; *Strategic Res., Inc.* (2016) 364 NLRB No. 42 [6 months].)[14] The County may not evade a finding of a past practice by failing to train its supervisors and managers, failing to review the information available to it, and then describing their actions as "mistakes."

[14] Indeed, the facts of this case demonstrate that requiring an employer to meet and confer in good faith before terminating a past practice believed to have developed by mistake is hardly an oppressive burden. The County did in fact propose successor MOU language that would have clarified that shift differentials were not available for released time; it then withdrew that proposal.

Moreover, in most cases, nothing would prevent an employer from implementing a change in the past practice after bargaining in good faith to impasse and exhausting statutory impasse procedures. This option was available to the County, at least as to released time that is not mandated by MMBA section 3505.3. As we explained in *County of Riverside, supra*, PERB Decision No. 2307-M, and reiterate below, section 3505.3 gives recognized employee organizations a statutory right to released time for specified purposes. The County could not have imposed a limitation of that right. (*Rowland Unified School District* (1994) PERB Decision No. 1053, p. 7, fn. 5.)

III. Violation of MMBA Section 3505.3

The County also excepts to the ALJ's conclusion that the County violated MMBA section 3505.3 by failing to pay shift differentials to employees who were on released time during times outside of their qualifying shifts. Because the ALJ followed our interpretation of this section from *County of Riverside*, *supra*, PERB Decision No. 2307-M, the County urges us to overrule that decision. We considered the interpretation of section 3505.3 extensively in that decision, and the County offers no persuasive reason to depart from it. We therefore decline to do so.

At the time of the events at issue in this case, MMBA section 3505.3 stated:

> Public agencies shall allow a reasonable number of public agency employee representatives of recognized employee organizations reasonable time off without loss of compensation or other benefits when formally meeting and conferring with representatives of the public agency on matters within the scope of representation.

Effective January 1, 2014, section 3505.3 was amended to expand the purposes for which an employer must grant released time without loss of compensation, but with no substantive changes to the language relevant to this case. (Stats. 2013, ch. 305.)[15]

[15] MMBA section 3505.3 now states:

> (a) Public agencies shall allow a reasonable number of public agency employee representatives of recognized employee organizations reasonable time off without loss of compensation or other benefits when they are participating in any one of the following activities:
>
> (1) Formally meeting and conferring with representatives of the public agency on matters within the scope of representation.
>
> (2) Testifying or appearing as the designated representative of the employee organization in conferences, hearings, or other proceedings before the board, or an agent thereof, in matters

In *County of Riverside*, *supra*, PERB Decision No. 2307-M, we held that MMBA section 3505.3 entitles employees to the same compensation they would have otherwise earned if they had not been released for bargaining. We stated:

> The Board has described the right to released time as the right of an employee "to continue to receive full compensation." (*Anaheim [Union High] School District* [(1981)] PERB Decision No. 177, emphasis added.) With this description in mind, we construe "loss" within the meaning of MMBA section 3505.3 as measured against the amount of pay the employee would have earned if the employee had not been "formally meeting and conferring with representatives of the public agency on matters within the scope of representation." To construe it otherwise would exact a penalty on employees for engaging in formal negotiations, and create a chilling effect on the exercise of protected employee rights, i.e., participation in organizational activities.

(*Id.* at pp. 32-33, fn. omitted.) Thus, we concluded that SEIU stated a prima facie case by alleging that the County failed to pay employees the shift differentials and specialty payments they would have received if they had worked their normal shifts, instead of being released for bargaining. (*Id.* at p. 33.)

> relating to a charge filed by the employee organization against the public agency or by the public agency against the employee organization.
>
> (3) Testifying or appearing as the designated representative of the employee organization in matters before a personnel or merit commission.
>
> (b) The employee organization being represented shall provide reasonable notification to the employer requesting a leave of absence without loss of compensation pursuant to subdivision (a).
>
> (c) For the purposes of this section, "designated representative" means an officer of the employee organization or a member serving in proxy of the employee organization.

In accordance with this decision, the ALJ found a violation of MMBA section 3505.3 when the County announced its refusal to pay employees their shift differentials. In its exceptions, the County does not dispute that, as a factual matter, it began to refuse to pay employees their shift differentials in February 2011. It raises essentially three legal arguments for why our interpretation of section 3505.3 was wrong. None has merit.

First, the County argues that the ALJ was not bound by our prior decision because the existence of a past practice was a factual matter for the ALJ to determine. In the absence of a past practice, the County argues, there was no violation of MMBA section 3505.3. Although not clearly articulated, the County's argument seems to be that a "loss of compensation" occurs only if the employer has a past practice of paying the shift differentials *for released time*.

Because we have affirmed the ALJ's finding that there was a past practice, the County's argument on this point is moot. Nevertheless, we explain why the statutory violation is not dependent on whether there is a past practice.

Our reading of MMBA section 3505.3 is that the "loss of compensation" is measured against what the employee would have received if he or she had not been released for bargaining, not what the employee has previously received during bargaining. To hold otherwise would interpret section 3505.3 as doing nothing more than preventing the County from changing how it compensates employees on released time. As we noted previously, however, to construe the term "loss" otherwise "would exact a penalty on employees for engaging in formal negotiations. . . ." (*County of Riverside*, *supra*, PERB Decision No. 2307-M, p. 32.) We reiterate that we do not believe that was the Legislature's intent in enacting section 3505.3.

Second, the County urges us to abandon our interpretation of MMBA section 3505.3 from *County of Riverside, supra*, PERB Decision No. 2307-M and instead follow a purportedly contrary statement by a federal district court. The particular statement relied on by the County is that section 3505.3 "requires only that employee union representatives be compensated for time spent in negotiations during their regularly scheduled work hours." (*Local 1605 Amalgamated Transit Union, AFL-CIO v. Central Contra Costa County Transit Authority* (N.D. Cal. 1999) 73 F.Supp.2d 1117, 1125 (*Local 1605*).)

Before the ALJ, the County argued that *Local 1605, supra*, 73 F.Supp.2d 1117 was "binding precedent." The ALJ rejected this argument on three grounds: first, that the statement was actually dicta, since the federal court ultimately declined to consider whether there had been a violation of section 3505.3 (*Local 1605, supra*, at p. 1126); second, that federal decisions are not binding on questions of state law; and third, that trial court decisions are never considered binding precedent. The County does not dispute that the ALJ properly rejected the argument that *Local 1605* was binding precedent, but now argues that *Local 1605* should be followed as persuasive authority.

We disagree that the federal court's decision is persuasive authority on the question before us. This is primarily because the County is quoting the court out of context. Immediately before the statement the County relies on, the court explained that the employer "had paid Plaintiffs [i.e., the union's negotiators] for all time spent in negotiations, including overtime hours and hours spent negotiating during Plaintiffs' days off." (*Local 1605, supra,* 73 F.Supp.2d 1117, 1125.) It then states: "Such compensation was not within the mandate of § 3505.3 of the MMBA, which requires only that employee union representatives be

compensated for time spent in negotiations during their regularly scheduled work hours." (*Ibid.*)

Thus, the federal court was considering, offhandedly, whether MMBA section 3505.3 required an employer to compensate employees for overtime and time spent negotiating on their days off. We are faced with a different question: whether employees who are released from their regular job duties for bargaining must receive the same pay they would have received had they worked their regular shift. *Local 1605, supra,* 73 F.Supp.2d 1117 was not considering this question, so it is not persuasive authority.

Finally, the County argues that it would be a gift of public funds to pay an employee a shift differential for a shift they did not work. Gifts of public funds are a constitutional issue, as they are prohibited by article XVI, section 6 of the California Constitution. We consider this argument to avoid any conflict between the Constitution and our interpretation of MMBA section 3505.3. (*Cumero v. Public Employment Relations Bd.* (1989) 49 Cal.3d 575, 583.)

We perceive no conflict here. It is well settled that "[m]oney spent for public purposes is not a gift even though private persons may benefit." (*Community Memorial Hospital v. County of Ventura* (1996) 50 Cal.App. 4th 199, 207.) As we explained in *County of Riverside*:

> our interpretation of MMBA section 3505.3 is consistent with the underlying public policy embodied in the MMBA to "promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations." (§ 3500, subd. (a).) This policy is not served by a compensation system that deters employees from engaging in collective bargaining.

(*County of Riverside, supra,* PERB Decision No. 2307-M, p. 33.) Thus, our interpretation of section 3505.3 advances the very same purposes as the MMBA itself. Those purposes are

unquestionably public purposes. Moreover, benefits and pay for public employees are also considered to advance public purposes. (*Sturgeon v. County of Los Angeles* (2008) 167 Cal.App.4th 630, 638.) Therefore, our interpretation of the MMBA does not result in a gift of public funds.

ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, it has been found that the County of Riverside (County) violated the Meyers-Milias-Brown Act (MMBA) sections 3503, 3505, 3505.3, 3506, and 3506.5, subdivisions (a), (b), and (c), and therefore committed unfair practices under MMBA section 3509, subdivision (b), and Public Employment Relations Board (PERB or Board) Regulation 32603, subdivisions (a), (b), (c), when it: (1) unilaterally ceased paying employees' qualified claims for shift differentials during approved released time for negotiations or other union activities; and (2) failed to pay employees their full compensation or other benefits during approved released time for formal meeting and conferring with representatives of the County over matters within the scope of representation.

Under MMBA section 3509, subdivision (b), it is hereby ORDERED that the County, its governing body, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to provide notice and opportunity to bargain to Service Employees International Union, Local 721 (Local 721) over decisions to cease paying employees' claims for shift differentials during approved released time for negotiations or other union activities.

2. Failing to pay employees on approved released time for formal meeting and conferring with representatives of the County over matters within the scope of representation their full compensation or other benefits.

3. Interfering with Local 721's right to represent bargaining unit members in their employment relations with the County.

4. Interfering with bargaining unit members' right to participate in the activities of an employee organization.

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

1. Rescind the policy change regarding payment of employees' claims for shift differentials during approved released time for negotiations or other union activities, and revert to the established practice in place before March 1, 2011, of paying those claims.

2. Make whole unit employees for financial losses suffered as a result of the County's unlawful action. Any employees who, but for their participation in negotiations or other union activities while on approved released time, would have qualified for a shift differential, have suffered a financial loss. Any employees on approved released time for formal meeting and conferring with representatives of the County over matters within the scope of representation who were not paid their full compensation or other benefits have suffered a financial loss. Any financial losses shall be augmented with interest at a rate of 7 percent per annum.

3. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations in the County where notices to employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the County, indicating that the County will comply with the terms of this

Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that this Notice is not reduced in size, altered, defaced, or covered with any other material. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the County to communicate with its employees in the bargaining units represented by Local 721.

4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of PERB, or to the General Counsel's designee. The County shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on Local 721.

Members Banks and Krantz joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. LA-CE-702-M, *Service Employees International Union, Local 721 v. County of Riverside*, in which all parties had the right to participate, it has been found that the County of Riverside (County) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq.

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

A. CEASE AND DESIST FROM:

1. Failing and refusing to provide notice and opportunity to bargain to Service Employees International Union, Local 721 (Local 721) over decisions to cease paying employees' claims for shift differentials during approved released time for negotiations or other union activities.

2. Failing to pay employees on approved released time for formal meeting and conferring with representatives of the County over matters within the scope of representation their full compensation or other benefits.

3. Interfering with Local 721's right to represent bargaining unit members in their employment relations with the County.

4. Interfering with bargaining unit members' right to participate in the activities of an employee organization.

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

1. Rescind the policy change regarding payment of employees' claims for shift differentials during approved released time for negotiations or other union activities, and revert to the established practice in place before March 1, 2011, of paying those claims.

2. Make whole unit employees for financial losses suffered as a result of the County's unlawful action. Any employees who, but for their participation in negotiations or other union activities while on approved released time, would have qualified for a shift differential, have suffered a financial loss. Any employees on approved released time for formal meeting and conferring with representatives of the County over matters within the scope of representation who were not paid their full compensation or other benefits have suffered a financial loss. Any financial losses shall be augmented with interest at a rate of 7 percent per annum.

Dated: _____ THE COUNTY OF RIVERSIDE

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 721, Charging Party, v. COUNTY OF RIVERSIDE, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-702-M PROPOSED DECISION (November 30, 2015)

Appearances: Weinberg, Roger & Rosenfeld, by Alan Crowley, Attorney, for Service Employees International Union, Local 721; The Zappia Law Firm, by Edward P. Zappia and Brett M. Ehman, Attorneys, for County of Riverside.

Before Valerie Pike Racho, Administrative Law Judge.

INTRODUCTION

In this case, an exclusive representative alleges that a public agency violated the Meyers-Milias-Brown Act (MMBA) and PERB Regulations by unilaterally changing policies for compensating union representatives who were released from their duties to participate in collective bargaining or other union activities.[1] The exclusive representative further alleges that the public agency violated MMBA section 3505.3, which mandates that employees released from duty to participate in formal meet and confer sessions with the public agency shall suffer no "loss of compensation or other benefits." The public agency denies any violation of statute or regulation.

[1] The MMBA is codified at Government Code section 3500 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

PROCEDURAL HISTORY

On June 28, 2011, Service Employees International Union, Local 721 (Local 721 or Union) filed an unfair practice charge with Public Employment Relations Board (PERB or Board), alleging that the County of Riverside (County) unilaterally changed a long-standing practice of paying union representatives their full wages, including any shift differentials, when employees were released from duty for negotiations. Local 721 subsequently amended the charge to more broadly allege a change to policies concerning paying shift differentials and premium pay for any type of "union release time," not only that for negotiations.[2]

On April 10, 2012, the PERB Office of the General Counsel (PERB OCG) dismissed the charge in its entirety for failure to state a prima facie case. PERB OGC further determined that the newly amended allegations were untimely. Local 721 filed exceptions to the dismissal on May 4, 2012.

On March 1, 2013, the Board issued *County of Riverside* (2013) PERB Decision No. 2307-M (Decision No. 2307-M),[3] which reversed the dismissal of the unfair practice charge and directed that a complaint issue alleging both a unilateral change to release time policies and a denial of rights under MMBA section 3505.3. (*Id*. at pp. 33-34.) In doing so, the Board found that the claims determined by PERB OGC to have occurred outside the statute of limitations period were in fact timely under the equitable tolling doctrine. (*Id*. at pp. 16-17.)

On April 5, 2013, PERB OGC issued a complaint in the case. Consistent with the Board's order, the complaint alleged a unilateral change to existing release time policy. The

[2] The parties use the phrase "release time" to discuss any time that an employee is released from his or her regular duties by the County to participate in either formal negotiations or other union-related activities under both contractual and statutory obligations.

[3] Decision No. 2307-M was precedential. (See PERB Regulation 32320, subd. (c).)

complaint further alleged that the County unlawfully denied Local 721 representatives release time on April 25, 2011, and again on June 9, 2011. The complaint did not assert the County's alleged changes to release time policies violated MMBA section 3505.3.

On May 8, 2013, the County filed an answer to the complaint, denying the substantive allegations and asserting multiple affirmative defenses. An informal settlement conference was held on July 15, 2013, but the matter was not resolved.

On December 16, 2013, a formal hearing was held. During the hearing, Local 721 moved to amend the complaint to withdraw the denial of release time allegations and to add the claim that the alleged release time policy changes also violated MMBA section 3505.3. The County did not object to either amendment and the motion was granted. The newly added allegations were treated as denied by the County.

The parties also reached a series of stipulations in lieu of live testimony. First, the parties agreed to the admission of several joint exhibits.[4] The County also introduced its own exhibits with no objections from Local 721.[5] Second, the parties agreed to treat the transcripts of witness testimony from a two-day advisory arbitration between the parties over the issue of release time as though it were testimony produced during the course of the PERB hearing. The transcripts from the advisory arbitration hearing before Arbitrator Walter F. Daugherty, which

[4] Joint exhibits 1-8 consisted of various iterations of relevant contracts between the parties, documents filed with PERB in the instant unfair practice charge, and the advisory arbitration decision issued in January 2012 by Arbitrator Jill Klein. The evidentiary record of the Klein arbitration was not introduced in the current record.

[5] The County's exhibits involve an investigation into the alleged misconduct of one of the employees at issue here who claimed a shift differential during use of release time. The County's investigation of the employee is only tangentially related to the release time and shift differential claims in the instant action. The County's briefs did not reference this evidence nor explain why it was introduced. Given the unsubstantiated relevance to deciding the issues presented here, and that the documents consist of wholly uncorroborated hearsay, they have not been considered in reaching a proposed decision.

took place on March 15 and May 17, 2012, were included among the stipulated exhibits (Joint Exh. 10). The full evidentiary record from the Daugherty arbitration and the arbitrator's advisory decision were also received in evidence (Joint Exh. 9). However, in regard to PERB's consideration of the arbitrator's findings, the County emphasized that the parties were submitting the evidence from the arbitration to PERB for adjudication, and their stipulation did not include any "motion for res judicata or anything else." Local 721 did not disagree with those statements. Third, the parties agreed that if Local 721 representative Wendy Thomas was called to testify, she would have said that she was Local 721's lead negotiator in 2011, and that Local 721 member Sharon Schilb told her that Schilb could no longer participate on Local 721's bargaining team because she did not receive certain premium pay while in bargaining.[6] After these stipulations were memorialized for the record, the parties each gave opening statements and the hearing concluded.

The parties filed an opening round of briefs on March 21, 2014. They filed reply briefs on April 25, 2014.[7] At that point, the record was closed and the matter was considered submitted for decision.

FINDINGS OF FACT

Jurisdiction

The County is a "public agency" within the meaning of MMBA section 3501, subdivision (c), and PERB Regulation 32016, subdivision (a). Local 721 is an "exclusive

[6] The County did not waive any hearsay, relevance, or other objections in this third stipulation.

[7] At hearing, there was discussion over the possibility of a status conference after the submission of opening briefs to determine whether the record should be reopened to take further evidence. Via email in March 2014, the parties agreed to forego the status conference, that the record need not be reopened, and that reply briefs would be submitted.

representative" within the meaning of PERB Regulation 32016, subdivision (b). Local 721 represents multiple bargaining units at the County including the Supervisory Unit. It represents around 6,000 members across all County bargaining units.

The Memorandum of Understanding

The parties have a single negotiated Memorandum of Understanding (MOU) that applies to all bargaining units. Several iterations of that MOU were admitted into the record. The changes alleged in the complaint occurred in 2011, when the 2010-2011 MOU was in effect. That is the MOU discussed here.

The MOU contains a grievance procedure culminating in advisory arbitration. All prior and subsequent versions of the MOU have a substantially similar grievance procedure.

Article 4, Section 3 of the MOU covers various forms of "premium pay," which entitles eligible employees for extra salary based on special assignments or duty. One type of premium pay at issue in this case is in Section 3, subdivision (C), concerning "Shift Differentials." In general, shift differentials pay additional compensation to employees for shifts that would otherwise be less desirable. The "Evening Shift" differential is described in relevant part as:

> County employees . . . working their regularly scheduled shift that ends after 6:00 p.m. and who perform work between the hours of 3:00 p.m. and 11:30 p.m. shall be paid a night differential of $.60 per hour for the time actually worked between 3:00 p.m. and 11:30 p.m.

The "Night Shift," or graveyard shift differential, is described in relevant part as:

> County employees . . . working their regularly scheduled shift that ends after 11:00 p.m. and who perform work between the hours of 11:00 p.m. and 7:30 a.m. shall be paid a night differential of $1.20 per hour for the time actually worked between 11:00 p.m. and 7:30 a.m.

(Emphasis added.) Under MOU Article 4, Section 3, subdivision (C), "[s]hift differentials do not apply to vacation, sick leave, holiday pay, call or standby duty." Furthermore, "[e]mployees who work [sic] day shift between the hours of 7:00 a.m. to 6:00 p.m. shall not be entitled for a shift differential." The cited provisions are substantially similar to both prior and subsequent versions of that MOU.

Article 4, Section 3, subdivision (E), of the MOU describes "Special Assignments" differentials for nursing personnel certified for and assigned to certain specialties, such as the Emergency Room, Operating Room, Neonatal Intensive Care Nursery, or Psychiatry. Under Article 4, Section 3, subdivision (E)(2), employees who possess the required qualifications for the assignment and are "working in the designated units" are eligible for the differential. All other versions of the MOU contain substantially similar language. The 2010-2011 MOU, and all other iterations, also provide for other types of premium pay such as "Training/Preceptor" pay, "Bilingual" pay, "Inconvenience Differential" pay, and "Female Prisoner Search and Meal Assignments" differential pay.

Article 31 of the MOU also describes various "Union Rights." This case concerns release time provisions contained in Article 31, Section 6. Under this section, Local 721 has what the parties refer to as a "release time bank" of time, providing Local 721 with 20 minutes of release time per represented employee per calendar year. Because of the size of Local 721's membership, it had around 2,000 hours in the release time bank annually. According to the MOU, "[t]ime spend training Stewards in the grievance procedure through the providing of release time to prepare for grievances/administrative interviews and Skelly hearings, will be charged to this Article/Section." All other versions of the MOU contain substantially similar provisions.

The MOU also contains language allowing Local 721 representatives to take one shift of County-paid release time per month for monthly regional union meetings. There are also provisions for Local 721 executive board members to attend their monthly meetings and for Local 721's president to take full-time release. Costs for those last two types of release time are paid by the County, but reimbursed by Local 721. All subsequent versions of the MOU contain substantially similar provisions. None of the versions of the MOU admitted into the record specify how release time for negotiations is handled. Nor does any iteration of the MOU expressly discuss whether employees using release time qualify for shift differentials or other premium pay.

The County's Practice Regarding Claiming Shift Differentials

The MOU does not specify how shift differentials are reported to the County. In practice, eligible employees claim shift differentials on their regular timesheets during each two-week payroll period. On those timesheets, employees record hours worked using the "REG" payroll code and then specify how much of that time they claim qualifies for a differential by using payroll code, "Z." Employee timesheets are reviewed by the employee's direct supervisor for accuracy. Timesheets are then separately reviewed by department management and then again by the payroll office, which is part of the County's Human Resources (HR) department. The record showed that HR commonly issued payroll corrections because of errors on timesheets or elsewhere in the process. However, the record also showed that the payroll office had limited capacity to review all timesheets in the short time available to complete payroll processing each pay period.

The County's Practice Regarding Requesting Release Time

Union representatives request release time directly from HR. If the request is granted at that level, HR emails the union representative's supervisor for department-level approval, who considers the request based on operational needs. Union representative Thomas's June 2009 release time request is illustrative of this system in operation. She made the request to HR which approved it and, on June 12, 2009, sent an email to Thomas's supervisor, Sheriff's department captain Larry Grotefend, stating:

> This above named employee[s] have been approved release time to attend an SEIU Bargaining Task Force Session, [and] if necessary, up to one hour of travel time to and from your work location. This meeting is considered a SEIU Bargaining Task Force Session opportunity for the above named employee[s]; therefore there will be no loss in pay to the employee[s]. As an FYI, there should be NO overtime for employee[s] working day shift and then going to the task force meetings. The approval by Human Resources is in accordance with the MOU between the parties.

County HR has sent department supervisors other similar email messages with slightly different wording and with the phrase, "there will be no loss in pay to the employees," underscored. Once the request was approved by both HR and the Union representative's supervisor, the employee was permitted to use release time for the event. In or around 2009, employees on release time were instructed to record it on their timesheets under the REG code, the same payroll code used for actual hours worked. The payroll office has no role in tracking release time. HR does track release time, primarily for the purposes of determining whether the time should be deducted from the release time bank and whether the time was reimbursable to the County.

The UNSEU Payroll Code

In late 2009 or early 2010, the County created a new payroll code, "UNSEU," for Local 721 representatives to report release time on their timesheets. Local 721 initially opposed use

of the code because the purpose of it was not made clear at the time. The new code was discussed during joint Labor-Management meetings between the parties. During those meetings, County representatives explained that the code was intended to track release time via the payroll system. Under the practice in place at the time, all release time was reported under the REG code, which left the County unable to determine from looking at timesheets whether the employee was performing the duties of his or her assignment or whether the person was using release time. Release time was only tracked manually by HR through reviewing individual requests.

Thomas testified that County Principal HR Analyst Sarah Franco said that employees would continue reporting release time using the REG code, but would additionally label all release time using the UNSEU code. Franco assured that the only purpose of the new code was track release time to reconcile the release time bank. According to Thomas, Franco also said that employees' compensation would not change and that release time would not be reflected on employees' paychecks. An email dated February 3, 2010, from HR Services Manager Lisa Piña said that the purpose of the codes "are only to track (mirror) the already approved release time." Piña also stated that "HR does not believe that these codes are subject to meet and confer under the MMBA as they don't affect the terms and conditions of employment as their payroll time is already tracked as an administrative matter." At that point, Local 721 withdrew its opposition to the code and Local 721 representatives, including Thomas, began using it in or around March 2010. The UNSEU code, and another payroll code for tracking release time, were eventually incorporated into the 2010-2011 MOU, as well as subsequent versions. This new MOU language, like that before it, also did not expressly

specify whether employees using release time are eligible for shift differentials or other forms of premium pay.

Employees' Use of Release Time and Claims for Shift Differentials in 2009-2010

Two employees—Thomas and Kevin Luke—testified regarding their use of release time and claims for shift differentials while released from their regular duties. Vicki Pounders, a County representative from the payroll office, also testified. Pounders said it was not the County's intent to pay shift differentials for employees on release time, but admitted the County had likely done so, because under the REG code one is not able to determine whether an employee claiming a differential was on duty or on release time. Pounders also confirmed that an employee's departmental supervisor and a timekeeper also must check and approve an employee's timesheet before it is processed by the payroll office.

1. Wendy Thomas

At the times relevant to this case, Thomas was employed at the County as a communications supervisor working in the Sheriff's department. Starting in 2008, Thomas became active in Local 721. She was one of between 12 and 15 members of Local 721's negotiating team for the 2009-2010 MOU. Thomas testified that she requested and received release time for negotiation sessions whenever the meetings occurred during her regularly scheduled shift. Under the practice described above, HR emailed each negotiating team member's supervisor for department-level approval. In Thomas's case, the email was sent to Grotefend.

Thomas testified that she claimed a shift differential whenever she was assigned to a qualifying shift and was never denied any differentials while using release time during the

2009 negotiations.[8] That is, her claim for shift differentials were paid by the County during this period. Although the parties agreed to new release time provisions during those negotiations, the parties did not discuss whether employees using release time qualify for shift differentials or other premium pay. Thomas said that she believed other Local 721 negotiators also were paid differentials during this time, but there was no evidence to what extent Local 721's negotiators qualified for or claimed shift differentials and to what extent those individuals notified Thomas of whether or not they were paid for such differentials. Thomas reported only that no one informed her that they had not been paid appropriate shift differentials. Thomas noted that she and the other bargaining team members frequently talked about issues related to release time. Thomas also testified to claiming a shift differential for release time for Union education and training activities, labor-management committee meetings, and grievance representation during 2009, provided her release time corresponded to a shift that would otherwise qualify for the differential pay. The County also paid these claims.

Thomas was mostly scheduled for the day shift in 2010. She said, however, that she continued claiming shift differentials for part of her shift so long as her shift included hours described in the shift differential provisions of the MOU. For instance, she said that, although she worked daytime hours in 2010, she was frequently assigned to work from 6:00 a.m. to 4:30 p.m. Thomas said that she claimed and was paid one and a half hours of shift differential for the hours between 6:00 a.m. and 7:30 a.m. Thomas described a trip to Washington D.C. in 2010 for Union training for which the County granted her release time. For part of that time

[8] Thomas further clarified that while on release time, if the bargaining session lasted beyond her scheduled hours of work, she would participate in bargaining from that point on without overtime pay, shift differential, or compensation of any kind.

during the trip, Thomas had been scheduled for shifts that were eligible for shift differential and for other parts she was scheduled for shifts that were not eligible for a differential. Thomas claimed shift differentials only for those eligible shifts during her release time in Washington D.C. and the County paid them.[9]

Thomas was also involved in successor MOU negotiations in 2010. She said that she used release time to participate in those negotiations and that she claimed a shift differential anytime she was assigned a 6:00 a.m. to 4:30 p.m. shift. Thomas said that the County paid for her claimed shift differentials throughout 2010, even when she was using release time. Although the parties agreed to new release time provisions during the 2010 negotiations, the parties did not discuss whether employees qualify for shift differentials or other premium pay while using release time.

2. Kevin Luke

During relevant time periods, Kevin Luke was employed by the County Department of Public Social Services. Luke was on SEIU's bargaining team in 2009 and 2010. During those years, Luke worked a 3/12 shift Friday through Sunday. Luke was granted release time for negotiations and Union education and training activities during that period, and he claimed a shift differential if his release time coincided with the hours for which he would have been eligible for that pay under the MOU. Luke testified that of the two or three times he claimed a shift differential during release time, he never recalled being denied his shift differential pay or being told anything by HR about it, but he did not closely examine his pay warrant to verify he actually received the pay because he was used to getting paid without incident. At least once,

[9] Thomas also described other Union education/training activities for which she requested and received release time and claimed and was paid shift differentials in 2010.

although Luke was eligible for shift differential while on release time, he did not claim the differential on his timecard.

The 2011 Negotiations

Thomas was Local 721's chief negotiator in the 2011 successor MOU negotiations. She was assigned to the graveyard shift for at least part of that year. According to Thomas, because she was assigned to work hours between 11:00 p.m. and 7:30 a.m., the assignment qualified for a night shift differential under the MOU. Although negotiations were typically scheduled for daytime hours—when Thomas was not scheduled to work—she requested and received release time for the shift before each negotiation session because she would be otherwise unable to rest between working and participating in bargaining. Thomas also claimed a night shift differential for release time used in 2011. In January 2011, the County paid Thomas's claimed shift differentials, even on days when she was using release time. Luke also participated on the Union's negotiating team in 2011. However, during that time Luke was not assigned to a shift eligible for differential pay; thus, he did not claim any shift differential during his release time for negotiations in 2011.

In February 2011, during ongoing successor MOU negotiations, the County stopped paying shift differentials for employees using release time. According to Thomas, in a negotiation session around that time, County Employee Relations Director Brian McArthur, informed Local 721 that "they weren't going to pay shift differential[s] for Union time." Thomas inquired about this with her supervisor, Grotefend. In an email, dated March 15, 2011, Grotefend explained that he received direction from HR that "the County's position is that employees off work for union release time are not eligible to receive any [shift differential pay]." On May 25, 2011, County HR representative Cherie Pearson confirmed that Thomas's

shift differentials claimed for time reported under the UNSEU code were removed. Before March 2011, HR's notifications to department supervisors of approved release time requests noted that "there will be no loss in pay to the employees." After March 2011, HR's release time notifications to departments were changed to state, "there will be no loss in regular compensation."

On March 15, 2011, the County passed a proposal across the negotiating table that expressly listed release time among the other forms of leave ineligible for shift differentials. Local 721 rejected that proposal. Local 721 proposed modifying the shift differential provisions in the MOU to expressly require employees to be paid for shift differentials while taking release time if the shifts otherwise qualified for a differential. The County rejected that position. Both proposals were ultimately withdrawn before the parties ratified their successor MOU.

Advisory Arbitration Decisions Regarding Premium Pay

Local 721 filed multiple grievances over union representatives who were denied claimed premium pay while using release time. On January 23, 2012, Arbitrator Klein found that a Licensed Vocational Nurse II, Sharon Schilb, was not entitled to a "specialty assignment" differential while using release time for bargaining because the plain language of the MOU in effect at the time required that Schilb be "working in the designated units" identified as qualifying for specialty assignment differential. It is not clear when the underlying grievance was filed. Other than the arbitrator's written findings, no evidence about

Schilb's use of release time or her claims for specialty assignment differentials was admitted into the record.[10]

On October 1, 2012, Arbitrator Daugherty found that the County violated an established past practice regarding the payment of shift differentials by rejecting various claims by Thomas in 2011. Both the Klein and the Daugherty decisions expressly declined to reach the issue of whether the denial of differentials violated MMBA section 3505.3.

Other Evidence Regarding Release Time and Shift Differentials

Both parties cited to other documents purporting to describe the County's history of paying, or not paying, employees' shift differentials while using release time. The County asserts that an employee, Mark Grays, was not paid shift differentials for released time used in February through May 2010, even though he was assigned to the graveyard shift at the time. However, the entire basis for this assertion was a chart produced from a source not identified for the record. (See County's Exh. 28.) There was no evidence or stipulation concerning the accuracy or authenticity of the information from the chart. Nor was it clear from the record that Grays claimed shift differentials during the time period described in the chart or that he was even in a bargaining unit represented by Local 721.[11]

Local 721 refers to documents that it claims shows that the County paid Local 721 representatives differentials while time using release time. Its asserted proof consists of documents that were admitted into the record during the Daugherty arbitration. As Local 721 maintains, those documents show that Danny de la Pena claimed differentials on January 20,

[10] As noted previously, the parties did not attempt to introduce the evidentiary record from the Klein arbitration into the current record. Schilb did not testify at the Daugherty arbitration.

[11] This chart was not a part of the evidentiary record in the Daugherty arbitration.

2011, and May 17, 2011, which were days that he also used release time. Marlo Clemons's timesheets show that differentials were claimed on October 28, 2010, January 20, 2011, April 14, 2011, April 20, 2011, May 26, 2011, and June 7, 2011.

ISSUES

1. Did the County unilaterally change an existing policy of paying Local 721 representatives shift differentials and/or other forms of premium pay while using release time?

2. Did the County's refusal to pay Local 721 representatives shift differentials and/or other forms of premium pay while using release time for negotiations violate MMBA section 3505.3?

CONCLUSIONS OF LAW

Positions of the Parties

Local 721's position is that there is a long-standing and binding past practice of paying Union representatives for shift differentials while using release time. It maintains that the County intentionally changed that practice in March 2011 by ceasing to pay differentials. Local 721 also argues that a violation should extend more than six months before the charge was filed, under a theory of equitable tolling, to include the denial of special assignment pay during release time granted to Schilb. Local 721 further advocates for a broad interpretation of the phrase "loss of compensation or other benefits" under MMBA section 3505.3, citing to Decision No. 2307-M, for the proposition that employees' entitlement to equal pay and benefits while using release time for negotiations includes premium pay and differentials.

The County's position is that the plain language of the MOU precludes Thomas, or any other Local 721 representative, from being paid for shift differentials while on release time. It asserts that such representatives are not performing "work" within the meaning of the shift

differential provisions of the MOU when using release time. It similarly argues that because there is no right to differentials while on release time, Local 721 representatives suffer no "loss of compensation" under MMBA section 3505.3, by not receiving differential pay during negotiations. Without directly disputing the evidence that Thomas received shift differentials while using release time in the past, the County contends that Local 721 failed to establish a binding past practice because the County never intended on paying those differentials. The County argues that Luke's testimony is unreliable and does not establish a past practice of paying shift differentials during release time. Finally, the County maintains that requiring the County to pay shift differentials for employees using release time is contrary to public policy.

Discussion

The complaint issued by PERB OGC after direction from the Board in Decision No. 2307-M alleged that, in or around March 2011, the County changed its previous policy of paying employees full wages and benefits, including "shift differentials or special pay premiums" while on "union released time." (Emphasis added.) At hearing, the complaint was amended to allege, consistent with the Board's direction in Decision No. 2307-M, that "[t]his conduct also independently violates Government Code section 3505.3 by paying employees less than full compensation and benefits when meeting and conferring with representatives of [the County] on matters within the scope of representation." Thus, the complaint, as amended, alleges both that the County violated its duty to bargain in good faith under MMBA sections 3505, and 3506.5, subdivision (c), and its obligation to provide employees released for negotiations their full compensation and other benefits under MMBA section 3505.3. Because Local 721 urges in its briefs that PERB should apply the doctrine of equitable tolling to find a violation regarding Schilb's denial of special assignment pay during release time for

negotiations, and those events occurred well outside of the timeframe of the change in policy alleged in the complaint,[12] it will be treated as an unalleged violation and discussed first. Next, whether the duty to bargain in good faith was violated by the County will be addressed, followed by discussion of the alleged violation of MMBA section 3505.3.

I. Unalleged Violation

Under the unalleged violation doctrine, an Administrative Law Judge (ALJ) may entertain unalleged independent violations only under the following circumstances: (1) adequate notice and opportunity to defend has been provided to the respondent; (2) the conduct is intimately related to the subject matter of the complaint and 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. The failure to meet any of these standards will prevent the ALJ from considering unalleged conduct as violations of the particular act in question. (*City of Inglewood* (2015) PERB Decision No. 2424-M, pp.14-15 citing *Tahoe-Truckee Unified School District* (1988) PERB Decision No. 668.)

The above standards are not met here, especially with respect elements three and four, regarding the unalleged violation having been fully litigated and the opportunity to examine and cross-examine witnesses having been afforded the parties. The only evidence in the current record regarding Schilb's alleged denial of special assignment pay during release time derives from Arbitrator Klein's advisory opinion and Local 721's assertion that if Thomas had been called to testify in the instant hearing, Thomas would have said that Schilb told Thomas that Schilb could no longer participate in negotiations because Schilb was not receiving

[12] The only indication in the record regarding when this alleged violation occurred was in Arbitrator Klein's advisory arbitration decision. The arbitrator's statement of facts noted that the alleged denial by the County of special assignment premium pay for Schilb occurred in 2010, well before the change alleged in the complaint occurring in March 2011.

premium pay from the County. First, Local 721's offer of proof of Thomas's testimony does not satisfy the ability to examine and cross-examine a witness, and the County specifically did not waive any objections to the offer of proof. Second, as noted previously, the evidentiary record from the Klein arbitration was not introduced here; thus, there is no underlying witness testimony from that proceeding to consider. For these reasons, the parties were not given any opportunity in the instant proceeding to examine and cross-examine pertinent witnesses over the unalleged violation.

The parties also entered no specific stipulation regarding the evidentiary value to be afforded Arbitrator Klein's findings. As such, that document consists entirely of uncorroborated hearsay, which cannot form the basis of a factual finding in this case.[13] (PERB Regulation 32176; *Palo Verde Unified School District* (2013) PERB Decision No. 2337.) A single, hearsay document without reliable testimony or stipulation of facts to support it does not meet the standard that the unalleged issue must be fully litigated. Accordingly, the issue of Schilb's alleged denial of special assignment pay during her release time for negotiations will not be considered and it is therefore unnecessary to analyze whether the doctrine of equitable tolling would render those allegations timely.

II. Unilateral Change

A four-part test is applied by the Board to determine an unlawful unilateral change:

> 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*

[13] Notably, even if Thomas had testified regarding Schilb's statement to her, that also would have been hearsay without any apparent exception to the hearsay rule.

> *Unified School District* (1981) PERB Decision No. 160; *Grant Joint Union High School District* (1982) PERB Decision No. 196 (*Grant*).)

(*County of Santa Clara* (2013) PERB Decision No. 2321-M, p. 13, citing *Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262 (*Fairfield-Suisun*).) An employer's unlawful failure and refusal to negotiate concurrently violates an exclusive representative's right to represent unit members in their employment relations and interferes with employees' exercise of representational rights. (*San Francisco Community College District* (1979) PERB Decision No. 105.)[14]

The nature of existing policy is a question of fact to be determined from an examination of the record as a whole, and it can be established through negotiated contract terms. (*Oakland Unified School District* (1983) PERB Decision No. 367 (*Oakland*).) It is well-settled that when evaluating an allegation of a departure from existing policies, "the plain language of a contract or rule will be accepted where it is clear and unambiguous." (*Westlands Water District* (2004) PERB Decision No. 1622-M, p. 7; citations omitted.) However, "where a contract is silent or ambiguous as to a policy, it may be ascertained by examining past practice or bargaining history." (*Oakland*, *supra*, PERB Decision No. 367, p. 22; citation omitted.) In determining whether an action has a continuing impact on terms and conditions of employment of bargaining unit employees, PERB considers whether the employer believes or acts as if it has a right to take the action without bargaining. (*State of California (Department of Corrections and Rehabilitation, Ventura Youth Correctional Facility)* (2010) PERB Decision No. 2131-S; *County of Riverside* (2003) PERB Decision No. 1577-M.)

[14] 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.)

The final three elements of the test for unilateral change quoted above from *Fairfield-Suisun* are not in serious dispute in this case and are satisfied for the following reasons. There is no question that the policy of paying shift differential pay during release time is a part of employees' total compensation, which is within the scope of representation. The record establishes that the County took action to eliminate shift differential pay while employees were released from duty for Union activities without providing Local 721 prior notice and opportunity to bargain. The County maintains that it acted within its rights to eliminate this pay because it never intended to pay it during release time and because the MOU requires such payments only when employees are performing "work" associated with their customary duties. Thus, the only element of the test for unlawful unilateral change that is at issue here is whether there was a change to existing policy. In making that determination, some conclusions regarding undisputed facts and law reached by the Board in Decision No. 2307-M are controlling.

A. Decision No. 2307-M

In Decision No. 2307-M, the Board fully considered, and rejected, the County's argument that MOU provisions regarding shift differentials clearly and unambiguously dictate that employees must be performing the actual duties of their position in order to be eligible for shift differential pay. The Board stated:

> we reject the County's argument that the MOU "clearly provides that shift differentials exclusively apply" only to employees who are "actually working." For support, the County relies on the section of the MOU governing the applicability of the shift differentials, which provides that "[s]hift differentials do not apply to vacation, sick leave, holiday pay, call or standby duty." The County appears to equate union released time with being absent from work, and concludes that in either case, employees are not "actually working" and therefore are not eligible for shift differentials or special pay premiums. There are several

> problems with this argument. First, presumably there was nothing to prevent the parties from including union released time in the finite list of exclusions, but as written, union released time is not explicitly exempted from the application of shift differentials.[15] Second, union released time is of a categorically different nature of paid time than vacation, sick leave, holiday pay, call or standby duty. Employees on union released time are physically at the worksite, but have been released from their regularly assigned duties by the County for a designated period of time. They are not home, on vacation or otherwise free to attend to personal or other non-work related business. Therefore, union released time is not comparable to vacation, sick leave, holiday pay, call or standby duty. While true that employees on union released time are not performing their regular duties, they are participating in union activities related to the workplace.
>
> The County also points to language in the MOU setting forth the various types of shift differentials in arguing that shift differentials only apply to employees working their "regularly scheduled shift." While regularly assigned *duties* are necessarily performed during regularly scheduled *shifts*, the County's conflation of the two concepts is rejected. Notwithstanding any shift changes necessary to accommodate the scheduling of collective bargaining sessions, employees on union released time are excused from their regularly assigned duties. By agreeing to the phrase "regularly assigned shift," we discern no intent by the parties deny employees the shift differentials or special pay premiums they would have received but for their participation in collective bargaining. At a minimum, this phrase, as it applies to the determination of eligibility for shift differentials or special pay premiums, is sufficiently ambiguous, and therefore warrants an examination of SEIU's past practice claim.

(*Id.* at pp. 22-23; italics and bracketed text in original, underscore added.)

The Board made clear that the parties' MOU provisions regarding shift differential eligibility do not clearly and unambiguously set established policy regarding paying shift differentials while employees are using release time for negotiations or other union activities,

[15] The Board's statement here refers to the canon of construction—*expressio unius est exclusion alterius*—to express or include one thing implies the exclusion of the other, or the alternative. (Black's Law Dict. (2d pocket ed. 2001) p. 265.)

and therefore the parties' past practice regarding this issue must be examined.[16] The Board also conclusively determined that release time is paid time off from regular duties, which is of a different nature and character than paid time off for vacation, sick leave, holidays, or stand-by status. The County continues to argue that the MOU is controlling over established policy here despite the Board's contrary analysis and conclusions regarding the same MOU language. The County also argues that the zipper clause of the MOU, which notes that the contract represents the parties' full and complete understanding of unit employment conditions, prevents the examination of past practice, citing *Temple City Unified School District* (1989) PERB Decision No. 782 (*Temple City*). The County misconstrues Board precedent over zipper clauses. What that case actually stands for is that:

> a "zipper clause,"…has the effect of allowing either party to avoid (during the term of the agreement) <u>further negotiations</u> on matters established <u>by either contract or past practice</u>. (*Los Rios Community College District* (1988) PERB Decision No. 684, p. 13.) The clause specifically states that it <u>does not constitute a waiver of CTA's right to bargain a change in past practice</u>, <u>though this would be the case even in the absence of such language</u>. (See *Los Rios Community College District*, *supra*, p. 14; *Los Angeles Community College District* (1982) PERB Decision No. 252.)

(*Temple City*, *supra*, PERB Decision No. 782, pp. 6-7; footnote omitted, underscore added.) Thus, *Temple City* instructs that a zipper clause prevents the demand for further negotiations, during the life of the agreement, over contractual terms <u>or</u> a past practice. It expressly does <u>not</u> hold, as the County urges, that past practices may not be considered as established policies in

[16] The Board also concluded that because the MOU is sufficiently ambiguous regarding the policy of paying shift differentials or other premium pay during release time, that the precept of *Marysville Joint Unified School District* (1983) PERB Decision No. 314 (*Marysville),* that unambiguous contract language controls over contrary past practices, is inapplicable to this case.

the presence of contractual terms, or that a union waives its right to bargain over a unilateral change in past practice by the inclusion of a zipper clause in a contract.[17]

Furthermore, nothing in the now fully-developed record indicates that the operative language in the MOU was disputed by the parties at the time of the Board's analysis of it. It is also the same language that was introduced into the current record. The Board's analysis of law applied to undisputed facts should not be disturbed. Essentially, the Board rejected the County's defense to unilateral change that it acted in accord with clear and unambiguous contract terms.[18] Accordingly, the Board's finding that the MOU language here is sufficiently ambiguous to make examination of past practice necessary is the law of the case. (See, e.g., *Jurupa Unified School District* (2015) PERB Decision No. 2458, p. 15; *Salinas Valley Memorial Healthcare System* (2015) PERB Decision No. 2433-M, pp. 31-32.) The County's arguments regarding the MOU clearly and unambiguously setting established policy are accordingly rejected.

The Board recognized in Decision No. 2307-M that PERB has historically applied several different, but similar, tests to determine past practice:

> The Board has stated that it must be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a

[17] The County quoted footnote 5 on page 13 of the Board's decision in *Temple City*, stating in part: "the zipper clause in the parties' agreement would have allowed the District to reject, for the term of the agreement, a demand to bargain a change in past practice." It is unclear from the County's brief why this quoted passage would support the County's position. Being relieved from the duty to bargain over a proposed change in established terms during the life of a contract is not the same as a license for the employer to make unilateral changes to established past practices.

[18] A charge may be dismissed based on an affirmative defense that involves a question of law or the application of law to undisputed facts which have been properly alleged by the respondent or admitted by the charging party. (*Long Beach Community College District* (2003) PERB Decision No. 1568, p. 15; *Metropolitan Water District of Southern California* (2009) PERB Decision No. 2055-M, p. 4, fn. 4.)

> period of time as a fixed and established practice accepted by both parties. (*County of Placer* (2004) PERB Decision No. 1630-M, citing *Hacienda La Puente Unified School District* (1997) PERB Decision No. 1186; see also *Riverside Sheriffs' Assn. v. County of Riverside* (2003) 106 Cal.App.4th 1285, 1291.) In addition, PERB has described an enforceable past practice as one that is "regular and consistent" or "historic and accepted." (*Hacienda La Puente Unified School District*, *supra*, PERB Decision No. 1186.) PERB has also held that a past practice is established through a course of conduct or as a way of doing things over an extended period of time. (*Pajaro Valley Unified School District* (1978) PERB Decision No. 51 (*Pajaro Valley*); *Cajon Valley Union School District* (1995) PERB Decision No. 1085.)

(*Id.* at p. 20.) The Board ultimately applied the test from *Pajaro Valley*—that a past practice may be established through a course of conduct or as a way of doing things over an extended period of time—to the facts of this matter. (Decision No. 2307-M, pp. 21-22.) Thus, the test from *Pajaro Valley* is appropriate to apply here to determine whether Local 721 has met its burden of showing the County's unilateral departure from an established practice. Responding to the County's assertion that the a binding past practice cannot be shown because any payment of shift differential during release time was either an isolated occurrence or inadvertent oversight, the Board noted that such an assertion represented a material factual dispute that needed to be resolved at hearing. (Decision No. 2307-M, p. 25.)

B. Analysis of Past Practice in This Case

To begin, although the complaint alleges a change in the payment of shift differentials "or special pay premiums" while employees used release time, the only competent evidence in the record is over the payment of shift differentials. Only shift differentials were at issue in the Daugherty arbitration, the record of which the parties stipulated should be treated as if it were produced during the course of the current proceedings. As discussed previously regarding the unalleged violation, only uncorroborated hearsay evidence exists regarding alleged payment of special assignment differential to Schilb while she was on release time, which is insufficient to support a factual finding. (PERB Regulation 32176; *Palo Verde Unified School District*, *supra*, PERB Decision No. 2337.) Thus, the analysis here is limited to the issue of shift differentials during release time. The allegation that the County unilaterally changed its policy of paying "special pay premiums" to employees while on release time is hereby dismissed for lack of evidence.

Thomas and Luke were the only employees who testified regarding claiming and receiving shift differential pay during release time. Thomas testified without contradiction that whenever she was assigned to a shift that qualified for a differential, she claimed and was paid the shift differential during her release time for formal contract negotiations throughout 2009 and 2010, and also during her release time for a variety of Union education and training activities during the same time period, including an extended trip to Washington D.C. During MOU negotiations in 2011, up until March of that year, Thomas claimed and was paid a shift differential during her release time, even though none of the hours of bargaining overlapped with her graveyard shift. Luke testified that he claimed shift differential two or three times in 2009 and 2010, when his release time fell within hours that he was scheduled to work. One

time, although he was eligible for a shift differential because of his assigned shift, he did not claim it on his timecard. Although he did not examine his paycheck carefully to confirm that he was actually paid the shift differential for those periods, he was not informed by the County that his claims were denied. Luke was used to getting paid without incident.

Regarding Thomas, the County does not directly dispute that she was paid shift differentials during release time. Instead, it contends that any payments of shift differentials during such time were inadvertent and unintended by the County. Once it realized the mistake, it ceased such payments. Thus, it was not a practice that was "enunciated" and "accepted" by the County as a "fixed and established practice." (County's opening brief, p. 21.) Regarding Luke, the County argues that his testimony was unreliable because he could not specifically recall if he was actually paid for the shift differentials he claimed, and because he was eligible for a shift differential at one point but was not paid the differential, there is no established practice that the County regularly paid shift differentials to employees on release time. None of these arguments are persuasive.

As to the argument that the shift differential payments were "unintentional," it is not supported by facts in the record for at least two reasons. First, although the UNSEU code, which allowed the County to more easily track the use of release time, was implemented in late 2009 or early 2010, payments of shift differentials during release time continued for more than a year after UNSEU was put into practice. If these shift differential payments had really been inadvertent, especially considering that the County was concerned enough about release time issues to create a payroll tracking code specific to that issue, it seems that the practice would have been discovered and ended sometime shortly after the initiation of the UNSEU code; certainly earlier than March 2011. There is also no evidence in the record that the County tried

to recoup the supposed inadvertent payments from employees who received them. This also casts doubt on the premise that the County believed that shift differential payments during release time were mistakenly or improperly paid.

Second, the record shows that department management must first approve HR's notification that the Union has requested an employee be released from duty to participate in negotiations or other Union activities, and then after-the-fact must approve the employee's timecard which includes a separate Z code for shift differential on particular days and at particular times. Since department management was necessarily aware of when it had approved release time for the employee, and then could see the claim for shift differential on the employee's timecard during the particular time of release, it stands to reason that department management was aware that shift differentials were being claimed during release time, and yet still approved the time records for payment. Even if the payroll office was unaware of the practice during the time that release time was coded as REG, the department, having pre-approved specific release times, cannot claim to be similarly unaware. As the Board stated:

> [G]iven the County's authority to approve leave requests and its control over the administrative payroll system, the County's argument that its wage payments to employees were not made knowingly is unpersuasive. The County had the means and the opportunity, not to mention the responsibility as a public employer, to be cognizant at all times of how it pays its employees and what it pays its employees for.

(Decision No. 2307-M, p. 28.) Thus, the County cannot defeat a finding of past practice here by claiming it was unaware of these payments.[19]

[19] The fact that department management was necessarily aware of both when employees were on release time and that they claimed shift differentials during that time distinguishes these facts from those in *Omnitrans* (2008) PERB Decision No. 1996-M. In that case, after

Regarding Luke, his admission that he did not follow up on whether or not his pay warrants actually showed payment of shift differentials when he claimed them during his release time does not make his testimony unreliable. He credibly testified that he claimed shift differentials while released from regular duty to participate in negotiations or Union education/trainings several times and that he was never informed by the County of any problem with his timecards. He also testified credibly that he did not make a habit of checking his pay warrants because he was used to getting paid without problems. Given that the County always paid Thomas's claims for shift differentials during her release time taken before March 2011, it is more likely than not that Luke was similarly paid for his claims. Likewise, it can be surmised from the approved payroll records of employees de la Pena and Clemons that they were also paid their claimed differentials during release time.[20]

Moreover, although the County argues that Luke was eligible at least once for a shift differential but the County did not pay it, this does not show that the County's practice of paying it when it was claimed was not regular and consistent. For the instance in question, Luke did not actually claim the differential on his timecard. To establish a past practice here, what is relevant are actions by the County when presented with a claim for shift differential

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discovering from a newspaper article that Omnitrans employees on release time were organizing employees of a different employer during that same time, the Board held that Omnitrans management did not "knowingly" approve release time for that purpose.

[20] The payroll records were signed by the employees and department supervisors. Although these employees did not testify, payroll records of this kind are typically admissible under an official records exception to the hearsay rule. (Evid. Code, § 1280; *Bellflower Unified School District* (2014) PERB Decision No. 2385, pp. 9-10.) The same conclusion cannot be reached regarding the uncorroborated chart introduced by the County regarding employee Grays. The record simply does not reflect any information about how the chart was compiled or who compiled it. Again, uncorroborated hearsay cannot form the basis of a factual finding. (PERB Regulation 32176; *Palo Verde Unified School District*, *supra,* PERB Decision No. 2337.)

during release time, not whether employees always remembered to submit the claim for it. The evidence is sufficient to demonstrate that when an employee claimed a shift differential during release time for negotiations and other Union activities before March 2011, the County routinely approved and paid those claims. A past practice is established.

The record amply shows that a change in the established practice occurred, as the County notified Local 721 bargaining team members at a bargaining session in 2011 that the County would cease paying shift differentials during release time. The County then ceased such payments, and the notification language from HR to department management for release time approval changed from "there will be no loss in pay to the employees," to "there will be no loss in regular compensation." (Emphasis added.) As it has been shown that a change to established policy was made by the County, and all other elements of the test for unilateral change are also shown, Local 721 has met its burden of demonstrating a prima facie case. The County's defense that it was enforcing the terms of a written MOU is not demonstrated under these facts. (See e.g., *Regents of the University of California* (2010) PERB Decision No. 2109-H; *Marysville*, *supra*, PERB Decision No. 314.) Thus, the County's unilateral action violated the MMBA and PERB Regulation and was an unfair practice.

III. Statutory Violation of MMBA Section 3505.3

The MMBA guarantees employee representatives of an employee organization the right to release time for formal negotiations over employment conditions with the public agency employer as follows:

> Public agencies shall allow reasonable number of public agency employee representatives of recognized employee organizations reasonable time off without loss of compensation or other benefits when formally meeting and conferring with representatives of the public agency on matters within the scope of representation.

(MMBA, § 3505.3.) The Board has long held that release time is both a mandatory subject of bargaining and a statutory right. (*San Mateo County Community College District* (1993) PERB Decision No. 1030.) The specific statutory guarantees quoted above apply only to formal negotiations, not to other types of union activities. (Decision No. 2307-M, p. 33.) Thus, for release time issues regarding formal negotiations other than what is specifically addressed by the statute, or for matters regarding release time for other types of union activities, there is a specific duty to bargain over those issues. (*Anaheim Union High School District* (1981) PERB Decision No. 177.) An employer may not seek reimbursement from an employee organization for employee release time costs related to formal negotiations, because employees are the intended beneficiaries of the statutory right to be released from duty to bargain with the employer without loss of compensation. (*Ibid.*)

The Board's precedential decision in Decision No. 2307-M set forth a binding interpretation of MMBA section 3505.3 that is the law of the case. The Board stated:

> [M]MBA section 3505.3 requires public agencies to allow reasonable time off for formal negotiations "without loss of compensation or other benefits." In construing the meaning of this phrase, we are guided by the fundamental rules of statutory construction. A court should ascertain the intent of the Legislature to effectuate the purpose of the law; and if the language of the statute is clear and unambiguous, then the intent of the Legislature is reflected in the plain meaning of the statute. (*Reid v. Google* (2010) 50 Cal.4th 512, 527.)
>
> [¶…¶]
>
> By reducing employees' pay from full wages to base wages when they are excused from their regular duties to engage in formal negotiations, a loss in compensation or other benefits occurs. The way in which employees' time is compensated affects not only the computation of take-home pay, but often such benefits as retirement credits and seniority. The County argues that no loss occurred because employees engaged in formal negotiations of

> still are entitled to wages of some kind, i.e., their base wages. "Loss" within the meaning of the statutory directive, however, must be measured by an objective standard, rather than left to the discretion of one party to decide.
>
> [¶…¶]
>
> We construe "loss" within the meaning of the MMBA section 3505.3 as measured against the amount of pay the employee would have earned if the employee had not been "formally meeting and conferring with representatives of the public agency on matters within the scope of representation. To construe it otherwise would exact a penalty on employees for engaging in in formal negotiations, and create a chilling effect on the exercise of protected employee rights, i.e., participation in organizational activities.

(*Id.* at pp. 31-33; footnotes omitted; emphasis added.) The Board also clarified that its holding over the determination of loss does not turn on when negotiations were scheduled to occur; thus, if the employee would have worked a shift eligible for shift differentials if he or she had not participated in bargaining, then the employee is entitled to full compensation, including the differential, during that release time. (*Id.* at p. 32, fn. 19.)

The County takes issue with the Board's statutory interpretation of MMBA section 3505.3, arguing, among other things, that it is against public policy because it penalizes tax payers who must ultimately foot the bill for what amounts to a gift of public funds to an employee who did not work a shift qualifying for bonus pay, and who are also obligated to pay bonus pay to another employee who must cover the undesirable shift vacated by the employee on release time. The County also argues that the Board's decision was made without the benefit of full legal briefing on the subject and is contrary to a federal trial court's interpretation of MMBA section 3505.3, which it asserts is binding upon PERB.

Notwithstanding that the Board's interpretation of the statute is the law of the case and may not be disturbed, I address briefly these two arguments. Regarding the latter argument,

the statement of the federal trial court quoted by the County in its brief is that MMBA section 3505.3 requires: "only that employee union representatives be compensated for time spent in negotiations during their regularly scheduled work hours." (*Local 1605 Amalgamated Transit Union, AFL-CIO v. Central Contra Costa County Transit Auth.* (N.D. Cal. 1999) 73 F.Supp.2d 1117, 1124; emphasis added.) However, later in the decision, after finding a violation of MMBA section 3505, the court clarified, "[t]he court therefore does not consider Plaintiff's other claims for compensation under §§ 3506 and 3505.3 of the MMBA." (*Id.* at p. 1126; emphasis added.) The court then dismissed as moot claims and cross-claims arising under MMBA section 3505.3. (*Ibid*.)

As a threshold matter, PERB has exclusive initial jurisdiction to determine violations of the MMBA. (MMBA, § 3509, subd. (b).) Although PERB "shall apply and interpret unfair labor practices consistent with existing judicial interpretations of this chapter[,]" that caveat does not apply to the cited federal trial court decision here. (*Ibid.*) Setting aside the obvious fact that the court's statement regarding MMBA section 3505.3 was dicta, as the court expressly did not reach claims under that section of the statute in its decision, PERB is simply not bound by interpretations of the MMBA issued by a trial court in any event.

Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow the decisions of courts exercising superior jurisdiction. Administrative agencies exercising inferior jurisdiction must accept settled law as declared by courts of superior jurisdiction; it is not their function to attempt to overrule decisions of a higher court. (*State of California (Department of Personnel Administration)* (2008) PERB Decision No. 1978-S, p. 9, citing *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.) However, federal courts are not controlling on matters of state

law. (9 Witkin, Cal. Proc. 5th (2008) Appeal, § 507, p. 570.) The decisions of the lower federal courts are entitled to the same weight given to the state courts from sister jurisdictions. To the extent they are persuasive, they may be followed. (*Ibid*; emphasis added.) Moreover, trial court decisions have no precedential value and are not citable authority. (*Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs* (The Rutter Group 2014) ¶ 14.194.3, p. 14-81, citing *Bolanos v. Super. Ct.* (2008) 169 Cal.App.4th 744, 761 [request that reviewing court judicially notice a minute order issued by a trial court was improper].) The doctrine of stare decisis applies only to decisions of appellate courts and trial courts make no binding precedents." (*Fenske v. Board of Administration* (1980) 103 Cal.App.3d 590, 595-596.) Thus, the federal trial court's passing comment regarding MMBA section 3505.3 cannot disturb PERB's interpretation of the statute.

Finally, it is not a "gift" of public funds to pay employees their full compensation and other benefits for time that they are released from regular duties to participate in negotiations. Rather, it is a statutory obligation imposed on the public agency employer by the Legislature. As the Board pointed out in Decision No. 2307-M, employees who are negotiating over employment conditions with the employer are not simply off work, enjoying their own free time. Rather, they are participating in a statutorily protected process, one from which the employer also derives a benefit in the form of improved labor relations. (See MMBA, § 3500, subd. (a): "It is also the purpose of this chapter to promote the improvement of personnel management and employer-employee relations".)

If "but for" the bargaining obligation an employee would have been able to work a shift that entitled him or her to a shift differential, then there is no other logical way to view "full compensation" in such a circumstance than the precise wage that the employee would have

earned if not released from regular duties for negotiations. Otherwise, participation in negotiations would result in the employee losing wages, which amounts to a penalty against the employee for exercising a statutory right. (Decision No. 2307-M, p. 33.)

To be clear, this requirement for "full compensation" is only statutorily imposed for release time for formal meeting and conferring over matters within the scope of representation. The County is free to address its concerns regarding payment of shift differentials during release time for other types of union activities during future negotiations with Local 721 for a successor MOU at the appropriate time.[21] As it has been shown that the County failed to pay employees released from duty to participate in negotiations their full compensation, including any applicable shift differentials, this conduct violated MMBA section 3505.3, and concurrently MMBA section 3506.5, subdivision (b), as it also denied Local 721 the rights guaranteed to it by the MMBA. (Decision No. 2307-M, p. 33, fn. 20.)

REMEDY

It has been found that the County violated MMBA sections 3503, 3505, 3505.3, 3506, and 3506.5, subdivisions (a), (b), and (c), and therefore committed unfair practices under MMBA section 3509, subdivision (b), and PERB Regulation 32603, subdivisions (a), (b), (c), and (g). MMBA section 3509, subdivision (b), authorizes PERB to order "the appropriate remedy necessary to effectuate the purposes of this chapter." (*Omnitrans* (2010) PERB Decision No. 2143-M.) This includes an order to cease and desist from conduct that violates the MMBA. (*City of Torrance* (2008) PERB Decision No. 1971-M.)

[21] This does not mean, however, that a unilateral cessation of payment of shift differentials during release time for union activities other than for formal negotiations would be lawful under the MMBA. (See *infra*, § II.)

PERB's remedial authority also includes the power to order an offending party to take affirmative actions designed to effectuate the purposes of the MMBA. (*City of Torrance, supra*, PERB Decision No. 1971-M.) In cases of unilateral action, PERB generally orders employers to rescind the policy change and restore the status quo as it existed before the violation. (*Lucia Mar Unified School District* (2001) PERB Decision No. 1440, proposed decision, p. 56.) That is appropriate here. In addition, the traditional make-whole remedy in a unilateral change case is ordered. Thus, the County is ordered to pay shift differential pay for any employee who was on approved release time after March 1, 2011, either for formal negotiations with County representatives, or for other Union activities, and who would have qualified to claim a shift differential for their regular shifts that were missed because of the release time. Any financial losses should be augmented with interest at a rate of 7 percent per annum. (*Journey Charter School* (2009) PERB Decision No. 1945a.)

It is also appropriate to order the County to post a notice incorporating the terms of this order at all locations where notices to unit employees are usually posted. Posting of such a notice, signed by an authorized representative of the County, provides employees with notice that the County acted in an unlawful manner, must cease and desist from its illegal action, and will comply with the order. In addition to physical posting of paper notices, the notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the County to communicate with its employees in the bargaining unit represented by Local 721. (*City of Sacramento* (2013) PERB Decision No. 2351-M.) It effectuates the purposes of the MMBA to inform employees of the resolution of this controversy. (*Omnitrans, supra*, PERB Decision No. 2143-M.)

PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, it has been found that the County of Riverside (County) violated the Meyers-Milias-Brown Act (MMBA or Act) (Government Code, § 3500 et seq.). The County violated MMBA sections 3503, 3505, 3505.3, 3506, and 3506.5, subdivisions (a), (b), and (c), and therefore committed unfair practices under MMBA section 3509, subdivision (b), and Public Employment Relations Board (PERB or Board) Regulation 32603, subdivisions (a), (b), (c), when it: (1) unilaterally ceased paying employees' qualified claims for shift differentials during approved release time for negotiations or other union activities; and (2) failed to pay employees their full compensation or other benefits during approved release time for formal meeting and conferring with representatives of the County over matters within the scope of representation.

Under MMBA section 3509, subdivision (b), it is hereby ORDERED that the County, its governing body, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to provide notice and opportunity to bargain to Service Employees International Union, Local 721 (Local 721) over decisions to cease paying employees' qualified claims for shift differentials during approved release time for negotiations or other union activities.

2. Failing to pay employees on approved release time for formal meeting and conferring with representatives of the County over matters within the scope of representation their full compensation or other benefits.

3. Interfering with Local 721's right to represent bargaining unit members in their

employment relations with the County.

4. Interfering with bargaining unit members' right to participate in the activities of an employee organization.

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

1. Rescind the policy change regarding payment of employees' qualified claims for shift differentials during approved release time for negotiations or other union activities, and revert to the established practice in place before March 1, 2011, of paying those claims.

2. Make-whole unit employees for financial losses suffered as a result of the County's unlawful action. Any employees who, but for their participation in negotiations or other union activities while on approved release time, would have qualified for a shift differential, have suffered a financial loss. Any employees on approved release time for formal meeting and conferring with representatives of the County over matters within the scope of representation who were not paid their full compensation or other benefits have suffered a financial loss. Any financial losses should be augmented with interest at a rate of 7 percent per annum.

3. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations in the County where notices to employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the County, indicating that the County will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that this Notice is not reduced in size, altered, defaced, or covered with any other material. In addition to physical posting of paper notices, the Notice shall be posted by

electronic message, intranet, internet site, and other electronic means customarily used by the County to communicate with its employees in the bargaining unit represented by Local 721.

4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or to the General Counsel's designee. The County shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on Local 721.

Right to Appeal

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).)