STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 521, Charging Party, v. COUNTY OF KERN, Respondent.	Case No. LA-CE-992-M PERB Decision No. 2615-M December 21, 2018

Appearances: Weinberg, Roger & Rosenfeld by Sean D. Graham, Attorney, for Service Employees International Union, Local 521; Liebert Cassidy Whitmore by Adrianna E. Guzman, and Joshua A. Goodman, Attorneys, and James Brannen, Deputy County Counsel, for County of Kern.

Before Banks, Winslow, and Krantz, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Respondent County of Kern (County) to the attached proposed decision of an administrative law judge (ALJ). The ALJ found that the County unilaterally altered employees' terms and conditions of employment without adequately affording Charging Party Service Employees International Union, Local 521 (SEIU) notice and an opportunity to meet and confer, in violation of the Meyers-Milias-Brown Act (MMBA),[1] sections 3503, 3505, and 3506.5, subdivisions (a), (b) and (c), and PERB Regulation 32603, subdivisions (a), (b) and (c).[2]

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

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

We have reviewed the record in this matter and considered the parties' arguments in light of applicable law. We find that the record supports the ALJ's factual findings. The ALJ's conclusions of law are well reasoned and consistent with applicable law. We affirm the proposed decision and adopt it as the decision of the Board itself, subject to the following discussion.

BACKGROUND

The ALJ's procedural history and factual findings can be found in the attached proposed decision. We summarize those findings here to give context to our discussion of the exceptions.

The County's Mental Health Department (Department) includes six divisions that provide direct services to clients: Adult Care, Children's System of Care, Crisis Services, Kern Linkage Program, Recovery Support Administration, and Substance Abuse Disorder System of Care. A "direct service" is a client care action that is billable to Medi-Cal. Employees in the above-referenced divisions also perform work that is not billable to Medi-Cal. State regulations dictate which services are billable and which are non-billable.

From at least the mid-1990s until approximately September 2014, the Department's Adult Care Division expected employees, generally, to meet a 50 percent direct service target, while the other aforementioned divisions expected employees, generally, to meet a 75 percent direct service target. In the course of selecting and implementing a formula for calculating whether employees met these targets, division supervisors exercised discretion. For instance, they chose whether and to what extent to deduct leave, training, and various "duty restrictions"[3] from employees' total paid time to determine employees' available hours. Supervisors used varying formulas from division to division as well as within each division.

[3] Duty restrictions are client services that are not billable to Medi-Cal.

In or about September 2014, the County created a new, Department-wide 75 percent direct services target and a corresponding Department-wide formula (Departmental Formula) that superseded all existing formulas. The County made three primary types of changes. First, for Adult Care employees, the County increased employees' direct services target from 50 percent to 75 percent.[4] Second, the County standardized supervisors' use of assorted variables in their calculations, including the categories of duty restrictions that can be deducted from an employee's total paid hours.[5] Third, whereas only the Adult Care Division had previously used a performance evaluation scoring rubric based on the extent to which employees met their direct services target, the County began using a standardized performance evaluation scoring rubric for employees in all six divisions. On November 6, 2014, the County further revised the Departmental Formula and made associated changes.

The record does not contain evidence that the County provided SEIU with advance notice of either the original or revised set of changes. However, on October 15, 2014, the County and SEIU convened for their bi-monthly labor-management meeting, and the County notified SEIU that a committee was working on these issues. SEIU asked to meet and confer over the changes and also asked for a copy of the formula, and the County responded that it

[4] This change had a significant impact on employee workload and performance standards. Prior to September 2014, unlicensed staff in the Adult Care Division had individualized direct service targets that ranged from 850 to 910 hours per employee per year. After the County implemented its standardized formula, employees' annual targets ranged from 1,275 to 1,365 hours. For licensed staff in the Adult Care Division, direct service hour targets were between 840 and 900 hours per year before the County's change, and the annual targets increased to a range of 1,260 to 1,350 hours after the change.

[5] An employee in the Children's System of Care Division testified that as a result of these changes, her direct service hour target increased from 50 hours per month to more than 65 hours per month. While she more often than not met her direct services goal prior to the County's changes, she was not able to meet the new, higher target, and as a result she received "improvement needed" ratings.

would provide a copy after the committee completed developing it. The next day, Elizabeth Brown (Brown), a County human resources representative, e-mailed a copy of the formula previously used by the Crisis Services Division to Ernest Harris (Harris), SEIU's Regional Director, and Elizabeth Camarena, SEIU's representative. Brown did not explain that she had not sent SEIU the new Departmental Formula.

After SEIU learned that the County had implemented the new 75 percent direct services target and the associated Departmental Formula, Harris sent a letter dated December 10, 2014 to Bill Walker (Walker), the County Director of Mental Health, demanding that the County cease and desist from imposing these changes and further demanding that it meet and confer if it intended to implement them. At the time he sent his letter, Harris had not yet seen the Departmental Formula. Walker responded with a letter dated January 14, 2015, stating that the new standards were already in place. He advised that the County would continue to use such policies and/or standards of practice to evaluate its employees, and recommended that Harris contact him to arrange a meeting if he felt the topic warranted further discussion. At no point following the October 15, 2014 labor-management meeting did the parties meet and confer over the County's changes.

DISCUSSION

The MMBA obligates public agencies to meet and confer in good faith with recognized employee organizations regarding wages, hours, and other terms and conditions of employment. (MMBA, § 3505.) An employer commits a per se violation of its duty to meet and confer if it fails to afford the employees' representative reasonable advance notice and a meaningful opportunity to bargain before reaching a firm decision to create or change a policy affecting a

negotiable subject. (*County of Santa Clara* (2013) PERB Decision No. 2321-M, p. 21; *City of Sacramento* (2013) PERB Decision No. 2351-M, pp. 28-29.)

To establish an unlawful unilateral action, the charging party must allege facts demonstrating that: (1) the employer took action to change policy; (2) the change in policy concerns a matter within the scope of representation; (3) the action was taken without giving the exclusive representative notice or opportunity to bargain over the change; and (4) the action had a generalized effect or continuing impact on terms and conditions of employment. (*County of Monterey* (2018) PERB Decision No. 2579-M, pp. 9-10; *Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262, p. 9.)

While the County's exceptions raise challenges relating to each of the aforementioned elements, the proposed decision adequately addresses many of the County's arguments, and the Board need not further analyze those exceptions. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 5.) The Board also need not address alleged errors that would not impact the outcome. (*Ibid*.) With these principles in mind, we address the County's three central arguments.

I. The County's Dynamic Status Quo Defense

A change in policy generally falls into one of three categories: (1) changes to the parties' written agreements; (2) changes in established past practices; or (3) newly created policies, or application or enforcement of an existing policy in a new way. (*County of Monterey*, *supra*, PERB Decision No. 2579-M, p. 10; *Pasadena Area Community College District* (2015) PERB Decision No. 2444, p. 12, fn. 12; *City of Davis* (2016) PERB Decision No. 2494-M, pp. 30-31.) For the reasons discussed below and in the proposed decision, we find that the County altered established past practices, implemented a new policy, and applied existing policy in a new way.

The County's primary argument is that its new Departmental Formula is sufficiently akin to its prior policies that the County had no duty to bargain before deciding on the formula. The County frames its argument mainly as a defense under the "dynamic status quo" principle, which permits an employer to make changes to terms and conditions of employment, without notice and an opportunity to bargain, if the changes follow a consistent pattern of past changes that is formulaic or otherwise not influenced by employer discretion. (*Regents of the University of California* (2004) PERB Decision No. 1689-H, adopting proposed decision at pp. 30-31.)

An employer asserting that its challenged changes were consistent with a dynamic status quo must show that it made only nondiscretionary changes. In *Pajaro Valley Unified School District* (1978) PERB Decision No. 51 (*Pajaro*), the employer had a formulaic past practice in which it contributed only a preset amount toward employees' health insurance premiums and deducted from employees' paychecks any overages beyond the established employer-paid contribution. (*Id*. at pp. 9-10.) Thus, when the employer's health insurance providers raised applicable insurance premium rates, the employer exercised no discretion in passing the higher cost on to employees, thereby continuing exactly the past practice it had previously followed. (*Id*. at p. 10.)

We applied the same principle in *Regents of the University of California* (1996) PERB Decision No. 1169-H, where the University had a formulaic past practice in which it benchmarked its employer contribution to the full monthly premium of the lowest cost HMO plan and required employees choosing a more expensive plan to make up the difference. (*Id*., adopting warning letter at p. 2.) The University therefore exercised no discretion when it followed that formula in a new year. As in *Pajaro*, some employees experienced an increase in costs, but there was no bargainable change in past practice.

In *Regents of the University of California, supra*, PERB Decision No. 1689-H, the University no longer followed the "benchmark" formula addressed in *Regents of the University of California, supra*, PERB Decision No. 1169-H. Because the University instead exercised discretion based on budget availability and other factors, it was required to provide notice and an opportunity to bargain before deciding the amount of its contribution. (*Id.*, adopting proposed decision at p. 35.)

Similarly, in *Regents of the University of California* (1983) PERB Decision No. 356-H, the University had a practice of increasing employee parking rates each year, but its annual increases followed no set formula and instead involved discretion, meaning that it had a duty to provide notice and an opportunity to bargain before reaching a decision. (*Id.* at pp. 17-18.) In deciding on its annual increases to parking rates, the University took into account increased costs, as well as available budget, but taking these factors into account was not the same as following a nondiscretionary formula. (*Id.* at pp. 15-16.) The employer retained discretion regarding how much of its available budget it was willing to use to subsidize increased costs and the share of increases that would be borne by different groups of daily and monthly parkers, including employees, patients, and others. (*Ibid.*)[6] As a result, the Board rejected the University's dynamic status quo defense.

[6] Notably, when the status quo as to a particular employment term follows a nondiscretionary pattern of change, the employer must act in accordance with that pattern of change, and in fact commits a unilateral change if it fails to do so. (*California State Employees Assn. v. PERB* (1996) 51 Cal.App.4th 923, 937 [to maintain status quo, employer must continue established practice of annually reviewing employees' performance and awarding merit increases to deserving employees]; *Daily News of Los Angeles v. NLRB* (D.C. Cir. 1996) 73 F.3d 406, 411 [noting that "'in some circumstances it will be an unfair labor practice to grant unilaterally a wage increase,'" but in other cases, where the status quo involves an existing wage structure calling for annual increases, it is unlawful to unilaterally deny a wage increase] (quoting *NLRB v. Allied Products Corp.* (6th Cir. 1977) 548 F.2d 644, 652-53).) Therefore, the parties' rights and duties are the same regardless of whether the status

Here, we agree with the ALJ that the County did not follow a nondiscretionary past practice. Although the County asserts that it has used substantially the same 75 percent direct service requirement for decades, the record shows that not every division used a 75 percent target. Prior to September 2014, the Adult Care Division used a 50 percent direct services target, and it lowered that target for some employees based on individual duty restrictions. The County characterizes the lower target in Adult Care as an error, in that supervisors allegedly did not follow policy for many years. Regardless of the extent to which the lower target in Adult Care was an error, the County's implementation of a new, higher target represented a significant departure for employees working in Adult Care. These employees saw their workload and performance standards increase by more than 400 direct services hours per year. The County's claim of mistake does not excuse its bargaining obligation. (*County of Riverside* (2018) PERB Decision No. 2573-M, p. 24.)

The County also departed from the status quo by standardizing the manner in which division supervisors used assorted variables in their direct service target calculations—specifically, how supervisors deducted leave and duty restriction hours from employees' total paid hours in a year. The County did this in two primary ways. First, the County standardized leave deductions to include vacation leave, sick leave, holidays, and required training hours. Some divisions, like the Crisis Services Division, did not previously deduct training hours from leave. Second, the County created a core set of standard duty restrictions that applied to all divisions. Prior to implementation of the Departmental Formula, supervisors in each division could decide which duty restrictions to apply and how to apply them.

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quo is dynamic or static; in both instances, following or maintaining the status quo provides a defense to a unilateral change charge, but failure to follow or maintain the status quo establishes a violation, absent notice and an opportunity to bargain.

The County also imposed a performance evaluation scoring rubric on employees in all six divisions, placing employees into one of five tiered performance levels based on the extent to which they surpassed or fell short of their goals. Previously, only the Adult Care Division used such a performance evaluation scoring rubric. The rubric the County implemented Department-wide, adapted from the Adult Care Division's rubric, rated employees as unsatisfactory (under 85 percent of target hours), needs improvement (85 percent to 94.99 percent of target hours), standard (95 percent to 104.99 percent of target hours), above standard (105 percent to 114.99 percent of target hours), or outstanding (over 115 percent of target hours).

Because these changes were not consistent with a nondiscretionary past practice, we reject the County's dynamic status quo defense.

II. The County's "Fundamental Management Prerogative" Defense

Under the MMBA, the scope of representation includes all matters relating to employment conditions and employer-employee relations, including wages, hours, and other terms and conditions of employment. (MMBA, § 3504.) Fundamental managerial decisions regarding the merits, necessity, or organization of public services, however, are outside the scope of representation and therefore not subject to the MMBA's meet-and-confer requirement. (*Ibid*.)

The County argues that its 75 percent direct service standard is excluded from the scope of representation because it concerns the merits, necessity, and organization of mental health services the County provides. We disagree, for two reasons. First, we note that several aspects of the County's changes—particularly its performance evaluation scoring rubric and its standardization of variables in performing calculations—stand apart from the 75 percent target that the County claims is not bargainable. Even as to that target, however, we conclude that it

does not relate primarily to the merits, necessity, or organization of mental health services. Rather, it relates primarily to employee performance standards and workload and is therefore within the scope of representation. (See *County of Orange* (2018) PERB Decision No. 2594-M, pp. 18-20 [management decisions directly defining the employment relationship are always within the scope of representation]; see also *Los Angeles Unified School District* (2017) PERB Decision No. 2518, pp. 14-15 [criteria for rating employee performance is negotiable].)[7]

III. The County's Waiver Defense

The County argues that SEIU waived its right to bargain by: (1) not following up on the County's October 16, 2014 e-mail providing the direct service target formula used by the Crisis Services Division; (2) failing to more explicitly demand to meet and confer in its December 10, 2014 cease and desist letter; and (3) not responding to the County's January 14, 2015 offer to arrange a meeting. For the following reasons, however, we do not find that the County has met its burden of showing that SEIU consciously abandoned (and thus waived) its right to bargain. (*Placentia Unified School District* (1986) PERB Decision No. 595, pp. 4-8.)

The ALJ correctly found that SEIU requested to meet and confer and requested a copy of the Departmental Formula at issue, to allow for meaningful bargaining. The County did not respond by agreeing to meet and confer, did not restore or maintain the status quo, and did not send SEIU a copy of the Departmental Formula. Rather, the County simply sent SEIU a copy of the formula previously used by the Crisis Services Division, without explanation. Thus, there is no evidence that SEIU consciously abandoned its bargaining right.

[7] To the extent the proposed decision can be read to imply that the 75 percent direct service target may not fall within the scope of representation, we clarify that the target is within the scope of representation.

Moreover, we cannot find that SEIU waived its right to bargain given that it did not receive a copy of the Departmental Formula until December 2014, by which point the changes were a fait accompli. (*City of Palo Alto* (2017) PERB Decision No. 2388a-M, p. 49; *Arvin Union School District* (1983) PERB Decision No. 300, pp. 9-11.) The County thus failed to satisfy its burden of providing SEIU with notice of proposed but not yet finalized changes and an opportunity to meet and confer, to impasse or agreement, before finalizing the changes. (*Regents of the University of California*, *supra*, PERB Decision No. 1689-H, adopting proposed decision at pp. 45-46.)[8]

For these reasons, the ALJ correctly found that the County failed to meet and confer in good faith in violation of MMBA sections 3503, 3505, and 3506.5, subdivisions (a), (b), and (c), and PERB Regulation 32603, subdivisions (a), (b), and (c), when it unilaterally changed terms and conditions of employment without providing SEIU notice or an opportunity to bargain over the decision.

REMEDY

While we mainly adopt the remedies the ALJ ordered, we modify those remedies to better effectuate the purposes of the MMBA.

Our primary modification is that SEIU may elect to decline restoration of the status quo, and instead retain the County's new Departmental Formula and associated changes, in any

[8] Though SEIU requested to meet and confer, when an employer finalizes its decision before providing notice and an opportunity to bargain, a union is not obligated to request bargaining, nor to accept any employer offer to meet and confer that is made after the employer has already reached a firm decision. (*Ibid.*) By the same token, though the County offered to meet and confer in January 2015, it did not restore the status quo, which is a necessary condition for meaningful bargaining to occur. (*City of San Ramon*, *supra*, PERB Decision No. 2571-M, p. 15 [good faith bargaining is not possible when employer has already "imposed the very terms under discussion, thereby forcing [the union] to start from a position of having to talk the [employer] back to the status quo."])

of the six divisions at issue. We make this modification based on the County's argument, in its exceptions, that employees in certain divisions may be harmed by rescission of the County's changes. (*Denver Post Corp.* (1999) 328 NLRB 118, 126, cited with approval in *City of Riverside* (2009) PERB Decision No. 2027-M, p. 15.) We leave it to SEIU to make this decision because "[w]hether a change is beneficial or detrimental to the employees is a decision reserved to the employees as represented by their union." (*Solano County Employees' Assn. v. County of Solano* (1982) 136 Cal.App.3d 256, 262.)

ORDER

Upon the foregoing facts, conclusions of law, and the entire record in this case, it is found that the County of Kern (County) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3505, and 3506.5, subdivisions (a), (b), and (c), and Public Employment Relations Board (PERB or Board) Regulation 32603, subdivisions (a), (b), and (c), when its Department of Mental Health (Department) implemented a Department-wide 75 percent direct services target, corresponding Department-wide formula (Departmental Formula), and associated changes without providing the Service Employees International Union, Local 521 (SEIU) notice and an opportunity bargain over the decision.

Pursuant to section 3509, subdivision (b), of the Government Code, it hereby is ORDERED that the County, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and confer in good faith with SEIU by unilaterally implementing the 75 percent direct services target, Departmental Formula, and associated changes.

2. Denying SEIU its right to represent employees.

3. Interfering with the right of bargaining unit employees to be represented by the employee organization of their choosing.

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

1. Rescind the 75 percent direct services target, Departmental Formula, and associated changes, unless SEIU requests to retain such changes in any of the Department's divisions. If SEIU elects to retain such changes in any of the Department's divisions, SEIU must submit its request(s) to the Department within ninety (90) days of the date this Decision is no longer subject to appeal.

2. Make whole those bargaining unit employees adversely affected by the Departmental Formula or associated changes by rescinding negative evaluations and corrective/disciplinary actions or those offending portions of the negative evaluations and corrective/disciplinary actions which were based upon the Departmental Formula or associated changes. However, the County may reimpose such negative evaluations and corrective/ disciplinary actions, if they were warranted under the prior work standards. If a negative evaluation or corrective/disciplinary action is rescinded and not reimposed, the affected employee shall be made whole, including where applicable, reinstatement and/or backpay with interest at the rate of 7 percent per annum.

3. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all work locations where notices to County employees in the bargaining units represented by SEIU are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the County, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. The Notice shall also be posted by electronic

message, intranet, internet site, and other electronic means customarily used by the County to communicate with employees in the bargaining units represented by SEIU. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

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 the General Counsel's designee. The County shall provide reports, in writing, as directed by the General Counsel or his designee. All reports regarding compliance with this Order shall be concurrently served on SEIU.

Members Banks and Winslow 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-992-M, *Service Employees International Union Local 521 v. County of Kern*, in which all parties had the right to participate, it has been found that the County of Kern violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq., and PERB Regulations when its Department of Mental Health (Department) implemented a 75 percent direct service target, corresponding Department-wide formula (Departmental Formula), and associated changes without providing the Service Employees International Union, Local 521 (SEIU) notice and an opportunity bargain over the decision.

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 meet and confer in good faith with SEIU by unilaterally implementing the 75 percent direct services target, Departmental Formula, and associated changes.

2. Denying SEIU its right to represent employees.

3. Interfering with the right of bargaining unit employees to be represented by the employee organization of their choosing.

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

1. Rescind the 75 percent direct services target, Departmental Formula, and associated changes, unless SEIU requests to retain such changes in any of the Department's divisions. If SEIU elects to retain such changes in any of the Department's divisions, SEIU must submit its request(s) to the Department within ninety (90) days of the date this Decision is no longer subject to appeal.

2. Make whole those bargaining unit employees adversely affected by the Departmental Formula or associated changes by rescinding negative evaluations and corrective/disciplinary actions or those offending portions of the negative evaluations and corrective/disciplinary actions which were based upon the Departmental Formula or associated changes. However, the County may reimpose such negative evaluations and corrective/ disciplinary actions, if they were warranted under the prior work standards. If a negative evaluation or corrective/disciplinary action is rescinded and not reimposed, the affected employee shall be made whole, including where applicable, reinstatement and/or backpay with interest at the rate of 7 percent per annum.

Dated: _____ COUNTY OF KERN

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 521, Charging Party, v. COUNTY OF KERN, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-992-M PROPOSED DECISION (December 27, 2016)

Appearances: Weinberg, Roger & Rosenfeld by Sean D. Graham, Attorney, for Service Employees International Union, Local 521; Liebert Cassidy Whitmore by Adrianna E. Guzman, Attorney, and James Brannen, Deputy County Counsel, for County of Kern.

Before Shawn P. Cloughesy, Chief Administrative Law Judge.

INTRODUCTION

This case concerns allegations that a public employer violated the Meyers-Milias-Brown Act (MMBA)[1] and Public Employment Relations Board (PERB or Board) Regulations[2] when it implemented a direct service target formula without providing the exclusive representative prior notice and an opportunity to bargain over the decision or the effects of the decision. The public employer denies any violation.

PROCEDURAL HISTORY

On March 16, 2015, the Service Employees International Union, Local 521 (Local 521) filed the instant unfair practice charge against the County of Kern (County).

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

[2] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 and following.

On September 9, 2015, PERB's Office of the General Counsel issued a complaint alleging that the County implemented a "Direct Service Target Formula" policy, a "Progress Note Documentation Standards" policy, and a "Timeliness of Documentation Standard" policy without providing Local 521 notice and an opportunity to bargain over the decision or the effects of the decision in violation of MMBA sections 3503, 3505, 3506, and 3506.5, subdivisions (a), (b), and (c), and PERB Regulation 32603, subdivisions (a), (b), and (c).

On September 28, 2015, the County filed its answer to the complaint, denying any violation of the MMBA and PERB Regulations and setting forth its affirmative defenses.

On December 11, 2015, an informal conference was held, but the matter was not resolved.

Formal hearing was held on April 25 and 26, 2016. On the first day of hearing, Local 521 withdrew the allegations in the complaint pertaining to the implementation of the "Progress Note Documentation Standards" policy and the "Timeliness of Documentation Standard" policy. The County did not object to the withdrawal and, as such, the allegations within paragraphs 11 through 24 of the complaint will be considered withdrawn and dismissed.

At the conclusion of Local 521's case-in-chief, the County moved to dismiss the complaint for failure to state a prima facie case. The motion was denied without prejudice.

The matter was submitted for decision with the filing of post-hearing briefs on June 29, 2016.

FINDINGS OF FACT

Parties

Local 521 is an exclusive representative within the meaning of PERB Regulation 32016, subdivision (b), and represents a number of employee classifications in the

County's Department of Mental Health (Department), including: Psychiatrist I through III; Clinical Psychologist I through II; Mental Health Therapist I through II; Mental Health Recovery Specialist I through III; Program Specialist I; Program Technician; Substance Abuse Specialist I through II; Mental Health Nurse I through II; Nurse Practitioner; Vocational Nurse I through II; and Youth Prevention Specialist I through II.

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

Background

The Department operates as a mental health clinic providing direct services to the community, primarily to those who are Medi-Cal beneficiaries. The Department bills these services on a per-minute basis and is reimbursed by Medi-Cal. The following divisions within the Department provide direct services to clients: (1) Children's System of Care; (2) Adult System of Care; (3) Kern Linkage; (4) Crisis Services; (5) Recovery Support Administration; and (6) Substance Use Disorder. Each of these divisions includes employees represented by Local 521.

In addition to direct services, the Department provides non-billable services referred to as "activities." Activities are services related to patient care, but for which Medi-Cal does not reimburse the Department. For example, accompanying a client to a doctor's appointment constitutes a non-billable activity. The County does not determine which services are billable direct services and which are non-billable activities. This determination is made by the California Department of Health Care Services (DHCS) and is set forth in its regulations.

DHCS periodically audits the Department to ensure the Department is providing direct services in compliance with DHCS regulations. To help ensure compliance, the Department

has set a 75 percent direct service target for employees who provide direct services. This target has been in place for decades and generally requires employees to spend at least 75 percent of their available time providing direct services to clients. However, acknowledging that employees provide a mixture of direct services and activities, the 75 percent direct service target is only a starting point and is adjusted downward to account for the amount of time an employee spends providing activities. Adjustments are made on an employee-by-employee basis and result in an employee's actual direct service target for a given year.

Historically, each division in the Department maintained its own formula for calculating an employee's actual direct service target. The record contains two written formulas, one from Crisis Services and another from Adult System of Care.[3] The two formulas operate on the same general principle, starting with an employee's total paid hours for a given year then deducting leave and training hours to determine the employee's available hours. Each formula then takes a percentage of those available hours as the employee's initial direct service target. This initial direct service target is then adjusted downward by subtracting the number of hours an employee spends performing non-billable activities. The resulting number is the employee's actual direct service target.

While the Crisis Services and Adult System of Care formulas include the same variables, each division set the values for the variables in markedly different ways. For example, the divisions differed on how many leave and training hours were deducted from an employee's total paid hours. They also differed on how they calculated the initial direct service target. While Crisis Services calculated this number by taking 75 percent of an

[3] The record reflects Children's System of Care also memorialized their formula, but the formula is not in the record.

employee's available hours, Adult System of Care took 50 percent of an employee's available hours.

The divisions that did not memorialize their formulas followed the same general principles as Crisis Services and Adult System of Care, but there were notable differences. For example, some divisions did not deduct any training or leave hours from an employee's total paid hours. Others determined an employee's initial direct service target by taking 75 percent of the employee's total paid hours; not his available hours. Additionally, in some divisions, different supervisors used different formulas to calculate employees' actual direct service targets so that similarly-situated employees in the same division had different targets.

Each division used an employee's actual direct service target as a performance metric where employees were rated on whether they approached or surpassed their target. At least one division—Adult System of Care—memorialized its evaluation rubric as part of its formula.

Regina Kane (Kane) is a mental health nurse in the County. In June 2010, she received a memorandum from the County referencing the 75 percent direct service target. Kane was the President of Local 521 at the time. At the formal hearing, Kane confirmed that there has always been a 75 percent direct service target, although the formula that the County used to calculate her actual target changed during her tenure.

The Current Dispute

In May 2014, Bill Walker (Walker), the Director of the Department, directed a working group to unify each division's direct service target formula into a single formula that would apply Department-wide. The working group completed its task in September 2014. The resulting Department-wide formula operates under the same general principles as the ones used by the divisions—it calculates an employee's available hours, determines an initial direct

service target, then deducts non-billable activities to determine the employee's actual direct service target. The new formula standardizes the amount of leave and training hours that can be deducted from an employee's total paid hours and sets the initial direct service target as 75 percent of an employee's available hours. The formula also adopts the performance evaluation rubric previously used by Adult System of Care.

On October 15, 2014, Ernest Harris (Harris), a regional director at Local 521, attended a labor-management meeting where the County stated a working group was developing a new direct service target formula for the Department. Local 521 requested to meet and confer about the new formula. The following day, the County sent Local 521 two documents: (1) an August 13, 2012 memorandum regarding standards for timeliness of progress notes; and (2) the direct service target formula previously used by Crisis Services.

On November 6, 2014, the Department issued a revised version of its direct service target formula. The record does not reflect that the County provided Local 521 either the original or revised versions of the direct service target formula prior to implementing the formula. Harris testified that Local 521 learned that the new formula went into effect when its members approached it about the change.

On December 10, 2014, Harris corresponded with Walker and objected to the unilateral implementation of the new Department-wide direct service target formula. Walker replied on January 14, 2015, stating the new formula was consistent with standard practices and/or policies at the Department, and the Department would continue using the formula.

ISSUES

1. Was the unfair practice charge timely filed?

2. Did the County commit an unlawful unilateral change when it implemented a Department-wide direct service target formula?

CONCLUSIONS OF LAW

Statute of Limitations

The County argues the complaint must be dismissed because Local 521 knew of the 75 percent direct service target as early as June 2010. The MMBA contains a six-month statute of limitations. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072, 1091.) Generally, the limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177, p. 4, citing *Fairfield-Suisun Unified School District* (1985) PERB Decision No. 547.[4]) At the formal hearing, the respondent bears the burden of demonstrating that the charge was filed outside the six-month limitations period. (*Los Angeles Unified School District* (2014) PERB Decision No. 2359, p. 3.)

The complaint states the County violated the MMBA when it implemented a "Direct Service Target Formula" policy on or around December 10, 2014. The County construes this language to mean implementation of the 75 percent direct service target. Were the direct service target itself at issue, the charge would be untimely since Local 521 knew of the target well before six months of when it filed its charge. However, the issue before PERB is whether

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

implementation of the Department-wide direct service target *formula* constituted an unlawful unilateral change. This is what Local 521 challenged in its unfair practice charge and what the parties litigated at formal hearing.

Local 521 became aware of the new formula on October 15, 2014, and it filed its unfair practice charge within six months of that date. Accordingly, the charge is deemed timely and a decision will be reached on the merits.[5]

Unilateral Change

If established, an unlawful unilateral change is a per se violation of the County's duty to bargain in good faith. (*Stockton Unified School District* (1980) PERB Decision No. 143, p. 22.) This is because such conduct has an inherently destabilizing and detrimental effect upon the parties' bargaining relationship. (*San Mateo County Community College District* (1979) PERB Decision No. 94, pp. 14-15.) To state a prima facie violation, Local 521 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

[5] Even assuming the complaint does not specifically refer to the implementation of the Department-wide direct service target formula, that issue meets the criteria for an unalleged violation. The Board has the authority to review unalleged violations when the following criteria are met: (1) adequate notice and opportunity to defend has been provided to respondent; (2) the acts are intimately related to the subject matter of the complaint and are part of the same course of conduct; (3) the unalleged violation has been fully litigated; and (4) the parties have had the opportunity to examine and be cross-examined on the issue. (*County of Riverside* (2010) PERB Decision No. 2097-M, p. 7, citing *Fresno County Superior Court* (2008) PERB Decision No. 1942-C.) The unalleged violation must also have occurred within the applicable statute of limitations period. (*Ibid.*)

Here, Local 521 raised the issue of the County's implementation of a single Department-wide direct service target formula in its unfair practice charge and in its opening statement at hearing. Additionally, the direct service target formula is intimately related to the subject matter of the complaint, the implementation of the Department-wide formula was fully litigated at hearing, both parties had the opportunity to examine and cross-examine witnesses on the issue, and, as discussed above, the implementation of the Department-wide direct service target formula occurred within the six months of the charge being filed.

exclusive representative notice or opportunity to bargain over the change; and (4) the action had a generalized effect or continuing impact on terms and conditions of employment. (*County of Santa Clara* (2013) PERB Decision No. 2321-M, p. 13, citing *Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262.)

A. Change in Policy

The County argues there was no change in policy because implementation of the Department-wide direct service target formula was consistent with a dynamic status quo. In *Pajaro Valley Unified School District* (1978) PERB Decision No. 51, the Board held that the status quo against which an employer's conduct is evaluated must take into account the regular and consistent past patterns of changes in conditions of employment. (*Id.* at p. 6.) There, the union argued the school district implemented a unilateral change when it increased the amount deducted from employees' paychecks that went toward paying health plan premiums. (*Id.* at p. 7.) The Board found there was no unilateral change because the school district's conduct was consistent with a dynamic status quo in which it only paid a set amount for insurance premiums and passed on the cost of any premium increases to employees. (*Id.* at pp. 9-10.) Notably, the increase in the amount deducted was not due to any decision made by the school district, but the result of the health plan increasing its rate. (*Ibid.*; see also *Regents of the University of California* (1996) PERB Decision No. 1169-H [adjustments to employees' health benefits were consistent with a dynamic status quo where employer's contribution toward an employee's health plan was adjusted each year to reflect health plan changes and costs assessed by the health carriers].)

By contrast, the Board has declined to recognize a dynamic status quo where the employer retains discretion in making changes. In *Regents of the University of California*

(1983) PERB Decision No. 356-H, the Board found the university implemented a unilateral change when it increased parking fees. The Board rejected the university's argument that a dynamic status quo existed because the increase in parking fees was not set by a clear formula. (*Id.* at p. 15.) It was not keyed to a standard method of computation, such as a cost-of-living increase, nor was the amount of the increase determined by a third party. (*Ibid.*) The university exercised vast discretion in computing an annual operating budget for the parking system and exercised virtually unfettered discretion in determining how it would extract increased costs. (*Id.* at pp. 15-16; see also *Regents of the University of California* (2004) PERB Decision No. 1689-H [no dynamic status quo existed where university changed health plan contribution from one based on the cost of the lowest-priced HMO to one based on the university's budgetary considerations].)

Here, the County's dynamic status quo argument fails because the Department has always maintained discretion when calculating an employee's actual direct service target. This is evidenced by the wide variation in how the divisions previously generated their formulas, with each division determining for itself what variables to use and what values to assign to those variables.[6] The Department's decision to move to a single Department-wide formula simply transferred the exercise of discretion from the division level to the Department level, and there is nothing that would prevent the Department from making changes to the formula if it deemed that to be necessary. Accordingly, implementation of the new Department-wide direct service target formula was not consistent with a dynamic status quo and constituted a change in policy.

[6] The one exception is time spent performing non-billable activities since DHCS determines what constitutes a non-billable activity.

B. Scope of Representation

MMBA section 3504 defines the scope of representation as including:

> [W]ages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.

The County asserts the 75 percent direct service target is outside the scope of representation because it pertains to the amount of services the Department will provide, which is part of the County's fundamental managerial prerogative. However, the direct service target itself is not at issue. Rather, the issue is whether the new Department-wide direct service target formula is within the scope of representation.

Courts have held that employee workload is within the scope of representation under the MMBA. (*Los Angeles County Employees Assn. v. County of Los Angeles* (1973) 33 Cal.App.3d 1, 5.) Additionally, the Board has held that performance standards are within the scope of representation because they suggest rewards for attaining those standards and discipline for failure to attain them, which directly impacts the terms and conditions of employment. (*State of California (Department of Motor Vehicles)* (1998) PERB Decision No. 1291-S, adopted proposed decision, p. 8.)

Here, the Department-wide direct service target formula sets employees' workload by determining the amount of work an employee must perform to satisfy the general 75 percent direct service target. The formula also sets a performance standard since whether an employee reaches or surpasses the target determines what rating they receive for purposes of any performance evaluation. Accordingly, the Department-wide direct service target formula was within the scope of representation.

C. Notice and Opportunity to Bargain

The County first created the new Department-wide direct service target formula in September 2014. Local 521 did not learn of the new policy until October 2014, after the County had already created the new formula. The County did not respond to Local 521's request to meet and confer over the formula nor did it provide Local 521 a copy of the original or revised version of the formula prior to implementation. Accordingly, the County implemented the new Department-wide formula without providing Local 521 notice and an opportunity to bargain.

D. Generalized Effect or Continuing Impact

There does not appear to be any dispute that the Department-wide direct service target formula had a generalized effect and continuing impact on the terms and conditions of employment. The policy applies to all employees in the Department who provide direct services and impacts their hours of work as well as how the County rates their job performance.

Based on the above, the implementation of the Department-wide direct service target formula constituted an unlawful unilateral change in violation of MMBA sections 3505 and 3506.5, subdivision (c), and PERB Regulation 32603, subdivision (c). This conduct also constituted derivative violations of MMBA sections 3503, 3506, and 3506.5, subdivisions (a) and (b), and PERB Regulation 32603, subdivisions (a) and (b). (*City of Selma* (2014) PERB Decision No. 2380-M, pp. 26-27.)

REMEDY

MMBA section 3509, subdivision (b), states in part:

> The initial determination as to whether the charge of unfair practice is justified and, if so, the appropriate remedy necessary

> to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board.

It has been found that the County failed to meet and confer in good faith in violation of MMBA sections 3503, 3505, 3506, and 3506.5, subdivisions (a), (b), and (c), and PERB Regulation 32603, subdivisions (a), (b), and (c), when it implemented a Department-wide direct service target formula without providing Local 521 notice or an opportunity to bargain over the decision. The appropriate remedy is to order the County to cease and desist from such conduct. (*City of Selma, supra*, PERB Decision No. 2380-M, p. 27.) It is also appropriate to order the County to reinstate the status quo ante by rescinding the Department-wide direct service target formula. (*Ibid.*)

In addition to requesting the rescission of the Department-wide direct service target formula, Local 521 also requested that the County make its affected employees whole for any losses suffered as a result of the unlawful unilateral change by rescinding any negative or adverse employment actions (negative evaluations or corrective/disciplinary actions) which relied upon the unlawfully imposed non-negotiated work standard. (*California State Employees Assn. v. Public Employment Relations Bd.* (1996) 51 Cal.App.4th 923, 946; *Fairfield-Suisun Unified School District, supra*, PERB Decision No. 2262, p. 18-19.) This request will be granted, but with modifications. The County is ordered to rescind negative evaluations and corrective/disciplinary actions or those offending portions of the negative evaluations and corrective/disciplinary actions which were based upon the unilaterally implemented work standards. However, the County may reimpose such negative evaluations and corrective/disciplinary actions, if they were warranted under the prior work standards. (*San Bernardino City Unified School District* (1998) PERB Decision No. 1270, p. 3.) If the adverse employment actions are rescinded and not reimposed, the affected employees shall be

made whole, including where applicable, reinstatement and/or backpay with interest at the rate of 7 percent per annum. Any negative evaluation or corrective/disciplinary action which has been finally adjudicated through a grievance/arbitration process or through an administrative appeal process such as a civil service commission, or resolved through settlement agreement will be exempt from this aspect of the ordered remedy.

The County is further ordered to post a notice signed by an authorized representative and incorporating the terms of the order below. (*City of Sacramento* (2013) PERB Decision No. 2351-M, pp. 47-48.) The notice posting order effectuates the purposes of the MMBA by informing employees that the controversy over this matter has been resolved and that the employer will comply with the ordered remedy. (*Ibid.*) The notice posting shall include both a physical posting of paper notices at all places where employees in the bargaining units represented by Local 521 are customarily placed, as well as a posting by electronic message, intranet, internet site, and other electronic means customarily used by the County to communicate with employees in the bargaining units represented by Local 521. (*Ibid*.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the County of Kern (County) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3505, 3506, and 3506.5, subdivisions (a), (b), and (c), and Public Employment Relations Board (PERB or Board) Regulation 32603, subdivisions (a), (b), and (c), when its Department of Mental Health (Department) implemented a Department-wide direct service target formula without providing the Service Employees International Union, Local 521 (Local 521) notice and an opportunity bargain over the decision.

Pursuant to section 3509, subdivision (b), of the Government Code, it hereby is ORDERED that the County, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and confer in good faith with Local 521 by unilaterally implementing a Department-wide direct service target formula.

2. Denying Local 521 its right to represent employees.

3. Interfering with the right of bargaining unit employees to be represented by the employee organization of their choosing.

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

1. Rescind the Department-wide direct service target formula.

2. Make whole those bargaining unit employees adversely affected by the Department-wide direct service target formula, as follows:

a. Rescind negative evaluations and corrective/disciplinary actions or those offending portions of the negative evaluations and corrective/disciplinary actions which were based upon the Department-wide direct service target formula. However, the County may reimpose such negative evaluations and corrective/disciplinary actions, if they were warranted under the prior work standards. If a negative evaluation or corrective/ disciplinary action is rescinded and not reimposed, the affected employee shall be made whole, including where applicable, reinstatement and/or backpay with interest at the rate of 7 percent per annum.

b. Regardless of the remedies set forth in subdivision (a), a negative evaluation or corrective/disciplinary action which relied upon the Department-wide direct service target formula, shall not be rescinded, modified, or reimposed, if it has been finally

adjudicated through the grievance/arbitration process or through an administrative appeal process such as a civil service commission, or resolved through settlement agreement.

3. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to County employees in the bargaining units represented by Local 521 are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the County, indicating that it 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 the Notice is not reduced in size, altered, defaced or covered with any other material. The Notice shall also be posted by electronic message, intranet, internet site, and other electronic means customarily used by the County to communicate with employees in the bargaining units represented by Local 521.

4. Written notification of the actions taken to comply with this Order shall be made to PERB's General Counsel, or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his designee. All reports regarding compliance with this Order shall be concurrently served on Local 521.

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 twenty (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, subdivision (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).)