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Toward the end of their meeting, McGinnis asked Guthrie to keep their meeting in confidence between the two of them because she did not want Cook or Phillips to know what they had discussed. He responded that he could only do that for so long because Cook is the president of the Association and would need to know that Guthrie was canceling labor-management meetings. McGinnis said Cook would be out for a week and then she had something going on after that, as a result she asked Guthrie for three weeks. Guthrie told her that when he notified Cook about canceling the labor-management meetings, he was going to let Cook know that he had talked to McGinnis about it, since Cook had a right to know as Association president, though he would not necessarily tell Cook the details they had discussed. McGinnis said that was okay. Guthrie told McGinnis that since she said she needed three weeks, if he did not hear from anyone in three weeks, he would call Cook and have a meeting with her. Then he told her if she decided not to talk to Cook that was fine, but in three weeks he would call Cook regardless. McGinnis said okay. Guthrie testified that he never told McGinnis she should fear him or that he wanted Cook off the Association Board.

McGinnis contradicted Guthrie's testimony in a number of respects.<sup>4</sup> However, the ALJ concluded that both observational and non-observational factors support crediting Guthrie's testimony over McGinnis' testimony. We have reviewed the record, and we similarly find Guthrie's testimony to be the more complete and credible account of what occurred at the November 8, 2013 meeting. Guthrie typically answered questions in a straightforward manner and testified about the different parts of the meeting in a coherent and consistent manner. Where he was uncertain, he said so, and he qualified his recollection as needed without prompting. Guthrie's testimony was consistent with statements he made to City Manager Dominic Lazzaretto (Lazzaretto) on December 5, 2013 about the November 8 meeting.

McGinnis' testimony, in contrast, was often elicited by leading questions on direct examination, reducing its credibility. Indeed, the ALJ repeatedly cautioned counsel for the Association about leading McGinnis. Several times, McGinnis agreed with leading statements by Association counsel, only to have to backtrack later. McGinnis also offered inconsistent, or at least exaggerated, testimony about Guthrie's loudness during the November 8, 2012 meeting. At one point in her testimony, McGinnis described part of the meeting as "45 minutes of him yelling and screaming at me. . ." But when pressed on cross examination to describe his loudness on a scale of one to ten, she backtracked, describing silent expressions of anger: "It wasn't so much the loudness. It was his facial expressions, the, like, the gritting of

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<sup>4</sup> For example, McGinnis testified that Guthrie was "livid" and "ripped into [her]." McGinnis also testified that Guthrie told her that Cook needed to go, and should be replaced by Chris Hoeflin. McGinnis said that Guthrie made an analogy about lions, said his captains and McGinnis should fear him, asked McGinnis if she had insurance, and said, "I hope you have insurance." At that point, according to McGinnis, she did not know what to think and was very scared. McGinnis further asserted that Guthrie closed the meeting by saying he was giving her three weeks and if she didn't remove Cook in that timeframe, he would have it done through the members."

the teeth, and the leaning like this forward, coming towards me.” We infer McGinnis likely exaggerated when she first stated that Guthrie was yelling and screaming for 45 minutes.

McGinnis was also unable to recall certain parts of the November 8 meeting.

Finally, we have reason to doubt McGinnis’s testimony regarding Guthrie’s November 8, 2012 comments on insurance—which McGinnis alleged to be coercive. McGinnis testified that Guthrie asked her if she had insurance. She explained that Guthrie’s question followed an analogy about lions and a statement that she should fear him. She denied that he mentioned insurance in the context of whether the Association had insurance and emphasized that “the insurance comment was directed solely at me” and that she took it to refer to personal insurance right before testifying that Guthrie’s comment made her “very scared.” But the minutes of the February 15, 2013 Association membership meeting reflect that “APCEA received verbal threats regarding . . . [l]ack of Association insurance, Board being sued by members, and Union Busting to remove President from office.” McGinnis said that at that meeting they “discussed with the members what had been occurring with me and the Chief and the things that he had said and done, and we asked our attorney to explain what some of the remedies could be.” The grouping of these topics in the minutes, McGinnis’ description of meeting, and the lack of any evidence that someone other than McGinnis raised these topics, all suggest the minutes reflect McGinnis’ statements about the November 8 meeting. Thus, it appears McGinnis characterized Guthrie’s comments about insurance as being about Association insurance, not personal insurance, at the February 15, 2013 meeting, but was adamant in her testimony that his comments referred to her personally. This shift



suggests that one of her statements was untrue or that her recollection changed over time. In any event, it casts further doubt on her testimony.<sup>5</sup>

B. Guthrie's Statements on February 21, 2013

The Association held a general membership meeting on February 15, 2013. At some point in the meeting, members discussed the part-time dispatcher issue, and one of the members asked if the Association had slowed down the hiring process. Phillips responded, saying something to the effect that if Guthrie claimed the Association had slowed down the process, he was not telling the truth. Multiple attendees later told Guthrie that Phillips had called him a liar.

On February 21, 2013, Guthrie addressed a group of dispatchers. He disputed that he was a liar and shared a short PowerPoint-style presentation to support his position. Cook and McGinnis were not present at the meeting in question, while Kristi Ortiz (Ortiz), Campbell, and Association member Kristin Gavrity, though present, did not have strong recollections.

Deborah Cuddihy (Cuddihy) testified as follows. The meeting took place in the Emergency Operation Center, a classroom style room with desks, chairs, a podium, and a projector. After a discussion of overtime issues, Campbell said she wanted to clear the air about Phillips calling Guthrie a liar. Campbell told the group she left the Association Board because she felt betrayed by Cook and McGinnis for going behind her back on the part-time dispatcher issue. At that point, Guthrie started talking about his interactions with Phillips. Guthrie said he believed Phillips had lied to them. Guthrie used the projector to show an e-

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<sup>5</sup> McGinnis also testified inconsistently when asked about the December 5, 2013 meeting with Lazzaretto. When asked if, on December 5, Phillips had accurately recounted the November 8, 2012 meeting, she responded, "I believe it was very accurate." Later, she admitted she did not recall what Phillips said on December 5 regarding the November 8 meeting.

mail between him and Phillips. Then, he projected a timeline showing alleged delays in the hiring process. Guthrie also said, “that he was on the side of the workers,” that the Association Board and Phillips were hindering the process, and that Phillips was threatening toward him.

Guthrie’s recollection differed somewhat from Cuddihy’s. Guthrie testified that he made a “little three-slide PowerPoint or something like that.” The slides included an e-mail Phillips had sent to Casalou and a timeline he quickly repurposed from one he had used to prepare for a Workers’ Compensation deposition. He took the presentation to the meeting with the dispatchers. Guthrie testified that he told them as follows:

I just need you to know that your Chief hasn’t lied to you, that I’ll make decisions, I’ll do things at times that might be unpopular, and maybe I’m, in your mind, I’m making the wrong decision. And that’s all part of the business that we have to conduct, but I have not lied to you, and I just want you to know that. And I want to show you a couple things that supports me not lying to you . . . .

Though there are some differences between Guthrie’s and Cuddihy’s recollections of the meeting, we find it unnecessary to resolve them, because, as discussed *post*, there is inadequate evidence to support an interference finding under either set of facts.

C. Alleged Interference Subsequent to February 21, 2013

On May 7, 2013, the Association filed unfair practice charge number LA-CE-847-M against the City (first charge). The Office of General Counsel issued a complaint (first complaint) on October 31, 2013, alleging that Guthrie interfered with protected rights through his comments about the Association’s leadership on November 8, 2012, and his comments about the Association’s chief negotiator on February 21, 2013.

At a June 17, 2013 Association membership meeting, Association member Ortiz proposed removing Cook and Association Treasurer Cuddihy from their Association positions.

Later in the meeting, Ortiz deleted Cuddihy from her proposal. Although Ortiz asked that the Association hold a secret ballot vote regarding her proposal on June 24, Association leadership declined this request and directed Ortiz to follow the procedure in the bylaws if she planned to proceed.

On June 26, 2013, Phillips sent a letter to Ortiz warning that the Department could discipline her for sending union-related e-mails over the City's e-mail system. Ortiz felt threatened by Phillips' letter. Ortiz testified that the letter was one of a number of problematic things that Phillips had done, and that she did not believe Phillips should continue as the Association's attorney.

In mid-July 2013, Cook went out on leave and did not return to work.

On November 14, 2013, a group of Association members met and voted to remove Cook, McGinnis, and Cuddihy from their Association positions and replace them with Ortiz, Mike Vercillo (Vercillo), and Caroline Ngai (Ngai). Nine of the Association's twenty members attended. The group selected Vercillo to act as scribe and take minutes. Vercillo confirmed proxies and attached them to the minutes. Taking each person one at a time, Ortiz read charges against Cuddihy, McGinnis, and Cook. In each instance, all votes of those nine present and all five proxies were cast to remove them. Then members nominated Ortiz, Vercillo, and Ngai to serve as President, Vice President, and Treasurer respectively, and they assumed office by acclamation because there were no rival nominees.

On November 18, 2013, Ortiz sent a memorandum to Director of Administrative Services, Hue Quach (Quach). The body of the memo read:

Mr. Quach,

This is to inform you that on November 14, 2013, the General Membership of the APCEA has voted to remove Board members

of [sic] Judy Cook as President, Pam McGinnis [sic] as Secretary and Deborah Cuddihy as Treasurer. At the same meeting, the General Membership of the APCEA has elected a new Board, which consists of Kristi Ortiz as President, Mike Vercillo as Secretary and Caroline Ngai as Treasurer.

Please find the minutes to the November 14, 2013 meeting attached.

Ortiz included a copy of the minutes, the attendance sheet, written charges against each of the Association Board members, and proxy forms.

Quach sought legal advice from the City's outside labor relations counsel, Steve Filarsky (Filarsky). On November 20, 2013 at 3:06 p.m., Quach sent Ortiz a letter thanking her for contacting him and noting as follows: "Based on the information that was provided to Human Resources, we want to congratulate you, Mike, and Caroline in becoming the newly elected board members for the APCEA."

On November 20 at 3:17 p.m., Cook e-mailed Lazzaretto a copy of a letter from Cook to Sylvia Duran at the Arcadia City Federal Credit Union. The letter disputed the removal of Cook, McGinnis, and Cuddihy, and stated that "the so-called 'Minutes' of a purported membership meeting on November 14, 2013, are fraudulent in that no authorized membership meeting took place that day." Lazzaretto responded to Cook on November 21 that he understood the membership voted to remove the previous Association Board and that "the City is now meeting and conferring with that newly recognized Association Board." The next month, the City and the new Association leaders reached a new MOU, completing negotiations that had been ongoing for several months, as described below.

D. The Parties' Negotiations for a New MOU

The parties had an MOU set to expire on June 30, 2014. Based on past practice, the parties would have expected to commence their next bargaining cycle in spring 2014. In a

departure from that practice, Lazzaretto's secretary, Connie Schacatano (Schacatano), e-mailed Cook and leaders of other unions representing City employees, inviting them to a meeting on August 22, 2013, in order to discuss the City's desire to engage in early and compressed negotiations for a possible successor MOU with each union. Schacatano's e-mail was the first time the City proposed to start negotiations early. At the time of Schacatano's e-mail, Cook, McGinnis, and Cuddihy were all out on leave, and the Association had not yet formed its team for negotiations. Cook responded that the Association Board members and the Association's attorney were unavailable that day, and she requested that any handouts or notes from the meeting be forwarded to her. Cook never heard back from Schacatano.

Schacatano contacted Campbell and told her she invited the Association, but did not receive a response, that she believed somebody from the Association should be at the meeting, and that she would ask Lazzaretto if she could invite Campbell. Campbell held no leadership position with the Association, having resigned from the Association Board in November 2012. Lazzaretto approved inviting someone from the Association to attend. Campbell did not contact the Association before the meeting, Cook was unaware Campbell had been invited, and no Association representative authorized Campbell to attend on the Association's behalf.

Campbell attended the August 22, 2013 meeting. Lazzaretto described the point of the meeting as being for "all the unions" to know his philosophy for negotiations, because they "were headed into labor negotiations." He testified that the City Council was looking for a "completely different kind of model for labor negotiations." At the meeting, he explained his philosophy for negotiations. He emphasized that he did not view good negotiations as having a winner, that transparency was essential, that he believed the parties shared common goals, that attorneys were not necessary, and that if the unions did not bring an attorney neither would the

City. He also explained the City Council's philosophy and the mayor's goals for negotiations. He emphasized the Council was not satisfied with the previous approach to negotiations, which they believed was too time consuming and antagonistic. He explained that the City "decided to accelerate the negotiations process," allegedly modeled on "collaborative negotiations" in the entertainment industry. In this approach, he explained,

[Y]ou do it long before [the contracts] expire and you provide a shorter window for negotiations. You take all of the fluff off of payroll and you just -- you can break it down to the issues that really matter.

You give people an opportunity to talk about what really matters to them. If you can't do it during that two-month window, you break it off. You cool off. And then you do traditional negotiations.

Pursuant to this new approach, the City announced that it was setting an "Intensive 2-Month Window" as October 1, 2013 to the beginning of December.

At the August 22, 2013 meeting, Lazzaretto also said that he wanted to "make sure we're all working from the same information." He discussed the City's financial situation and what past contracts had looked like in terms of raises and pension changes, as well as how compensation compared to employees in other cities. His presentation included ten slides regarding the principle that "Budgeting is Not Easy," and he presented detailed information about volatility in different revenue streams. He also presented detailed information about anticipated future obligations and outlined the seven-year cost history of each of the City's labor contracts. He shared market comparison data for each bargaining unit against eight nearby cities.

Lazzaretto's August 22 presentation ended by discussing next steps. He advised each union to provide an initial proposal by September 8 or await a proposal from the City. That

night, Quach e-mailed Campbell and other attendees. His e-mail read, in part, “As requested, attached is the presentation that was provided earlier today in our meeting. Please feel free to share this with any and all members of your group.” Campbell did not communicate with Cook about the meeting before September 2. She did not brief the Association Board about the meeting and did not meet with the Association and tell them what had been discussed.

On September 2, 2013, Campbell e-mailed the entire membership of the Association about the August 22 meeting. Her e-mail read:

Hello Union Members,  
The City Manager scheduled a meeting with all the Unions on 8/22/13. The APCEA board members were unable to attend the meeting so the City Manager’s office invited me to attend. It was an informational meeting on the upcoming negotiations. The attached power point presentation was sent to me and I am forwarding it to all the members. The City Manager indicated that if any union member had questions about the the [sic] upcoming negotiations or the information on the power point, please feel free to contact Hue Quach or Jason Kruckeberg.  
Thank you,  
Chris

Association leaders were surprised and alarmed when they learned the City invited Campbell to the meeting. She had resigned from the Association Board months earlier, and Association leaders were suspicious of her loyalty and motives.

On September 12, 2013, Assistant City Manager Jason Kruckeberg (Kruckeberg) sent Cook and Phillips a letter purporting to initiate contract negotiations. The letter stated the City wanted “a negotiations process that is streamlined and focused . . . to attempt[] to reach agreement . . . by the end of November 2013.” (Underscoring omitted.) The letter further stated that “[t]his accelerated time frame requires mutual commitment and flexibility to meet as often as is necessary . . . .” Kruckeberg told Cook that the Association could schedule

bargaining dates through Doodle (an online scheduling website). Cook responded, designating Phillips as the Association's lead negotiator.

In mid-September, the Association formed its negotiations team after first soliciting interest from members. On September 25, McGinnis sent an e-mail to Association members announcing Vercillo and Linda Winstead as new members of the negotiations team, joining Cook, McGinnis, Cuddihy, and Phillips. The team members met amongst themselves to discuss priorities. The team wanted to achieve some specialty increases for individual groups within the Association, including those working at the warrant desk. The team also discussed the need for a compensation study for records clerks.

On October 2, 2013, Phillips e-mailed Lazzaretto for a copy of "any documents/handouts and any power point presentation shown" at the August 22 meeting. Lazzaretto responded that day with materials attached. He also explained that the market comparisons in the materials only included "basic salary/PERS/medical costs and are not fully comprehensive," and he explained that the City did not intend to peg salaries to the market, but offered the data for informational purposes. He also stated that the City's goal was to be collaborative and that was why the materials noted that attorneys are not necessary, but the City understood that the Association wanted Phillips involved. Lazzaretto closed by noting Kruckeberg would lead the City's bargaining team.

On November 4, 2013, Kruckeberg sent an e-mail to Phillips to confirm the first negotiations meeting with the Association for November 6. Phillips responded on November 5 and said he had calendar conflicts with that date and the second scheduled date. He closed noting, "There is plenty of time since the current MOU does not expire until mid-2014." Kruckeberg responded later that day to confirm that the November 6 and November 13 dates



were cancelled. He invited Phillips to schedule new dates using Doodle or to send the City some dates and times the Association is available. He noted the City had met multiple times with every other labor group and stressed, “[a]s of the end of November, we will close off this accelerated negotiation process and we will open negotiations again in the spring once the new Council is established.”

Filarsky wrote Phillips on November 6, 2013. He started by stating the City Manager had met with representatives of all the City’s bargaining units on August 22 to discuss reopening contracts early, and he described negotiations with other unions. He described the “deal points” in the City’s agreement with the Arcadia Police Officers Association as a series of cost-of-living adjustments over a four-year term, an additional equivalent of 1.5% in non-pensionable benefits spread over three years, and a signing bonus.

In response to Phillips’ November 5 e-mail to Kruckeberg, Filarsky wrote, “We do not have plenty of time. The window of opportunity ends on Wednesday, November 27, 2013, the last business day of November. . . . The City is fully prepared to offer APCEA members the same deal points offered to, and accepted by APOA. However, time is of the essence. In closed session last night the City Council reiterated that the window expires on November 27, 2013.” (Emphasis in original.)

Phillips responded on November 8, 2013. He disputed Filarsky’s contention that the City Manager had met with all groups in August, noting that while Campbell attended the kickoff meeting, she was not an authorized representative of the Association. He also stressed that he did not “understand the City’s ‘need for speed’ since the MOU’s don’t expire until mid 2014” and suggested the City was using a tactic where “‘if you don’t take advantage of this

deal now, you won't see this offer again' (i.e. Signing Bonuses?)" He suggested Filarsky send him the City's offer for consideration and offered to schedule a meeting.

Filarsky responded later that day, stating: "I understand that there have been, and perhaps continue to be, internal issues with APCEA; I leave that to you and your Board to work out," and he offered to have a copy of the August 22 presentation sent over. He explained the reason why the City had decided to make its offer expire on November 27, 2013: Because a City Council election was upcoming, in April 2014, and two incumbent Council members were unable to run for re-election due to term limits. Filarsky further commented as follows: "As to whether the current offer will appear again in the spring, I simply don't know--that will be up to the new City Council. I am fairly confident that the early signing bonus will not be part of the spring offer."

On November 14, 2013, at 4:56 p.m., Filarsky e-mailed Phillips that all other bargaining groups had accepted the City's offer. His email further stated: "Once again, the City and I, are extending the opportunity to your unit to avail itself of the same 4 year deal; time is growing very short." Phillips responded at 5:26 p.m. the same day and summarized his understanding of the City's current offer. He said he understood it to be that the Association could have the same offer as the other unions, there was no option to add specialty/incentive increases, and Association members would receive a one-time cash bonus. He also asked to see a spreadsheet showing each member's bonus payout under the proposed offer. He closed by asking if it was the case that if the union did not accept the offer by November 27, 2013, they could bargain in the spring of 2014, but that the signing bonus would most likely be off the table, and whether his summary was accurate.

Filarsky responded at 5:47 p.m. the same day, generally confirming Phillips' impression. He said there was no option to add specialty/incentive increases other than as part of the 1.5% non-pensionable benefits component of the offer. He explained the signing bonus was the equivalent of half a percent salary to each employee and said he would let Phillips calculate the dollar value. He confirmed the union could bargain in the spring if it declined the offer, but stressed "if I had to bet, the [bonus] would not be on the table (as you know, the City has never offered such a provision in the past and is only doing so now because of the unique timing of these negotiations)." He closed noting, "I understand your membership is meeting tonight; I hope they appreciate that every other unit has seen it prudent to take the deal."

After the City recognized new Association leaders on November 20, the City relaxed the November 27 deadline it had placed on its offer. The new Association leaders negotiated with the City through at least December 12, 2013 and, ultimately, agreed to a new contract.

On April 28, 2014, Cook, McGinnis, and Cuddihy filed unfair practice charge number LA-CE-913-M on their own and the Association's behalf. The Office of General Counsel issued a complaint (second complaint) on June 25, 2014, alleging that the City bargained in bad faith with the Association between August and November of 2013, and engaged in the following acts of interference: (1) The City unlawfully recognized the results of the November 14, 2013 election; (2) The City provided the new Association Board with unauthorized access to the Association's bank account and post office box; and (3) The City shared information with Association members about the first charge and failed to discipline Association member Ortiz for sending an e-mail critical of the Association's leaders.

The ALJ held a pre-hearing conference on September 22, 2014 to address a motion to consolidate the two complaints and a motion to bifurcate the issue of who had authority to

represent the Association. Phillips purported to appear on behalf of the Association and Cook, McGinnis, and Cuddihy, while attorney Michael McGill purported to appear on behalf of the Association and Ortiz, Vercillo, and Ngai. The ALJ granted the motion to consolidate, in part, and agreed to entertain any motions to dismiss the Association as a party after the close of evidence, thereby mooting the motion to bifurcate.

On October 15, 2014, the competing factions reached a partial settlement agreement designating Cook, McGinnis, and Cuddihy as the Association's representatives for the purpose of this matter, while prospectively recognizing Ortiz, Vercillo, and Ngai as the Association's President, Secretary, and Treasurer. Thus, the hearing proceeded on February 23, 2015, with Cook, McGinnis, and Cuddihy, represented by Phillips, as the Association's representatives. Ortiz, Vercillo, and Ngai became the undisputed Association representatives for all other purposes, thereby mooting out, by agreement, any possibility that Cook, McGinnis, and Cuddihy could overturn the disputed recall, either through these consolidated PERB cases or otherwise.

## DISCUSSION

### I. Interference Allegations

To prove interference, a charging party need not show that an employer acted with an unlawful motive, if it can show that the employer conduct at issue has a tendency to create at least "slight harm" to employee rights. (*San Diego Unified School District* (2019) PERB Decision No. 2634, p. 17.) Thus, to establish a prima facie case, the charging party must demonstrate that the employer's conduct tends to *or* does result in harm to employee rights. (*Ibid.*) If the prima facie case is established, PERB balances the degree of harm to protected rights against any legitimate business interest asserted by the employer. (*Ibid.*) Where the harm

is slight, the Board will entertain a defense of operational necessity and then balance the competing interests. (*Ibid.*) Where the harm is inherently destructive of protected rights, the employer must show the interference was caused by circumstances beyond its control. (*Ibid.*)<sup>6</sup>

As noted *ante*, the first complaint challenges Guthrie's comments about the Association's leadership on November 8, 2012 and his comments about the Association's chief negotiator on February 21, 2013, while the second complaint contains the following additional interference allegations: (1) The City unlawfully recognized the results of the November 14, 2013 election and provided unlawful assistance to the new Association Board; (2) The City provided the new Association Board with unauthorized access to the Association's bank account and post office box; and (3) The City shared information with Association members about the first charge and failed to discipline Association member Ortiz for sending an e-mail critical of the Association's leaders. Before resolving these allegations, we first discuss the legal standards relevant to alleged interference with internal union affairs.

A. Legal Standards Regarding Alleged Employer Interference in Internal Union Affairs

MMBA section 3506.5 prohibits different types of employer conduct in five subdivisions. The allegations against the City arise under the first four subdivisions. Subdivision (a) concerns discrimination and interference with employees' protected rights, subdivision (b) concerns denying employee organizations their rights, subdivision (c) concerns the duty to meet and confer in good faith, and subdivision (d) concerns domination or interference with the administration of an employee organization or assistance thereto. In light

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<sup>6</sup> Although *San Diego Unified School District, supra*, PERB Decision No. 2634 did not arise under the MMBA, the same interference test applies under each labor relations statute that PERB administers. (See, e.g. *City of Commerce* (2018) PERB Decision No. 2602-M, pp. 3-5 [harmonizing *Carlsbad Unified School District* (1979) PERB Decision No. 89 and its progeny with Court of Appeal precedent under the MMBA].)

of these subdivisions' relationship to one another and to the facts of this case, we address subdivision (a), then (d), (c), and (b).

#### Subdivision (a)

Subdivision (a) prohibits employers from interfering with employee rights. MMBA section 3502 guarantees employees “the right to . . . participate in the activities of employee organizations of their own choosing.” This includes the right to participate in selecting employee organization leaders. This right is so fundamental that the National Labor Relations Board (NLRB) has long held that “[i]t goes without saying” that members’ efforts to select their union’s leaders are protected employee rights. (*Local Union No. 18, International Union of Operating Engineers* (1963) 141 NLRB 512, 518-521.)

#### Subdivision (d)

The Legislature adopted MMBA section 3506.5 in 2011. (Stats. 2011, ch. 271, § 2.) Subdivision (d) uses the same pertinent language as PERB Regulation 32603, subdivision (d), promulgated in 2001, shortly after PERB gained jurisdiction over the MMBA, and is nearly identical to provisions in other statutes administered by PERB. (See, e.g., Ralph C. Dills Act (Dills Act),<sup>7</sup> section 3519, subd. (d); Higher Education Employer-Employee Relations Act (HEERA),<sup>8</sup> section 3571, subd. (d); Educational Employment Relations Act (EERA),<sup>9</sup> section 3543.5, subd. (d).) Accordingly, it is appropriate to consider authority discussing these parallel statutes in construing section 3506.5, subdivision (d). (*Coachella Valley Mosquito and Vector Control Dist. v. California PERB* (2005) 35 Cal.4th 1072, 1089-1090 [California’s public

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<sup>7</sup> The Dills Act is codified at Government Code section 3512 et seq.

<sup>8</sup> HEERA is codified at Government Code section 3560 et seq.

<sup>9</sup> EERA is codified at Government Code section 3540 et seq.

sector labor relations statutes are interpreted harmoniously, absent differences revealing a contrary legislative intent].)

Subdivision (d) consists of three clauses, providing that public agencies shall not: (1) “Dominate or interfere with the formation or administration of any employee organization,” (2) “contribute financial or other support to any employee organization,” or (3) “in any way encourage employees to join any organization in preference to another.” Although the second complaint permitted the Association to argue that the City’s conduct amounted to “domination” and/or “interference with the administration of the Association,” the evidentiary record warrants close review only of the interference theory, as the Association did not introduce evidence of domination. One of the central interference allegations is that the City supported one internal union faction over the other, rather than remaining neutral.

While much PERB precedent addresses an employer’s duty to remain strictly neutral when two different employee organizations are in competition with each other (see, e.g., *Salinas Valley Memorial Healthcare System* (2010) PERB Order No. Ad-387-M, adopting administrative determination at p. 25), the first two clauses of subdivision (d) apply even in the absence of competing unions. For instance, the subdivision’s first clause applies to allegations that an employer is “involved in the [] formation of [an employee organization] or at any time has [attempted to] influence[] [management of the organization].” (*Azusa Unified School District* (1977) EERB<sup>10</sup> Decision No. 38, adopting proposed decision, p. 6, fn. 3 (*Azusa*).) In such cases, we must consider the level of the employer’s involvement. For example, in *Redwoods Community College District* (1987) PERB Decision No. 650, the Board adopted a decision by an ALJ finding the employer violated its duties under EERA section 3543.5,

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<sup>10</sup> Prior to 1978, PERB was known as the Educational Employment Relations Board or EERB.

subdivision (d) through pervasive involvement in both formation and administration of an employees' council that functioned as an employee organization. (*Id.* at p. 2 and adopting proposed decision at pp. 54-55.) An employer may also violate the first clause by interfering with an employee organization's internal affairs. (See *Poway Unified School District* (2015) PERB Decision No. 2441 (*Poway*), adopting proposed decision, p. 45 [noting that an employer should not intervene in an internal union election, "lest it be held liable for interfering with the administration of the union."].)<sup>11</sup>

Under the second clause, similarly, "it may be an unfair practice to render assistance to an employee organization even if there is no other organization in competition with it." (*Azusa, supra*, EERB Decision No. 38, pp. 6-7.) An employer can extend benefits to a labor organization in a spirit of cooperation (*ibid.*), but may not lend so much assistance that the employee organization appears to become a "company union." (*Clovis Unified School District* (1984) PERB Decision No. 389, p. 19.)

Under subdivision (d), as in other interference cases, a charging party need not show actual harm in order to establish interference. As we have noted:

[T]he charging party must allege facts which demonstrate that the employer's conduct tends to interfere with the internal activities of an employee organization or tends to influence the choice between employee organizations. . . . Proof that an employer intended to unlawfully dominate, assist or influence employees'

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<sup>11</sup> In limited circumstances, an exclusively represented employee can establish an unfair practice charge against his or her union even though the topic of the charge relates to internal union affairs governed by the union's bylaws or constitution. (See, e.g. *Service Employees International Union, Local 99 (Kimmitt)* (1979) PERB Decision No. 106, p. 8 [internal union affairs subject to duty of fair representation if such affairs have a substantial impact on the relationship between unit members and their employers].) In the instant case, in contrast, there is no need for the Association to establish a "substantial impact" on the relationship between unit members and their employers, as PERB is statutorily-directed to resolve allegations that an employer has interfered in the internal affairs of a union. (*Poway, supra*, PERB Decision No. 2441, adopted proposed decision, p. 45.)



free choice is not required. Nor is it necessary to prove that employees actually changed membership as a result of the employer's act. . . . The threshold test is "whether the employer's conduct tends to influence [free] choice or provide stimulus in one direction or the other."

(*County of San Bernardino* (2018) PERB Decision No. 2556-M, adopting proposed decision at p. 22 (internal citations omitted).)

While we most typically apply these standards in cases concerning competition between employee organizations, as noted above, that need not always be the case. In accordance with the statutory language and our admonition against employer interference in internal union affairs (*Poway, supra*, PERB Decision No. 2441, adopting proposed decision, p. 45), an employer's duty of strict neutrality extends to internal union affairs, even in the absence of a competing employee organization.

However, we must qualify and flesh out an employer's duty of neutrality by noting that an employer may face a dilemma when two competing union factions each plausibly claims to represent the organization. NLRB precedent helps to illustrate what employer actions may or may not violate its duty of neutrality in such a case. In *Howland Hook Marine Terminal Corp* (1982) 263 NLRB 453 (*Howland Hook*), for instance, a dispute arose between internal union factions after the union elected as president "an insurgent candidate opposed to the policies of the Local's incumbent president and executive board." (*Id.* at p. 453.) The new president held an election for an interim steward, but a group of the union's executive officers asserted that the election violated the union's bylaws. (*Id.* at pp. 453-454.) After the employer recognized a newly elected interim steward, executive officers in the opposing faction threatened a work stoppage unless the employer recognized a different person that the opposing faction believed properly held the interim position. (*Id.* at p. 454.) The employer acceded to this pressure and

began recognizing the opposing faction’s preferred interim steward. (*Ibid.*) The NLRB found the employer did not commit an unfair practice, emphasizing there was no evidence the employer seized on the dispute to avoid bargaining obligations or otherwise acted in bad faith in deciding whom to recognize as steward pending the outcome of internal union procedures or other litigation between the factions. (*Ibid.*) Notably, “as a result of an internal union dispute,” the employer “was faced with competing claims from two factions,” each of which had apparent authority based on “at least, a colorable claim” under plausible interpretations of the union’s bylaws. (*Ibid.*) Those claims presented the employer “with the choice of having to refuse to recognize any interim steward, a course hardly consistent with its obligations to bargain,” or “recognizing the choice of one faction over that of the other.” (*Ibid.*) We endorse the NLRB’s ultimate conclusion in favor of the employer, and hold that an employer is not liable for interference, domination, unlawful assistance, or discrimination where it merely attempts in good faith to comply with its duty to bargain—which may require it to recognize one candidate on an interim basis pending the outcome of internal union procedures or other litigation between the factions—irrespective of whether the employer ends up temporarily recognizing the “wrong” candidate based on the outcome of such procedures. (*Ibid.*)

In contrast, however, we hold that an employer violates its duty of neutrality if it favors one internal union faction over the other in a manner that materially strays from a good faith effort to comply with its duty to deal with the union’s chosen representatives. In *Modern Drop Forge Co., Inc.* (1998) 326 NLRB 1335 (*Modern Drop Forge*), for instance, the employer did not merely attempt to comply with its duty to bargain as best as it could under the circumstances. The Company changed the locks on the union’s bulletin boards and gave the keys only to the union’s so-called “loyalist” faction. (*Id.* at p. 1340.) The loyalists, in turn,

used the bulletin boards to post a notice to members that falsely declared the officers' positions "vacant" and called for an election to replace them, all without a colorable claim under the union's bylaws. (*Ibid.*) The Company then gave one of the loyalists release time to plan the purported election. (*Ibid.*) About 40 members attended the purported election, but the loyalists hired security guards who denied entrance to approximately 35 or 40 other members. (*Ibid.*) Although a union officer reported these facts to the employer, it nonetheless recognized the new leadership. (*Id.* at p. 1341.) The employer also informed employees in writing that "the 'former' officers . . . were 'summarily kicked out of office,'" and urged employees to support the "new" officers. (*Id.* at p. 1344.) Although the old officers secured an order from a federal judge invalidating the purported election, the employer stated that it was not bound by the ruling. (*Id.* at p. 1342.) Whereas in *Howland Hook*, both union factions had apparent authority to speak on behalf of the union, in *Modern Drop Forge*, the loyalists "obviously did not have even a colorable claim." (*Id.* at p. 1345.) The employer took actions that tended to interfere in internal union affairs and were not necessary to comply in good faith with the employer's duty to bargain. While those factors alone would be enough to show a violation, even without evidence of intent, the employer in *Modern Drop Forge* also manifested an unlawful intent to favor one internal union faction. (*Ibid.*)

#### Subdivision (c)

The duty to meet and confer in good faith requires employers to bargain with an employee organization's designated representatives. (*Anaheim Union High School District* (2015) PERB Decision No. 2434, pp. 16-17.) As evident in *Howland Hook* and *Modern Drop Forge*, an employer that chooses to bargain with one faction over another will generally be found to have acted unlawfully only to the extent it is found to have interfered in the union's

internal affairs based on the above-stated factors. (*Modern Drop Forge, supra*, 326 NLRB at p. 1344.)

Subdivision (b)

Subdivision (b) prohibits employers from “deny[ing] []employee organizations the rights guaranteed to them by [the MMBA].” In a case involving an employer that allegedly favors one of two competing union factions, an employer’s liability under subdivision (b) will generally turn on whether it has unlawfully interfered in the union’s internal affairs based on the above-stated factors.

B. Guthrie’s Alleged Interference on November 8, 2013

The ALJ dismissed the allegations relating to Guthrie’s November 8, 2013 comments, crediting Guthrie’s testimony about what happened and finding that Guthrie’s account of what occurred did not constitute interference. For the reasons noted *ante*, we agree with the ALJ’s determination that Guthrie’s testimony was more credible than McGinnis’ contrary testimony. Based on Guthrie’s testimony regarding the meeting, we find that most of his comments were lawful, but he interfered with internal Association affairs by offering an incentive for a change in internal Association leadership.

Specifically, we find that Guthrie encouraged McGinnis to remove Cook as the Association president, by stating that he would resume labor-management meetings if Cook were ousted. Irrespective of whether we view Guthrie’s comments as a promise of benefit, as favoring one internal union faction over another, or as a combination of such actions, we apply an objective standard and consider whether a statement would tend to interfere with protected activities based on a reasonable employee’s likely view of the statement. (*Regents of the University of California* (1983) PERB Decision No. 366-H, pp. 15-16, fn. 10.)

Guthrie's phrasing at one point indicated that either a change in Association leadership or a change in the Association's "philosophy" would be sufficient for him to agree to resume labor-management meetings. In order to refrain from interfering, Guthrie should have restricted himself to discussing the Association's philosophy. Instead, he went further in the wrong direction with a follow-up commitment that he would resume labor-management meetings could if the Association ousted Cook from office. A reasonable employee would view these comments as inserting the employer into internal union affairs and/or as favoring one faction in the union, and as promising a benefit if the Association members took a particular action with respect to their leadership. Guthrie made things worse with his later statements that he would wait three weeks before telling Cook that he was discontinuing labor-management meetings. Given his earlier statements, the most reasonable interpretation was that he was encouraging McGinnis to remove Cook in the next three weeks and thereby save the labor-management meetings. Although McGinnis requested time to seek Cook's resignation, this was not a spontaneous statement; rather, it responded to Guthrie's ultimatum that he would discontinue labor-management meetings if Cook remained in office.

As discussed *ante*, the MMBA protects union members' right to choose their union leaders without employer interference. Guthrie was not in the position of the employer in *Howland Hook*, who had no choice but to make a good faith choice between two competing factions both with apparent authority. Rather, Guthrie overstepped by inserting the employer into a leadership debate.

We are not asked to determine if it was unlawful for Guthrie to discontinue the labor-management meetings. Rather, the alleged interference was in explicitly holding out the meetings, a benefit, as an incentive for the Association to oust its president. We find no

operational necessity for Guthrie to act in that manner. In the absence of any operational necessity, we need not determine whether Guthrie's statements tended to cause only slight harm, or were inherently destructive.

C. Guthrie's Alleged Interference on February 21, 2013

The first complaint alleges that Guthrie interfered with employee rights and the Association's right to represent its members when he told Association members that the Association's president, vice president, and attorney had lied to them, that Guthrie was on their side, and that the Association's attorney had threatened him. The ALJ found that Guthrie was permissibly responding to a personal attack on his integrity. We agree, for the reasons discussed below.

The MMBA does not forbid managers from responding to personal attacks. (*City of Oakland* (2014) PERB Decision No. 2387-M, p. 27; *State of California (Department of Transportation)* (1983) PERB Decision No. 304-S, p. 28.) But a manager cannot go so far as to coerce or disparage protected activity or the collective bargaining process, nor make explicit or implicit threats or promises based on such activity, and a manager's remarks may or may not constitute persuasive evidence of animus in a discrimination case, depending on all the relevant circumstances. (*City of Oakland, supra*, PERB Decision No. 2387-M, pp. 25-26; *County of Riverside* (2010) PERB Decision No. 2119-M, pp. 18-20.) Brinksmanship, intemperate remarks, or exaggerations likely to mislead employees may, depending on the context, constitute illegal interference in their own right, or they may constitute evidence of animus, particularly if they are not directly responsive to a personal attack. (*City of Oakland, supra*, PERB Decision No. 2387-M, p. 25, fn. 5.)

As noted *ante*, the Association held a general membership meeting on February 15, 2013. When one of the members asked if the Association had slowed down the part-time dispatcher hiring process, Phillips said something to the effect that if Guthrie claimed the Association had slowed down the process, he was not telling the truth. Multiple attendees later told Guthrie that Phillips had called him a liar. Thus, when Guthrie addressed a group of dispatchers six days later, he was responding to a personal attack. No witness testified that he did so in a threatening or coercive manner. Rather, Guthrie's response that he had not lied, and his efforts to back up his contention with a brief discussion of the timeline of events, did not constitute interference.

D. The City's Conduct Following the November 2013 Association Board Election

As discussed *ante*, Ortiz began efforts to change the Association's leadership at the Association's June 17, 2013 membership meeting. Ultimately, on November 14, 2013, Ortiz and eight other Association members purported to remove Cook, McGinnis, and Cuddihy from the Association Board. On November 18, the faction representing the purported new Association Board informed the City about the result of the November 14 meeting. Specifically, the new board provided the City with a packet of information indicating that a supermajority of Association members voted to recall Cook, McGinnis, and Cuddihy and to replace them with Ortiz, Vercillo, and Ngai, and further provided the minutes, proxy forms, and an accompanying memorandum from Ortiz purporting to introduce the new Association Board.

Two days later, by e-mail at 3:06 p.m. on November 20, the City recognized the new Association leadership, after first having sought advice from the City's outside labor relations counsel. Eleven minutes later, via an e-mail at 3:17 p.m., Cook informed the City that the

prior Association Board disputed the validity of the November 14 election. The City, however, continued to recognize the new Association Board.

Under the standards discussed *ante*, we find that the City did not violate the MMBA in recognizing and bargaining with the new Association Board. When presented with rival colorable claims about a disputed union election, an employer remains obligated to deal with the union and therefore may have little choice but to recognize one faction on an interim basis, pending any internal union appeals or other litigation that may occur to resolve the dispute. Here, the facts indicate when the City initially recognized the new Association Board, the City had not yet been presented with evidence that Cook, McGinnis, and Cuddihy had a colorable claim to the Association's leadership positions. Rather, the City at that point had before it only a packet of information indicating that a supermajority of Association members voted to recall Cook, McGinnis, and Cuddihy and to replace them with Ortiz, Vercillo, and Ngai, plus the minutes, proxy forms, and an accompanying memorandum from Ortiz purporting to introduce the new Association Board.

Shortly after recognizing the new Association Board, the City arguably received a competing claim.<sup>12</sup> However, even assuming for the sake of argument that the City was at that point faced with competing colorable claims, the record does not demonstrate that the City

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<sup>12</sup> The e-mail Lazzaretto received from Cook on November 20, 2013 did not directly dispute the election or request the City take any action, but it attached a letter Cook had written to the Arcadia City Federal Credit Union. In the third paragraph of this letter, Cook claimed as follows: “[T]he so-called ‘Minutes’ of a purported membership meeting on November 14, 2013, are fraudulent in that no authorized membership meeting took place that day.” Neither the e-mail nor the attached letter explain the importance of whether the meeting at which Cook, McGinnis, and Cuddihy were removed was “an authorized membership meeting” or in any way disputes the accuracy of the other documents Ortiz sent to the City. To the extent that Cook, McGinnis, and Cuddihy claim they could only have been legitimately removed at “an authorized membership meeting,” or that the opposing faction improperly used proxy votes, there is no evidence the Association made such arguments to the City.



thereafter acted in bad faith. Although Guthrie, and by extension the City, had preferred that Cook be ousted, there is no evidence that the City seized on the internal dispute to avoid bargaining obligations, or otherwise violated the above-discussed parameters when it decided to continue recognizing the new Board.

Notably, we need not determine to what extent Guthrie's interference a year earlier, at the November 8, 2012 meeting with McGinnis, could support a remedy that involves either wholly undoing the City's decision to recognize the new Association Board in November 2013 or requiring the City to take any actions other than posting a notice and refraining from further interference. (Cf. *County of Monterey* (2004) PERB Decision No. 1663-M, adopting proposed decision at p. 30 and fn. 19 [discussing remedies such as deregistration and disestablishment].) Rather, posting a notice and refraining from further interference is the most that could be called for here, given the parties' partial settlement agreement designating Cook, McGinnis, and Cuddihy as the Association's representatives for the purpose of this matter, while recognizing Ortiz, Vercillo, and Ngai as the Association's President, Secretary, and Treasurer prospectively.<sup>13</sup> Moreover, along the same lines, the record contains no evidence that any party sought to resolve the leadership dispute using internal union procedures, through the

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<sup>13</sup> Even had the parties not reached the aforementioned partial settlement agreement, it is far from clear that the Association could, on this record, achieve a remedy stronger than an order to cease and desist from further interference. Guthrie's conduct at the November 8, 2012 meeting with McGinnis happened a year before the purported recall, and the Association presented no evidence any members who voted to recall the Association Board were influenced by it. Similarly, while we find, *post*, that the City engaged in bargaining violations, it is far from clear that the Association could, on this record, show that those violations could support a stronger remedy. Indeed, those witnesses who voted in favor of the recall all stated the City had no effect on their decision, which was instead motivated solely by the conduct of Cook and Phillips. Their testimony is supported by ample evidence of conflicts between various members on the one hand and Cook and/or Phillips on the other.

procedures laid out in Corporations Code section 7616 for judicial determination of the validity of an election, or via other possible avenues.<sup>14</sup>

The second complaint alleges the City dominated and interfered with the administration of the Association by providing the new Association Board with access to the Association's bank account and post office box. The record contains no evidence the City was involved in the new Association Board's access to the bank account or post office. Accordingly, we dismiss this allegation.

E. Additional Interference Allegations

The second complaint alleges the City interfered with employee rights by sharing information about the first charge with employees and by not disciplining Ortiz for sending an e-mail on June 3, 2013 discussing it. The record reveals that the City provided the first charge to an employee who requested it in a public record request, and that Ortiz then used the City's e-mail system to send out an e-mail regarding the charge. The City did not discipline Ortiz for doing so. We find the record to be devoid of any facts suggesting that these events tend to cause even slight harm to protected rights, and we therefore need not even consider the City's reasons for its decisions. Thus, we dismiss these allegations.

II. Bargaining Allegations

In determining whether a party has violated its duty to meet and confer in good faith, PERB uses a "per se" test or a "totality of the conduct" analysis, depending on the specific conduct involved and its effect on the negotiating process. (*City of Davis* (2018) PERB Decision No. 2582-M, p. 9.) Per se violations generally involve conduct that violates statutory

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<sup>14</sup> The Association was organized as a California Nonprofit Mutual Benefit Corporation, and therefore was apparently subject to Corporations Code section 7616.

rights or procedural bargaining norms. (*Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M, p. 13.)

The totality of conduct test applies to bad faith bargaining allegations that our precedent has not identified as constituting a per se refusal to bargain. (*City of Davis, supra*, PERB Decision No. 2582-M, p. 9.) Under this test, the Board looks to the entire course of negotiations, including the parties' conduct at and away from the table, to determine whether the respondent has bargained in good faith. (*Ibid.*) The ultimate question is whether the respondent's conduct, when viewed in its totality, was sufficiently egregious to frustrate negotiations. (*Id.* at p. 10.)

For the reasons discussed below, we find the City violated its duty to bargain in good faith. First, the City committed a per se violation by unilaterally imposing ground rules in advance of negotiations. Second, the City bargained in bad faith under the totality of the circumstances by inviting a former Association leader to participate in a bargaining meeting without notifying the Association's official representatives and by making an "exploding" offer without adequate justification, as well as by unilaterally imposing ground rules.

A. Per Se Violation

Parties must bargain bilaterally regarding ground rules for negotiations in the same manner they must bargain in good faith about substantive terms or conditions of employment. (*County of Orange* (2018) PERB Decision No. 2594-M, pp. 8-16.) As relevant here, all format and timing issues relating to negotiations are bargainable ground rules, including but not limited to when to commence negotiations, deadlines for phases of negotiations, topic sequences, the use of cooling off periods, and interest-based bargaining formats. (*Id.* at p. 9, p. 13 fn. 6, & p. 14 fn. 7; See *City of Livermore* (2014) PERB Decision No. 2396-M, p. 10;

*Los Angeles Unified School District* (1992) PERB Decision No. 964, p. 9.) An employer may not unilaterally set ground rules. (*County of Orange, supra*, PERB Decision No. 2594-M, pp. 8-16; *Anaheim Union High School District* (1981) PERB Decision No. 177, p. 9.)

The City violated the MMBA by imposing the following ground rules. First, the City unilaterally determined that bargaining should commence much earlier than the parties had previously anticipated. Second, the City unilaterally determined that this early start date would be paired with an “accelerated” approach capped by a late November or early December 2013 deadline and, in the absence of a deal by the deadline, a cooling off period in which there would be no negotiations. Since the City announced these ground rules as a *fait accompli* at the outset of negotiations, it eliminated the give and take that are the essence of good faith bargaining and thus committed a *per se* violation of its duty to meet and confer. (*San Mateo County Community College District* (1979) PERB Decision No. 94, pp. 15-16.)

B. Bad Faith Under the Totality of Conduct Test

To resolve a bad faith bargaining allegation premised wholly or in part on conduct that does not constitute a *per se* violation, we apply a totality of conduct test. As previously noted, the ultimate question is whether the respondent’s conduct, when viewed in its totality, was sufficiently egregious to frustrate negotiations. (*City of San Jose* (2013) PERB Decision No. 2341-M, p. 19.) Under the totality of the circumstances test, the Board considers a variety of indicia of bad faith. A single indicator of bad faith, if egregious, can be a sufficient basis for finding that a negotiating party has failed to bargain in good faith. (*Ibid.*) In this case, we find that the City bargained in bad faith based on the following three indicia.

1. Unilateral Imposition of Ground Rules

A per se violation may also support a finding of bad faith under the totality of conduct test. (*City of San Jose, supra*, PERB Decision No. 2341-M, p. 23.) In this case, the City's unilateral imposition of ground rules, as described above, indicated bad faith.

2. Undermining the Association's Selection of Representatives

Employees have the right to negotiate collectively through a representative of their own choice. (*Hanford Joint Union High School District Board of Trustees (1978)* PERB Decision No. 58, p. 7.) Accordingly, parties have the right to appoint their own negotiators, and neither side may dictate who their opposing representatives will be. (*Anaheim Union High School District, supra*, PERB Decision No. 2434, pp. 16-17; *Yolo County Superintendent of Schools (1990)* PERB Decision No. 838, adopting proposed decision at p. 33.) Absent highly unusual circumstances not present here, an employer must bargain with an employee organization's designated representatives. (*Anaheim Union High School District, supra*, PERB Decision No. 2434, p. 17.) Thus, efforts by the employer to undermine an employee organization's selected negotiators indicate an absence of a good faith, while a flat ban on meeting with a particular representative would be a per se violation. (*Id.*, citing *Yolo County Superintendent of Schools, supra*, PERB Decision No. 838.)

Here, the City undermined the Association's selection of representatives when it invited Campbell to the negotiations kickoff and when it gave her information about negotiations to distribute to the Association's members. The negotiations kickoff was a meeting reserved for the leaders of the City's unions, and the City used the meeting to discuss its goals and announce ground rules for negotiations. But Campbell was not an Association leader and the Association did not designate her to attend on its behalf. This undermined the Association's

selected representatives because Campbell became privy to detailed information about negotiations, initially kept the information to herself, and ultimately shared the information directly with the Association's members. This elevated Campbell at the expense of the Association's designated representatives, thereby indicating the City's bad faith.<sup>15</sup> Further, when Campbell e-mailed the kickoff PowerPoint to the members, she wrote in part, "The City Manager indicated that if any individual union member had questions about the [] upcoming negotiations or the information on the power point [sic], please feel free to contact Hue Quach or Jason Kruckeberg." Thus, the City further undermined the Association's designated representatives by giving Campbell important bargaining information, which empowered her to encourage Association members to go directly to management with questions about negotiations.

### 3. The City's Exploding Offer

In *County of Tulare* (2015) PERB Decision No. 2461-M, the employer presented a last, best, and final offer and requested a response within three weeks. (*Id.* at p. 5.) The union filed a charge claiming that this request evidenced bad faith, but the Board dismissed the charge, noting that the employer did not threaten any particular consequence if the union failed to respond by that date, and the employer "took no action when [the union] did not respond by the requested date." (*Id.*, adopting proposed decision at p. 12.) The Board left open under what circumstance a party may lawfully notify the other party that its offer will expire if not accepted by a particular deadline. In the below discussion, we review PERB decisions

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<sup>15</sup> Guthrie was aware Campbell had expressed a conflict between her role on the Association Board and her duties as a manager, and chose the latter when she resigned. While this fact is not critical to our finding, and the record does not reveal how widely this fact was known within management, it at least demonstrates the range of dangers that occur when an employer rather than a union determines who will attend a meeting on behalf of the union.

touching on exploding offers, and, for the reasons discussed below, we clarify and flesh out our standard for such cases: a party cannot in good faith make an exploding proposal unless it can adequately explain a legitimate basis for doing so.

Our holding is rooted in the fact that regressive bargaining—making proposals that are, as a whole, less generous to the other party than prior offers—manifestly moves bargaining parties further away from agreement and therefore indicates bad faith unless such regressive bargaining is supported by an adequate explanation. (*Anaheim Union High School District* (2016) PERB Decision No. 2504, adopting proposed decision at p. 43.) Most typically, a party must show changed economic conditions or other changed circumstances to support its regressive posture. (*Ibid.*)

An exploding offer should be held to the same standard, as it telegraphs a threat to move the parties farther apart unless the other party accedes to a particular unilaterally-established deadline. (Abramson, *Fashioning an Effective Negotiation Style: Choosing Between Good Practices, Tactics, and Tricks*, *supra*, 23 Harv. Negot. L. Rev. at 333 [an exploding offer may be a sound negotiating practice if justified, but otherwise may be a ploy].) If a party was free to make an exploding offer at any time and offer no justification for threatened or actual regressive bargaining other than the other side's failure to accept the proposal by a given deadline, then exploding offers would amount to an exception that swallows the regressive bargaining rule. Were that the law, it would be hard to imagine reasons why parties would not attach deadlines to most or all significant proposals, thereby achieving maximum flexibility to later engage in regressive bargaining.

We also reach this conclusion based on our substantial experience fostering bargaining norms that lead to harmonious labor relations, including our carefully crafted case law

distinguishing bad faith inflexibility from lawful hard bargaining, as well as our precedent finding bad faith when a party adopts a “take-it-or-leave-it” attitude or unilaterally imposes a ground rule or a deadline on bargaining. As to the first point, a party exhibits bad faith if it fails to provide an adequate explanation for its inflexible position. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 8.) Along the same lines, a take-it-or-leave-it attitude is evidence of bad faith, because it shows a predetermination to achieve capitulation to all of its economic demands. (*Id.* at p. 9.) Moreover, we have noted not only that an employer may not unilaterally set ground rules, but also that an employer’s upcoming budget deadline generally does not constitute exigent circumstances allowing the employer to accelerate negotiations unilaterally. (*Id.* at p. 10.) Therefore, when a party issues an exploding offer without an adequate explanation as to why its bargaining position should become less generous on a given date in the future, it effectively imposes its own ground rule and deadline, evidences unlawful inflexibility, and manifests a take-it-or-leave-it attitude.

Although these principles are strongly rooted in PERB precedent, prior decisions have not delineated in any detail how they apply to exploding offers. For instance, in *Trustees of the California State University* (2006) PERB Decision No. 1871-H, the Board adopted a regional attorney’s dismissal letter finding that the employer’s exploding offer in that case did not constitute unlawful “conditional bargaining.” (*Id.*, adopting dismissal letter at p. 2 [no conditional bargaining found, where the condition at issue was a deadline within the parties’ control].) The skeletal dismissal letter indicated that no allegation was at issue other than alleged conditional bargaining. For instance, there is no discussion of threatened or actual regressive bargaining. In the absence of any such allegation, the dismissal letter is also unclear



as to what reason(s), if any, the employer provided for moving the parties further away from agreement by rescinding its wage offer.

In *County of Solano* (2014) PERB Decision No. 2402-M (*Solano*), an ALJ declined to find an employer engaged in bad faith when it made an exploding wage proposal and ultimately withdrew the offer after the union did not accept it by the employer's deadline. (*Id.*, proposed decision at pp. 10, 15 & 22-23.) Because neither party excepted to this finding, it was not before the Board and the ALJ's finding is not precedential. (*County of Santa Clara* (2018) PERB Decision No. 2613-M, pp. 7-8, fn. 6 [even where Board adopts a proposed decision, ALJ conclusions are binding only on the parties if there are no exceptions to such conclusions and the Board declines to reach the issues sua sponte]; accord *County of Orange* (2018) PERB Decision No. 2611-M, p. 2, fn. 2; *City of Torrance* (2009) PERB Decision No. 2004, p. 12.) However, we examine the ALJ's conclusion nonetheless, because it helps to illustrate permissible and impermissible exploding offers.

The employer in *Solano* entered negotiations with a significant budget deficit, and from the outset the employer insisted on concessionary proposals that would substantially narrow the budget gap; although it included the exploding wage increase in its package proposal, this increase was more than offset by the employer's concessionary demands on pension, health benefits, and furloughs. (*Solano, supra*, PERB Decision No. 2402-M, adopting proposed decision at p. 8.) The employer explained its exploding wage offer, and its eventual withdrawal of that proposal, in a legally sufficient manner: the employer could only afford the wage increase if it started the overall concessionary package by a given date, and when that date elapsed with the employer still unable to begin reaping any net savings, it had to pay off its continuing structural deficit by taking the wage increase off the table. (*Id.*, adopting

proposed decision at pp. 22-23.) This rationale adequately supported the employer's exploding offer, as the MMBA required it to maintain the status quo until impasse or agreement, and it could only implement retroactive wage or benefit cuts via agreement, but not via imposition.

While *Solano* demonstrates one potential legitimate rationale for an exploding offer in concessionary bargaining cycles, in other cases, including the instant one, an employer's net proposals are not concessionary. In these circumstances, too, we must consider the employer's stated rationale and determine if it legitimately supports the exploding offer. For instance, when an employer offers a retroactive wage increase, its initial lump sum wage cost invariably escalates the longer negotiations continue, but many employers in such circumstances can set aside the money needed to pay the retroactive wage increase as time goes on without a ratified contract. A party asserting that it cannot set aside money in this manner, or asserting a different basis for its exploding offer, must be in a position to prove its rationale if requested to do so. (*City of Davis* (2018) PERB Decision No. 2582-M, pp. 19-20 & fn. 11 [employer evinces bad faith if it does not rationally support its bargaining proposals, including by providing requested information to back up its claims, as "[g]ood faith bargaining necessarily requires that claims made by either bargainer should be honest claims," and if an argument is "important enough to present in the give and take of bargaining," the party making the claim must be able to back it up if asked] [internal citations omitted].)

Before applying these principles to the instant case, we note that in *Anaheim Union High School District*, *supra*, PERB Decision No. 2504, the Board cited *Trustees of the California State University*, *supra*, PERB Decision No. 1871-H and *Solano*, *supra*, PERB Decision No. 2402-M, and asserted that a party establishing a deadline for acceptance of a proposal does not commit a violation under PERB's per se bad faith bargaining test. (*Id.*,

adopting proposed decision at p. 38.) However, when the Board moved from a per se violation analysis to applying the totality of conduct test, it noted that “parties may offer new, even regressive proposals if based upon changed economic conditions,” and that without adequate explanation the change in position is evidence of bad faith. (*Id.*, adopting proposed decision at pp. 43-44.) We hold that a bargaining party similarly evidences bad faith under the totality of conduct test if it does not adequately justify a threatened change in position that is inherent in an exploding offer.

We turn now to the instant facts. While the City’s exploding offer was not a per se violation, it is an indicator of bad faith under the totality conduct test unless the City adequately explained to the Association a legitimate basis for its deadline and its regressive posture after that deadline. We find no such adequate explanation on these facts. As an initial matter, the City’s exploding offer was inextricable from the unilaterally-imposed ground rules discussed *ante*. Moreover, the City’s stated reason for establishing a November deadline was that the City would be holding a City Council election the following spring. We find that the City’s exploding offer evidenced bad faith, given the significant time lag between the City’s unilaterally-imposed deadline and the City Council election, and also given the inherent uncertainty as to whether the eventual election would lead to a new Council majority favoring new budgetary expenditures so significant as to require the City to take a less generous bargaining position with the Association.

For the foregoing reasons, we find that the City engaged in bad faith bargaining under both the per se and totality of conduct tests. However, because of the unique procedural posture of this case, we order only a limited remedy. As noted *ante*, the Association leadership elected on November 14, 2013 bargained with the City and agreed to a successor MOU, the

Association has not demonstrated the City caused the change in leadership, and the parties reached a sui generis partial settlement prior to the formal hearing in this matter. In these unusual circumstances, the appropriate remedy for the City's conduct is a cease and desist order and the posting of a notice, and we find no need for any additional remedies that might otherwise be available.

### ORDER

Based on the foregoing findings of fact and conclusions of law, the entire record in this case, the Public Employment Relations Board (PERB) finds the City of Arcadia (City) violated: (1) MMBA sections 3506 and 3506.5, subdivisions (a) and (b), and PERB Regulation 32603, subdivisions (a) and (b), by encouraging Arcadia Civilian Police Employees Association (Association) Vice President Pamela McGinnis to remove President Judy Cook from office; and, (2) MMBA sections 3503, 3505, 3506, and 3506.5, subdivisions (a), (b), and (c), and PERB Regulation 32603, subdivisions (a), (b), and (c), by undermining the Association's selection of bargaining representatives, unilaterally setting ground rules for bargaining, and imposing a time limit to accept a bargaining proposal that was not necessitated by any legitimate deadline.

The County, its governing board and its representatives, shall:

A. CEASE AND DESIST FROM:

1. Interfering with Association members' right to select their own leaders;
2. Undermining the Association's selection of its bargaining representatives;
3. Imposing ground rules without notice and an opportunity to meet and confer; and

4. Placing time deadlines on proposals without adequate justification.

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

1. Within ten (10) workdays after this decision is no longer subject to appeal, post at all work locations in the City 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 City, indicating that the City will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. 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 City to communicate with its employees in the bargaining unit represented by the Association. Reasonable steps shall be taken to ensure that this Notice is not reduced in size, altered, defaced, or covered with any other material.

2. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. Respondent 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 the Association.

Members Banks and Paulson joined in this Decision.



**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 Nos. LA-CE-847-M & LA-CE-913-M, *Arcadia Police Civilian Employees Association, et al. v. City of Arcadia*, in which all parties had the right to participate, it has been found that the City of Arcadia violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3506 and 3506.5, subdivisions (a) and (b), and PERB Regulation 32603, subdivisions (a) and (b), by encouraging former Association Vice President Pamela McGinnis to remove former President Judy Cook from office; and Government Code sections 3503, 3505, 3506, and 3506.5, subdivisions (a), (b) and (c), and PERB Regulation 32603, subdivisions (a), (b) and (c), by undermining the Association's selection of bargaining representatives, unilaterally setting ground rules for bargaining, and imposing a time limit on a bargaining proposal that was not necessitated by any legitimate deadline.

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

**CEASE AND DESIST FROM:**

1. Interfering with Association members' right to select their own leaders;
2. Undermining the Association's selection of its bargaining representatives;
3. Imposing ground rules without notice and an opportunity to meet and confer;  
and
4. Placing time deadlines on proposals without adequate justification.

Dated: \_\_\_\_\_

City of Arcadia

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.**