STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 521, Charging Party, v. COUNTY OF KERN & KERN COUNTY HOSPITAL AUTHORITY, Respondent.	Case No. LA-CE-1084-M PERB Decision No. 2659-M August 6, 2019

Appearances: Weinberg, Roger & Rosenfeld by Matthew J. Gauger and Adam J. Thomas, Attorneys, for Service Employees International Union Local 521; Liebert Cassidy Whitmore by Adrianna E. Guzman, Kevin J. Chicas, and Melanie H. Rollins, Attorneys, and Karen S. Barnes, Chief Deputy County Counsel, for County of Kern & Kern County Hospital Authority.

Before Banks, Krantz, and Paulson, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by County of Kern (County) and its successor, Kern County Hospital Authority (Authority) (collectively, Respondents), to the attached proposed decision of an administrative law judge (ALJ). The unfair practice complaint (Complaint) in this matter alleged that Respondents violated the Meyers-Milias-Brown Act (MMBA)[1] and PERB Regulations[2] by unilaterally contracting with an outside company to provide services that had historically been performed by Respondents' employees who are exclusively

[1] The MMBA is codified at Government Code section 3500 et seq. Statutory references herein are to the Government Code, except where otherwise specified.

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

represented by Charging Party Service Employees International Union Local 521 (Local 521). The ALJ found that Respondents enacted an unlawful unilateral policy change by using contract labor to provide medical assistant services at two outpatient clinics located on Stockdale Highway in Bakersfield, California (the Stockdale Highway facility, Suites 100 and 300). In contrast, the ALJ found there was insufficient evidence to show that Respondents unlawfully contracted out seven other types of services in Suites 100 and 300, services at a surgery center in Suite 200 of the Stockdale Highway facility, or services at two clinics located at 820 34th Street in Bakersfield (34th Street clinics). Respondents excepted to most of the ALJ's key findings regarding medical assistant services in Suites 100 and 300, and Respondents urge the Board to find no subcontracting violation. Local 521 filed no exceptions and urges us to affirm the proposed decision.

We have reviewed the record in this matter and considered the parties' arguments. We conclude that the record supports the ALJ's proposed decision and we adopt it as the decision of the Board itself, subject to and as clarified by the following discussion.[3] We also amend the ALJ's proposed remedy to provide a deadline by which Respondents must restore the status quo.

BACKGROUND

The ALJ's procedural history and factual findings can be found in the attached proposed decision. We summarize and supplement these findings for context.

[3] No party excepted to the ALJ's findings regarding seven of eight types of services performed at Suites 100 and 300, operations at Suite 200, and operations at the 34th Street clinics. Accordingly, these conclusions are not before the Board, the ALJ's conclusions regarding these issues in the attached proposed decision are binding only on the parties, and we do not speculate as to whether those findings are supported by the record and consistent with applicable law. (PERB Regs. 32215, 32300, subd. (c); *City of Torrance* (2009) PERB Decision No. 2004-M, p. 12.)

Kern Medical Center and Respondents' Labor Agreement with Local 521

Kern Medical Center (KMC), also known as Kern Medical, is the public health system for Kern County. A significant proportion of KMC's patients are indigent or socioeconomically disadvantaged.

On September 26, 2014, the Kern County Hospital Act was signed into law, authorizing the County to establish a hospital authority. (Health & Safety Code, section 101852, et seq.) Subsequently, the County's Board of Supervisors adopted Ordinance Nos. A-356 and A-357, establishing the Authority to operate KMC on a prospective basis. Prior to this, the County ran KMC. The Authority, which is a special district subject to the MMBA,[4] was tasked with improving KMC's flexibility, responsiveness, and innovation. In approximately mid-2016, KMC employees were transferred from the County to the Authority.

At all relevant times, Local 521 has represented six bargaining units of employees working at KMC under a single Memorandum of Understanding (MOU). Most of the critical events relative to this dispute occurred while the parties were governed by an MOU effective March 28, 2015 through August 27, 2017. Under MOU Article 2, section 9, the parties agreed as follows:

> A. The County shall meet and confer with the Union prior to contracting out for services where represented employees in bargaining units 1-6 currently provide those services, provided the County is required by law to do so.
>
> B. The County and [Local 521] agree that the County is permitted to contract out the remote maintenance, landscaping, and custodial services at (1) the Lost Hills Paramount/Wonderful Park and (2) the buildings and facilities in North Kern.

[4] Government Code sections 3501, subdivision (c), and section 31468, subdivision (m); Health and Safety Code section 101855, subdivision (b)(4).

KMC's main facility is a hospital in eastern Bakersfield, which provides both inpatient and outpatient care. Before it opened the Stockdale Highway and 34th Street clinics, KMC operated six clinics, one of which was co-located at the hospital campus and five of which were located at remote sites.[5] Respondents directly employed its own employees at five of these clinics. At the sixth clinic, located on Truxtun Avenue in Bakersfield, California (Truxtun facility), the record reflects that Respondents contracted with the Comprehensive Blood and Cancer Center (CBCC) to provide administrative, managerial, and operations services beginning in 2012.[6] However, the scope of those services is unclear; the record contains no evidence regarding the extent to which the Truxtun facility uses CBCC employees as medical assistants and/or to perform any other services traditionally or historically performed by KMC employees represented by Local 521. Local 521 introduced unrebutted evidence that Respondents did not provide Local 521 with notice and an opportunity to bargain prior to contracting with CBCC for administrative, managerial, and operations services at the Truxtun facility.

Respondents' Decision to Open the Stockdale Highway Clinics

By 2013, KMC had experienced financial losses for several years. KMC's Chief Strategy Officer, Alton Scott Thygerson (Thygerson), testified that KMC had been losing millions of dollars each month.[7] The County Board of Supervisors wanted to promote financial stability. One way Respondents attempted to improve KMC's financial condition was to enter into agreements with health plans to provide medical services to patients with health insurance.

[5] Three of these clinics were located at detention or correctional facilities.

[6] CBCC is one of several fictitious business names for Ravi Patel, M.D., a California professional medical corporation.

[7] Thygerson is a Vice President at Meridian Healthcare Partners (Meridian), a private company which provides management and consulting services for the Authority.

Respondents determined that KMC should create new facilities that are more convenient and appealing to insured patients than the County hospital. Respondents believed that expanding KMC's use of outpatient clinics would attract the sort of patients it needed to improve its financial condition. According to Thygerson, such new clinics could deliver health care to patients who have a low risk for medical complications; providing such care at new outpatient clinics, he believed, would be efficient for the patients and profitable for KMC. In addition, Respondents intended that new offsite clinics would service patients in western Bakersfield. Thygerson also explained that managed health plans prefer to have procedures performed in an outpatient setting for cost reasons and may not authorize certain procedures to be performed in a hospital. Finally, Thygerson expressed his opinion that such newer clinics could be designed to emulate a private practice setting with nice amenities and better aesthetics.

The Stockdale Highway Clinics and Their Staffing

On March 24, 2015, the County began leasing medical office space at 9300 Stockdale Highway in Bakersfield. On or around August 11, 2015, the County amended its agreement with CBCC. Under the amendment, CBCC agreed to provide non-physician personnel at additional sites beyond the Truxtun facility, to be designated by KMC. The amendment also significantly increased the scope of personnel services to be provided, as well as the annual amount payable under the agreement. Respondents did not provide Local 521 with advance notice or an opportunity to meet and confer prior to amending the CBCC agreement.

In January 2016, KMC opened a clinic at Suite 100 of the Stockdale Highway facility. KMC provides urology, urogynecology, obstetrics, and gynecology services at Suite 100.

Meridian Vice President Renee Villanueva (Villanueva) is in charge of ambulatory care at KMC. This includes responsibility for outpatient clinics. Villanueva elected neither to hire

new KMC employees to staff Suite 100, nor to transfer existing KMC employees to the clinic. Instead, she elected to obtain staff on a contract basis, pursuant to the amended agreement with CBCC, without providing notice to Local 521 or an opportunity to meet and confer. CBCC has provided between three and five medical assistants for the Suite 100 clinic.

In approximately spring 2016, Respondents opened the Suite 300 clinic, offering ear, nose, and throat services, podiatry, neurosurgery, thoracic surgery, orthopedic surgery, and general surgery. As with Suite 100, Respondents have at all relevant times obtained medical assistant staffing for Suite 300 through the CBCC agreement, without first providing Local 521 with notice and an opportunity to meet and confer. CBCC provides between three and five contract medical assistants at Suite 300.

Villanueva testified that medical assistants employed through CBCC have a broader skill set than those filling union-represented medical assistant positions elsewhere in KMC. As discussed below, however, we affirm the ALJ's determination that the contractors' job duties are within the scope of the union-represented KMC medical assistants' duties.

Villanueva testified that hiring through normal County processes was slow, and that it tended not to attract experienced applicants. There is no evidence that Respondents engaged in any recruitment efforts to staff Suite 100 or Suite 300 with KMC employees. Nor did Villanueva have any discussions about using KMC employees to staff Suites 100 and 300. Thygerson testified that using contractors in place of KMC employees (at both Suite 100 and Suite 300) saved KMC money. He reached this conclusion by comparing wages and benefits costs under the CBCC agreement with comparable positions at the County and/or the Authority. At the time of the hearing, no employees represented by Local 521 were laid off or had their wages, hours, or benefits changed as a result of Respondents' decision to use CBCC labor at Suites 100 and 300.

The Complaint and Proposed Decision

The Complaint identified eight classifications within Local 521's bargaining units whose typical job duties were allegedly assigned to outside contractors. As noted *ante*, the ALJ found no violation as to seven of these classifications and no violation as to any operations at Suite 200 or the 34th Street clinics.

As to the medical assistant classification, however, the ALJ found that "the CBCC medical assistant positions used in Suites 100 and 300 overlap significantly with the work of" the medical assistant job classification that Local 521 exclusively represents. (Proposed decision, p. 18.) Indeed, like the contracted medical assistants in Suites 100 and 300, the represented medical assistant position is designed to function in an outpatient setting and take direction from a physician; the core function of the represented medical assistants is to act as an "extension of a physician in an outpatient care setting." For example, represented medical assistants escort patients to exam rooms, collect patient vital signs and other information, and administer immunizations. The represented medical assistant position also assists medical providers during exams and minor surgeries, cleans and disinfects medical instruments, answers telephones and documents telephone conversations, prepares and organizes records, orders and maintains supplies, and stocks patient areas. While Villaneuva testified that positions at Suite 100 and 300 had broader duties than existing KMC positions, contracted medical assistants perform job duties akin to those performed by union-represented KMC medical assistants. We therefore agree with the ALJ that "Respondents elected to use contractors in Suites 100 and 300 to perform work that would have otherwise been assigned to the Medical Assistant classification represented by Local 521, in a substantially similar [manner]." (Proposed decision, pp. 18-19.)

The issue before us is whether Respondents violated the MMBA by subcontracting for medical assistant services of a type that had been historically or traditionally performed by union-represented employees, without notice and an opportunity to meet and confer.

DISCUSSION

Although the Board reviews exceptions to a proposed decision de novo, to the extent that a proposed decision adequately addresses issues raised by certain exceptions, the Board need not further analyze those exceptions. (*County of Santa Clara* (2019) PERB Decision No. 2629-M, p. 6.) The Board also need not address alleged errors that would not impact the outcome. (*Ibid*.) To the extent an ALJ assesses credibility based upon observing a witness in the act of testifying, we defer to such assessments unless the record warrants overturning them. (*Id.* at pp. 8-9.)

An employer's unilateral change violates the duty to bargain in good faith where: (1) the employer took action to change existing policy; (2) the policy change concerned 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 change has a generalized effect or continuing impact on terms and conditions of employment. (*City of Davis* (2016) PERB Decision No. 2494-M, p. 18 (*Davis*), citing *Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262, p. 9.)

In order to satisfy the first element, a charging party generally must show at least one of the following: (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* (2018) PERB Decision No. 2579-M, p. 10 (*Monterey*); *Pasadena Area Community College District* (2015) PERB Decision No. 2444, p. 12, fn. 12;

Davis, *supra*, PERB Decision No. 2494-M, pp. 30-31.) Here, when Respondents began using contract medical assistants to staff the clinics in Suites 100 and 300, without notifying Local 521 or giving the union an opportunity to bargain, Respondents at least implemented a new policy, and/or applied existing policy in a new way. (See, e.g., *O.G.S. Technologies Inc.* (2011) 356 NLRB 642, 645 [where employer had previously subcontracted 85 percent of die-cutting work, change in status quo found when employer subcontracted remaining 15 percent].) The primary dispute is whether Respondents' decision to contract out for medical assistants at the new clinics was within the scope of representation. We proceed to analyze that question.[8]

A. Framework for Determining If a Decision Falls within the Scope of Representation

Under the MMBA, the scope of representation covers "all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and

[8] We reject Respondents' claim that the proposed decision is "based on an issue not raised in the Complaint" and that Respondents therefore "never litigated this issue or had the opportunity to examine and be cross-examined on this matter." Respondents' closing brief to the ALJ acknowledged that "the matter centers around" Local 521's allegation that Respondents contracted out bargaining unit work without providing notice or the opportunity to bargain. Later in the same brief, Respondents argued alternate theories in support as to why the subcontracting at issue was outside the scope of bargaining; Respondents argued that they allegedly had no obligation to bargain because the facilities were newly-opened and no bargaining unit member suffered a diminution of wages or working hours. Respondents further argued that they had no duty to bargain because the subcontracting was not based on labor costs, and instead was allegedly based on a "change in the nature and direction" of Respondents' business. Respondents therefore litigated the case, first, as a subcontracting matter, which is appropriate given that Respondents contracted with a separate entity, CBCC, to provide staffing. In the alternative, Respondents' closing brief also addressed a separate theory regarding transfer of work to non-unit employees of the same employer. (*Eureka City School District* (1985) PERB Decision No. 481, p. 15 (*Eureka*).) The ALJ, citing *Beverly Hills Unified School District* (1990) PERB Decision No. 789, correctly noted that the *Eureka* line of decisions does not apply to subcontracting cases. Respondents now claim that a single paragraph of the Complaint was misleading as to which of these two theories was alleged. We find the Complaint as a whole was not misleading, and in any event there was no prejudice, as the parties litigated the subcontracting questions that lie at the heart of the case. Indeed, Respondents' closing brief noted that "the instant case involves contracting out, as opposed to transferring of bargaining unit work."

other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." (MMBA, § 3504.) The California Supreme Court has interpreted this provision in a series of cases. (*International Assn. of Fire Fighters, Local 188, AFL-CIO v. PERB (City of Richmond, Real Party in Interest and Respondent)* (2011) 51 Cal.4th 259 (*Richmond Firefighters*); *Claremont Police Officers Association v. City of Claremont* (2006) 39 Cal.4th 623; *Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651; *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

In establishing an analytic framework for assessing whether a decision falls within the scope of representation, the Court has explained that MMBA section 3504 was intended to incorporate federal precedent regarding the scope of representation under the National Labor Relations Act (NLRA),[9] and the Court therefore "has looked to federal precedents." (*Richmond Firefighters*, *supra*, 51 Cal.4th at p. 272.) Specifically, the Court has repeatedly noted that it applies a framework initially deriving from the U.S. Supreme Court's analysis in *First National Maintenance Corporation v. NLRB* (1981) 452 U.S. 666, 676-680 (*First National Maintenance*).

Under this framework, there are three categories of managerial decisions, each with its own implications for the scope of representation: (1) "'decisions that "have only an indirect and attenuated impact on the employment relationship" and thus are not mandatory subjects of bargaining,' such as advertising, product design, and financing; (2) 'decisions directly defining the employment relationship, such as wages, workplace rules, and the order of succession of layoffs and recalls,' which are '*always* mandatory subjects of bargaining'; and (3) 'decisions that directly affect employment, such as eliminating jobs, but nonetheless may not be mandatory

[9] The NLRA is codified at 29 U.S.C. section 151 et seq.

subjects of bargaining because they involve "a change in the scope and direction of the enterprise" or, in other words, the employer's "retained freedom to manage its affairs unrelated to employment.'" (*County of Orange* (2018) PERB Decision No. 2594-M, p. 18, citing *Richmond Firefighters,* 51 Cal.4th at pp. 272-273.) In the closest cases—the third category of managerial decisions—we apply a balancing test, under which bargaining is required only if "the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business." (*County of Orange*, *supra*, PERB Decision No. 2594-M, p. 18, quoting *Richmond Firefighters*, *supra*, 51 Cal.4th at p. 273 and *First National Maintenance*, *supra*, 452 U.S. at p. 679.)[10]

B. Analysis of Respondents' Medical Assistant Subcontracting

Given that the above-described scope of representation principles are rooted in NLRA precedent, it is not surprising that our cases applying those principles to subcontracting similarly show significant influence from federal decisions interpreting the NLRA. (*Rialto Police Benefit Assn. v. City of Rialto* (2007) 155 Cal.App.4th 1295, 1302 fn. 4 (*Rialto*).) Nor is it surprising that California public sector subcontracting precedent, like related federal precedent, is periodically adjusted and refined. (See, e.g., *Folsom-Cordova Unified School District* (2004) PERB Decision No. 1712, adopting proposed decision at pp. 17-18 [tracing part of the evolution of subcontracting decisions under state and federal law, including the shift in focus from requiring unions to establish cost as part of the employer's motivation for

[10] When interpreting the MMBA, it is generally appropriate to take guidance from administrative and judicial authorities interpreting other labor relations laws, including the NLRA, to the extent they comport with the purposes of the statues we enforce. (*Monterey*, *supra*, PERB Decision No. 2579-M, p. 11, fn. 6.)

subcontracting].)[11] For instance, *post* beginning at page 17, we update our standard to take into account recent persuasive federal precedent that PERB has not previously considered.

We have noted that subcontracting, sometimes referred to as contracting out, is "generally within the scope of bargaining." (*Long Beach Community College District* (2008) PERB Decision No. 1941.) Indeed, while subcontracting falls within the third category of decisions under *Richmond Firefighters*, in a majority of cases on this topic we have found subcontracting decisions to be negotiable. Nonetheless, to prevail in showing that the *Richmond Firefighters* balancing test warrants finding a particular subcontracting decision to have been bargainable, a union generally must establish one of three circumstances, which we discuss serially below. While Local 521 need only establish one viable theory, in this case it prevails under all three.

1. A Material Portion of Respondents' Concerns Underlying Their Subcontracting Decision were Amenable to Bargaining

The first means for a union to show that the benefits of bargaining outweigh the costs is to establish that that the employer's reasons for subcontracting included, to a material extent, issues that are amenable to bargaining.[12] As discussed above, Respondents hoped to serve the western part of the Bakersfield community and to improve KMC's financial condition by

[11] To the extent the Board has not always had need to fully lay out this evolution (see, e.g., *City of Milpitas* (2015) PERB Decision No. 2443-M, pp. 16-17), we do not interpret such decisions as reverting to an earlier paradigm focused solely on cost motivations. Rather, where one means of establishing a subcontracting violation is established, the Board often has refrained from assessing all possible bases or theories.

[12] The several avenues for a union to establish that subcontracting falls within the scope of representation, as discussed herein, establish criteria describing when the benefits of bargaining outweigh the burden placed on management. These subcontracting-specific criteria stand in for the balancing test, much like topic-specific criteria we have developed for many other types of management decisions, and therefore mean that PERB and the NLRB need not "reinvent the wheel" in each subcontracting case. (*Overnite Transportation Co.* (2000) 330 NLRB 1275, 1276, affd. in part, reversed in part mem. (3d Cir. 2000) 248 F.3d 1131.)

providing more medical services to patients with health insurance and a low risk of complications, at outpatient clinics that emulate private practices with nice amenities and aesthetics. These factors explain why Respondents opened the Stockdale Highway clinics; however, they do not explain why Respondents chose to use subcontracted medical assistants to staff the clinics.

We agree with the ALJ that Respondents chose to subcontract because hiring through normal County processes was slow, Respondents hoped to attract better applicants, and Respondents would save money. Respondents had plenty of notice of the need to staff up at the Stockdale Highway clinics, but never took any steps toward doing so on its own, nor toward providing Local 521 with notice and an opportunity to meet and confer regarding a set of parameters that would meet Respondents concerns. Most importantly, Respondents' entirely standard reasons for subcontracting show that the duty to bargain was triggered, because at least a material portion of Respondents' concerns were amenable to bargaining. (See, e.g. *Rialto, supra*, 155 Cal.App.4th at pp. 1307-1308 [employer required to bargain where its reasons for subcontracting included management strife, problems with delivery of services, employee lawsuits, and economic costs]; *Lucia Mar Unified School District* (2001) PERB Decision No. 1440, adopted proposed decision at p. 43 (*Lucia Mar*) [personnel issues are suitable for negotiations].)

Early decisions placed great weight on labor costs as the primary motivating factor that is amenable to negotiations. (See, e.g., *Oakland Unified School District* (2005) PERB Decision No. 1770, adopted proposed decision at pp. 37-38 (*Oakland USD*), citing *State of California (Department of Personnel Administration)* (1987) PERB Decision No. 648-S.) Labor costs remain a quintessential example of a bargainable concern, but *Rialto*, *Lucia Mar*, and other

cases explain that personnel issues are similarly "most suitable for negotiations between an employer and a union." (*Lucia Mar, supra*, PERB Decision No. 1440, adopted proposed decision at p. 43; accord *Oakland USD, supra*, PERB Decision No. 1770, adopted proposed decision at p. 30 [issues amenable to bargaining include needed improvements in services, supervision, and training].)

Accordingly, in assessing the extent to which Respondents' motivations for subcontracting establish that the decision was a bargainable one, we first consider Respondents' argument that they were not even partially motivated by labor cost concerns. We find the argument to be inconsistent with Thygerson's testimony and not credible in light of the overall context. Respondents retained Thygerson, and indeed the Authority was established, in large part in order for KMC to stem financial losses and create financial stability. Thygerson testified that the objective of expanding outpatient opportunities "is not just to enhance care and provide care in a setting that is efficient and convenient for patients and for physicians to practice there. It is also there to provide some additional commercial growth for the hospital," and to provide "additional financial resources." Thygerson further testified that outpatient clinics could be "highly profitable if operated correctly." Utilizing CBCC staffing as opposed to represented employees is "saving money," according to Thygerson. Thygerson reached this conclusion "[b]ased on the benefit costs of the two respective parties as well as the hourly wages of those staff." In the face of this testimony and the overall context in which the clinics were established, we find that labor costs were part of the subcontracting calculus. (See *Lucia Mar, supra*, PERB Decision No. 1440, adopted proposed decision at p. 42 [claim that cost savings had absolutely nothing to do with employer's subcontracting decision unpersuasive in light of all the evidence to the contrary].)

Even aside from our finding that labor costs played a role in Respondents' motivations, we also do not accept Respondents' argument that they would be excused from bargaining if they were solely motivated by their desire (a) to staff the clinics within a relatively short period of time, and (b) to counteract KMC's poor reputation among applicants, which made it difficult to recruit and retain qualified individuals. The Board has previously rejected an employer's argument that frustration with its own internal personnel issues and inefficiencies is sufficient to establish a right to subcontract without bargaining. (*Lucia Mar*, *supra*, PERB Decision No. 1440, adopted proposed decision at pp. 42-43.) In *Lucia Mar*, we found that personnel problems do not constitute "entrepreneurial issues" such as whether to invest significant capital in new facilities or to stop offering certain services to the public. (*Id*. at p. 43.) Rather, resolving personnel problems is particularly amenable to bilateral negotiations. (*Ibid*.) Moreover, we note that Respondents' desire to staff the positions was a result of their own self-imposed timetable, including their failure to get a timely start on the hiring process, apparently because they had already decided to subcontract the work.[13]

[13] Because quality of services is an area that is amenable to negotiations, we have rejected the contention that subcontracting becomes a fundamental management prerogative outside the scope of negotiations merely because the employer's reasons are focused on the quality of the services provided. (See, e.g., *Long Beach Community College District*, *supra*, PERB Decision No. 1941, p. 13.) Furthermore, Respondents have largely not attempted to justify their unilateral action by any "compelling operational necessity." (Cf. *Lucia Mar*, *supra*, PERB Decision No. 1440, adopted proposed decision at pp. 45-47, citing *Calexico Unified School District* (1983) PERB Decision No. 357 [compelling operational necessity may justify an employer's unilateral action prior to completion of negotiations if the necessity results from sudden unforeseen occurrence beyond employer's control, the timing precludes negotiations, and there is no alternative to the action taken]; *Redwoods Community College District*, (1997) PERB Decision No. 1242 (*Redwoods*), adopted proposed decision at pp. 25-26.) Respondents did not show that its subcontracting was the unavoidable result of sudden changes in circumstances, that there was no opportunity for notice and negotiations prior to any unilateral action by Respondents, or that there were no other alternatives available to Respondents.

Respondents did not even attempt to address their concerns through the negotiation process, instead dismissing out of hand any possibility that negotiations could ameliorate such concerns. Respondents did so at their own peril. As we noted in *Lucia Mar*, in rejecting the employer's contention that it was released from the bargaining obligation based on its expectation that the union would use the process to "create alternatives to subcontracting, thereby blocking it," if negotiations "had not given the District what it believe it needed, it was still free to contract out the work at the completion" of impasse. "The law does not mandate success, but only requires a 'good faith' effort by the parties to reach agreement." (*Lucia Mar*, *supra*, PERB Decision No. 1440, adopted proposed decision at p. 45.) We cannot say here what results negotiation would have netted, nor indeed was Local 521 required to "demonstrate that it is able to solve every problem raised by the employer before it has the opportunity to negotiate," but our labor policy is founded on the determination that the chances that "a satisfactory solution could be reached . . . are good enough to warrant subjecting such issues to the process of collective negotiation." (*Id*. at pp. 43-44, quoting *Fibreboard Paper Products Corp. v. NLRB* (1964) 379 U.S. 203, 214 (*Fibreboard*).)

Thus, Respondents' reasons for subcontracting provide one basis for finding that the balancing test weighs in favor finding a duty to bargain. Moreover, as discussed below, in the instant case there is also a bargaining obligation because the subcontracted medical assistant duties are substantially the same as those performed by unit employees.

2. Respondents Decided to Use Subcontracted Employees to Perform Substantially the Same Types of Job Duties that Bargaining Unit Employees Perform for Respondents Elsewhere Within Kern Medical Center

The ALJ also concluded that Respondents had a duty to bargain because subcontracted medical assistants at the Stockdale Highway facility, Suites 100 and 300, perform substantially the same duties as that traditionally or historically performed by bargaining unit medical

assistants, and that circumstance triggered a bargaining obligation even absent evidence that Respondents' reasons materially related to labor costs or other bargainable concerns. We have reviewed the record and find that it supports the ALJ's finding.

PERB has relied on federal precedent, including the United States Supreme Court's decision in *Fibreboard*, *supra*, 379 U.S. 203, to hold as follows: "[W]here the employer simply replaces its employees with those of a contractor to perform the same services under similar circumstances," then there is no need to engage in any balancing to determine whether the benefits of bargaining outweigh the costs. (*Lucia Mar*, *supra*, PERB Decision No. 1440, adopted proposed decision at p. 39.) In such cases, there is no need to look at the employer's motivation for subcontracting. (*Oakland USD*, *supra*, adopted proposed decision at pp. 37-38.)

Respondents' exceptions require us to answer this question: Just as a union has no need to establish the employer's motivation for subcontracting when the employer replaces existing bargaining unit employees with employees of an outside organization, is the same true when an employer opens new operations, if the nature of the subcontracted job duties is sufficiently similar to the duties that bargaining unit employees already perform for the employer? The National Labor Relations Board (NLRB) has answered this question affirmatively; the NLRB found that the same rationale applies to new work that the employer undertakes, if in the course of taking on the new work the employer subcontracts for services or duties that are sufficiently similar in nature to those that bargaining unit employees have historically or traditionally performed. (*Mi Pueblo Foods* (2014) 360 NLRB 1097, 1098-1099; *Overnite Transportation Co.*, *supra*, 330 NLRB at p. 1276.)

Five years ago, in *Mi Pueblo Foods*, the NLRB summarized its holding in *Overnite Transportation Co.* as follows:

> In *Overnite Transportation Co.*, the [NLRB] found that an employer had an obligation to bargain over its decision to use subcontractors, rather than unit employees, to handle an influx of new work that unit employees could not handle. Noting that unit employees did not lose work as a result of the subcontracting, it held that its decision in *Torrington* [*Industries* (1992) 307 NLRB 809] requiring bargaining over subcontracting is not limited to situations in which it has been affirmatively shown that the employer has taken work away from current bargaining unit employees. In so finding, [*Overnite Transportation Co.*] reasoned: [¶] " . . . We think it plain that the bargaining unit work is adversely affected whenever bargaining unit work is given away to nonunit employees, regardless of whether the work would otherwise have been performed by employees already in the unit or by new employees who would have been hired into the unit."

(*Mi Pueblo Foods*, *supra*, 360 NLRB 1097, 1099, citing *Overnite Transportation Co.*, *supra*, 330 NLRB at p. 1276.)

We find these federal precedents to be persuasive, particularly given that our subcontracting jurisprudence is largely based on federal law.[14] Adopting *Overnite Transportation Co.* establishes a second potential basis, beyond Respondents' reasons for subcontracting, to find that Respondents' decision fell within the scope of representation. To determine whether that rationale applies here, we compare the subcontracted duties to duties performed by bargaining unit employees elsewhere in KMC.

The duties performed by the CBCC medical assistants include answering telephones, escorting patients to exam rooms, taking patient vital signs, collecting other patient data,

[14] Although we have not previously considered whether to adopt *Overnite Transportation Co.* and *Mi Pueblo Foods*, the principles the NLRB articulated therein are hardly foreign to our precedent. Indeed, we have noted that an "actual or potential" diminution of union work through subcontracting not only withdraws wages and hours associated with the contracted-out work from the unit, but also weakens the collective strength of employees in the unit, which in turn undermines their collective ability to effectively deal with the employer. (*Arcohe Union School District* (1983) PERB Decision No. 360, pp. 5-6; see also *City of Sacramento* (2013) PERB Decision No. 2351-M, pp. 21-22.)

assisting medical providers during outpatient procedures, cleaning instruments, ordering and stocking supplies, organizing medical records, and other clerical duties. All of the CBCC medical assistants' job duties fall within the scope of the represented medical assistant classification, which is designed to function in an outpatient setting and take direction from a physician. Respondents argue that the clinic environment and more limited medical services provided at the Stockdale Highway clinics render the positions at those clinics distinct. Even accepting that the Stockdale Highway clinics constitute a less harried work environment than the main KMC facility, however, there was no persuasive evidence that the CBCC medical assistants perform the overlapping job duties in a materially different manner from represented employees, nor was there proof that the represented medical assistant classification would be incapable of performing the work at these two clinics. There was, in sum, no showing that the fundamental nature of the services performed was materially different. (*Redwoods*, *supra*, PERB Decision No. 1242, p. 4 [essential functions performed by positions in question not significantly different after new approach implemented].)

Citing *Trustees of the California State University* (2006) PERB Decision No. 1839-H (*CSU San Marcos*), Respondents urge us to find no duty to subcontract if an employer is opening a new facility and therefore does not layoff any existing bargaining unit employee due to its subcontracting. In *CSU San Marcos*, an auxiliary organization that was a separate employer from the California State University (CSU) financed and developed a new housing project.[15] The auxiliary organization contracted with a private entity which provided student housing services, including the services of resident agents and maintenance workers. Even

[15] The Board found that the auxiliary organization was not a single or joint employer with, or an alter ego of, CSU. (*CSU San Marcos*, *supra*, PERB Decision No. 1839-H, adopted proposed decision at p. 10.) Local 521 raises no such theories in the instant case, and we therefore express no opinion as to the extent to which such theories might apply.

aside from these unusual facts, the parties' collective bargaining agreement permitted CSU to make subcontracting decisions that did not result in layoffs, and the case involved no layoffs.[16] Nonetheless, the union charged that it had a right to bargain with CSU about the auxiliary organization's contracting decision. On the specific facts of that case, the ALJ concluded that the union had not established a right to bargain with CSU. The Board adopted the ALJ's proposed decision. (*CSU San Marcos, supra*, PERB Decision No. 1839-H, p. 2, adopting proposed decision.) Thus, *CSU San Marcos* involved subcontracting by an entity that was found to be external to the employer, involving a function the employer had not previously performed; and the case also featured a clear and unmistakable waiver of the right to bargain in the parties' contract. The instant case is distinguishable and we decline to extend *CSU San Marcos* beyond its unique circumstances.[17] To the extent that *CSU San Marcos* could arguably support a view that there is necessarily no duty to bargain when an employer opens a new facility and therefore does not layoff any existing bargaining unit employee due to its subcontracting, we disagree with such a view and find it to be out of step with the principles set forth in *Overnite Transportation Co.* and *Mi Pueblo Foods*. (See also *Sociedad Espanola de Auxillio Mutuo y Beneficiencia de P.R. v. NLRB* (1st Cir. 2005) 414 F.3d 158, 166-167 [duty to bargain over subcontracting extends beyond the circumstances where the employer's subcontracting decision will result in direct loss of union jobs]; *Acme Die Casting* (1994)

[16] The ALJ noted that section 3.2 of the parties' MOU granted CSU the right to unilaterally contract out work provided no unit employee was displaced. (*CSU San Marcos, supra*, PERB Decision No. 1839-H, p. 2, adopting proposed decision at p. 8.) No employee was displaced, giving CSU a contractual waiver defense. (*Ibid*.)

[17] There was also no evidence that labor costs or any other factor amenable to negotiations were a factor. Rather, the key factor was obtaining better financing options through the auxiliary. (*CSU San Marcos, supra*, PERB Decision No. 1839-H, adopted proposed decision at p. 11; see also *id*. at p. 27 [conc. opn. of Shek, L.].)

315 NLRB 202, 209 [fact that no employees were laid off or suffered a reduction in their work week—even if true—is irrelevant].)

Here, as noted above, Respondents have employed (and continue to employ) medical assistants at KMC's hospital and at multiple KMC clinics. Indeed, the medical assistant classification represented by Local 521 is designed to function in an outpatient setting, and the work now performed by contracted medical assistants at the Suite 100 and Suite 300 clinics is similar to the work which has been—and continues to be—performed by represented employees. These facts constitute a further basis, irrespective of Respondents' reasons for subcontracting, to find that Respondents had a duty to provide Local 521 with notice and an opportunity to meet and confer before reaching a firm decision to subcontract medical assistant work to CBCC.[18]

3. Respondents Also Unilaterally Altered the Status Quo by Adopting a New Interpretation of the Parties' MOU

Even if an employer's reasons for subcontracting are not amenable to negotiation and the subcontracted duties substantially differ from those which bargaining unit employees have traditionally or historically performed, a union can still establish a subcontracting violation if the employer unilaterally alters the terms of a written policy or agreement, or applies such policy or agreement in a new way. (*Monterey, supra*, PERB Decision No. 2579-M, p. 10; *Pasadena Area Community College District, supra*, PERB Decision No. 2444, p. 12, fn. 12; *Davis, supra*, PERB Decision No. 2494-M, pp. 30-31.)

[18] Since *Lucia Mar, Overnite Transportation Co.*, and other cases create a means to establish the duty to bargain irrespective of the employer's motivation for subcontracting, there are relatively few situations in which the employer's rationale for subcontracting is ultimately dispositive. As one example of such a fact pattern, where an employer subcontracts work that falls within the general bargaining unit definition, but involves duties fundamentally different from those ever previously performed by bargaining unit employees, then in that instance the employer's motivations for subcontracting are normally dispositive.

Article 2, section 9 of the parties' agreement does not waive bargaining rights regarding any category of subcontracting other than the category described in part B of that section, namely, remote maintenance, landscaping, and custodial services at particular locations. Thus, unlike the employer in *CSU San Marcos*, Respondents cannot raise the parties' MOU as a defense to the duty to bargain we have found hereinabove. Indeed, to be effective, an alleged waiver of statutory bargaining rights must be specific, clear, and unmistakable (*Monterey*, *supra*, PERB Decision No. 2579-M, p. 24), and in this case Article 2, section 9, part A of the MOU does not even generally reserve rights to the employer, much less clearly and unmistakably waive any specific union rights.[19]

[19] A similar test applies to any argument that a union has waived bargaining rights through its conduct. (See, e.g., *City of Milpitas*, *supra*, PERB Decision No. 2443-M, p. 22; *Los Angeles Unified School District* (2017) PERB Decision No. 2518, p. 39 (*Los Angeles*) [waiver of bargaining rights must demonstrate "intentional relinquishment" of right to bargain]; *Regents of the University of California* (2004) PERB Decision No. 1689-H, adopting proposed decision, at p. 44 (*Regents*) [waiver of right to bargain must be "clear and unmistakable"].) Here, although Respondents claim that the Truxtun facility is similar to the Stockdale Highway clinics in that each is an "exempt" clinic, meaning it has no licensed RN on site, that fact alone does not come close to establishing a waiver. We do not know to what extent CBCC provides medical assistants at Truxtun, the record shows that Local 521 did not receive notice of any subcontracting that occurred at Truxtun, and in any event a failure to demand bargaining as to one instance of subcontracting—even after receiving notice—would not establish a waiver for the future. (*Los Angeles*, *supra*, at p. 44 [union may only waive its right to bargain by inaction if it failed to request negotiations where it had notice of proposed change]; *Regents*, *supra*, adopting proposed decision, at p. 50 [union's acquiescence in a previous unilateral change does not operate as a waiver of the right to bargain for all times].) The skeletal record facts regarding the Truxtun facility also do not come close to establishing a past practice or dynamic static quo allowing future subcontracting of medical assistant work at new exempt clinics. Even if Respondents had introduced evidence regarding medical assistant subcontracting at Truxtun, that would not have sufficed, as each discrete decision whether to subcontract at a new facility is discretionary and therefore triggers a specific bargaining obligation, absent a clear and unmistakable waiver. (*County of Kern* (2018) PERB Decision No. 2615-M, pp. 6-9 [employer could not assert a past practice or dynamic status quo defense given that its changes were discretionary]; *Regents*, *supra*, PERB Decision No. 1689-H, adopting proposed decision, at pp. 29-31 [same].)

Moreover, the MOU provides Local 521 with a further basis for establishing that Respondents' subcontracting decision was an unlawful unilateral change. While in some cases an MOU's language may provide an independent basis for finding a unilateral change in policy, in this case the MOU provides only a derivative basis for finding a violation, as follows: The MOU unambiguously establishes as the status quo an agreement to bargain subcontracting when required under the MMBA. Because we have already determined, *ante*, that the MMBA required Respondents to provide notice and an opportunity to meet and confer before contracting for medical assistant services at the Stockdale Highway facility, Suites 100 and 300, Respondents committed a further unilateral change by deviating from the plain language of the parties' agreement. (*San Francisco County Superior Court & Region 2 Court Interpreter Employment Relations Committee* (2018) PERB Decision No. 2609-I, p. 7; cf. *City of Milpitas*, *supra*, PERB Decision No. 2443-M, p. 21 [noting that even when a contractual subcontracting provision contains a limited waiver permitting certain subcontracting, it can also establish a restriction on subcontracting, which the employer may not unilaterally alter].)

REMEDY

"A properly designed remedial order seeks a restoration of the situation as nearly as possible to that which would have obtained but for the unfair labor practice." (*Modesto City Schools* (1983) PERB Decision No. 291, pp. 67-68; accord *Lucia Mar*, *supra*, PERB Decision No. 1440, adopting proposed decision at pp. 56-57; cf. *Sure-Tan, Inc. v. NLRB* (1984) 467 U.S. 883, 900 [to effectuate labor relations principles, a remedial order should be tailored to the unfair practice it is intended to address].) PERB's standard remedy for an employer's unlawful unilateral change therefore restores the prior status quo and provides make-whole relief—including back pay, lost benefits, and interest—to the extent necessary to remedy the

respondent's unlawful conduct. (See, e.g., *City of San Diego* (2019) PERB Decision No. 2464a-M, pp. 4-5 [to restore status quo, employer must make all affected employees whole, and must also reimburse charging party for reasonable attorney fees subsequently incurred in ancillary litigation brought in order to undo the employer's unilateral change].)[20]

Restoring the parties and affected employees to their respective positions before the unlawful conduct occurred is critical to remedying unilateral change violations, because it prevents the employer from gaining a one-sided and unfair advantage in negotiations. (See, e.g., *County of Santa Clara* (2013) PERB Decision No. 2321-M, p. 23, citing *San Mateo County Community College District* (1979) PERB Decision No. 94, pp. 14-17; *San Francisco Community College District* (1979) PERB Decision No. 105, p. 17 [requiring a union to pursue negotiations from a changed position caused by the employer's unilateral action "would be tantamount to requiring it to recoup its losses at the negotiations table"].) When carried out in the context of declining revenues, a public employer's unilateral actions "may also unfairly shift community and political pressure to employees and their organizations, and at the same time reduce the employer's accountability to the public." (*County of Santa Clara*, *supra*, PERB Decision No. 2321-M, at p. 23, citing *San Mateo County Community College District*, *supra*, PERB Decision No. 94, p. 16.) In analyzing the appropriate remedies in this case, we begin with non-economic remedies, before turning to economic relief.

I. Rescission

Having found a unilateral subcontracting violation, the ALJ appropriately ordered Respondents to cease and desist from unilaterally subcontracting bargaining unit work at the

[20] Retirement contributions and/or retirement benefits are appropriately included in PERB's standard make-whole remedy, when employees have lost such compensation as a result of unfair practices. (*City of San Diego* (2015) PERB Decision No. 2464-M, p. 45, affirmed *sub nom*. *Boling v. PERB* (2018) 5 Cal.5th 898, 920, *reh'g denied* (Oct. 10, 2018).)

Stockdale Highway facility, Suites 100 and 300, and to rescind the unilaterally adopted contract with CBCC for medical assistant services at those clinics. (*Lucia Mar, supra,* PERB Decision No. 1440, adopting proposed decision at pp. 56-57; *Desert Sands Unified School District* (2010) PERB Decision No. 2092, pp. 30-35; see also *San Diego Adult Educators v. PERB* (1990) 223 Cal.App.3d 1124, 1137 [rescission of subcontract and reinstatement of laid off employees to future classes offered by the District].)

Because it can take time to rescind a contract, we look for a reasonable deadline, and in the interim, we extend make-whole relief, with interest, until employees cease accruing harm. (See, e.g., *Lucia Mar, supra,* PERB Decision No. 1440, adopting proposed decision, pp. 56-57 [requiring contract termination at the "earliest opportunity"]; *Lucia Mar Unified School District* (2004) PERB Decision No. 1640, p. 3 [after further proceedings, establishing a date certain for contract termination].) In the instant case, the CBCC contract allows termination at any time if required by a court or agency order, and, in any event, the contract permits termination without cause on 30 days' notice. Taking these provisions into account, we require termination within 30 days after this decision is no longer subject to appeal.

II. Make-Whole Relief

The Board crafts make-whole remedies, including "back pay, front pay or other forms of compensation," as necessary "to make injured parties and/or affected employees whole." (*Sonoma County Superior Court* (2017) PERB Decision No. 2532-C, p. 40; see, e.g., *Mt. San Antonio Community College Dist. v. PERB* (1989) 210 Cal.App.3d 178, 184, fn. 3 [where respondent unilaterally changed employment terms, respondent ordered to pay "to the affected employees the difference in wages between that which they earned and that which they should have earned in the absence of the employer's unilateral action, minus any mitigation"].)

In many cases involving illegal subcontracting, bargaining unit employees suffer monetary losses; for instance, the employer may lay off bargaining unit employees as an integral part of its subcontracting. (See, e.g., *Lucia Mar, supra*, PERB Decision No. 1440, adopting proposed decision at pp. 14, 39 & 56-57.) In such cases, our make-whole remedy can be relatively straightforward: Affected bargaining unit employees should receive compensation for all wages and benefits lost, minus mitigation, plus interest.

In cases such as the instant one, however, bargaining unit employees may maintain substantially the same compensation after the employer's subcontracting. The economic harm, if any, falls on newly-hired subcontracted employees if they are required to work under economic standards that are lower than those that would apply if they had been hired directly by the public employer and placed in the appropriate bargaining unit positions.

In tailoring an appropriate remedy for such cases, the Board must take heed of the central principle noted above: A make-whole award should be tailored "to expunge the actual consequences" of an unfair practice, including restoration of "the economic status quo that would have obtained but for the respondent's wrongful act." *(City of Pasadena* (2014) PERB Order No. Ad-406-M, p. 13 (*Pasadena*); *Ponce Construction, Inc.* (2001) 333 NLRB No. 40, p. 2; cf. *Local Jt. Exec. Bd. of Las Vegas v. NLRB* (9th Cir. 2018) 883 F.3d 1129, 1139-1140 [NLRB abused its discretion by ordering make-whole remedy that failed to compensate the affected employees].) Our remedies therefore include "measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice, even when doing so necessarily entails some degree of uncertainty as to the precise relationships." (*Pasadena*, *supra*, PERB Order No. Ad-406-M, p. 13.) For this reason, even where a public employer's unfair practice causes harm to employees of a private employer, PERB nonetheless

crafts a make-whole remedy. (*Los Angeles Unified School District* (2001) PERB Decision No. 1469, pp. 2-3 and adopting proposed decision at pp. 68 & 83-84.)

Accordingly, when a public employer subcontracts operations in violation of a statute we enforce, and the record shows that private sector subcontracted employees are harmed, PERB should order reasonably requested economic remedies tailored to make such employees whole. If the parties develop a sufficient record in compliance proceedings or otherwise, that remedy may include the difference in total compensation, including benefits, between subcontracted employees' actual compensation and the compensation the public employer pays to comparable employees. Such an order is appropriate even though it necessarily involves approximation. (*Pasadena*, *supra*, Order No. Ad-406-M, pp. 8, 13-14 & 26-27.) Doing so is generally preferable to "permitting the employer to evade liability because of uncertainty *caused by the employer's own unlawful conduct*, and thus leaving an unfair practice unremedied. (*Pasadena*, *supra*, Order No. Ad-406-M, p. 26, emphasis in original.)

In this case, however, Local 521 did not seek a make-whole remedy for the subcontracted employees, the ALJ did not order such a remedy, and Local 521 took no exceptions.[21] In those circumstances, we decline to order make-whole relief for the

[21] The ALJ's remedy discussion relied on *Folsom-Cordova Unified School District*, *supra*, PERB Decision No. 1712, adopting proposed decision at p. 31. There, the subcontract had not yet gone into effect as of the hearing, and in any event it appears that the charging party, like Local 521 here, did not seek make-whole relief for any employees the subcontractor may have thereafter employed. (*Id.*, adopting proposed decision at pp. 18-19.) The ALJ's proposed remedy did provide that Local 521 could seek a modification of the order in a compliance proceeding if it contends that "financial losses occurred" as a result of Respondents' unilateral change at these clinics after the record closes. (Proposed decision, p. 24.) While the passively worded phrase "financial losses occurred" leaves open the possibility that that the ALJ intended to provide make whole relief to subcontracted employees, the best reading of his overall proposed decision, in light of the fact that Local 521 did not request make-whole relief for subcontracted employees, is that the ALJ did not order such relief sua sponte. Nor do we do so.

subcontracted employees, though our order implements the ALJ's conclusion that Respondents must at least make whole medical assistants represented by Local 521, if any, who may have been harmed by the contract with Comprehensive Blood and Cancer Center for medical assistant services at the clinics located at 9300 Stockdale Highway, Bakersfield, California, Suites 100 and 300.

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 and the Kern County Hospital Authority (collectively Respondents) violated rights and obligations under Meyers-Milias Brown Act (MMBA), Government Code sections 3503, 3505, and 3506, which is prohibited under MMBA section 3506.5, subdivisions (a), (b), and (c), and PERB Regulation 32603, subdivisions (a), (b), and (c). Respondents violated the MMBA by unilaterally contracting with an outside company to provide medical assistant services of a type that had been historically or traditionally performed by Respondents' medical assistants who are exclusively represented by Charging Party Service Employees International Union Local 521 (Local 521). All other allegations are dismissed.

Pursuant to MMBA Section 3509, subdivision (b), it hereby is ORDERED that Respondents, their governing bodies and their representatives shall:

A. CEASE AND DESIST FROM:

1. Unilaterally subcontracting medical assistant services located at 9300 Stockdale Highway, Bakersfield, California, Suites 100 and 300, after thirty (30) workdays have elapsed from the date this decision is no longer subject to appeal, unless Local 521 agrees otherwise.

2. Interfering with Local 521's right to represent its members.

3. Interfering with employees' right to be represented by Local 521.

4. Failing or refusing to provide Local 521 with advance notice and an opportunity to meet and confer regarding decisions to subcontract duties or services that have been historically or traditionally performed by employees exclusively represented by Local 521.

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

1. Within thirty (30) workdays after this decision is no longer subject to appeal, unless Local 521 agrees otherwise, rescind the contract with Comprehensive Blood and Cancer Center for medical assistant services at the clinics located at 9300 Stockdale Highway, Bakersfield, California, Suites 100 and 300.

2. Provide Local 521 with advance notice and an opportunity to meet and confer regarding decisions to subcontract duties or services that have been historically or traditionally performed by employees exclusively represented by Local 521.

3. Make whole any medical assistant represented by Local 521 who is demonstrated to have been harmed by the contract with Comprehensive Blood and Cancer Center for medical assistant services at the clinics located at 9300 Stockdale Highway, Bakersfield, California, Suites 100 and 300.

4. Within ten (10) workdays of the date this matter is no longer subject to appeal, post at all work locations where Respondents customarily post notice to employees represented by Local 521, copies of the Notice attached hereto as an Appendix. The Notice must be signed by authorized agents of Respondents, indicating that it 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 Respondents to communicate with its certificated employees. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

5. 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. Respondents shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on Local 521.

Members Banks and Paulson 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-1084-M, *Service Employees International Union, Local 521 v. County of Kern and Kern County Hospital Authority*, in which all parties had the right to participate, it has been found that the County of Kern and Kern County Hospital Authority violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq. and Public Employment Relations Board (PERB) Regulations (Cal. Code Regs., tit. 8, § 31001 et seq.), by unilaterally contracting with an outside company to provide medical assistant services of a type that had been historically or traditionally performed by medical assistants who are exclusively represented by Charging Party Service Employees International Union Local 521 (Local 521).

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

A. CEASE AND DESIST FROM:

1. Unilaterally subcontracting medical assistant services located at 9300 Stockdale Highway, Bakersfield, California, Suites 100 and 300, after thirty (30) workdays have elapsed from the date this decision is no longer subject to appeal, unless Local 521 agrees otherwise.

2. Interfering with Local 521's right to represent its members.

3. Interfering with employees' right to be represented by Local 521.

4. Failing or refusing to provide Local 521 with advance notice and an opportunity to meet and confer regarding decisions to subcontract duties or services that have been historically or traditionally performed by employees exclusively represented by Local 521.

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

1. Within thirty (30) workdays after this decision is no longer subject to appeal, unless Local 521 agrees otherwise, rescind the contract with Comprehensive Blood and Cancer Center for medical assistant services at the clinics located at 9300 Stockdale Highway, Bakersfield, California, Suites 100 and 300.

2. Provide Local 521 with advance notice and an opportunity to meet and confer regarding decisions to subcontract duties or services that have been historically or traditionally performed by employees exclusively represented by Local 521.

3. Make whole any medical assistant represented by Local 521 who is demonstrated to have been harmed by the contract with Comprehensive Blood and Cancer Center for medical assistant services at the clinics located at 9300 Stockdale Highway, Bakersfield, California, Suites 100 and 300.

COUNTY OF KERN

By: _____
Authorized Agent Dated

KERN COUNTY HOSPITAL AUTHORITY

By: _____
Authorized Agent Dated

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 and KERN COUNTY HOSPITAL AUTHORITY, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-1084-M PROPOSED DECISION (June 26, 2018)

Appearances: Weinberg, Roger & Rosenfeld, by Mathew J. Gauger and Adam J. Thomas, Attorneys, for Service Employees International Union, Local 521; Liebert Cassidy Whitmore, by Adrianna E. Guzman and Kevin J. Chicas, Attorneys, for County of Kern and Kern County Hospital Authority.

Before Eric J. Cu, Administrative Law Judge.

INTRODUCTION

In this case, an exclusive representative accuses a public agency employer and its successor of unilaterally contracting out bargaining unit work. Both employers deny that their use of contractors violates the Meyers-Milias Brown Act (MMBA) or the Public Employment Relations Board (PERB or Board) Regulations.[1]

PROCEDURAL HISTORY

On April 21, 2016, the Service Employees International Union, Local 521 (Local 521) filed an unfair practice charge with PERB against the County of Kern (County) and the Kern County Hospital Authority (Authority). Local 521 accused the County and the Authority (collectively Respondents) of contracting out work performed by six of its bargaining units.

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

Local 521 amended its charge two times during the course of PERB's investigation. Respondents filed a position statement in response to the original charge and each amendment.

On March 27, 2017, the PERB Office of the General Counsel issued a complaint alleging that Respondents enacted an unlawful unilateral policy change by using contract labor at a surgery center located on Stockdale Highway, in Bakersfield, California, to perform the work of eight represented classifications, i.e., the Central Supply Assistant, Hospital Staff Nurse, Medical Assistant, Nurse Practitioner, Vocational Nurse, Surgical Technician, Patient Care Technician, and Office Service Specialist. The PERB complaint further alleges that Respondents enacted a second unlawful unilateral change by using contract labor to perform the work of the same positions at two additional clinics at the same facility.

Respondents filed an answer to the PERB complaint on April 14, 2017, denying the substantive allegations and asserting multiple affirmative defenses. Respondents also affirmatively alleged that the surgery center alleged in the complaint has not yet opened and no final decisions have been made about staffing at that site.

An informal settlement conference was held on June 13, 2017, but the matter was not resolved. Thereafter, the case was placed in abeyance at the request of the parties. The abeyance was lifted in November 2017 and a formal hearing was scheduled for February 22 and 23, 2018. On the first day of hearing, Local 521 moved to amend the complaint to allege additional instances of unlawful subcontracting unit work at a facility located at 34th Street, in Bakersfield. That motion was granted over Respondents' objections.

The parties filed closing briefs on May 29, 2018. At that point, the record was considered closed and the matter was submitted for decision.

FINDINGS OF FACT

Kern Medical Center

Kern Medical Center (KMC) provides medical services throughout Kern County. KMC operates 24 hours per day, seven days per week. It is the designated public hospital for Kern County and it accordingly receives funding to provide medical care for indigent and socioeconomically disadvantaged residents. A significant proportion of KMC's patients come from those populations. It is also the only local facility designated as a Level 2 trauma center, which means it is equipped to treat patients suffering from significant traumatic injuries.

KMC's main facility is a hospital in eastern Bakersfield, which provides both inpatient and outpatient care. The hospital was designed and built in the 1950s and a portion was renovated in the 1980s. KMC also operates two off-campus licensed clinics, the Sagebrush Clinic and clinics for local inmate and juvenile hall patients. Licensed clinics operate under the same generally stringent requirements and regulations of a hospital and must have a registered nurse on staff that is responsible for supervising clinic staff.

The County and the Authority

The County is a "public agency" within the meaning of MMBA section 3501, subdivision (c). On September 26, 2014, the Kern County Hospital Act (AB 2546) was signed into law, authorizing the County to establish a hospital authority for managing, administering, and controlling area medical facilities, such as KMC.[2] Subsequently, the County's governing Board of Supervisors passed and adopted Ordinance Nos. A-356 and A-357, establishing the Authority as the entity authorized to operate KMC. Prior to this, the County ran KMC and KMC was staffed with County employees. The Authority was tasked with providing "an

[2] The Kern County Hospital Act is now codified at Health and Safety Code, section 101852, et seq.

organizational and operational structure that facilitates and improves the Kern Medical Center's ability to function with flexibility, responsiveness and innovation." Part of the creation of the Authority included the transfer of employees at KMC from the County to the Authority. This transfer occurred sometime around mid-2016.

The Authority is a special district within the meaning of Government Code section 31468, subdivision (m). Pursuant to Health and Safety Code section 101855, subdivision (b)(4), the Authority is subject to PERB's jurisdiction. It is a "public agency" within the meaning of MMBA section 3501, subdivision (c). Meridian Healthcare Partners is a private company which provides management and consulting services for the Authority.

Local 521

Local 521 is an exclusive representative within the meaning of PERB Regulation 32016, subdivision (b). Local 521 represents multiple bargaining units of employees working at KMC including, as relevant to this case, the Administration unit, Clerical unit, Professional unit, Supervisory unit, Technical Services unit, Clerical unit, and Trades/Crafts/Labor unit.

On or around March 16, 2016, Local 521 and the County entered into a single Memorandum of Understanding (MOU) for all six of those KMC bargaining units with an effective period of March 28, 2015 through August 27, 2017. Under Article 2, section 9(A), the County agreed to negotiate with Local 521 before contracting out work performed by the six units, to the extent required by law. Under Ordinance No. A-356, the Authority is bound by the terms of this MOU.

The Positions Identified in the PERB Complaint

The PERB complaint identifies eight positions whose job duties were allegedly assigned to outside contractors. It is undisputed that each of the eight positions are in one of

Local 521's six bargaining units. Only one witness, Renita Nunn, testified in significant detail about these positions. Nunn is Director of Employment and Health Services for the Authority.

Central Supply Assistant

The Central Supply Assistant is a position in Local 521's Technical Services unit. According to Nunn, this position's primary function is to receive equipment from Authority warehouses and deploy that equipment to different hospital units. According to the job description, the position also receives and sterilizes equipment and instruments, folds linens, and answers telephones.[3]

There is also an Extra-Help version of the Central Supply Assistant position, performing essentially the same duties in essentially same manner. Extra-Help positions are used by KMC to fill in for employee absences, or address staffing needs during special projects or other times of extraordinary need. Extra-Help classifications are in different bargaining units, also represented by Local 521.

Hospital Staff Nurse

The Hospital Staff Nurse is a position in Local 521's Professional unit. According to Nunn, this position functions as the primary caregiver for hospital patients during inpatient stays. The position administers medication and assists in assessing patient condition in a 24-hour care environment. According to the job description, the position also collects and assesses patient information, contributes to the development of a nursing action plan, implements therapeutic care in response to patient needs, and educates patients and family members about testing, procedures, and medical conditions.

[3] Nunn testified that this job description, and every other job description admitted as an exhibit, accurately reflects each position's job duties.

KMC also utilizes Per Diem Hospital Staff Nurses, who perform similar work under similar circumstances. Per diem nurses are not in a bargaining unit.

Medical Assistant

The Medical Assistant is a position in Local 521's Trades/Crafts/Labor unit. Nunn testified that this position acts as an "extension of a physician in an outpatient care setting." The position escorts patients to exam rooms, collects patient vital signs and other information, and administers immunizations. According to the job description, the position also assists medical providers during exams and minor surgeries, cleans and disinfects medical instruments, answers telephones and documents telephone conversations, prepares and organizes records, orders and maintains supplies, and stocks patient areas. There is also an Extra-Help version of this position.

Nurse Practitioner

The Nurse Practitioner is a position in Local 521's Professional unit. Nunn testified that this position is the most advanced of the registered nurse classifications. According to the job description, the position may interview patients to obtain their medical history, perform examinations and diagnostic procedures, and educate patients on medical conditions. There is also a per diem version of this position.

Office Services Specialist

The Office Services Specialist is in Local 521's Clerical unit. Nunn testified that this position provides clerical assistance to physicians. According to the job description, such assistance can include screening telephone calls and taking messages, distributing mail, word processing, and gathering data and preparing reports. There is also an Extra-Help version of this position.

Patient Care Technician

The Patient Care Technician is in Local 521's Trades/Crafts/Labor unit. Nunn testified that this position functions similarly to the Medical Assistant classification, but in an inpatient setting. Job duties for the position may include taking vital signs, bathing, and clerical duties. According to the job description, the position also records vital signs and pain levels, handles food trays, answers call signals, makes beds, and performs general clerical duties. There is also an Extra-Help version of this position.

Surgical Technician

The Surgical Technician is in Local 521's Technical Services unit. Nunn testified that this position works exclusively in hospital operating rooms. Their duties include handling and sterilizing equipment, assisting with patient placement, and passing instruments to surgeons during operations. According to the job description, the position also prepares operating rooms and surgical equipment, washes, shaves, and dresses patients before operations, sterilizes equipment and instruments, and keeps records. There is also an Extra-Help version of this position.

Vocational Nurse

The Vocational Nurse is in Local 521's Technical Services unit. According to Nunn, this position provides general nursing duties and takes direction from the Hospital Staff Nurse classification. According to the job description, the position also changes patient dressings, cauterizations, and deep tracheal suction instruments, bathes patients, participates in the creation of patient nursing plans, and administers special diets and treatments. There is also a per diem version of this position.

KMC's Financial Difficulties

Alton Scott Thygerson is a Vice President at Meridian Healthcare Partners and functions as the Chief Strategy Officer for KMC. In that role, Thygerson is responsible for hiring and contracting with physicians, strategy development, and developing and launching new programs and services. He started in this role in around Fall 2013. At the time, KMC had been having financial losses for several years and the County's Board of Supervisors expressed the desire to create financial stability. According to Thygerson, KMC had been losing millions of dollars each month.

One way Authority management elected to improve KMC's financial condition was to pursue opportunities in managed healthcare contracts. This refers to entering into agreements with health plans to provide medical services to patients with health insurance. Management at the Authority determined that KMC needed to create facilities that are more convenient and appealing to insured patients. In Thygerson's assessment, those patients have higher expectations about the cost, efficiency, and amenities of their healthcare facilities, than patients who traditionally sought care at KMC. Thygerson explained that, in a hospital setting, medical care tends to be slower because those facilities are designed to address the worst of all possible circumstances. This inevitably creates more procedures and requirements for things such as infection control and safety protocols. In addition, patients seeking care in a hospital regularly have appointments canceled if another patient suffering from major trauma requires the attention of the physicians, facilities, and other resources.

Management at the Authority believed that expanding KMC's use of outpatient clinics would attract the sort of patients it needed to improve its financial condition. According to Thygerson, such clinics could deliver healthcare to patients who have a low risk for medical

complications in a manner that is both efficient for the patient and profitable for KMC. In addition, offsite clinics could service the western part of the Bakersfield community that would otherwise have to travel a long distance to reach KMC's main facility. Thygerson also explained that managed health plans prefer to have procedures performed in an outpatient setting for cost reasons and may not authorize certain procedures to be performed in a hospital. Finally, Thygerson expressed his opinion that clinics could be designed to emulate a private practice setting with nice amenities and better aesthetics located in a facility that is more convenient than KMC's aging hospital.

The Stockdale Highway Clinics

On March 24, 2015, the County began leasing medical office space at 9300 Stockdale Highway, in Bakersfield (the Stockdale Highway facility). The purpose of the new space was to operate medical clinics in order to expand the available services offered by KMC and accommodate the shortage of space at existing KMC facilities.

On or around August 11, 2015, the County amended an existing agreement with the Comprehensive Blood and Cancer Center (CBCC) to provide contract-based staff for external clinics. According to the amended agreement:

> County has requested additional services from [CBCC], as such services are unavailable from County resources, and [CBCC] has agreed to provide services in the form of non-physician personnel to staff clinic or other practice sites designated by [KMC], as requested by County[.]

On or around July 20, 2016, the CBCC contract staff agreement was amended to reflect the fact that the Authority has assumed control of KMC and replaced the County as a party to the agreement.

Suite 100

In January 2016, KMC opened a clinic at Suite 100 of the Stockdale Highway facility. This clinic operates as an exempt clinic, meaning that it is not subject to the same regulatory standards as a licensed clinic. For example, unlike in a licensed clinic, an exempt clinic does not require a registered nurse on site at all times. Rather, the physicians practicing at the exempt clinic manage the staff there. KMC provides urology, urogynecology, obstetrics and gynecology services at Suite 100. There are between six and seven exam rooms. Unlike at KMC's main campus, this clinic provides no inpatient services and does not provide 24-hour care.

Meridian Vice President Renee Villanueva is in charge of ambulatory care at KMC. This includes responsibility for outpatient clinics. Villanueva elected not to use existing KMC employees to staff Suite 100. According to Villanueva, recruitment for new employees was still being managed by the County's personnel department at the time. She testified that:

> It was weeks if not months to hire anyone through their recruiting process, and we had a reputation to overcome. People didn't just line up to apply to be medical assistants at Kern Medical with experience. Experienced people did not apply.

Instead, staffing was provided on a contract basis, pursuant to the agreement with CBCC. There was no evidence of any recruitment efforts to staff this clinic with KMC employees. She did not have any discussions about using KMC employees to staff the clinic. The Authority continued using contract labor from CBCC after it assumed control of employment at KMC and became a party to the CBCC agreement.

CBCC provides between three and five medical assistants for the Suite 100 clinic. Villanueva testified that these individuals have a broader skill set than the Medical Assistant position in Local 521's Trades/Crafts/Labor unit. She said that the nature of the work at the

clinic requires staff to answer telephones, schedule appointments, assist physicians with procedures, clean instruments, escort patients to exam rooms, check and record vital signs, verify patient medication, administer shots, clean and restock rooms after examinations, and perform office work. Nurses are not regularly assigned to work at this clinic. Thygerson testified confidently as to his belief that using contractors over KMC employees at this clinic saved KMC money. He reached this conclusion by comparing wages and benefits costs under the CBCC agreement with comparable positions at the County and/or the Authority. No employees represented by Local 521 were laid off or had their wages, hours, or benefits changed as a result of using CBCC labor at this clinic.

Suite 300

In or around March or May 2016, the County and/or the Authority opened up a second exempt clinic in Suite 300 of the Stockdale Highway facility. Services provided at this clinic include ear, nose, and throat services, podiatry, neurosurgery, thoracic surgery, orthopedic surgery, and general surgery. It does not offer inpatient care. There are between 10 and 12 exam rooms. As with Suite 100, staffing for Suite 300 was at all times provided through the CBCC agreement. Once again, Villanueva did not have any conversations about using KMC employees to staff Suite 300.

CBCC also provides between three and five contract medical assistants at Suite 300. The scope of their skills and work is similar to the CBCC medical assistants provided at Suite 100. As with Suite 100, CBCC does not provide nursing staff at Suite 300. Thygerson again testified that using contractors over KMC employees at this clinic saves KMC money. No employees represented by Local 521 were laid off or had their wages, hours, or benefits changed as a result of using CBCC labor at this clinic.

Suite 200

The Authority is also leasing space at Suite 200 in the Stockdale Highway facility. The Authority plans on using the space as an outpatient surgery center. It created a limited liability company for this purpose. However, that location has not opened because the Authority has not yet met all of the regulatory requirements for opening such a facility. No final decisions have been made about how the Authority plans on staffing that location if and when the surgery center opens.

The REACH and GROW Clinics

Effective on or around May 1, 2017, KMC moved its REACH clinic from the KMC main campus to 820 34th Street, Bakersfield (the 34th Street facility). The REACH clinic provides services to medically fragile patients who have no strong relationship with a regular physician and might otherwise seek medical care in an emergency room. KMC also operates the GROW clinic at that same location, which provides care for a similar patient population. It is unclear from the record when that clinic opened or whether it was previously housed at the KMC main campus. Medical providers at both clinics could include physicians, pharmacists, and social workers. No evidence was presented as to whether the work currently being done at those facilities is the same or different from work done by represented employees at KMC.

Villanueva testified that 34th Street facility is "also a CBCC facility." However, Villanueva could not specify what staffing CBCC provides at either the REACH or GROW clinics because she explained that she has no job-related responsibilities and provides no services at those clinics. No employees represented by Local 521 were laid off or had their hours reduced as a result of using CBCC labor at these clinics. Local 521 Internal Organizer Pete Rodriguez testified that he spoke with individuals working at that facility and they told

him that they were employed by CBCC, but paid through KMC. None of those individuals testified.

Local 521's Information Request

Rodriguez is Local 521's current custodian of records. He testified about reviewing Local 521's file on KMC. That file includes correspondence between Ernest Harris, a prior Executive Director at Local 521, and Lisa Hockersmith, identified in documents as a Senior Director of Human Resources at KMC.[4] According to the documents, On January 8, 2016, Harris requested information from KMC about staffing at a location entitled "the Southwest Surgery Center." According to Local 521's documents, Hockersmith responded around a month later, stating that "the decision was made to provide staffing through an outside contractor." In later correspondence, Hockersmith stated that her earlier statement about using contractors did not refer to the anticipated surgery center. Rather, it concerned other clinics located at the Stockdale Highway facility, presumably those at Suites 100 and 300.

ISSUES

1. Did Respondents unilaterally change a negotiable policy by using contract labor at the Stockdale Highway facility?

2. Did Respondents unilaterally change a negotiable policy by using contract labor at the 34th Street facility?

[4] An individual identifying herself as Hockersmith made an appearance at the opening of the hearing in this case. She identified her title at the time as Vice President of Human Resources. Neither Harris nor Hockersmith testified.

CONCLUSIONS OF LAW

1. Contracting Out at the Stockdale Highway Facility

The PERB complaint alleges that Respondents unilaterally changed a negotiable policy by using contract labor at the Stockdale Highway facility. An employer's unilateral changes violate the duty to bargain in good faith where: (1) the employer took action to change existing policy; (2) the policy change concerned 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 change has a generalized effect or continuing impact on terms and conditions of employment. (*City of Davis* (2016) PERB Decision No. 2494-M, p. 18, citing *Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262, p. 9; see also *Grant Joint Union High School District* (1982) PERB Decision No. 196, p. 10 and *Walnut Valley Unified School District* (1981) PERB Decision No. 160, p. 5.)[5]

a. Using Contract Medical Assistants at the Stockdale Highway Facility, Suites 100 and 300

Respondents do not dispute that Respondents began using contract medical assistants at the clinics in Suites 100 and 300. It is also undisputed that neither the County nor the Authority notified Local 521 before deciding to use contractors at these locations. The Authority continues using contractors at these clinics. Respondents contend that the decision to use contractors in at the clinics was non-negotiable.

To prove that an employer contracted out bargaining unit work, the union must prove that the employer began using a contractor to perform the same work previously done by unit

[5] 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, p. 616; *Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M, p. 13, fn. 4.)

members. (*State of California (Department of Veterans Affairs)* (2010) PERB Decision No. 2110-S, p. 6 (*Veterans Affairs Dept.*), citing *Rialto Police Benefit Assn. v. City of Rialto* (2007) 155 Cal.App.4th 1295 (*City of Rialto*), p. 1299; *Oakland Unified School District* (2005) PERB Decision No. 1770 (*Oakland USD*).) Not all use of contract labor is subject to negotiations. Some contracting decisions are managerial decisions at the core of entrepreneurial control, based on factors not amenable to negotiations. (*City of Milpitas* (2015) PERB Decision No. 2443-M, p. 16, citing *Ventura County Community College District* (2003) PERB Decision No. 1547 (*Ventura County CCD*), p. 19 and *Fibreboard Corp. v. NLRB* (1964) 379 U.S. 203 (*Fibreboard*).) Subcontracting unit work is negotiable where: (1) the employer simply replaces its employees with those of a contractor to perform the same services under similar circumstances; or (2) where the decision was motivated substantially by potential savings in labor costs. (*City of Rialto*, p. 1306, citing *Fibreboard*, p. 213; see also *Veterans Affairs Dept.*, p. 6, citing *Lucia Mar Unified School District* (2001) PERB Decision No. 1440 (*Lucia Mar USD*).) On the other hand, the decision to use contractors based upon a fundamental change in the nature and direction of the employer's operations are not generally subject to negotiations. (*Oakland USD*, p. 6, citing *Lucia Mar USD*.)

In *City of Rialto*, *supra*, 155 Cal.App.4th 1295, a city executed a contract with the local sheriff's department to perform police services within its borders. The court found that decision to be negotiable because the city did not eliminate its police services, but merely entered into an arrangement to have those services performed by another entity. (*Id*. at pp. 1302-1303.) The city acknowledged that the contracting decision was motivated, in part, by the prospect of reducing the costs of those services. (*Id*. at p. 1309.) Similarly, in *Oakland USD*, *supra*, PERB Decision No. 1770, a school district eliminated its own police force and

entered into a $1 million contract for the city police department to do the police work previously done internally. (*Id*. at pp. 6-7.) The Board concluded that the employer's decision to use contractors was subject to negotiations because it completely eliminated its own police force and anticipated labor costs savings from its contracting decision. (*Id*. at pp. 9-10.)

In contrast, in *Trustees of the California State University* (2006) PERB Decision No. 1839-H (*CSU San Marcos*), the University used an auxiliary organization to finance and develop a new housing project at its San Marcos campus. The auxiliary organization contracted with a private entity who provided the services of resident agents and maintenance workers. A union claimed that its bargaining unit contained similar positions at other campuses. (*Id*. at proposed dec., p. 5.) PERB rejected the union's claim, holding that the existence of similar positions at other campuses did not prove that the work at issue was being done at the San Marcos campus. PERB accordingly found that there was not enough evidence to prove that the contractors were performing unit work. (*Id*. at proposed dec., p. 11.)[6]

In this case, Respondents contend that the use of contractors in Suites 100 and 300 is non-negotiable because Local 521 failed to prove that their unit exclusively performed the work being done by contractors. This argument appears to rely on PERB case law discussing actionable transfers of work from a represented unit to non-unit employees. However, the Board analyzes the negotiability of such transfers differently from cases where an employer has elected to subcontract unit work to non-employees. (*Ventura County CCD*, *supra*, PERB Decision No. 1547, pp. 16-17, citing *Whisman Elementary School District* (1991) PERB Decision No. 868.) The decision to transfer work to non-unit employees is negotiable where unit employees cease performing the work altogether or where non-unit employees began

[6] The union also failed to demonstrate in that case that contractors were used in the new facility in order to achieve labor cost savings.

performing work previously done exclusively by the bargaining unit. (*Ventura County CCD*, pp. 16-17, citing *Eureka City School District* (1985) PERB Decision No. 481 (*Eureka CSD*), p. 15.) The Board has expressly declined to apply this standard to subcontracting cases. (*Beverly Hills Unified School District* (1990) PERB Decision No. 789, pp. 16-17 [holding that the *Eureka CSD* analysis did not apply, and that a subcontracting decision was negotiable even though some of the work in question was historically assigned outside the unit].) Therefore, because this case does not involve the transfer of unit work to Respondents' other employees not represented by Local 521, I find Respondents' argument unpersuasive.[7]

Respondents also assert that decision to use contractors in Suites 100 and 300 is non-negotiable because it was based on a change in the nature and direction of the services provided by KMC. I agree to a limited extent. The record shows that Respondents elected to open these two clinics as part of an effort to expand KMC's use of ambulatory facilities over traditional hospitals. The leadership at the Authority believed that this could attract a different type of customer/patient and would increase KMC's profits. The Authority felt that the customers it sought to reach had higher expectations about the cost, convenience, efficiency, and amenities in their medical services than KMC's traditional patients. In addition, the Authority also sought to attract customers with health insurance because entering into agreements with managed healthcare providers could open additional revenue streams for KMC and ultimately increase profits. Managed health plans prefer that certain procedures for a certain profile of patients be performed in an outpatient setting, as opposed to a hospital. As

[7] I recognize that the PERB complaint alleges that the work at issue was previously performed exclusively by eight enumerated positions represented Local 521's bargaining units, but I do not find this assertion critical to the claim that Respondents unlawfully contracted out unit member work at those locations. Rather, the complaint, at its core, alleges that work historically done by the enumerated bargaining unit positions was instead assigned to outside contractors in the new clinics.

a result, the clinics in Suites 100 and 300 do not offer inpatient care. Neither clinic regularly uses nurses or any positions designed to work in a hospital environment. Therefore, to the extent that Local 521 contends that Respondents unlawfully used contract labor to perform the duties of represented nurse positions or positions performing work in inpatient or in-hospital settings, I conclude that Respondents' decision not to use represented positions for this work was based on its effort to change the nature of the services provided at KMC. Local 521 has not proven that Respondents began assigning the work of those positions to contractors at Suites 100 and 300.

That conclusion notwithstanding, the record shows that the CBCC medical assistant positions used in Suites 100 and 300 overlap significantly with the work of other positions represented by Local 521's unit. The duties performed by the CBCC medical assistants include answering telephones, escorting patients to exam rooms, taking patient vital signs, collecting other patient data, assisting medical providers during outpatient procedures, cleaning instruments, ordering and stocking supplies, organizing medical records, and other clerical duties. Although Villanueva testified that the CBCC staff has a broader skill set than positions represented by Local 521, all of the job duties the contractors perform are also performed by the Medical Assistant job classification, in Local 521's Trades/Crafts/Labor unit. Like the staff in Suites 100 and 300, the represented Medical Assistant position is designed to function in an outpatient setting and take direction from a physician. There was no evidence that the CBCC contractors perform these job duties any differently from represented employees. There was also no proof that the represented Medical Assistant classification would be incapable of performing the work at these two clinics. Thus, I find that Respondents elected to use contractors in Suites 100 and 300 to perform work that would have otherwise been assigned to

the Medical Assistant classification represented by Local 521, in a substantially similar matter. And, as in in *Oakland USD, supra*, PERB Decision No. 1770, Thygerson testified that the Authority expects to save money on labor costs by using CBCC contractors instead of employees. (See *Id.*, pp. 9-10, proposed dec., pp. 38-40.) As in that case, I find that such savings was at least part of the calculus when the Authority determined that the clinics would generate profits for KMC. For these reasons, I hold that the decision to use contract medical assistants at the Suite 100 and 300 clinics was negotiable.

At hearing, Respondents argued that this case is analogous to *CSU San Marcos, supra*, PERB Decision No. 1839-H, but I find the two matters distinguishable. In *CSU San Marcos*, the union attempted to establish its subcontracting claim on the basis that unit members were performing similar work at some, but not all of the university's campuses. There was no evidence that unit members performed the work at the campus where the subcontractors were deployed. Here, by contrast, it is undisputed that represented employees staff all of KMC's other outpatient facilities, including its offsite clinics that existed before the Stockdale Highway clinics opened. The Medical Assistant position in the Trades/Crafts/Labor unit is even designed to function specifically in an outpatient capacity, such as in a clinic. The work performed at the clinics in Suites 100 and 300 is similar to the work done by the represented Medical Assistant position. Unlike in *CSU San Marcos*, the record here also shows that the decision to use contractors at these clinics was motivated in part by labor costs.

Respondents also argue that the contracting decisions at these two clinics were non-negotiable because no unit members had their wages, hours, or benefits changed as a result. However, the Board has found subcontracting of unit work to be negotiable because it believed that the loss of actual or potential work from the unit affects wages, hours, and other terms of

employment. Furthermore, diminution of unit work weakens the collective strength of employees in the unit, which negatively impacts their ability to effectively deal with the employer. (*City of Sacramento* (2013) PERB Decision No. 2351-M, pp. 21-22, citing *Arcohe Union School District* (1983) PERB Decision No. 360, pp. 5-6.) Accordingly, Respondents' argument is unpersuasive.

Respondents contend that, even if the decision to use contract medical assistants at Suites 100 and 300 was negotiable, their bargaining obligation should be excused because they needed to staff those clinics quickly and the County's recruitment and hiring system was cumbersome and ineffective at attracting viable talent. I find this argument unpersuasive for multiple reasons. First, Villanueva, who is responsible for KMC's outpatient clinics, testified that she had no discussions about ever using represented employees to staff the clinics. In addition, the County began leasing space at the Stockdale Highway facility on March 24, 2015. Less than six months later, the County entered into a staffing agreement with CBCC. The clinics in Suites 100 and 300 did not open until early 2016. There was no explanation in the record for why there was an insufficient amount of time to even attempt to recruit represented employees for the clinics. Finally, Respondents' argument does not address why the Authority continued using contract labor at these clinics even after it assumed full control of all KMC employees and, presumably, departed from what was considered to be the County's cumbersome hiring process. Instead, the record shows that, the CBCC agreement was amended on July 20, 2016, to allow the Authority to continue using contract labor at those clinics. For all these reasons, Respondents were not excused from the obligation to provide notice and the opportunity for bargaining over the decision to use contractors at Suites 100 and 300.

The County's unilateral decision to use contractors for medical assistant services at Suites 100 and 300 of the Stockdale Highway facility violated the duty to negotiate in good faith under MMBA section 3505. The Authority perpetuated that violation by continuing to use the same contractors after it assumed control of KMC's employees, the County's bargaining obligations under the MOU with Local 521, and the CBCC staffing agreement. These actions constitute unfair labor practices under MMBA section 3505.6, subdivision (c) and PERB Regulation 32603, subdivision (c). The same conduct also interferes with Local 521's right to represent their bargaining units under MMBA section 3503, and represented employees' right to be represented by Local 521, under MMBA section 3506. Such interference is unlawful under MMBA section 3506.5, subdivisions (a) and (b) and PERB Regulation 32603, subdivisions (a) and (b). (See *County of Sacramento* (2009) PERB Decision No. 2045-M, p. 4.)

b. Using Contractors at the Stockdale Highway Facility, Suite 200

The PERB complaint also alleges that Respondents have decided to contract out unit member work at a surgery center in Suite 200 of the Stockdale Highway facility. However, the record shows that the surgery center at that location has not opened and that no final decisions have been made about how it will be staffed if and when it does open. There was no evidence that Respondents have either started using contractors to perform unit work in Suite 200 or that they have decided to do so. Therefore, there is insufficient evidence to show that Respondents are contracting out bargaining unit work at this location. This claim is accordingly dismissed for lack of proof.

2. Contracting Out Allegation at the REACH and GROW Clinics

Local 521 amended the PERB complaint to allege that Respondents unlawfully used contractors to perform unit member work at the REACH and GROW clinics located at 820 34th Street in Bakersfield. Villanueva acknowledged that the clinics at this location use CBCC contract labor in some capacity. But, there was little evidence presented about what duties CBCC contractors provide at this location. Thygerson testified broadly that services provided at these clinics could include pharmacist and social worker services. A general inference might be made that certain positions represented by Local 521, such as the Pharmacist and Medical Social Worker positions in the Professional unit or the Pharmacist Technician position in the Technical Services unit, also perform similar types of medical services. However, unlike with the Stockdale Highway clinics in operation, there was no evidence regarding the extent to which the work done by CBCC contractors at the REACH and GROW clinics is similar or different from that of any represented positions.[8] It is also unclear from the record whether the work done at the REACH clinic is the same or different from the work done there when the clinic was housed at KMC's main facility. Local 521 Internal Organizer Rodriguez testified that he spoke to people working that and they said they were from CBCC. But, it is unclear what duties those people were performing at the time. Furthermore, none of the individuals Rodriguez spoke to testified at hearing and his account of what they said is uncorroborated hearsay. This is insufficient to constitute reliable evidence about what duties those people perform. (See PERB Regulation 32176; *Palo Verde Unified School District* (2013) PERB Decision No. 2337, p. 19-20; *County of Riverside* (2009) PERB Decision No. 2090-M, p. 12, fn. 9.) Nor was any evidence presented about the reasoning for using

[8] Thygerson briefly speculated about the type of work contractors were performing at the 34th Street facility, but he admitted he had no basis for that testimony.

contractors at this facility. Thus, I am unable to conclude either that contractors at this location are performing unit work under similar circumstances or that the motivation behind using contractors was to achieve labor cost savings. Therefore, Local 521 failed to demonstrate Respondents contracted out any unit work at these clinics. This claim is also dismissed.

REMEDY

MMBA Section 3509, subdivision (b), authorizes PERB to order "the appropriate remedy necessary to effectuate the purposes of this chapter." (*Omnitrans* (2010) PERB Decision No. 2143-M, p. 8.) This includes an order to cease and desist from engaging in any unlawful conduct and post notice of the violation. (*Id*. at p. 9.) The Board may also issue "make whole" relief to remedy the unfair practices where appropriate. (*Omnitrans* (2009) PERB Decision No. 2030-M, pp. 29-30, citing MMBA § 3509, subd., (b); 3541.3, subds. (c) and (i); *County of San Joaquin (Health Care Services)* (2003) PERB Decision No. 1524-M; *San Diego Adult Educators v. PERB* (1990) 223 Cal.App.3d 1124, p. 1137.) Additionally, appropriate remedies in cases unlawful subcontracting cases may include an order to rescind the unlawful contract. (See *Desert Sands Unified School District* (2010) PERB Decision No. 2092, pp. 30-35.) These remedies are appropriate here.

Local 521 also argues that unit members should be made whole for lost pay and benefits that resulted from the unilateral change. Although such remedies are conceivable in unlawful subcontracting cases (see *Lucia Mar USD, supra*, PERB Decision No. 1440, p. 4), the evidence shows that no such losses occurred in this case. Thygerson provided undisputed testimony that no unit member represented by Local 521 was laid off, or had their wages, hours, benefits, or overtime opportunities changed because of how the clinics at Suites 100 and 300 of the Stockdale highway facility were staffed. Local 521 presented no evidence that any

unit member suffered financial losses because of Respondents' subcontracting decision at the clinics in Suites 100 and 300.[9] I accordingly decline to award money damages as part of the remedy in this case. (See *Folsom-Cordova Unified School District* (2004) PERB Decision No. 1712, proposed dec., p. 31.) If Local 521 contends that financial losses occurred as a result of Respondents' unilateral change at these clinics sometime after the record closed in this case, Local 521 may seek an modification of this order, as appropriate, in a compliance proceeding. (See *Id*.)

Finally, it is appropriate to direct Respondents to post a notice of this order, signed by authorized representatives. These remedies effectuate the purposes of the MMBA because employees are informed that Respondents have acted unlawfully, are required to cease and desist from such conduct, and will comply with the order. (*City of Selma* (2014) PERB Decision No. 2380-M, proposed dec., pp. 14-15.) The notice posting shall include both a physical posting of paper notices at all places where members of the Administration unit, Clerical unit, Professional unit, Supervisory unit, Technical Services unit, and Trades/Crafts/Labor unit 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 its employees in the [relevant] bargaining unit[s]." (*Centinela Valley Union High School District* (2014) PERB Decision No. 2378, pp. 11-12, citing *City of Sacramento, supra*, PERB Decision No. 2351-M.)

Local 521 requests that copies of the notice be mailed to unit members and that the Authority be ordered to give an oral reading of notice before employees. Local 521 is correct

[9] Local 521 Internal Organizer Rodriguez acknowledged that no unit members were laid off because of how the clinics at the Stockdale Highway facility were staffed. He did not testify about the existence or non-existence of any other specific financial losses.

that PERB has broad remedial authority to effectuate the purposes of the statutes it administers. However, Local 521 has not presented any facts showing that PERB's traditional notice posting remedies are inadequate here. (See *Alliance College-Ready Public Schools Susan & Eric Smidt Technology High School, and Alliance Renee & Meyer Luskin Academy High School* (2017) PERB Decision No. 2545, pp. 17-18, citations omitted.) Local 521 has also not presented any other basis for concluding that PERB should depart from that standard notice posting order. Accordingly, the request for these additional remedies is rejected.

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 and the Kern County Hospital Authority (collectively Respondents) violated rights and obligations under Meyers-Milias Brown Act (MMBA), Government Code sections 3503, 3505, and 3506, which is prohibited under MMBA section 3506.5, subdivisions (a), (b), and (c), and PERB Regulation 32603, subdivisions (a), (b), and (c). Respondents violated the MMBA by unilaterally deciding to subcontract work performed by positions represented by Service Employees International Union, Local 521, at clinics located at 9300 Stockdale Highway, in Bakersfield, Suites 100 and 300. All other allegations are dismissed.

Pursuant to MMBA Section 3509, subdivision (b), it hereby is ORDERED that Respondents, their governing bodies and their representatives shall:

A. CEASE AND DESIST FROM:

1. Unilaterally subcontracting bargaining unit work located at 9300 Stockdale Highway, Bakersfield, Suites 100 and 300.

2. Interfering with Local 521's right to represent its members.

3. Interfering with employees' right to be represented by Local 521.

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

1. Rescind the unilaterally adopted contract with the Comprehensive Blood and Cancer Center for medical assistant services at the clinics located at 9300 Stockdale Highway, Bakersfield, Suites 100 and 300.

2. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the Administration unit, Clerical unit, Professional unit, Supervisory unit, Technical Services unit, and Trades/Crafts/Labor unit are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by authorized agents of Respondents, 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.

3. 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. 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 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 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).)