STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS HIGH DESERT CHAPTER 531, Charging Party, v. MODOC COUNTY OFFICE OF EDUCATION, Respondent.	Case No. SA-CE-2887-E PERB Decision No. 2684 November 27, 2019

Appearances: California School Employees Association by Christina C. Bleuler, Deputy Chief Counsel, for California School Employees Association and its High Desert Chapter 531; Lozano Smith by Thomas E. Gauthier and Erin M. Hamor, Attorneys, for Modoc County Office of Education.

Before Shiners, Krantz, and Paulson, Members.

DECISION

SHINERS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by the California School Employees Association and its High Desert Chapter 531 (CSEA) to a proposed decision of an administrative law judge (ALJ). The complaint alleged that the Modoc County Office of Education (MCOE) violated the Educational Employment Relations Act (EERA)[1] by reducing the work hours of two bargaining unit members without providing CSEA prior notice and an opportunity to bargain over the decision and/or the effects of the decision. Following a formal hearing, the ALJ dismissed the complaint and underlying unfair practice charge, concluding that MCOE was not

[1] EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

required to bargain over its decision to reduce daily work hours because the parties' collective bargaining agreement (CBA) contained a waiver of CSEA's right to bargain over that subject.

Based on our review of the proposed decision, the entire record, and relevant legal authority in light of the parties' submissions, we conclude that CSEA did not waive its right to negotiate the reduction in work hours. We accordingly reverse the proposed decision and find that MCOE violated EERA as alleged in the complaint.

FACTUAL BACKGROUND

CSEA is an employee organization and an exclusive representative of an appropriate unit of employees within the meaning of section 3540.1, subdivisions (d) and (e), respectively. MCOE is a public school employer within the meaning of section 3540.1, subdivision (k). CSEA represents a bargaining unit of approximately 60 to 65 classified employees of MCOE. The parties' CBA was in effect from July 1, 2014 through June 30, 2017, and later extended through June 30, 2020.

Marita Anderson (Anderson) has been a Special Education Instructional Assistant (IA) at MCOE since 1991, and has served as CSEA President since 1995. During the relevant time period, CSEA Labor Relations Representatives have included John Cross (Cross) until January 2017; Jan Dole (Dole) for six months after Cross; and Jeffery Kirby (Kirby), who started in June 2017.

Timothy Hoff (Hoff) served as MCOE's Human Resources Director since 2008. As part of his duties, Hoff has served as MCOE's lead negotiator in collective bargaining with

CSEA. From 2001 to 2010, Peter Currer (Currer) was MCOE's Director of Special Education Local Plan Area (SELPA),[2] and an MCOE negotiating team member.

The Parties' CBA

Article 14 of the CBA is entitled "Layoff/Reduction and Re-employment." It provides, in relevant part, as follows:

> 14.1 Reason for Layoff
>
> Layoff/Reduction of hours shall occur only in accordance with the California Education Code or for reason permitted by law.
>
> 14.2 Notice of Layoff
>
> In the event of a layoff, including reduction of assigned hours of employment, the following steps will be taken:
>
> 14.2.1 The Superintendent/Designee shall notify CSEA prior to the serving of layoff notices. Notification shall include reason for layoffs and identify, by name and classification, the employee(s) holding those position(s) designated for layoff.
>
> 14.2.2 The Superintendent/Designee shall send written layoff notice to the affected employee(s) not less than sixty (60) calendar days prior to the effective date of layoff. Any layoff notice shall include reason for layoff, bumping rights, if any, and re-employment rights.
>
> [¶ . . . ¶]
>
> 14.4 Bumping Rights
>
> [¶ . . . ¶]
>
> 14.4.2 An employee whose position has been eliminated or reduced in hours may have bumping rights over a less senior employee in that classification.
>
> 14.6 Demotion or Reduction in Time, in Lieu of Layoff

[2] SELPA is a voluntary collaboration between three local school districts and MCOE to provide free, appropriate education for disabled children. MCOE is the legal entity that receives state and federal funds for the SELPA. (See Ed. Code, § 56205 et seq.)

[¶ . . . ¶]

14.6.1 An employee who accepts voluntary demotion or reduction in hours in lieu of layoff, shall be restored to his/her former class or number of hours as vacancies become available. The employee shall retain this eligibility for a period of sixty-three (63) months. Demotion shall be defined as accepting a position in a lower-paid classification.

14.6.2 Employees who accept a reduction in hours shall continue to receive health insurance benefits with the same terms and conditions for a period of one (1) calendar month.

14.7 Effects of Layoff . . .

[¶ . . . ¶]

14.7.3 The Superintendent will not increase the use of volunteers to cover positions reduced or eliminated through the layoff process.

14.7.4 This completes negotiations on the effects of layoff, and no further negotiations on the effects of layoff *are* required.

(Italics in original.)

The record does not contain evidence as to the inception of Article 14.[3] Articles 14.1-14.6 have appeared materially unchanged in the parties' successive CBAs since 2000.

In 2003, the parties negotiated the language on effects of layoff that now appears at Article 14.7.4 in the CBA. Currer testified that the new provision allowed management flexibility in its staffing. MCOE covers 2,500 square miles, primarily serving special education students. Modoc County is rural, with difficult winter weather and sparse work opportunities; it is common for people to live there for only a short time. Because the MCOE

[3] Article 14 appeared as Article 15 in earlier contracts. At some time after 2003, the parties renumbered the Articles and moved the substance of Article 15 to Article 14.

student population fluctuates greatly, frequent adjustments to staffing levels are necessary to meet student needs.

Prior Layoffs and Reductions in Work Hours

In May 2011, MCOE decided to reduce the work hours of several bargaining unit employees. On May 25, 2011, Hoff sent formal notices to four IAs and one preschool teacher to inform them that their work hours would be reduced between 0.5 and 1.5 hour(s) per day during the 2011-2012 school year due to funding constraints. CSEA representatives Cross and Anderson were copied with each notice. CSEA did not request to negotiate over this reduction in hours or its effects.

In November 2011, MCOE decided to lay off four IAs at Stronghold Court School (Stronghold). After informing CSEA of its decision, MCOE and CSEA discussed the potential for the affected employees to receive a voluntary reduction in hours in lieu of layoff under Article 14.6 of the CBA. MCOE and CSEA ultimately agreed to reduce the assigned daily hours of the four IAs. Anderson and Hoff signed a memorandum of understanding reflecting these terms, citing Articles 14.6, 14.6.1, and 14.6.2 of the CBA.

In May 2012, MCOE decided to lay off, or in some instances reduce the daily work hours of, several classified bargaining unit employees in the 2012-2013 school year. On May 2, 2012, Hoff sent an e-mail to Cross and Anderson notifying them of MCOE's decision. CSEA did not request to bargain over the reduction in hours or its effects.[4]

[4] Consistent with PERB's decisional law that a decision to lay off employees is normally not within the scope of representation, Anderson conceded that the parties' CBAs have never allowed CSEA to negotiate over a decision to lay off employees. Moreover, while layoff effects are within the scope of representation, Anderson acknowledged that Article 14.7.4 waived CSEA's right to negotiate layoff effects.

Pursuant to Article 14.2, on March 30, 2016, Hoff sent an e-mail to Cross and Anderson to provide notice of MCOE's intent as of the end of the 2015-2016 school year to eliminate extra hours previously added to six IAs' work schedules. On April 6, 2016, Anderson e-mailed Hoff, asking if the six employees would be hired in the 2016-2017 school year and whether they would be eligible to bump less senior employees. CSEA did not request to bargain the reduction in extra hours or its effects.

On March 23, 2017, Hoff e-mailed Anderson and Dole to provide notice of layoffs and reductions in hours affecting several bargaining unit employees at the end of the 2016-2017 school year. CSEA did not request to negotiate over the reduction in hours or its effects.

The Disputed Reductions in Hours

On May 30, 2017, Hoff e-mailed and mailed Anderson a "Pre-notification" letter informing CSEA of MCOE's intent to reduce Anderson's and Dion Ditmore's (Ditmore) daily working hours by one hour, from 6.25 to 5.25 hours, at the start of the 2017-2018 school year. The letter was copied to Kirby. The letter stated:

> Per the CBA between . . . Superintendent . . . and CSEA . . . , the designee of MCOE is hereby notifying you, as specified in Article 14, 14.2.1 that a reduction in working hours for IAs at Stronghold will occur commencing with the start of the 2017/2018 [school year].

MCOE's rationale for the reduction in hours was "decreased enrollment and only partial funding." The letter said the two affected employees would receive a letter from MCOE providing a 60-day notice, reason(s) for the reduction in hours, and displacement entitlements.

That same day, Kirby e-mailed Hoff, responding, "CSEA and MCOE will need to negotiate the decision and effects of any proposed reduction in time" for the two IAs.

On June 7, 2017, Hoff replied by e-mail:

> In accordance with Ed Code 45117 (i.e., 60-Day Notice of layoff) and the collective bargaining agreement between MCOE & CSEA (Article 14.2) Section 14.2.2, I'm proceeding today with sending out the sixty day notification of reduction of work hours to the effected [sic] employees as indicated in the document that was [sent] to you on May 30th, and that corresponds to the collective bargaining agreement language of 14.2.1.
>
> Article 14 of the collective bargaining agreement between MCOE and CSEA specifies that the decision to implement lay-offs [sic]/ reduction in hours is assigned to the employer who is required to follow agreed upon steps (i.e., 14.3, 14.4). Moreover, the Effects of Layoff (i.e., 14.7) have been identified, agreed to and concluded (14.7.4). Are there other effects that you wish to discuss?

That day, Hoff sent Anderson formal written notice that her assigned work hours as a Stronghold IA would be reduced by one hour beginning August 17, 2017. Anderson acknowledged receipt of the letter, and returned a signed copy to MCOE indicating she chose not to exercise her bumping rights.

Later on June 7, 2017, Kirby e-mailed Hoff demanding that MCOE cease and desist from making unilateral decisions to reduce the hours of classified positions. Kirby asserted that the decision to reduce hours was not a layoff, and accordingly CSEA demanded to negotiate both the decision and its effects. CSEA claimed that MCOE could not legally issue a reduction in hours notice prior to decision bargaining.

On June 8, 2017, Hoff sent Ditmore formal written notice that his work hours as a Stronghold IA would be reduced by one hour starting August 17, 2017. Ditmore also declined to exercise his bumping rights.

Also on June 8, 2017, Kirby sent a letter to Hoff demanding that MCOE cease and desist from unilaterally reducing the working hours of Anderson and Ditmore until

negotiations with CSEA concluded. CSEA proposed to meet on June 20 or 21, 2017, to negotiate over the proposed reductions.

On June 14, 2017, MCOE's attorney, Erin Hamor (Hamor), responded to Kirby's cease and desist letter. Hamor stated that MCOE was under no obligation to negotiate either its decision or the effects of its decision to reduce work hours because the CBA and the parties' past practice established that CSEA waived its right to negotiate on these subjects. Although Hamor claimed MCOE was not required to do so, MCOE offered to engage in further discussions over any negotiable effects CSEA wished to discuss on June 20 or 21, 2017.

Kirby replied to Hamor's letter on June 15, 2017, confirming that MCOE had rejected CSEA's demand to bargain the decision to reduce work hours, while acknowledging MCOE's offer to negotiate the effects of its reduction of hours for Anderson and Ditmore.[5]

MCOE reduced Anderson's and Ditmore's work hours by one hour daily at the start of the 2017-2018 school year. During the immediately preceding summer, Ditmore picked up two additional hours of work per day as an IA at Modoc High School, and accordingly he began the school year with 7.25 daily work hours. On September 13, 2017, Hoff notified CSEA that Anderson and Ditmore would be laid off from their positions at Stronghold due to an enrollment decrease, and on September 18, 2017, Hoff notified Anderson and Ditmore of the layoff. Toward the end of October 2017, Anderson exercised her bumping rights and moved to a 6.25-hour position at a different school, working hours she still held at the time of the hearing. On October 9, 2017, Ditmore accepted a 5-hour per day IA position at Modoc

[5] Kirby's initial reply to Hamor's response letter stated MCOE rejected CSEA's demand to bargain the decision and effects of any proposed reduction in hours. Hamor e-mailed Kirby that the letter was inaccurate since MCOE had offered to discuss effects. Kirby then sent a revised reply.

High School, the same location as the 2-hour IA position he had previously picked up, resulting in a total of 7 daily work hours through the time of the hearing.

DISCUSSION

The Board reviews exceptions to a proposed decision de novo. (*County of Santa Clara* (2019) PERB Decision No. 2629-M, p. 6.) Under this standard, we review the entire record and are free to reach different factual and legal conclusions than those in the proposed decision. (*City of Milpitas* (2015) PERB Decision No. 2443-M, p. 12.)

1. Unilateral Change

EERA obligates a public school employer to meet and negotiate in good faith with representatives of employee organizations concerning matters within the scope of representation. (EERA, § 3543.3.) The scope of representation includes "matters relating to wages, hours of employment, and other terms and conditions of employment." (EERA, § 3453.2, subd. (a)(1).)

It is unlawful for a public school employer to "[r]efuse or fail to meet and negotiate in good faith with an exclusive representative." (EERA, § 3543.5, subd. (c).) A unilateral change to a matter within the scope of representation constitutes a per se violation of the duty to meet and negotiate. (*Stockton Unified School District* (1980) PERB Decision No. 143, p. 22.) To establish a prima facie case of an unlawful unilateral change, the charging party must show: (1) the employer took action to change policy;[6] (2) the change in policy concerned a matter within the scope of representation; (3) the action was taken without giving the

[6] The Board has recognized three general categories of unilateral changes: (1) changes to the parties' written agreement; (2) changes in established past practice; and (3) newly created policy or application or enforcement of existing policy in a new way. (*Pasadena Area Community College District* (2015) PERB Decision No. 2444, p. 12, fn. 6.)

exclusive representative notice or opportunity to bargain over the change; and (4) the action has a generalized effect or continuing impact on terms and conditions of employment. (*Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262, p. 9.)

CSEA established a prima facie case of an unlawful unilateral change. First, MCOE's decision to reduce Anderson's and Ditmore's work hours constituted a change in policy. Prior to August 17, 2017, each employee was scheduled to work 6.25 hours per day. Effective that date, each employee's working hours were reduced to 5.25 hours per day. The Board has consistently found similar reductions in work hours to constitute a change in policy. (E.g., *San Ysidro School District* (1997) PERB Decision No. 1198, adopting proposed decision at p. 11; *Pleasant Valley School District* (1985) PERB Decision No. 488, adopting proposed decision at p. 19.) Second, "PERB has long held that the general subject of hours of employment is within the scope of representation." (*Huntington Beach Union High School District* (2003) PERB Decision No. 1525, p. 4; *North Sacramento School District* (1981) PERB Decision No. 193, p. 8.)[7]

Third, operating on the belief that CSEA had waived its right to negotiate over a reduction in work hours, MCOE did not provide CSEA with notice and an opportunity to negotiate prior to deciding to reduce Anderson's and Ditmore's hours. CSEA first learned of MCOE's decision when Hoff sent Anderson the pre-notification letter on May 30, 2017. When the exclusive representative first learns of a change after the decision has been made, "by definition, there has been inadequate notice." (*City of Sacramento* (2013) PERB Decision No. 2351-M, p. 33.)

[7] Conversely, a school employer's decision to lay off employees is not a matter within the scope of representation, and only the effects of the layoff decision are negotiable. (*Newman-Crows Landing Unified School District* (1982) PERB Decision No. 223, p. 13.)

Finally, although the reduction in work hours was specific to Anderson and Ditmore, MCOE's action had a generalized effect and continuing impact on terms and conditions of employment because MCOE asserted that the CBA allows it to unilaterally reduce hours without negotiating with CSEA. (*County of Monterey* (2018) PERB Decision No. 2579-M, p. 13; *Grant Joint Union High School District* (1982) PERB Decision No. 196, p. 9.) Because it proved all four elements of the unilateral change test, CSEA established a prima facie case that MCOE violated its duty to negotiate in good faith.[8] The question then becomes whether MCOE proved its affirmative defense that CSEA waived its right to bargain over the changes in working hours.

2. MCOE's Waiver Defense

An employer may take unilateral action on a matter within the scope of representation where the exclusive representative has waived its right to negotiate over changes to that subject. (*Grossmont Union High School District* (1983) PERB Decision No. 313, p. 4.) A waiver of statutory rights must be "clear and unmistakable," and the evidence must demonstrate an "intentional relinquishment" of a given right. (*Ibid.*; *Moreno Valley Unified School District* (1995) PERB Decision No. 1106, adopting proposed decision at p. 9 (*Moreno Valley*); *California State Employees' Assn. v. Public Employment Relations Bd.* (1996) 51 Cal.App.4th 923, 937 (*California State Employees' Assn.*).) "Public policy disfavors finding a waiver based on inference and places the burden of proof on the party asserting the waiver." (*County of Santa Clara* (2013) PERB Decision No. 2321-M, p. 19.) "[N]ot only must waiver

[8] Given our finding that the decision to reduce work hours was bargainable, we need not address CSEA's effects bargaining claim.

be clearly established, but any doubts must be resolved against the party asserting waiver." (*Placentia Unified School District* (1986) PERB Decision No. 595, p. 8 (*Placentia*).)

CSEA's exceptions turn on the ALJ's finding of a contractual waiver of the right to negotiate over reductions in work hours. CSEA argues that the proposed decision improperly conflated layoffs and reductions in hours, and applied an incorrect standard for waiver. MCOE asserts that both the CBA and the parties' past practice support a finding of waiver, and urges us to uphold the proposed decision. We address each of MCOE's asserted theories of waiver in turn.

A. Waiver by Contract

MCOE contends that it was not required to bargain over its decision to reduce Anderson's and Ditmore's work hours or the effects of that decision because language in the CBA constituted a waiver of CSEA's right to bargain over those matters. "Waiver is most readily apparent where the specific subject is covered by the express terms of an existing collective bargaining agreement." (*Placentia*, *supra*, PERB Decision No. 595, p. 4.) To constitute a waiver, the contract language must "specifically reserve for management the right to take certain action or implement unilateral changes regarding the issues in dispute." (*Berkeley Unified School District* (2004) PERB Decision No. 1729, adopting warning letter at p. 3, citing *California State Employees' Assn.*, *supra*, 51 Cal.App.4th at pp. 938-940.)

The Board's decisional law regarding contractual waivers is consistent in its requirement that a waiver must be specifically expressed or necessarily implied. (*Moreno Valley*, *supra*, PERB Decision No. 1106, p. 9.) For instance, in *Berkeley Unified School District*, *supra*, PERB Decision No. 1729, we found a contract provision stating "[t]he District shall not automatically assume responsibility for the increase in employee health and welfare premiums after expiration of this Agreement" clearly waived the union's right to bargain over

increases in employee premium contributions outside the term of the contract. (*Id.* at p. 4.) Similarly, we found a union waived its right to negotiate over an employer's decision to reduce a unit member's hours where the contract stated: "The County retains its right to relieve employees from duty because of lack of work or for other legitimate reasons." (*County of Ventura (Office of Agricultural Commissioner)* (2011) PERB Decision No. 2227-M, adopting warning letter at p. 3; see also *Colton Joint Unified School District* (2003) PERB Decision No. 1534, adopting warning letter at pp. 4-5 [finding that contract language stating "scheduling of duty hours and workdays shall be at the discretion of the District," coupled with language that "[v]acations will be scheduled at the convenience of the District," allowed the district to require bus drivers to be on vacation during winter break]; *Turlock Joint Union High School District* (1996) PERB Decision No. 1151, adopting warning letter at p. 3 [contract language stating "The District shall have final authority to determine class size and pupil assignment" allowed district to unilaterally determine class size].)

On the other hand, broadly-worded management rights clauses are often inadequate to constitute a waiver of the right to negotiate over a specific subject. (*Moreno Valley, supra*, PERB Decision No. 1106, pp. 9-11.) *Moreno Valley* involved a particularly comprehensive management rights clause that reserved to the employer all matters not within the statutory scope of representation. Part of the clause provided that the employer's reserved rights included its "sole right to manage the District and direct the work of its employees . . . to determine the staffing patterns and the number and kinds of personnel required . . . to hire, assign . . . and transfer employees." (*Id.*, adopting proposed decision at p. 6.) The employer argued this clause allowed it to unilaterally reduce the hours of its employees. The Board disagreed, concluding that none of this language clearly gave the employer the right to change shift

assignments without first negotiating with the union. (*Id*., adopting proposed decision at pp. 9-13.)

In *Placentia*, *supra*, PERB Decision No. 595, we similarly found no waiver of the right to bargain over a reduction in work hours. In that case, the Board examined whether the association had waived its right to bargain over effects of layoffs and reductions in hours based upon the inclusion in the contract of (1) a layoff article, and (2) a management rights clause. The layoff article specified notice procedures in the event of a layoff, yet it was silent on the effects of layoff. (*Id.*, adopting proposed decision at pp. 5-6.) The management rights clause stated that the employer had all the usual rights to discharge its obligations, and reserved to the employer all the rights it had prior to the contract. (*Id.* at p. 6.) The Board determined that there was no express contractual language, bargaining history, or zipper clause to support a finding of waiver regarding either layoff effects or reductions in hours. (*Id.* at p. 5.) In doing so, the Board specifically rejected "the proposition that negotiation over a broad subject such as layoffs itself constitutes waiver as to particular aspects of the subject that neither were discussed nor covered by the eventually agreed upon contract language." (*Ibid.*, emphasis in original.)

Turning to reduction in work hours, the *Placentia* Board observed that the association had originally proposed in bargaining to incorporate into the contract the Education Code's definition of "layoff," which includes a voluntary reduction in hours. (*Placentia*, *supra*, PERB Decision No. 595, p. 9.) The district rejected the proposal, asserting the proposed language was unnecessary. (*Id.* at pp. 9-10.) The association withdrew its proposal and the ultimate contract was silent as to reductions in hours. (*Id.* at p. 10.) The Board found this evidence insufficient to conclude that the association waived its right to negotiate over reductions in

work hours. (*Ibid.*) Further, the Board observed that even if the contract language was interpreted to incorporate the Education Code's layoff definition, that would not constitute a waiver because the Code's definition only includes voluntary reductions in hours, not involuntary reductions. (*Id.* at pp. 10-11.)

Although the Board does not have authority to resolve purely contractual disputes, it may interpret contracts when necessary to resolve an alleged unfair practice. (*San Francisco County Superior Court & Region 2 Court Interpreter Employment Relations Committee* (2018) PERB Decision No. 2609-I, p. 7.) In interpreting a contract, the Board relies on traditional rules of contract interpretation and uses the California Civil Code as a guide. (*Barstow Unified School District* (1996) PERB Decision No. 1138, p. 13.) Thus, we begin our analysis by examining the parties' intent, as demonstrated by the ordinary and plain meaning of the contract language. (*County of Tulare* (2015) PERB Decision No. 2414-M, p. 19; *County of Sonoma* (2012) PERB Decision No. 2242-M, pp. 15-16.)

Applying the above authority, we find that CSEA did not contractually waive its right to bargain over the decision to reduce Anderson's and Ditmore's work hours. MCOE's contractual waiver argument is based on Article 14 of the CBA. On its face, Article 14 does not expressly confer upon MCOE the right to unilaterally decide to reduce employee hours. Article 14 does not define the terms "layoff" and "reduction in hours" for purposes of its subsections. Article 14.1 (Reason for Layoff) provides the *terms* under which a layoff or reduction in hours may occur, viz., only in accordance with the Education Code or for other lawful reason. Article 14.2 (Notice of Layoff), which forms the basis of MCOE's waiver claim, merely details the notice *procedure* MCOE is to follow once a decision to lay off or reduce hours of employment is final. As to how the decision is to be made, Article 14.2 is

silent. And while Article 14.2 subsumes a "reduction of hours" into a "layoff," it sheds no light on the meaning of those terms outside the context of providing notice.

Article 14.7 (Effects of Layoff) suffers from the same infirmity. While Article 14.7.4 contains an express waiver of CSEA's right to negotiate the effects of a layoff, it refers only to "negotiations on the *effects of layoff*" (emphasis added). Article 14.7.4 does not define the term "layoff" and is silent as to a reduction in hours of employment. We will not infer a waiver based upon contractual silence. (*Palo Verde Unified School District* (1983) PERB Decision No. 321, p. 12.) Further, it is clear from the language of Article 14.7.4 that the parties knew how to formulate a contractual waiver, but they did not do so for a decision to reduce hours or the effects of such a decision. Read in its entirety, Article 14 lacks "clear and unmistakable" language that grants MCOE the right to unilaterally decide to reduce hours of employment, or relinquishes CSEA's right to negotiate over such a decision.[9]

Although there is no clear waiver language in Article 14, MCOE contends the parties intended to allow MCOE to unilaterally reduce work hours to give it flexibility in staffing to meet student needs. When contract terms are ambiguous, we may look to bargaining history to discern the parties' intent. (*State of California (Department of Forestry and Fire Protection)* (2018) PERB Decision No. 2546-S, pp. 9-10; *City of Milpitas*, *supra*, PERB Decision No. 2443-M, p. 21.) Unfortunately, the record here provides scant guidance as to the parties' intent at the time they negotiated Article 14. The record does not contain the proposals that led

[9] We disagree with the ALJ's observation that failing to read Article 14 as a waiver of CSEA's right to negotiate over a reduction in work hours would render meaningless the pre-notification requirement in Article 14.2.1. Although the pre-notification provision appears more suited to a layoff situation, the required notice could serve to inform CSEA of proposed reductions in hours, as the provision does not limit the notice to being given after a firm decision has been made by MCOE.

to the adoption of Article 14 or the parties' discussions of those proposals at the bargaining table, which typically are the most probative forms of extrinsic evidence in interpreting a collective bargaining agreement. (See, e.g., *Vallejo Police Officers Assn. v. City of Vallejo* (2017) 15 Cal.App.5th 601, 618-619; *Merced County Sheriff's Employee's Assn. v. County of Merced* (1987) 188 Cal.App.3d 662, 673-674.) Instead of such pertinent evidence, both parties' witnesses testified regarding their subjective understanding of the meaning of Article 14. But absent any evidence that the parties mutually discussed their respective understandings during bargaining over Article 14, this testimony is of minimal value. (*Regents of the University of California (Davis)* (2010) PERB Decision No. 2101-H, pp. 21-22; see *Vallejo Police Officers Assn.*, *supra*, 15 Cal.App.5th at p. 617 [declarants' testimony about their subjective understanding of the intent of a collective bargaining agreement provision was irrelevant]; see also *Vaillette v. Fireman's Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 690 ["true, subjective, but unexpressed intent of a party is immaterial and irrelevant" to contract interpretation].) Moreover, to find a waiver the bargaining history must show the matter was "fully discussed" or "consciously explored" and the representative "'consciously' yielded its interest in the matter." (*Placentia*, *supra*, PERB Decision No. 595, p. 4, citing *Los Angeles Community College District* (1982) PERB Decision No. 252, p. 13.) Without evidence of the parties' bargaining discussions or proposals, the record contains no relevant evidence from which we can conclude that the parties intended Article 14 to act as a waiver of CSEA's right to negotiate over reductions in daily work hours.

B. Waiver By Past Practice

PERB may ascertain established policy from past practice where the contract is silent or ambiguous as to a policy. (*County of Riverside* (2013) PERB Decision No. 2307-M, p. 20;

Marysville Joint Unified School District (1983) PERB Decision No. 314, p. 9.) "The parties' practical construction of a contract, as shown by their actions, is important evidence of their intent, and helps us to resolve ambiguities in the contract." (*Antelope Valley Community College District* (2018) PERB Decision No. 2618, p. 19.)[10]

MCOE asserts that the parties' past practice lends support to its interpretation of Article 14. Specifically, MCOE relies on instances in May 2011, May 2012, March 2016, and March 2017 in which MCOE unilaterally decided to reduce work hours and sent notices to CSEA in accordance with Article 14, without any objection from CSEA. According to MCOE, this evidence of past practice serves to confirm MCOE's interpretation of Article 14 as constituting a waiver of CSEA's right to negotiate over reductions in hours.

But past practice is not relevant here because our decisional law is clear that a union's "acquiescence in previous unilateral changes does not operate as a waiver of the right to bargain for all times."[11] (*San Jacinto Unified School District* (1994) PERB Decision No. 1078, adopting proposed decision at p. 23; accord *Los Angeles Unified School District* (2017) PERB Decision No. 2518, adopting proposed decision at p. 39, fn. 16; *Regents of the University of*

[10] Although the parties' past practice may be used to interpret ambiguous contract language, the most common use of past practice is to determine whether the parties have created a binding term or condition of employment that is not found in a written agreement. (See, e.g., *County of Sonoma* (2012) PERB Decision No. 2242-M, pp. 17-19 [finding charging party failed to prove the existence of "an unwritten but established past practice" that was binding on the county]; see also *Pasadena Area Community College District*, *supra*, PERB Decision No. 2444, p. 12 [for purposes of determining an unlawful unilateral change, an existing policy may be "contained in a written agreement, in written employer rules or regulations, or in an unwritten established past practice"].)

[11] This rule is a corollary to the rule established in *Marysville Joint Unified School District*, *supra*, PERB Decision No. 314, that "[t]he mere fact that an employer has not chosen to enforce its contractual rights in the past does not mean that, ipso facto, it is forever precluded from doing so." (*Id.* at p. 10.)

California (2004) PERB Decision No. 1689-H, adopting proposed decision at p. 50; see also *NLRB v. Miller Brewing Co.* (9th Cir. 1969) 408 F.2d 12, 15, *enforcing* 166 NLRB 831 (1968) ["it is not true that a right once waived under the Act is lost forever. [Citation.] Each time the bargainable incident occurs [the] Union has the election of requesting negotiations or not."][12]; *Exxon Research & Engineering Co.* (1995) 317 NLRB 675, 685, *enforcement denied for other reasons*, 89 F.3d 228 (5th Cir. 1996) [the "mere fact that a union has previously acquiesced in an employer's unilateral implementation of plant rules does not, however, mean that the employer is free thereafter to implement different plant rules or significant and material changes in existing plant rules without giving the union notice and an opportunity to bargain"].) CSEA's failure to demand to bargain in past instances where MCOE gave notice of a decision to reduce work hours thus did not waive CSEA's right to negotiate over the reduction of Anderson's and Ditmore's work hours.

REMEDY

The Board's standard remedy for an employer's unlawful unilateral change is restoration of the status quo ante, appropriate make-whole relief including back pay and benefits with interest, and a cease-and-desist order. (*City of San Diego* (2015) PERB Decision No. 2464-M, p. 40, affirmed *sub nom. Boling v. PERB* (2018) 5 Cal.5th 898, 920.) Anderson and Ditmore were each working 6.25-hour positions at the time MCOE reduced their daily work hours. The record before us demonstrates that Ditmore's hours of employment did not decrease below 6.25 after MCOE's decision to reduce his hours because he was able to obtain

[12] When interpreting the statutes within its jurisdiction, PERB may take guidance from federal private sector authority to the extent it comports with the purposes of the statutes we enforce. (See, e.g., *City of Sacramento, supra*, PERB Decision No. 2351-M, p. 21; *San Mateo Community College District* (1979) PERB Decision No. 94, pp. 12-17.)

additional hours at another school site. For this reason, we do not order back pay for Ditmore. On the other hand, Anderson's hours of employment decreased to 5.25 from the start of the 2017-2018 school year until October 2017, at which time she obtained a different position and returned to a 6.25-hour daily work schedule. We thus order a limited back pay remedy for Anderson, to make her whole from the start of the 2017-2018 school year until the date she assumed her new 6.25-hour position. It is also appropriate to order MCOE to cease and desist from unilaterally reducing the work hours of bargaining unit employees, and to post a notice incorporating the terms of the Board's order. (*Pleasant Valley School District*, *supra*, PERB Decision No. 488, adopting proposed decision at p. 35.)

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is found that the Modoc County Office of Education (MCOE) violated the Educational Employment Relations Act, Government Code section 3543.5, subdivisions (a), (b), and (c), when it unilaterally reduced work hours without providing California School Employees Association and its High Desert Chapter 531 (CSEA) notice and an opportunity to bargain over the decision.

Pursuant to section 3541.5, subdivision (c), of the Government Code, it is hereby ORDERED that MCOE, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with CSEA over the reduction of hours of bargaining unit employees.

2. Denying CSEA its right to represent employees.

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

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

1. Make Marita Anderson whole for all work hours lost as a result of MCOE's unlawful unilateral change, with interest at the rate of 7 percent per annum.

2. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all work locations where notices to MCOE employees in the bargaining unit represented by CSEA are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of MCOE, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. The Notice shall also be posted by electronic message, intranet, internet site, and other electronic means customarily used by MCOE to communicate with employees in the bargaining unit represented by CSEA. 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, or the General Counsel's designee. MCOE shall provide reports, in writing, as directed by the General Counsel or his designee. All reports regarding compliance with this Order shall be concurrently served on CSEA.

Members Krantz 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. SA-CE-2887-E, in which all parties had the right to participate, it has been found that the Modoc County Office of Education (MCOE) violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq., when it unilaterally reduced work hours without providing California School Employees Association and its High Desert Chapter 531 (CSEA) notice and an opportunity to bargain over the decision.

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

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with CSEA over the reduction of hours of bargaining unit employees.

2. Denying CSEA its right to represent employees.

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

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

1. Make Marita Anderson whole for all work hours lost as a result of MCOE's unlawful unilateral change, with interest at the rate of 7 percent per annum.

Dated: _____ MODOC COUNTY OFFICE OF EDUCATION

By: _____
Authorized Agent

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