STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CULVER CITY EMPLOYEES ASSOCIATION, Charging Party, v. CITY OF CULVER CITY, Respondent.	Case No. LA-CE-1247-M PERB Decision No. 2731-M June 10, 2020

Appearances: Brian Niehaus, Senior Labor Representative, for Culver City Employees Association; Liebert, Cassidy Whitmore by Steven M. Berliner, Attorney, for City of Culver City.

Before Banks, Krantz, and Paulson, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by respondent City of Culver City (City) and cross-exceptions by charging party Culver City Employees Association (Association) to the attached proposed decision of an administrative law judge (ALJ).[1] The ALJ found that the City unilaterally changed its policy concerning employees' work schedules, meal periods, and rest breaks without affording the Association notice and an opportunity to meet and confer, and interfered with employee and organizational rights, in violation of

[1] After the City timely filed its exceptions to the proposed decision, the Association filed its "Statement of Exceptions to Administrative Law Judge's Proposed Decision." Though the label has no bearing on our analysis, we treat the Association's documents as cross-exceptions. (PERB Reg. 32310.) PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

the Meyers-Milias-Brown Act (MMBA)[2] and PERB Regulations. However, the ALJ dismissed the Association's bypassing and related interference allegations for lack of proof.

The Board has reviewed the entire record in this matter and considered the parties' arguments in light of applicable law. We find that the record supports the ALJ's factual findings and his conclusions of law are generally well-reasoned and consistent with applicable law. Thus, we adopt the proposed decision as the decision of the Board itself, except for the ALJ's bypassing analysis at pages 42-49, subject to the below discussion. As discussed below, we also modify the ALJ's proposed remedy.[3]

BACKGROUND

The full procedural history and factual findings can be found in the attached proposed decision.[4] We recite the findings here in brief to provide context for our discussion.

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

[3] The City has requested oral argument in this case pursuant to PERB Regulation 32315. The Board denies requests for oral argument when an adequate record has been prepared, the parties have had ample opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear to make oral argument unnecessary. (*Regents of the University of California* (2018) PERB Decision No. 2578-H, p. 2, fn. 3.) This case satisfies all of the above criteria. We therefore deny the City's request for oral argument.

[4] At the formal hearing on February 26, 2019, the City and the Association entered into the record a number of stipulated facts and exhibits, most of which form the basis of the ALJ's factual findings.

The City's Police Department, which includes a jail facility, operates 24 hours a day, 7 days a week. At all times relevant herein, Scott Bixby (Bixby) was the Chief of Police. Manuel Cid (Cid), Administrative Lieutenant, was Bixby's chief executive officer.

The Association is the exclusive representative of a unit of non-management miscellaneous City employees, including the following non-sworn employees in the City's Police Department: Jailer, Senior Jailer, Police Records & Property Supervisor, Police Records Technician, Custodian, Animal Services Officer, Parking Enforcement Supervisor, Parking Enforcement Officer, Property Technician, Forensic Specialist, Secretary, and Administrative Secretary. Some of these classifications provide 24-hour service for the City's jail facility, while other classifications, such as parking enforcement officers, provide extended service for the City beyond usual business hours, but on a less than 24-hour basis.

A. 2014-2017 MOU

The City and the Association were parties to a memorandum of understanding (MOU) that was in effect from July 1, 2014 to June 30, 2017 (2014-2017 MOU). As relevant here, Article Three, entitled Work Periods, Schedules, and Overtime, included the following provisions:

> "I. ESTABLISHING AND POSTING WORK SCHEDULES
>
> "A. The City shall establish work schedules for unit employees. The work schedule shall specify the days of the week and the daily starting and quitting times.
>
> [¶ . . . ¶]

"III. WORK SCHEDULES

"A. CITY WORK SCHEDULES
City work schedules shall be as herein defined, except as otherwise provided for in this agreement:

[¶ . . . ¶]

"3. *4/10 Work Schedule:* The 4/10 work schedule shall consist of a forty (40) work hour week schedule consisting of four (4) ten (10) paid work hour days in a seven (7) consecutive calendar day period exclusive of any meal periods assigned by management.

"4. *3/12 Work Schedule:* The 3/12 work schedule for Jailers and Safety Service Communications Operators is scheduled each bi-weekly pay period as follows:

"*Jailers:*
- One (1) Jailer works 6:00 am - 6:00 pm Monday through Wednesday, plus eight (8) hours every other Sunday; and
- The other Jailer works 5:00 am - 5:00 pm Thursday through Saturday, plus eight (8) hours every other Sunday.

"*Safety Service Communications Operators:*
The 3/12 work schedule for Safety Service Communication Operators is 7:00 am - 7:00 pm or 7:00 pm - 7:00 am, three (3) days each week, plus an eight (8) hour shift every other Sunday.

"IV. CHANGING OF WORK SCHEDULES

"A. NOTICE TO EMPLOYEES

This shall not preclude, following proper notification to unit employees, other work schedules or the changing of the work schedule including the utilization of comparable work schedules (e.g., ten [10] hours per day for four [4] days per week) when the needs of the City so dictate, such as

conformance to operational needs of the department or compliance with law.

"B. TWENTY-ONE (21) CALENDAR DAY NOTICE

The City agrees that work schedules existing as of the effective date of this MOU will not be changed without a minimum twenty-one (21) calendar day notice, except (a) in cases of emergency, (b) upon request of the affected employee, or (c) by mutual agreement of the parties.

"C. REQUEST FOR CHANGE IN WORK SCHEDULE
Unit employees may request, with Department Head approval, a different work schedule.

[¶ . . . ¶]

"VIII. BREAK-REST PERIODS WITH PAY FOR UNIT EMPLOYEES EXCLUDING BUS OPERATORS

"A. BREAK-REST PERIOD DEFINED

Break-rest periods must be earned as any other benefit and are computed at the rate of fifteen (15) minutes per four (4) hours worked or major fraction thereof.

"B. BREAK- REST PERIOD SCHEDULING

"1. Break-rest periods are scheduled and/or rescheduled by management so as not to impair service and as job requirements dictate.

[¶ . . . ¶]

"C. BREAK-REST PERIOD FIFTEEN (15) MINUTE DURATION

The duration of a break-rest period shall consist of fifteen (15) minutes of cessation of work and will include time

involved in going to and from a rest area unless otherwise authorized by this agreement.

"D. LIMITATIONS

"1. Break-rest periods are non-cumulative and shall not be added to any meal time, vacation, or any other form of authorized absence from work, unless authorized by Management.

"2. Break-rest periods may not be used at the beginning or the end of a work shift unless authorized by management.

[¶ . . . ¶]

"IX. MEAL TIME - UNPAID/NON-WORK TIME

"A. MEAL TIME SCHEDULING

"1. The schedule for meal times shall be determined by management in consideration of the continuity of services provided to the public and the convenience of the unit employee.

"2. All unit employees, except for Bus Operators, shall be entitled to one (1) non-working, unpaid meal time per scheduled work day of eight (8) or more consecutive hours worked, exclusive of overtime worked.

"B. MEAL TIME ONE (1) HOUR DURATION

"1. Except for some field and twenty-four (24) hour operations, as specified by management, the normal unpaid meal time shall be one (1) hour in duration.

[¶ . . . ¶]

"C. LIMITATIONS

"1. Meal time is non-cumulative and shall not be added to any break-rest time, vacation, or any other form of authorized absence from work, unless authorized by Management.

"2. Meal time may not be used at the beginning or the end of a work shift unless authorized by management.

"3. All meal time taken is considered non-work time and is unpaid."

Article Seven, section I, entitled "Term of Memorandum of Understanding," stated: "This MOU shall be effective July 1, 2014 and together with all the terms, conditions and effects thereof, shall expire as of midnight on June 30, 2017." In addition, Article Seven, section V.A, provided as follows:

"A. FULL AGREEMENT – WAIVER OF MEET AND CONFER

"1. This MOU contains all of the covenants, stipulations, and provisions, agreed upon by the parties.

"2. Therefore, during the term of this agreement, except as provided herein, all other compensation and benefits not modified in this agreement shall remain in full force and effect.

"3. For the purpose of the MOU neither party shall be compelled to meet and confer with the other concerning any issues, whether specifically discussed prior to the execution of this MOU or which may have been omitted in the meet and confer process leading up to the execution of the MOU, except by mutual agreement of the parties.

"4. Each party acknowledges that it had the full and unlimited opportunity to meet and confer over any issue it either did raise or could have raised and hereby waives the

> right to meet and confer further during the term of this MOU except as specifically provided herein."

The City and the Association did not execute or enter into any side letter or other agreement modifying the MOU.

B. Police Department Schedules for Non-Sworn Employees, 2007-2017

From approximately 2007 to November 13, 2017, the Police Department followed a consistent and unbroken practice of allowing non-sworn employees to combine their two 15-minute paid rest periods into a single half-hour paid meal period, in lieu of an uninterrupted and unpaid meal period of one hour. Thus, employees on a 4/10 schedule worked a 10-hour day inclusive of a 30-minute paid meal period, and employees on a 3/12 schedule worked a 12-hour day inclusive of a 30-minute paid meal period.

C. Successor MOU Negotiations

On or about April 27, 2017, the City and the Association began negotiations for a successor MOU. The 2014-2017 MOU expired on June 30, 2017, without an extension. On or about October 3, 2017, the parties reached a tentative agreement on all outstanding issues, although specific language and implementation dates had yet to be finalized. Thereafter, the parties reached agreement on all outstanding details.

D. Schedule Changes

On October 5, 2017, at Bixby's direction, Cid sent an e-mail to all Association-represented employees with the subject line "CCEA Employee Work Schedules/Meal Breaks." The e-mail stated, in part:

> "It has recently come to the attention of the City's management that current [Police] Department CCEA employee's [sic] work schedules and meal breaks are not consistent with CCEA-MOU guidelines.

> Therefore, effective November 13th, 2017, all CCEA employee's [sic] work schedules and meal breaks will be in accordance with CCEA-MOU guidelines.
>
> "Please consult with your respective section's supervisor regarding any adjustment to your work schedule, as to ensure accounting for your one (1) hour unpaid meal break. As a reminder, and as outlined in CCEA-MOU, Article III Section IX-C, meal time is non-cumulative and shall not be added to any other break time. In addition, meal breaks may not be used at the beginning or the end of a work shift, unless authorized by management.
>
> "For further [sic], please refer to the attached CCEA-MOU, or your respective supervisor. Thank you in advance for your cooperation."

Following Cid's message, employees learned of their new work schedules through their direct supervisors. On November 13, 2017, the Police Department implemented new schedules for all bargaining unit employees that included a one-hour unpaid meal period, thereby extending each employee's workday by one hour. Thus, following the change, employees on a 4/10 schedule were required to work an 11-hour workday inclusive of a one-hour unpaid meal period, rather than their former 10-hour workday inclusive of a 30-minute paid meal period. Similarly, after the change, employees on a 3/12 schedule were required to work a 13-hour workday inclusive of a one-hour unpaid meal period, as contrasted with their former 12-hour workday inclusive of a 30-minute paid meal period.

Approximately two to three days after the Police Department enacted the new schedules, Bixby held a staff meeting for all affected employees who wished to attend.

E. Adoption of Successor MOU

On November 14, 2017, the Association ratified the successor MOU, which covered a period from July 1, 2017 through June 30, 2020. The City Council adopted

the successor MOU on November 27, 2017. The parties did not enter into or execute any subsequent side letter or other agreement modifying the relevant contract provisions cited herein. The successor MOU contained provisions regarding employee schedules, meal periods, and rest breaks that were substantially identical to those in the expired MOU.

DISCUSSION

Under the Board's de novo standard of review, the Board is free to draw its own, and perhaps contrary, inferences from the evidence presented, and form its own conclusions. (*Los Angeles Unified School District* (2016) PERB Decision No. 2479, p. 13.) However, to the extent that a proposed decision adequately addresses issues raised by certain exceptions, the Board need not further analyze those exceptions. (*County of Lassen* (2018) PERB Decision No. 2612-M, p. 5.) With this in mind, we turn to the City's exceptions and the Association's cross-exceptions.

A. The Association's Prima Facie Case of a Unilateral Change

The MMBA requires public employers to meet and confer in good faith with recognized employee organizations on matters that fall within the "scope of representation." (MMBA, §§ 3504, 3505.) An employer commits a per se violation of its duty to meet and confer when it fails to afford the employees' representative reasonable advance notice and an opportunity to bargain before reaching a firm decision to establish or change a policy concerning a negotiable subject. (*County of Kern* (2018) PERB Decision No. 2615-M, pp. 4-5; *City of Sacramento* (2013) PERB Decision No. 2351-M, p. 28.)

To establish an unlawful unilateral action, the charging party must prove facts showing that: (1) the employer took action to change policy; (2) the change in policy concerns a matter within the scope of representation; (3) the action was taken without giving the exclusive representative notice or opportunity to bargain over the change; and (4) the action had a generalized effect or continuing impact on terms and conditions of employment. (*County of Monterey* (2018) PERB Decision No. 2579-M, pp. 9-10; *Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262, p. 9.) PERB has recognized three general categories of unlawful unilateral actions: (1) changes to the parties' written agreements; (2) changes in established past practices; or (3) newly created policies, or application or enforcement of an existing policy in a new way. (*County of Monterey*, *supra*, PERB Decision No. 2579-M, p. 10; *Pasadena Area Community College District* (2015) PERB Decision No. 2444, p. 12, fn. 6.)

The ALJ properly concluded that the Association stated a prima facie case of a unilateral change. As the parties stipulated and the ALJ found, the City had an established, consistent practice spanning at least a decade of allowing non-sworn Police Department employees work schedules that combined two paid 15-minute rest periods into a single half-hour paid meal period, in place of an uninterrupted and unpaid one-hour meal period. This practice was understood and accepted by Association-represented employees. These work schedules were "unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties." (*County of Orange* (2018) PERB Decision No. 2611-M, pp. 10-11, fn. 7; *County of Riverside* (2013) PERB Decision

No. 2307-M, p. 20.) Accordingly, the City's decision to discontinue the practice of allowing employees to combine paid rest periods in lieu of a one-hour unpaid meal period was a change in existing policy.[5]

Workday schedules, including meal periods and start and end times of workdays, are a matter within the scope of representation because they directly affect "wages, hours, and other terms and conditions of employment." (MMBA, § 3504; *County of Monterey*, *supra*, PERB Decision No. 2579-M, p. 13.)

The City did not provide notice to the Association before reaching a firm decision to change policy. Direct notice to employees of the impending schedule change via Cid's October 5, 2017 e-mail did not satisfy the City's duty to provide notice to the Association. Rather, the City had an obligation to provide the Association with reasonable advance notice and a meaningful opportunity to bargain prior to reaching a firm decision to change policy. (MMBA, § 3505; *City of Sacramento*, *supra*, PERB Decision No. 2351-M, p. 28.)

Finally, the City's decision had a generalized effect or continuing impact on terms and conditions of employment because it impacted multiple employees and because the City contended it had the right to make the schedule changes pursuant to the parties'

[5] In fact, the City concedes that it changed non-sworn employees' schedules, asserting that it did so to conform to the terms of the 2014-2017 MOU—in other words, that the MOU authorized the City to make the contested change. To the extent the City contends that its decision to make the schedule changes at issue did not represent a change in policy, but simply a reversion to the MOU, that argument is appropriately framed as an affirmative defense, rather than a negation of the change element of the Association's prima facie case. See discussion *post*, pp. 16-17.

MOU. (*City of Davis* (2016) PERB Decision No. 2494-M, p. 32; *County of Orange* (2018) PERB Decision No. 2611-M, p. 11.)

Thus, we concur with the ALJ's finding that the Association stated a prima facie case of a unilateral change.

B. The City's Waiver Defense

An employer may lawfully 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. (*Modoc County Office of Education* (2019) PERB Decision No. 2684, p. 11, citing *Grossmont Union High School District* (1983) PERB Decision No. 313, p. 4 (*Grossmont*).) As waiver is an affirmative defense, the party asserting it bears the burden of proof, and any waiver of the right to bargain must be "clear and unmistakable." (*Ibid*.; *Moreno Valley Unified School District* (1995) PERB Decision No. 1106, adopting proposed decision at p. 9.) An employer asserting a contractual waiver defense may rely on the waiver only during the term of the contract, unless the parties have explicitly agreed that it continues past contract expiration. (*San Bernardino Community College District* (2018) PERB Decision No. 2599, pp. 12-13; *Regents of the University of California* (2004) PERB Decision No. 1689-H, adopting proposed decision at p. 25, citing *Blue Circle Cement Company* (1995) 319 NLRB 954; *Antelope Valley Union High School District* (1998) PERB Decision No. 1287, p. 4.)

The ALJ correctly rejected the City's waiver defense on the ground that the MOU was expired at the time the City implemented the schedule changes. The City argues that the ALJ's conclusion was in error and that *Marysville Joint Unified School*

District (1983) PERB Decision No. 314 (*Marysville*) directly supports its authority to make the contested schedule changes. We disagree.

1. *Marysville*

In *Marysville*, the parties' collective bargaining agreement provided that "every certificated employee shall be entitled to one duty-free lunch break of no less than 30 minutes each day." (*Marysville*, *supra*, PERB Decision No. 314, p. 2.) For several years prior to and during the life of the agreement, teachers were afforded duty-free lunch periods of 50 to 55 minutes. After the agreement had expired, and while the parties were in negotiations for a successor agreement, the employer laid off all noon-duty supervisors and directed school principals to assign teachers to noontime supervision duties on a rotating basis. As a result of the teachers' assignments to noon-duty, teachers' lunch periods decreased to 30 minutes. The union filed an unfair practice charge alleging that the new assignments constituted an unlawful unilateral change in hours of employment. Subsequently, the parties entered into a successor agreement containing an identical lunch period provision. Finding that the expired collective bargaining agreement established only a minimum duty-free lunch period and that the district's consistent past practice had been to allow teachers to take 55 minutes for lunch, the ALJ concluded that the decrease in the duty-free lunch period was an unlawful unilateral change.

The Board reversed. Acknowledging that the parties' status quo "may be embodied in the terms of a collective agreement," the Board found that the lunch period provision was "clear and unambiguous on its face" in allowing the district to

grant teachers a lunch period of only 30 minutes in length.[6] (*Marysville*, *supra*, PERB Decision No. 314, p. 9.) Thus, the Board found that the union had waived its right to negotiate over the employer's reduction of the lunch period to 30 minutes and "[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.)

Although *Marysville* has sometimes been misconstrued as establishing an expansive defense that exists apart from a contractual waiver defense, its holding is notably unremarkable and does not support this construction. *Marysville* stands for the principle that an employer may assert a contractual waiver defense based on clear and unambiguous contract language,[7] even where the employer has not followed such contract language in the past.[8] Indeed, the doctrine of waiver by contract was extant law prior to *Marysville* (*Amador Valley Joint Union High School District* (1978) PERB Decision No. 74, pp. 8-9; *Los Angeles Community College District* (1982) PERB Decision No. 252, pp. 10-11) and the Board has reaffirmed it time and again since. (*Placentia Unified School District* (1986) PERB Decision No. 595, pp. 7-8; *Cajon*

[6] In spite of the *Marysville* Board's finding that the contract language was sufficiently clear to constitute a waiver, we express no opinion whether the contract language was in fact clear and unambiguous.

[7] The Board has also articulated the standard as one of whether the contract language was "clear and unmistakable." (*Grossmont*, *supra*, PERB Decision No. 313, p. 3.) We regard the two standards as interchangeable.

[8] While the contract in *Marysville* was expired at the time the employer imposed the shorter lunch periods, thereby implying that a contractual waiver may survive during the status quo, as we discuss *post* at pp. 18-19, the Board has long since overruled that aspect of the decision sub silentio.

Valley Union School District (1989) PERB Decision No. 766, p. 4; *City of Milpitas*, (2015) PERB Decision No. 2443-M, pp. 21-22.)[9]

2. Post-*Marysville* Interpretations

Subsequent cases further confirm *Marysville*'s meaning. In the same year as *Marysville* and *Grossmont*, for instance, the Board cited *Marysville* as an example of a union waiving its right to bargain. (*Oakland Unified School District* (1983) PERB Decision No. 367, p. 29.) The next year, the Board once again cited *Marysville* in the context of waiver. (*Los Angeles Unified School District* (1984) PERB Decision No. 407, pp. 2-5.) Then, in *Fresno County Board of Education and Superintendent of Schools/Fresno County Department of Education* (1984) PERB Decision No. 409, the Board discussed the central reasoning in *Marysville*. The Board stated that, "In *Marysville*, the reduction in length of a lunch period was found to be pursuant to a collective bargaining agreement, even when that reduction did not occur for several years after the agreement was negotiated. No violation of the EERA was found because the Association had waived its right to negotiate about the change." (*Id.* at pp. 9-10.)

[9] Notably, the Board issued *Marysville* the day after it issued *Grossmont*, *supra*, PERB Decision No. 313, which also dealt with waiver by contract. In *Grossmont*, the Board held that a union waived its right to bargain about specific changes to work schedules when it agreed to a contract that specified the work schedules. (*Grossmont*, *supra*, PERB Decision No. 313, pp. 2-4.) *Grossmont* helps interpret *Marysville*. Since the same Board decided *Marysville* so closely after *Grossmont*, it is highly unlikely the Board intended *Marysville* to depart from the *Grossmont* standard, especially as neither decision distinguishes the other as involving different considerations.

Despite *Marysville*'s narrow holding as a waiver by contract defense, the Board has at times applied the case in an inconsistent manner. For instance, the Board has periodically applied *Marysville* not as a contract waiver defense but rather as an element necessary for a charging party to establish as part of its prima facie case for a unilateral change, effectively requiring the charging party to prove that a contract did not permit the change at issue. (See *State of California (Department of Corrections)* (1997) PERB Decision No. 1201-S, adopting warning letter at p. 3 ["an employer does not make an unlawful [unilateral] change if its actions conform to the terms of the parties' agreement"]; *Regents of the University of California* (2010) PERB Decision No. 2109-H, p. 7 ["Even assuming there was a past practice of requiring medical verification only in cases of abuse, the University is not precluded from enforcing the terms of the contract. Accordingly, the charge does not demonstrate a prima facie case of an unlawful unilateral change in the sick leave policy."].)

However, more modern Board decisions have returned to treating *Marysville* as a waiver defense. (See, e.g., *Regents of the University of California* (2012) PERB Decision No. 2300-H, p. 28 ["Because the MOU is ambiguous as to whether it applies to this conduct, neither has the employer sustained its burden to prove its [*Marysville*] defense."]; *City of Sacramento*, *supra*, PERB Decision No. 2351-M, p. 24 [describing *Marysville* as a case "involving a contractual waiver of the right to bargain"].) As part of returning to *Marysville*'s roots, the Board has held that an employer commits a prima facie unilateral change if it begins to enforce a contract or policy in a new way, a holding that in practice requires the employer to raise *Marysville*'s contractual waiver doctrine as an affirmative defense. (*County of Monterey*, *supra*, PERB Decision

No. 2579-M, p. 10; *Pasadena Area Community College District*, *supra*, PERB Decision No. 2444, p. 12, fn. 6.)

At other times, the Board cited *Marysville* to support a waiver defense ostensibly based on an employer's non-contractual policy contained in an employment handbook or departmental manual as opposed to a bilaterally executed collective bargaining agreement. (See, e.g., *Regents of the University of California* (1989) PERB Decision No. 763-H [provisions in an accounting manual].) But *Marysville* arose in the context of a bilateral agreement and must be limited to that context. There is a separate and narrow line of waiver precedent relating to waivers not arising from a bilateral agreement. Under these cases, the party asserting waiver must show that the other party's conduct was sufficiently clear to rise to the level of conscious abandonment, typically because the employer has provided proper advance notice of a proposed change and the union has failed to request to meet and confer. (*Metropolitan Water District of Southern California* (2009) PERB Decision No. 2055-M, p. 5; *Stockton Police Officers' Assn. v. City of Stockton* (1988) 206 Cal.App.3d 62, 66.)[10]

Finally, because the collective bargaining agreement at the center of *Marysville* was expired when the employer implemented the shortened lunch periods, PERB has on occasion erroneously suggested that a waiver may survive post-contract

[10] This line of cases gives no benefit to the City here, as it did not provide advance notice to the Association. Nor do we consider whether the City's conduct was sufficiently clear to acquiesce to an unwritten modification to the MOU. Neither party has asked us to consider this possibility, and in any event the MOU was expired at the time the City changed its policy.

expiration.[11] However, the Board long ago impliedly overruled that facet of *Marysville* (see *Regents of the University of California*, *supra*, PERB Decision No. 1689-H, adopting proposed decision at p. 25), and it is now beyond dispute that a contractual waiver expires with the contract unless the parties have clearly and unmistakably agreed that it continues past contract expiration. (See *San Bernardino Community College District*, *supra*, PERB Decision No. 2599, pp. 12-13; *Los Angeles Unified School District* (2013) PERB Decision No. 2326, p. 40, fn. 28; *Antelope Valley Union High School District*, *supra*, PERB Decision No. 1287, p. 4.) With today's decision, we clarify any prior misapplication of *Marysville* and expressly reiterate that waivers do

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[11] One such case is *State of California (Employment Development Department)* (1998) PERB Decision No. 1247-S (*EDD*). There, the employer had a consistent practice of allowing employees to take 60-minute lunch periods. After the parties' MOU expired and the parties were in successor negotiations, the employer unilaterally reduced the length of employees' lunch periods to 30 or 45 minutes pursuant to an MOU provision stating that "employees will normally be allowed a meal period of not less than thirty (30) minutes or more than sixty (60) minutes." (*Id*., adopting partial dismissal letter at p. 5.) The Office of the General Counsel dismissed the union's unilateral change allegation on the ground that *Marysville* was apposite. On appeal of dismissal of its charge, the union argued that *Marysville* was inapplicable because the parties' MOU had expired. The Board rejected this argument, stating that the waiver was effective because "[u]pon expiration of a contract, the employer must maintain certain terms and conditions of employment embodied in that contract until such time as bargaining over a successor agreement has been completed." (*Id*. at p. 3.) The employer was therefore entitled to reduce the lunch periods and did not commit a unilateral change in doing so.

EDD's holding stands in stark opposition to modern Board precedent, which requires an employer in this situation to maintain the status quo (including the length of a lunch period) after contract expiration, and does not permit unilateral action based upon an expired waiver. As discussed *ante*, the Board's jurisprudence regarding waiver-by-contract has developed in the recent years. Consequently, PERB decisions that have relied on *Marysville* in the post-expiration context, such as *EDD*, are no longer good law.

not survive beyond the terms of their contracts unless intended to do so by their own terms, a principle that the Board has silently recognized for years. To the extent *Marysville* suggested otherwise, we hereby overrule it.

It also bears noting, though the issue is not before us, that an employer asserting a contractual waiver cannot do so for a retaliatory motive. In such an instance, an employer's discriminatory application of contractual language may itself give rise to a discrimination claim, and our assessment of an employer's motivation may include whether the employer, by its assertion of contractual waiver to justify its conduct, engaged in disparate treatment or departed from established procedures or standards. (*City of Sacramento* (2019) PERB Decision No. 2642-M, p. 21.) We are not presented with such facts in this case.

In sum, by clarifying that *Marysville* breaks no new ground beyond the well-established contractual waiver principle, the modern Board has laid to rest three misconceptions and reiterated that a charging party does not bear the burden to show the inapplicability of *Marysville*, *Marysville* does not treat a unilateral employer policy as akin to a bilateral agreement, and *Marysville* does not apply where a waiver has expired.

3. Application to Instant Case

In this case, because the parties' 2014-2017 MOU was expired at the time the City made the decision to change non-sworn employees' schedules, we find that the ALJ properly analyzed the City's decision as a unilateral change under *NLRB v. Katz*

(1962) 369 U.S. 736,[12] and correctly rejected the City's waiver defense. (See *Pajaro Valley Unified School District* (1978) PERB Decision No. 51, pp. 5-6.) Nothing in the MOU suggests that the schedule waiver provision was intended to outlive the contract's term. Consequently, the ALJ's dismissal of the City's waiver defense was proper.

C. Association's Bypassing Allegation

The Association excepted to the ALJ's dismissal of its bypass and related interference claims, arguing that Cid's October 5, 2017 e-mail and Bixby's follow-up meeting with Police Department staff derogated the Association's exclusive authority by directly addressing employees on a bargainable policy. The Association notes that the City's conduct was particularly egregious given that the parties were in a critical stage of contract negotiations: the parties had a tentative agreement in place, but the Association had yet to ratify it. The Association additionally asserted that Cid's e-mail was factually inaccurate in stating that employees' existing 30-minute paid meal periods were inconsistent with the 2014-2017 MOU. The ALJ dismissed the Association's allegations for a failure of proof. Because we find that the ALJ applied an incorrect legal standard to the bypass and related interference allegations, we do not adopt the proposed decision's discussion and attendant dismissal of those allegations.

[12] While we have repeatedly noted that PERB precedent protects representational rights to a greater extent than corresponding National Labor Relations Board (NLRB) precedent, we consider NLRB precedent for its persuasive value when it is consistent with California authority. (*Contra Costa Community College District* (2019) PERB Decision No. 2652, p. 27, fn. 17, citing *Capistrano Unified School District* (2015) PERB Decision No. 2440, pp. 13-15 & 29, fn. 15.)

An employer's duty to bargain in good faith requires that it provide the exclusive representative with notice and an opportunity to negotiate in good faith over matters within the scope of representation. (*Walnut Valley Unified School District* (1981) PERB Decision No. 160, p. 5.) Consistent with the principle of exclusivity, an employer may not communicate directly with employees to undermine or derogate the representative's exclusive authority to represent unit members. (*Omnitrans* (2010) PERB Decision No. 2143-M, adopting proposed decision at p. 12, citing *Muroc Unified School District* (1978) PERB Decision No. 80; *Clovis Unified School District* (2002) PERB Decision No. 1504, p. 22.) A charging party may demonstrate that an employer has unlawfully bypassed the exclusive representative by showing that the employer dealt directly with its employees to create a new policy of general application, or to obtain a waiver or modification of existing policies applicable to those employees. (*City of San Diego (Office of the City Attorney)* (2010) PERB Decision No. 2103-M, p. 7, disapproved on other grounds by *City of Sacramento* (2013) PERB Decision No. 2351-M, p. 27.)

We find that Cid's October 5, 2017 e-mail, whether framed as a new policy of general application or a waiver of existing policies, unlawfully bypassed the Association. Cid sent his e-mail directly to Association members during the pendency of successor MOU negotiations, stating that employees' "work schedules and meal periods are not consistent" with the 2014-2017 MOU and that, effective November 13, 2017, "all [Association] employee's [sic] work schedules and meal breaks will be in accordance" with the 2014-2017 MOU. In other words, the City's intent was to abolish employees' existing work schedules and implement new schedules in their place. The

problem with Cid's e-mail was twofold: first, it dealt with a bargainable topic while ignoring the Association and instead directly and exclusively addressing employees. Second, the timing of the e-mail jeopardized the unit members' perception of the Association's authority precisely at a time such authority was critical, as the tentative agreement had yet to be ratified.

Similarly, Bixby's meeting with Association-represented employees about the schedule changes prior to the conclusion of successor MOU negotiations had the effect of undermining the Association's authority as the exclusive representative by suggesting that employees could communicate directly with the City about policy changes within the scope of representation. This action hampered the Association's ability to fully meet and confer with the City during the unfinished negotiations process. We thus find that the City dealt directly with unit employees regarding their work schedules and thereby bypassed the Association.

For the same reasons that we find a bypass violation, we also find that the City unlawfully interfered with employees' rights. To prove employer interference with protected rights, a charging party need only show that the employer has engaged in conduct that tends to or does result in at least slight harm to statutory rights. (*County of Santa Clara* (2018) PERB Decision No. 2613-M, p. 8.) By communicating directly with unit employees on matters subject to bargaining before the tentative agreement was finalized, the City interfered with the rights of unit employees to be fully represented by the Association.

Accordingly, we conclude that the ALJ's dismissal of the Association's bypassing and related interference allegations was in error.

D. Remedy

The MMBA empowers PERB with broad authority to investigate and remedy violations of the Act and to take any action the Board deems necessary to effectuate the Act's purposes. (MMBA, § 3509, subd. (b); *City of Palo Alto* (2019) PERB Decision No. 2664-M, p. 2.) The Board's standard remedy for an employer's unlawful unilateral change is a cease-and-desist order, restoration of the status quo ante, appropriate make-whole relief including back pay and benefits with interest, and a bargaining order. (*Pasadena Area Community College District*, *supra*, PERB Decision No. 2444, pp. 23-24; *City of San Diego* (2015) PERB Decision No. 2464-M, p. 40, affirmed *sub nom*. *Boling v. PERB* (2018) 5 Cal.5th 898, 920; *County of Santa Clara* (2019) PERB Decision No. 2680-M, p. 14.) This standard remedy ordinarily applies to a bypassing violation as well. (*Antelope Valley Community College District* (2018) PERB Decision No. 2618, pp. 24-25; *Omnitrans*, *supra*, PERB Decision No. 2143-M, pp. 8-9.)

Having found that the City changed its policy regarding non-sworn employees' work schedules, meal periods, and rest breaks without providing the Association with notice and an opportunity to bargain over the decision, the ALJ ordered the City to restore the prior status quo by reinstating the Police Department policy in effect from 2007 to November 2017. The order also required the City to meet and confer in good faith with the Association at its request regarding any harm suffered by non-sworn employees as a result of the unlawful unilateral change, as well as "the appropriate measure or amount of backpay or other compensation, if any, to be paid by the City" to make non-sworn employees whole. (Proposed decision, p. 59.) The City

challenges the remedial order in its entirety, though it incorrectly characterizes the bargaining order as an affirmative award of backpay. The Association did not except to any aspect of the remedy. We address each part of the order in turn.

A restorative order returning "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 and thereby 'forcing employees to talk the employer back to terms previously agreed to.'" (*City of San Diego*, *supra*, PERB Decision No. 2464-M, p. 40.) While restoration of the status quo ante is a hallmark of most unilateral change remedies (*ibid*.; *County of Santa Clara* (2013) PERB Decision No. 2321-M, p. 22), it is not appropriate here given that the parties bargained and subsequently agreed to a new MOU containing substantially identical schedule and meal period provisions as the expired MOU. (See *San Mateo City School District* (1984) PERB Decision No. 375a, p. 4 [modifying an order to restore the status quo ante to terminate at the point the change became lawful due to a bargained agreement or a lawful post-impasse imposition of new terms]; *Compton Community College District* (1989) PERB Decision No. 720, pp. 24-25.) We find that, by agreeing to the language in Article Three, sections IX.A, IX.B.1, and IX.C, the Association clearly and unmistakably waived its right to bargain the change in policy concerning schedules and meal periods. Thus, once the successor MOU took effect, the City was entitled to make the disputed changes to non-sworn employees' schedules. Though this finding does not absolve the City of liability for its unlawful unilateral change, we

conclude that a return to the status quo would not effectuate the purposes of the Act and accordingly adjust that portion of the ALJ's order.

As part of a standard unilateral change remedy, make whole relief is warranted if it is more likely than not that employees suffered a harm. Make whole relief compensates employees for the difference between what they actually earned and what they would have earned, but for the employer's unlawful conduct. (*Antelope Valley Community College District*, *supra*, PERB Decision No. 2618, p. 26.) Beyond the practical value of such monetary relief, make whole relief also serves an important policy purpose in ensuring that employees are not punished for vindicating their rights, while also acting as a deterrent against future unlawful conduct. (*City of San Diego*, *supra*, PERB Decision No. 2464-M, p. 41.) As the ALJ observed, PERB may order backpay even though its measure is imprecise. (Proposed decision, p. 52, citing *Los Angeles Unified School District* (2017) PERB Decision No. 2518, p. 44; see *City of Pasadena* (2014) PERB Decision No. Ad-406-M, p. 27 [approving of "reasonable approximations and averages as an appropriate, non-arbitrary alternative method for computing backpay" where the employer's own unlawful conduct made a precise determination of backpay infeasible]; *Mark Twain Union Elementary School District* (2003) PERB Decision No. 1548, p. 9 [affirming award of compensatory time off for employer's unilateral increase in work hours, requiring parties to meet and confer over the manner in which the compensatory time would be granted, and ordering a backpay as an alternative].)

That is arguably the case here. The City paid non-sworn employees for all hours worked at the appropriate rates. Nevertheless, harm may be quantified in a

number of ways, not only increased workload or reduced pay. Here, the schedule changes resulted in employees' workdays being extended by one hour. While the City was authorized to implement the schedule changes during the life of the 2014-2017 MOU and after the successor MOU took effect, for the period from November 13, 2017, when the City implemented the schedule change, to November 27, 2017, when the City Council adopted the successor MOU, the changes were unlawful. The best measure of the value of this time, as in *Mark Twain Union Elementary School District*, *supra*, PERB Decision No. 1548, p. 9, would be an hour's pay per day. However, we do not order such a make whole remedy as the ALJ declined to order back pay and the Association did not except to the ALJ's remedial order.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is found that the City of Culver City (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq. and PERB Regulations, when it changed its policy concerning non-sworn Police Department employees' work schedules, meal periods, and rest breaks without affording the Association notice and an opportunity to bargain over the decision. By the same conduct, the City has been found to have interfered with the rights of these employees to be represented by their designated representative, the Association; to have denied the Association its right to represent unit members; and to have bypassed the Association by dealing directly with unit employees regarding the work schedule changes.

Pursuant to MMBA section 3509, subdivision (b), it is hereby ORDERED that the City, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and confer in good faith with the Association over employees' work schedules, rest breaks, and meal periods.

2. Bypassing the Association and dealing directly with unit employees regarding changes to employees' work schedules, rest breaks, and meal periods.

3. Denying the Association its right to represent employees.

4. 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. Within 10 workdays following the date this decision is no longer subject to appeal, post at all work locations where notices to City employees in the bargaining unit represented by the Association are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the City, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. The Notice shall also be posted by electronic message, intranet, internet site, and other electronic means customarily used by the City to communicate with employees in the bargaining units represented by the Association. Reasonable steps shall be taken to ensure that

the Notice is not reduced in size, altered, defaced or covered with any other material.[13]

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

Members Krantz and Paulson joined in this Decision.

[13] In light of the ongoing COVID-19 pandemic, Respondent shall notify PERB's Office of the General Counsel (OGC) in writing if, due to an extraordinary circumstance such as an emergency declaration or shelter-in-place order, a majority of employees at one or more work locations are not physically reporting to their work location as of the time the physical posting would otherwise commence. If Respondent so notifies OGC, or if Charging Party requests in writing that OGC alter or extend the posting period, require additional notice methods, or otherwise adjust the manner in which employees receive notice, OGC shall investigate and solicit input from all parties. OGC shall provide amended instructions to the extent appropriate to ensure adequate publication of the Notice, such as directing Respondent to commence posting within ten workdays after a majority of employees have resumed physically reporting on a regular basis; directing Respondent to mail the Notice to all employees who are not regularly reporting to any work location due to the extraordinary circumstance, including those who are on a short term or indefinite furlough, are on layoff subject to recall, or are working from home; or directing Respondent to mail the Notice to those employees with whom it does not customarily communicate through electronic means.

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-1247-M, *Culver City Employees Association v. City of Culver City*, in which all parties had the right to participate, it has been found that the City of Culver City (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq. and PERB Regulations when it changed its policy concerning non-sworn Police Department employees' work schedules, meal periods, and rest breaks without affording the Culver City Employees Association (Association) notice and an opportunity to bargain over the decision. By the same conduct, the City has been found to have interfered with the rights of these employees to be represented by their designated representative, the Association; to have denied the Association its right to represent unit members; and to have bypassed the Association by dealing directly with unit employees regarding the work schedule changes.

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

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and confer in good faith with the Association over employees' work schedules, rest breaks, and meal periods.
2. Bypassing the Association and dealing directly with unit employees regarding changes to employees' work schedules, rest breaks, and meal periods.
3. Denying the Association its right to represent employees.
4. Interfering with the right of bargaining unit employees to be represented by the employee organization of their own choosing.

Dated: _____ CITY OF CULVER CITY

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST 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

CULVER CITY EMPLOYEES ASSOCIATION, Charging Party, v. CITY OF CULVER CITY, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-1247-M PROPOSED DECISION (August 21, 2019)

Appearances: Brian Niehaus, Senior Labor Representative, for Culver City Employees Association; Liebert, Cassidy Whitmore, by Steven M. Berliner, Attorney, for City of Culver City.

Before Scott Miller, Administrative Law Judge.

INTRODUCTION

The complaint issued by the Public Employment Relations Board (PERB or Board) alleges that the City of Culver City (City) violated its duty to meet and confer and interfered with protected rights in violation of the Meyers-Milias-Brown Act (MMBA) and PERB Regulations[1] when, on October 5, 2017, the City's Police Department notified non-sworn employees of its decision to change department policies affecting employee work schedules, rest breaks, and meal periods effective November 13, 2017. At the time of the change in policy was announced and implemented, the City was in negotiations for a successor Memorandum of Understanding (MOU) with the Culver City Employees Association (Association), which is the exclusive representative of employees in the General Services Unit, including non-sworn Police Department employees. The City admits it informed Association-

[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.

represented employees of the Police Department's decision to change work schedules, rest breaks, and meal periods, and that it implemented this decision before negotiations concluded, but denies any liability, arguing that its actions were authorized by the terms of the parties' expired MOU.

For reasons explained below, I find and conclude that the City violated its duty to meet and confer and interfered with protected rights by unilaterally deciding to change policies affecting negotiable subjects, as alleged in the Complaint, but that its communications with employees did not unlawfully bypass the Association or interfere with protected rights.

PROCEDURAL HISTORY

On October 20, 2017, the Association filed an unfair practice charge with PERB. On November 27, 2017, the City filed a position statement with PERB. On June 15, 2018, PERB's Office of the General Counsel issued a complaint alleging that the City had violated its duty to meet and confer and had concurrently interfered with employee and organizational rights by changing employees' schedules and meal periods and by communicating directly with employees about such changes.

On July 9, 2018, the City answered the complaint by admitting some of the factual allegations, denying others, and denying any liability. The City's answer also asserted various affirmative defenses, including waiver and mootness. On August 2, 2018, the parties attended an informal settlement conference at PERB, but were unable to resolve the dispute.

On February 26, 2019, the parties met for one day of formal hearing, where they entered into the record several stipulated facts and joint exhibits and also presented witnesses and other documents in support of their respective positions. While setting the briefing

schedule, I asked the parties to discuss how or whether this case falls within PERB's line of cases on the dynamic status quo.[2]

On April 8, 2019, the parties filed closing briefs and, pursuant to the schedule agreed on at the hearing, on April 22, 2019, the City filed a reply brief. The Association filed no reply. At that point, the record was considered closed and the matter fully submitted for proposed decision.

FINDINGS OF FACT

A. Parties and Jurisdiction

The City is a public agency within the meaning of Government Code section 3501, subdivision (c), and PERB Regulation 32016, subdivision (a). The City's Police Department, which includes a jail facility, operates 24 hours a day, seven days a week. The Chief of Police is the executive decision-maker for the Police Department. At all times relevant to these proceedings, Scott Bixby was the City's Chief of Police. Administrative Lieutenant Manuel Cid served as the Chief's executive officer with considerable authority to communicate the Chief's directives to Department employees. Chief Bixby described Lt. Cid as "the communication arm from me to the rest of the Department."

The Association is an employee organization within the meaning of Government Code section 3501, subdivision (a), a recognized employee organization within the meaning of Government Code section 3501, subdivision (b), and an exclusive representative within the meaning of PERB Regulation 3201, subdivision (b). The Association represents an

[2] As discussed below, under the "dynamic status quo" principle, an employer may make changes to terms and conditions of employment without providing notice and an opportunity to request bargaining, if the changes follow a consistent pattern of past changes following a pre-determined formula and are not subject to considerable employer discretion. (*County of Kern* (2018) PERB Decision No. 2615-M, p. 6, citing *Regents of the University of California* (2004) PERB Decision No. 1689-H, adopting proposed decision at pp. 30-31.)

appropriate unit consisting of non-management miscellaneous employees of the City, including non-sworn employees of the Police Department. The Police Department's non-sworn personnel include the following job classifications: Jailer, Senior Jailer, Police Records & Property Supervisor, Police Records Technician, Custodian, Animal Services Officer, Parking Enforcement Supervisor, Parking Enforcement Officer, Property Technician, Forensic Specialist, Secretary, and Administrative Secretary.

As suggested by the diversity of these classifications, non-sworn personnel perform a variety of tasks within the Police Department, some of which required extended or 24-hour service. In addition to 24-hour maintenance of the City's jail facility and responsibility for the health and welfare, transportation, booking, fingerprinting, and photographing of inmates, employees assigned to forensics may be called upon at any time to process a crime scene. Although non-sworn personnel assigned to parking enforcement do not work on a 24-hour basis, Chief Bixby characterized these duties as "a top priority" of the City and expressed his desire to have "extended coverage" for parking enforcement whenever possible.

B. The Parties' Expired MOU

The City and the Association were parties to an MOU whose term was from July 1, 2014 to June 30, 2017. Several provisions of the expired MOU are relevant to these proceedings.

Article One, Section IX.B, which set forth the "City's Rights," included the following language:

> The City reserves the right to make the final determination, as to all matters which are necessary to manage, control and administer the City's operations including, but not limited to:
> …
> 14. Establishing, changing and/or modifying work schedules for employees; …

Article Three of the expired MOU pertaining to work schedules included the following provisions:

> I. ESTABLISHING AND POSTING WORK SCHEDULES
>
> A. The City shall establish work schedules for unit employees. The work schedule shall specify the days of the week and the daily starting and quitting times.
>
> [¶ . . . ¶]
>
> III. WORK SCHEDULES
>
> A. CITY WORK SCHEDULES
>
> City work schedules shall be as herein defined, except as otherwise provided for in this agreement:
>
> [¶ . . . ¶]
> 3. *4/10 Work Schedule:* The 4/10 work schedule shall consist of a forty (40) work hour week schedule consisting of four (4) ten (10) paid work hour days in a seven (7) consecutive calendar day period exclusive of any meal periods assigned by management.
> 4. *3/12 Work Schedule:* The 3/12 work schedule for Jailers and Safety Service Communications Operators is scheduled each bi-weekly pay period as follow:
>
> *Jailers:*
> - One (1) Jailer works 6:00 am - 6:00 pm Monday through Wednesday, plus eight (8) hours every other Sunday; and
> - The other Jailer works 5:00 am - 5:00 pm Thursday through Saturday, plus eight (8) hours every other Sunday.
>
> *Safety Service Communications Operators:*
> The 3/12 work schedule for Safety Service Communication Operators is 7:00 am- 7:00 pm or 7:00 pm- 7:00 am, three (3) days each week, plus an eight (8) hour shift every other Sunday.

IV. CHANGING OF WORK SCHEDULES

A. NOTICE TO EMPLOYEES

This shall not preclude, following proper notification to unit employees, other work schedules or the changing of the work schedule including the utilization of comparable work schedules (e.g., ten [10] hours per day for four [4] days per week) when the needs of the City so dictate, such as conformance to operational needs of the department or compliance with law.

B. TWENTY-ONE (21) CALENDAR DAY NOTICE

The City agrees that work schedules existing as of the effective date of this MOU will not be changed without a minimum twenty-one (21) calendar day notice, except (a) in cases of emergency, (b) upon request of the affected employee, or (c) by mutual agreement of the parties.

C. REQUEST FOR CHANGE IN WORK SCHEDULE

Unit employees may request, with Department Head approval, a different work schedule.

[¶ . . . ¶]

VIII. BREAK-REST PERIODS WITH PAY FOR UNIT EMPLOYEES EXCLUDING BUS OPERATORS

A. BREAK-REST PERIOD DEFINED

Break-rest periods must be earned as any other benefit and are computed at the rate of fifteen (15) minutes per four (4) hours worked or major fraction thereof.

B. BREAK- REST PERIOD SCHEDULING

1. Break-rest periods are scheduled and/or rescheduled by management so as not to impair service and as job requirements dictate.

[¶ . . . ¶]

C. BREAK-REST PERIOD FIFTEEN (15) MINUTE DURATION

The duration of a break-rest period shall consist of fifteen (15) minutes of cessation of work and will include time involved in going to and from a rest area unless otherwise authorized by this agreement.

D. LIMITATIONS

1. Break-rest periods are non-cumulative and shall not be added to any meal time, vacation, or any other form of authorized absence from work, unless authorized by Management.
2. Break-rest periods may not be used at the beginning or the end of a work shift unless authorized by management.

IX. MEAL TIME-UNPAID/NON-WORK TIME

A. MEAL TIME SCHEDULING

1. The schedule for meal times shall be determined by management in consideration of the continuity of services provided to the public and the convenience of the unit employee.
2. All unit employees, except for Bus Operators, shall be entitled to one (1) non-working, unpaid meal time per scheduled work day of eight (8) or more consecutive hours worked, exclusive of overtime worked.

B. MEAL TIME ONE (1) HOUR DURATION

1. Except for some field and twenty-four (24) hour operations, as specified by management, the normal unpaid meal time shall be one (1) hour in duration.

[¶ . . . ¶]

C. LIMITATIONS

1. Meal time is non-cumulative and shall not be added to any break-rest time, vacation, or any other form of authorized absence from work, unless authorized by Management.
2. Meal time may not be used at the beginning or the end of a work shift unless authorized by management.

3. All meal time taken is considered non-work time and is unpaid.

In addition to the above provisions regarding work schedules, meal periods, and rest breaks, Article Seven of the expired MOU contained various General Provisions, including the following language regarding the agreement's term: "This MOU shall be effective July 1, 2014 and together with all the terms and conditions and effects thereof, shall expire as of midnight on June 30, 2017." The parties stipulated that they did not execute or enter into any side letter or other agreement extending the 2014-2017 MOU or modifying any of the above-quoted provisions.

C. Police Department Schedules for Non-Sworn Personnel 2007-2017

Since approximately 2007, the Police Department's policy was to allow non-sworn employees to combine their two 15-minute paid rest periods into a single half-hour meal period, which was taken in lieu of an uninterrupted and unpaid meal period of one hour. The parties stipulated that non-sworn Police Department employees consistently followed this policy for at least ten years before the present dispute arose. Thus, employees assigned to a 4/10 schedule worked a ten-hour day inclusive of one half-hour paid meal period by combining their two 15-minute rest breaks in lieu of the unpaid, hour-long meal period specified by the MOU. Similarly, employees on a 3/12 schedule similarly worked a 12-hour day inclusive of a half-hour paid "meal" period instead of a one-hour unpaid meal period.[3]

[3] I use quotation marks here to denote that, in terms of the categories of duty-free time identified in the expired MOU, the "meal" period referred to here was, in fact, a combination of two "break-rest periods," which nonetheless served as the functional equivalent of a meal period before November 14, 2017. Inasmuch as the parties have used the term "meal period" or "half-hour meal period" for the prior status quo practice of combining rest periods, I do so as well and allow the context to clarify which of the two categories is being discussed.

D. Successor Negotiations

On or about April 27, 2017, representatives of the Association and the City began negotiations for a successor MOU. The MOU expired on June 30, 2017 without an extension. On or about October 3, 2017, the parties reached a tentative agreement on all outstanding issues, though, as of that date, specific language and implementation dates for some items had not yet been finalized. The record does not disclose precisely when, but there is no dispute that these outstanding details were reduced to writing and finalized within a matter of days or, at most, weeks.

E. Lt. Cid's October 5, 2017 Message to Employees

At the direction of Chief Bixby, on October 5, 2017, Lt. Cid sent an e-mail message with the subject line "CCEA Employee Work Schedules/Meal Breaks" to all non-sworn Police Department employees.[4] The Chief did not dictate the specific wording or review the contents of Lt. Cid's message before it was sent, but the testimony of both men confirmed that the subject and general directive of the message was fully authorized by the Chief. According to Lt. Cid, Chief Bixby directed him to "send out an email with the effective date of when these changes were going to occur and to make sure that it got out to all Police Department staff." Chief Bixby testified that he had Lt. Cid "send this out so that everybody was well aware of the change that was about to take place." The relevant portions of Lt. Cid's message are quoted here in full:

> It has come to the attention of the City's management that current [Police] Department CCEA employee's [sic] work schedules and meal breaks are not consistent with CCEA-MOU guidelines. Therefore, effective November 13th, 2017, all CCEA employee's

[4] There is no dispute that the term "CCEA" here and throughout Lt. Cid's message referred to the Association or its bargaining unit.

> [sic] work schedules and meal breaks will be in accordance with CCEA-MOU guidelines.
>
> Please consult with your respective section's supervisor regarding any adjustment to your work schedule, as to ensure accounting for your one (1) hour unpaid meal break. As a reminder, and as outlined in CCEA-MOU, Article III Section IX-C, meal time is non-cumulative and shall not be added to any other break time. In addition, meal breaks may not be used at the beginning or the end of a work shift, unless authorized by management.
>
> For further, please refer to the attached CCEA-MOU, or your respective supervisor. Thank you in advance for your cooperation.

F. Implementation of the Schedule Change

Following Lt. Cid's message, employees learned of their new work schedules through their direct supervisors. On November 13, 2017, the new schedules took effect for all Association-represented employees in the Police Department. Thereafter, affected employees worked schedules which included a one-hour unpaid meal period which, in turn, extended each employee's regular workday by one hour. Accordingly, employees assigned to a 4/10 work schedule now worked an 11-hour workday with a one-hour unpaid meal period, whereas they had previously worked a 10-hour workday with a half-hour, paid meal period. Likewise, employees assigned to a 3/12 work schedule now worked a 13-hour workday with a one-hour unpaid meal period instead of their former 12-hour workday with a half-hour paid meal period.

Approximately two or three days after implementation, the Chief also held a meeting for all affected employees who wished to attend. According to the Chief, the purpose of the meeting was, among other things, to discuss his reasons for making these changes.[5]

[5] Bixby also offered testimony on the views expressed by Association-represented employees at this meeting regarding the policy changes. Although arguably relevant to the Association's bypassing allegation, including whether the City used direct communications with employees to undermine or derogate the Association's authority as the bargaining

G. Adoption of the 2017-2020 MOU

The parties stipulated that a comprehensive tentative agreement was ratified by the Association on November 14, 2017 and adopted by the City Council on November 27, 2017. The resulting successor MOU covered the period from July 1, 2017 through June 30, 2020. The parties also stipulated that they have not since executed or entered into any side letter or other agreement modifying any provisions of the 2017-2020 MOU that are relevant to these proceedings.

ISSUES

A. Unilateral Change and Related Interference Allegations

Did the City fail or refuse to meet and confer in good faith, and concurrently interfere with employee and organizational rights, in violation of the MMBA and PERB Regulations by:

(1) changing its established past practice of allowing unit members employed in the Police Department to take their break-rest time directly before or after meal periods; and/or,

(2) changing its established practice of allowing unit members in the Police Department to receive a paid half-hour meal period and instead requiring all schedules of unit members in the Police Department to include a one-hour unpaid meal period?

B. Bypassing and Related Interference Allegations

Did the City bypass, undermine, and/or derogate the authority of the Association, and concurrently interfere with employee and organizational rights, in violation of the MMBA and PERB Regulations when, on or about October 5, 2017, it authorized or permitted its agent

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representative, because this testimony was not corroborated by any non-hearsay evidence, I make no factual findings on what views were expressed by affected employees at this meeting. (PERB Reg. 32176; *City of Santa Clara* (2016) PERB Decision No. 2476-M, p. 10.)

Lt. Cid to send an e-mail message advising unit members in the Police Department of schedule and meal period changes as described above?

CONCLUSIONS OF LAW

A. Unilateral Change Allegations

The MMBA obligates public agencies and their designated representatives to "meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of . . . recognized employee organizations," and to "consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action." (MMBA, § 3505; *Boling v. Public Employment Relations Board* (2018) 5 Cal.5th 898, 916–917, reh'g denied (Oct. 10, 2018), cert. denied *sub nom. City of San Diego, Cal. v. Public Employment Relations Bd.* (2019) 139 S.Ct. 1337; *Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 780–781 (*Voters for Responsible Retirement*).) A public employer violates its duty to meet and confer when it fails to afford the employees' representative reasonable advance notice and meaningful opportunity to bargain, before reaching a firm decision to create or change a policy affecting a negotiable subject. (*City of Sacramento* (2013) PERB Decision No. 2351-M, pp. 28-29; *County of Santa Clara* (2013) PERB Decision No. 2321-M, pp. 17-18.) Because of their detrimental and destabilizing effect on bilateral negotiations between equals, absent a valid defense, PERB regards a unilateral change to negotiable matters as a per se violation of the duty to meet and confer in good faith and inherently destructive of the rights of employees and employee organizations. (*County of Monterey* (2018) PERB Decision No. 2579-M, p. 10; *County of Santa Clara*, *supra*, PERB Decision No. 2321-M, p. 23; *El Dorado Union High School District* (1986) PERB Decision No. 564, adopting proposed dec. at p. 19; *Antioch*

Unified School District (1985) PERB Decision No. 515, pp. 18-19; see also *City & County of San Francisco* (2017) PERB Decision No. 2536-M, p. 9.)[6]

The Complaint includes two unilateral change allegations. Paragraphs 9-11 allege that on or about October 5, 2017, the City altered its established practice of at least five years by modifying the schedules of Association-represented employees in the Police Department to include an unpaid, one-hour meal period, whereas previously these employees had received a half-hour, paid meal period. Paragraphs 3-5 allege that on the same date, the City altered its established practice of at least five years by no longer allowing Association-represented employees "to add their break-rest time directly prior to or after meal periods."

The undisputed evidence indicates that a half-hour, paid meal period was in place for non-sworn Police Department employees from approximately 2007 until November 13, 2017, as a result of allowing employees to combine their two 15-minute paid rest breaks *in lieu of* taking the contractually-guaranteed one-hour unpaid meal period. The Association presented no evidence or argument about employees using their rest breaks immediately *before or after* their meal periods and, on its face, the allegations of paragraphs 3-5 are logically and factually incompatible with the allegations of paragraphs 9-11 and with the parties' stipulation that, from approximately 2007 until November 13, 2017, non-sworn Police Department employees did not take a one-hour unpaid meal period.

[6] When interpreting the MMBA, PERB may take guidance from administrative and judicial authorities interpreting the National Labor Relations Act, 29 U.S.C. § 151 et seq., the California Agricultural Labor Relations Act, Labor Code § 1148 et seq., and other California labor relations statutes with parallel provisions, policies, or purposes. (*Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1089–1090; *Moreno Valley Unified School Dist. v. Public Employment Relations Bd.* (1983) 142 Cal.App.3d 191, 196; *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 615-617 (*City of Vallejo*).)

PERB Regulations permit a hearing officer to "disregard any error or defect in the complaint that does not substantially affect the rights of the parties," and the Board has held that an amendment to a complaint that merely reflects the allegations or issues actually litigated is appropriate, even in the absence of motion to amend, because it does not substantially affect the rights of the parties. (PERB Reg. 32640; *City of Montebello* (2016) PERB Decision No. 2491-M, pp. 6-8; see also *Hacienda La Puente Unified School District* (1997) PERB Decision No. 1186, pp. 4-5 (*Hacienda La Puente*).) To the extent paragraphs 3-5 of the Complaint were intended to allege that the unilateral change theory regarding employee meal periods also affected employee rest breaks, this issue was actually litigated and is therefore appropriate for consideration as part of the same allegations set forth in paragraphs 9-11. Alternatively, to the extent paragraphs 3-5 were intended to allege a separate theory of liability regarding the use of paid rest breaks immediately before or after employees' unpaid, one-hour meal periods, these allegations must be dismissed as abandoned.

A.1. The Association's Prima Facie Case

To state a prima facie case of a unilateral change, the charging party must allege facts demonstrating that: (1) the employer reached a firm decision or took action to change policy; (2) the change in policy concerns a matter within the scope of representation; (3) the decision or action was taken without giving the exclusive representative notice or opportunity to bargain over the change; and (4) the decision or action had a generalized effect or continuing impact on terms and conditions of employment. (*County of Santa Clara*, *supra*, PERB Decision No. 2321-M, p. 21, citing *Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262 (*Fairfield-Suisun*).) Unilateral change allegations may involve: (1) changes to the parties' written agreements; (2) changes in established past practice; or, (3) newly created

policy or the application or enforcement of an existing policy in a new way. (*County of Monterey*, *supra*, PERB Decision No. 2579-M, p. 10; *Pasadena Area Community College District* (2015) PERB Decision No. 2444, p. 12 (*Pasadena Area CCD*); *Regents of the University of California* (2003) PERB Decision No. 2300-H, pp. 20, 25-27; *Grant Joint Union High School District* (1982) PERB Decision No. 196, p. 8.)

Here, there is no serious dispute as to any element of PERB's test for a unilateral change. The City made a firm decision to change policy, as indicated in Lt. Cid's message of October 5, 2017, and confirmed by the testimony of Lt. Cid and Chief Bixby at the hearing. There was nothing tentative about the language of Lt. Cid's message, and no other circumstances evinced a wavering of Chief Bixby's decision to change work schedules and meal and rest periods, effective November 13, 2017. (See *City of Sacramento*, *supra*, PERB Decision No. 2351-M, pp. 26-27; cf. *Long Beach Community College District* (2003) PERB Decision No. 1568, pp. 9-12 (*Long Beach CCD*).)

There is likewise no dispute that the policy changes communicated to employees by Lt. Cid's message and later implemented in the Police Department affected negotiable subjects. MMBA section 3504 defines the scope of representation as encompassing "all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment," subject to certain exceptions, which are not at issue here.[7] (MMBA, § 3504; *Vernon Fire Fighters v. City of Vernon* (1980)

[7] The scope of representation does not include "consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." (MMBA, § 3504; *County of Orange* (2018) PERB Decision No. 2594-M, pp. 18-20.) However, the position argued in the City's briefs is not that its changes to employee schedules, meal periods, and break times were excluded from the *statutorily-defined* scope of representation, but that they were not subject to meeting and conferring by virtue of *contractual* language waiving the Association's right to bargain over these changes. PERB's designation of a subject as

107 Cal.App.3d 802, 812–816 (*City of Vernon*).) The City's decision to extend the workday by one hour for every shift worked by each non-sworn Police Department employee and to restrict their ability to combine paid rest breaks in lieu of an unpaid meal period undoubtedly affected employee's "wages, hours, and other terms and conditions of employment." Among the negotiable subjects affected were the start and end times of the work day and the length or amount of employees' duty-free time at work. (*County of Monterey*, *supra*, PERB Decision No. 2579-M, p. 13; *Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, p. 39 (*Petaluma*); *Salinas Union High School District* (2004) PERB Decision No. 1639, p. 3.) Therefore the negotiable element of PERB's test for a unilateral change is also met.

There is also no dispute that the City's change in policy had a generalized effect or continuing impact on employment conditions. This element of PERB's unilateral change test is satisfied if the respondent asserts that its conduct was authorized by contract, statute or other legal authority. (*County of Riverside* (2003) PERB Decision No. 1577-M, p. 6; *Hacienda La Puente*, *supra*, PERB Decision No. 1186. p. 4.) It is also satisfied if the change in policy remains in effect or is applicable to future situations. (*Fairfield-Suisun*, *supra*, PERB Decision No. 2262, p. 15; *Pasadena Area CCD*, *supra*, PERB Decision No. 2444, pp. 15-16; see also *Modesto City Schools and High School District* (1985) PERB Decision No. 552, p. 8; and *Jamestown Elementary School District* (1990) PERB Decision No. 795, p. 6.) Both conditions apply here. The changes announced in Lt. Cid's message were implemented and remained in effect as of the date of the hearing. Additionally, as discussed below, the City's position

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negotiable is a *statutory* designation, and subjects do not lose their designation as negotiable simply because they are included within a collective bargaining agreement. (*County of Monterey*, *supra*, PERB Decision No. 2579-M, p. 11, fn. 5; *City of Folsom* (2015) PERB Order No. Ad-423-M, p. 4.)

throughout these proceedings has been that its conduct was expressly authorized by the terms of the expired MOU. There is thus no dispute that the changes implemented on November 13, 2017 had a generalized effect or continuing impact.

The only even debatable question is whether the City satisfied its obligation to provide the Association with adequate notice and meaningful opportunity for bargaining before reaching a firm decision to change policy. The City argues that Lt. Cid's e-mail message to employees met the requirements of the MOU, and thereby satisfied any obligation the City may have had to provide notice under the circumstances. According to the City, the MOU's language requiring notice to employees replaces its statutory obligation to give notice to the Association. The Association contends that this language supplements, rather than supplants, the City's duty to give notice to the Association during the life of the MOU and that in any event because the MOU was not in effect at the time, any waiver of the Association's right to notice expired with agreement on June 30, 2017.

I need not resolve this dispute over the proper interpretation of the MOU to decide whether the Association has established a prima facie case of a unilateral change. The statutory language and well-settled decisional law requires a public employer to provide the employees' representative with reasonable notice and meaningful opportunity to request bargaining "*prior to* arriving at a determination of policy or course of action" affecting matters within the scope of representation. (MMBA, § 3505, emphasis added; *Boling v. Public Employment Relations Bd*., *supra*, 5 Cal.5th at p. 904; *City of Sacramento*, *supra*, PERB Decision No. 2351-M, pp. 28-29; *NLRB v. Katz* (1962) 369 U.S. 736, 746 (*Katz*).) The meet and confer procedure was "intended to operate on decisions yet to be taken, not to serve as a mechanism retrospectively to review policy already implemented." (*Stockton Police Officers'*

Assn. v. City of Stockton (1988) 206 Cal.App.3d 62, 65-66 (*City of Stockton*).) Thus, "a union can only ever waive a reasonable opportunity to bargain over a decision that has not already been firmly made by the employer," and has no obligation to request bargaining over a *fait accompli*. (*Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M, p. 42, fn. 18 (*Fresno Co. IHSS Public Authority*); *City of Sacramento*, *supra*, PERB Decision No. 2351-M, pp. 28-29.)

Notice must be provided to a person designated by the employee organization to receive it or who has authority to act on behalf of the organization. (*Los Angeles Community College District* (1982) PERB Decision No. 252, pp. 17-18.) Additionally, notice "must be communicated in a manner that clearly informs the recipient of the proposed change to matters within scope or of the nonnegotiable decision whose effects are within scope." (*City of Sacramento*, *supra*, PERB Decision No. 2351-M, p. 29.) Informing affected employees of the Department's decision to change policy does not constitute actual or constructive notice to the representative. (*Ibid*.)

Here, the City provided no notice to the Association before reaching a firm decision to change work schedules and meal and rest break policies. Senior Jailer Eric O'Neal, who is a member of the Association's board of directors, testified, without contradiction, that the organization received no notice from management nor opportunity to negotiate over the policy changes in dispute,. Lt. Cid acknowledged that Senior Jailer O'Neal was the Association's designated representative in the Police Department and that no notice was sent to him in his capacity as the Association's representative, *i.e*., separate from *and prior to*, Lt. Cid's message to all affected employees.

Although negotiations for a successor MOU had not yet concluded, Chief Bixby confirmed that neither he nor any other representative of the City offered to meet with the Association about the change before (or after) Lt. Cid's message to employees. In fact, the Chief only met and discussed the changes *with affected employees*, not the Association, and did so two or three days *after implementation*. Providing notice to employees of a change in policy does not satisfy the public employer's statutory obligation *to the representative*; absent a defense, such conduct is "nothing more than its announcement of a *fait accompli*." (*City of Sacramento*, *supra*, at pp. 33-34.)

The City contends that no notice to the Association was required under the terms of the expired MOU. However, this argument is based on its interpretation of the expired MOU, and thus sounds in waiver. (*City of Milpitas* (2015) PERB Decision No. 2443-M, pp. 20-22.) As such, it is properly addressed as an affirmative defense, rather than as negating the City's undisputed failure to provide notice as an element of the prima facie case. (*Ibid*.; see also *County of Monterey*, *supra*, PERB Decision No. 2579, pp. 23-25; *California State Employees' Assn. v. Public Employment Relations Bd.* (1996) 51 Cal.App.4th 923, 937.)

The facts supporting each element of PERB's test for a unilateral change are undisputed. Whether characterized as implementing a new policy, or as a new application of existing policy, as set forth in the parties' expired MOU, the Association has established that the City altered its established practice of approximately ten years of combining two 15-minute paid rest breaks in lieu of a one-hour unpaid meal period, and thereby extending the length of the workday by one hour for each shift worked by non-sworn employees in the Police Department. Absent a valid defense, the City's conduct constitutes a per se violation of its meet-and-confer obligations. Although the City's answer to the Complaint and its briefs raise

several arguments, only two defenses need be addressed to dispose of this case: waiver by contract and established past practice/dynamic status quo.

A.2. The City's Affirmative Defenses

The City concedes that from approximately 2007 until November 2017, there was a consistent practice of allowing non-sworn employees to combine their 15-minute paid rest breaks in lieu of the contractual one-hour unpaid meal period. However, it advances several theories as to why this practice was not "binding" or part of the status quo during successor negotiations. Although variously characterized as doctrines of waiver and mootness, the essence of the City's argument is that its conduct cannot have been an unlawful unilateral change because it acted in accordance with its rights under the 2014-2017 MOU.[8]

First, the City argues that it was authorized to eliminate the practice of combining paid rest breaks in lieu of the one-hour unpaid meal period because it was contrary to the language of the MOU. Because the MOU states that "the normal unpaid meal time shall be one (1) hour in duration," the City argues that, under *Marysville Joint Unified School District* (1983) PERB Decision No. 314 (*Marysville*) and similar cases, even if the City had not previously insisted on enforcing this provision, that fact could not preclude it from lawfully doing so here. (*Id*. at p. 10.) According to the City, because it had an operational need to improve coverage, and because it provided the 21-day notice to employees required by the expired MOU, the City satisfied any meet-and-confer obligation it may have had before eliminating the contrary practice of combining rest breaks and reverting to the one-hour unpaid meal period expressly

[8] Indeed, the City's brief argues that the "only issue to be determined" in this case is whether the City's change to employee schedules "violated the applicable [MOU]," not whether it violated the City's *statutory* obligation to meet and confer under the MMBA.

contemplated by the MOU. (*State of California (Department of Corrections)* (1996) PERB Decision No. 1149-S, pp. 4-5.)

Alternatively, the City argues that as part of the status quo, as defined by the expired MOU, it had and at all times retained complete discretion to eliminate the alternative work schedule and meal period arrangement it had previously authorized for the Police Department's non-sworn personnel in 2007. In addition to the City's Rights clause, which allowed the City to "[e]stablish[], chang[e] and/or modify[] work schedules for employees," provisions of Article III of the expired MOU expressly authorized the City to schedule and re-schedule rest breaks and meal periods in accordance with operational needs, *as determined by management*, and subject only to the "Notice to Employees" requirement. According to the City, because it had previously bargained for the right to change work schedules, rest breaks, and meal periods, as specified in the 2014-2017 MOU, and because this language was carried over without change into the successor agreement, the City's right to act unilaterally on these subjects "always remained a part of the status quo between the parties," including during negotiations when no MOU was in effect.

Elaborating on the latter point, the City contends that the circumstances surrounding ratification/adoption of the successor MOU demonstrate that the Association acquiesced to the City's changes, or rendered the Complaint's unilateral change allegations moot. Although the City concedes that it provided no notice to the Association, it argues that the Association was aware of Lt. Cid's e-mail message to employees and that the changes announced therein would take effect on November 13, 2017. It contends the Association was also "well aware of the City's interpretation" of language in the 2014-2017 MOU authorizing the City to act unilaterally with respect to schedules, rest breaks, and meal periods. Because the Association

ratified the successor MOU containing identical language after the disputed changes took effect, the City argues that the Complaint's unilateral change allegations must be dismissed because the Association knowingly and voluntarily relinquished any interest in the matter.

Because each of these defenses is ultimately contract-based, I first review the legal principles governing the duty to meet and confer during contract negotiations, and then address the specific arguments raised by the City.

Applicable Law

The MMBA imposes a mutual obligation on public employers and recognized employee organizations "personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation." (MMBA, § 3505.) The statute makes this obligation applicable to "all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment." (MMBA, § 3504.) Neither party to contract negotiations is authorized to insist on "negotiating certain subjects in isolation from others," to "impose arbitrary limits on the range of possible compromises it will consider," or to refuse a request "to engage in meaningful discussion of one or more matters within scope." (*City of San Jose* (2013) PERB Decision No. 2341-M, pp. 29-30, 32.)

Absent agreement, or an overall deadlock in negotiations and exhaustion of statutory or other applicable impasse procedures, a public employer must provide the employees' representative notice and meaningful opportunity to bargain over changes to any matters within scope. (*Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 537, superseded on another ground as stated in *Coachella Valley Mosquito and Vector Control Dist.*

v. Public Employment Relations Bd., *supra*, 35 Cal.4th 1072, 1077; *California State Employees' Assn. v. Public Employment Relations Bd.*, *supra*, 51 Cal.App.4th at p. 936; *San Joaquin County Employees Assn. v. City of Stockton* (1984) 161 Cal.App.3d 813, 818–820; *Buck Brown Contracting Co*. (1984) 272 NLRB 951, 953.) The obligation to refrain from making unilateral changes during contract negotiations extends beyond the mere duty to give notice and an opportunity to bargain on individual subjects; it encompasses a duty to refrain from implementation *at all*, unless and until negotiations result in agreement or an overall impasse and exhaustion of impasse proceedings. (*County of Orange*, *supra*, PERB Decision No. 2594-M, pp. 14-15; *City of Roseville* (2016) PERB Decision No. 2505-M, p. 33; *County of Riverside* (2014) PERB Decision No. 2360-M, pp. 11-16; *Katz*, *supra*, 369 U.S. at pp. 742-743; see also *Litton Financial Printing Div., a Div. of Litton Business Systems, Inc. v. NLRB* (1991) 501 U.S. 190, 191 [*Katz* doctrine against unilateral changes applies whenever "an existing agreement has expired and negotiations on a new one have yet to be completed"].)

An employer may claim that the union has waived or otherwise surrendered its right to bargain over a particular subject either by contract or through inaction/acquiescence. (*City of Milpitas*, *supra*, PERB Decision No. 2443-M, p. 20; *City of Davis* (2016) PERB Decision No. 2494-M, pp. 31-32; *City of Stockton*, *supra*, 206 Cal.App.3d at p. 66; *Marysville*, *supra*, PERB Decision No. 314, p. 10.) However, public policy disfavors a finding of waiver based on inference and therefore places a high burden of proof on the party asserting that defense. (*Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 667–668 (*Farrell*); *Long Beach CCD*, *supra*, PERB Decision No. 1568, p. 14.) A waiver of the right to bargain over a particular subject must be clear and unmistakable, and the evidence must indicate an intentional relinquishment of that right. (*Farrell*, *supra*, 41 Cal.3d at pp. 667–668;

California State Employees' Assn. v. Public Employment Relations Bd., *supra*, 51 Cal.App.4th at pp. 937-938; *City of Milpitas*, *supra*, PERB Decision No. 2443-M, p. 20; *Los Angeles Community College District*, *supra*, PERB Decision No. 252, pp. 10-20.)

A contractual waiver will not be inferred solely from a broadly-worded management rights clause, zipper clause, or similar provision, either separately or in combination, unless the contract expressly or by necessary implication confers such right. (*Oakland Unified School Dist. v. Public Employment Relations Bd.* (1981) 120 Cal.App.3d 1007, 1011 (*Oakland USD*); *Los Angeles Community College District*, *supra*, PERB Decision No. 252, pp. 10-12.) To meet the "clear and unmistakable" wavier standard, the contract language must be specific, or it must be shown that the matter sought to be waived was fully discussed and consciously explored and that the waiving party thereupon consciously yielded its interest in the matter. (*Trojan Yacht* (1995) 319 NLRB 741, 742.) Where contractual language is clear and unambiguous, it is unnecessary to go beyond the plain language to ascertain its meaning. (Civ. Code, §§ 1638, 1639, 1644; *County of San Luis Obispo* (2015) PERB Decision No. 2427-M, pp. 36-37; *City of Modesto* (2004) PERB Decision No. 1724-M, p. 3.) Where the contract is ambiguous or silent on a subject, its meaning may be ascertained by examining past practice or bargaining history.

Regardless of whether contract language is ambiguous, "clear and unambiguous," or silent as to the particular subject in dispute, an employer's waiver-by-contract or similar defense to a bargaining charge presumes that an agreement was in place at the relevant time. (*Katz*, *supra*, 369 U.S. at pp. 742-743; see also *Provena Hosps.* (2007) 350 NLRB 808, 810–815; *Ador Corp*. (1965) 150 NLRB 1658, 1660–1661.) As a general rule, "the defense of waiver is not available to an employer during the course of negotiations for a labor agreement to succeed

an expired one." (*Int'l Assn of Fire Fighters* (1991) 304 NLRB 401, 402.) Applying the reasoning of *Katz*, the NLRB has explained that,

> when ... the parties are engaged in negotiations, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole.

(*Bottom Line Enterprises* (1991) 302 NLRB 373, 374, enfd. sub nom. *Master Window Cleaning v. NLRB* (9th Cir. 1994) 15 F.3d 1087; see also *Lawrence Livermore National Security* (2011) 357 NLRB 203, 205–206.) Both PERB and California courts interpreting the MMBA and other California labor relations statutes have followed the logic of *Katz*, including the prohibition against implementation until negotiations have concluded *on all subjects*. (*City of San Jose*, *supra*, PERB Decision No. 2341-M, p. 30; *Pajaro Valley Unified School District* (1978) PERB Decision No. 51, pp. 5-6 (*Pajaro*); *California State Employees' Assn. v. Public Employment Relations Bd*., *supra*, 51 Cal.App.4th at pp. 934–935; *Banning Teachers Assn. v. Public Employment Relations Bd.* (1988) 44 Cal.3d 799, 807; *Ruline Nursery Co. v. Agricultural Labor Relations Bd.* (1985) 169 Cal.App.3d 247, 264; *City of Vernon*, *supra*, 107 Cal.App.3d 802, 824–825.)

An employer may also assert a waiver of the right to bargain based on the union's failure to request bargaining, despite knowledge of contemplated or impending unilateral action by the employer. (*City of Stockton*, *supra*, 206 Cal.App.3d at pp. 65-66; *United States Lingerie Corp.* (1968) 170 NLRB 750, 751–752; *Montgomery Ward & Co., Inc.* (1962) 137 NLRB 418, 422–423.) However, when a claim of waiver is based on notions of acquiescence or waiver by inaction, the employer must show that the union had "clear notice," meaning *advance knowledge*, of the employer's intent to change policy with sufficient time to allow a

reasonable opportunity to bargain about the change and then failed to request negotiations. (*Los Angeles Unified School District* (2017) PERB Decision No. 2518, p. 44 (*LAUSD*); *NLRB v. Unbelievable, Inc.* (9th Cir. 1995) 71 F.3d 1434, 1440–1441; see also *Farrell*, *supra*, 41 Cal.3d at pp. 667–668; *Metropolitan Edison Co. v. NLRB* (1983) 460 U.S. 693, 708.)

With these principles in mind, I turn to the City's affirmative defenses.

The City's *Marysville* Defense Fails Because the MOU Had Expired by Its Own Terms and the *Katz* Doctrine Prohibiting Unilateral Changes During Contract Negotiations Applied

In *Marysville*, the collective bargaining agreement guaranteed certificated employees "one duty-free lunch break of no less than 30 minutes each day" but, for serval years, certificated employees had been permitted lunch breaks of 50 to 55 minutes. (*Id*. at p. 2.) Following budget cuts, the school district eliminated certain classified positions and reassigned their duties to certificated employees. As a result of the reassignment, certificated employees' lunch breaks were reduced to 30 minutes. (*Id*. at pp. 4-5.) In resolving the union's unilateral change allegation, the Board noted that an employer's established policy may be ascertained by examining its past practice or bargaining history where a contract is silent or ambiguous as to the policy in question. In this case, however, the Board found the applicable contract language was "clear and unambiguous" in guaranteeing certificated employees only a minimum of 30 minutes and concluded that it was therefore unnecessary to go beyond that plain language to ascertain the school district's established policy, as defined by its contractual obligations. (*Id*. at pp. 8-10.) Rejecting the union's past practice argument, the Board held: "The 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.)

Here, the essence of the City's *Marysville* defense is that, at all times, including on October 5, 2017 when it advised employees of its decision to change policy, the status quo, as

defined by the expired MOU, authorized the City to act unilaterally with respect to work schedules, rest breaks, and meal periods. However, there is no dispute that when the City announced and then implemented its decision to change schedules, rest breaks, and meal periods, the 2014-2017 MOU had already expired, but the parties' successor negotiations had not yet concluded. I conclude that *Marysville* and similar cases do not apply here because no MOU was in effect when the City decided to change policy.

Nevertheless, the City argues that *Marysville* is still controlling because the MOU's terms and conditions, including the City's bargained-for right to change work schedules, rest breaks, and meal periods, survived expiration and, at all times, defined the parties' status quo. Thus, as framed by undisputed facts and PERB decisional law, the question presented is not whether the 2014-2017 MOU permitted the City to make the disputed changes, but whether the City acted in derogation of its duty to meet and confer during a hiatus period between agreements. That question, in turn, depends on whether the City's decision to change policy fell within the parameters of the parties' status quo. (*Regents of the University of California*, *supra*, PERB Decision No. 1689-H, proposed dec. at pp. 25-27.) For the following reasons, I conclude that it was not.

Under ordinary principles of contract law, the parties' obligations are extinguished upon expiration of the agreement. (Restatement (Second) of Contracts § 235 (1981) [a duty is discharged when fully performed].) However, California and federal authorities alike recognize that a collective bargaining agreement is "not an ordinary contract," nor necessarily "governed by the common law concepts that control private contracts." (*Amalgamated Transit Union Local 1277 v. Los Angeles County Metropolitan Transportation Authority* (2003) 107 Cal.App.4th 673, 689, and federal cases cited therein.) For policy reasons, "certain terms

contained in an expired CBA remain in effect until such time as bargaining over a successor agreement has been completed by either reaching agreement or concluding impasse proceedings." (*State of California (Department of Corrections)*, *supra*, PERB Decision No. 1149-S, p. 2, fn. 2.)

Under an exception to the *Katz* rule against unilateral changes, an employer may lawfully make unilateral changes in working conditions even before completing negotiations, if such changes are "a mere continuation of the status quo." (*Katz*, *supra*, 369 U.S. at p. 746; see also *Regents of the University of California* (1983) PERB Decision No. 356-H, p. 15; *Post-Tribune Co.* (2002) 337 NLRB 1279, 1280.) The "status quo" against which the employer's conduct is evaluated "must take into account the regular and consistent past patterns of changes in the conditions of employment." (*Pajaro Valley*, *supra*, PERB Decision No. 51, p. 6.) Thus, an established past practice that develops under the agreement can become part of the status quo and define the post-expiration actions the employer is permitted to take unilaterally. (*California State Employees Association v. Public Employment Relations Bd.*, *supra*, 51 Cal.App.4th at p. 923; *Post-Tribune Co.*, *supra*, 337 NLRB 1279, 1280.) The principle that an employer may lawfully take unilateral action that "does not alter the status quo," and which therefore permits changes that have become part of the status quo, is referred to as the "dynamic status quo." (*County of Kern*, *supra*, PERB Decision No. 2615-M, p. 6; *Post-Tribune Co.*, *supra*, 337 NLRB at pp. 1280–1281.)

When the status quo regarding a particular employment term has followed a nondiscretionary pattern of change, i.e. according to an identifiable or pre-determined formula, the employer must act in accordance with that pattern of change; in fact it commits an unfair practice if it fails to do so without an otherwise valid defense. (*County of Kern*, *supra*, PERB

Decision No. 2615-M, pp. 7-8, fn. 6, *California State Employees Assn. v. Public Employment Relations Bd.*, *supra*, 51 Cal.App.4th at p. 937.) By contrast, where an employer has an established practice involving periodic changes to working conditions that follow no pre-determined formula but are instead subject to employer discretion, once the contract expires, the employer may neither discontinue that practice, nor continue to exercise its discretion unilaterally. (*Regents of the University of California*, *supra*, PERB Decision No. 356-H, pp. 16-17.) In such circumstances, "[w]hat is required is a maintenance of the preexisting practice, i.e., the general outline of the program," and, to the extent that discretion has existed in determining the timing or other specifics of the practice, the union must have notice and opportunity to negotiate over such changes before implementation. (*Ibid*., citing *Oneita Knitting Mills, Inc.* (1973) 205 NLRB 500, 501, fn. 1; see also *NLRB v. Ralph Printing & Lithographing Co.* (8th Cir. 1970) 433 F.2d 1058, 1062-1063.)

Stated another way, a contractual reservation of managerial discretion, whether embodied in a management rights clause or other provisions of a collective bargaining agreement, expires with the agreement itself, unless the parties clearly intended otherwise. (*Los Angeles Unified School District* (2013) PERB Decision No. 2326, p. 40, fn. 28 (*Los Angeles USD*); *Regents of the University of California*, *supra*, PERB Decision No. 1689-H, proposed dec. at p. 25, citing *Blue Circle Cement Company* (1995) 319 NLRB 954; *Antelope Valley Union High School District* (1998) PERB Decision No. 1287, p. 4.) Likewise, a past practice of changes involving the exercise of employer discretion under a management rights clause or similar contractual provision does not authorize continued unilateral changes post-expiration, unless the employer had established the past practice of making such changes during *both* periods when the contract was in effect *and* during hiatus periods. (*E.I. Du Pont De Nemours* (Aug. 26, 2016) 364 NLRB

No. 113; *Beverly Health & Rehabilitation Services* (2001) 335 NLRB 635, enfd. in relevant part (D.C. Cir. 2003) 317 F.3d 316; *Register-Guard* (2003) 339 NLRB 353; *Ironton Publications, Inc.* (1996) 321 NLRB 1048; *Blue Circle Cement Co.*, *supra*, 319 NLRB at pp. 954-955.)[9]

In addition to "dynamic" status quo situations involving managerial discretion, employers involved in contract negotiations must also refrain from making unilateral changes when the status quo is "static" i.e., where there has been no pattern of change. This is true, even if the matter had been subject to managerial discretion during the life of the agreement. To the extent a management rights clause or similar contractual provision authorizes unilateral action to change matters that are mandatory subjects of bargaining, "it is, in effect, a union's waiver of its statutory right to bargain over those matters," and, as such, it expires with the agreement, absent evidence the parties intended otherwise. (*Holiday Inn of Victorville* (1987) 284 NLRB 916.) Thus, the *Katz* rule against unilateral changes applies. (*Regents of the University of California*, *supra*, PERB Decision No. 1689-H, proposed dec. at p. 25.)

Katz involved merit pay increases whose amounts varied considerably according to employer discretion, as determined by is quarterly or semi-annual merit reviews. (*Ibid*.) Because the parties were in negotiations for a successor agreement, the employer was obligated to continue the general outline of its practice of awarding merit pay increase, but was not

[9] In *Raytheon Network Centric Sys.* (2017) 365 NLRB No. 161, the NLRB overruled *Du Pont* and similar cases holding that a discretionary past practice developed during the life of an agreement does not authorize the same discretionary pattern of change following expiration. (slip. op. at pp. 5-21.) *Raytheon* did not, however, overrule earlier NLRB cases, such as *Ironton* and *Blue Circle* holding that a contractual waiver of bargaining rights does not survive expiration of the agreement, absent evidence that the parties so intended. Moreover, PERB has previously endorsed the reasoning of *Blue Circle* (see *Regents of the University of California*, *supra*, PERB Decision No. 1689-H, proposed dec. at p. 25), and the Board's most recent discussion on the dynamic status quo in *County of Kern*, *supra*, PERB Decision No. 2615-M gives no indication that PERB intends to depart from its prior precedents and adopt the more recent NLRB rule announced in *Raytheon*. (See, e.g., *Capistrano Unified School District* (2015) PERB Decision No. 2440, p. 35 (*Capistrano*).)

authorized to exercise the discretionary aspects of this practice without providing notice and opportunity for bargaining and, upon request, then bargaining to agreement or impasse. (*Katz*, *supra*, 369 U.S. at pp. 741–742.) PERB has applied the same logic to require employers to bargain over discretionary changes to other terms and conditions of employment, including criteria for performance evaluations (*LAUSD*, *supra*, PERB Decision No. 2518, pp. 14-15); changes in employee health insurance benefits (*Regents of the University of California* (1996) PERB Decision No. 1169-H, pp. 4-6); increased costs of health insurance premiums (*Regents of the University of California*, *supra*, PERB Decision No. 1689-H, proposed dec. at pp. 31-32); parking fee increases (*Regents of the University of California*, *supra*, PERB Decision No. 356-H, pp. 8-9); and, most recently, changes to workloads and performance standards (*County of Kern*, *supra*, PERB Decision No. 2615-M, pp. 3, fn. 4, 8, 11).

The alternative rule urged by the City would mean that once an employer had obtained the right to act unilaterally with respect to a particular subject in a collective bargaining agreement, such discretion would never expire, even when no agreement was in effect. The employer would have no meaningful incentive to ever enter into a successor agreement, and the legislative scheme for resolution of workplace disputes through bi-lateral negotiations would become a hollow promise. (*County of San Luis Obispo*, *supra*, PERB Decision No. 2427-M, p. 40, citing *City of Torrance* (2008) PERB Decision No. 1971-M, p. 27 ["calcification of working conditions" disfavored]; *Holtville Unified School District* (1982) PERB Decision No. 250, pp. 9-10; see also *Los Angeles USD*, *supra*, PERB Decision No. 2326, pp. 35-37, 42 [unfettered employer discretion held in perpetuity "plainly inimical to the bilateral nature of collective bargaining"].)

Thus, where the status quo regarding a particular employment term has followed *either* a discretionary pattern of change *or* no pattern of change at all, the default rule is not, as the City suggests, management's right to continue acting unilaterally according to language in the expired agreement. Rather, the *Katz* rule governing post-expiration negotiations applies; the employer must afford the union notice and an opportunity to bargain over proposed changes to matters within scope, and, and it must refrain from implementing such changes, absent agreement or an overall deadlock in negotiations and exhaustion of impasse procedures. (*County of Kern*, *supra*, PERB Decision No. 2615-M, p. 7; *California State Employees' Assn. v. Public Employment Relations Bd.*, *supra*, 51 Cal.App.4th at p. 936; *Taft Broadcasting Co*. (1967) 163 NLRB 475, 478, enfd. *sub nom*. *Television Artists AFTRA v. NLRB* (D.C. Cir. 1968) 395 F.2d 622.)

Authorities are divided over exactly how a dynamic status quo defense is analyzed. According to some authorities, a modification that is consistent with the employer's established pattern of change is no "change" in working conditions at all. By simply following its pattern of past changes, the employer's conduct negates that element of the prima facie case for a unilateral change. In accordance with this view, some PERB decisions assign to the charging party, typically the union, the burden of proving both the existence and the precise contours of the established practice allegedly violated by the employer's unilateral action. (*County of Sonoma* (2008) PERB Decision No. 1962-M, pp. 13-16; *Hacienda La Puente*, *supra*, PERB Decision No. 1186, pp. 3-4, fn. 3; *Regents of the University of California*, *supra*, PERB Decision No. 1169-H, pp. 4-6.)

However, other PERB decisions and private-sector authorities appear to treat the argument as an affirmative defense. (*County of Kern*, *supra*, PERB Decision No. 2615-M, p. 6;

LAUSD, *supra*, PERB Decision No. 2518,, pp. 37-38; *Post-Tribune Co.*, *supra*, 337 NLRB at pp. 1280–1281.) Under this view, an employer asserting that its change to working conditions was authorized by the status quo has the burden of demonstrating that the asserted past practice occurred "with such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis." (*Caterpillar, Inc.* (2010) 355 NLRB 521, 522.)

The latter view is more consistent with the policy underlying the *Katz* rule against unilateral changes during negotiations. As the U.S. Supreme Court explained, where the employer has traditionally exercised a large measure of discretion in making changes to negotiable subjects, it is impossible for the exclusive representative to know whether a change to those subjects made during negotiations entails a substantial departure from the past practice. (*Katz*, *supra*, 369 U.S. at pp. 746-747.) The union may therefore properly insist on notice and opportunity for meeting and conferring before the employer makes such changes during a hiatus in the contract. (*Ibid*.; see also *Regents of the University of California*, *supra*, PERB Decision No. 1689-H, proposed dec. at p. 30, citing *Regents of the University of California*, *supra*, PERB Decision No. 356-H.)

Whether Conceived as a Dynamic or Static Status Quo, the City's Change in Policy was the Product of Managerial Discretion and therefore Subject to Negotiation

Regardless of how the burden of proof is allocated, there is no dispute in this case that, on or about October 5, 2017, the City reached a firm decision to change employee schedules, as memorialized in Lt. Cid's message to employees, and that it then implemented this change in policy before negotiations concluded. There is also no dispute that this change in policy was an exercise of managerial discretion. The City's Rights clause of the expired MOU authorized the City to "[e]stablish[], chang[e] and/or modify[] work schedules for employees … following

proper notification to unit employees."[10] Separate provisions of the MOU state that 15-minute paid rest periods "are scheduled and/or rescheduled by management so as not to impair service and as job requirements dictate," and that "[t]he schedule for meal times shall be determined by management in consideration of the continuity of services provided to the public and the convenience of the unit employee." Although the "normal unpaid meal time shall be one (1) hour in duration," the expired MOU also contemplates exceptions to this rule, particularly "for some field and twenty-four (24) hour operations, *as specified by management*." (Emphasis added.)

It is undisputed that the Police Department operates on a 24-hour basis and that it has some field operations, including parking enforcement, with non-sworn personnel. It is also undisputed that the City authorized schedules for all non-sworn Police Department employees in approximately 2007 that deviated from the "normal" one-hour unpaid meal period. The parties' stipulated facts and the testimony of Association and City witnesses alike demonstrate that, even though there were occasional changes to the start or end times of their shifts or other changes to their hours worked, non-sworn employees consistently adhered to this alternative meal period arrangement until November 13, 2017.

Thus, unlike cases where the "status quo was a work environment of fluctuating hours and schedules" (*Regents of the University of California* (1997) PERB Decision No. 1182-H, p. 23), there is no evidence here of "a regular and consistent pattern of past changes" with

[10] As evidenced by the conflicting positions argued in the parties' briefs, the MOU is unclear whether the notice to employees required by section A is the same requirement as the 21 calendar day notice required by section B and, more specifically, whether the City's *contractual* obligation to provide notice to employees exists in lieu of, or in addition to, the *statutory* requirement of notice to the Association of schedule changes. Other provisions of the expired MOU authorizing the City to change employee schedules without 21 days' notice "(a) in cases of emergency, (b) upon request of the affected employee, or (c) by mutual agreement of the parties" are not at issue.

respect to the length of employees' shifts, the timing of employee breaks, or the duration or paid or unpaid status of meal periods. (*LAUSD*, *supra*, PERB Decision No. 2518, p. 38.) There is likewise no evidence that either the City's adoption of the alternative arrangement in 2007 or its decision to eliminate that arrangement in October 2017 was made according to any pre-determined formula or discernible methodology against which the unilateral changes at issue may be measured. (*Id*. at pp. 37-38.) The MOU itself identified no criteria for how management in field or 24-hour operations would determine the need for an exception to the "normal unpaid meal time" of one hour in duration, and the parties generally agree that such decisions were solely the product of management discretion.

According to Chief Bixby, the Police Department initially approved the modified schedule allowing employees to use their paid rest breaks as a half-hour lunch in lieu of the MOU's one-hour unpaid meal period in an effort to improve employee morale. However, the elimination of that alternative arrangement ten years later was due to the City's desire to improve coverage by staggering employee meal periods, an entirely different criterion. Thus, even assuming the City was authorized to make periodic changes to work schedules, rest breaks, and meal periods in accordance with a "regular and consistent" pattern, its failure to do so follow any pre-determined formula or set criteria here precludes a dynamic status quo defense. (*Regents of the University of California*, *supra*, PERB Decision No. 1689-H, proposed dec. at p. 31-32; *San Jacinto Unified School District* (1994) PERB Decision No. 1078, pp. 22, 35 (*San Jacinto*); *Daily News of Los Angeles v. NLRB* (D.C. Cir. 1996) 73 F.3d 406, 411–414.)

In sum, because there is no evidence of any periodic changes to the practice of employees combining their rest breaks to form a half-hour, paid meal period, much less any evidence that such changes were made according to any pre-determined or discernible formula,

the City can assert no credible dynamic status quo defense under the circumstances. Moreover, to the extent the City was authorized to make such changes during the term of the 2014-2017 MOU, it was due entirely to the degree of discretion afforded the City by the language of MOU, which was no longer in effect in October 2017, when the City decided to change policy.

Curiously, the City not only admits this point, but stridently insists on it as the correct interpretation of the MOU. Relying on the phrase "as specified by management" in Article VIII, section B.1 of the expired MOU, the City argues that because the Police Department operates on a 24-hour basis, it "has discretion to set employee meal periods at some duration other than one hour, and that it did so from approximately 2007 to November of 2017."

The purely discretionary nature of the City's change in policy is further demonstrated by its position in these proceedings. According to the City's closing brief: "In 2007, when it allowed meal periods other than a one-hour unpaid break to improve employee morale, the City/Department retained discretion to change them again." The City put on no evidence that "employee morale" is subject to a pre-determined formula or any discernible methodology. In fact, it concedes that the Chief's decision to change policy in October 2017 was not based on employee morale, but on staffing/coverage concerns and other criteria, only some of which were even disclosed at the time. The degree of discretion inherent in the City's decision thus makes any dynamic status quo defense inapplicable.

For reasons discussed above, any notion of a "static" status quo, in which pure managerial discretion is a term or condition that survives expiration of the MOU is equally unpersuasive. The City's contention that it would "unreasonable and impractical" to require the Chief, as the commanding officer of the Police Department, to provide the reasons for his decisions affecting negotiable subjects is one that is contrary to the statutory scheme for bilateral

collective bargaining. The first purpose of the MMBA identified in section 3500 is "to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations." Section 3505 operationalizes this purpose by defining the term "meet and confer" to include a mutual obligation of public employers and employee organizations "to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation ... ." PERB and judicial precedents alike have interpreted this language as requiring the parties to explain their positions "in sufficient detail to permit the negotiating process to proceed on the basis of mutual understanding." (*County of San Luis Obispo*, *supra*, PERB Decision No. 2427-M, p. 41, citing *Jefferson School District* (1980) PERB Decision No. 133, p. 11.)

Here, the City bargained for discretion to act unilaterally during the term of the 2014-2017 MOU and it successfully renewed those rights under the successor agreement. It did not, however, automatically retain such discretion during the intervening contractual hiatus, and it has pointed to no language in the expired MOU suggesting that the parties intended for the City's Rights or similar provisions reserving managerial discretion to outlive the contract. The City's past practice defense is therefore rejected.

The City's Waiver by Inaction and Mootness Defenses also Fail

The City's answer also asserts a mootness defense and, as discussed above, a recurring theme in the City's closing brief is that, despite knowing that the changes announced in Lt. Cid's message would occur, "and thus knowing that the City believed it had the right to make these changes," the Association ratified the 2017-2020 MOU. According to the City,

because both the 2014-2017 and successor MOUs contained identical language ostensibly authorizing the City to make the changes alleged in the Complaint, the Association either acquiesced to those changes or, as a practical matter, rendered the issues moot by ratifying the successor MOU.

Under long-standing PERB precedent, a case in controversy becomes moot only when the essential nature of the complaint is lost because of some superseding act or acts of the parties. Merely discontinuing wrongful conduct does not end the underlying controversy; there must be evidence that the party acting wrongfully has lost its power to renew its conduct. Thus, by definition, where respondent asserts that its conduct was lawful, the controversy cannot be moot. (*Amador Valley Joint Union High School District* (1978) PERB Decision No. 74, pp. 5-7.)

Applying this reasoning, PERB has held that a unilateral change allegation is not rendered moot merely because the parties reached agreement on the disputed term or condition of employment in subsequent negotiations. (*County of Riverside* (2010) PERB Decision No. 2132-M, p. 7.) Only when the agreement clearly settles whether the respondent's conduct was unlawful or explicitly waives the charging party's right to pursue the charge will PERB dismiss the allegation as moot. (*Oakland Unified School District* (1980) PERB Decision No. 126, affd. (1981) 120 Cal.App.3d 1007.) Neither of these conditions is met here.

Read together, various provisions of the 2014-2017 MOU authorized the City to make changes to work schedules, and to schedule and reschedule rest breaks and meal periods under certain conditions. However, as already emphasized, the MOU containing the above terms expired "as of midnight on June 30, 2017," and the parties stipulated that they did not execute or enter into any side letter or other agreement extending the MOU or modifying any of the above-quoted provisions. On November 27, 2017, the City adopted a successor MOU which,

except for its term, included substantively identical provisions covering employee schedules, rest breaks, and meal periods.

The MMBA makes any agreement reached by the representatives of a public agency and a recognized employee organization "tentative," until expressly adopted by the agency's governing body. (MMBA, § 3505.1; *City of Clovis* (2009) PERB Decision No. 2074-M, pp. 6-7.) Thus, "the language of an *unratified* tentative agreement may no more waive a statutory right than a unilaterally-imposed term can create a bi-lateral memorandum of understanding." (*Fresno Co. IHSS Public Authority*, *supra*, PERB Decision No. 2418-M, p. 42.) Even assuming the parties could bargain around this provision of the statute (see, e.g., *Santa Clara County Correctional Peace Officers' Assn., Inc. v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1038–1039), the record includes no ground rules, local rules, or other evidence that the parties did so, and, in fact, the parties' stipulated facts indicate that the tentative agreement reached on or about October 3, 2017 would *not* take effect until ratified and adopted.

Although the 2017-2020 MOU indicates that its term runs from July 1, 2017 through June 30, 2020, ARTICLE SEVEN, Section VI.A, expressly acknowledges that this successor MOU "shall not be in force and effect until ratified by a simple majority vote of unit employees who are in classifications represented by the [Association] set forth in this agreement and adopted in the form of a resolution of the City Council." The parties stipulated that these conditions were not met until November 27, 2017, and the MOU includes a copy of the City Council resolution memorializing the City's adoption of the agreement on that date. Thus, neither the 2014-2017 MOU nor its successor was in effect at the time the City changed its policy by the parties.

The 2017-2020 MOU includes no provision which either "clearly settles the issue of whether the [City's] conduct was unlawful or explicitly waives the [Association's] right to pursue the [present] charge." In fact, the present controversy is nowhere mentioned in the 2017-2020 MOU. Additionally, the City continues to assert that its conduct was lawful, while the Association has not waived its right to pursue the present dispute. By definition, the dispute cannot be moot because the City claims authority to repeat the conduct at issue. Accordingly, whether framed as waiver by inaction/acquiescence or mootness, the City's argument the Complaint's unilateral change allegations are precluded by the parties' successor MOU fails.

Having asserted no other viable defenses to the allegations that the City altered its past practice regarding a half-hour, paid meal period, I find and conclude that the City violated its duty to meet and confer by reaching a firm decision to change policy, and then implementing changes to non-sworn employees' work schedules, rest breaks, and meal periods, as alleged in paragraphs 9-12 of the Complaint.

The City's Conduct Also Interfered with Protected Employee and Organizational Rights

The Complaint alleges that, by unilaterally changing non-sworn employees' work schedules, meal periods, and rest breaks, the City also interfered with employee rights and denied the Association its right to represent unit members in violation of the MMBA and PERB Regulations. The Association has not separately discussed these allegations in its brief, and the City argues that, because it satisfied its obligation to provide 21-day notice under the expired MOU, it cannot be found to have interfered with protected rights.

PERB precedent holds that, absent a valid defense, an employer's unilateral change to working conditions not only harms employee rights, but is "inherently destructive" of such

rights. (*City of Livermore* (2014) PERB Decision No. 2396-M, adopting proposed dec. at pp. 16-17; *County of Riverside* (2013) PERB Decision No. 2307-M, pp. 17-18; *Healdsburg Union Elementary School District* (1994) PERB Decision No. 1033, pp. 15-16; see also *County of Santa Clara*, *supra*, PERB Decision No. 2321-M, pp. 22-23.) As noted above, the MOU is ambiguous on whether the language requiring notice to employees satisfies any separate, *statutory* notice obligation to the Association and, in any event, the City has put on no evidence of bargaining history or other persuasive evidence that this language was intended to survive expiration *and* supersede the Association's statutory right to notice and meaningful opportunity to request bargaining on negotiable matters. Even assuming such was the parties' intent, that would still not excuse the City's unilateral *implementation* of changes to negotiable matters before reaching agreement or an overall deadlock in negotiations. (*County of Orange*, *supra*, PERB Decision No. 2594-M, pp. 14-15; *City of Roseville*, *supra*, PERB Decision No. 2505-M, p. 33; see also *City of San Jose*, *supra*, PERB Decision No. 2341-M, p. 30 [absent agreement, employer may not implement negotiable issues in seriatim].) The City's claim to have satisfied its contractual notice obligation to employees therefore does not address whether it interfered with their right to representation by failing to provide notice to the Association, their designated bargaining representative.

Applying the same logic, I conclude that the City's conduct was no less adverse to the rights of employees. (*County of Sacramento* (2014) PERB Decision No. 2393-M, p. 33; see also *County of Riverside* (2010) PERB Decision No. 2119-M, pp. 20-21, 23; *Marion Hosp. Corp.* (2001) 335 NLRB 1016, 1019, 1023 [announcing unilateral changes to employees independently interferes with employee rights].) Other than its contract-based defenses, which have been rejected with respect to the Complaint's unilateral change allegation, the City has

neither asserted nor argued any other defense to the Complaint's interference allegations. Accordingly, I conclude that its conduct also interfered with the representational rights of employees and the Association, in violation of the MMBA and PERB Regulations, as alleged in the Complaint.[11]

B. Bypassing and Related Interference Allegations

Like the other PERB-administered statutes and the federal law on which it was modeled, the MMBA's scheme for public-sector collective bargaining envisions exclusive representation by majority rule. (MMBA, § 3507.1, subd. (c); *Paulsen v. Local No. 856 of Internat. Brotherhood of Teamsters* (2011) 193 Cal.App.4th 823, 833; *Voters for Responsible Retirement*, *supra*, 8 Cal.4th at pp. 782–784; *Emporium Capwell Co. v. Western Addition Community Organization* (1975) 420 U.S. 50, 62; see also Gov. Code, §§ 3543, subd. (a), 3543.1, subd. (a); *Hartnell Community College District* (2015) PERB Decision No. 2452, p. 34.) The public employer's duty to meet and confer thus also exacts a "negative duty to treat with no other." (*Hanford Joint Union High School District Board of Trustees* (1978) PERB Decision No. 58, p. 7, citing *Medo Photo Supply Corp. v. NLRB* (1944) 321 U.S. 678, 684; see also *City of Sacramento*, *supra*, PERB Decision No. 2351-M, p. 41, fn. 18; *Redwoods Community College District* (1987) PERB Decision No. 650, adopting proposed decision at pp. 50-51; *Cascade Employers Assn., Inc.* (1960) 126 NLRB 1014, 1028.) A public employer violates its duty to meet and confer in good faith when it bypasses the exclusive representative and deals directly with employees over negotiable matters to create a new policy of general application, or to obtain a waiver or modification of existing policies. (*City of San Diego*

[11] Specifically, the City interfered with employee rights in violation of MMBA sections 3506, and 3506.5, subdivision (a), and PERB Regulation 32503, subdivision (a), and denied the Association its right to represent employees in violation of MMBA sections 3503, and 3506.5, subdivision (b), and PERB Regulation 32603, subdivision (b).

(Office of the City Attorney) (2010) PERB Decision No. 2103-M, p. 7, disapproved on other grounds by *City of Sacramento*, *supra*, PERB Decision No. 2351-M, p. 27; *Clovis Unified School District* (2002) PERB Decision No. 1504, p. 23.)

In this context, the term "dealing with" and its various conjugates encompass conduct much broader than actual negotiations or the formal exchange of proposals and counterproposals. (*Omnitrans* (2010) PERB Decision No. 2143-M, p. 5-6; *Lake Elsinore School District* (1986) PERB Decision No. 563, p. 4; *Electromation, Inc. v. NLRB* (7th Cir. 1994) 35 F.3d 1148, 1161; *Allied-Signal, Inc.* (1992) 307 NLRB 752, 753; *NLRB v. Cabot Carbon Co.* (1959) 360 U.S. 203, 210–213.) Direct dealing may involve adjusting employee grievances without notice to the exclusive representative, soliciting employee sentiment on the union's bargaining position, establishing or using employee committees as a bilateral mechanism for changing working conditions, or any other direct communications with employees giving the impression of a quid pro quo offer that is not before the union. (*Petaluma*, *supra*, PERB Decision No. 2485, p. 32; *Omnitrans*, *supra*, PERB Decision No. 2143-M, p. 5-6; *California State University* (1989) PERB Decision No. 777-H, pp. 2-4; *Gerawan Farming, Inc. v. Agricultural Labor Relations Bd.* (2018) 23 Cal.App.5th 1129, 1211, review denied (Sept. 12, 2018); *Americare Pine Lodge Nursing and Rehabilitation Center v. NLRB* (4th Cir. 1999) 164 F.3d 867, 875; *Stroehmann Bakeries, Inc. v. NLRB* (2d Cir. 1996) 95 F.3d 218, 221–224; *Van Can Co*. (1991) 304 NLRB 1085, fn. 5.) Such tactics are "inherently divisive," in that they "make negotiations difficult and uncertain" and "subvert the cooperation necessary to sustain a responsible and meaningful union leadership." (*NLRB v. General Elec. Co.* (2d Cir. 1969) 418 F.2d 736, 755, cert. denied, (1970) 397 U.S. 965.) The evil is not in what terms are offered to employees, but "in the offer itself." (*Ibid*.)

Direct dealing is thus characterized by employer communications or other actions whose purpose or effect is to "persuade employees to believe that they can achieve their objectives directly through the employer." (*Americare Pine Lodge v. NLRB*, *supra*, 164 F.3d at p. 875.) The question is whether the content or surrounding circumstances of an employer's communications with employees is likely to undermine or derogate the union's position as the exclusive representative. (*Omnitrans*, *supra*, PERB Decision No. 2143-M, p. 5-6; *Oak Park Unified School District* (1998) PERB Decision No. 1286, adopting dismissal letter at pp. 2-4 (*Oak Park*); *Muroc Unified School District* (1978) PERB Decision No. 80, pp. 20-22 (*Muroc*); *Allied-Signal*, *supra*, 307 NLRB 752, 753.)

However, once a policy has been established by lawful means, an employer may take necessary actions, including consulting with employees, to implement the policy. (*Hilmar Unified School District* (2004) PERB Decision No. 1725, pp. 9-10 (*Hilmar*); *Walnut Valley Unified School District* (1981) PERB Decision No. 160, p. 6 (*Walnut Valley*); cf. *Allied-Signal*, *supra*, 307 NLRB at pp. 753–754.) Additionally, "an employer does not necessarily 'deal with' its employees merely by communicating with them, even if the matters addressed concern working conditions." (*NLRB v. Peninsula General Hosp. Medical Center* (4th Cir. 1994) 36 F.3d 1262, 1271.) An employer is entitled to express its views, arguments, or opinions on employment related matters, provided such expression contains no threat of reprisal or force or promise of benefit. (*County of Riverside*, *supra*, PERB Decision No. 2591-M, p. 8; *City of Oakland* (2014) PERB Decision No. 2387-M, pp. 23-25.) The employer's representatives may speak freely to employees about a wide range of issues, including the status of negotiations, outstanding offers, its bargaining position, the reasons for its position, and objectively supportable, reasonable beliefs concerning future events. (*State of California (Department of*

Personnel Administration) (2009) PERB Decision No. 2078-S, pp. 10-12; *Trustees of the California State University* (2006) PERB Decision No. 1871-H, adopting dismissal letter at pp. 3-4; *Regents of the University of California* (1983) PERB Decision No. 366-H, adopting proposed dec. at pp. 17-18; *NLRB v. Gissel Packing Co.* (1969) 395 U.S. 575, 618–620.)

The Association advances two theories in support of the Complaint's bypassing allegation. First, it argues that Lt. Cid's e-mail message dealt directly with Association-represented employees to create a new policy of general application or to obtain a waiver or modification of existing policies applicable to those employees. Second, it argues that the City's communications with employees included inaccurate information about negotiations whose purpose or reasonably likely effect was to derogate the Association's authority or undermine its position in negotiations. Neither argument is persuasive.

PERB precedent holds that, once a policy has been established by lawful means, an employer may take necessary actions, including consulting with employees, to implement that policy. (*Hilmar*, *supra*, PERB Decision No. 1725, pp. 9-10; *Walnut Valley*, *supra*, PERB Decision No. 160, p. 6; cf. *Allied-Signal*, *supra*, 307 NLRB at pp. 753–754.) As discussed above, the City's policy changes were established through unilateral action and not by lawful means. It is also undisputed that Lt. Cid's message announcing these changes was sent to employees, and not to the Association. Following private-sector precedent, PERB's cases treat an employer's announcement of a change in policy affecting negotiable matter to employees, rather than to their representative, as a *fait accompli* and inconsistent with the employer's duty to meet and confer**.** (*City of Sacramento*, *supra*, PERB Decision No. 2351-M, pp. 33-36) As noted above, such conduct also interferes with employee rights to participate in organizational activities and be represented by the employee organization of their choice. (*Marion Hosp.*, *supra*, 335 NLRB at pp. 1019, 1023.)

However, it does not follow that the City's communications to employees announcing and implementing these changes automatically constituted direct dealing. There is nothing in Lt. Cid's message that expressly or by implication suggests a quid pro quo offer to employees. To the contrary, the message is quite clear that the City has already reached a firm decision, that this decision is not subject to discussion with either the Association or employees, and that it will take effect on the appointed date.

Board law holds that, absent a waiver or other valid justification, an employer may not meet with exclusively-represented employees and seek their agreement to change working hours. (*North Sacramento School District* (1981) PERB Decision No. 193, pp. 9-10). Chief Bixby testified that he met with affected employees to discuss his reasons for making the changes. However, this meeting occurred approximately two or three days *after* implementation and, while the changes themselves were unlawful, there is insufficient evidence about this meeting with employees, including what was discussed, to demonstrate that the Chief solicited employee input or used the meeting as a bilateral mechanism for making *further* changes to terms or conditions of employment. The City's creation of a new policy of general application or modification of existing policies applicable to Association-represented employees is addressed through the unilateral change allegations discussed above. Lacking any evidence that the City *dealt with* employees in any bi-lateral sense, the Association's first theory of direct dealing is rejected.

The second theory advanced by the Association is that, at a critical point in the parties' negotiations, Lt. Cid's message to employees inaccurately characterized a negotiable matter as subject to unilateral employer discretion and thereby undermined the Association's bargaining position or authority in the eyes of the employees it represents. According to the Association,

an employer is obligated to refrain from presenting factually inaccurate information about negotiations, and the City violated this obligation by advising employees that existing schedules with half-hour, paid meal periods were inconsistent with the MOU, when in fact the MOU expressly lists this schedule as applicable for Jailers and further authorizes management to approve alternative meal period arrangements, which the City did in 2007.

Whether an employer's speech is protected or constitutes a proscribed threat or promise is determined by applying an objective rather than a subjective standard. (*California State University*, *supra*, PERB Decision No. 777-H, adopting proposed dec. at p. 8.) Statements made by an employer are to be viewed in their overall context (i.e., in light of surrounding circumstances) to determine if they have a coercive meaning. (*Los Angeles Unified School District* (1988) PERB Decision No. 659, p. 9 and cases cited therein.) PERB also places considerable weight on the accuracy of employer speech. (*City & County of San Francisco*, *supra*, PERB Decision No. 2536-M, pp. 28-29; *Regents of the University of California* (1997) PERB Decision No. 1188-H, p. 23; see also *San Bernardino Public Employees Association (White)* (2018) PERB Decision No. 2572-M, p. 26.) Where employer speech accurately describes events, and does not carry a threat of reprisal or force, or a promise of benefit, the Board will not find the speech unlawful. (*County of Riverside*, *supra*, PERB Decision No. 2119-M, pp. 17-18; *Alhambra City and High School Districts* (1986) PERB Decision No. 560, pp. 17-18; *San Francisco Unified School District* (1983) PERB Decision No. 317, pp. 5-6.) Even where an employer's communications with employees misrepresent or omit material facts or the law, but do not expressly or impliedly convey a threat of reprisal or force or a promise of benefit, PERB has found no unfair practice. (*City of Fresno* (2006) PERB Decision No. 1841-M, adopting partial dismissal, p. 2; *South Bay Union School District* (1990) PERB Decision

No. 815, pp. 11-12, overruled on other grounds by *Sweetwater Union High School District* (2014) PERB Order No. IR-58, pp. 15-16.)

Most of the above PERB decisions consider employer misrepresentations or omissions of material fact as interference, rather than direct dealing, allegations. (See, e.g., *City & County of San Francisco*, *supra*, PERB Decision No. 2536-M, pp. 28-29; *County of Riverside*, *supra*, PERB Decision No. 2119-M, pp. 17-18; *Regents of the University of California*, *supra*, PERB Decision No. 1188-H, p. 23.) However, as noted above, the record in this case includes insufficient evidence to show either that the contents of Lt. Cid's message or the surrounding circumstances conveyed any quid pro quo offer to employees not presented to the Association, and, moreover, the City's act of announcing the changes to employees has already been found to constitute an interference violation. Under the circumstances, I can discern no benefit it attempting to stretch the doctrine of direct dealing beyond recognition to fit this particular fact pattern, even assuming Lt. Cid's message to employees misrepresented either the terms of the expired MOU or the City's bargaining obligation under the MMBA.

Alternatively, PERB has considered employer communications to employees in the context of an overall campaign or strategy to frustrate negotiations or undermine the representative in the eyes of employees. (*Trustees of the California State University*, *supra*, PERB Decision No. 1871-H, adopting warning letter, pp. 2-3; *Oak Park*, *supra*, PERB Decision No. 1286, adopting dismissal letter at pp. 2-4; *Muroc*, *supra*, PERB Decision No. 80, pp. 20-22.) Private-sector precedents similarly hold that "an employer's communication to employees during the course of contract negotiations is not entitled to protection, even though couched in noncoercive language, where it merely serves the tactical purpose of implementing a bargaining table strategy which is itself unlawful." (*Adolph Coors Co.* (1978) 235 NLRB 271, 277, and

federal cases discussed therein.) Although they involve direct communications with employees, such allegations are, essentially, a surface bargaining allegation in which the employer's communications are part of a pattern or practice aimed at frustrating negotiations or undermining the representative's authority. (*Ibid*.; *Oak Park*, *supra*, PERB Decision No. 1286, adopting dismissal letter at pp. 2-4; *Muroc*, *supra*, PERB Decision No. 80, pp. 20-22; *General Electric Company* (1964) 150 NLRB 192, enfd. (2d. Cir. 1969) 418 F.2d 736; see also *City of San Jose*, *supra*, PERB Decision No. 2341-M, p. 19.)

Here, the unilateral change and bypassing allegations were alleged separately in the PERB Complaint and not as part of any pattern or practice by the City aimed at frustrating negotiations or persuading employees to abandon the Association. Nor was any evidence presented of such a pattern or practice or surface bargaining strategy by the City. To the contrary, notwithstanding its unlawful unilateral changes, it concluded a tentative agreement with the Association and then adopted that agreement. Accordingly, the Complaint's bypassing allegation and related interference allegations are dismissed for lack of proof.

REMEDY

The Legislature has vested PERB with broad authority to investigate and remedy unfair practices, including alleged violations of the MMBA, and to take "any action and make any determinations in respect of these charges or alleged violations" as the Board deems necessary to effectuate the policies and purposes of the MMBA. (MMBA, § 3509, subds. (a), (b); Gov. Code, § 3541.3; *Mt. San Antonio Community College Dist. v. Public Employment Relations Bd.* (1989) 210 Cal.App.3d 178, 189-190; *City of Pasadena* (2014) PERB Order No. Ad-406-M, p. 12; see also *Regents of the University of California* (2010) PERB Decision No. 2094-H,

pp. 35-37, superseded by statute on other grounds.)[12] Where a public employer has committed unfair practices, PERB has the power and the duty to declare such actions "void" and to order the employer to cease and desist its unlawful conduct, take such actions as are necessary to "undo" its effects, and make injured parties and any affected employees "whole." (*City of Palo Alto v. Public Employment Relations Bd.* (2016) 5 Cal.App.5th 1271, 1312, 1315, 1319, review denied (Mar. 15, 2017); see also *Modesto City Schools* (1983) PERB Decision No. 291, pp. 67-68; *Santa Monica Community College District* (1979) PERB Decision No. 103, pp. 27-29.)

Under long-standing PERB precedent, 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*, *supra*, PERB Decision No. 291, pp. 67-68), and both PERB and judicial authorities have routinely followed this approach in cases involving unlawful unilateral changes to negotiable matters. (*City of San Diego* (2015) PERB Decision No. 2464-M, pp. 40-42; *California State Employees' Association v. Public Employment Relations Bd*., *supra*, 51 Cal.App.4th at p. 946; *Oakland USD*, *supra*, 120 Cal.App.3d at pp. 1014-1015.) Thus, the customary remedy for a unilateral change is an order to bargain upon request, coupled with restoration of the prior status quo, "which is necessary to enable good faith bargaining under conditions akin to those preceding the unilateral change." (*County of Santa Clara*, *supra*, PERB Decision No. 2321-M, p. 22.) An appropriate remedy would also award back pay or other monetary compensation to make injured parties and affected employees "whole" for any losses suffered as a direct result of the unlawful conduct. (*Ibid.*;

[12] MMBA section 3509, subdivision (b), as amended in 2011 by Senate Bill 857 (Stats.2011, chapter 539, § 1), deprives PERB of authority to award strike-preparation expenses as damages, or to award damages for costs, expenses, or revenue losses incurred during, or as a consequence of, an unlawful strike. Otherwise, however, the broad remedial powers described in *Regents of the University of California*, *supra*, PERB Decision No. 2094-H remain good law.

City of San Diego, *supra*, PERB Decision No. 2464-M, p. 40-42, *City of Pasadena*, *supra*, PERB Order No. Ad-406-M, p. 12.)

As an appropriate remedy, the Association requests that the City be ordered to: (a) cease and desist any unlawful conduct as determined by these proceedings; (b) restore the status quo ante with respect to work schedules, meal periods, and rest breaks for all non-sworn Police Department personnel, (c) compensate affected employees with one hour of back pay for each workday that was extended by one hour as result of the City's unilateral change in policy; and, (d) post notice to employees of the City's unlawful conduct and its willingness to comply with the law.

Having found the City has unilaterally changed policy affecting negotiable matters without a valid defense and also interfered with employee and organizational rights, most of the remedial measures requested by the Association are not controversial. Ordering the respondent to cease and desist its unlawful conduct is a customary, and even ubiquitous, feature of a Board-ordered remedy for unfair practices. (*City of Commerce* (2018) PERB Decision No. 2602-M, p. 17; *City of Selma* (2014) PERB Decision No. 2380-M, p. 26.)

Restoring the parties and affected employees to their respective positions before the unlawful conduct occurred is likewise critical to remedying unilateral change violations, because it prevents the employer from gaining a one-sided and unfair advantage in negotiations and thereby "forcing employees to talk the employer back to terms previously agreed to." (*County of Santa Clara*, *supra*, PERB Decision No. 2321-M, pp. 22-23, citing S*an Mateo County Community College District* (1979) PERB Decision No. 94, pp. 14-17.) As the Board recently observed, restoration of the prior status quo both "affirm[s] the principle of bilateralism in negotiations, which is the 'centerpiece' of the MMBA and other PERB-

administered statutes," and "vindicate[s] the authority of the exclusive representative in the eyes of employees." (*City of San Diego*, *supra*, PERB Decision No. 2464-M, p. 41, citing *Voters for Responsible Retirement*, *supra*, 8 Cal.4th at p. 780; and *Pajaro Valley*, *supra*, PERB Decision No. 51, p. 5.)

Posting physical and electronic notice is also an essential part of the Board's customary remedy in unfair practice cases. (*City of Sacramento*, *supra*, PERB Decision No. 2351-M, pp. 2, 43-46.) Such notice serves to declare the parties' respective rights and obligations and to inform affected employees of their rights under the statute, the resolution of this controversy, and the employer's willingness to comply with the law. (*Id*. at p. 44.) Finding nothing in the record or the parties' briefs to suggest otherwise, I find PERB's standard cease-and-desist order, restoration of the prior status quo, and PERB's customary notice posting requirements are appropriate here.

Less certain is the appropriateness of the Association's request for one hour of back pay for each extended shift worked by a non-sworn employee because of the Police Department's unilateral change in policy. The City argues that the Association's request for back pay is unsupported by the record, punitive, and would result in a windfall to employees, who were already paid for all hours worked. Some of the City's concerns are either misplaced or overstated, as PERB has previously considered and rejected these or similar arguments.

For example, the fact that there is no evidence in the record to demonstrate that any employee incurred financial losses as a direct result of a unilateral change does preclude a back pay award. (*LAUSD*, *supra*, PERB Decision No. 2518, p. 44.) Where liability is established, the fact that the amount of damage may not be susceptible of exact proof or may be uncertain, contingent, or difficult of ascertainment should not bar recovery. (*City of Pasadena*, *supra*,

PERB Order No. Ad-406-M, p. 13; *Pulaski & Middleman, LLC v. Google, Inc*. (9th Cir. 2015) 802 F.3d 979, 989, cert. denied (2016) 136 S.Ct. 2410.) Nor must recovery be denied simply because it is difficult to apportion the degree of fault between the respondent's unfair practices and other causes potentially contributing to any losses suffered by the charging party or affected employees. (*Capistrano*, *supra*, PERB Decision No. 2440, pp. 44-46, 50, fn. 24, 53, 54, citing *Redwoods Community College District* (1983) PERB Decision No. 293, affd. in relevant part (1984) 159 Cal.App.3d 617; *Lake Elsinore Unified School District* (2004) PERB Decision No. 1648, p. 8; see also *California Orange Co. v. Riverside Portland Cement Co*. (1920) 50 Cal.App. 522, 524-529.)

As noted previously, PERB's customary remedy for a unilateral change includes an order to make affected employees "whole," and courts have repeatedly affirmed PERB's authority to order back pay, front pay, and other form of compensation necessary to make injured parties and affected employees "whole" for any out-of-pocket expenses suffered as the result of an employer's unfair practices. (*Bellflower Unified School District* (2017) PERB Decision No. 2544, p. 13, review denied, Court of Appeal, Second District, Division 3, California (Case No. No. B288594, filed December 4, 2018); *Mt. San Antonio Community College Dist. v. Public Employment Relations Bd.*, *supra*, 210 Cal.App.3d at pp. 189-190; *Oakland USD*, *supra*, 120 Cal.App.3d at p. 1015; *Santa Monica Community College District v. Public Employment Relations Bd.* (1980) 112 Cal.App.3d 684, 691–692, affirming PERB remedial order in *Santa Monica CCD*, *supra*, PERB Decision No. 103, at pp. 27-29; see also *NLRB v. J. H. Rutter-Rex Mfg. Co.* (1969) 396 U.S. 258, 263, 265; *Nish Noroian Farms v. Agricultural Labor Relations Bd*. (1984) 35 Cal.3d 726, 743–745; *Rivcom Corp. v. Agricultural Labor Relations Bd*. (1983) 34 Cal.3d 743, 771–772.) Where no specific formula

or exact method of computing such compensation has been specified, such matters can be resolved in compliance proceedings. (*LAUSD*, *supra*, PERB Decision No. 2518, p. 44; *City of Pasadena*, *supra*, PERB Order No. Ad-406-M, p. 14; *County of Riverside* (2013) PERB Decision No. 2336-M, p. 16; *Los Angeles Unified School District* (2001) PERB Decision No. 1469, p. 7; *Fresno County Office of Education* (1996) PERB Decision No. 1171, pp. 2, 3-5.) Rather than leaving an employer's unfair practices go unremedied because of some degree of uncertainty as to the measure of back pay, PERB may look to similar circumstances, reasonable approximations and averages, or other means to compute the appropriate amount of back pay for any employees directly affected by an unfair practice. (*City of Pasadena*, *supra*, PERB Order No. Ad-406-M, pp. 26-27; *San Jacinto*, *supra*, PERB Decision No. 1078, pp. 38-39; see also *Leeds & Northrup Co.* (1967) 162 NLRB 987, 989, fn. 2.)

Thus, the fact that some employees may receive compensation for hours not actually worked does not necessarily render a back pay award excessive, punitive, or otherwise improper. For example, in *Holtville*, *supra*, PERB Decision No. 250, PERB ordered a school district to make employees whole after unilaterally implementing compulsory retirement standards, by paying the affected employees at the rate they would have received as year-to-year teachers rather than ordering their reinstatement. (*Id*. at p. 12.) Because PERB's remedies are designed to effectuate public policy, rather than vindicate private rights, they are not necessarily constrained by the rules for awarding monetary judgments in civil litigation. (*City of Pasadena*, *supra*, PERB Order No. Ad-406-M, p. 13; *United Teachers Los Angeles (Raines, et al)* (2016) PERB Decision No. 2475, p. 69, fn. 44; *Sandrini Brothers v. Agricultural Labor Relations Bd*. (1984) 156 Cal.App.3d 878, 883.) Doubts as to the appropriate remedy for unfair practices, including the appropriate measure of back pay, are

therefore resolved against the respondent whose unlawful conduct made such uncertainty possible. (*City of Sacramento*, *supra*, PERB Decision No. 2351-M, p. 48, citing *State of California (Department of Transportation)* (1983) PERB Decision No. 304-S.)

The City is correct that PERB has no authority to award back pay as punitive damages. (*Regents of the University of California*, *supra*, PERB Decision No. 2094-H, pp. 35-37; *State of California (Secretary of State)* (1990) PERB Decision No. 812-S, p. 11.) However, in addition to reimbursing employees for losses incurred as the result of an unfair practice, Board-ordered remedies may appropriately serve deterrent and restitutionary functions. (*Kern Community College District* (1983) PERB Decision No. 337, pp. 16-20l; *Highland Ranch v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 848, 862.) So long as it has some rational basis and is not so excessive as to be punitive, PERB may appropriately order a back pay remedy designed to reduce the employer's financial incentive for shirking its bargaining obligations and ensure that it does not profit from its wrongful conduct. (*City of San Diego*, *supra*, PERB Decision No. 2464-M, pp. 41-42; *Mt. San Antonio Community College Dist. v. Public Employment Relations Bd.*, *supra*, 210 Cal.App.3d at pp. 189-190; *Bertuccio v. Agricultural Labor Relations Bd*. (1988) 202 Cal.App.3d 1369, 1390-1391; *International Union of Electrical, Radio & Machine Workers v, NLRB* (D.C. Cir. 1970) 426 F.2d 1243.)

In light of the above, it is unquestionably appropriate to order that employees be compensated for any additional time worked as a result of an employer's unfair practices. In numerous cases, PERB has reasoned that when, as the result of a unilateral change, employees' worktime increases without a proportionate increase in pay, the employees are effectively being paid less per unit of time worked than their representative bargained for, or less than it might have bargained for, had it been provided notice and opportunity to request bargaining as required

by law. (*Mark Twain Union Elementary School District* (2003) PERB Decision No. 1548, p. 6 (*Mark Twain*), quoting *Oak Grove School District* (1986) PERB Decision No. 582; *City of Pasadena*, *supra*, PERB Order No. Ad-406-M, p. 7.) An appropriate make whole remedy for employees whose hours of work have increased absolutely or whose workload has increased per unit of time as the result of a unilateral change may entail either compensatory time off, back pay, or some combination thereof. (*City of Pasadena*, *supra*, PERB Order No. Ad-406-M, p. 19; *Mark Twain*, *supra*, PERB Decision No. 1548, pp. 6-9; *Corning Union High School District* (1984) PERB Decision No. 399, p. 10.)

However, there is no dispute here that non-sworn employees were both paid for all hours worked, and that they were paid at the same rate they were otherwise entitled to receive under the terms and conditions of the expired MOU. In fact, it was undisputed that any employee who was required to work during the one-hour unpaid meal period was paid overtime at the contractual rate of one and one-half times the employee's regularly hourly rate. Thus, the reasoning of *Mark Twain* and similar cases is inapplicable here.

The Association argues, that, although employees still worked, and were compensated for, the same number of hours per shift, because of the change to a one-hour unpaid meal period, the length of the workday increased from 12 to 13 hours. The harm suffered by employees was thus not an increased amount of work or a reduction in pay per unit of time. Rather, it was a rearrangement of duty-free hours within each shift worked which resulted in an overall lengthening of the workday. The benefit to employees of a shorter workday cannot be denied, even if its compensable value is difficult to specify.

Nevertheless, for every wrong there is a remedy (Civ. Code, § 3523), and where the wrong is an unfair practice within PERB's jurisdiction, a PERB hearing officer has the power

and duty to fashion an appropriate remedy. (MMBA, § 3509, subds. (a), (b); Gov. Code, § 3541.3; *City of San Diego*, *supra*, PERB Decision No. 2464-M, pp. 39-42; *State of California (Department of Corrections & Rehabilitation)* (2012) PERB Decision No. 2282-S, p. 15.) While the appropriate measure of damages may be too speculative or uncertain in the current posture of this case, that fact should not preclude any remedy for the City's unfair practices. In the most literal sense, the statutorily-enumerated subject of "hours" refers "to the question of when employees will work and when they will not" (*Davis Joint Unified School District* (1984) PERB Decision No. 393, p. 27), and PERB has long regarded the amount or distribution of duty-free time within the workday as a negotiable matter, particularly where it affects the start or end time for work, or the overall length of the workday. (*San Jacinto*, *supra*, PERB Decision No. 1078, p. 19-20, 22; see also *City of Vallejo*, *supra*, 12 Cal.3d 608, 617–618.)

Accordingly, the City shall, upon the Association's request, promptly meet and confer over any harm suffered by current and former Association-represented employees resulting from the City's unilateral change in policy regarding work schedules, rest breaks, and meal periods, and over the appropriate measure of back pay or other compensation, if any, to be paid by the City for such harm. Any back pay or other monetary award shall be compounded by interest at the rate of seven (7) percent per annum. Any disputes over this order shall be submitted to PERB's Office of the General Counsel for resolution in accordance with PERB Regulation 32980.

PROPOSED ORDER

Based upon the foregoing findings of facts, conclusions of law, and the entire record in this case, I find and conclude that the City of Culver City (City) violated the Meyers-Milias-

Brown Act (MMBA), Government Code sections 3505, and 3506.5, subdivision (c), and committed an unfair practice under Government Code section 3509, subdivision (b), and PERB Regulation 32603, subdivision (c), by failing and refusing to meet and confer with the Culver City Employees Association (Association) before changing its established policy regarding the work schedules, rest breaks, and meal periods of non-sworn employees in the City's Police Department. By the same conduct, the City has been found to have interfered with the rights of non-sworn Police Department employees to be represented by their designated representative, the Association, in violation of the MMBA, Government Code sections 3506 and 3506.5, subdivision (a), and 3509, subdivision (b), and PERB Regulation 32603, subdivision (a); and to have denied the Association its right represent unit members in violation of the MMBA, Government Code sections 3503, 3506.5, subdivision (b), and 3509, subdivision (b), and PERB Regulation 32603, subdivision (b).

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

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and confer in good faith with the Association concerning employees' work schedules, rest breaks, and meal periods;

2. Interfering with the rights of employees to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations, including the right to be represented by the Association; and,

3. Denying the Association the right guaranteed by the MMBA to represent its unit members.

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

1. At the Association's request, restore the prior status quo by reinstating the policy in effect in City's Police Department from approximately 2007 until November 2017 of permitting non-sworn employees to combine their 15-minute, paid rest breaks in lieu of a one-hour unpaid meal period and adjusting the start and end times of employees' shifts accordingly;

2. At the Association's request, meet and confer in good faith with the Association regarding any harm suffered by current and former Association-represented employees resulting from the City's unilateral change in policy in November 2017 regarding the work schedules, rest breaks, and meal periods of non-sworn employees in the City's Police Department, and over the appropriate measure or amount of back pay or other compensation, if any, to be paid by the City to make current or former non-sworn employees of the City's Police Department whole for such harm. Any back pay or other monetary award shall be compounded by interest at the rate of seven (7) percent per annum.

3. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to non-sworn employees in the City's Police Department are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the City, 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 the City to communicate with non-sworn employees in the City's Police Department.

Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

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

All other allegations in the PERB Complaint and underlying unfair practice charge in Case No. LA-CE-1247 are DISMISSED.

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) 327-9425
E-FILE: PERBe-file.Appeals@perb.ca.gov

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd.

(a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)