STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA PUBLIC, PROFESSIONAL AND MEDICAL EMPLOYEES, TEAMSTERS LOCAL 911, Charging Party, v. CITY OF SAN DIEGO, Respondent.	Case No. LA-CE-1229-M PERB Decision No. 2747-M October 6, 2020

Appearances: Gilbert & Sackman by Joshua Adams, Attorney, and Neil M. Sholander, Attorney/Business Representative, for California Public, Professional and Medical Employees, Teamsters Local 911; Office of the City Attorney by Joan F. Dawson, Deputy City Attorney, for City of San Diego.

Before Banks, Shiners, and Krantz, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) for a decision based upon the evidentiary record from a hearing before an administrative law judge (ALJ). California Public, Professional and Medical Employees, Teamsters Local 911 (Teamsters or Union) filed the underlying unfair practice charge against the City of San Diego (City), alleging that the City violated the Meyers-Milias-Brown Act (MMBA) and PERB Regulations.[1]

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

The parties initially had a dispute under their Memorandum of Understanding (MOU). When the City changed a longstanding policy governing the routing of emergency service calls, the Union filed a grievance, held a press conference, and petitioned the City Council to reverse the change. The parties then negotiated a grievance settlement requiring the Union to withdraw its grievance, the City to rescind its policy change, and both parties to negotiate about the policy. The Union alleges that, in the wake of executing the grievance settlement, the City violated the MMBA in several respects. Specifically, the operative amended complaint in this matter alleges that the City: (1) bargained in bad faith while engaging in negotiations required under the grievance settlement; (2) retaliated against the Union and employees it represents for their protected activities; and (3) sent three e-mails that constituted unlawful interference with MMBA rights. The City denies each of these claims.

We have reviewed the entire administrative record and considered the parties' arguments in light of applicable law. For the reasons explained below, we find that the Union established that two of the three challenged e-mails interfered with protected rights, but the Union established neither its bad faith bargaining claim nor its retaliation claims.

PROCEDURAL HISTORY

The Union filed the underlying charge on September 11, 2017. The City responded on November 22, 2017, and PERB's Office of the General Counsel issued a complaint against the City on May 8, 2018. The City answered the complaint on

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

May 23, 2018. In its answer, the City denied the material allegations and raised multiple affirmative defenses.

After unsuccessful efforts to settle the case, the parties participated in an evidentiary hearing on August 28-30, 2019, and January 22-24, 2020. On the first day of hearing, prior to its case-in-chief, the Union provided notice that it intended to move to amend the complaint. On September 16, 2019, the Union filed a motion to amend the complaint and a proposed amended complaint. The City responded on September 26, 2019. The ALJ granted the Union's motion and issued an amended complaint on January 13, 2020.[2] The City answered the amended complaint on January 21, 2020.

The parties filed opening post-hearing briefs in April 2020 and reply briefs the following month. At that time, the record was closed. On May 20, 2020, the Board directed that the record and the parties' post-hearing briefs be submitted to the Board itself for decision pursuant to PERB Regulation 32215.

FACTUAL FINDINGS

The City is a "public agency" within the meaning of MMBA section 3501, subdivision (c) and PERB Regulation 32016, subdivision (a). The Union is an "employee organization" within the meaning of MMBA section 3501, subdivision (a) and an "exclusive representative" within the meaning of PERB Regulation 32016, subdivision (b). The Union represents City employees in five classifications, split

[2] The amended complaint added the interference claims based on three e-mails the Union discovered in the preceding six months before moving to amend the complaint. The amended complaint also added two new protected activities with respect to the retaliation claim.

between two bargaining units: lifeguards at three different levels in the Lifeguard Unit, as well as lifeguard sergeants and marine safety lieutenants in the Supervisory Lifeguard Unit. At all material times, the Union and the City were parties to a single MOU covering both units, which was in effect from July 1, 2016 to June 30, 2020. For convenience, we refer to employees in all five represented classifications as "lifeguards," and we refer to the two units together as "the bargaining unit."

All City lifeguards work for the Lifeguard Division in the City's Fire-Rescue Department (Department). The Department also employs firefighters and paramedics, among others. In addition to their work on the beach and in the ocean, lifeguards perform rescues on the cliffs of San Diego, and they perform inland water rescues in lakes, rivers, and elsewhere during flood conditions.

Brian Fennessy was the City's Fire Chief from November 2015 through his retirement in April 2018. During Fennessy's tenure, Rick Wurts was the City's Lifeguard Chief and head of the Lifeguard Division. Wurts reported to Fennessy and Assistant Fire Chief Christopher Webber.

I. The City's Policy for Routing Rescue Calls Prior to December 15, 2016

The City's Police Department receives all emergency 911 calls. Prior to December 15, 2016, police dispatchers would transfer certain emergency calls to one of two Fire-Rescue Department dispatch centers, depending on the nature of the emergency and the personnel who should respond. Specifically, police dispatchers would transfer calls to the Emergency Command and Data Center (ECDC)[3] to

[3] ECDC is also referred to as "Fire Department Dispatch," the "Fire Command Center," or the "Fire-Metro Communications Center."

dispatch firefighters and paramedics, or the Lifeguard Communications Center (LCC) to dispatch lifeguards. Police dispatchers were also required to conference ECDC dispatchers into any call transferred to the LCC.

Although the LCC and ECDC are both housed under the Department's auspices, the two communications centers use different computer systems and different methods to locate 911 callers. Of the two communication centers, ECDC has the larger dispatcher staff and can handle a higher call volume. ECDC uses a computer-aided dispatch (CAD) system, while LCC dispatchers do not use CAD. LCC dispatchers, however, are specially trained to respond to calls requiring water rescues; thus, they know the geography and topography of areas lacking street signs, such as cliffs, the beach, inland lakes and rivers, and the ocean.

II. The City's 2016 Change to its Dispatch Policy and The Union's Response

On December 15, 2016, the City changed its dispatch policy. The new policy required police dispatchers to route inland water rescue calls to ECDC in the first instance. Fennessy announced the policy change in a memorandum and standard operating procedure (SOP) entitled: "Dispatch SOP for Inland Water Rescue" (the "2016 Dispatch Policy"). It stated:

> "The Fire-Rescue Department is implementing changes to dispatching protocols for Inland Water Rescues. Beginning December 15, 2016[,] San Diego Police dispatch will route all 911 calls for inland water rescue to the [ECDC]. The attached SOP outlines roles and responsibilities for ECDC and the [LCC]. Please review the SOP wi[th] all lifeguard dispatchers."

The 2016 Dispatch Policy similarly provided: "Inland water rescue emergency requests, received via any source, shall be triaged and assigned by ECDC

dispatchers," and that the LCC "shall be conferenced into the call to interrogate the [Reporting Party] to decide a Lifeguard level of response.[4]

Prior to this change, LCC received most of its calls directly from police dispatch. After the change, inland water rescue calls that LCC previously had received directly from police dispatchers were now routed through ECDC. The Department thus converted LCC from a secondary dispatch to a tertiary dispatch for inland water rescue calls. The change did not apply to calls involving ocean rescues, nor to other rescues occurring outside of inland waters.

Operating under the new dispatch policy, ECDC dispatchers began to send firefighters as the primary responders to certain calls, though in the past lifeguards had been the primary responders. The Union perceived this as a loss of work. The Union also believed the new policy delayed inland water rescue calls by two to three minutes and even delayed ocean rescue calls because ECDC dispatchers were improperly trained or otherwise unprepared to distinguish how to handle different types of calls.

[4] Fennessy explained that a January 2016 rainstorm and attendant flooding persuaded him to make the policy change. Fennessy believed that the volume of calls had overwhelmed LCC dispatchers, and that as a result, lifeguards failed to answer dozens of calls that police dispatchers routed to LCC. When LCC failed to answer several attempted calls, police dispatchers re-routed them to ECDC. Moreover, the volume of calls outstripped the number of lifeguards available to respond. Fennessy concluded that routing emergency calls to the LCC in the first instance had slowed the City's response time. The Department commissioned Citygate, a consulting firm, to study the Lifeguard Division's dispatch and operations. After Citygate completed its study, Fennessy issued the 2016 Dispatch Policy.

The Union filed a grievance on January 2, 2017. The grievance alleged that the 2016 Dispatch Policy and a December 22, 2016 memorandum to Communications personnel violated the parties' MOU, including provisions regarding preservation of lifeguard work, primary responsibility for responding to rescue requests, and routing of inland water rescue requests.

The Union also protested the policy change in a January 23, 2017 letter to City Councilmembers and a February 15, 2017 letter to Fennessy, claiming that the new policy delayed emergency response and that lack of notice to and training of ECDC dispatchers caused confusion, engendering further delays. On March 14, 2017, the Union held a press conference. At the press conference, the Union claimed that the 2016 Dispatch Policy had contributed to a young child drowning in the City's Model Boat Basin, a small, shallow body of water in Mission Bay Park, where remote control boats are floated. Chief Steward Ed Harris was the main Teamsters spokesperson at the press conference.

Soon afterward, the City held its own press conference to present its view of the Model Boat Basin tragedy. Fire Chief Fennessy and Police Captain Jerry Hara spoke at the press conference, and other members of Fire-Rescue Department management attended, together with representatives of other City employee unions. In e-mail correspondence with the fire chief of another city, Fennessy called the information conveyed in the Union's press conference "patently inaccurate," and described Harris as a "real nut job" based on his presentation at the press conference. At a morning briefing for lifeguards sometime after the Union's press conference, Wurts told those assembled, including Marine Safety Lieutenant John Sandmeyer, that the Union's

performance at the press conference displeased Department management and each lifeguard participant would be held accountable.

On March 16, 2017, Sandmeyer e-mailed other lifeguards from his personal e-mail account. Sandmeyer, who wrote to a list the Union had compiled for internal communications, used the subject heading "Lifeguard Union Fail." Sandmeyer drafted the e-mail in reaction to what he considered "an example of the Union leading a poor high-profile press conference that . . . just sort of sullied our reputation." Sandmeyer opened his e-mail by stating "Teamsters 911 let down San Diego Lifeguards in a huge way" and taking aim at Harris for "manipulating the facts and context to serve half-truths." Sandmeyer then forwarded his e-mail to Wurts, who responded with an e-mail stating: "Thanks John. Very powerful! Thank you for your leadership. This Division needs the wisdom and direction of people like you." Sandmeyer later promoted to captain, a rank outside of the bargaining unit.

III. The Parties' Grievance Settlement

On June 12, 2017, the City and the Union executed a settlement agreement requiring the Union to dismiss the 2016 Dispatch Policy grievance. In exchange, the Department agreed to rescind its December 15 and 22, 2016 memoranda and restore the status quo that existed prior to December 15, 2016, by ordering that Police Department dispatchers send all inland water rescue calls directly to LCC. Moreover, the parties agreed to "meet and confer in accordance with the MMBA on the mandatory subjects of bargaining, related to the following subjects: (a) Dispatch

procedure for inland water rescues; (b) Record keeping and medical procedures for medical aides; [and] (c) Computer aided dispatch and related electronic devices."[5]

Assistant Fire Chief Webber testified that pursuant to the settlement agreement, the City "revert[ed] back to the old policy" "by written direction to the Police Department Command personnel." According to Webber, management addressed this rescission in an ECDC dispatch meeting; Webber further testified that he "was told" that the same information was communicated to Police Department dispatchers. A June 2017 memorandum from Hara to Police Department Communications personnel appears to show the City's reversion to its old policy. Although both parties introduced the Hara memorandum with no objection, the memorandum bears a "draft" watermark. The record does not contain a final version of the memorandum. While the "draft" designation creates some uncertainty, Chester Mordasini, the Union's signatory to the settlement agreement, testified that he received a copy of the memorandum that did not bear the "draft" watermark, and he believed that "the memo was sent." Mordasini and Lifeguard Dispatcher Brian Zeller testified that although the City rescinded its 2016 Dispatch Policy, subsequent practice was inconsistent. Overall, the weight of the evidence leads us to find that the City rescinded its 2016 Dispatch Policy, though individual police dispatchers may have erred at times, perhaps due to confusion resulting from the City's policy reversals.

[5] The parties agreed, however, that at the completion of their meet and confer process, the 2016 Dispatch Policy would apply during "water alert three" conditions, although lifeguard dispatchers would be assigned to ECDC during those periods. Such conditions occur during heavy rains with the potential risk of flooding.

IV. The Parties' Negotiations Pursuant to Their Grievance Settlement

In accordance with the grievance settlement agreement, the parties met on several occasions between August and December of 2017 to negotiate over the inland water rescue dispatch procedure. On August 8, 2017, in advance of the parties' first meeting on August 15, the City sent its opening proposal to the Union.

At the August 15 bargaining session, Mordasini stated that the City's proposal was "unacceptable," as the key provision regarding the routing of inland water rescue requests was identical to the rescinded 2016 Dispatch Policy. Specifically, section C.1 of both the rescinded policy and the City's opening proposal to the Union stated: "Inland Water Rescue emergency requests received via any source shall be triaged and assigned by ECDC dispatchers." The City did not explain how its opening proposal differed, if at all, from the rescinded 2016 Dispatch Policy. Instead, the City's chief negotiator, Tim Davis, explained the City's perspective as to why its approach made sense, generally repeating its earlier arguments in favor of consolidating emergency dispatching in the better-resourced ECDC. Davis, however, acknowledged the Union viewed the proposal as an attempt to take lifeguard work. Davis solicited a counter-proposal from the Union and suggested that the parties should convene a "study session" with lifeguard dispatchers and other "experts." The parties discussed having a subcommittee develop a proposal.

On September 6, 2017, the Union sent a letter to the City Attorney protesting the City's "re-proposing" the terms in the rescinded policy. The Union's letter asserted that the City had provided "no rational argument" supporting the proposal. On September 11, 2017, the Union filed the instant charge.

The parties continued bargaining on September 19, 2017. Among other topics, the parties discussed the Model Boat Basin drowning. The parties met again on October 25, 2017 and discussed concepts for addressing the inland water rescue dispatch procedure and Union concerns regarding the working committee established for such purpose. The chief negotiators exchanged e-mail correspondence on October 26 and 27, 2017, memorializing both parties' belief that they were making progress on the inland water rescue policy issues and both parties' commitment to exchange further comprehensive proposals on the subject.

The City provided its next proposal on November 15, 2017, and the Union countered on December 6, 2017. After this exchange of proposals, the parties met for their fourth and final bargaining session on December 8, 2017. The parties' proposals represented their divergent approaches to addressing the issue; the City was narrowly focused on addressing the dispatch procedure while the Union was focused on addressing emergency response staffing more globally. Davis explained that the City did not agree to the Union's counter-proposal because, among other reasons, it attempted to reduce the number of firefighter resources dispatched to a rescue. Mordasini asked Davis to "get back to us."

In an e-mail dated February 22, 2018, the City rejected the Union's December 6, 2017 inland water rescue dispatch proposal because the City felt that it restricted the level of personnel and equipment the City could use to respond to a call and that these matters went beyond the scope of the negotiations the parties envisioned in their settlement agreement. Nevertheless, the City proposed reaching "an interim agreement that allows Alerts 3s and 4s [involving severe weather] to be

done consistent with Local 911's proposal . . . [which] would include having lifeguard dispatchers working out of the Emergency Command and Data Center during these advanced Alerts." If the parties could reach such an agreement, the City said, it would consider the grievance settlement negotiations complete without further policy changes at that time. The City concluded by stating that it was in the process of drafting a plan "to improve integration between the Lifeguard Division and the Fire Department," and would meet and confer over negotiable subjects in connection with successor MOU negotiations.

By e-mail dated March 2, 2018, the Union declined the City's suggestion that it enter into an agreement regarding the advanced Alerts, indicated its "willingness to develop a comprehensive policy that includes dispatch and operations," and requested to meet and confer regarding various other, unrelated matters. The Union did not request further bargaining on the inland water rescue dispatch policy, and neither party declared impasse.[6] The City thereafter maintained the same dispatch policy it had followed prior to December 15, 2016, and did not attempt to re-implement the 2016 Dispatch Policy.

V. The City's Swiftwater Rescue Team

The State of California Office of Emergency Services (CalOES) sponsors 13 Swiftwater/Flood Water Rescue Teams (SWR Teams), including a City team (the City SWR Team). During an emergency, other states' governors can request assistance

[6] The parties reached agreement on the other negotiable matters set out in the grievance settlement.

from California teams through an Emergency Management Assistance Compact. The requesting state pays for personnel deployed in this manner.

In an earlier iteration, the City staffed its SWR Team entirely by firefighters. Over time, the City added lifeguards to its SWR Team due to their expertise with water operations, and because the Department had trouble staffing it with qualified firefighters. When deployed, an SWR Team generally includes 14 members.[7] By 2017, the City SWR Team included 11 lifeguard specialists who performed rescues in the water and three firefighters who provided management or support roles, including a task force leader, a medic, and a communications specialist. Firefighters filled the three management or support roles because no lifeguards had the state-required certifications.

The City has no written policies setting the number of lifeguards to serve on its SWR Team, and the MOU also does not address SWR Team composition. As early as 2012, Fennessy and Webber were involved in discussions to change the SWR Team composition. In February 2017, City Battalion Chief David Gerboth became SWR Team program manager and assumed administrative responsibility for the Team. Within the month, Fennessy told Gerboth that he wanted to change the composition of the City's team. Fennessy specifically asked him to investigate changing the composition so that it included half firefighters and half lifeguards. Pursuant to Fennessy's direction, Gerboth determined that most CalOES SWR Teams included no

[7] The CalOES deployment order specifies the team type, which determines the number of members on the team. "Type-1 Teams" have 14 members.

lifeguards, and on the one SWR team he found that did include lifeguards, they made up less than half the team.

The City SWR Team is a specialty team. No individual City lifeguard is required to serve on the team; rather, serving on the team is a volunteer, prestigious assignment available to lifeguards who have certain skills and who complete additional training beyond that generally required of a City lifeguard. Pursuant to a City Council resolution, City employees deployed as part of the City SWR Team, including those represented by the Union, are paid "portal-to-portal" for their time, providing an opportunity for compensation exceeding their regular pay. Lifeguards are paid for this special service only if they deploy.

In 2017, Sandmeyer served as Team Manager for the City SWR Team.[8] Gerboth delegated to Sandmeyer responsibility to maintain the Lifeguard Division's operational readiness for SWR Team deployments. Sandmeyer prepared, or supervised preparation of, team member rosters, assigning members to either a red or blue team, signifying that they were on-call to be deployed in alternate months.

Since 2007, the City SWR Team has only deployed on one occasion, to assist with the response to flooding in Riverside County in 2011 or 2012.[9] Although the City SWR Team has not deployed since the Riverside County flooding, the City prepared to deploy a type-1 SWR Team consisting of 14 members to Butte County in February

[8] The Team Manager is the ranking lifeguard deployed on a water rescue operation.

[9] The team deployed to Riverside County was not a type-1 Team. As a result, it had fewer than 14 members.

2017 in response to the threatened collapse of the Oroville Dam. That team was never deployed.

Certain City personnel—but not lifeguards—also participate in an entirely different rescue team known as California Task Force 8, which is an urban search and rescue (USAR) task force sponsored by the Federal Emergency Management Agency (FEMA). FEMA sponsors 28 USAR task forces across the country within the "National Urban Search and Rescue Response System." FEMA is responsible for funding the USARs' equipment and personnel costs (which may be supplemented by local agencies) and for ensuring the task forces' operational readiness status. California Task Force 8 is a FEMA USAR task force composed of City employees as well as employees from other emergency response agencies in Southern California. The approximately 210 members of Task Force 8 include firefighters, canines and their handlers, building engineers, and doctors. No FEMA USAR task force includes lifeguards.

VI. Hurricane Harvey Emergency Response

In August 2017, Hurricane Harvey hit Texas, and in statements to the media, that state's governor made a broad request for help to respond to flooding and other emergency conditions. FEMA issued an activation order effective August 26, 2017, deploying California Task Force 8 to assist with Hurricane Harvey search and rescue efforts. Although about half of the deploying personnel were City employees, there are

no lifeguards on Task Force 8. For this assignment, Task Force 8 used some state-owned equipment that the City's Lifeguard Division housed and maintained.[10]

Sandmeyer participated in daily conference calls with the California OES office regarding whether SWR Teams would be assigned to work in Texas, and from those conversations Sandmeyer understood that the City SWR Team "was potentially in the rotation to go to Texas for this hurricane." Sandmeyer communicated this information to Wurts, Webber, and Gerboth, as well as to the City SWR Team members. Based on Sandmeyer's understanding that the City SWR Team was on "stand by" to deploy to Texas, and pursuant to what he understood to be Gerboth's authorization, Sandmeyer directed the City SWR Team of 11 lifeguards and three firefighters to pack their gear and prepare to leave for Texas. Ultimately, however, the City SWR Team did not assist in the Hurricane Harvey recovery because the Texas governor never requested such assistance.

On August 27, 2017, the day after Task Force 8 deployed to Texas, Sandmeyer sent an e-mail at 10:44 a.m. to State fire chiefs and other CalOES officials. In this e-mail, Sandmeyer noted that even though Task Force 8 had deployed, there were no lifeguards on that team, and the City SWR Team, comprised of 11 lifeguards plus three firefighters, had the resources and personnel to field an additional search and rescue team. Moreover, even though Task Force 8 was using equipment maintained

[10] CalOES can authorize a FEMA USAR team to use CalOES equipment. In this case, Gerboth directed Sandmeyer to have members of the Lifeguard Division prepare and deliver rescue boats and other supplies to the USAR cache. The Lifeguard Division housed and maintained much of this equipment due to space constraints at the USAR cache.

by the Lifeguard Division, the City SWR Team had enough equipment in reserve to staff an additional response team. Fennessy was not copied on Sandmeyer's e-mail and was embarrassed to learn about it when Kim Zagaris, the CalOES Fire and Rescue Chief, forwarded it to him at 12:10 p.m. that same day. Zagaris wanted Sandmeyer and Fennessy to know that it was best if such communications went "through the chain of command within San Diego City Fire/Rescue."

Six minutes later, at 12:16 p.m., Fennessy responded to Zagaris, first stating that he would address the matter with Sandmeyer, and then stating that the City SWR Team, if requested, "will be 50/50 mix of firefighters and lifeguards. If Lifeguard Labor organization challenges, we may need to consider dropping lifeguards from the team."

Soon thereafter, at 12:34 p.m., Fennessy e-mailed Webber as follows:

> "John [Sandmeyer] didn't copy anyone from [San Diego City Fire Department] on the email . . . he had to have known that he may have been counseled not to send direct. It's as if he reached out like they are a separate agency. As you know, the flow is from CalOES Fire & Rescue Chief to the Fire Chief of the teams that equipment has been assigned.
>
> "I know we considered waiting, but Wurts and Sandmeyer need to know now that any future CalOES request for the SWR Team will be a mix of firefighters and lifeguards. If this is unacceptable, then the lifeguards will be removed from our CalOES SWR roster.
>
> "Within the City, we will comply with the intent of the MOU when responding to SWR. However, for State or FEMA taskings, we will operate consistent with all other agencies that have been provided equipment by FEMA and CalOES. If we want to include Lifeguards on the CalOES SWR team, I'm okay with it, but no more than 50%.

> "[¶] . . . [¶]
>
> "Better meet with Rick and Sandmeyer and get them squared away on how the system works."

A half hour later, at 1:07 p.m., Fennessy e-mailed Davis, the City's labor relations negotiator:

> "I've directed Chief Webber to meet with Wurts and Sandmeyer to explain how the State mutual aid system works and that we want to be inclusive and will continue to allow lifeguards to participate on the CalOES SWR team, but only if the . . . team is a 50/50 mix of firefighters and lifeguards. We had planned this anyway, but need to inform them now before the rainy season begins.
>
> "We will continue to comply with the City/Department agreed upon MOU with L911 concerning SWR within the City. Lifeguards are the 'primary' responders to swiftwater rescue within the City.
>
> "However, if L911 takes issue with including firefighters on the CalOES SWR Team as firefighters were in the past, I will have the lifeguards removed from the CalOES SWR team and it will be staffed by firefighters only."

The next day, Fennessy reiterated to Davis that: "I support [lifeguards] participating on the CalOES SWR team, but the team makeup would be 50/50 and not 100% LGs."

On August 29, 2017, Harris held a press conference to protest what he characterized as Fennessy's blocking the City SWR Team from responding to Hurricane Harvey. At the press conference, Harris distributed an open letter to the Texas governor, and the mayor and citizens of Houston, in which Harris described the City SWR Team's preparedness and desire to assist with the emergency response. In the open letter, Harris also accused Fennessy of blocking SWR team members from even using their own vacation time to assist in the rescue effort.

In response to the Union's press conference, the City issued its own press statement to, as Fennessy put it, clear up "the confusion that surfaced after Ed Harris . . . held a news conference . . . about us not sending the Swiftwater Rescue Team to Texas."

VII. Post-Hurricane Events

On September 6, 2017, Fennessy e-mailed Zagaris regarding future staffing of the City SWR Team. First, Fennessy wrote: "To be clear, staffing 50/50 has been a consideration of mine and staff since last year." Fennessy then wrote:

> "Since all of the media attention and questions following my not approving on duty lifeguard staff to self dispatch/deploy surfaced, I've been asked a lot of questions by other fire chiefs and rescue organizations about our staffing the CalOES SWR San Diego team exclusively with lifeguard staff. Specifically, why would I permit an all lifeguard team to deploy to the type of flood rescue we've seen in Texas and throughout the years in the U.S. when lifeguards do not have all of the training, skills and experience that FEMA and the other 12 CalOES teams expect of another team in this environment.
>
> "I've had to admit to myself that these are good questions. Further, now that I am aware that there is an expectation (and requirement of FEMA) of SWR teams possessing skills beyond those of just meeting the State supported swimming standards, would continuing to staff the CalOES SWR San Diego team exclusively with lifeguards be placing them at risk and perhaps the other flood rescue teams at risk if their assistance was needed? If the assumption by all of the other SWR/Flood Rescue teams are that every team alongside them are trained, skilled and experienced in all of the emergency operations I identified above, am I now knowingly placing my own lifeguards and other teams in harms [sic] way? I believe so.

> "Thus, I have ordered that any future CalOES SWR San Diego team deployments be a 50/50 mix of SND firefighters and lifeguards. While my lifeguards are excellent swimmers, they do not possess all of the other necessary training, skills or experience in the emergency operations I identified above and that FEMA requires. Ensuring that one-half of the team are firefighters I believe mitigates the risk to an acceptable level. In addition, it helps demonstrate within my own organization, that we are truly one SND team.
>
> "Having said all of that, I also recognize that our Lifeguard Union Chief Steward has made such a public case for those he represents self deploying, many fire chiefs and firefighters are calling into question why CalOES would allow SND or any fire department/district to staff any of their teams with lifeguards. Given the above, I understand and respect why the question is being asked."

In approximately early September, Wurts and Sandmeyer met in Wurts' office and discussed Fennessy's decision to reduce lifeguard representation on the City SWR Team. Sandmeyer testified that Wurts "indicated" that Fennessy's decision resulted from the Union's press conference. Sandmeyer further explained that Wurts "insinuated" that misinformation from Union members "had aggravated the chain of command to the point where they were going to reduce the amount of lifeguards on the Team."[11] Wurts testified after Sandmeyer and did not contradict Sandmeyer's account of their discussion.

[11] Sandmeyer's testimony recounting the conversation falls within the party admission exception to hearsay, because he testified regarding statements by Wurts, an agent of the City. (*Bellflower Unified School District* (2014) PERB Decision No. 2385, p. 10)

On September 7, 2017, Sandmeyer e-mailed an internal Union distribution list with the subject heading “Union Fail Part V.” Sandmeyer did so because he “thought the Union had let down the Lifeguard Division.” In his e-mail, Sandmeyer referenced a published letter from Sacramento Fire Chief Walt White, which criticized Harris for comments he made at the August 29 press conference. Sandmeyer further wrote, in reliance on what Wurts had told him, that as a result of the August 29 press conference, “[b]y order of [Fennessy], your represented members have just been reduced in numbers by 40% from the CalOES team.” Sandmeyer forwarded a copy of his e-mail to Wurts, who responded: "That is one of the most well written letters I have ever read. Well done!” Wurts also forwarded Sandmeyer’s e-mail to Fennessy and Webber. Wurts testified that he did so “to make sure that they were aware of what was going on” in the Lifeguard Division.

As of the time of hearing, the City SWR team had not deployed since 2011 or 2012. Nevertheless, the team maintains operational readiness for deployment. To this end, the Lifeguard Division creates SWR team rosters. After August 2017, SWR team rosters included only seven lifeguards rather than eleven. For example, Sandmeyer prepared rosters for possible deployments in October 2018 and spring 2019 with seven lifeguards on each team. Sandmeyer changed the roster composition (decreasing the number of lifeguards rostered from eleven to seven) pursuant to instruction from Wurts in September 2017.

DISCUSSION

I. The Bad Faith Bargaining Allegation

In determining whether a party has violated its duty to meet and confer in good faith, PERB uses a "per se" test or a "totality of the conduct" analysis, depending on the specific conduct involved and its effect on the negotiating process. (*City of Arcadia* (2019) PERB Decision No. 2648-M, p. 34 (*Arcadia*).) Per se violations generally involve conduct that violates statutory rights or procedural bargaining norms. (*Id.* at pp. 34-35.) The totality of conduct test applies to bad faith bargaining allegations that our precedent has not identified as constituting a per se refusal to bargain. (*Id.* at p. 35.) Under this test, the Board looks to the entire course of negotiations, including the parties' conduct at and away from the table, to determine whether the respondent has bargained in good faith. (*Ibid*.) The ultimate question is whether the respondent's conduct, when viewed in its totality, was sufficiently egregious to frustrate negotiations. (*Ibid*.) A single indicator of bad faith, if egregious, can be a sufficient basis for finding that a negotiating party has failed to bargain in good faith. (*City of San Jose* (2013) PERB Decision No. 2341-M, p. 19.)

Pursuant to their June 12, 2017 settlement agreement resolving the 2016 Dispatch Policy grievance, the parties agreed to bargain over inland water rescue dispatch procedures, and related topics. The Union alleges that during the ensuing August-December 2017 negotiations, the City breached its duty to bargain in good faith by: (1) failing to explain its bargaining position adequately; (2) making a predictably unacceptable proposal; (3) failing to return to the status quo which preceded the 2016 Dispatch Policy; and (4) abandoning negotiations.

As to the first alleged bad faith indicator, we find that the City did in fact explain its bargaining proposals adequately.

Given the Union's vocal opposition to the 2016 Dispatch Policy, the Union argues that the City's opening proposal, which was identical, or nearly so, to the 2016 Dispatch Policy, was predictably unacceptable and therefore an indicator of bad faith. "Making proposals that are predictably unacceptable to the other party is a well-established indicium of bad faith bargaining." (*Children of Promise Preparatory Academy* (2018) PERB Decision No. 2558, p. 33.) The City notes that it showed flexibility on the proposal from the outset. The City solicited a counter-proposal, acknowledged the Union's position that the proposal was an incursion into the lifeguards' traditional work jurisdiction, and suggested that subsequent discussions include lifeguard dispatchers and other experts. The parties also discussed that a stakeholder subcommittee could come up with a proposal. The parties met for three additional face-to-face bargaining sessions and exchanged further proposals, with both parties expressing their belief that they were making progress toward a resolution. Ultimately, however, the City rejected the Union's December 6, 2017 proposal, asserting that it restricted the level of personnel and equipment the City could use to respond to a call, and that these matters went beyond the scope of the negotiations the parties envisioned in their settlement agreement. The City instead offered what it believed to be a Union-approved "interim agreement" regarding dispatching in severe weather, and to defer the more contentious dispatching issues to successor MOU negotiations. The Union declined the City's proposal and did not

request further bargaining. We find the City's above-described conduct did not frustrate negotiations.

We next consider the Union's argument that the City never returned to the pre-2016 Dispatch Policy status quo, despite its obligation to do so under the parties' grievance settlement. Such a failure, if proven, would be an indicator of bad faith. (Cf. *County of Kern* (2018) PERB Decision No. 2615-M, p. 11, fn. 8 [restoring the status quo is a necessary condition for meaningful bargaining to occur]; *City of San Ramon* (2018) PERB Decision No. 2571, p. 15 [good faith bargaining is not possible when employer has already "imposed the very terms under discussion, thereby forcing [the union] to start from a position of having to talk the [employer] back to the status quo."]; *City of Palo Alto* (2017) PERB Decision No. 2388a-M, p. 49 [compelling a union to bargain back to the status quo makes impossible the give and take that is the essence of good faith bargaining]; *County of Santa Clara* (2013) PERB Decision No. 2321-M, p. 24 [bargaining "from a hole" is futile, and restoring the status quo is necessary so that "bargaining may proceed on a level playing field."].)

Here, however, multiple City witnesses testified that pursuant to the settlement agreement, the Department reverted to the pre-2016 Dispatch Policy and communicated this directive to Police Department and ECDC dispatchers. In fact, as noted above, Union witnesses corroborated the City witnesses' testimony, while noting some residual confusion or inconsistent practice by dispatchers. Although an employer's inconsistent practice could pose such an obstacle to good faith bargaining that it amounts to an incomplete restoration of the status quo, the Union did not show

such facts here. Rather, as of the time of hearing, there was little dispute that the City had returned to the status quo that existed before the 2016 Dispatch Policy.

Lastly, we evaluate the Union's argument that the City abandoned negotiations in bad faith. If an employer declares impasse without reaching a bona fide impasse after good faith negotiations, but the employer neither changes employment terms nor refuses to continue bargaining, the Board considers that evidence under the totality of conduct test. (*City of San Ramon*, *supra*, PERB Decision No. 2571, p. 7, fn. 9; *County of Riverside* (2014) PERB Decision No. 2360-M, p. 12.) In contrast, if the employer in those circumstances refuses to bargain further or proceeds to change employment terms, that constitutes further evidence of bad faith under the totality test, and it also constitutes a per se violation. (*City of San Ramon*, *supra*, p. 7, fn. 9; *County of Riverside*, *supra*, p. 11.) Here, the City did not take any such steps—it did not even declare impasse. The City rejected the Union's last proposal and offered an alternate one that included features it thought the Union might approve. When that did not lead to progress, the City nonetheless decided to maintain the pre-2016 Dispatch Policy status quo and take up dispatching in the context of broader successor MOU negotiations. The Union did not seek further bargaining over the dispatch issue at that time but rather moved on to other issues. The record therefore does not reflect that the City abandoned negotiations or that its commitment to negotiations was lesser than the Union's commitment.

For these reasons, we dismiss the Union's bad faith bargaining claim.

II. The Retaliation Allegation

To establish a prima facie case of retaliation, the charging party has the burden to prove, by a preponderance of the evidence, that (1) one or more employees engaged in activity protected by a labor relations statute that PERB enforces; (2) the respondent had knowledge of such protected activity; (3) the respondent took adverse action against one or more employees; and (4) the respondent took the adverse action "because of" the protected activity, which PERB interprets to mean that the protected activity was a substantial or motivating cause of the adverse action. (*City and County of San Francisco* (2020) PERB Decision No. 2712-M, p. 15 (*San Francisco*).)

If the charging party meets its burden to establish each of these factors, certain fact patterns nonetheless allow a respondent the opportunity to prove, by a preponderance of the evidence, that it would have taken the exact same action even absent protected activity. (*San Francisco*, *supra*, PERB Decision No. 2712-M, p. 15.) This affirmative defense is most typically available when, even though the charging party has established that protected activity was a substantial or motivating cause of the adverse action, the evidence also reveals a non-discriminatory motivation for the same decision. (*Id.* at pp. 15-16.) In such "mixed motive" or "dual motive" cases, the question becomes whether the adverse action would not have occurred "but for" the protected activity. (*Id*. at p. 16.)

The Union alleges that the City reduced the number of lifeguards on its SWR Team in retaliation for protected activities. The first two elements of the Union's prima facie case are not in serious dispute. There is no question the Union engaged in the four protected activities described in the amended complaint: filing a grievance in

January 2017, holding press conferences in March and August 2017, and issuing a September 2017 letter to the City Attorney protesting the City's "re-proposing" the terms in the rescinded 2016 Dispatch Policy. Nor is there any doubt that the City was aware of these actions. At issue is whether the Union established adverse action, whether one or more of the protected activities noted in the amended complaint were at least a motivating cause for the alleged adverse action, and, if so, whether the City has proven that it would have followed exactly the same course of action even absent those protected activities.

A. Adverse Action

PERB uses an objective test to determine whether an employer's action is adverse. (*San Francisco*, *supra*, PERB Decision No. 2712, p. 19, citing *Chula Vista Elementary School District* (2018) PERB Decision No. 2586, pp. 24-25 (*Chula Vista*).) "The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment." (*San Francisco,* at pp. 19-20, citing *Chula Vista,* at p. 25 (internal citation omitted).) Context is highly relevant in determining whether non-punitive directives are adverse. (*San Diego Unified School District* (2019) PERB Decision No. 2683, p. 9.) Reducing work opportunities constitutes an adverse action. (See, e.g., *El Dorado Union High School District* (1986) Decision No. 564, pp. 21-25 [district engaged in adverse action by declining to offer bus drivers an opportunity to drive on weekend trips and instead arranging travel via Greyhound].)

The City argues that the Union cannot show adverse action because "Chief Fennessy's proposal to modify the team composition has not been formally implemented." It is true that the City SWR Team did not deploy to assist in the Hurricane Harvey response, and at the time of hearing the SWR Team had not deployed since the City's decision to reduce the level of lifeguard staffing on the team. Nonetheless, the evidence establishes that by September 6, 2017, Fennessy had diminished lifeguard representation on future City SWR Teams to 50 percent, or to a maximum of seven members. In his separate August 27, 2017 e-mails to Zagaris, Webber, and Davis, Fennessy made clear that future SWR Team deployments would be staffed by equal numbers of firefighters and lifeguards, consequently decreasing the number of lifeguards on any team. On September 6, 2017, Fennessy sent a further e-mail to Zagaris confirming this fact. In his August 27 e-mail to Webber, Fennessy instructed Webber to meet with Wurts and Sandmeyer to impart this information. Wurts, in turn, told Sandmeyer that lifeguard membership would be reduced on future SWR Teams, as notably recounted in Sandmeyer's September 7, 2017 e-mail. Indeed, even though the City SWR Team has not deployed in recent years, it must maintain its operational readiness, which includes developing rosters of personnel ready to be deployed. All rosters prepared post-September 2017 show a maximum of seven lifeguards on call to be deployed on a given Team; the post-September 2017 rosters differ from the earlier ones which uniformly provide for 11-lifeguard teams.[12]

[12] While an actual or threatened diminution in work opportunities is, standing alone, an adverse action, we also note that SWR service is a prestige assignment and that lifeguards on the City SWR Team are eligible for portal-to-portal pay, a substantial increase in their regular compensation.

We thus find sufficient evidence to conclude that had the City SWR Team deployed after September 2017, it would have consisted of seven firefighters and seven lifeguards.

Even assuming for the sake of argument that the City has not yet implemented Fennessy's directive, PERB precedent provides that a threat of action and carrying out the action are separate adverse acts. (*San Diego Unified School District* (2017) PERB Decision No. 2538, pp. 12-13; *City of Davis* (2016) PERB Decision No. 2494, p. 42; *Regents of the University of California* (2004) PERB Decision No. 1585-H, pp. 7-8.) As noted above, Fennessy instructed Webber to inform Wurts and Sandmeyer about the change, and Wurts did in fact inform Sandmeyer, who was at that point still a bargaining unit employee. Moreover, Sandmeyer relayed the information to other lifeguards in his September 7, 2017 e-mail. Fennessy's threat therefore constitutes an alternate basis for finding that the City has taken adverse action.

B. Nexus and the City's Affirmative Defense

To resolve the Union's retaliation claim, we must consider the City's motivations. In doing so, we keep in mind that even when an employer has a managerial, statutory, or contractual right to take an employment action, its decision to act cannot be based on an unlawful motive, intent, or purpose. (*County of Santa Clara* (2019) PERB Decision No. 2629-M, p. 13; *County of Lassen* (2018) PERB Decision No. 2612-M, p. 6; *Berkeley Unified School District* (2003) PERB Decision No. 1538, pp. 4-5.)

We have weighed every piece of evidence, and every argument, bearing on the alleged discriminatory and non-discriminatory reasons for Fennessy's decision to

reduce the number of lifeguards on the City SWR Team. For the reasons explained below, we find that the Union has established that discriminatory animus was a motivating factor in Fennessy's decision, but the City has proven that it would have taken the same action, at the same time, even absent the Union's protected activities.

As noted above, Fennessy and Webber discussed rebalancing the City SWR Team as early as 2012. Other fire chiefs expressed to Fennessy their concern that the City's lifeguard-heavy team could not provide sufficient backup to SWR Teams trained based on FEMA standards. Fennessy continued the discussions in February 2017, when Gerboth became the City's CalOES program manager and Fennessy tasked him with investigating a 50-50 split between firefighters and lifeguards. Thus, Fennessy had a non-retaliatory business reason to consider modifying the composition of the City SWR Team.

However, Fennessy was only *considering* changing the SWR Team composition—until Sandmeyer's August 27, 2017 e-mail caused him to execute the change.[13] In his August 27 e-mail to Webber, Fennessy acknowledged that he and other managers had not, prior to that day, had a definite or final plan to make the change at any particular time. The record confirms that Fennessy had been holding back on making any contemplated change, as the SWR Team rosters prepared earlier in 2017—in February in preparation for possible deployment to the Oroville Dam and in August in advance of Hurricane Harvey—provided for eleven lifeguards, not seven.

[13] No party has asked us to consider whether Sandmeyer's unauthorized e-mail to Zagaris was protected activity in whole or in part, and we decline to consider the issue sua sponte.

On August 27, 2017, Zagaris forwarded Fennessy a copy of Sandmeyer's unauthorized e-mail advocating for the City SWR Team to be deployed, and just six minutes later Fennessy responded with notification that any such deployment would be half lifeguards and half firefighters—in direct contrast to the prepared roster. Fennessy reiterated the decision in two e-mails that he sent within the same hour, to Webber and Davis. This sequence provides strong evidence that Sandmeyer's unauthorized e-mail to Zagaris was the most significant immediate event leading to Fennessy's decision.

The record also reveals sufficient evidence of retaliatory animus to make this a mixed motive case. First, Fennessy's e-mails show that while he was aggravated over Sandmeyer's unauthorized e-mail to Zagaris, he also harbored anti-union animus, as evidenced by his statement to City labor negotiator Davis that if the Union were to take issue with his decision, he would remove lifeguards from the SWR Team altogether and staff it solely with firefighters.[14]

[14] Prior to the Union's protected activity, management already had in the works a potential plan to alter the SWR Team composition to include half firefighters and half lifeguards, but management had no potential plan in the works to eliminate lifeguards altogether. Fennessy's contemporaneous writings and his testimony leave no doubt that any decision to zero out lifeguards' participation on the SWR Team would be mainly a product of protected activity, and those circumstances underpin our finding that Fennessy's e-mail reflected unlawful animus. Notably, the amended complaint did not allege that Fennessy engaged in unlawful retaliation or interference by threatening to eliminate completely lifeguards' SWR role; any such further composition change, or new statement pertaining to such a change, must be litigated in a subsequent charge. However, as discussed below, as a remedy for the interference claims alleged in the amended complaint, we order the City to cease and desist from linking a decrease in lifeguard work opportunities to protected activity.

Moreover, Sandmeyer testified that during a meeting in Wurts' office, Wurts indicated that management had changed the SWR Team composition because the Union held a high-profile press conference. Wurts testified after Sandmeyer at the formal hearing and did not attempt to dispute Sandmeyer's testimony about their discussion. Although the Union held its August 2017 press conference two days after Fennessy reduced lifeguard representation on the City SWR Team, management had already manifested a significant negative reaction following the Union's protected activities earlier in 2017, and Wurts likely saw the August press conference as further exacerbating management's earlier reaction.[15]

It is likely that lingering animus from the Union's protected activities in January through March 2017 contributed to Fennessy's August 27 decision, even if animus resulting from those earlier activities was not enough, standing alone, to trigger the decision. The Union's August 29 press conference also likely further solidified Fennessy's resolve not to back down from reducing lifeguard representation on the SWR Team.[16]

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[15] As noted above, at a morning briefing sometime after the Union's March 2017 press conference, Wurts told those assembled that the Department's management was displeased with the Union's performance at the press conference and every lifeguard participant would be held accountable.

[16] The City has not asked us to consider whether, at either press conference, the Union made false statements with actual malice and thereby went beyond the bounds of protected activity. (See *County of Riverside* (2018) PERB Decision No. 2591-M, pp. 6-7 [criticism of management or working conditions is protected by the MMBA unless it is shown by clear and convincing evidence that the speaker acted with actual malice].)

Because the record reveals dual motives, we must determine if the District met its burden to show it would have taken identical action, even absent protected activity. (*San Francisco*, *supra*, PERB Decision No. 2712-M, p. 27; *San Diego Unified School District* (2019) PERB Decision No. 2634, pp. 15-16.) This determination can involve weighing the evidence supporting the employer's justification against the evidence of the employer's unlawful motive, in order to determine what would more likely than not have occurred in the absence of protected activity. (*San Diego Unified School District* (2019) PERB Decision No. 2666, p. 7.) Fennessy's e-mails and the record in its entirety persuade us that Fennessy made a final decision to change the City SWR Team composition on August 27, 2017, when he was primarily aggravated by Sandmeyer's unauthorized e-mail to Zagaris. Fennessy was already contemplating the change for legitimate reasons that predated any protected activity, and it was Sandmeyer's unauthorized e-mail to Zagaris—more so than any protected activity—that was the but-for cause leading Fennessy to make a final decision.

We find that the City has established its affirmative defense—that it would have taken exactly the same action at the same time even absent any protected activity—by a preponderance of the evidence. We therefore dismiss the Union's retaliation claim.

III. The Interference Allegations

A. Timeliness

We first consider whether the Union timely moved to add the interference allegations set out in paragraphs 13-16 of the amended complaint. These allegations are based on three e-mail messages sent by Wurts—to Sandmeyer on March 16 and September 7, 2017 and to Fennessy and Webber on September 7, 2017—that the

Union first saw when it reviewed the documents the City produced pursuant to subpoena on June 26, 2019. On August 28, 2019, the first day of hearing, the Union provided notice of its intent to move to amend the complaint to add allegations based on these three e-mails, and in its opening statement it described its proposed interference theory. On August 29 and 30, 2019, the three e-mails were admitted into evidence as part of the Union's case-in-chief. The Union filed a formal motion to amend on September 16, 2019. The ALJ granted the motion on January 13, 2020. The evidentiary hearing resumed on January 22-24, 2020, during which time the Union completed its case-in-chief and the City presented its defense.

In its post-hearing brief, the City contends that the interference allegations based on Wurts' e-mails are time-barred because the Union moved to amend the complaint over two years after Wurts sent the e-mails. The MMBA generally precludes PERB from issuing a complaint based on an unfair practice occurring more than six months prior to the filing of the charge. (*Coachella Valley Mosquito & Vector Control Dist. v. Public Employment Relations Bd*. (2005) 35 Cal.4th 1072, 1089-1092.) However, the limitations period begins to run once the charging party knew or reasonably should have known of the conduct underlying the charge. (*United Teachers of Los Angeles (Raines, et al.)* (2016) PERB Decision No. 2475, p. 57.) There is no dispute that the Union first learned of Wurts' three e-mails by virtue of the City's response to a subpoena on June 26, 2019, well within the sixth months prior to the Union's request to amend the complaint. The City has not pointed to any evidence

that the Union knew or reasonably should have known of the e-mails earlier. Accordingly, the statute of limitations does not bar the Union's interference claims.[17]

Moreover, the Teamsters' motion to amend the complaint during the hearing was appropriate under PERB Regulation 32648, which provides:

> "During hearing, the charging party may move to amend the complaint by amending the charge in writing, or by oral motion on the record. If the Board agent determines that amendment of the charge and complaint is appropriate, the Board agent shall permit an amendment. In determining the appropriateness of the amendment, the Board agent shall consider, among other factors, the possibility of prejudice to the respondent."

Even if the addition of a new theory of liability based on conduct that occurred more than two years prior—but not discovered by Teamsters until three months before its motion to amend—would constitute prejudice, any such prejudice was dispelled because the City had four months to prepare to defend against the new interference allegations, which were fully litigated during the remaining days of hearing. (See *Eastern Municipal Water District* (2020) PERB Decision No. 2715-M, p. 8 ["Even if an amended pleading would prejudice the other party, it is appropriate to grant the requested amendment if the ALJ can order accommodations that sufficiently alleviate

[17] Under the relation-back doctrine, a charging party may amend a charge to add alleged violations that it discovered more than six months earlier "if the amended charges are closely related to the actions in the original charge." (*Monterey Peninsula Unified School District* (2014) PERB Decision No. 2381, p. 37, quoting *Gonzales Union High School District* (1984) PERB Decision No. 410, pp. 19-20.) Because the Union raised the interference allegations within six months of discovering Wurts' e-mails, we need not determine whether the relation back doctrine would apply to these facts.

the prejudice, typically a continuance that allows additional time to prepare the case."].) For these reasons, the Teamsters' motion to amend was appropriate.

B. Merits

To establish a prima facie interference case, a charging party must show that a respondent's conduct tends to or does result in some harm to protected rights under our statutes. (*Trustees of the California State University (Northridge)* (2019) PERB Decision No. 2687-H, p. 3 (*CSU*).) Once a charging party has established a prima facie case, the burden shifts to the employer. (*Ibid*.) The degree of harm dictates the employer's burden. (*Ibid*.) If the harm is "inherently destructive" of protected rights, then the employer must show that the interference was caused by circumstances beyond its control and that no alternative course of action was available. (*Id.* at pp. 3-4.)[18] On the other hand, for employer conduct that is not inherently destructive, the employer may attempt to justify its actions based on operational necessity. (*Id.* at p. 3.) In such cases, PERB will balance the employer's asserted interests against the tendency to harm protected rights; if the tendency to harm outweighs the asserted business justification, PERB finds a violation. (*Ibid*.)[19]

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[18] In *Regents of the University of California* (2018) PERB Decision No. 2610-H, the Board explained that conduct is inherently destructive if its "natural and probable consequence" is to discourage protected activity, including but not limited to requiring employees to give up protected activity to receive a pay increase; maintaining an overbroad restriction that bars a mix of protected and unprotected activities; or implementing a wholesale replacement of represented employees with non-represented employees. (*Id.* at pp. 58-61 & 71.)

[19] Once a prima facie case is established, the Board has categorized employer conduct as "inherently destructive" or having a "comparatively slight" impact (see, e.g., *CSU*, *supra*, PERB Decision No. 2687-H, p. 3), but the latter descriptor signifies only that the tendency to harm protected rights is something less than inherently

In resolving an interference claim involving employer speech, we consider the employer's statement in its overall context, i.e., in light of surrounding circumstances, to determine if an employee or union representative would objectively tend to feel that the statement coerces, restrains, or otherwise interferes with protected rights. (See, e.g., *Los Angeles Unified School District* (1988) PERB Decision No. 659, p. 9.) One relevant factor is the extent to which a statement is truthful or misleading. (See, e.g., *California State University* (1989) PERB Decision No. 777-H, p. 3; *Alhambra City and High School District* (1986) PERB Decision No. 560, pp. 16-17; *Muroc Unified School District* (1978) PERB Decision No. 80, p. 21.)

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destructive; it does not mean that the tendency to harm is necessarily "slight." Within the category of employer actions or rules that are not inherently destructive, the stronger the tendency to harm, the greater is the employer's burden to show its purpose was important and that it narrowly tailored its actions or rules to attain that purpose while limiting harm to protected rights to the extent possible. (See, e.g., *County of San Bernardino (Office of the Public Defender)* (2015) PERB Decision No. 2423-M, p. 36 ["The scrutiny with which the employer's conduct will be examined depends on the severity of the harm."]; *Claremont Unified School District* (2019) PERB Decision No. 2654, p. 23 ["The key to an appropriate directive is that it is tailored to the particular circumstances."]; *Regents of the University of California* (2004) PERB Decision No. 1700-H, adopting proposed decision at p. 60 [in devising access rules for its main administrative building, employer may have had legitimate concern that demonstrators might block ingress and egress or otherwise disrupt operations, but employer broadly prohibited all demonstrations rather than narrowly drawing its rules to address legitimate operational needs].)

Member Shiners disagrees that the concept of "inherently destructive conduct" should be part of PERB's interference standard. (*Contra Costa County Fire Protection District* (2019) PERB Decision No. 2632-M, pp. 72-76 (dis. opn. of Shiners, M.).) Nevertheless, he recognizes that extant Board law continues to include that concept in its interference test, and thus concurs in its application here for institutional reasons.

The amended complaint alleges that the City violated MMBA section 3506.5, subdivisions (a), (b), and (d) when Wurts: (1) responded to Sandmeyer on March 16 and September 7, 2017, praising e-mails that Sandmeyer had sent to other bargaining unit lifeguards and subsequently forwarded to Wurts, and (2) forwarded Sandmeyer's September 7, 2017 e-mail to Fennessy and Webber.

We now reexamine the circumstances surrounding these e-mails. As described *ante*, the Teamsters protested the City's new 2016 Dispatch Policy several times. The Union filed a grievance on January 2, 2017; the Union protested the change in letters to City Councilmembers and Fennessy on January 23 and February 15, 2017, respectively; and, on March 14, 2017, Harris held a press conference where he claimed that the new policy contributed to a child's drowning. At a Department briefing following the press conference, Wurts told those assembled that the Union's performance at the press conference displeased Department management and each lifeguard participant would be held accountable.

On March 16, 2017, Sandmeyer e-mailed bargaining unit lifeguards criticizing Union leaders for "manipulat[ing] facts and context to serve half[-]truths" and asserting that the Union's press conference "damage[d] our reputation." According to Sandmeyer, the Teamsters' hyperbole and inaccurate claims "let down San Diego Lifeguards in a huge way," and he urged that bargaining unit members learn the true facts. Sandmeyer forwarded his e-mail to Wurts, who e-mailed back the same day as follows: "Thanks John. Very powerful! Thank you for your leadership. This Division needs the wisdom and direction of people like you."

On August 29, 2017, after California Task Force 8 deployed in response to Hurricane Harvey, Harris held another press conference to protest what he characterized as Fennessy's blocking the City SWR Team, including lifeguards, from also deploying. On August 30, 2017, the City issued a press statement explaining FEMA's policies for activating rescue task forces to clear up any confusion caused by the Teamsters' press conference. On August 27 and September 6, 2017, Fennessy announced that he was changing the City SWR Team's staffing composition by reducing the number of lifeguards and increasing the number of firefighters.[20]

On September 7, 2017, Sandmeyer e-mailed bargaining unit lifeguards accusing Harris and others of "speak[ing] blindly" while not understanding CalOES's methods for assigning SWR Teams to respond in emergencies. Sandmeyer referenced a statewide letter criticizing Harris for his comments and wrote that the Fire Chief "just . . . reduced [lifeguard representation] by 40% from the CalOES team" because of the Teamsters' press conference. Sandmeyer forwarded his e-mail to Wurts, who responded: "That is one of the most well written letters I have ever read. Well done!" Wurts then forwarded Sandmeyer's e-mail to Fennessy and Webber.

We find that two of Wurts' three e-mails violated the MMBA.[21] Specifically, Wurts' March 16 and September 7, 2017 e-mails to Sandmeyer tended to interfere

[20] As discussed *ante*, we find that Fennessy would have reduced lifeguard representation to half of the City SWR Team even absent protected activity. We thus examine his decision solely for our consideration of the overall context surrounding Wurts' e-mail communications with Sandmeyer.

[21] Wurts' September 7, 2017 e-mail to Fennessy and Webber—in which he forwarded Sandmeyer's e-mail—was an internal management communication. We

with, restrain, and coerce protected employee and employee organization rights in violation of MMBA section 3506.5, subdivisions (a) and (b). Moreover, these e-mails also tended to interfere with internal union affairs in violation of MMBA section 3506.5, subdivision (d). We explain.

1. Analysis Under MMBA Section 3506.5, Subdivisions (a) and (b)

In evaluating whether employer speech constitutes interference with protected rights, "the Board will look to the surrounding circumstances in which employer speech occurs, including the employer's power to control terms and conditions of employment and the economic dependence of employees on the employer, to determine whether, when viewed in context, employer speech conveys a threat of reprisal or force, a promise of benefit or a preference for one employee organization over another." (*Hartnell Community College District* (2015) PERB Decision No. 2452, p. 25 *(Hartnell)*.) Viewed in context, Wurts' e-mails to Sandmeyer fell outside the range of permissible employer speech in two respects.

First and foremost, Wurts' September 7 e-mail endorses a link between the reduction of lifeguards on the SWR Teams and protected activity. In early September 2017, Wurts had indicated to Sandmeyer that the Union's press conference late the previous month had led to Fennessy's decision to reduce lifeguard work opportunities, and Sandmeyer repeated this coercive message in his September 7 e-mail to all lifeguards. By effusively praising the e-mail without indicating any parts that were untrue, Wurts further embraced the strongly coercive idea—which Wurts himself had

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find no evidence that it had a tendency to interfere in employees' or employee organizations' protected rights.

originated—that Fennessy had reduced lifeguard representation on the SWR Team due to protected activity. (*County of Merced* (2014) PERB Decision No. 2361-M, adopting proposed decision at p. 19 [even where manager intended his statement to be protective of his employees, it interfered with protected rights by suggesting that employees might lose desirable assignments due to protected activity].)[22]

Furthermore, a reasonable employee receiving or otherwise learning of Wurts' two praising e-mails to Sandmeyer might reasonably infer that he or she might avoid adverse action and/or obtain preferential treatment for opposing Union leadership.[23] This is particularly the case in light of Wurts' prior statement that any lifeguard participating in the Union's March 2017 press conference would be held accountable. Notably, any implication of a potential benefit would mainly encourage opposition to

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[22] We do not absolve the City of liability based on Wurts' testimony that he would not necessarily have corrected Sandmeyer's September 7 e-mail if it was inaccurate. First, it is likely that Wurts would have noticed that Sandmeyer's September 7 e-mail linked a decrease in lifeguard work opportunities to protected activity. Indeed, Wurts testified that he thought Sandmeyer "was trying to put information out there to the crew to help them better understand all of it." This testimony underscores the importance of Sandmeyer's e-mail and the potential importance of Wurts' decision to endorse it. Wurts had no duty to correct misinformation in Sandmeyer's e-mail if he merely read it, but once he praised it without any correction, he affirmatively put management into the realm of endorsing what Sandmeyer had written about management's alleged retaliation for protected activities (which was, in turn, based on Wurts' earlier oral comments to Sandmeyer). Indeed, even if Wurts never noticed that he was endorsing an e-mail linking a decrease in lifeguard work opportunities to protected activity, the resulting tendency to interfere with protected activities remains. Moreover, the City has not attempted to assert any offsetting business need for Wurts' e-mails to Sandmeyer on March 16 and September 7.

[23] As noted above, Sandmeyer later earned a promotion, though the complaint did not allege this to constitute interference.

the Union's leadership, meaning that this aspect of Wurts' e-mails primarily relates to the City's interference with internal union affairs, as discussed *post*.

It is of no consequence whether Sandmeyer shared Wurts' e-mails with any other employees or Union representatives. Wurts' coercion was unlawful even if no one other than Sandmeyer knew of it. (See, e.g., *Claremont Unified School District* (2019) PERB Decision No. 2654, pp. 19-24 [district's conduct interfered with a single employee's statutory rights]; *Chula Vista City School District* (1990) PERB Decision No. 834, p. 13 [a brief statement made only to one person is sufficient to support an interference claim].) Furthermore, Wurts' September 7 e-mail also tended to interfere with others' protected conduct given the possibility that Sandmeyer might forward it to other employees or share the message contained in the e-mail.[24] Indeed, the characterization in Sandmeyer's e-mail—that protected conduct had led to adverse

[24] Member Shiners disagrees that the mere *possibility* Sandmeyer might have forwarded or otherwise shared the content of Wurts' September 7 e-mail with other bargaining unit employees demonstrates a tendency to interfere with protected conduct. (See *Petaluma City Elementary School District/Joint Union High School District* (2018) PERB Decision No. 2590, p. 8 ["our cases require that employees or union representatives hear, see, read, or otherwise perceive an employer's allegedly coercive statement to establish the prima facie case of interference"].) He would instead find interference based on the narrower ground that Wurts' e-mail indicated to Sandmeyer that he would not "be held accountable" as other lifeguards would be for the Union's protected conduct and that he would instead enjoy management's protection—an implicit promise of benefit—if he continued to criticize Union leadership. (See *Arcadia*, *supra*, PERB Decision No. 2648-M, pp. 28-30 [finding interference in chief of police's comments promising a benefit in exchange for continued internal opposition to union leadership].)

action—was directly based on Wurts' earlier oral comments to Sandmeyer, which well illustrates how news of a manager's interfering remark tends to spread.[25]

2. Analysis Under MMBA Section 3506.5, Subdivision (d)

MMBA section 3506.5, subdivision (d) relevantly proscribes public agencies from "interfer[ing] with the . . . administration of any employee organization." While much PERB precedent addresses an employer's duty to remain strictly neutral when two different employee organizations are in competition with each other, an employer also may violate this clause by interfering in an employee organization's internal affairs, even in the absence of competing unions. (*Arcadia*, *supra*, PERB Decision No. 2648-M, pp. 22-34.)

To demonstrate such interference, a charging party must establish facts showing that the employer's conduct tends to interfere with the internal activities of an employee organization. (*Arcadia*, *supra*, PERB Decision No. 2648-M, p. 24.) An employer may not take a position on internal union affairs or put its thumb on the scale in favor of or against a particular union leader. (*Id.* at pp. 25-30.)

In *Arcadia*, a police chief interfered in internal union affairs by offering an incentive, or promising a benefit in exchange for, a change in union leadership. (*Arcadia*, *supra*, PERB Decision No. 2648-M, pp. 28-30.) PERB found that a reasonable employee would view the chief's comments as favoring one faction in the union over another. (*Ibid*.) Because the MMBA protects union members' right to

[25] The amended complaint did not contain a separate interference allegation regarding Wurts' oral comments to Sandmeyer, so we find no violation based on those comments.

choose their union leaders without employer interference, PERB held that the employer unlawfully inserted itself into internal union affairs by encouraging the association to oust its president. (*Id*. at pp. 29-30.)

While this case is closer than *Arcadia*, Wurts put management's thumb on the scale against Harris's leadership, both by implicitly promising that Sandmeyer's opposition to Harris would exempt him from being held "accountable" for the Union's protected conduct, as well as by unreservedly embracing Sandmeyer's e-mail asserting that Harris had caused a loss in sought-after lifeguard opportunities on the SWR Team.[26] Indeed, when Wurts, a member of Fennessy's management team and the head of the Lifeguard Division, endorsed the idea that Harris's protected activities caused Fennessy to retaliate, this was a heavy cudgel that would reasonably tend to foment further internal Union actions against Harris. Moreover, as noted above, there was no offsetting business need for Wurts' e-mails to Sandmeyer. We therefore find the City, through its agent Wurts, unlawfully interfered with internal union affairs.

In sum, two of Wurts' three e-mails constituted unlawful interference, but we dismiss the amended complaint's allegation as to Wurts' September 7, 2017 e-mail to Fennessy and Webber.

ORDER

Based upon the foregoing findings of fact and conclusions of law, and the entire record in this case, the Public Employment Relations Board (PERB) finds that the City of San Diego (City) violated the Meyers-Milias-Brown Act (MMBA), codified at

[26] Wurts did not include any language that can be interpreted as praising only part of Sandmeyer's message.

Government Code, § 3500 et seq. Specifically, the City violated MMBA sections 3503, 3506 and 3506.5, subdivisions (a), (b), and (d) and PERB Regulation 32603, subdivisions (a), (b), and (d) by interfering with protected rights and with the internal union activity of California Public, Professional and Medical Employees, Teamsters Local 911 (Teamsters Local 911). All other allegations in the amended charge are dismissed.

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

A. CEASE AND DESIST FROM:

1. Interfering with protected rights by linking a decrease in lifeguard work opportunities to protected activity by lifeguards or Teamsters Local 911; and

2. Interfering with the internal union affairs of Teamsters Local 911.

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

1. Within 10 workdays after this decision is no longer subject to appeal, post at all work locations in the City where notices to Teamsters Local 911-represented employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the City, indicating that the City will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the City to communicate with its employees in the bargaining units represented by Teamsters Local 911. Reasonable

steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.[27]

2. Written notification of the actions taken to comply with the terms of 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 served concurrently on Teamsters Local 911.

Members Banks and Shiners joined in this Decision.

[27] 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 10 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-1229-M, *California Public, Professional and Medical Employees, Teamsters Local 911 v. City of San Diego*, in which all parties had the right to participate, it has been found that the City of San Diego violated the Meyers-Milias-Brown Act, Government Code sections 3503, 3506 and 3506.5, subdivisions (a), (b), and (d) and Public Employment Relations Board Regulation 32603, subdivisions (a), (b), and (d) by interfering with protected rights and with the internal union activity of California Public, Professional and Medical Employees, Teamsters Local 911 (Teamsters Local 911).

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

CEASE AND DESIST FROM:

1. Interfering with protected rights by linking a decrease in lifeguard work opportunities to protected activity by lifeguards or Teamsters Local 911; and

2. Interfering with the internal union affairs of Teamsters Local 911.

Dated: _____ City of San Diego

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.