STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CRIMINAL JUSTICE ATTORNEYS ASSOCIATION OF VENTURA COUNTY, Charging Party, v. COUNTY OF VENTURA, Respondent.	Case Nos. LA-CE-1260-M LA-CE-1268-M PERB Decision No. 2758-M March 23, 2021

Appearances: Rains Lucia Stern St. Phalle & Silver, by Richard A. Levine, Attorney, for Criminal Justice Attorneys Association of Ventura County; Leroy Smith, County Counsel, and Matthew A. Smith, Assistant County Counsel, for County of Ventura.

Before Banks, Chair; Shiners and Krantz, Members.

DECISION

BANKS, Chair: These consolidated cases are before the Public Employment Relations Board (PERB or Board) on exceptions by the County of Ventura to a proposed decision by an administrative law judge (ALJ). The ALJ concluded that the County violated its duty to meet and confer in good faith by: (1) implementing its decision to withhold taxes based upon accrued paid leave without affording the Criminal Justice Attorneys Association of Ventura County (Association) adequate notice and a meaningful opportunity to bargain over the negotiable effects of that decision; and (2) bargaining in bad faith over amending the parties' leave redemption plan. The proposed decision dismissed the remainder of the Association's allegations.

We have reviewed the entire record and considered the parties' arguments in light of applicable law. We affirm the proposed decision based upon the following findings and discussion. We also clarify the ALJ's remedial order, tailoring it more closely to the harms caused by the County's violations.

PROCEDURAL BACKGROUND

On November 20, 2017, the Association filed Unfair Practice Case No. LA-CE-1260-M, alleging that the County unilaterally characterized accrued leave as taxable income. On November 30, 2017, the Office of the General Counsel (OGC) issued a complaint against the County, alleging that the County violated the Meyers-Milias-Brown Act (MMBA) and its own local rules by deciding to withhold taxes on leave hours as those hours were accrued, rather than as they were cashed out or used, without bargaining over the decision or its effects.[1]

On December 6, 2017, the Association filed Unfair Practice Case No. LA-CE-1268-M alleging that the County engaged in bad faith bargaining when meeting and conferring over changes to represented employees' paid leave plan. OGC issued a complaint on September 11, 2018. On the parties' joint motion, the ALJ consolidated Case Nos. LA-CE-1260-M and LA-CE-1268-M for formal hearing, which took place over 10 days between January 28 and April 18, 2019.

The ALJ issued a proposed decision on February 28, 2020. The ALJ concluded that the County violated its duty to bargain in good faith by unilaterally implementing its decision to withhold taxes based upon what it considered to be constructive receipt

[1] The MMBA is codified at Government Code section 3500 et seq. All statutory references herein are to the Government Code unless otherwise specified.

income without completing negotiations over the negotiable effects of that decision. The ALJ also found that the County engaged in bad faith bargaining during its negotiations with the Association over amending the parties' leave redemption plan. Specifically, the ALJ found that the County misrepresented its tax withholding plan and made an exploding offer without adequate justification.[2] The ALJ dismissed the Association's remaining allegations, finding that: the County's duty to bargain was limited to the effects of its decision to apply the constructive receipt doctrine, as the decision itself fell outside the scope of bargaining; and the Association had not established that various other County conduct demonstrated bad faith.

The County filed timely exceptions to the proposed decision. The Association filed a response but no exceptions.[3]

FACTUAL BACKGROUND[4]

The Parties

The County is a "public agency" within the meaning of MMBA section 3501, subdivision (c), and PERB Regulation 32016, subdivision (a). The Association is an

[2] An exploding offer is one that expires on a given date. (*City of Arcadia* (2019) PERB Decision No. 2648-M, p. 2, fn. 3 (*Arcadia*).)

[3] The ALJ's conclusions to which neither party excepted are not before the Board; they are therefore non-precedential and binding only on the parties. (*County of Santa Clara* (2018) PERB Decision No. 2613-M, p. 2, fn. 2; PERB Reg. 32300, subd. (c) [PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.].)

[4] Neither party excepted to the proposed decision's factual findings. The following background includes mainly facts drawn from the ALJ's findings, together with supplemental facts drawn from the record.

"exclusive representative" within the meaning of PERB Regulation 32016, subdivision (b), representing the Criminal Attorney and Criminal Attorney Supervising bargaining units.

The Memorandum of Agreement

The Association and the County were parties to a Memorandum of Agreement (MOA) that had an effective term of May 16, 2017, to May 15, 2020. The prior MOA had an approximate effective period of 2014 through 2017.

Article 12 of the 2014-2017 MOA concerned paid leave. Each represented employee accrued annual leave on a biweekly basis at a rate that depended on the length of his/her service. Employees could use annual leave hours for paid time off or redeem them for cash. Under MOA Section 1208, employees could use annual leave as paid time off for illnesses or personal reasons, subject to supervisor approval. Section 1203 provided that employees who use annual leave receive compensation and benefits at the same rate as if they are on the job. The section further provided that annual leave benefits would not be forfeited under any circumstances and that no employee could be ordered to use annual leave or sick leave benefits at a time not of his or her choosing.

MOA Section 1205 addressed the right to redeem accrued annual leave hours for cash. Employees who had used at least 80 hours of accrued leave in the prior 12 months could redeem accrued leave hours for payment twice per calendar year. The maximum amount of accrued leave each employee could redeem ranged from 100 to 200 hours per year, depending on the employee's length of service. For employees hired before the effective date of the 2014-2017 MOA, the cash value of redeemed

leave was at what the parties called the “grossed-up” rate, which included the value of employer-paid benefits such as health insurance contributions, retirement contributions, and annual leave accrual.[5]

Unit members considered the annual leave program to be one of the most valuable benefits in the MOA. Some members rarely redeemed any leave hours and instead used the bulk of their accrued hours as time off for medical or other personal reasons. In other cases, employees retained their accrued hours and redeemed them closer to retirement to maximize their pensionable income, which was used to calculate their monthly retirement benefits.

Each of the County’s nine other bargaining units had some form of an annual leave plan with a cash redemption option. Unrepresented County employees had a similar benefit as well. Among the County’s employee groups, only the Association had contractual protection against forfeiting accrued annual leave.

Before August 2016, the County neither reported accrued annual leave hours as taxable income nor withheld taxes based on such hours until employees either used them as paid time off or redeemed them.

The County’s 2016 Changes to its Tax Practices

Jeffrey Burgh is the County’s elected Auditor-Controller. His office is responsible for, among other things, ensuring the accuracy of the County’s payroll and guaranteeing that the County’s payroll practices comply with state and federal law. This includes properly reporting employees’ taxable income to the Internal Revenue

[5] The cash value of hours redeemed by employees hired on or after the effective date of the 2014-2017 MOA was calculated using only their base salary rate.

Service (IRS) and Franchise Tax Board (FTB), as well as withholding the appropriate amount in taxes from employee pay.

In the summer of 2016, County Counsel Leroy Smith met with Burgh and expressed concerns about the tax implications of the redemption option in the County's various annual leave plans. Smith informed Burgh that the IRS and FTB may consider accrued leave as income for tax purposes under the constructive receipt doctrine, which is defined in U.S. Treasury Department Regulation 1.451-2. (26 C.F.R. § 1.451-2.)[6] Subdivision (a) of that regulation states, in relevant part:

> "Income although not actually reduced to a taxpayer's possession is constructively received by him in the taxable year during which it is credited to his account, set apart for him, or otherwise made available so that he may draw upon it at any time, or so that he could have drawn upon it during the taxable year if notice of intention to withdraw had been given. However, income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations or restrictions."

At the time, the Auditor-Controller's Office was not applying the constructive receipt doctrine to any County leave plans.

After hearing Smith's concerns, Burgh conducted his own investigation, including reviewing available literature on the subject and speaking with his counterparts in other counties throughout the state. He became convinced that constructive receipt was an issue the County had to address. Ultimately, Burgh concluded that leave hours under the County's various redemption plans carried the risk of being considered income under the constructive receipt doctrine.

[6] This regulation had not changed at any time in or around 2016.

On August 12, 2016, Burgh sent a letter to contacts at all County unions, including Association President Maeve Fox. Burgh wrote that the Association's annual leave plan was "not illegal per se," but that the redemption option in the plan "risks exposing both [represented employees] and the County to unintentional tax consequences under a tax principle known as the 'constructive receipt doctrine.'" Burgh further wrote that, based upon his understanding of the doctrine, "your existing leave redemption plan requires that my Office report as taxable income the maximum amount of leave that an employee *is eligible to redeem in a year, regardless of whether she/he actually elects to cash-out that leave*." (Original italics.) Burgh suggested that the Association's annual leave plan could be amended to avoid the constructive receipt issue, but that:

> "[I]n the absence of an agreement between the County and your union to amend the leave redemption plan in your current MOA to avoid constructive receipt, I am legally obligated to fully comply with federal tax laws, and as such beginning with tax year 2017, I will report as taxable income all income that employees are eligible to receive in lieu of leave/vacation under current plans."

The Initial Meeting Over Constructive Receipt

After Burgh sent his letter, representatives from Human Resources (HR) sought to meet with each of the County's 10 unions, including the Association. On or around August 18, 2016, HR Director Shawn Atin, then-Labor Relations Manager Craig Leedham, and HR representative Jim Dembowski met with Fox, Association Vice President Margaret Coyle, and Association Board Member Michael Albers. The purpose of the meeting was to explain the constructive receipt issue to the Association and to discuss ways to avoid taxation under that doctrine. The County reiterated its

position from Burgh's letter the prior week: absent changes to the redemption plan, the County intended to start treating accrued leave eligible for redemption as constructively-received income.

The HR representatives acknowledged that the parties' MOA was still in effect, but they suggested reopening negotiations on Article 12. No formal proposals were exchanged that day, but the County presented three ideas for modifying the Association's leave plan. First, the County proposed that each year employees would irrevocably elect the number of leave hours, if any, they would redeem in the following year. Second, the County suggested prohibiting employees from redeeming more hours than they accrued during that calendar year. Finally, the County suggested that any employees who irrevocably elected to redeem leave hours, but did not use at least 80 leave hours in the prior 12 months as required under MOA Section 1205, would forfeit the number of accrued leave hours needed to satisfy the 80-hour requirement. The County would not provide compensation for the forfeited hours.[7]

During the meeting, which Coyle testified was "incredibly heated," Association representatives expressed concern that the limitations on what accrued leave may be redeemed for cash would inhibit employees' ability to maximize their retirement income. Fox criticized the County's suggestion that leave be forfeited to satisfy the 80-hour requirement, calling it "stealing," illegal, and a violation of the prohibition against forfeitures under MOA Section 1203. The Association requested any legal authority the County had showing that the constructive receipt doctrine applied to the County's

[7] Association representatives referred to this idea as the County's "forfeiture provision."

existing leave redemption plans. The County representatives promised to respond. The meeting ended without any agreement.

On August 24, 2016, Leedham e-mailed union representatives, including Fox and Coyle, IRS Private Letter Rulings (PLRs)[8] discussing the constructive receipt doctrine and its relation to paid leave cash-out plans. These PLRs all predated the 2014-2017 MOA between the County and the Association. As part of the same e-mail, Leedham also produced a memo that Smith had drafted, which concluded that the constructive receipt doctrine applied to accrued leave under each of the County's existing leave redemption plans.

The County's Requests to Commence Bargaining

The County designated Leedham as its primary contact person for any negotiations with the Association over the constructive receipt issue. On September 13, 2016, Leedham e-mailed Fox requesting to meet and confer over changes to the leave redemption language in the MOA. He offered several dates in September for commencing negotiations and expressed the desire to move quickly to implement any needed changes before the start of 2017. To that end, Leedham's e-mail included a suggested negotiation timeline stating the County's desire to start negotiations with all unions in September, to reach tentative agreements with all unions by October 21, and to ratify those agreements by November 1. The timeline

[8] A PLR is written guidance from the IRS about how tax laws apply to a set of presented facts. PLRs are not considered precedential, but are generally relied upon as guidance for how the IRS would handle situations similar to what was assessed in the letter. (*Airline Pilots Assn. Internat. v. United Airlines, Inc.* (2014) 223 Cal.App.4th 706, 722, fn. 5.)

included enough time for the County to create and send irrevocable election forms to employees and to have employees complete and return those forms before the end of 2016. Leedham did not state that unions were required to follow the timeline or specify that there would be any consequences if a union did not adhere to it.

Fox responded to Leedham the following day, stating that in order to bargain in an informed manner the Association needed time to consult with an attorney, and it had therefore hired Robert Wood to provide advice regarding the constructive receipt doctrine and its potential application. Leedham responded to Fox the same day, again asserting the County's desire to complete negotiations promptly, so the County could implement the changes and notify employees before the start of 2017.

On September 30, 2016, the County submitted its first written proposal seeking changes to the MOA's annual leave plan. The proposal included the three elements discussed at the August 18, 2016 meeting: (1) the irrevocable election form and process; (2) a rule restricting employees' ability to redeem leave to only those hours accrued in the calendar year of the request; and (3) the "forfeiture provision." Though the County did not normally send proposals before scheduling any negotiation sessions, Leedham did so here to facilitate negotiations before the end of the year. Fox replied that the Association would respond after consulting with Wood.

Leedham's October 2016 Correspondence with Rick Shimmel

In early October 2016, Rick Shimmel, Executive Director of the Ventura County Deputy Sheriffs' Association, representing the County's deputy sheriffs' unit, e-mailed Leedham questions about how the County intended to implement the constructive receipt doctrine with respect to its paid leave redemption plan. Leedham responded on

October 11, 2016, sending a copy of his response to Burgh, among others. In his response, Leedham wrote that constructive receipt income would be reported as regular earnings on employee W-2 forms. He also wrote that, with one minor exception not at issue, leave hours that had previously been reported as constructively received income would not be reported as income again when those hours are used or redeemed in the future.

Leedham's e-mail also included the following response to Shimmel's question:

> "[Question:] If you begin reporting the value of constructively received earnings on the W-2, will <u>any</u> payroll taxes be paid or withheld on those earnings? If so, which taxes?
>
> "[Answer:] *The County will pay its portion; there will be no withholdings of employee constructively received earnings*."

(Original italics.)

Neither Shimmel's e-mail nor Leedham's response was addressed to anyone at the Association. However, later in the day on October 11, 2016, Shimmel forwarded a copy of Leedham's response e-mail to Fox and Coyle.

<u>Letter from the Association's Tax Counsel</u>

On October 20, 2016, Wood sent a letter to the County asserting that its leave plans did not trigger the constructive receipt doctrine because they already included substantial limitations on employees' ability to redeem leave hours.

On November 9, 2016, Leedham e-mailed Fox again, acknowledging receipt of Wood's letter and again requesting to meet over changing the Association's leave plan. He informed Fox that the Auditor-Controller's Office was beginning its process to account for constructively received income. Leedham said the County was willing to

temporarily modify its proposal to allow employees who have announced their intent to retire to redeem leave hours accrued in prior years. At this time, the County was actively negotiating changes to the various leave plans with all 10 of its unions. The County communicated to the unions that, if it reached an agreement with one union containing more favorable terms than what was being offered to others, it would include the better terms in subsequent offers to the other unions.

The Association's Initial Successor MOA Proposal

On December 2, 2016, the Association sent the County its initial proposal for a successor MOA. The proposal was a comprehensive list of all MOA sections the Association sought to change in the upcoming negotiations. The proposal included enhancements to the leave redemption option in Section 1205, but it did not include any language intended to address the constructive receipt issue.

The County's Amended Proposal Regarding Constructive Receipt

On December 8, 2016, Leedham e-mailed Fox a revised version of the County's constructive receipt proposal. The essential components of the County's proposal remained the same, but it added a provision that would allow employees to void their irrevocable elections if they could not meet the 80-hour usage prerequisite because their vacation request was denied.

On December 12, 2016, Association counsel Richard Levine e-mailed Leedham rejecting the County's December 8 proposal. He asserted the Association's position that the constructive receipt doctrine did not apply to the paid leave plan and that it would be improper for the County to start reporting accrued leave hours as taxable income.

The Auditor-Controller's Constructive Receipt Presentations

Starting in December 2016, the Auditor-Controller's Office began hosting informational presentations about how it intended to apply the constructive receipt doctrine to the redemption options in various negotiated MOAs and the resolution for unrepresented employees. All employees were invited.

The written presentation materials described the constructive receipt doctrine and listed the penalties that the IRS or FTB could assess for failing to properly collect or pay income and employment taxes or submitting false tax documents. The materials then described the County's proposed plan for modifying employees' leave redemption policies to avoid the risk of tax consequences. The proposed plan was largely identical to the most recent proposal the County had already sent to the Association, including the use of an irrevocable election form and the restriction that employees could only cash out leave that was accrued in the current calendar year. The materials noted that the proposed changes would not apply to employees represented by a union unless the union agreed to the modifications.

The presentation also described what would happen for employees whose leave redemption plans were not modified to adjust for the constructive receipt doctrine. Specifically, the materials stated that the County would not honor irrevocable election forms from those employees, and they would continue to be able to redeem leave for cash consistent with the existing terms of their MOAs. The presentation materials also stated that the Auditor-Controller's Office would "withhold and report all employee and employer applicable taxes and retirement contributions, potentially resulting in a 'Net Pay Distribution' balance of -0- on the final pay check received for

calendar year 2017." A copy of the Auditor-Controller's presentation materials was posted on the Auditor-Controller's Office website.

Represented Employees' Irrevocable Election Submissions

Around the time the Auditor-Controller's Office was hosting the constructive receipt presentations, Association unit members began approaching Association Board members with questions. Association representatives advised the employees that they should submit irrevocable election forms to the County even though the parties had not reached any agreement on the constructive receipt issue. An unknown number of employees submitted forms, but the County did not accept any of them. On December 16, 2016, Fox e-mailed Leedham asking if the County would accept irrevocable election forms submitted by Association-represented employees. She further asked, if the County rejected the irrevocable election forms from Association members, whether those members could still submit leave redemption requests.

Leedham responded to Fox the same day stating that, because the parties had not reached any agreement for using irrevocable election forms, the County considered any irrevocable election forms from Association members to be unenforceable and any such forms would therefore not be accepted. He also stated that Association unit members would still be able to redeem leave consistent with the existing terms in MOA Section 1205.

Before the end of 2016, the County reached agreements with four unions to amend their paid leave redemption plans to avoid the constructive receipt issue.

The 2017 Successor MOA Negotiations

Successor MOA negotiations started on January 23, 2017. Leedham was the County's chief negotiator and spokesperson. Attorney Steven Silver was the Association's chief negotiator and spokesperson.

The County's initial proposal for a successor MOA stated, "The County desires to modify leave redemption procedures to avoid constructively received income resulting from current MOA provisions." Leedham explained that the County was proposing the same changes to the leave redemption plan that it had sent to the Association in 2016. Neither party sought to discuss the leave redemption plan or the constructive receipt issue during the bargaining sessions that occurred on January 23 and 30, and February 6 and 16, 2017.

The Association raised the constructive receipt issue as negotiations progressed further into February 2017. The Association's team expressed willingness to modify the redemption language in their annual leave plan even though they still disagreed that the constructive receipt doctrine applied to the plan as it was then structured. However, the Association rejected the County's proposal that restricted employees to only redeeming those leave hours that were accrued during the calendar year of the redemption request. The Association also adamantly opposed the County's "forfeiture provision."

The Association's negotiators stated that the irrevocable election form was fully sufficient to address the County's concern about constructive receipt risks. They further expressed that the County's proposal would reduce employees' ability to maximize their retirement income. The Association proposed using the irrevocable

election process and eliminating the 80-hour usage requirement from MOA Section 1205.

Leedham stated that he had received different tax advice: to avoid the constructive receipt risk, the parties needed to implement both the irrevocable election and the restriction on which accrued leave hours could be redeemed. He also said that the "forfeiture provision" was necessary to make the irrevocable election binding on employees. Otherwise, according to Leedham, employees could effectively rescind their irrevocable elections by declining to use 80 hours of leave. The County rejected the Association's proposal to eliminate the 80-hour usage requirement altogether, claiming that doing so would increase retirement costs for the County and that the County was not interested in enhancing leave redemption benefits.

The parties had a lengthy discussion about constructive receipt at their March 2, 2017 bargaining session. The Association again proposed modifying the leave redemption plan to include irrevocable elections while eliminating the 80-hour usage requirement. The County again rejected the Association's proposal.

The Association then suggested that the parties seek an IRS PLR opinion to determine whether the existing leave redemption plan triggered the constructive receipt doctrine. Leedham declined, asserting that the County was confident in its interpretation of the doctrine and that the County did not want to invite the IRS to scrutinize its tax practices. Leedham noted that the IRS could audit up to three previous tax years and seek payment for any taxes in arrears. Coyle and Association Board Member Paul Feldman said that the Association would accept that risk in order to be forthright with the IRS. Leedham expressed his belief that other unions with

similar leave redemption benefits would not likely be as willing. Leedham also said the County would not impose any changes to the leave redemption plan on the Association. He said that, if the Association was unwilling to modify the leave redemption plan, the Auditor-Controller's Office would begin applying its interpretation of the constructive receipt doctrine to the Association's plan starting that year.

During other negotiation sessions, the Association proposed temporarily accepting the County's proposed changes to the leave redemption plan, if the County would agree to revert to the prior plan terms if the IRS issued an opinion that the constructive receipt doctrine did not apply. The Association alternatively proposed accepting the County's limitations on redeeming only those hours accrued during the calendar year, with the exception that employees who declare their intent to retire that year could redeem hours accrued in prior years as well. This last proposal was, in essence, making the one-time exception the County proposed earlier into a permanent, ongoing option available to Association members each year. The County rejected each of these proposals.

The County's Misstatements at the Bargaining Table

By the April 4, 2017 bargaining session, the parties were close to agreement on most terms for a successor MOA but remained at odds on the constructive receipt issue. Around this time, the parties began discussing the possibility of setting aside the constructive receipt negotiations and finalizing all other MOA terms.

Because it was starting to appear that the parties would not reach agreement over how to address the problem with the 80-hour usage requirement for redemptions, the Association's team sought to learn more about the County's constructive receipt

taxation implementation plan. The Association's negotiating team asked to meet with Burgh to discuss how represented employees' leave hours would be taxed, but the County declined to make Burgh available.[9]

The Association therefore directed its questions to Leedham. Silver asked Leedham whether the County would merely report accrued leave hours as constructively received income, or whether the County would also withhold taxes for constructive receipt income from employees' paychecks. Leedham responded that, except for a few minor exceptions, the County *would only be reporting* accrued leave hours as taxable constructive receipt income and that, for the most part, there *would be no tax withholding*. Leedham thereby repeated the same information he had told Shimmel in October 2016, which Shimmel had shared with Fox and Coyle. The record reflects that Leedham had made similar statements across the bargaining table throughout March and April, though the record does not include details as to these other statements.

Leedham testified his responses were based on conversations he had with Burgh or others in the Auditor-Controller's Office. He also testified that he always used "qualifying words" before answering the Association's tax questions, such as that his responses were "based on the information he had at the time" or that it was not his role to interpret the tax code. During Coyle's testimony, she denied that Leedham ever used qualifying language before answering the Association's tax questions.[10]

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[9] Two Association witnesses testified to this fact. When Leedham testified, he did not dispute their account.

[10] Although the ALJ did not make a credibility finding to resolve this testimonial conflict, we have no need to do so here given that such a determination would not

The County's Exploding Offer

At the April 4, 2017 session, the County submitted a new proposal containing most of the same amendments to the leave redemption plan, with two notable differences. First, the County would allow employees, as a one-time exception, to submit their 2017 irrevocable election forms by May 5, 2017, to assist the transition to the new procedures.[11] Second, the County proposed an optional re-opener to discuss restoring the terms of the prior leave redemption plan in the event that the IRS, a court, or another governing authority determined that the then-existing plan language did not trigger the constructive receipt doctrine. The County's proposal contained the following note:

> "(April 4, 2017, note: since the proposed revision to Section 1205 below contains time-sensitive changes to the leave redemption election process, if a complete tentative agreement for a successor MOA is not reached by the close of business on April 7, 2017, this proposed revision to Section 1205 shall be withdrawn in its entirety.)"

There was some confusion as to which elements of the County's proposal would expire after April 7, 2017. Leedham testified that the County had meant it would only withdraw its proposal to temporarily allow employees to submit same-year irrevocable election forms. Fox testified that she thought that the County would withdraw all pending proposals for a successor MOA. Coyle testified that she believed

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affect the outcome of the case. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 5 (*San Ramon*).) We do, however, discuss the import of Leedham's statements *post* at pp. 34-35 and pp. 37-38.

[11] Going forward, employees would be required to submit their irrevocable election forms before the start of the year in which they planned to take the leave.

the County was withdrawing all its proposals pertaining to the constructive receipt issue. Feldman testified that while he felt the deadline was arbitrary and too short, he understood the County to mean that it would be withdrawing only the temporary exception allowing for same-year irrevocable election forms. Leedham admitted at hearing that the County could have been clearer about which parts of its proposal would expire at the deadline.

The Association did not accept the County's April 4, 2017 proposal, and the County withdrew it after April 7, 2017. Leedham said that the County's earlier constructive receipt proposal was still acceptable, but only for the 2018 tax year and future years. The County did not withdraw its proposals for other MOA sections under discussion.

The parties met again on April 19, 2017. Leedham again said the County would only report constructive receipt income and not withhold taxes on it. The parties discussed the other remaining unresolved issues in negotiations and ultimately reached a tentative agreement for a three-year successor MOA. The tentative agreement included no changes to Section 1205 and contained no provisions designed to address the constructive receipt issue.

Leedham informed the Association's negotiators that the County would not accept irrevocable election forms from Association unit members since no agreement was reached on that issue. He also confirmed that, because there were no changes to the leave redemption plan in the successor MOA, the leave redemption option would not change, and the County would continue to honor leave redemption requests properly submitted under Section 1205. He said that the "door was always open" to

continuing discussions and resolving their differences on the constructive receipt issue.

Ratification of the MOA

The tentative agreement for the successor MOA was subject to ratification by the Association's unit members. The Association recommended that unit members vote to approve the tentative agreement. Although employees reported concerns about being taxed for their accrued leave under the constructive receipt doctrine, Association representatives repeated Leedham's statements that the County intended to report constructive receipt income but not use such income as a basis for tax withholding. Unit members voted to ratify the MOA in May 2017. The Association heard nothing further from the County about the constructive receipt issue until September 2017.

The County's September 22, 2017 Letter

On September 22, 2017, Amy Herron, Chief Deputy Auditor-Controller, General Accounting, sent a letter to all employees whose unions had not agreed to modify their leave redemption plans. Herron wrote that, for employees who chose not to redeem accrued leave hours or to redeem fewer hours than the maximum allowed, the County would nonetheless treat "the value of that accrued vacation eligible for cash out" as constructively received income. Herron further wrote:

> "In other words, the IRS treats this as income even though you did not actually receive it, because it was available to you to be drawn upon at your request. *The constructively received income will be included in your taxable wages, and taxes will be calculated and withheld on that amount*."

(Italics added.) She did not explain whether the withholding would apply only to leave accrued in 2017, or to all accrued leave. Herron recommended that employees consider cashing out the maximum amount of leave they were eligible to redeem before the end of the year to avoid constructive receipt taxation. Herron sent a template version of the letter to Coyle, in her capacity as Association Vice President, one day before she sent the letter to Association members.

At Coyle's request, Fox, Coyle, and Feldman met with Burgh and Herron on October 11, 2017, to discuss Herron's letter. Burgh and Herron confirmed that the Auditor-Controller's Office would be both reporting constructively received income and withholding taxes on that income from employees' paychecks. Based on concerns raised by Association members, Association representatives asked numerous questions about how the County would be taxing employees under various scenarios. Herron answered the questions that she could and said she would attempt to find answers to the remaining questions.

On October 12, 2017, Fox e-mailed Leedham, Burgh, Herron, and others complaining that the County had provided information during negotiations that was contradicted by information the Association received the previous day from the Auditor-Controller's Office. Specifically, the County previously informed the Association's negotiators that it would only be reporting accrued leave hours as constructively received income, not withholding taxes from employees' paychecks. Fox stated that the tax withholding plan would result in employees receiving zero or close to zero net pay at the end of the year. She asserted that the Association had detrimentally relied on the County's earlier, contrary representations. She requested

copies of the County's bargaining notes to assist the Association in deciding how to proceed.

On October 26, 2017, Fox e-mailed Leedham and other HR representatives, again complaining that the County's taxation plan could result in employees with zero net pay at the end of the year, which contradicted earlier representations from the County. Leedham responded on October 31, 2017, directing her to send further inquiries to County Counsel Smith.

The County's November 6, 2017 Letter

Initially, the Auditor-Controller's Office planned to withhold constructive receipt taxes only during the final pay period of 2017. However, the Auditor-Controller's Office later determined that some employees' 2017 withholdings were greater than their earnings in a single pay period. The Auditor-Controller's Office concluded that it would implement 2017 withholdings over three pay periods: the second bi-monthly pay period in November 2017 and both pay periods in December 2017.

On November 6, 2017, Herron issued another letter to employees whose unions had not reached agreements to avoid constructive receipt taxation. Herron restated that the County would report income and withhold taxes on the maximum amount of annual leave allowed for redemption, even if an employee did not exercise his/her option to cash out any leave.

Herron also explained that the Auditor-Controller would be withholding taxes for constructively received income during the last three paychecks of the year, and that constructive receipt income would be reported on employees' W-2 forms for 2017. Herron wrote that the Auditor-Controller's Office would track the hours already taxed

as constructive receipt income and treat them as a post-tax benefit when employees used or redeemed them in the future. Finally, Herron advised employees who wanted to avoid constructive receipt on *any* of their last three paychecks of the year to submit their cash-out requests by November 16, 2017. The final deadline for cash-out requests was December 8, 2017.

The Irell & Manella Letter

The Association hired the law firm of Irell & Manella to explore litigation options regarding the constructive receipt dispute. On November 8, 2017, attorney David Schwarz sent a letter to Smith and Burgh requesting that the County "immediately suspend its planned withholdings and maintain the status quo pending good faith discussions." Schwarz disagreed with the County's interpretation of the constructive receipt doctrine and its decision not to honor irrevocable election forms sent by Association unit members. He also accused the County of bad faith bargaining by taking inconsistent positions, withholding critical information from the Association's negotiators, and enacting pre-impasse unilateral policy changes. Schwarz said that the County's unilaterally planned withholding created the "threat of year-end 'holiday' garnishments." The letter concluded:

> "Given the immediate need to resolve this issue, whether by negotiation or litigation, CJAAVC requests that the County advise us no later than by November 13, 2017, at 10 a.m. PST, whether it will (a) forbear from proceeding with any payroll deductions for at least thirty (30) days and (b) agree to immediately engage in good faith bargaining to resolve this issue."

The County did not respond directly to the letter. But Leedham sent Fox a letter on November 16, 2017, stating that the County was still willing to amend the leave

redemption language in the MOA to avoid constructive receipt taxation. He stated that the County's most recent offer remained available for the Association to accept for 2018. Furthermore, to mitigate the effects of constructive receipt for 2017, the County was willing to waive the current limitation on the number of leave redemption requests each unit member could make. This would allow unit members who had already made two redemption requests, but who had not yet cashed out the maximum possible number of hours, to avoid constructive receipt taxation. Leedham offered dates to resume negotiations.

Fox responded to Leedham's letter on November 17, 2017, expressing the Association's willingness to meet on the issue. She asked whether the County was willing to negotiate all aspects of the constructive receipt issue, including ways to avoid such tax withholding for the 2017 tax year.

Implementation of the Tax Withholding Decision

Pursuant to the plan Herron described in her November 6, 2017 letter, the County withheld taxes on constructively received income beginning with employees' November 24, 2017 paycheck. The County's tax withholding lowered the net paychecks that many Association bargaining unit members received. Some unit members experienced tax withholdings so substantial that one or more of their final three 2017 paychecks netted out to near zero.

Moreover, the County created a double taxation problem by taxing the same hours twice. This problem was exacerbated by the fact that the County pays the grossed-up rate when an employee cashes out leave hours, and the regular rate when an employee uses leave hours. Thus, in some cases, employees used leave hours,

received the base salary rate for those hours and paid taxes on that salary, and then near the close of 2017 had the same hours taxed as constructively received at the higher grossed-up rate.

For example, as of November 18, 2017, Senior Deputy District Attorney Melissa Suttner had used 248 hours of her annual leave during the calendar year, paid taxes on those hours as she used them, and had only 67 hours left in her bank. Prior to the County's implementation of the constructive receipt rule, Suttner's regular net wages exceeded $3,000 each bimonthly pay period. Beginning with the payroll ending November 18, 2017, the County taxed her on 200 hours of leave as constructive receipt income—the maximum number of hours she could have cashed out based on her years of service—yielding a grossed-up constructive income of $21,862.84. The resulting additional tax (mainly levied on hours she had already used and for which she had already paid taxes at the regular rate) resulted in net wages of $7.04 for Suttner's November 24, 2017 paycheck. Suttner then increased her allowances from three to 99 to allow her to increase her take-home pay for the remaining pay periods that year. Suttner asked the County to reimburse her for the difference between the grossed-up rate that it used for tax withholding and the regular rate that it applied when she used her leave time, without success. She paid $75 out of pocket to Certified Public Accountant Richard Womack to file amended tax returns with the IRS and FTB. As of the hearing she had not yet received a response from either agency.

Similarly, Senior Deputy District Attorney Lisa Lyytikainen had used 268 hours of her annual leave during the calendar year, paid taxes on those hours as she used them, and had 136 hours left in her leave bank. Beginning with the payroll date ending

November 18, 2017, the County taxed her on 200 hours of leave, her maximum redemption allowable under the MOA, equating to a grossed-up value of $20,869.72. Once she learned that the County would withhold taxes on 200 hours of her annual leave, Lyytikainen increased her allowances to 99 before the pay period ending November 18, 2017 because she "didn't want to risk getting a zero paycheck for the last three pay periods of the year." Lyytikainen asked the County to reimburse her the difference between the grossed-up rate that it used for tax withholding and the regular rate that applied when she used her leave, but the County refused. The Association presented evidence of other unit members who had been affected in substantially similar ways.

The Parties' Subsequent Negotiations on the Constructive Receipt Issue

On November 28, 2017, the Association submitted a written offer on the constructive receipt issue. The Association proposed accepting the use of irrevocable election forms, the limitation that employees could only redeem leave hours that were accrued that year, and retention of the 80-hour redemption prerequisite. However, the Association rejected the "forfeiture provision" from the County's proposal. Instead, the Association proposed that employees who submitted an irrevocable election form but failed to use 80 hours of leave would have their irrevocable elections declared void, rendering them unable to redeem leave that year. Finally, the Association called for the County to permanently allow employees who were imminently retiring to redeem leave hours accrued in prior years, which the County had previously proposed only as a one-time exception.

The Association submitted an alternative proposal the next day. Under this proposal, unit members could request to "front-load" the accrual of their annual leave hours to the beginning of each year. Normally unit members accrued annual leave hours throughout the year and did not earn their full allotment of hours until the last pay period of the year.

Around this time, the Association also made a "tax-as-you-go" proposal whereby the County would report and collect taxes on constructive receipt income as leave accrued throughout each tax year, rather than during the last three pay periods of the year.

The County rejected the Association's proposals in a December 1, 2017 letter from Atin, opining that the Association's proposals did not avoid the risk of constructive receipt taxation. Atin explained that the County was still willing to accept the terms of its own prior proposal, including the offer to waive the current limitation on the number of leave redemption requests each unit member could make in 2017, in order to allow employees the opportunity to cash out as many hours as possible that year.

On December 7, 2017, Atin e-mailed Fox, Coyle, and other Association representatives, inquiring whether the Association would accept the County's offer to amend the annual leave plan for 2018, in which case the County would temporarily waive the requirement that employees use 80 hours of leave before requesting redemptions for 2017. The County was also still willing to allow unit members who had already exceeded the number of leave requests that year, but who had not yet cashed

out the maximum possible number of hours, to submit one additional redemption request.

On December 20, 2017, Leedham informed Fox and Coyle, via e-mail, that the County had reached a constructive receipt agreement with the deputy sheriffs' bargaining unit. That agreement did not include the County's "forfeiture provision" that the Association had consistently opposed. Instead, employees who submitted irrevocable elections, but failed to use enough leave to request a redemption, would be ineligible to redeem leave and would still be considered to have constructively received the income designated on their irrevocable election forms. Leedham said that the County was willing to offer the same terms to the Association. On December 21, 2017, Fox proposed eliminating the 80-hour redemption prerequisite and capping, for pension purposes, the number of leave hours that would be considered compensable pay. She suggested that the County retirement board could pass a resolution to effectuate the latter change.

On December 22, 2017, Atin responded, stating that the County was unable to verify the legality of the Association's proposal. He suggested that the parties enter into a one-year agreement on the constructive receipt issue while they explored the legal and other implications of the Association's proposals.

On December 28 and 29, 2017, Fox and Coyle e-mailed a series of questions about the County's pending proposal. Atin answered some questions while stating that the County had already answered others and had not changed its position. Atin suggested that the Association either submit a written counteroffer that would address any concerns it had about the County's proposal or that the parties meet to discuss

the matter in person. At the same time, however, Atin noted that it was the last business day of the year and that if the Association wanted to reach an agreement that year, the parties would have to do so by 5:00 p.m. that day. Otherwise, Atin offered to continue discussing the matter in 2018. He said that the pending proposal was not the County's last, best, and final offer, and that the County was willing to continue the discussion. No agreement was reached addressing the constructive receipt issue in 2017. The County continued to report accrued leave hours as constructively received income and withhold taxes on that income in the 2018 tax year.

The Parties' Tax Experts

At the hearing, the ALJ allowed the County to designate Judith Boyette, an attorney with several years' experience advising employers about the tax implications of leave cash-out plans and other tax matters, as an expert witness on tax law. The ALJ allowed the Association to designate Womack as its expert on tax preparation, though not specifically on constructive receipt application.[12]

Boyette testified that, if an employer concludes its employees are in constructive receipt of income, it must both report all taxable income and withhold the appropriate amount in taxes from employees' paychecks. Merely reporting taxable income but not withholding taxes creates the risk of incurring tax penalties, according to Boyette.

[12] Neither party filed exceptions to the ALJ's expert witness rulings and therefore they are non-precedential. (*County of Santa Clara*, *supra*, PERB Decision No. 2613-M, p. 2, fn. 2.) We accordingly express no opinion on those rulings.

Boyette also testified that employers are not required to withhold income taxes at any particular point in the year because each employer's operations are different. She said that employers should withhold taxes at the earliest reasonable time within the tax year.

Boyette avoided any prediction as to whether the IRS would find that a particular leave cash-out plan triggered the constructive receipt doctrine. Rather, she labeled various components of cash-out plans as positive or negative factors that the IRS would weigh in its determination. Boyette acknowledged that one could seek an IRS PLR about whether a leave cash-out plan triggered the constructive receipt doctrine, but she said that doing so came with certain risks. First, she testified that if a reviewing IRS agent finds a problem with the plan under review, that agent may refer the matter to the local IRS office, which may elect to audit the program. Second, Boyette said that seeking a PLR would not fully resolve the tax questions surrounding the leave plan since there was no mechanism for obtaining an IRS opinion on whether it would consider a leave cash-out plan to be operating as a deferred compensation plan.

Womack testified that a group of 10 Association members retained him to file amended returns seeking refunds from doubly taxed income or other potential over-withholding, as well as to provide related advice. He filed 20 amended returns in total, one to the IRS and one to the FTB for each individual. As of the hearing date, he was aware of 16 refunds resulting from the amended returns: eight from the IRS and eight from the FTB.

DISCUSSION

The Board reviews exceptions to a proposed decision using a de novo standard of review. (*Sacramento City Unified School District* (2020) PERB Decision No. 2749, p. 6 (*Sacramento City*).) Under this standard, we review the entire record and are free to make different factual findings and reach different legal conclusions than those in the proposed decision. (*City & County of San Francisco* (2021) PERB Decision No. 2757-M, p. 8.)

A. Bad Faith Bargaining – Case No. LA-CE-1268-M

The complaint in Case No. LA-CE-1268-M alleged that the County engaged in bad faith bargaining during its negotiations with the Association over amending the parties' leave redemption plan. 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 conduct" analysis, depending on the specific conduct involved. (*Arcadia*, *supra*, PERB Decision No. 2648-M, p. 34.) Per se violations generally involve conduct that violates statutory rights or procedural bargaining norms. (*Id*. at pp. 34-35.) In contrast, the totality of conduct test applies to allegations of bad faith bargaining conduct that does not constitute a per se refusal to bargain. (*Id*. at p. 35.)[13] Under the totality of conduct test, the ultimate question is whether the respondent's conduct, when viewed in its totality, was sufficiently egregious to frustrate negotiations. (*San Ramon*, *supra*, PERB

[13] The phrases "totality of circumstances" and "totality of conduct" are interchangeable, and either phrase describes the operative test. (*County of Sacramento* (2020) PERB Decision No. 2745-M, p. 9, fn. 8.) While PERB frequently refers to bad faith bargaining under this test as "surface bargaining," that label does not limit the scope of the relevant factors to only those involving superficial bargaining conduct. (*Ibid*.)

Decision No. 2571-M, p. 7.) A single indicator of bad faith, if egregious, can be a sufficient basis for finding that a party has failed to bargain in good faith. (*City of San Jose* (2013) PERB Decision No. 2341-M, pp. 18-19 (*San Jose*).)

The County contends the ALJ erred in finding a bad faith bargaining violation for two reasons. First, the County argues that both acts the ALJ found were bad faith indicia—its misrepresentations at the bargaining table and unjustified exploding offer—occurred outside of the statute of limitations period. Second, the County challenges the ALJ's conclusion that its April 4, 2017 exploding offer indicated bad faith. We find no merit in either exception.

1. Statute of Limitations

Absent a recognized exception, PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged 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, 1077.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177, p. 4.) Before a complaint issues, the charging party must allege facts that would, if proven, establish timeliness. (*Los Angeles Unified School District* (2014) PERB Decision No. 2359, pp. 3 & 30.) After a complaint issues, the respondent must plead untimeliness as an affirmative defense (or the defense is waived), and the respondent bears the burden of proving that the statute of limitations bars the charge. (*Id*. at p. 30.)

The County does not except to the ALJ's ruling that, during negotiations in March and April 2017, Leedham repeatedly misrepresented that the County would only report income and not withhold taxes based on employees' accrued leave hours. Instead, it argues the ALJ improperly relied on that conduct to find the County bargained in bad faith because it occurred more than six months before the charge was filed on December 6, 2017. We disagree.

"In order to toll the statute of limitations based on lack of notice or discovery, [the Association must] show that it did not have 'clear and unequivocal notice' of the alleged misconduct." (*Trustees of the California State University (San Marcos)* (2020) PERB Decision No. 2738-H, p. 12.) Nothing in the record shows that the Association knew or should have known prior to September 22, 2017, that Leedham had made material misrepresentations at the bargaining table.

As discussed further below, Leedham repeatedly represented at the negotiations table throughout March and April 2017 that the County would only report as income and not withhold taxes on employees' accrued leave hours. Association representatives took Leedham's statements at face value and communicated them to their membership, recommending that unit members ratify the tentative agreement precisely because of the reassurances the bargaining team had received that the County would only report constructive receipt income. Based on Leedham's assurances, the Association membership ratified the MOA in May 2017. The Association's reasonable reliance was reinforced when the County did not communicate anything further about the issue for over four months. It was only upon receipt of the Auditor-Controller's September 22, 2017 letter directly contradicting

Leedham's March and April 2017 statements that the Association first learned of the County's misrepresentations. Even then, it took some work for the Association to figure out which representation was correct. Because the Association could not have discovered that Leedham's statements were inaccurate until after September 22, 2017, the statute of limitations could not have begun to run prior to that date, and the misrepresentations therefore fall within the limitations period. (*Trustees of the California State University (San Marcos)*, *supra*, PERB Decision No. 2738-H, p. 12; *Gavilan Joint Community College District*, *supra*, PERB Decision No. 1177, p. 4.)

In contrast, the Association clearly knew of the County's April 4, 2017 exploding offer at the time it was made, more than six months before the charge was filed. This case thus presents a common scenario in which certain indicia of bad faith fall outside the limitations period while others fall inside the limitations period. However, PERB considers bargaining conduct that occurs outside the statute of limitations period if there is also challenged conduct occurring within the limitations period. (*Anaheim Union High School District* (2015) PERB Decision No. 2434, adopting proposed decision at pp. 57-58 (*Anaheim*).) Such an approach is necessary because "[a]rtificially removing from consideration any bargaining conduct older than six months for any purpose is antithetical to the 'totality of the bargaining conduct' analysis." (*County of San Diego* (2020) PERB Decision No. 2721-M, p. 9, fn. 5, quoting *Anaheim*, *supra*, PERB Decision No. 2434, adopting proposed decision at p. 58.) However, when none of the respondent's conduct during the limitations period evinces bad faith, evidence from outside the limitations period cannot be used to

"reviv[e] a legally defunct unfair practice charge." (*Anaheim*, *supra*, PERB Decision No. 2434, adopting proposed decision at p. 56.)[14]

Here, Leedham's misrepresentations are deemed timely because the Association did not actually discover and confirm they were inaccurate until several weeks after it received the County's September 22, 2017 letter. Because there is timely evidence of the County's bad faith, we consider the County's April 4, 2017 exploding offer as a further indicator of bad faith. (*Anaheim*, *supra*, PERB Decision No. 2434, adopting proposed decision at pp. 57-58.) The ALJ therefore did not err by finding bad faith based on both the misrepresentations and the exploding offer.

2. Indicia of Bad Faith

Under the totality of conduct test, bad faith indicia relevant here include: misrepresenting facts (*Rio School District* (2008) PERB Decision No. 1986, p. 12); failing to explain a bargaining position in sufficient detail or to provide requested information supporting a bargaining position, without an adequate reason for such failure (*City of Davis* (2018) PERB Decision No. 2582-M, pp. 19-20, citing *NLRB v. Truitt Mfg. Co*. (1956) 351 U.S. 149, 152-153; *San Jose*, *supra*, PERB Decision No. 2341-M, p. 42); engaging in dilatory or evasive tactics, failing to prepare

[14] The Board has typically not framed this analysis as falling under the new wrongful act doctrine, an exception to the statute of limitations that applies if, during the limitations period, the respondent committed a new wrongful act that goes beyond merely reiterating a prior policy. (*County of San Diego*, *supra*, PERB Decision No. 2721-M, p. 14, citing *City & County of San Francisco* (2017) PERB Decision No. 2536-M, p. 15.) However, the Board's traditional approach in bad faith bargaining cases mirrors the new wrongful act doctrine in holding that the Board will consider bargaining conduct outside the statute of limitations period if there is also challenged conduct occurring within the limitations period.

adequately for negotiations, or failing to take one's bargaining obligation seriously (*Children of Promise Preparatory Academy* (2018) PERB Decision No. 2558, p. 26; *Oakland Unified School District* (1983) PERB Decision No. 326, pp. 33-34); and making a time-limited, i.e., "exploding," offer without a legitimate basis (*Arcadia*, *supra*, PERB Decision No. 2648-M, p. 43.)

Notably, the County does not dispute that Leedham misrepresented the true facts when he repeatedly claimed that the County would not withhold taxes based on the constructive receipt doctrine. These misrepresentations, while indicators of bad faith in their own right, also prove a failure on the County's part to provide requested information, fully prepare for bargaining, and treat negotiations with adequate care and seriousness. It would have required little effort on Leedham's part to confirm his statements with Burgh's office, for instance. Adding to this bad faith conduct, the Association asked Leedham to make Burgh available and Leedham denied the request, also failing to make someone else from the Auditor-Controller's Office available to answer the Association's questions. Even if Leedham qualified his statements as being "based on the information he had at the time," they were no less misleading. Likewise, Leedham's claim that it was not his role to interpret the tax code is unavailing as the Association never asked him to do so; rather, the Association asked him a factual query, i.e., how the County was planning to implement tax withholding. The County thus failed to exhibit the central aspects of good faith bargaining, including honesty, preparation, thoroughness, seriousness, and reasonable attempts to answer the other side's questions. Moreover, as discussed above, the record shows that this conduct frustrated negotiations by leading the

Association to rely on the fact its members would not experience increased tax withholding.

Finally, we turn to the County's exceptions as to another indicator. Specifically, the County argues that the ALJ incorrectly found that it failed to provide an adequate explanation for making an exploding offer. We find no merit to this exception.

While an exploding offer is not a per se violation, a bargaining party evidences bad faith under the totality of conduct test if it does not adequately justify a threatened change in position that is inherent in an exploding offer. (*Arcadia*, *supra*, PERB Decision No. 2648-M, p. 43.) This is because an exploding offer, like regressive bargaining—making proposals that are overall less generous to the other party than prior offers—manifestly moves parties further away from agreement and thus, without an adequate explanation, indicates bad faith. (*Id*. at p. 39.)

In *Arcadia*, at the employer's behest, the employer and union began successor contract negotiations ten months prior to the expiration of the parties' existing contract, far earlier than the few months the parties had historically devoted to negotiations. After the union had formed its negotiations team, but prior to the first formal bargaining session, the employer made a comprehensive offer to the union with the caveat that it would expire in 22 days (at the end of November). The employer's stated reason for establishing a deadline for acceptance was that the City would be holding a City Council election the following spring, potentially changing the composition of the Council. We found the employer's explanation inadequate to justify the exploding offer given the significant time lag between the employer's unilaterally imposed deadline

and the City Council election. Without a legitimate basis, the exploding offer evidenced bad faith.

Here, the County made an offer with an expiration date only three days later, at which point the County did, in fact, withdraw its offer. As the County saw it, its risk of exposure to tax liability would increase as the year progressed. On this point, Leedham testified that "[i]f bargaining was to continue for months and months, we didn't believe that we could continue to offer something like this deep into a calendar year." Thus, the potential tax liability gave the County a reasonable basis for not leaving its offer on the table throughout 2017.

While we credit the County's argument that the tax liability issue gave it a reasonable basis for not leaving its offer on the table throughout 2017, the County gave neither the Association nor PERB a clear, supportable reason for its exceedingly short, three-day deadline. Nor did it give any reason why it could not have provided a longer, more reasonable period of time for the Association to respond to its offer without materially increasing its potential tax liability. We infer from the County's inability to justify the tight timeline that the three days was intended at least in part to pressure the Association into reaching agreement on a successor MOA, which is not a legally sufficient explanation to make an exploding offer. (See *Arcadia*, *supra*, PERB Decision No. 2648-M, p. 39 ["If a party was free to make an exploding offer at any time and offer no justification for threatened or actual regressive bargaining other than the other side's failure to accept the proposal by a given deadline, then exploding offers would amount to an exception that swallows the regressive bargaining rule"].) Although we do not preclude the possibility of circumstances under which such a short

deadline may be legitimately justified, the facts here do not present us with such a situation.

The County contends, however, that its exploding offer did not have the effect of frustrating negotiations because the parties ultimately agreed to a successor MOA. This argument overlooks the critical fact that the parties did not reach an agreement on amendments to the leave redemption plan that would have addressed the constructive receipt issue. As the ALJ noted, one result of the County's exploding offer was to rush the Association's negotiators and curtail the Association's opportunity to meaningfully consider and discuss the offer's implications. And because the Association did not know at the time that the County planned to withhold taxes based on constructive receipt income, the Association was unable to appreciate that the County's exploding offer would have allowed unit members to avoid constructive receipt tax withholdings that year. The exploding offer and misrepresentations thus combined to frustrate good faith negotiations.

Likewise, we do not share the County's perspective that the exploding offer was essentially harmless because "there is no evidence in the record that the Association . . . would have entertained the proposal if the deadline was longer." The County appears to claim that its proposal was absolved of wrongfulness because the parties were never able to resolve the constructive receipt issue before the Association ratified the MOA. We cannot ignore, however, that this result may have been attributable, at least in part, to the rush and confusion generated by the exploding offer and misrepresentations, which prevented the Association from appreciating the full import of not reaching a resolution. And in any event, we generally do not look favorably upon a

party's rationalizations of an unlawful act by a claim of futility. (See, e.g., *Lucia Mar Unified School District* (2001) PERB Decision No. 1440, adopting proposed decision at p. 45 ["The law does not mandate success, but only requires a 'good faith' effort by the parties to reach agreement"]; cf. *Calexico Unified School District* (1983) PERB Decision No. 357, adopting proposed decision at pp. 20-23.) The ALJ thus correctly found that the County's exploding offer was an indicator of bad faith.

In sum, the Association's bad faith bargaining allegations are timely. The Association did not actually discover Leedham's misrepresentations until September 22, 2017, and it filed its unfair practice charge on December 6, 2017, well within the six-month statute of limitations. Because we were presented with timely evidence of the County's bad faith, we considered the County's April 4, 2017 exploding offer as a further indicator of bad faith, despite that conduct falling outside the statute of limitations period. Based on the County's misrepresentations and exploding offer, among other bad faith indicia, the ALJ properly found that the County violated its duty to bargain in good faith.

B. Bargaining the Effects of the County's Decision – Case No. LA-CE-1260-M

1. Waiver by the Association

The County argues the ALJ erred by failing to find that the Association had waived its right to bargain the effects of the County's decision to withhold taxes on constructively received income.[15] According to the County, the ALJ's erroneous

[15] The Association has not excepted to the ALJ's conclusion that the County had no duty to bargain over its decision to withhold taxes and instead had only a duty to bargain over foreseeable effects. The ALJ's conclusion is therefore not before us and is non-precedential. (*County of Santa Clara*, *supra*, PERB Decision No. 2613-M, p. 2, fn. 2.) We accordingly express no opinion as to whether the County had decision

conclusion stems from his finding that the County did not give the Association sufficient notice of its decision to withhold taxes on constructively received income until November 6, 2017, rather than on September 22, 2017. We do not find the County's arguments persuasive.

The duty to bargain in good faith extends to the implementation and effects of a decision that has a foreseeable effect on matters within the scope of representation, even where the decision itself falls outside the scope of representation. (*County of Santa Clara* (2019) PERB Decision No. 2680-M, pp. 11-12.) An employer must provide notice and a meaningful opportunity to bargain over the reasonably foreseeable effects of its decision before implementation, just as it would for a decision involving a mandatory subject of bargaining. (*Id*. at p. 12; *City of Sacramento* (2013) PERB Decision No. 2351-M, p. 17.) Once the union receives proper advance notice, it must demand to bargain effects or risk waiving its right to do so. (*County of Santa Clara* (2013) PERB Decision No. 2321-M, p. 30.) The union's demand must clearly communicate its desire to bargain over the effects of the decision, as opposed to the decision itself, and identify the matters within the scope of representation that it proposes to bargain. (*Ibid*.) However, a union is not required to demand to bargain effects where an employer fails to provide notice prior to implementing the change. (*Id*. at p. 31; *Bellflower Unified School District* (2017) PERB Decision No. 2544, adopting proposed decision at p. 22.)

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bargaining duties in addition to effects bargaining duties. Instead, our discussion focuses on the County's waiver argument and whether the County was entitled to implement its decision without completing effects bargaining.

On the other hand, a union may waive its right to bargain the reasonably foreseeable effects of an employer's decision if it fails to demand to bargain such effects. (*County of Santa Clara*, *supra*, PERB Decision No. 2321-M, pp. 30-31.) "An employer raising a waiver defense must establish that: (1) it provided the employee organization clear and unequivocal notice that it would act on a matter, and (2) the employee organization clearly, unmistakably and intentionally relinquished its right to meet and confer in good faith." (*City of Palo Alto* (2017) PERB Decision No. 2388a-M, p. 38, original underline.) To establish that a union waived its right to bargain by inaction, "the evidence must demonstrate an intentional relinquishment of the union's right to bargain." (*Santee Elementary School District* (2006) PERB Decision No. 1822, p. 3 (*Santee*), citing *San Francisco Community College District* (1979) PERB Decision No. 105.)

To trigger a union's obligation to demand bargaining, notice of a proposed change must "clearly inform[] the employee organization of the nature and scope of the proposed change." (*County of Santa Clara*, *supra*, PERB Decision No. 2321-M, p. 30, citing *Santee*, *supra*, PERB Decision No. 1822.) In *Lost Hills Union Elementary School District* (2004) PERB Decision No. 1652 (*Lost Hills*), following contract negotiations and the union's ratification of a successor collective bargaining agreement, the district unilaterally implemented a new wage formula that was not itself contained in the contract. The new formula decreased pay for certain job classifications. During bargaining, the district's negotiator described the wage formula as, "If you are driving a bus, you get bus pay. If you are a custodian, you get custodian pay. If you're grounds, you get grounds pay." (*Id*., adopting proposed decision at p. 4.)

Later, the district's director of business services told the union president "there was going to need to be some adjustments made to the salary schedule," and the union president only asked in response whether the change would happen immediately. (*Ibid*.) The Board found that the district bargaining representative's statement was "hardly clear or unambiguous, one which could inform [the union] of [the district's] intent to change the wage formula." (*Id*., adopting proposed decision at p. 6.) Neither "could the District's meaning have been reasonably understood" from the district's statement that some "adjustments" would be made to the salary schedule. (*Ibid*.) As a result, the Board concluded that the district had not provided the union with notice or an opportunity to bargain prior to implementation of the change. (*Ibid*.; see, e.g., *Santee*, *supra*, PERB Decision No. 1822, pp. 7-8.)

Applying these standards, we conclude that the County did not provide the Association with clear notice of its decision to implement tax withholding based upon constructively received income until November 6, 2017. Although the County's September 22, 2017 letter announced that "the constructively received income will be included in your taxable wages, and taxes will be calculated and withheld," it lacked critical details that would have put the Association on notice of the County's intended change, much like the employer's statement in *Lost Hills*. The letter did not advise the Association of when the County planned to implement the tax withholding; which unit members would be subject to withholding; how the County would calculate the withholding to avoid double taxation and which pay rates it would use to determine employees' tax liability under the constructive receipt rule; and whether the County would withhold taxes on leave accrued in 2017, on all accrued leave (including that

from previous years), or on leave accrued going forward after a certain date.[16] Most importantly, the letter contravened what Leedham had represented to the Association during negotiations in March and April 2017, thereby requiring the Association to figure out which set of representations were correct. Thus, the September 22 letter did not, by itself, clearly inform the Association of the County's planned change. The requisite notice came instead from the County's November 6 letter, which contained the specifics of how the County intended to implement its tax plan.

The County argues that the key details missing from its September 22, 2017 letter were those which would have been subject to effects bargaining, implicitly arguing that the letter provided the Association with notice sufficient to obligate it to demand effects bargaining. But the foreseeable effects of the County's decision to begin withholding taxes based on constructive receipt income were not apparent from the September 22 letter. The Association needed more information, as described *ante*, before it could make a viable demand to bargain the effects of the decision. (See *Santee*, *supra*, PERB Decision No. 1822, p. 8 [new policy providing that consequences of violating the policy were to be delineated in a separate regulation did not allow the employee organization to determine the foreseeable effects of the policy change on bargaining unit members].) Under these circumstances, the September 22, 2017 letter did not provide sufficiently clear notice of the proposed changes.

[16] While some of this information may arguably relate to portions of the decision that the ALJ found to fall outside the scope of representation, the information was still necessary to allow the Association to assess potential effects in a meaningful manner. Moreover, other parts undisputedly fall within the scope of representation. For instance, the parties could have bargained the timing of the withholding—specifically, the pay periods in which the County intended to implement them.

Even if we were to regard the County's September 22, 2017 letter as adequate notice of the County's decision to withhold taxes on constructively received income, the record is replete with evidence that the Association did not at any point clearly and unmistakably waive its right to bargain.[17] The Association repeatedly indicated its interest in bargaining over the impacts of the County's decision following the issuance of the September 22 letter.

First, after receiving the letter, Coyle requested a meeting with the Auditor-Controller's Office. On October 11, 2017, Burgh and Herron met with Coyle, Fox, and Feldman to discuss the County's planned implementation of the constructive receipt rule. The Association representatives presented a number of hypotheticals to Burgh and Herron in an attempt to address various members' concerns about how the County intended to withhold taxes. It was during this meeting that Burgh and Herron confirmed that the Auditor-Controller's Office would be both reporting as constructively received income the leave hours that employees were eligible to redeem and withholding taxes on that income from employees' paychecks.

[17] The County's misrepresentations about its tax withholding plan also undercut the County's waiver argument. There can be no *intentional* relinquishment of an interest where such relinquishment was induced by the employer's misstatement. (See *San Bernardino Community College District* (2018) PERB Decision No. 2599, p. 14, citing *Placentia Unified School District* (1986) PERB Decision No. 595, p. 4 ["evidence must 'reflect[ ] a *conscious abandonment* of the right to bargain over a particular subject'" (emphasis added)].) Though the September 22 letter started to backtrack from the misrepresentations, the County is not entitled to presume that a union must turn on a dime and suddenly assume that prior employer representations were false, and a later representation is true. The Association began investigating which set of facts were true, which was what a reasonable organization would have done.

Second, on October 12, 2017, Fox e-mailed Leedham, Burgh, Herron, and other County representatives to complain that Leedham's representations during negotiations directly contradicted the information that Burgh and Herron had given the Association the previous day. Fox requested copies of bargaining notes to help the Association Board decide what actions it needed to take.

Later, on October 26, 2017, Fox e-mailed Leedham and other HR representatives about the County's taxation plan, again complaining that the County's tax plan could result in employees with zero net pay on end of the year paychecks, which contradicted earlier representations from the County. None of these actions are consistent with an intentional relinquishment of the Association's right to bargain over the effects of the County's tax withholding decision.[18]

Two days after it finally learned the truth about the County's tax withholding plan, the Association, through its counsel, made a valid demand to bargain effects via its November 8, 2017 letter.[19] Among other references to the impacts of the County's

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[18] Indeed, the Association's interest in negotiating the tax withholding decision after September 22, 2017 is even more apparent when considered in the context of the multiple attempts the Association made to discuss the County's constructive receipt taxation plans between October 2016 and April 2017.

[19] Despite the ALJ's finding that the November 8, 2017 letter "did not specify that the Association was seeking to bargain over the effects of the withholdings decision," he nevertheless properly concluded that the Association timely signaled its interest in bargaining over the negotiable effects of the County's tax withholding decision. (See *County of Sacramento* (2013) PERB Decision No. 2315-M, p. 5 ["In order to perfect a valid demand to bargain, the exclusive representative is not required to recite a formulaic phrase, but may express its request in any form that conveys its desire to meet and confer or negotiate about a matter within the scope of representation"].)

decision, the letter stated, “We believe there are a number of options that might mitigate or avoid these [potentially negative] outcomes. CJAAVC remains willing to find that solution.” The Association demanded that the County not implement its tax withholding decision before completing good faith negotiations with the Association. Both parties subsequently exchanged proposals designed to minimize or avoid the adverse consequences of the County’s decision, including proposals to “tax-as-you-go” and to eliminate the limit on leave redemption requests. None of the proposals discussed at the time required the County to rescind its decision to withhold taxes on constructively received income. As the ALJ also pointed out, because the County ultimately engaged with the Association in bargaining over the effects of the tax withholding decision, the County could not then maintain that the Association had waived its right to demand effects bargaining.

Since the party asserting waiver bears the burden of proving it as an affirmative defense, we resolve any doubts against that party. (*County of Merced* (2020) PERB Decision No. 2740-M, p. 19; *Regents of the University of California* (2004) PERB Decision No. 1689-H, adopting proposed decision at pp. 44-45.) It is clear from the record that the Association did not clearly and unmistakably waive its right to bargain. Thus, we reject the County’s waiver argument.

2. The County’s Unilateral Implementation

The County challenges the ALJ’s finding that it was not entitled to implement its tax withholding decision before completing bargaining over the effects of that decision, arguing that it satisfied the test set forth in *Compton Community College District* (1989) PERB Decision No. 720 (*Compton CCD*). In that case, the Board identified the

limited circumstances under which an employer may implement a decision on a non-mandatory topic prior to exhausting its effects bargaining obligation. (*Id*. at pp. 14-15.) An employer is privileged to implement such a decision where: (1) the implementation date is based on an immutable deadline or an important managerial interest, such that a delay in implementation beyond the date chosen would effectively undermine the employer's right to make the decision; (2) it gives sufficient advance notice of the decision and implementation date to allow for meaningful negotiations prior to implementation; and (3) it negotiates in good faith prior to implementation and continues to negotiate afterwards as to the subjects that were not resolved by virtue of implementation. (*Ibid*.) As to the first element, it is difficult to find support for an "immutable" deadline here, given that there was no change in tax law giving rise to the City's decision to look into and begin applying the constructive receipt doctrine. The City had already incurred the same risk of tax liability for years, and the City did not articulate any reason why 2017 was so different that it created an immutable deadline.

As already found *ante*, the County did not give the Association sufficient notice of its decision to implement the tax withholding such that the parties could meaningfully exchange and consider the other's proposals beforehand. The September 22 letter did not put the Association on immediate notice of the County's tax decision not only because it lacked key information as to when the withholding would take place, to whom the withholdings would apply, and how they would be enacted, but also because the letter was irreconcilably inconsistent with what Leedham had represented to the Association during negotiations five months earlier. The Association spent the ensuing weeks trying to uncover the truth about the

County's plan. By November 6, when the Association finally learned the details of the County's plan to withhold taxes, only 10 days remained until the County would begin implementation, as the cutoff date for processing the November 24 paychecks was November 16. Thus, the County did not give sufficient advance notice of its decision to allow for meaningful negotiations before implementation.

As to the third element, the County claims the ALJ erred by finding that the County bargained in bad faith prior to implementing its withholding decision. According to the County, an employer's "obligation to bargain over the effects of such a non-negotiable decision would not arise until after notice of the decision is given and a bargaining demand is made." The gravamen of the County's argument is that we should disregard its earlier misrepresentations and exploding offer—neither of which it disputes it made—because it did not give notice of its decision to implement the tax withholdings until months later. We reject the County's invitation to apply *Compton CCD* in such a mechanistic way.

We do not read *Compton CCD* as being so limited as to require PERB to consider only an employer's post-notice bargaining conduct. The third element of the test broadly requires that "the employer negotiates in good faith prior to implementation." While the facts in *Compton CCD* did not involve a finding of earlier bad faith conduct, there is likewise no qualifying language stating that the employer's obligation to bargain in good faith is circumscribed to the period between notice and implementation. Indeed, such a limitation would run counter to the MMBA's unqualified requirement that employers and employee organizations meet and confer in good faith. (§ 3505.)

Moreover, we cannot set aside the County's misrepresentations and exploding offer in analyzing the third element of *Compton CCD* because they are inextricably tied to the later effects bargaining. By erroneously informing the Association that the County only intended to report and not withhold taxes, Leedham misled the Association's negotiators on a critical effect. The County compounded the problem by refusing to bring Burgh or anyone else from the Auditor-Controller's Office to the bargaining table, or to at least have a reasonable alternative for the Association to get reliable answers and engage in interactive dialogue. The consequences of these actions carried into the fall as the Association scrambled to discern the truth about the County's plan following the September 22 letter. The net effect of the exploding offer was to cut short negotiations on the constructive receipt issue, making it even less likely the Association would learn that the County had misled it. With more time to discuss the County's tax plan, the Association may have been able to learn the truth and thus had ample time to negotiate the effects of the County's decision, instead of the 10 days it was ultimately left with in November 2017.

Accordingly, we find that the County did not negotiate in good faith prior to implementation of its tax withholding decision. Because the County did not meet the *Compton CCD* test, it was not privileged to implement that decision when it did.

C. Remedy

The ALJ's proposed remedial order required the County to "compensate Association unit members for financial losses, if any, arising directly from its failure to provide the Association with adequate notice and the opportunity to fully bargain over the effects of its decision to withhold taxes from paid leave hours taxed as

constructively received income." The County excepts to the ALJ's proposed make-whole order, contending that the only "financial losses" employees could have suffered were the withholding of constructive receipt taxes, which the County was required to withhold by state and federal law. The Association urges us to uphold the proposed make-whole relief and points to several categories of "damages and/or impairment of benefits to Association unit members."

The Legislature has granted PERB broad authority to investigate and remedy violations of the MMBA and to take any action the Board deems necessary to effectuate the Act's purposes. (§ 3509, subd. (b); *City of Palo Alto* (2019) PERB Decision No. 2664-M, p. 2.) 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." (*City of Culver City* (2020) PERB Decision No. 2731-M, adopting proposed decision at p. 50, citing *Modesto City Schools* (1983) PERB Decision No. 291, pp. 67-68.) An appropriate remedy therefore should make whole all injured persons or organizations for the full amount of their losses and should withhold from the wrongdoer the fruits of its violation. (*Sacramento City*, *supra*, PERB Decision No. 2749, p. 10; *City of Pasadena* (2014) PERB Order No. Ad-406-M, p. 13.)

The standard remedy for an employer's unlawful unilateral change usually consists of a cease-and-desist order, make-whole relief for employees injured by the change, rescission of the change, and a bargaining order. (*County of Santa Clara*, *supra*, PERB Decision No. 2680-M, p. 14; *Pasadena Area Community College District* (2015) PERB Decision No. 2444, pp. 23-24.) Similarly, when an employer implemented changes to terms and conditions of employment without first reaching a

bona fide impasse in negotiations due to its surface bargaining conduct, the typical remedy for a bad faith bargaining violation includes an order to cease and desist from the unlawful bargaining conduct and restore the status quo. (*San Ramon*, *supra*, PERB Decision No. 2571-M, p. 17; *City of Selma* (2014) PERB Decision No. 2380-M, p. 25.)

When an employer's violation involved a failure to bargain effects, make-whole relief runs from the date any impacted employee began to experience harm until the earliest of: (1) the date the parties reach an agreement as part of complying with our effects bargaining order; (2) the date the parties have reached impasse and exhausted any post-impasse procedures that may be required or agreed upon; or (3) failure by the union to bargain in good faith. (*County of Santa Clara*, *supra*, PERB Decision No. 2680-M, p. 14.)

Here, the ALJ's proposed make-whole remedy directed the County to "compensate Association unit members for any financial losses incurred as a direct result [of] its decision to implement its constructive receipt income tax withholdings decision before completing negotiations over the negotiable effects of that decision." While this proposed remedy would be appropriate in many cases, particularly where further litigation is needed to determine both the nature and amount of losses resulting from a violation, the unique circumstances of this case warrant a different approach. Over the course of a 10-day hearing, the parties created an extensive record that allows us to define the nature of appropriate make-whole relief more specifically than the ALJ did in the proposed decision. In the interest of administrative economy, we will do so to avoid protracted compliance proceedings.

Because we have no reason to determine whether the County was right or wrong in its interpretation of the constructive receipt doctrine, and because unit members were able to obtain at least partial refunds of excess withholdings through Womack's efforts, we do not order the County to make employees whole for their additional tax liability or for harms caused when employees sought to reduce their taxes by redeeming accrued leave.[20] In contrast, however, a preponderance of the evidence indicates that the County's MMBA violations are a substantial cause of the circumstances reasonably leading unit members to retain a tax professional to assist them with filing amended federal and/or state tax returns (including some employees who may do so in the near future, either for the first time or on a repeated basis).[21] Under salient PERB precedent, these employees are entitled to reimbursement of

[20] PERB has made employees whole for taking leave at a time not of their choosing, when those circumstances resulted from an employer's decision to change a policy within the scope of representation without providing notice and an opportunity to bargain in good faith to impasse or agreement. (*Lodi Unified School District* (2020) PERB Decision No. 2723, p. 21.) Here, however, the Association did not except to the ALJ's conclusion that the County's decision to begin applying the constructive receipt doctrine fell outside the scope of representation, and we decline to consider that issue sua sponte. Also not before us are any claims that the County bargained in bad faith by proposing to adopt or adopting an illegal construction of state and federal tax laws. While such illegality claims occasionally require PERB to interpret state or federal constitutional rights or statutory schemes that we do not enforce, we have no cause to do so here. (Cf. *San Jose*, *supra*, PERB Decision No. 2341-M, p. 49 [claim involved an alleged illegal or prohibited subject of bargaining]; *City of Pinole* (2012) PERB Decision No. 2288-M, pp. 8-12 [same].)

[21] While the Association describes the problem with the County's tax withholdings as one of double taxation, testimony from Association witnesses and other record evidence focuses on the differential in rates at which the County taxed bargaining unit members. Irrespective of how the problem is characterized, the remedy is the same, as employees can recoup excess withholding through the assistance of a tax professional.

accountancy and/or related professional fees incurred in relation to the County's implementation of its constructive receipt tax withholding decision. (See, e.g., *Sacramento City*, *supra*, PERB Decision No. 2749, pp. 11-13 [ordering reimbursement of legal expenses reasonably incurred in a separate proceeding to remedy, lessen, or stave off the impacts of the other party's unfair practice]; *City of San Diego* (2019) PERB Decision No. 2464a-M, p. 4 [on remand from Court of Appeal's affirmance of the Board's award of legal expenses, ordering reimbursement of reasonable attorneys' fees and costs for litigation undertaken to remedy unfair practice]; *Omnitrans* (2009) PERB Decision No. 2030-M, p. 30 [ordering reimbursement of legal expenses incurred in ancillary criminal trespassing case resulting from employer's unfair practice].)[22]

While it is possible some unit members might have hired tax professionals even if the County had followed the law, such uncertainty does not bar a make-whole award. (*City of Pasadena*, *supra*, PERB Order No. Ad-406-M, pp. 13-14 [PERB uses a preponderance of evidence standard to estimate damages even if the exact measure of damages is uncertain].) Particularly given that the record shows impacted employees have successfully obtained refunds from the IRS and FTB through filing amended tax returns to address the double taxation issue and/or other bargainable impacts, reimbursement of ancillary fees incurred is sufficient to make unit members

[22] Because the Association did not file exceptions, there is no request before us to reverse the ALJ's denial of an attorneys' fees award or to order reimbursement of ancillary attorneys' fees the Association incurred from retaining tax experts and/or the attorneys it hired in November 2017 for bargaining over the constructive receipt issue. (See *Sacramento City*, *supra*, PERB Decision No. 2749, pp. 11-13 [explaining standards PERB applies in two discrete contexts in which a party seeks an award of legal expenses].)

whole.[23] The County's obligation to reimburse these fees will last until: (1) the date the parties reach an agreement as part of complying with our effects bargaining order; (2) the date the parties have reached impasse and exhausted any post-impasse procedures that may be required or agreed upon; or (3) failure by the Association to bargain in good faith or to request bargaining. (*County of Santa Clara*, *supra*, PERB Decision No. 2680-M, p. 14.).

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the County of Ventura violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3502, 3503, 3505, 3506, and 3506.5, subdivision (c), and PERB Regulation 32603, subdivision (c), by implementing its decision to withhold taxes based upon accrued paid leave without affording the Criminal Justice Attorneys Association of Ventura County (Association) adequate notice and a meaningful opportunity to bargain over the negotiable effects of that

[23] In certain cases involving back pay awards, an appropriate make-whole remedy may include an order requiring compensation for increased tax liability resulting from a lump sum back pay award that covers more than one calendar year. (See, e.g., *Don Chavas, LLC* (2014) 361 NLRB 101, 102; *Economy v. Sutter East Bay Hospitals* (2019) 31 Cal.App.5th 1147, 1163-1164; *Clemens v. CenturyLink, Inc.* (9th Cir. 2017) 874 F.3d 1113, 1117.) Although the case before us does not present facts implicating so-called "tax neutralization," we note that PERB's broad statutory authority to investigate and remedy violations of the MMBA empowers us to order this relief where appropriate. (Compare MMBA, § 3509, subd. (b) with *Barber v. State Personnel Bd.* (2019) 35 Cal.App.5th 500, 505 [holding that State Personnel Board is not statutorily authorized to provide compensation for increased tax liability stemming from a multi-year lump sum backpay award because Gov. Code, § 19584 is limited to payments of "salary"].)

decision; and by bargaining in bad faith over amending the parties' leave redemption plan.

Pursuant to MMBA section 3509, it is hereby ORDERED that the County, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Negotiating with the Association in bad faith.

2. Failing to provide the Association notice and the opportunity to complete bargaining over the negotiable effects of the County's decision to begin withholding taxes based upon accrued leave hours that it deemed to be constructively received income.

3. Interfering with the Association's right to represent its members.

4. Interfering with employees' right to be represented by the Association.

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

1. Meet and confer with the Association, upon demand, over modifying the parties' paid leave redemption plan to avoid constructive receipt taxation.

2. Meet and confer with the Association, upon demand, over the negotiable effects of the County's decision to begin withholding taxes based upon accrued leave hours that it deemed to be constructively received income.

3. Reimburse Association unit members for any accountancy and/or related professional fees incurred in relation to the County's implementation of its constructive receipt tax withholding decision. Compensation for these fees shall be

augmented by interest at a rate of seven percent per annum. The period of reimbursable fees shall commence on September 22, 2017, and continue until the earliest of: (1) the date the parties reach an agreement as part of complying with our effects bargaining order; (2) the date the parties have reached impasse and exhausted any post-impasse procedures that may be required or agreed upon; or (3) failure by the Association to request bargaining or to bargain in good faith.

4. Within 10 workdays after this decision is no longer subject to appeal, post at all County locations where notices to employees in the Association's bargaining unit are customarily posted, copies of the Notice attached hereto as an Appendix. In addition to physical posting, the Notice shall be posted by electronic means customarily used by the County to regularly communicate with employees in the Association's bargaining unit. The Notice must be signed by an authorized agent of the County, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.[24]

[24] In light of the ongoing COVID-19 pandemic, the County 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 the County so notifies OGC, or if the Association 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 the County to commence posting within 10 workdays after a majority of employees have resumed physically reporting on a regular basis; directing the County to mail the Notice to all employees who are not regularly reporting to any

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

Members Shiners and Krantz joined in this Decision.

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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 the County 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 Nos. LA-CE-1260-M and LA-CE-1268-M, *Criminal Justice Attorneys Association of Ventura County v. County of Ventura*, in which all parties had the right to participate, it has been found that the County of Ventura (County) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq. by implementing its decision to withhold taxes based upon accrued paid leave without affording the Criminal Justice Attorneys Association of Ventura County (Association) adequate notice and a meaningful opportunity to bargain over the negotiable effects of that decision; and by its bad faith bargaining conduct over amending the parties' leave redemption plan.

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

A. CEASE AND DESIST FROM:

1. Negotiating with the Association in bad faith.

2. Failing to provide the Association notice and the opportunity to complete bargaining over the negotiable effects of our decision to begin withholding taxes based upon accrued leave hours that we deemed to be constructively received income.

3. Interfering with the Association's right to represent its members.

4. Interfering with employees' right to be represented by the Association.

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

1. Meet and confer with the Association, upon demand, over modifying the parties' paid leave redemption plan to avoid constructive receipt taxation.

2. Meet and confer with the Association, upon demand, over the negotiable effects of our decision to begin withholding taxes based upon accrued leave hours that we deemed to be constructively received income.

3. Reimburse Association unit members for any accountancy and/or related professional fees incurred in relation to implementation of our constructive receipt tax withholding decision. Compensation for these fees shall be augmented by interest at a rate of 7 percent per annum. The period of reimbursable fees shall commence on September 22, 2017, and continue until the earliest of: (1) the date the parties reach an agreement as part of complying with the effects bargaining order; (2) the date the parties have reached impasse and exhausted any post-impasse procedures that may be required or agreed upon; or (3) failure by the Association to request bargaining or to bargain in good faith.

Dated: _____ COUNTY OF VENTURA

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.