*** * * JUDICIAL APPEAL PENDING * * ***

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SONOMA COUNTY DEPUTY SHERIFFS' ASSOCIATION, Charging Party, v. COUNTY OF SONOMA, Respondent.	Case No. SF-CE-1816-M
SONOMA COUNTY LAW ENFORCEMENT ASSOCIATION, Charging Party, v. COUNTY OF SONOMA, Respondent.	Case No. SF-CE-1817-M PERB Decision No. 2772-M June 23, 2021

Appearances: Rains Lucia Stern St. Phalle & Silver by Timothy K. Talbot and Zachery A. Lopes, Attorneys, for Sonoma County Deputy Sheriffs' Association; Mastagni Holstedt by Kathleen N. Mastagni Storm and Tashayla D. Billington, Attorneys, for Sonoma County Law Enforcement Association; Liebert Cassidy Whitmore by Richard C. Bolanos and Heather R. Coffman, Attorneys, for County of Sonoma.

Before Banks, Chair; Shiners, Krantz, and Paulson, Members.

DECISION

SHINERS, Member: These consolidated cases are before the Public Employment Relations Board (PERB or Board) for a decision based upon the evidentiary record from a hearing before an administrative law judge (ALJ). The

parties' dispute arises out of Measure P, which County of Sonoma voters approved in November 2020 after the County Board of Supervisors (BOS) placed it on the ballot. Measure P significantly increased the authority of the County's Independent Office of Law Enforcement Review and Outreach (IOLERO). Among other things, Measure P authorized IOLERO to independently investigate Sheriff's Office employees and make recommendations for their discipline, directly access sources of evidence obtained as part of internal affairs investigations, receive and review confidential peace officer personnel files, and post body worn camera (BWC) video online.

The operative complaints allege that the County violated the Meyers-Milias-Brown Act (MMBA) and PERB Regulations[1] by placing Measure P on the ballot while failing or refusing to meet and confer in good faith with the exclusive representatives of its non-managerial peace officers, Charging Parties Sonoma County Deputy Sheriffs' Association (DSA) and Sonoma County Law Enforcement Association (SCLEA) (collectively Associations), over Measure P and its effects. The complaints further allege that this conduct interfered with employee and union rights.[2]

[1] The MMBA is codified at Government Code section 3500 et seq. Unless otherwise specified, all further statutory references are to the Government Code. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

[2] The complaint in Case No. SF-CE-1817-M also alleged that the County's conduct violated its duty under MMBA section 3507 to consult with employee organizations over adoption of employer-employee relations rules, and violated article I, section 2(k) of the County's Employee Relations Policy, which requires the County to meet and confer over matters within the scope of representation.

The County asserts Measure P is outside the scope of representation because it "primarily affects the quality and nature of public services," specifically, relations between County law enforcement and the community. The County also argues that it has not refused to meet and confer over any negotiable effects of Measure P, and it stands willing to do so as part of implementing the measure now that voters have approved it.

We have reviewed the entire administrative record and considered the parties' arguments in light of applicable law. As explained below, we find that Measure P's amendments related to investigation and discipline of employees were subject to decision bargaining. We also find that some other amendments were subject to effects bargaining, while still other amendments were not subject to bargaining at all. Because the County did not provide the Associations notice or opportunity to meet and confer over the amendments subject to decision or effects bargaining before placing Measure P on the ballot, the County violated its obligation under the MMBA to meet and confer in good faith. We further find that the unlawfully adopted amendments are severable from the remainder of Measure P, and accordingly declare only those amendments void and unenforceable as to employees the Associations represent.

FINDINGS OF FACT

The Parties

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

"exclusive representative" within the meaning of PERB Regulation 32016, subdivision (b). DSA represents County employees in the following classifications: Deputy Sheriff Trainee, Deputy Sheriff I, Deputy Sheriff II, and Sheriff's Sergeant. SCLEA is an "employee organization" within the meaning of MMBA section 3501, subdivision (a) and an "exclusive representative" within the meaning of PERB Regulation 32016, subdivision (b). SCLEA represents County employees in multiple bargaining units, including Law Enforcement Non-Supervisory (Unit 40), Law Enforcement Supervisory (Unit 41), Corrections & Probation Non-Supervisory (Unit 30), and Corrections & Probation Supervisory (Unit 70). Approximately 220 SCLEA-represented employees work in the Sheriff's Office.

DSA and the County are parties to a Memorandum of Understanding (MOU) effective May 21, 2019, to March 31, 2023. SCLEA and the County are parties to a MOU that has an effective term from BOS adoption in 2019 to May 1, 2023. Article 6.5 of both MOUs, which concerns unit members' personnel files, specifically states: "The County and [DSA/SCLEA] agree that Personnel files and records are confidential." Article 30.3 of the DSA MOU requires the County to abide by the Public Safety Officers Procedural Bill of Rights Act (POBR).[3]

[3] POBR specifies basic procedural rights and protections that must be afforded to all public safety officers by the agencies that employ them when the officers are subject to investigation or discipline. (*California Correctional Peace Officers Assn. v. State of California* (2000) 82 Cal.App.4th 294, 304.) POBR is codified at § 3300 et seq.

Relevant Sheriff's Office Policies

Sheriff's Office Policy 425, "Body Worn Cameras and Audio Recorders," states that all recordings captured on a BWC are the property of the Sheriff's Office. A request for release of BWC video "shall be processed in accordance with the Records Maintenance and Release Policy." Sheriff's Office Policy 1013.11.5 provides employees the right to advance notice prior to disclosure of BWC video to allow "affected current and former members and their [families] adequate time to prepare" for the impact of the release. This advance notice requirement was negotiated by the Associations and the County.

Sheriff's Office Policy 806, "Maintenance Records and Release," states that the Sheriff's Office must maintain the confidentiality of peace officer personnel file information. It also states:

> "The Sonoma County Sheriff's Office is committed to providing public access to records in a manner that is consistent with the California Public Records Act (Government Code § 6250 et seq.), and peace officers' right to maintain the confidentiality of their personnel file records and information."

Sheriff's Office Policy 806 further requires that the Sheriff's Office "designate a Custodian of Records" with general authority to manage, maintain, disclose, and redact records prior to disclosure. The policy specifically states that confidential personnel file information shall not be disclosed absent a valid court order in conformance with Penal Code sections 832.7 and 832.8, the California Public Records Act (§ 6250 et seq.), and article 1, section 3(b)(3) of the California Constitution. Sheriff's Office Policy 807, entitled "Protected Information," requires members of the

Sheriff's Office who access protected information to have undergone appropriate training and other requirements, including a background check, and such persons may only access protected information for a legitimate work-related reason.

Sheriff's Office Policy 1010.14 provides: "All investigations of personnel complaints shall be considered confidential. The contents of such files shall not be revealed to anyone other than the accused member or authorized personnel, except pursuant to lawful process ([Pen. Code,] § 832.7)." Sheriff's Office Policy 1013, entitled "Personnel Records," reaffirms the Sheriff's Office's commitment to maintain the confidentiality of personnel file information, outlines the authority of the designated Custodian of Records to manage, maintain, disclose, and redact records prior to disclosure, and provides that such records may be disclosed "only as provided in [that] policy, the Records Maintenance and Release Policy or according to applicable discovery procedures." Sheriff's Office Policy 1013.1 provides that the "policy governs maintenance and access to personnel records. Personnel records include any file maintained under an individual member's name." Sheriff's Office Policy 1013.2 provides "[i]t is the policy of this office to maintain personnel records and preserve the confidentiality of personnel records pursuant to the Constitution and the laws of California ([Pen. Code,] § 832.7)."

Sheriff's Office Policy 1010.6.1(h) requires supervisors to ensure that "[POBR] rights of the accused member are followed ([Gov. Code,] § 3303 et seq.)." To that end, Sheriff's Office Policy 1010.6.2 specifically provides:

> "(a) Interviews of an accused member shall be conducted during reasonable hours and preferably when the member is on-duty. If the member is off-duty, he/she shall be compensated.

"(b) Unless waived by the member, interviews of an accused member shall be at the Sonoma County Sheriff's Office or other reasonable and appropriate place.

"(c) No more than two interviewers should ask questions of an accused member.

"(d) Prior to the interview, a member shall be informed of the nature of the investigation, the name, rank and command of the deputy in charge of the investigation, the interviewing officers and all other persons to be present during the interview.

"(e) All interviews shall be for a reasonable period and the member's personal needs should be accommodated.

"(f) No member should be subjected to offensive or threatening language, nor shall promises, rewards or other inducements be used to obtain answers.

"(g) Any member refusing to answer questions directly related to the investigation may be ordered to answer questions administratively and may be subject to discipline for failing to do so.

> "1. A member should be given an order to answer questions in an administrative investigation that might incriminate the member in a criminal matter only after the member has been given a *Lybarger* advisement.[4] Administrative investigators should consider the impact that compelling a statement from the member may have on any related criminal

[4] In an administrative investigation into a peace officer's possible criminal misconduct, the officer must be admonished that "(1) his silence could be deemed insubordination, leading to administrative discipline," but that "(2) any statement made under the compulsion of the threat of such discipline could not be used against him in any subsequent criminal proceeding." (*Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822, 829.)

investigation and should take reasonable steps to avoid creating any foreseeable conflicts between the two related investigations. This may include conferring with the person in charge of the criminal investigation (e.g., discussion of processes, timing, implications).

"2. No information or evidence administratively coerced from a member may be provided to anyone involved in conducting the criminal investigation or to any prosecutor.

"(h) The interviewer should record all interviews of members and witnesses. The member may also record the interview. If the member has been previously interviewed, a copy of that recorded interview shall be provided to the member prior to any subsequent interview.

"(i) All members subjected to interviews that could result in discipline have the right to have an uninvolved representative present during the interview. However, in order to maintain the integrity of each individual's statement, involved member shall not consult or meet with a representative or attorney collectively or in groups prior to being interviewed.

[¶ . . . ¶]

"No investigation shall be undertaken against any deputy solely because the deputy has been placed on a prosecutor's *Brady* list[5] or the name of the deputy may otherwise be subject to disclosure pursuant to *Brady v. Maryland*. However, an investigation may be based on the underlying acts or omissions for which the deputy has been

[5] A *Brady* list contains the names of "officers whom [law enforcement] agencies have identified as having potential exculpatory or impeachment information in their personnel files—evidence which may need to be disclosed to the defense under *Brady* [*v. Maryland* (1963) 373 U.S. 83 (*Brady*)] and its progeny." (*Association for Los Angeles Deputy Sheriffs v. Superior Court* (2019) 8 Cal.5th 28, 36.)

placed on a *Brady* list or may otherwise be subject to disclosure pursuant to *Brady v. Maryland* ([Gov. Code,] § 3305.5)."

Sheriff's Office Policy 1010.6.4, provides:

"Each personnel complaint shall be classified with one of the following dispositions:

"Unfounded – When the investigation discloses that the alleged acts did not occur or did not involve office members. Complaints that are determined to be frivolous will fall within the classification of unfounded ([Pen. Code,] § 832.8).

"Exonerated – When the investigation discloses that the alleged act occurred but that the act was justified, lawful and/or proper.

"Not sustained – A final determination discloses there is insufficient evidence to sustain the complaint or fully exonerate the member.

"Sustained – A final determination by an investigating agency, commission, board, hearing officer, or arbitrator, as applicable, following an investigation and opportunity for an administrative appeal pursuant to Government Code § 3304 and Government Code § 3304.5 that the actions of the deputy were found to violate law or office policy ([Pen. Code,] § 832.8)."

Sheriff's Office Policy 1010.6.5 provides:

"All Citizen Complaints and Policy and Procedure violation investigations shall be completed within 60 days upon assignment unless approval for an extension is granted. . . .. Internal Affairs Investigations shall be completed within 150 days upon assignment [. . .].

"Within one year of becoming aware of an act, omission, or other misconduct, the formal investigation must be

completed and the member notified of any intended disposition. The year begins when someone within the Sheriff's Office, who has the authority to initiate an investigation becomes aware of the act, omission, or other misconduct."

Sheriff's Office Policy 1013.6 provides:

"Internal affairs files shall be maintained under the exclusive control of the Internal Affairs Unit in conjunction with the office of the Sheriff. Access to these files may only be approved by the Sheriff or the Professional Standards Lieutenant.

"These files shall contain the complete investigation of all formal complaints of member misconduct, regardless of disposition. Investigations of complaints that result in the following findings shall not be placed in the member's file but will be maintained in the internal affairs file:

"(a) Not sustained

"(b) Unfounded

"(c) Exonerated

"Investigation files arising out of civilian's complaints shall be maintained pursuant to the established records retention schedule and for a period of at least five years. Investigations that resulted in other than a sustained finding may not be used by the Office to adversely affect an employee's career ([Pen. Code,] § 832.5).

"Investigation files arising out of internally generated complaints shall be maintained pursuant to the established records retention schedule and for at least five years ([Gov. Code,] § 26202; [Gov. Code,] § 34090)."

Sheriff's Office Policy 1013.11.4(c) provides that a "record from a separate and prior investigation or assessment of a separate incident shall not be released unless it is independently subject to disclosure pursuant to this policy."

IOLERO Before Measure P

The BOS created IOLERO in 2015 in response to a report from the Community and Local Law Enforcement Task Force, which the County had created in 2013. A Task Force subcommittee summarized IOLERO's key proposed functions as including: "community education and outreach; conveying feedback from the community on law enforcement issues; provision of a neutral location for complaint filing; public discourse regarding policies and procedures; advice and recommendation regarding policies and procedures; complaint tracking and trend analysis; annual reporting to the BOS, the Sheriff and the community on the work of the office of independent auditor on the status of law enforcement oversight; and finally, independent and confidential audit review of internal [Sheriff's Office] investigations of officer use of force incidents, incidents of misconduct, and corrective action taken."

In September 2016, the BOS adopted Ordinance No. 6174 establishing IOLERO under the Sonoma County Code (SCC) (Ch. 2, §§ 392 to 394). IOLERO's general duties under Ordinance No. 6174 were to audit Sheriff's Office administrative investigations, accept allegations of Sheriff's Office employee misconduct from the public, provide policy recommendations to the Sheriff's Office, increase transparency of Sheriff's Office policies, procedures, and operations, and conduct outreach and engage the community to strengthen the relationship between the community and law enforcement. Ordinance No. 6174 specifically prohibited IOLERO from: (1) conducting

its own investigations of alleged misconduct; (2) interfering with the powers and duties of the Sheriff; (3) compelling by subpoena testimony or the production of documents; (4) disclosing confidential personnel file information; and (5) deciding Sheriff's Office policy, directing activities, or imposing discipline.

SCC section 2-394(d) required IOLERO's Director and the Sheriff to establish protocols "that further define and specify the scope and process providing for IOLERO's receipt, review and audit of complaints and investigations in a coordinated and cooperative manner." Pursuant to this provision, the Sheriff's Office and IOLERO entered into an operational agreement that provided IOLERO would only receive a fully complete administrative investigation file "for audit." Upon receipt of the completed investigation file, IOLERO could provide "advice and/or recommendations" to the Sheriff's Office, which would be confidential consistent with the attorney-client relationship between the IOLERO Director and the County.[6] IOLERO's "advice and/or recommendations" would not be placed in the investigation file. The agreement also "granted access to the Sheriff's Office Investigations Management (AIM) database" and allowed the IOLERO Director to "have the ability to search all completed citizen complaint investigations and all completed investigations related to the identified exceptions to [Penal Code section 832.7]."[7] The agreement further specified that

[6] Former SCC section 2-393(c) required the IOLERO Director to be a licensed attorney and to enter into a special legal services agreement with the County.

[7] Penal Code section 832.7 excepts the following categories of documents from the confidentiality of peace officer personnel records: discharge of a firearm, use of force that caused great bodily injury, sustained claims of sexual assault, and sustained claims of dishonesty.

IOLERO "is not the custodian of records for peace officer personnel files" and "shall not retain or maintain any separate files containing" personnel file information, and that "such authority rests solely with the [Sheriff's Office]." While this agreement was in place, IOLERO did not have access to officers' *Brady* information.

The Evelyn Cheatham Effective IOLERO Initiative, i.e., Measure P

On June 23, 2020,[8] the BOS approved formation of an ad hoc committee "to explore possible amendments to the IOLERO ordinance." The ad hoc committee consisted of two BOS members and staff from the County Administrator's Office, County Counsel, IOLERO, and the Sheriff's Office. The goal of the ad hoc committee was to "explore possible amendments" to IOLERO's authority "within the limitations imposed by the California Constitution and the Government Code," and ultimately "to adopt amendments to the IOLERO Ordinance by mid to late October." In furtherance of this goal, the committee would solicit input from various "stakeholders" in three "phases" lasting through November or December of 2020.

An ad hoc committee charter was presented to the BOS on July 14, but the BOS postponed considering the charter to its August 4 meeting. During the August 4 meeting, the County Administrator's Office and County Counsel presented the BOS with a proposed Evelyn Cheatham IOLERO Initiative. The Summary Report accompanying the proposed initiative gave the BOS three options: (1) place the proposed initiative on the November 3, 2020 election ballot, (2) introduce the proposed changes as amendments to the existing IOLERO ordinance for direct

[8] All further dates are in 2020, unless otherwise indicated.

adoption by the BOS, or (3) approve the ad hoc committee charter. In the Summary Report, County Counsel cautioned the BOS that, if the BOS opted to put the initiative on the ballot and the measure passed, it could only be amended by placing another measure on a subsequent ballot and obtaining a majority vote. The BOS did not act on the proposed initiative but instead called a special meeting for August 6 to consider what action to take.

At the August 6 special meeting, the BOS voted to call a special election to submit the proposed initiative to voters and to consolidate the special election with the statewide general election on November 3, 2020. The County Registrar of Voters subsequently designated the proposed initiative as Measure P and placed it on the November 3, 2020 general election ballot, where it passed by a majority vote.[9]

The following provisions of Measure P setting out IOLERO's authority are at issue here:

> SCC section 2-392(d)(2): "[P]rovide independent investigations of employees of the sheriff-coroner where an investigation by that office is found by IOLERO to be incomplete or deficient in some way."
>
> SCC section 2-394(b)(2): "Review, audit and analyze administrative and public complaint investigations in mutual coordination and cooperation with the sheriff-coroner; the complaint investigations subject to such automatic review, audit, and analysis, shall include:

[9] County Labor Relations Manager Janie Carduff testified that she was not aware of any emergency circumstances or legal obligation requiring the BOS to place the proposed initiative on the November 2020 ballot instead of waiting for a future election.

"i. All complaints filed with IOLERO, regardless of the nature of the allegations included in that complaint;

"ii. All complaints or investigations or analyses of incidents that involve issues of whether uses of force violate law or policy;

"iii. All complaints or investigations or analyses of incidents that involve a possible violation of the U.S. or state constitutional rights of individuals;

"iv. All complaints or investigations or analyses of incidents that involve issues of bias by an employee in policing or corrections;

"v. All complaints or investigations or analyses of incidents that involve issues of sexual harassment or sexual assault by an employee;

"vi. All complaints or investigations or analyses of incidents that involve issues of dishonesty;

"vii. Every incident of force used by a sheriff's deputy regardless of whether a complaint is filed with IOLERO or the sheriff-coroner;

"viii. Every case where a civil lawsuit is filed against the sheriff's office related to the use of force regardless of whether a complaint is filed with IOLERO or the sheriff-coroner;

"xi. All racial profiling data collected by the sheriff's office in compliance with the Racial and Identity Profiling Act of 2015 or any successor legislation; and

"x. Any other complaints or investigations or analyses of incidents that become a matter of media interest."

SCC section 2-394(b)(3): "Act as a receiving and investigative agency for whistleblower complaints involving the sheriff-coroner . . . any whistleblower complaints received or investigated by IOLERO shall not need to be

reported by IOLERO to the sheriff-coroner, including the Internal Affairs Division."

SCC section 2-394(b)(4): "Make discipline recommendations, as appropriate, for officers subject to IOLERO investigations."

SCC section 2-394(b)(5): "As part of the process of review, audit and analysis, IOLERO may, among other things:

"i. Directly access and independently review any and all sources of investigative evidence to ensure that the investigation is complete and all material evidence has been secured and analyzed by investigators in reaching their investigative findings;

"ii. Directly receive all prior complaints for the involved deputy, previous investigation files (including *Brady* investigations) and the record of discipline for each complaint;

"iii. Directly access and review all body worn camera videos and be authorized to post every body worn camera video where force was used on IOLERO's website. Public posting shall be determined on a case by case basis to the extent allowed by law, in consideration of victim privacy rights and active investigations;

"iv. Where the director deems appropriate, directly contact complainants and witnesses to ensure the completeness and fairness of the investigation;

"v. Where the director deems appropriate, directly contact custodians of evidence held by third parties to ensure adequate efforts to secure such evidence by investigators;

"vi. Where the director deems appropriate, request supplemental investigation of matters relevant to the investigation that have not been adequately reviewed or analyzed, in the opinion of the director;

“vii. Where in the opinion of the director, the investigation of a complaint or incident by the sheriff-coroner is incomplete or otherwise deficient, conduct an independent investigation of the matter, to the extent deemed necessary by the director;

“viii. Where the investigation involves an incident resulting in the death of a person in custody of the sheriff-coroner or results from the actions of an employee, conduct an independent investigation of the matter; and

“ix. Independently subpoena records or testimony, as the director deems appropriate, to complete an adequate investigation. Among other sources of legal authority, such subpoena power is delegated from that held by the board of supervisors, to be used at the discretion of the director.”

SCC section 2-394(b)(7): “Advise if investigations appear incomplete, biased or otherwise deficient and recommend further review as deemed necessary; when warranted, propose independent recommendations or determinations regarding investigations, which recommendations may be made public on a summary level without personally identifying information.”

SCC section 2-394(e): “The sheriff-coroner shall cooperate fully with IOLERO by providing direct, unfettered access to information of the Sheriff’s Office, in order to facilitate IOLERO’s receipt, review and audit of complaints and investigations; IOLERO’s independent investigation of incidents; as well as IOLERO’s review of policies, practices, and training. Among the sources of information to which the sheriff-coroner shall provide such access to IOLERO are the following:

“1) Any database or other computer application, or physical files, containing incident reports, dispatch records, or records of responses to law enforcement calls for service;

"2) Any database or other computer application, or physical files, containing employee personnel records, investigations of complaints against employees, investigations of claims filed against the Sheriff's Office under the California Claims Act, including *Brady* investigations and the record of discipline with each complaint file or audit or investigations related to lawsuits filed against the County because of any action or inaction of an employee of the Sheriff's Office;

"3) Any database or other computer application, or physical files, containing jail inmate grievances and their investigations;

"4) Any database or other computer application containing the footage from body worn cameras;

"5) Any database or other computer application, or physical files, containing racial profiling data collected by the [S]heriff's [O]ffice pursuant to the Racial and Identity Profiling Act of 2015 or any successor legislation;

"6) Any database or other computer application, or physical files, containing video or audio recordings related to: incidents involving employees, investigations by employees, investigations of employees, investigations of claims filed against the Sheriff's Office under the California Claims Act, or lawsuits filed against the County because of any action or inaction of an employee of the Sheriff's Office."

SCC section 2-394(f): "The director shall be provided access by the sheriff-coroner to personally sit in and observe the investigative interviews of any complainant or witness in, or deputy who is a subject of, an administrative investigation, upon request by the director."

SCC section 2-394(g): "The sheriff-coroner shall cooperate with IOLERO by providing direct, unfettered access to staff

> of the Sheriff's Office, in order to facilitate IOLERO's ability to develop trusting relationships with such staff, and to informally obtain information related to the receipt, review and audit of complaints and investigations, as well as IOLERO's review of policies, practices, and training. Among the opportunities to access staff which the sheriff-coroner shall provide to IOLERO, are the following:
>
> "1) Any investigator for a complaint being audited by IOLERO;
>
> "2) Any employee who is a witness or custodian of relevant records for a complaint or incident being audited or otherwise by IOLERO; and
>
> "3) Any supervisor of an employee subject to an investigation being audited or otherwise conducted by IOLERO."[10]

Measure P does not say whether officers will be compensated for their interview time as required by POBR and Sheriff's Office Policy 1010.6.2(a). Employees who are interviewed while on duty must have their position backfilled. The Sheriff's Office detention facilities that do not have sufficient staff to cover employees required to appear for investigations and interviews thus will necessitate other SCLEA members to come "early in" or "hold over" after their shifts.

Measure P gives IOLERO unfettered access to BWC video and the Video Management System in the County detention facility. (SCC, § 2-394(b)(5)(iii) & (e)(4).) IOLERO's Director has authority to determine whether to release any use of force video, but Measure P is silent about whether IOLERO must adhere to Sheriff's Office

[10] SCC section 2-394(c)(2) provides that IOLERO is not authorized to "[d]isclose any confidential and/or privileged information to anyone not authorized to receive it, as prohibited by law."

policy requiring that employees be provided: advance notice of video release; an opportunity to review the video; a threat assessment; and safety detail, including for the affected member's family.[11] Similarly, Measure P is silent regarding whether IOLERO must provide context for the released video consistent with Sheriff's Office practice that helps explain policy, practice, and deputy perception.

Measure P eliminated the requirement that the IOLERO Director be a licensed attorney and enter into a legal services agreement with the County. Additionally, Measure P provides for the creation of a community advisory council composed of 11 members, none of whom is required to be an attorney. (SCC, § 2-397(c).) Measure P also deleted language that the "establishment of IOLERO does not affect the constitutionally and statutorily designated independent functions of the elected sheriff-coroner."

The Associations' Demands to Bargain over Measure P

The County did not provide the Associations written notice or an opportunity to meet and confer over Measure P before the BOS voted on August 6. In fact, the County Labor Relations Department did not discover that the BOS intended to vote on Measure P until the BOS was already in special session on August 6. Despite not receiving formal notice, shortly before the August 6 meeting, DSA sent the BOS a letter demanding to meet and confer over Measure P prior to the BOS making a final decision.

[11] Following public release of BWC video, employees have received threats requiring the Sheriff's Office to install cameras at their homes and provide patrol deputies for security.

On August 10, DSA asserted by letter that the County had violated DSA's rights under the MMBA, and urged the County to rescind its placement of Measure P on the ballot and comply with its bargaining obligations under the MMBA. DSA identified amendments that it believed would change existing policies within the scope of representation, including: (1) the manner in which allegations of misconduct against DSA members are investigated; (2) who determines if misconduct occurred and what discipline is warranted; (3) who has authority to access and review confidential personnel file information – including information relative to *Brady* reviews; (4) when such confidential information may be publicly released; and (5) who has authority to attend administrative interrogations and independently subpoena documents or testimony from DSA members.

The County responded the next day, explaining that the BOS's action on August 6 was "necessitated by the August 7, 2020 deadline for the November ballot," and that the BOS refused DSA's August 6 demand to meet and confer because "it was not in the community's interest to delay the ordinance to the March election of 2021." The County's letter nevertheless offered to meet with "[DSA] representatives to address and respond to the issues and concerns presented by your letters as well as any other elements of the Ordinance that may be subjects of bargaining as defined in the [MMBA]."

On August 12, DSA responded that the County cannot meet and confer in good faith after having already taken action, and BOS therefore must return the parties to the status quo. The County responded on August 14, stating it was "committed to work with the [DSA] . . . to address any and all negotiable effects and/or legal objections

concerning the subject Ordinance," but otherwise denied that the BOS's August 6 action violated the MMBA because the proposed amendments to IOLERO's authority solely concerned "policy reforms" which are not subject to negotiation. On August 17, DSA reiterated that the County had an obligation to meet and confer prior to the BOS's August 6 action, and that any effort thereafter is nothing more than a fait accompli because Measure P could not be amended prior to the November election.

SCLEA also demanded to meet and confer on August 6 before the BOS voted on Measure P, identifying concerns with the proposed amendments including: (1) peace officer personnel record confidentiality as required by the California Constitution and Penal Code; and (2) violations of POBR. After not receiving a response to its August 6 letter, SCLEA sent another letter to the County demanding it cease and desist from placing Measure P on the ballot and comply with its meet and confer obligations.

On August 11, the County responded that "it was not in the community's interest to delay the ordinance to the March election of 2021." On August 14, the County told SCLEA it was not required to meet and confer over the decision to place Measure P on the ballot and questioned whether SCLEA wished to meet and confer over the decision or the effects of the decision. On August 17, SCLEA sent a letter to the County requesting that it meet and confer over the decision and effects, rescind the August 6 resolution, and comply with the MMBA. The County responded the same day, stating it disagreed with SCLEA's characterization of its act as a fait accompli and requesting that SCLEA identify the foreseeable effects on matters within the scope of representation and provide dates to meet and confer.

PROCEDURAL HISTORY

On August 17, DSA filed Unfair Practice Case No. SF-CE-1816-M alleging that the County's placement of Measure P on the November 2020 ballot without first providing notice or an opportunity to meet and confer violated its statutory obligations as set forth in Government Code sections 3502, 3503, 3504.5, 3505, and 3506.5, as well as PERB Regulation 32603, subdivisions (a)-(d).

SCLEA filed Unfair Practice Case No. SF-CE-1817-M three days later, alleging the County failed to provide notice and an opportunity to meet and confer before placing Measure P on the November 2020 ballot in violation of Government Code sections 3502, 3503, 3504.5, subdivision (a), 3505, 3507, and PERB Regulation 32603, subdivisions (b) and (c).

On September 17, the Board granted the Associations' requests to expedite both charges at all levels pursuant to PERB Regulation 32147. A few days later, PERB's Office of the General Counsel issued complaints in each matter. Paragraph 4 of the complaints alleged that in August 2020 the BOS placed Measure P on the November 3, 2020 ballot, and that Measure P proposed to grant IOLERO the following additional authority:[12]

> "a. Conducting independent investigations of Sheriff's Office employees, even where no complaint exists. [SCC, §§ 2-392(d)(2); 2-394(b)(3), (5)(vii)-(viii) and deletion of language from SCC, § 2-394(c)(1)]
>
> "b. Making disciplinary recommendations. [SCC, § 2-394(b)(4)]

[12] Corresponding Measure P amendments are identified in brackets.

> "c. Receiving confidential personnel information pursuant to Penal Code section 832.7. [SCC, § 2-394(b)(5)(ii) & (e)(2)]
>
> "d. Subpoenaing records or testimony in investigations. [SCC, § 2-394(b)(5)(ix) and deletion of language from SCC, § 2-394(c)(3)]
>
> "e. Changing body worn camera policies. [SCC, § 2-394(b)(5)(iii)]
>
> "f. Interviewing any investigator, supervisor, witness or custodian of records for a complaint being investigated by IOLERO. [SCC, § 2-394(b)(5)(iv)-(v) & (g)(1)-(3)]
>
> "g. Investigating critical incidents resulting in the death of a person in custody. [SCC, § 2-394(b)(5)(viii)]
>
> "h. Directing supplemental investigation. [SCC, § 2-394(b)(5)(vi)]
>
> "i. Directly accessing any and all sources of investigative evidence. [SCC, § 2-394(b)(5)(i), (v) & (e)(1)-(6)]
>
> "j. Reviewing the record of discipline for each complainant. [SCC, § 2-394(b)(5)(ii) & (e)(2)]
>
> "k. Personally sitting in and observing the investigation interviews of any complainant, witness or deputy who is the subject of an administrative investigation." [SCC, § 2-394(f)]

The complaints alleged that the County did not give the Associations notice or an opportunity to meet and confer over the decision to place Measure P on the ballot or over the effects of that decision. The complaints alleged that, by this conduct, the County violated its statutory obligation to meet and confer over subjects within the scope of representation and interfered with employee and union rights. The complaint in Case No. SF-CE-1817-M also alleged that the County's conduct violated its duty under MMBA section 3507 to consult with recognized employee organizations over

adoption of employer-employee relations rules, and violated article I, section 2(k) of the County's Employee Relations Policy, which requires the County to meet and confer over matters within the scope of representation.

On September 28, the Chief ALJ granted the Associations' request to consolidate the cases. The parties participated in an informal settlement conference on October 2, but the matters were not resolved.

On October 7, SCLEA filed a motion to amend the complaint in Case No. SF-CE-1817-M to include an allegation that the County's conduct violated MMBA section 3502. On October 9, SCLEA moved to amend its complaint to include an interference allegation. The County did not oppose the motions. The Chief ALJ issued the amended complaint that same day.

Also on October 9, the County filed a motion to strike paragraphs 5 and 6 of the complaints, which alleged that the County failed to give SCLEA and DSA notice and an opportunity to meet and confer prior to its decision to place Measure P on the ballot. That same day, the Chief ALJ denied the County's motion to strike without prejudice.

The County answered the complaint in Case No. SF-CE-1816-M on October 12 and answered the amended complaint in Case No. SF-CE-1817-M on October 14.

One day before the formal hearing, SCLEA filed a motion to amend the complaint to clarify language in paragraph 4(j). The formal hearing took place on October 20. The next day, the Chief ALJ issued the second amended complaint in Case No. SF-CE-1817-M as requested by SCLEA.

The parties filed opening post-hearing briefs in November 2020 and reply briefs the following month. At that time, the record was closed. On December 9, the Board directed that the record be submitted to the Board itself for decision pursuant to PERB Regulation 32215.

DISCUSSION

I. Unilateral Change

MMBA section 3505 requires a public agency to meet and confer in good faith with representatives of recognized employee organizations concerning matters within the scope of representation. It is an unfair practice for a public agency to refuse or fail to comply with this obligation. (MMBA, § 3506.5, subd. (c).) Of relevance here, public agencies must comply with the MMBA's meet-and-confer requirements before submitting to voters an initiative affecting matters within the scope of representation. (*Boling v. Public Employment Relations Bd.* (2018) 5 Cal.5th 898, 915 (*Boling*); *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, 597-601 (*Seal Beach*).)

A unilateral change to a matter within the scope of representation is a per se violation of the duty to meet and confer in good faith. (*County of Merced* (2020) PERB Decision No. 2740-M, pp. 8-9 (*Merced*); *Stockton Unified School District* (1980) PERB Decision No. 143, p. 22.) To establish a prima facie unilateral change violation, the charging party must prove that: (1) the employer took action to change policy; (2) the change in policy concerns a matter within the scope of representation; (3) the change has a generalized effect or continuing impact on represented employees' terms and conditions of employment; and (4) the employer reached its decision without first

providing advance notice of the proposed change to the employees' union and negotiating in good faith at the union's request, until the parties reached an agreement or a lawful impasse. (*Merced*, *supra*, PERB Decision No. 2740-M, pp. 8-9; *City of San Diego* (2015) PERB Decision No. 2464-M, p. 51, affirmed *sub nom*. *Boling*, *supra*, 5 Cal.5th 898.)

The complaints in these consolidated cases allege that the County made unlawful unilateral changes by approving for placement on the ballot 11 specific categories of Measure P amendments without first providing DSA and SCLEA notice of the changes or an opportunity to meet and confer over them. We turn first to whether any of the 11 challenged categories of amendments in fact changed policy. We then examine whether those amendments that changed policy are within the scope of representation or have foreseeable effects on subjects within the scope of representation. Finally, we examine whether any of the negotiable amendments have a generalized effect or continuing impact on bargaining unit employees, and whether the County satisfied its notice and bargaining obligations as to those amendments.[13]

A. Change in Policy

There are three primary types of policy changes that may constitute an unlawful unilateral change: (1) a deviation from the status quo set forth in a written agreement or written policy; (2) a change in established past practice; and (3) a newly created policy or application or enforcement of existing policy in a new way. (*Merced*, *supra*,

[13] We express no opinion on whether the challenged Measure P amendments are good policy or an effective means to achieve the County's policy goals. Our sole task is to determine whether the MMBA's procedural requirements applied to those amendments and, if so, whether the County complied with them.

PERB Decision No. 2740-M, p. 9; *Pasadena Area Community College District* (2015) PERB Decision No. 2444, p. 12, fn. 6.)[14] We must examine each of the subdivisions of paragraph 4 of the complaints to determine whether each amounted to a change in policy.

Paragraph 4(a) – Conducting independent investigations of complaints and incidents involving Sheriff's Office employees[15]

Prior to Measure P, SCC section 2-394(c)(1) prohibited IOLERO from "conduct[ing] its own investigation of complaints against law enforcement personnel." Measure P deleted that language and added SCC sections 2-392(d)(2), and 2-394(b)(3), (b)(5)(vii), and (b)(5)(viii), which authorize IOLERO to conduct independent investigations of complaints against Sheriff's Office employees. And new SCC section 2-394(b)(5)(vii) mandates that IOLERO conduct an independent investigation of any incident "[w]here, in the opinion of the director, the investigation of a complaint or

[14] Past practice can be used to establish the status quo from which we assess an alleged unilateral change, and it can also be used as an interpretive aid in assessing ambiguous written language. In the former instance, a past practice establishes the status quo only if it was "regular and consistent" or "historic and accepted." (*Merced*, *supra*, PERB Decision No. 2740-M, p. 13, fn. 9.) However, the inquiry is fundamentally different when analyzing the parties' past practice to help ascertain the meaning of ambiguous language. (*Antelope Valley Community College District* (2018) PERB Decision No. 2618, p. 21.) In these circumstances, the past practice is but one tool for interpreting the contract, and therefore need not be as definitive as when it is defining the status quo in the absence of a contract term. (*Id*. at p. 22.)

[15] Paragraph 4(g) of the complaints, which specifically deal with investigations that result from the death of a person in custody or from the actions of an employee, is discussed below.

incident by the sheriff-coroner is incomplete or otherwise deficient." Measure P thus changed written policy about IOLERO conducting independent investigations.

Paragraph 4(b) – Making disciplinary recommendations

Prior to Measure P, SCC section 2-394(b)(4) authorized IOLERO to "[a]dvise if investigations appear incomplete or otherwise deficient and recommend further review…[and] propose independent recommendations or determinations regarding investigations." Measure P replaced that subsection with language that authorizes IOLERO to "[m]ake discipline recommendations, as appropriate, for officers subject to IOLERO investigations." Measure P thus changed written policy about IOLERO recommending discipline.[16]

Paragraph 4(c) – Receiving confidential personnel information pursuant to Penal Code section 832.7

Sheriff's Office Policy 1010.6.2 prohibits an investigation against any deputy solely because the deputy has been placed on a prosecutor's *Brady* list. The Sheriff's Office and IOLERO's operational agreement provided that IOLERO would only receive a fully complete administrative investigation file "for audit." Further, IOLERO did not have access to employees' *Brady* information. Measure P added SCC sections 2-394(b)(5)(ii) and (e)(2), which authorize IOLERO to "[d]irectly receive all prior complaints for the involved deputy, previous investigation files (including *Brady* investigations)[,] and the record of discipline for each complaint." Measure P thus changed policy about IOLERO accessing *Brady* investigations.

[16] Measure P made no change to that portion of section 2-394(c)(3) which provides that "IOLERO shall not be authorized to: . . . [¶] . . . [¶] . . . impose discipline on other county departments, officers and employees."

Paragraph 4(d) – Subpoenaing records or testimony in investigations

Prior to Measure P, SCC section 2-394(c)(3) prohibited IOLERO from "[c]ompel[ling] by subpoena the production of any documents or the attendance and testimony of any witness." Measure P deleted that language and added SCC section 2-394(b)(5)(ix), which authorizes IOLERO to "[i]ndependently subpoena records or testimony, as the director deems appropriate, to complete an adequate investigation." Measure P thus changed written policy about IOLERO subpoenaing records and testimony.

Paragraph 4(e) – Changing BWC policies

Sheriff's Office Policy 1013.11.5 provides employees the right to advance notice prior to disclosure of BWC video for safety reasons. Measure P added SCC section 2-394(b)(5)(iii), which authorizes IOLERO to "[d]irectly access and review all body worn camera videos and be authorized to post every body worn camera video where force was used on IOLERO's website. Public posting shall be determined on a case by case basis to the extent allowed by law, in consideration of victim privacy rights and active investigations." Measure P thus changed written policy regarding providing advance notice to employees prior to disclosure of BWC video.

Paragraph 4(f) – Interviewing any investigator, supervisor, witness, or custodian of records for a complaint being investigated by IOLERO

Prior to Measure P, SCC section 2-394(c)(1) prohibited IOLERO from "[c]onduct[ing] its own investigation of complaints against law enforcement personnel." Measure P deleted that language and added SCC section 2-394(b)(5)(iv) & (v) and (g)(1)-(3), which authorize IOLERO to interview supervisors, complainants, witnesses,

and custodians of evidence as part of an investigation. Measure P thus changed written policy about IOLERO conducting its own investigations.

Paragraph 4(g) – Conducting independent investigations of incidents resulting from the death of a person in custody or results from the actions of an employee

Prior to Measure P, SCC section 2-394(c)(1) prohibited IOLERO from "conduct[ing] its own investigation of complaints against law enforcement personnel." Measure P deleted that language and added new SCC section 2-394(b)(5)(viii), which mandates that IOLERO conduct an independent investigation of any incident "resulting in the death of a person in custody of the sheriff-coroner or results from the actions of an employee." Measure P thus changed written policy about IOLERO conducting independent investigations.

Paragraph 4(h) – Directing supplemental investigations

Prior to Measure P, SCC section 2-394(b)(4) authorized IOLERO to "advise if investigations appear incomplete or otherwise deficient and recommend further review as deemed necessary." Measure P made only one minor change to this provision: adding "biased" after "incomplete." New SCC section 2-394(b)(5)(vi) allows IOLERO to "request supplemental investigation" by the Sheriff's Office. Although these amendments use different language than the pre-Measure P County Code, we see no meaningful difference between them. Because SCC sections 2-394(b)(7) & (b)(5)(vi) did not change policy, paragraph 4(h) of the complaint is DISMISSED.

Paragraph 4(i) – Directly accessing any and all sources of investigative evidence

Prior to Measure P, the operational agreement between IOLERO and the Sheriff "granted [IOLERO] access to the Sheriff's Office Investigations Management (AIM) database" and allowed the IOLERO Director to "have the ability to search all

completed citizen complaint investigations and all completed investigations related to the identified exceptions to [Penal Code section 832.7].” Measure P added SCC sections 2-394(b)(5)(i) & (v) and (e)(1)-(6), which authorize IOLERO to have unfettered access to Sheriff’s Office databases, directly contact custodians of evidence, and “access and independently review any and all sources of investigative evidence to ensure that the investigation is complete and all material evidence has been secured and analyzed by investigators in reaching their investigative findings.” Measure P thus changed written policy about IOLERO’s access to sources of investigative evidence.

Paragraph 4(j) – Reviewing all prior complaints and the record of discipline for each complainant

Prior to Measure P, IOLERO did not have access to employees’ *Brady* information. Measure P added SCC section 2-394(b)(5)(ii), which authorizes IOLERO to “[d]irectly receive all prior complaints for the involved deputy, previous investigation files (including *Brady* investigations)[,] and the record of discipline for each complaint.” Measure P also added SCC section 2-394(e)(2), which authorizes IOLERO to have unfettered access to “*Brady* investigations and the record of discipline.” Measure P thus changed policy about IOLERO accessing *Brady* investigations and the record of discipline.

Paragraph 4(k) – Personally sitting in and observing the investigation interviews of any complainant, witness, or deputy who is the subject of an administrative investigation

Measure P added SCC section 2-394(f), which authorizes IOLERO’s Director to “personally sit in and observe the investigative interviews of any complainant or witness in, or deputy who is a subject of [an] administrative investigation.” Measure P

thus created a new policy allowing IOLERO to attend and observe administrative investigation interviews.

B. Scope of Representation

The scope of representation under the MMBA includes "all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." (§ 3504.) The "merits, necessity, or organization" language of MMBA section 3504 recognizes "the right of employers to make unconstrained decisions when fundamental management or policy choices are involved." (*Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 663 (*Building Material*).)

The County argues that it had no duty to bargain over its decision to place Measure P on the ballot, and therefore, at most, had a duty to bargain certain effects of that decision. We first determine which of the 10 amendments at issue, if any, fall within the scope of representation and therefore triggered a duty to bargain over the decision itself. For those falling outside the scope of representation, we analyze which effects, if any, the County had a duty to bargain.

i. Decision Bargaining

The gravamen of the County's argument is that Measure P as a whole falls under section 3504's fundamental management right exclusion because it involves relations between law enforcement and the community. More specifically, the County argues that under *Dibb v. County of San Diego* (1994) 8 Cal.4th 1200 (*Dibb*) and

Building Material, all management decisions regarding law enforcement-community relations are a fundamental management right. But neither decision establishes such a categorical rule.

Dibb addressed whether a county could "constitutionally amend its charter to provide for the creation of a citizens' board to review public complaints about the county sheriff and probation departments, and vest that board with power to subpoena witnesses and documents." (8 Cal.4th at p. 1204.) *Dibb* acknowledged that the conduct of sheriff and probation department employees is a legitimate concern of a county board of supervisors. (*Id.* at p. 1209.) It said nothing, however, about whether the MMBA's meet and confer requirements applied to the board of supervisors' conduct in creating the citizens' review commission. *Dibb* thus provides no support for the County's argument that all decisions related to law enforcement review bodies are fundamental management rights. (See *County of Orange* (2019) PERB Decision No. 2657-M, p. 15 (*Orange II*) ["It is axiomatic that cases are not authority for propositions not considered"].)

Building Material did not involve law enforcement services; it concerned the transfer of truck driving work to employees outside the bargaining unit. (41 Cal.3d at p. 655.) In the course of considering whether the employer was obligated to meet and confer over the transfer decision, the California Supreme Court made this observation on which the County relies: "decisions involving the betterment of police-community relations and the avoidance of unnecessary deadly force are of obvious importance, and directly affect the quality and nature of public services. The burden of requiring an

employer to confer about such fundamental decisions clearly outweighs the benefits to employer-employee relations that bargaining would provide." (*Id*. at p. 664.)

In support of its observation, the Court cited two cases involving changes to local law enforcement policies. First, the Court cited *Berkeley Police Assn. v. City of Berkeley* (1977) 76 Cal.App.3d 931 (*Berkeley*), which held that a city police chief had no duty to bargain before allowing a member of the city's citizens review commission to observe the police department's board of review hearings and sending a department representative to commission meetings, because these decisions were not within the scope of bargaining and did not alter the status quo. (*Id*. at pp. 937-938.)[17] Second, the Court cited *San Jose Peace Officer's Assn. v. City of San Jose* (1978) 78 Cal.App.3d 935 (*San Jose*), which held that a city need not bargain over a new use-of-force policy, as that decision also did not fall within the scope of bargaining. (*Id*. at p. 948.)

Because *Building Material* involved neither use-of-force policies nor police-community relations, the Court's observation regarding law enforcement decisions was dicta, which is no more binding on PERB than it is on a court. (*San Marcos Unified School District* (2003) PERB Decision No. 1508, pp. 21-22.) Most importantly, this dicta does not stand alone, and we consider it in light of more recent and more relevant precedent, which articulates a fact-specific standard rather than a categorical

[17] In *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802 (*Vernon*), the court emphasized that the police chief's decisions at issue in *Berkeley* did not truly alter the status quo. (*Id*. at p. 820.) While the court noted that *Berkeley* also held the decisions covered non-bargainable topics, the court explained that was because the decisions involved "administerial procedures within the police department." (*Id*. at p. 819.)

rule that all "decisions involving the betterment of police-community relations" are outside the scope of representation.

In the four decades since *Berkeley*, *San Jose*, and *Vernon* issued—indeed beginning with *Building Material* itself—the California Supreme Court has articulated (and PERB has adopted) a nuanced approach to deciding whether a management decision is within the scope of representation under the MMBA. Under this framework, "there are three distinct categories of managerial decisions, each with its own implications for the scope of representation: (1) decisions that have only an indirect and attenuated impact on the employment relationship and thus are not mandatory subjects of bargaining, such as advertising, product design, and financing; (2) decisions directly defining the employment relationship, such as wages, workplace rules, and the order of succession of layoffs and recalls, which are always mandatory subjects of bargaining; and (3) decisions that directly affect employment, such as eliminating jobs, but nonetheless may not be mandatory subjects of bargaining because they involve a change in the scope and direction of the enterprise or, in other words, the employer's retained freedom to manage its affairs unrelated to employment." (*County of Orange* (2018) PERB Decision No. 2594-M, p. 18 (*Orange I*), citing *International Assn. of Fire Fighters, Local 188, AFL-CIO v. Public Employment Relations Bd.* (2011) 51 Cal.4th 259, 272-273, internal quotations omitted (*Richmond Firefighters*).)

Decisions in the third category have "a direct impact on employment [even] though the decision is not in [itself] primarily about conditions of employment." (*Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 637,

internal quotations and citations omitted (*Claremont*).) For such decisions, we must balance the benefits of bargaining over the decision against the employer's managerial interest in making the decision. (*Richmond Firefighters*, *supra*, 51 Cal.4th at p. 273; *Claremont*, *supra*, 39 Cal.4th at p. 638; *Building Material*, *supra*, 41 Cal.3d at p. 660; *Orange I*, *supra*, PERB Decision No. 2594-M, p. 18.)

The County's decision to place Measure P on the ballot involved a mix of employment and non-employment matters. Measure P contains numerous amendments that have, at most, an indirect or attenuated impact on employment terms, but OGC did not issue a complaint as to any such amendments. Rather, all the amendments at issue directly affect employment, and we thus apply the balancing test for changes in the third category noted above. Decision bargaining is thus required only for those amendments where "the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business." (*Orange I*, *supra*, PERB Decision No. 2594-M, p. 18, quoting *Richmond Firefighters*, *supra*, 51 Cal.4th at p. 273.)

Neither PERB nor the courts have previously applied the *Orange I*/*Richmond Firefighters* balancing test in a case involving a law enforcement agency's changes to investigation and disciplinary procedures. Nonetheless, as noted in *Claremont*, discipline is a traditionally bargainable area. *Claremont* involved a city's decision to undertake a racial profiling study, which required officers to fill out a form for each traffic stop identifying a driver's perceived race or ethnicity and any prior knowledge the officer had regarding the driver's race or ethnicity. (39 Cal.4th at p. 629.) The California Supreme Court found no requirement to bargain over this decision,

specifically noting that the racial profiling study was not sufficiently related to employee discipline to merit bargaining. (*Id*. at p. 634.) The Court went on to "emphasize the narrowness" of its holding (*id*. at p. 639) and to suggest that changes impacting employee discipline—such as if the city were to begin disciplining officers for racial profiling—would be bargainable (*id.* at p. 634, fn. 6).

Accordingly, on the continuum of possible measures to enhance police accountability or improve police-community relations, those aimed at investigating and disciplining employees tend to fall on the negotiable side, unlike measures that relate primarily to public safety, such as revising use-of-force policies, implementing a racial profiling study, or requiring officers to wear body worn cameras.[18] (*Claremont*, *supra*, 39 Cal.4th at pp. 632-634; *San Francisco Police Officers' Assn. v. San Francisco Police Com.* (2018) 27 Cal.App.5th 676, 684-690 [following *San Jose* in finding that the city had no duty to engage in decision bargaining as to its decision to revise its use-of-force policy, while the city did engage in effects bargaining, including concerning the policy's impact on discipline].)

The County has a substantial interest in increasing transparency and fostering community trust in policing and correctional services. But for those Measure P amendments aimed in material part at investigation and discipline of employees, the benefits of collective bargaining outweigh the County's interest. Indeed, because such

[18] While changes to investigatory and disciplinary procedures and standards tend to be negotiable under the third category of managerial decisions under *Orange I*, *supra*, PERB Decision No. 2594-M, p. 18, depending on the particular facts of a case such changes may fall within the second category of decisions, for which we need not balance management's interest.

issues lie at the core of traditional labor relations, they are particularly amenable to collective bargaining. (Cf. *Rialto Police Benevolent Assn. v. City of Rialto* (2007) 155 Cal.App.4th 1295, 1309 [subcontracting decision was within scope of representation when it was motivated in part by personnel problems that were "eminently suitable for resolution through collective bargaining"]; *Lucia Mar Unified School District* (2001) PERB Decision No. 1440, adopting proposed decision at pp. 42-43 & 45 [same].)[19]

Applying these principles to the subset of Measure P amendments that were challenged in the complaints and which we found changed prior practice, we conclude that only the following Measure P amendments on investigating employees and recommending discipline are within the scope of representation: those granting IOLERO authority to conduct independent investigations of Sheriff's Office employees (SCC, §§ 2-392(d)(2), 2-394(b)(3) & (5)(vii)-(viii) and deletion of language from SCC, § 2-394(c)(1)) and recommend discipline of those employees (SCC, § 2-394(b)(4)); those allowing IOLERO to subpoena records or testimony in investigations (SCC, § 2-394(b)(5)(ix) and deletion of language from SCC, § 2-394(c)(3)) and review an officer's discipline record, including all prior complaints (SCC, § 2-394(b)(5)(ii) &

[19] While any police accountability measure may potentially gain greater buy-in and therefore be more effective as a result of discussions between labor and management (see Fisk & Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 759-775), as discussed above the MMBA tends to mandate decision bargaining only for those topics that fall within the general ambit of traditional labor relations rather than primarily relating to public safety. We express no opinion as to the desirability of any potential legislative revisions narrowing or expanding the scope of changes that a law enforcement agency must bargain.

(e)(2)); and the provision allowing the IOLERO Director "to personally sit in and observe" investigative interviews (SCC, § 2-394(f)).[20]

Taken together, these Measure P amendments establish a parallel investigative scheme for County peace officers. The Associations have a right to bargain before the County subjects employees they represent to such a parallel investigatory process for the first time, especially since IOLERO's procedures may deviate from the investigations conducted by the Sheriff's Office. These amendments thus directly affect employment by changing—or at least creating ambiguity about[21]—disciplinary procedures and standards.

For example, Sheriff's Office Policies 1010.6.5 and 1010.10.2 incorporate POBR's requirement that an investigation of misconduct be completed within one year

[20] The Associations argue that some of these amendments violate POBR. We express no opinion on that issue, as PERB lacks authority to enforce POBR. (See POBR, § 3309.5, subd. (c) ["The superior court shall have initial jurisdiction over any proceeding brought by any public safety officer against any public safety department for alleged violations of this chapter"].) We also acknowledge that the court in *Oakland Police Officers' Assn. et al. v. City of Oakland* (2021) 63 Cal.App.5th 503, applied POBR to an investigation conducted by the city's civilian police review agency. The court did not address, however, whether POBR applies as a matter of law to all investigations by civilian law enforcement oversight bodies. We accordingly do not assume that POBR applies to independent investigations conducted by IOLERO.

[21] Uncertainty over whether the employer will interpret and apply an ordinance provision in a way that changes or impacts a mandatory subject of bargaining may be a basis for finding an obligation to meet and confer over the provision before it is adopted. (See *Orange I*, *supra*, PERB Decision No. 2594-M, pp. 27-29.)

of the public agency's discovery of the misconduct.[22] But Measure P does not indicate when IOLERO's investigations take place—concurrently, before, or after the Sheriff's Office completes its investigation. It thus is possible that an officer could still be under investigation by IOLERO more than one year after the officer's misconduct was discovered. (Cf. *Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262, p. 12 [procedures for discipline are within scope of representation]; *Long Beach Police Officer Assn. v. City of Long Beach* (1984) 156 Cal.App.3d 996, 1007 [same].)

Measure P further impacts disciplinary procedures by expanding the types of evidence the County could use as a basis for discipline. (See *Rio Hondo Community College District* (2013) PERB Decision No. 2313, pp. 14-15 ["the type of evidence . . . that an employer may rely on for imposing discipline" "is logically and reasonably related to disciplinary procedures"].) Measure P permits IOLERO to use complaints that are exonerated, unfounded, or not sustained as a basis for recommending discipline. A Sheriff's Office's investigation thus could find that a peace officer is exonerated or that a complaint was unfounded, while IOLERO could find otherwise, creating a conflict in whether or not discipline should be imposed. Similarly, the Measure P amendments granting IOLERO authority to subpoena records or testimony in investigations and review an officer's discipline record, including all prior complaints, also could expand the evidence the County uses as a basis for discipline.

[22] POBR requires the investigation of misconduct to be complete within one year of the public agency's discovery "by a person authorized to initiate an investigation." (§ 3304, subd. (d)(1).)

For example, IOLERO now has the ability to review whether and why officers are on a *Brady* list, which could impact IOLERO's discipline recommendations.

The same is true about the provision allowing the IOLERO Director "to personally sit in and observe" the investigative interview of a deputy subject to investigation, as the Director could use any information from that interview as part of an independent IOLERO investigation of the same deputy (either as substantive evidence or to impeach the deputy in a later IOLERO investigative interview). This provision is distinguishable from the provision in *Berkeley* that allowed a member of a citizens' review commission to sit in on the police department's board of review hearings because the two events are very different. An investigative interview is designed to gather evidence (including any evidence of alleged misconduct), often in the immediate aftermath of an incident, and it may determine the officer's future career and indeed life trajectory. In contrast, the board of review hearing at issue in *Berkeley* consisted of a police department board discussing the results of an internal affairs investigation and deciding what action should be taken. (76 Cal.App.3d at pp. 934-935.) Such a discussion, in which the police department deliberates as to the appropriate level of discipline, if any, is the stage at which management must have the most unfettered right to determine who is in the room to allow it to reach an informed decision. *Berkeley*'s conclusion therefore does not undermine the settled principle that a union has the right to bargain over investigative and disciplinary procedures and standards.

Given the potential impact an investigative interview may have on an officer's career, procedures at such an interview are an important subject of collective

bargaining requiring negotiation before making a change. The County therefore should have bargained before placing on the ballot a measure that allowed IOLERO's Director to sit in and observe an investigative interview. Significantly, if the parties had bargained in good faith and reached an impasse, the County would have been privileged to place the matter on the ballot or to make changes directly without an election. (*Lucia Mar Unified School District*, *supra*, PERB Decision No. 1440, adopting proposed decision at p. 45.)

The County argues that in *Orange II*, *supra*, PERB Decision No. 2657-M, we found certain management decisions "expanding law enforcement oversight" to be outside the scope of representation. But *Orange II* should not—and cannot—be read so broadly. There, we found that changes to an ordinance governing the county's office of independent review concerned only management's direction to its legal counsel for the performance of legal services and thus were outside the scope of representation. (*Id*. at p. 17.) We relied on the explicit limitations of the ordinance to find that it "function[ed] much like a contract for legal services and concern[ed] only how [the office of independent review's] attorneys and staff will provide the County with legal advice; it does not change or have effects on the disciplinary procedure." (*Id*. at p. 18.) Our holding thus was based on the narrow scope of the ordinance.

Orange II is easily distinguishable from this case. Prior to Measure P, there was an attorney-client relationship between IOLERO and the Sheriff's Office. Measure P eliminated the requirement that the IOLERO Director be a licensed attorney and enter into a legal services agreement with the County. Measure P also created a community advisory council consisting of 11 members, none of whom must be a practicing

attorney. Measure P's changes to the IOLERO ordinance are not limited to—and in fact do not even involve—how IOLERO "will provide the County with legal advice." *Orange II* thus is of no relevance in this case.

Applying the *Orange I* balancing test to the remainder of the Measure P changes specified in the complaints in this matter (beyond those identified above), we conclude that they are not part and parcel of Measure P's attempt to create a parallel investigatory track. Based on that conclusion and the record as a whole, we find that the County's managerial interest outweighs the benefits of decision bargaining in those instances. This does not end our analysis, however, because we still must determine whether the County had a duty to provide notice and meet and confer over any effects of these amendments that are within the scope of representation.

ii. Effects Bargaining

"[T]he MMBA's duty to bargain 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 is not negotiable." (*County of Santa Clara* (2019) PERB Decision No. 2680-M, pp. 11-12.) A failure or refusal to bargain over the effects of a non-negotiable change is equally as harmful as a failure to bargain over a negotiable change, as it disrupts and destabilizes employer-employee relations by creating an imbalance in the power between management and employee organizations. (*Id*. at pp. 12-13; *County of Santa Clara* (2013) PERB Decision No. 2321-M, pp. 22-24.)

Applying this well-established law, we find that while the County was entitled to unilaterally decide to make changes to BWC policies and to permit IOLERO to interview an investigator, supervisor, witness, or custodian of records, those decisions

had potential negotiable effects that were subject to bargaining. In contrast, Measure P's amendments authorizing IOLERO to "directly contact custodians of evidence held by third parties" and directly access any and all sources of investigative evidence relate to IOLERO's pre-existing auditing function and were not subject to an obligation to engage in decision or effects bargaining.

a. BWC Policies

SCC section 2-394(b)(5)(iii) authorizes IOLERO "to post every body worn camera video where force was used on IOLERO's website. Public posting shall be determined on a case by case basis to the extent allowed by law, in consideration of victim privacy rights and active investigations." This provision is silent, however, about whether Sheriff's Office Policy 1013 applies to IOLERO's online posting of BWC video. Under that policy, the Sheriff's Office must provide the impacted individual advance notice and an opportunity to review the video, perform a threat assessment, provide safety detail for the affected member and their family, and provide context for the released video consistent with Sheriff's Office practice that helps explain policy, practice, and deputy perception. These protocols are intended to protect the safety of officers. Because public disclosure of BWC video by IOLERO without following existing Sheriff's Office protocols would impact workplace safety, SCC section 2-394(b)(5)(iii) is subject to effects bargaining. (See *City of Santa Maria* (2020) PERB Decision No. 2736-M, p. 23, citing *Richmond Firefighters*, *supra*, 51 Cal.4th at p. 275 ["workplace safety is firmly within the scope of representation"].)

b. Interviewing Investigator, Supervisor, Witnesses, and Custodian of Records

SCC section 2-394(b)(5)(iv) authorizes IOLERO to "directly contact complainants and witnesses to ensure the completeness and fairness of the investigation." But this provision does not specify whether "witnesses" may include Association-represented employees who may be accused of wrongdoing. Nor does it specify whether any witnesses who are Association-represented employees will be paid during these interviews. This provision could therefore impact discipline and wages, topics within the scope of representation, and the County therefore had a duty to negotiate over such potential effects.

SCC section 2-394(g)(3) directs the Sheriff's Office to provide IOLERO "direct, unfettered access" to "[a]ny supervisor of an employee subject to an investigation being audited or otherwise conducted by IOLERO." This provision does not specify whether "supervisor" may include Association-represented employees who may be accused of wrongdoing. Nor does it specify whether any such Association-represented supervisor will be paid during any discussion with IOLERO. This provision accordingly was subject to effects bargaining.

In contrast, SCC section 2-394(b)(5)(v) authorizes IOLERO to "directly contact custodians of evidence held by third parties to ensure adequate efforts to secure such evidence by investigators." Because by the provision's own terms the custodians of records subject to it are not employed by the County, this provision does not implicate County employees' wages or other working conditions. It further appears from the provision's language that it is aimed at determining whether an investigator made "adequate efforts to secure . . . evidence" from the third-party custodian. Because this

provision is solely related to IOLERO's pre-existing auditing function, it does not appear to impact employee discipline in any way. We therefore find the County had no obligation to meet and confer over SCC section 2-394(b)(5)(v).

c. Directly Accessing Any and All Sources of Investigative Evidence

Finally, SCC sections 2-394(b)(5)(i) & (e)(1), (3)-(6)[23] grant IOLERO unfettered access to investigative evidence and Sheriff's Office databases.[24] The existing operational agreement provided access to the Sheriff's Office AIM database. Although there is a change in how IOLERO has access to investigative evidence, it appears to be related to IOLERO's pre-existing auditing function and does not impact discipline or any other topic within the scope of representation. We thus conclude that the County had no obligation to meet and confer over SCC sections 2-394(b)(5)(i) & (e)(1), (3)-(6).

C. Generalized Effect or Continuing Impact

"A change of policy has, by definition, a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members." (*Grant Joint Union High School District* (1982) PERB Decision No. 196, p. 9.) As discussed *ante*, Measure P made several changes to existing policy and created several new policies where none existed before. Because these policy changes apply to Association-represented employees on an ongoing basis, they have a generalized

[23] SCC section 2-394(e)(2) is discussed *ante*.

[24] The Associations argue this access infringes on peace officer privacy rights. We express no opinion on that issue, as PERB lacks authority to enforce constitutional or statutory privacy rights. We note, however, that SCC section 2-394(c)(2) prohibits IOLERO from "[d]isclos[ing] any confidential and/or privileged information to anyone not authorized to receive it, as prohibited by law."

effect or continuing impact on bargaining unit members' employment conditions. (*State of California (Departments of Veterans Affairs and Personnel Administration)* (2008) PERB Decision No. 1997-S, pp. 18-19.)

D. Notice and Opportunity to Meet and Confer

MMBA section 3504.5, subdivision (a) provides that, except in cases of emergency:

> "the governing body of a public agency, and boards and commissions designated by law or by the governing body of a public agency, shall give reasonable written notice to each recognized employee organization affected of any ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation *proposed to be adopted by the governing body* or the designated boards and commissions and shall give the recognized employee organization the opportunity to meet with the governing body or the boards and commissions." (Italics added.)

MMBA section 3505 requires a public agency's governing body or its designee to "meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of . . . recognized employee organizations [and] consider fully such presentations as are made by the employee organization on behalf of its members *prior to arriving at a determination of policy or course of action*." (Italics added.) Public agencies must comply with the MMBA's meet-and-confer requirements before submitting to voters an initiative affecting matters within the scope of representation. (*Boling*, *supra*, 5 Cal.5th at p. 915; *Seal Beach*, *supra*, 36 Cal.3d at pp. 597-601.)

The County did not give the Associations advance written notice that the BOS was considering placing Measure P on the November 2020 ballot before the BOS

made a firm decision to do so. And when the Associations nonetheless demanded to bargain immediately before the BOS considered taking action on Measure P, the County ignored the demands. The County claims it had no duty to provide notice or an opportunity to bargain because Measure P was outside the scope of representation—an argument we have already rejected as to several of its amendments. The BOS's decision to place Measure P on the November 2020 ballot thus was, as the Associations characterized it, a fait accompli that deprived the Associations of their statutory right to meet and confer "prior to [the BOS] arriving at a determination of policy or course of action" on the amendments within the scope of representation. (MMBA, § 3505; *Merced*, *supra*, PERB Decision No. 2740-M, pp. 20, 23, citing *City of Palo Alto* (2017) PERB Decision No. 2388a-M, p. 49 ["A policy change subject to the duty to meet and confer and implemented without meeting and conferring, is a fait accompli, which, if left in place, would compel the union to 'bargain back' to the status quo [citations] and make impossible the give and take that are the essence of good faith consultation"].)

The County asserts that it was justified in its actions because it acted on the last day possible to place a measure on the November 2020 ballot. We address this defense first as to those topics that required decision bargaining and second as to those amendments that required effects bargaining.

i. Emergency Exception to Decision Bargaining

"[U]nder exceptionally limited circumstances, an employer may be excused from negotiating on the basis of true emergency that provides a basis for claiming that a business necessity excused a unilateral change." (*County of San Bernardino (Office*

of the Public Defender) (2015) PERB Decision No. 2423-M, p. 54; *Cloverdale Unified School District* (1991) PERB Decision No. 911, p. 21.) To establish this emergency exception, the employer must make "a specific and actual showing of an emergency" that leaves no alternative to the action taken and allows no time for meaningful negotiations before taking action. (*City of Davis* (2012) PERB Decision No. 2271-M, p. 25; *Calexico Unified School District* (1983) PERB Decision No. 357, adopting proposed decision at p. 20.) The alleged necessity must be the unavoidable result of a sudden change in circumstance beyond the employer's control. (*Lucia Mar Unified School District*, *supra*, PERB Decision No. 1440, adopting proposed decision at p. 46.) "Emergency is not synonymous with expediency, convenience, or best interests." (*Sonoma County Organization etc. Employees v. County of Sonoma* (1992) 1 Cal.App.4th 267, 277.)[25]

Here, the BOS placed Measure P on the November 2020 ballot in response to community pressure for greater police transparency and accountability following the murder of George Floyd, an unarmed Black man, by a Minneapolis police officer in May 2020.[26] Floyd's death brought renewed attention to police killing of civilians and

[25] An emergency does not completely extinguish a public employer's bargaining obligation. It merely allows the employer to make the change so long as the employee organization is given notice and an opportunity to meet and confer "at the earliest practicable time following the adoption of such ordinance, rule, resolution, or regulation." (MMBA, § 3504.5.)

[26] Proponents of the Evelyn Cheatham Effective IOLERO Initiative began gathering signatures in November 2019 to place the proposed initiative on the November 2020 ballot, but they were unable to collect the minimum number needed due to the COVID-19 pandemic. Subsequently, in the wake of Floyd's death, community members expressed an "outpouring of support" for the BOS to exercise its

sparked worldwide Black Lives Matter protests for police reform in the ensuing summer. In this context, the urgency and primacy of addressing excessive use of force by peace officers, creating robust and independent civilian oversight of policing and correctional services, and rebuilding community trust in law enforcement are well taken. Nonetheless, the emergency exception does not apply in this case.

First, the County did not prove that it had no alternative to placing Measure P on the November 2020 ballot. As the Summary Report presented at the August 4 BOS meeting indicates, placing Measure P on the November ballot was just one of three actions the BOS could have taken; it also could have introduced the proposed changes as amendments to the existing IOLERO ordinance subject to direct adoption by the BOS or moved forward with having the ad hoc committee make recommendations for amending the ordinance. The BOS thus did not have to take the particular action that it did.

Second, even focusing solely on the option of placing proposed changes before County voters, nothing precluded the County from engaging in meaningful negotiations before doing so. The County asserts it was justified in placing Measure P on the ballot prior to bargaining because August 7 was the last day to submit a measure for the November 3, 2020 election. In *County of Santa Clara* (2010) PERB Decision No. 2114-M, the county similarly argued that the statutory deadline for submitting initiatives for the upcoming November election justified placing a measure on the ballot before completing negotiations. (*Id*. at p. 15.) The Board recognized that

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authority under Election Code section 9140 to submit the initiative to voters in the November 2020 election.

a public agency may be privileged to place a measure on the ballot prior to completing negotiations when it is "faced with an imminent need to act prior to the statutory deadline for submitting the [measure] for the ballot." (*Id*. at p. 16.) But the statutory deadline itself is not such an "imminent need." (*Id*. at pp. 15-16)

No evidence in the record shows an "imminent need" for the County to have called a special election to place Measure P on the November 2020 ballot. By its very definition, a special election is one for which no statutory timeframe for holding is prescribed. (Elec. Code, § 353.) The County's own witness, Labor Relations Manager Carduff, testified that she was not aware of any emergency circumstances or legal obligation requiring the BOS to place the proposed initiative on the November 2020 ballot instead of waiting for a future election. And nothing in the record shows that the amendments made by Measure P would have been less effective had the voters approved them in a later election. Thus, while the BOS's desire to meet the moment was understandable, the "expediency, convenience, or best interests" served by placing Measure P on the November 2020 ballot did not amount to an emergency that excused the County from its obligation under the MMBA to provide the Associations notice and an opportunity to bargain before doing so. (See *County of Santa Clara*, *supra*, PERB Decision No. 2114-M, p. 16 ["The mere fact that the county thought inclusion of the measure on the November 2004 ballot was desirable does not constitute a compelling operational necessity sufficient to set aside its bargaining obligation"].)

ii. *Compton CCD* Test for Effects Bargaining

As for the Measure P amendments that were subject to effects bargaining, the County was required to "provide notice and a meaningful opportunity to bargain over the reasonably foreseeable effects of its decision before implementation, just as it would be required to do before making a decision on a mandatory subject of bargaining." (*County of Santa Clara*, *supra*, PERB Decision No. 2680-M, p. 12.) In *Compton Community College District* (1989) PERB Decision No. 720 (*Compton CCD*), 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, as discussed *ante* there was no immutable deadline here because the BOS could have placed Measure P on the ballot at a later election. (*County of Santa Clara*, *supra*, PERB Decision No. 2114-M, p. 15.) And nothing in the record shows that the County's ability to decide to put the changes proposed in Measure P before County voters would have been undermined by having to wait until the March 2021 election or a later election to do so. (In fact, the BOS could have

adopted the Measure P amendments itself without voter approval.) The County's self-imposed deadline to place Measure P on the November 2020 ballot therefore does not satisfy the first requirement under *Compton CCD*.

Regarding the second and third prongs of the *Compton CCD* test, the County, citing *Mt. Diablo Unified School District* (1983) PERB Decision No. 373 (*Mt. Diablo*), argues it had no duty to provide notice before the BOS voted to place Measure P on the ballot because "the duty to bargain effects does not arise until a firm decision is made." In *Mt. Diablo*, the Board held that "an employer's duty to provide notice and an opportunity to negotiate the effects of its decision to lay off arises when the employer reaches a firm decision to lay off." (*Id*. at p. 26.) Notably, while an employer need not negotiate over a decision that is outside the scope of representation, it must meet and confer over any alternatives to the decision as part of effects bargaining. (*City of Sacramento* (2013) PERB Decision No. 2351-M, p. 22; *San Mateo City School District* (1984) PERB Decision No. 383, p. 18.) Effects bargaining thus contemplates that negotiations may ultimately cause the employer to change its mind about the non-negotiable decision in some way.

But the Associations' ability to propose alternatives to the BOS's decision vanished as soon as the BOS placed Measure P on the ballot. Once a measure is placed on the ballot, a governing body has no ability to withdraw it or alter its terms in the 88 days preceding the election.[27] Because the BOS placed Measure P on the

[27] "The board of supervisors may submit to the voters . . . an ordinance for . . . amendment . . .. The ordinance shall be voted upon at any succeeding regular or special election and, if it receives a majority of the votes cast, the ordinance shall be . . . amended . . . accordingly." (Elec. Code, § 9140.) For both regular and special

ballot on the 88th day before the election, it could not withdraw the measure or alter its terms after that date. (Elec. Code, § 9118.5.) And although the BOS considered whether to include a provision in the measure allowing the BOS to amend the enacted ordinance by a four-fifths vote, it declined to adopt that provision. As a result, now that it has passed, Measure P may only be repealed or amended by a court or by the voters at a future election. (Elec. Code, § 9125.) The County's actions thus deprived the Associations of the ability to propose an alternative; for example, they could have proposed a competing ballot initiative on the November 2020 ballot. (See *City of San Diego*, *supra*, PERB Decision No. 2464-M, pp. 56-57 & adopting proposed decision at p. 48, fn. 19.) Under these circumstances, the County's failure to give the Associations notice and an opportunity to meet and confer over effects before placing Measure P on the ballot violated the statutory duty to meet and confer.

The County argues that it would be premature to find a failure or refusal to bargain effects because the time for such bargaining is when IOLERO and the Sheriff meet to amend their existing operational agreement to conform to Measure P. According to the County, the foreseeable negotiable effects of Measure P cannot be determined until then. But, as their correspondence with the County shows, the Associations were able to identify several negotiable effects from the text of Measure P itself. This case therefore is unlike *Santee Elementary School District* (2006) PERB Decision No. 1822, where the effects of a school board policy could not be determined

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elections, an initiative must be placed on the ballot not less than 88 days before the election. (Elec. Code, § 1405.) The proponent of an initiative may withdraw it at any time before the 88th day prior to the election. (Elec. Code, § 9118.5.)

until the implementing regulations were drafted. (*Id*. at pp. 7-8.) The County's willingness to bargain effects as part of revising the operational agreement thus cannot satisfy its effects bargaining obligation, especially given that the Associations were deprived of the opportunity to offer alternatives to any of Measure P's amendments prior to the measure being placed on the ballot.

Because the County failed to meet any of the three requirements under *Compton CCD*, much less all of them, we conclude that the County violated its duty under the MMBA to provide notice and meet and confer in good faith over the foreseeable effects of Measure P section 2-394(b)(5)(iii), (b)(5)(iv), and (g)(3). (*County of Santa Clara*, *supra*, PERB Decision No. 2321-M, p. 31.)[28]

II. Remedy

A. Severability

The Associations contend that the unlawfully adopted Measure P amendments should be severed from the remainder of the ordinance. PERB has authority to sever provisions of an ordinance even when, as here, the ordinance contains no severability clause. (*Orange I*, *supra*, PERB Decision No. 2594-M, p. 35.) Thus, with an eye toward preserving as much of the voters' will as possible, we examine whether the unlawfully adopted Measure P amendments are severable.

[28] We decline to address SCLEA's allegations in Case No. SF-CE-1817-M that the County violated (1) its duty under MMBA section 3507 to consult with recognized employee organizations over adoption of employer-employee relations rules, and (2) article I, section 2(k) of the County's Employee Relations Policy because reaching such findings would be cumulative and would not affect the remedy. (*Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M, p. 20.)

To be severable, "the invalid provision must be grammatically, functionally, and volitionally separable." (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 821 (*Calfarm*).) The first requirement, grammatical severability, means that the invalid provision may be removed without affecting the wording of the remaining provisions. (*Id*. at p. 822.) This requirement is met here. All of the amendments that were unlawfully adopted are distinct amendments, and the removal of each does not alter the wording of any remaining amendments.

The requirement of functional severability means that the remaining amendments can operate without the excised ones. (*Calfarm*, *supra*, 48 Cal.3d at p. 822.) This requirement is also met. The Measure P amendments granting IOLERO authority to conduct independent investigations of Sheriff's Office employees (SCC, § 2-394(b)(3) & (5)(vii), (viii) and deletion of language from SCC, § 2-394(c)(1)) and recommend discipline of those employees (SCC, § 2-394(b)(4)), those allowing IOLERO to subpoena records or testimony in investigations (SCC, § 2-394(b)(5)(ix) and deletion of language from SCC, § 2-394(c)(3)) and review an officer's discipline record, including all prior complaints (SCC, § 2-394(b)(5)(ii)), and the provision allowing the IOLERO Director to "to personally sit in and observe" investigative interviews of deputies (SCC, § 2-394(f)), all concern IOLERO's authority and ability to conduct independent investigations. The remainder of the ordinance pertaining to the appointment and qualifications of IOLERO staff, IOLERO's auditing of Sheriff's Office investigations, budget allotment, periodic performance audit, and establishment of the community advisory council, are not affected by the removal of the unlawfully adopted amendments.

The final requirement, volitional severability, is also met, although it is a close question. Volitional severability means the remaining amendments "would likely have been adopted" had the legislative body foreseen the partial invalidity of the enactment. (*Calfarm*, *supra*, 48 Cal.3d at p. 822; *Santa Barbara Sch. Dist. v. Superior Court* (1975) 13 Cal.3d 315, 331.) In the ballot measure context, "[t]he test is whether it can be said with confidence that the electorate's attention was sufficiently focused upon the parts to be severed so that it would have separately considered and adopted them in the absence of the invalid portions." (*People's Advocate, Inc. v. Superior Court* (1986) 181 Cal.App.3d 316, 333.) To make that determination we must examine any "policy statement or declaration of purpose," the measure's text, and the ballot materials. (*Gerken v. Fair Political Practices Com.* (1993) 6 Cal.4th 707, 717.)

The BOS resolution placing Measure P on the ballot expressed interest in "strengthening the ordinance establishing IOLERO to provide greater independence and oversight." The ballot described Measure P as a "measure to expand the oversight authority and independence of [IOLERO] to investigate Sheriff-related issues." The County Counsel's analysis of Measure P in the ballot pamphlet says: "Measure P would enhance the oversight authority and independence of IOLERO to review and analyze complaints against the Sonoma County Sheriff's Office." And SCC section 2-392(c) of the measure provides:

> "Meaningful independent oversight and monitoring of sheriffs' departments increases government accountability and transparency, enhances public safety, and builds community trust in law enforcement. Such oversight must have the authority and independence necessary to conduct credible and thorough investigations."

As the above language demonstrates, Measure P had two main objectives: increasing IOLERO's oversight authority and independence. Although IOLERO's authority to conduct independent investigations is an important part of Measure P, we cannot say based on review of the above statements that the measure would not have passed if it was limited only to increasing IOLERO's oversight authority. Thus, "it seems eminently reasonable to suppose that those who favor [Measure P] would be happy to achieve at least some substantial portion of their purpose." (*Santa Barbara Sch. Dist.*, *supra*, 13 Cal.3d at p. 332.) And it also seems reasonable that the measure would have passed without the amendments allowing IOLERO to post BWC video online and interview complainants, witnesses, and supervisors. We therefore find that the unlawfully adopted Measure P amendments are severable from the remainder of the ordinance.

B. Scope of Remedy

MMBA section 3509, subdivision (b) authorizes PERB to order "the appropriate remedy necessary to effectuate the purposes of this chapter." (*Omnitrans* (2010) PERB Decision No. 2143-M, p. 8.) This includes the authority to order an offending party to take affirmative actions designed to effectuate the purposes of the MMBA. (*Id*. at p. 10.) A "properly designed remedial order seeks a restoration of the situation as nearly as possible to that which would have obtained but for the unfair labor practice." (*Modesto City Schools* (1983) PERB Decision No. 291, pp. 67-68.)

PERB's traditional remedy for an employer's unlawful unilateral change includes restoration of the prior status quo and appropriate make-whole relief, including back pay and benefits with interest thereon, for all employees who have

suffered loss as a result of the unlawful conduct. (*City of San Diego*, *supra*, PERB Decision No. 2464-M, p. 40; *Regents of the University of California* (1983) PERB Decision No. 356-H, pp. 19-20.) "Restoring the parties and affected employees to their respective positions before the unlawful conduct occurred is critical to remedying unilateral change violations" to prevent the employer from gaining an unfair advantage in negotiations. (*City of San Diego*, *supra*, PERB Decision No. 2464-M, p. 40.)

Although PERB's remedial authority is broad, we lack "authority to overturn the results of an election in order to remedy a failure of procedure required by the MMBA." (*City and County of San Francisco* (2017) PERB Decision No. 2536-M, p. 41, citing *International Assn. of Fire Fighters v. City of Oakland* (1985) 174 Cal.App.3d 687, 694.) PERB, however, can declare provisions enacted in violation of the MMBA to be void and/or unenforceable, in whole or in part. (*City of Palo Alto v. Public Employment Relations Bd.* (2016) 5 Cal.App.5th 1271, 1315-1316; *City and County of San Francisco*, *supra*, PERB Decision No. 2536-M, p. 39.) Because Measure P was enacted by the voters at the November 3, 2020 election, we cannot order the County to rescind the unlawfully adopted amendments as part of restoring the status quo. We therefore declare void and unenforceable as to any employees the Associations represent the following amendments to Article XXVII of Title 2 of the Sonoma County Code, as adopted through Measure P: § 2-392(d)(2); § 2-394(b)(3); § 2-394(b)(4); § 2-394(b)(5)(ii); § 2-394(b)(5)(iii); § 2-394(b)(5)(iv); § 2-394(b)(5)(vii);

§ 2-394(b)(5)(viii); § 2-394(b)(5)(ix); § 2-394(e)(2); § 2-394(f); § 2-394(g)(3); and deletion of language from § 2-394(c)(1) and (c)(3).[29]

It appears from the County's briefs that it has not yet taken action to implement any of the unlawfully adopted Measure P amendments. But an unfair practice finding creates a presumption that employees suffered some financial loss as a result of the employer's unlawful conduct. (*Bellflower Unified School District* (2019) PERB Order No. Ad-475, p. 10; *Desert Sands Unified School District* (2010) PERB Decision No. 2092, pp. 31-32.) Consistent with the presumption, it is appropriate to give the Associations an opportunity to establish in compliance proceedings that any employees they represent suffered financial harm as a result of the application of any of the unlawfully adopted Measure P amendments. Similarly, in compliance proceedings the Associations may present evidence that represented officers have been subject to discipline or had items placed in their personnel files as a result of the application of any of the unlawfully adopted Measure P amendments.

Finally, we find that PERB's typical remedies of ordering the employer to cease and desist its unlawful conduct and post a notice of its violation are appropriate here.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it has been found that the County of Sonoma (County) violated the

[29] Because we conclude that the County violated the MMBA by failing to give the Associations notice and the opportunity to meet and confer over the negotiable amendments of Measure P, we confine our remedy to declaring those amendments void and unenforceable only as to employees represented by the Associations, rather than as to all County employees who may be subject to the amendments. (*Orange I*, *supra*, PERB Decision No. 2594-M, p. 39.)

Meyers-Milias-Brown Act (MMBA) and PERB Regulations. The County breached its duty to meet and confer in good faith with the Sonoma County Deputy Sheriffs' Association and Sonoma County Law Enforcement Association (collectively, Associations) in violation of Government Code section 3505 and Public Employment Relations Board (PERB or Board) Regulation 32603(c) (Cal. Code Regs., tit. 8, § 31001 et seq.) when it failed and refused to meet and confer over the Board of Supervisors' decision to place Measure P on the November 2020 ballot and over the foreseeable negotiable effects of that decision on employment conditions. By this conduct, the County also interfered with the right of County employees to participate in the activities of an employee organization of their own choosing, in violation of Government Code section 3506 and PERB Regulation 32603(a), and denied the Associations their right to represent employees in their employment relations with a public agency, in violation of Government Code section 3503 and PERB Regulation 32603(b).

Pursuant to section 3509, subdivision (a) of the Government Code, it is hereby ORDERED that the following amendments to Article XXVII of Title 2 of the Sonoma County Code (SCC) are void and unenforceable as to any employees represented by the Associations:

§ 2-392(d)(2)

§ 2-394(b)(3)

§ 2-394(b)(4)

§ 2-394(b)(5)(ii)

§ 2-394(b)(5)(iii)

§ 2-394(b)(5)(iv)

§ 2-394(b)(5)(vii)

§ 2-394(b)(5)(viii)

§ 2-394(b)(5)(ix)

§ 2-394(e)(2)

§ 2-394(f)

§ 2-394(g)(3)

and deletion of language from § 2-394(c)(1) and (c)(3)

It also is hereby ORDERED that the County, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Enforcing or otherwise applying the following amendments to Article XXVII of Title 2 of the Sonoma County Code as to any employees represented by the Associations: § 2-392(d)(2); § 2-394(b)(3); § 2-394(b)(4); § 2-394(b)(5)(ii); § 2-394(b)(5)(iii); § 2-394(b)(5)(iv); § 2-394(b)(5)(vii); § 2-394(b)(5)(viii); § 2-394(b)(5)(ix); § 2-394(e)(2); § 2-394(f), and § 2-394(g)(3); and deletion of language from § 2-394(c)(1) and (c)(3) (hereinafter referred to, collectively, as the unlawfully adopted Measure P amendments).

2. Refusing or failing to meet and confer in good faith with the Associations before placing any matter on the ballot that affects employee discipline and/or other negotiable subjects.

3. Interfering with bargaining unit members' right to participate in the activities of an employee organization of their own choosing.

4. Denying the Associations their right to represent employees in their employment relations with the County.

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

1. Upon request, meet and confer in good faith with the Associations before placing any matter on the ballot that affects employee discipline and/or other negotiable subjects.

2. Make employees represented by the Associations whole for any losses resulting from the County's application of any of the unlawfully adopted Measure P amendments. Any compensation awarded shall be augmented by interest at a rate of 7 percent per year.

3. Rescind any discipline imposed and remove any information placed in the personnel files of Association-represented employees as a result of the County's application of any of the unlawfully adopted Measure P amendments, except to the extent that the County demonstrates by a preponderance of the evidence that it would have taken the same action absent the unlawfully adopted Measure P amendments.

4. Within 10 workdays after this decision is no longer subject to appeal, post at all work locations in the County, where notices to employees represented by the Associations customarily are posted, copies of the Notice attached hereto as an Appendix. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the County to communicate with employees represented by the Associations. The Notice must be signed by an authorized agent of the County,

indicating that the County 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.[30]

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 designee. All reports regarding compliance with this Order shall be served concurrently on the Associations.

Chair Banks and Members Krantz and Paulson joined in this Decision.

[30] 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 Associations 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 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 No. SF-CE-1816-M, *Sonoma County Deputy Sheriffs' Association v. County of Sonoma*, and Unfair Practice Case No. SF-CE-1817-M, *Sonoma County Law Enforcement Association v. County of Sonoma*, in which all parties had the right to participate, it has been found that the County of Sonoma (County) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq., by implementing its decision to place Measure P on the November 2020 ballot without affording Sonoma County Deputy Sheriffs' Association and Sonoma County Law Enforcement Association (Associations) adequate notice and a meaningful opportunity to bargain over the measure's negotiable amendments, as well as over the negotiable effects of that decision.

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

A. CEASE AND DESIST FROM:

1. Enforcing or otherwise applying the following amendments to Article XXVII of Title 2 of the Sonoma County Code to any employees represented by the Associations: § 2-392(d)(2); § 2-394(b)(3); § 2-394(b)(4); § 2-394(b)(5)(ii); § 2-394(b)(5)(iii); § 2-394(b)(5)(iv); § 2-394(b)(5)(vii); § 2-394(b)(5)(viii); § 2-394(b)(5)(ix); § 2-394(e)(2); § 2-394(f), and § 2-394(g)(3); and deletion of language from § 2-394(c)(1) and (c)(3) (hereinafter referred to, collectively, as the unlawfully adopted Measure P amendments).

2. Refusing or failing to meet and confer with the Associations before placing any matter on the ballot that affects employee discipline and/or other negotiable subjects.

3. Interfering with bargaining unit members' right to participate in the activities of an employee organization of their own choosing.

4. Denying the Associations their right to represent employees in their employment relations with the County.

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

1. Upon request, meet and confer in good faith with the Associations before placing any matter on the ballot affecting employee disciplinary procedures and/or other negotiable subjects.

2. Make employees represented by the Associations whole for any losses resulting from the County's application of any of the unlawfully adopted Measure P amendments. Any compensation awarded shall be augmented by interest at a rate of 7 percent per year.

3. Rescind any discipline imposed and remove any information placed in the personnel files of Association-represented employees as a result of the County's application of any of the unlawfully adopted Measure P amendments, except to the extent that we demonstrate by a preponderance of the evidence that we would have taken the same action absent the unlawfully adopted Measure P amendments.

Dated: _____ COUNTY OF SONOMA

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.