STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SANTA CLARA COUNTY DISTRICT ATTORNEY INVESTIGATORS' ASSOCIATION, Charging Party, v. COUNTY OF SANTA CLARA, Respondent.	Case No. SF-CE-1403-M PERB Decision No. 2799-M December 20, 2021

Appearances: Rains Lucia Stern St. Phalle & Silver by Zachery Lopes, Attorney, for Santa Clara County District Attorney Investigators' Association; James R. Williams, County Counsel, and Samuel J. Cretcher, Deputy County Counsel, for County of Santa Clara.

Before Shiners, Krantz, and Paulson, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Santa Clara County District Attorney Investigators' Association to a proposed decision of an administrative law judge (ALJ). The parties' dispute arose in 2016, when the Santa Clara County Board of Supervisors adopted a Surveillance-Technology and Community-Safety Ordinance, which regulates the County's surveillance technology use.

The complaint alleges that the County violated the Meyers-Milias-Brown Act (MMBA) and PERB Regulations by enacting the Ordinance before completing negotiations over its decision to adopt the Ordinance and/or the decision's effects on

terms and conditions of employment.[1] The ALJ found that the County had no obligation to bargain over its decision to adopt the Ordinance, but the ALJ upheld the complaint's effects bargaining claim.

In its exceptions, the Association primarily contends that: (1) the County had a duty to bargain over the Ordinance's definition of the term "surveillance technology" and over its provision establishing criminal misdemeanor liability for misusing County surveillance technology; and (2) as a remedy for not bargaining over these terms, PERB should void the Ordinance in whole or in part.[2] The County filed no exceptions and urges us to affirm the proposed decision.

We have reviewed the record in this matter and considered the parties' arguments. Like the ALJ, we find the County was not required to engage in decision bargaining but did have a duty to engage in effects bargaining. While the ALJ found that the Association had the right to bargain over the Ordinance's effects on employee workload and safety, we conclude that the Association also had the right to meet and

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

[2] The Association requested oral argument in this case pursuant to PERB Regulation 32315. The Board denies requests for oral argument when an adequate record has been prepared, the parties have had ample opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear to make oral argument unnecessary. (*City of Culver City* (2020) PERB Decision No. 2731-M, p. 2, fn. 3.) This case satisfies all of the above criteria. We therefore deny the Association's request for oral argument.

confer over consequences to Association-represented employees found to have misused County surveillance technology.[3]

Accordingly, we amend the ALJ's proposed order in two primary respects. First, we direct the County to meet and confer, upon request, over all three of the above-noted effects. Second, in accord with our standard remedy for effects bargaining violations, we direct the County to cease and desist from enforcing the Ordinance against Association-represented employees until one of the following conditions is satisfied: the parties reach an overall agreement on each of the specified effects; the parties conclude their effects negotiations in a bona fide impasse; or the Association fails to pursue effects negotiations in good faith.[4]

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[3] We adjust the proposed decision in a manner that varies from both parties' positions to ensure that the decision hews to PERB precedent and effectuates the MMBA's purposes. (Cf. *State Employees Trades Council United (Ventura*, *et al.)* (2009) PERB Decision No. 2069-H, pp. 7-8 [the Board may review legal issues not raised by the parties when necessary to correct a mistake of law, and the Board has the power and duty to make any determination and take any action needed to effectuate the law's purposes].)

[4] No party excepted to the ALJ's conclusions that the County failed to provide the Association with adequate advance notice of the proposed Ordinance, failed to meet and confer in good faith over the Ordinance's reasonably foreseeable effects on workload and safety, and failed to reach a bona fide impasse in effects bargaining. In reaching these conclusions, the ALJ found that the County's implementation of the decision before completing effects bargaining was not excused under *Compton Community College District* (1989) PERB Decision No. 720 (*Compton*), and the ALJ rejected the County's other affirmative defenses, including that the Association waived its right to effects bargaining. Moreover, no party excepted to the ALJ's conclusion that, by violating its bargaining obligations, the County derivatively interfered with protected employee and union rights. Because the aforementioned conclusions are not before us, they remain non-precedential and are final and binding only on the

FACTUAL BACKGROUND

The County is a public agency within the meaning of MMBA section 3501, subdivision (c) and PERB Regulation 32016, subdivision (a). The Association is an employee organization within the meaning of MMBA section 3501, subdivision (a) and an exclusive representative within the meaning of PERB Regulation 32016, subdivision (b). The Association exclusively represents a bargaining unit of employees in the Criminal Investigator I, II, and III classifications employed by the County District Attorney's Office. All bargaining unit members are peace officers who investigate crimes. They often work alongside other law enforcement agencies and share information-gathering tools and data with such other agencies.

I. The County Begins Developing the Ordinance

In November 2014, the County Board of Supervisors (BOS) began considering legislation to ensure that use of County-owned surveillance technology promoted community safety while also protecting individual privacy.[5] Between March 2015 and

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parties to this case. (PERB Regs. 32215, 32300, subd. (c); *Trustees of the California State University (San Marcos)* (2020) PERB Decision No. 2738-H, p. 2, fn. 2.)

[5] In the Ordinance the BOS ultimately enacted, it found that protecting privacy is "a vital part of its duties," while acknowledging that surveillance technology "may also be a valuable tool to bolster community safety and aid in the investigation and prosecution of crimes." To balance the public's right to privacy with the need to promote and ensure community safety, the BOS found that "any decision to use surveillance technology must be judiciously balanced with an assessment of the costs to the County and the protection of privacy, civil liberties and civil rights." The Ordinance aimed to balance these interests and require that County surveillance technology be acquired and used with "proper transparency, oversight, and accountability."

April 2016,[6] the BOS Finance and Government Operations Committee (FGOC) held seven public meetings to hear comments and work on proposals for the Ordinance.

The proposed Ordinance required County departments, including the District Attorney's Office, to obtain BOS approval before seeking funds for or acquiring surveillance technology. It also directed County departments to obtain BOS approval before using surveillance technology for a purpose, in a manner, or at a location the BOS had not previously approved.

The proposed Ordinance required each County department to submit to the BOS for approval an Anticipated Surveillance Impact Report (Impact Report) and a Surveillance Use Policy (Use Policy) before the department acquires and operates new surveillance technology. The Impact Report identifies a technology's purpose, where it will be deployed, its potential impact on civil liberties, and its fiscal costs. The Use Policy identifies, among other things, what information the technology will collect, the authorized and unauthorized uses of the technology, and how data will be protected. Each Use Policy also contains an oversight provision specifying technical measures to monitor for misuse of the technology or collected information, as well as sanctions for Use Policy violations. As discussed *post*, the County has conceded that before adopting a Use Policy, a department must meet and confer regarding impacts on terms of conditions of employment, including discipline.

The proposed Ordinance also required that after the BOS approves a department's Impact Report and Use Policy, the department must thereafter submit

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[6] All further dates are 2016, unless otherwise indicated.

Annual Surveillance Reports updating the BOS and the public on the specific surveillance technology, how it was used, whether the community complained about its use, the total annual and ongoing costs for the technology and source of funding, and whether the technology has been effective at achieving its purpose.

Section A40-7(c) of the proposed Ordinance broadly defined "surveillance technology" as:

> "any electronic device, system using an electronic device, or similar technological tool used, designed, or primarily intended to collect, retain, process, or share audio, electronic, visual, location, thermal, olfactory or similar information specifically associated with, or capable of being associated with, any individual or group."

The proposed Ordinance identified specific examples of surveillance technology, such as drones with cameras or monitoring capabilities, automated license plate readers, and Global Positioning System (GPS) technology, and exempted certain equipment from the definition, including standard word-processing software, information-technology-protection tools such as web-filtering, or standard telephone-message equipment. Under certain circumstances, County-owned cell phones with the ability to capture audio or video also did not fall within the "surveillance technology" definition. The definition was intended to broadly cover the County's many departments and service areas, such as jails, hospitals, and airports, without requiring frequent updates to capture technological changes and innovations. Nevertheless, in 2018, the BOS amended Section A40-7(c) to exclude additional technology from the definition.

The proposed Ordinance made it a criminal misdemeanor to intentionally misuse County-owned surveillance technology "(1) for a purpose or in a manner that is

specifically prohibited in a [BOS]-approved Surveillance Use Policy, or (2) without complying with the terms of [the Ordinance] with respect to that County-owned surveillance technology." The proposed Ordinance tasked the District Attorney or the County Counsel with prosecuting violations.

The proposed Ordinance also contained a severability provision declaring: "If any section, subsection, paragraph, sentence, clause or phrase of [the Ordinance] is for any reason held unconstitutional or invalid," the remaining parts "shall remain fully effective." The provision further provided: "If the application of any part of [the Ordinance] to any person or circumstance is held invalid, the application of that part of [the Ordinance] shall not be affected regarding other persons or circumstances."

II. The Association Discovers the Proposed Ordinance

In February, Association President Michael Whittington learned that the FGOC would be considering the proposed Ordinance. The County had not notified the Association of the proposed Ordinance; rather, Whittington learned of it by reviewing the FGOC's agenda. Whittington attended the committee meeting to object to two of the proposed Ordinance's provisions: (1) the Ordinance's definition of "surveillance technology," which Whittington believed was vague and broad; and (2) the criminal misdemeanor provision. In April, the FGOC forwarded to the BOS its final draft of the proposed Ordinance and recommended that it be adopted. The FGOC made no substantive changes to the proposed Ordinance to address Whittington's concerns.

On May 6, the Association demanded to meet and confer over the proposed Ordinance and its effects. The Association's May 6 letter stated that the Ordinance "contemplates new and significant workplace restrictions and responsibilities," which

would increase workload and potentially expose Association members to harm. The letter also expressed concern regarding the criminal misdemeanor provision and the "vague and ambiguous" surveillance technology definition.

The County's Labor Relations Director, Sandra Poole, responded to the Association's letter that same day. The parties scheduled a meeting for May 17.

III. The Parties Meet on May 17

On May 17, Whittington and Association counsel Peter Hoffman met with Poole, County Labor Relations Representative Mitchell Buellesbach, and a third County Labor Relations Representative. The Association identified four concerns at the meeting: the Association believed (1) the definition of surveillance technology was vague and broad; (2) the reporting requirements would increase workload, which could impact employee productivity; (3) the reporting requirements would compromise employee safety by giving the public advance notice of, among other things, what surveillance technology is deployed, where it is deployed, and how it works; and (4) the criminal misdemeanor penalty criminalized workplace conduct and, when paired with the vague definition of surveillance technology, would create untenable working conditions.

The Association's chief concern was the misdemeanor provision. Whittington testified: "[A]s a peace officer, if I'm arrested by County Counsel for a misdemeanor crime, that could actually take away my job. I would be considered what's called a

Brady[7] officer. I'd have to disclose that to the feds[,] and it might jeopardize my ability to testify in the future."

Poole could not respond to these concerns during the meeting because she was not yet familiar with the proposed Ordinance. She did, however, state that she would investigate and respond to the Association's four concerns. The parties scheduled a second meeting for May 27.

Also on May 17, the County e-mailed notice of the proposed Ordinance to all employee organizations representing County employees, including the Association. That message informed the organizations that the first reading of the proposed Ordinance by the BOS would occur on May 24; the County attached a copy of the proposed Ordinance. A few days later, on May 20, the County informed the Association that the BOS would delay considering the proposed Ordinance until June so that the parties could continue to meet and confer.

On May 23, the County e-mailed a sample Annual Surveillance Report to the Association to address the Association's concerns regarding the proposed Ordinance's impact on workload and member safety. The County provided the two-page sample report to demonstrate that in its view the required "information is very general" and "does not identify specific individuals, activities or locations."

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[7] 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] and its progeny." (*Association for Los Angeles Deputy Sheriffs v. Superior Court* (2019) 8 Cal.5th 28, 36.)

On May 24, Whittington asked for the new date of the proposed Ordinance's first reading. Poole replied that the reading was "put off until June 7th, but that assumes that we complete meeting with the Labor Organizations by then."

IV. The Parties Meet on May 27

The same five individuals that met on May 17 met again on May 27. They continued discussing the Association's four concerns, as follows.

A. Surveillance Technology Definition and Misdemeanor Provision

The Association told the County that the broad definition of surveillance technology would lead to employees unknowingly violating the Ordinance or a Use Policy, thereby exposing themselves to criminal liability. The Association emphasized that a misdemeanor conviction would wreak havoc on a peace officer's career. For this reason, the Association wanted more specificity on how the definition would be applied.

Poole explained that the definition was broad because it had to encompass all County employees across all County departments. The County also offered the County Counsel's interpretation of the misdemeanor provision that only intentional misuse of surveillance technology would constitute a misdemeanor. County representatives did not, however, obtain the District Attorney's interpretation of the misdemeanor provision.

The Association proposed to amend the surveillance technology definition to identify exactly what technology the Ordinance would cover, and it proposed changes to the language of the misdemeanor provision. The County rejected these proposals, asserting that the terms of the proposed Ordinance were non-negotiable, and the

purpose of the meet and confer sessions was to negotiate effects of the proposed Ordinance. As Buellesbach testified: "We were not changing the Ordinance. We were going to talk about impacts." Poole suggested to the Association that it could bring its concerns about the language of the Ordinance to the BOS public meetings and speak during public comment.

The Association also asked why the proposed Ordinance contained a misdemeanor penalty, as, in its view, criminal sanctions were unprecedented as a potential consequence for an employee violation of workplace policy. Buellesbach testified that, in response, the County explained it was the "will of the [BOS]." The record does not reflect that the Association ever received a more specific answer to this question. The County never explained in the meeting why traditional forms of employee discipline were inadequate. The County asked the Association how it would react if the misdemeanor provision were removed. Hoffman replied that removal of that provision would make a "big difference."

B. Workload and Safety Issues

As to the concerns about workload and member safety, the parties discussed the sample Annual Surveillance Report which the County provided prior to the meeting. The Association informed the County that the sample did not resolve its concerns for at least two reasons. First, the Association believed that the sample conflicted with the proposed Ordinance's language and purpose because it lacked the level of detail required by the proposed Ordinance. Second, the sample was a draft that had not been reviewed by the BOS, so the Association believed it was unclear whether it reflected what an Annual Surveillance Report would, in practice, contain.

Buellesbach testified that the Association expressed concern that, "while the sample did what [the County] said it did," nonetheless it could be "expanded in the years to come and require the level of specificity that they were concerned about."

The Association proposed that the County incorporate the sample Annual Surveillance Report into the Ordinance itself. It is unclear from the record whether the County rejected this proposal during the meeting, but the County did not incorporate the sample into the proposed Ordinance or attach it to the proposed Ordinance.

The May 27 meeting concluded with Poole telling the Association that she would take its concerns to the BOS. We credit Hoffman's testimony that "Poole made it clear that she was going to be going back before the Board of Supervisors and that she was going to receive direction from them because of the unresolved issues with respect to the definition and the criminal penalty, and that we would hear back at a later time." Whittington similarly testified that Poole "wanted to speak with individuals in the County and the [BOS] to figure out how to address our issues. And that's how that meeting ended." We do not find reasonable Buellesbach's contrasting belief that the County had responded to the Association's concerns and that the parties "had no other outstanding business."

V. The BOS Adopts the Ordinance Without Further Bargaining

Following the May 27 meeting, Poole reported to the BOS the Association's concerns but did not inform the Association of any response. Neither party declared impasse. On June 7, the BOS conducted its first reading of the Ordinance. On June 21, the BOS adopted the proposed Ordinance without any substantive changes. The Ordinance became effective on July 21.

VI. The County Implements Use Policies

The record contains six Use Policies concerning surveillance technology used by the District Attorney's Office, dated between October 2018 and January 2019. Section 10, Oversight, of three of the six Use Policies contains the following provision: "Sanctions for violation of this Surveillance Use Policy or applicable laws may range from counselling to termination, and in more serious breaches, may result in criminal prosecution." The other three policies contain the same language but omit the phrase "or applicable laws."

The County concedes that it must provide the Association with notice and an opportunity to bargain over proposed Use Policies before the BOS considers them for approval. Although the record indicates that the parties bargained over some or all of the six Use Policies noted above, the record lacks critical facts. For instance, the record is incomplete as to whether the parties reached agreement on each Use Policy, or, alternatively, whether some other scenario(s) unfolded, such as one party abandoning negotiations or acting in bad faith, or the County imposing the policies after bargaining in good faith to impasse and exhausting any applicable post-impasse procedures.[8]

PROCEDURAL HISTORY

The Association filed its initial unfair practice charge against the County on July 28, and an amended charge on August 22. After the County responded, PERB's

[8] This case includes no alleged violation occurring during any negotiations over Use Policies. Moreover, the record reveals that, as of its close, no County employee had faced criminal prosecution pursuant to the misdemeanor provision.

Office of the General Counsel (OGC) issued a complaint alleging that on June 21, the County violated MMBA sections 3503, 3505, 3506, and 3506.5 and PERB Regulation 32603, when the BOS adopted the Ordinance "without having negotiated with [the Association] to agreement or through completion of negotiations concerning the decision to implement the change in policy and/or the effects of the change in policy." The County answered the complaint, denying the material allegations and raising several affirmative defenses.

On July 12, 2017, the parties attended an informal settlement conference, but the matter was not resolved. Shortly thereafter, based on the Association's unopposed request, PERB placed this case in abeyance pending litigation between the parties in *SCDAIA v. County of Santa Clara*, Santa Clara County Superior Court Case No. 19-CV-32719 (*SCDAIA v. County of Santa Clara*). In that litigation, the Association unsuccessfully challenged the constitutionality of the Ordinance. After the parties agreed to take this case out of abeyance, the ALJ held a formal hearing by videoconference on November 12 and 13, 2020. The parties filed closing briefs and the matter was submitted for proposed decision on February 2, 2021. On June 11, 2021, the ALJ issued the proposed decision.

DISCUSSION

The Board reviews exceptions to a proposed decision using a de novo standard of review. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 5.) However, to the extent that a proposed decision has adequately addressed issues raised by certain exceptions, the Board need not further analyze those exceptions. (*Ibid*.) The

Board also need not address alleged errors that would not impact the outcome of the case. (*Ibid*.)

On appeal, we are presented with many fewer questions than was the ALJ. As noted above, the County has not challenged any of the ALJ's findings or conclusions. The Association challenges the ALJ's conclusions that the County had no obligation to bargain over the criminal misdemeanor provision and the surveillance technology definition, as well as the ALJ's failure to void the Ordinance as part of the proposed remedy. Although we ultimately agree with the ALJ's conclusion that the County had no duty to engage in decision bargaining, we find that the County's obligation to meet and confer in good faith over reasonably foreseeable effects included the duty to bargain over consequences for Association-represented employees who violate the Ordinance.[9] We adjust the ALJ's remedy to incorporate this duty and to otherwise effectuate the MMBA's purposes.

I. <u>Decision Bargaining Allegation</u>

To establish a prima facie case that a respondent employer violated its decision bargaining obligation, a charging party union that exclusively represents a bargaining unit must prove: (1) the employer changed or deviated from the status quo; (2) the change or deviation concerned a matter within the scope of representation; (3) the change or deviation had a generalized effect or continuing impact on represented employees' terms or conditions of employment; and (4) the employer reached its

[9] To "meet and confer" has the same meaning as to bargain or to negotiate, and we use the terms interchangeably. (*Bellflower Unified School District* (2014) PERB Decision No. 2385, p. 4, fn. 4.)

decision without first providing adequate advance notice of the proposed change to the employees' union and bargaining in good faith over the decision, at the union's request, until the parties reached an agreement or a lawful impasse. (*Bellflower Unified School District* (2021) PERB Decision No. 2796, p. 9.)

Only the second element—whether the County's decision to adopt the Ordinance falls within the scope of representation—is at issue in this appeal. 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." (MMBA, § 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 the entire Ordinance falls under section 3504's fundamental management right exclusion because it required the careful balancing of two core public policy considerations, community safety and individual privacy. The County also argues that the Ordinance is "a fundamental, police-power-authorized, managerial policy because it set rules for deciding when and how County-owned surveillance technology may be used" for law enforcement functions.

The California Supreme Court has articulated a nuanced approach to applying section 3504. (*International Assn. of Fire Fighters, Local 188, AFL-CIO v. Public Employment Relations Bd.* (2011) 51 Cal.4th 259, 272-273 (*Richmond Firefighters*).) Under this framework, which PERB has adopted, "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*), citing *Richmond Firefighters*, *supra*, 51 Cal.4th at pp. 272-273, internal quotations omitted.)

Decisions in the third category of managerial decisions—the closest cases---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*, *supra*, PERB Decision No. 2594-M, p. 18.)

A. Definition of Surveillance Technology

We agree with the ALJ that the definition of surveillance technology falls within the third category of decisions in the *Richmond Firefighters* framework because it does not primarily concern the employment relationship but does impact that relationship—especially since County employees are by far the main persons who are at risk of violating the Ordinance. We also agree with the ALJ that the balancing test for decisions in this third category weighs in favor of the County's need for unencumbered decision-making. (*Orange*, *supra*, PERB Decision No. 2594-M, p. 18, quoting *Richmond Firefighters*, *supra*, 51 Cal.4th at p. 273.) We reach this conclusion, in part, because the surveillance technology definition is premised on two important government aims—protecting individual privacy and promoting public safety—which have little to do with employment. We see comparatively little benefit to requiring decision bargaining over the surveillance technology definition.

Relying on *County of Sonoma* (2021) PERB Decision No. 2772-M (*Sonoma*) (judicial appeal pending), the Association argues that the surveillance technology definition involves discipline and is therefore an employer decision "at the core of traditional labor relations," even where the competing governmental aims are substantial. (*Id*. at pp. 38-39, 42.) We disagree; although the surveillance technology definition could affect discipline, it is very different from the provisions we found to be subject to mandatory decision bargaining in *Sonoma*.

In *Sonoma*, *supra*, PERB Decision No. 2772-M, voters approved a ballot initiative, Measure P, after the Sonoma County Board of Supervisors placed it on the ballot. Measure P increased the authority of Sonoma 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, review confidential peace officer personnel files, and post body-worn camera video online. (*Id*. at p. 2.) The operative complaints alleged that the employer made unlawful unilateral changes by placing on the ballot 11 specific categories of Measure P amendments that directly affected employment, without first providing the exclusive representatives of certain law enforcement employees adequate advance notice and an opportunity to meet and confer.[10] (*Id*. at pp. 2, 27.) We determined that 10 of these amendments changed policy, and those focused on investigating employees and recommending discipline were within the scope of representation and therefore subject to decision bargaining. (*Id*. at pp. 39-40.)[11]

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[10] Measure P also contained numerous amendments that had at most an attenuated impact on employment terms. OGC did not issue a complaint as to any such amendments. (*Sonoma*, *supra*, PERB Decision No. 2772-M, p. 37.)

[11] While the County of Sonoma had "a substantial interest in increasing transparency and fostering community trust in policing and correctional services[,]" we found "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." (*Sonoma*, *supra*, PERB Decision No. 2772-M, p. 38.)

In contrast, *Sonoma* held that other Measure P amendments, such as those involving body-worn camera policies and those permitting IOLERO to interview witnesses or supervisors, were "not part and parcel of Measure P's attempt to create a parallel investigatory track." (*Sonoma*, *supra*, PERB Decision No. 2772-M, p. 44.) While we found Sonoma County's managerial interest outweighed the benefits of decision bargaining in those instances, we also determined that Sonoma County had a duty to provide notice and meet and confer over the potential negotiable effects of those policy changes. (*Ibid*.)

The surveillance technology definition at issue here is distinguishable from the parts of Measure P that *Sonoma* found subject to decision bargaining. The definition is not intended primarily to alter, add to, or reform an existing investigatory and disciplinary structure. Thus, while the amendments subject to decision bargaining in *Sonoma* lay at the core of traditional labor relations, the surveillance technology definition is not fundamentally about employment-related matters; rather, it is primarily aimed at privacy and community safety, while its employment impacts are clearly secondary.

As we explained this distinction in *Sonoma*, *supra*, PERB Decision No. 2772-M:

> "[O]n 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. (*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* [*Peace Officer's Assn. v. City of San Jose* (1978) 78 Cal.App.3d

> 935] 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].)"

(*Id*. at p. 38.) While some of the Measure P amendments at issue in *Sonoma* fell on the negotiable side of this continuum because they focused on investigating and disciplining employees, here the surveillance technology definition is more akin to use-of-force policies, implementing a racial profiling study, or requiring officers to wear body-worn cameras.

Other PERB precedent is in accord. For instance, in *San Bernardino Community College District* (2018) PERB Decision No. 2599 (*San Bernardino*), we considered whether a policy providing for the use of GPS tracking data by campus police was within the scope of representation. (*Id*. at pp. 8-12.) There we acknowledged that "a core function of the campus police is to protect District property and to keep students, staff and visitors safe." (*Id*. at p. 10, fn. 8.) In that case, however, we found the employer decided to install a GPS monitoring device on an employee's patrol vehicle primarily to monitor whether the employee was leaving his designated patrol area. (*Ibid*.) We contrasted that employment-related decision with one in which the employer's decision to install surveillance equipment is "not primarily about monitoring employees while they provide public services, and is instead installed, for instance, to deter members of the public from committing crimes, to apprehend such persons who do perpetrate crimes, to protect public property, or to keep staff and members of the public safe." (*Ibid*.) In those circumstances, decision bargaining is not required, but the employer must provide notice and an opportunity to

bargain over negotiable effects, including whether and how such surveillance might be used in relation to evaluating or disciplining employees. (*Ibid*.)

Applying these principles to the surveillance technology definition, we find that the benefits of bargaining do not outweigh management's need for freedom to protect the public's privacy and safety. This conclusion does not minimize the surveillance technology definition's potential consequences on employee discipline and other matters within the scope of representation. These employment-related impacts are subject to effects bargaining, as discussed *post*. (*Sonoma*, *supra*, PERB Decision No. 2772-M, p. 44; *San Bernardino*, *supra*, PERB Decision No. 2599, p. 10, fn. 8.)

B. Misdemeanor Provision

The misdemeanor provision presents a more difficult analysis. If the Ordinance had stated that the penalty for an employee's violation is summary termination, we would have no trouble finding that such a provision was subject to decision bargaining—either because it directly defines the employment relationship or, at least, because discipline lies at the core of traditional labor relations. (Cf. *Sonoma*, *supra*, PERB Decision No. 2772-M, p. 38, fn. 18 [changes related to discipline usually either directly define the employment relationship or are found negotiable under the balancing test that applies to *Richmond Firefighters*' third category of decisions].) The instant case therefore poses a quandary: if a measure specifying disciplinary penalties is subject to decision bargaining, does it make sense that a more severe criminal penalty for workplace misconduct or performance failures should be subject to effects bargaining but not decision bargaining? The most plausible argument in favor of such a seemingly incongruous result is the County's contention that the Ordinance applies

both to employees and to persons who are not County employees, making it a general criminal law rather than one focused on employees. We consider that contention.

The limited record before us makes it difficult to assess whether it is more than theoretical that the misdemeanor provision or any other part of the Ordinance might apply to persons (or entities) that are not County employees. But the same parties actively litigated this issue in *SCDAIA v. County of Santa Clara*, the superior court found that the misdemeanor provision does apply to non-employees, and the Association took no appeal from that decision.

Accepting the superior court's conclusion at face value and recognizing that the record before us is insufficient to assess the extent to which the Ordinance is likely or unlikely to apply to non-employees, several conclusions follow. First, we find that the misdemeanor provision falls within *Richmond Firefighters*' third category of decisions. In applying the balancing test for decisions in that category, management's interest is not quite as strong as it was for the surveillance technology definition. While management still has a strong interest in protecting privacy, the misdemeanor provision is not as critical to protecting privacy as is the surveillance technology definition. Indeed, the record reflects that other San Francisco Bay Area jurisdictions passed similar surveillance technology ordinances without such a criminal sanction.[12]

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[12] The record shows that the cities of Berkeley and Oakland enacted similar ordinances without criminal penalties for violations by city employees. (Oakland, Ord. No. 13489, § 2, 5-15-2018, 9.64.050(1)(D) ["Violations of this Article by a city employee shall result in consequences that may include retraining, suspension, or termination, subject to due process requirements and in accordance with any memorandums of understanding with employee bargaining units"]; Berkeley Municipal Code, Chapter 2.99.090 [Enforcement].)

Furthermore, the benefits of decision bargaining are stronger with respect to the misdemeanor provision, since it falls on a continuum of enforcement mechanisms ranging from counseling to discipline to criminal liability, and such issues are particularly amenable to collective bargaining. (*Sonoma*, *supra*, PERB Decision No. 2772-M, pp. 38-39.)

Nonetheless, because the Association failed to develop an adequate record regarding the extent to which non-employees are likely to be subject to the misdemeanor provision, in this unique circumstance we find it more practical to deal with the misdemeanor provision's application to employees as a bargainable impact of a provision that could apply to individuals who are not employees, or to certain private companies or nonprofits. In adopting this approach, we also consider a second gap in the record: both parties curiously avoided introducing evidence as to post-adoption negotiations over specific Use Policies. Faced with an incomplete record on several critical points, in a case that is already more than five years old, we decline to remand for further proceedings on liability. Instead, the MMBA's purposes are best effectuated by: (1) not ordering bargaining over the decision to enact a misdemeanor provision that apparently may apply to the public generally; and (2) instead enforcing the County's effects bargaining obligation, i.e., a duty to bargain over employee impacts, including all possible consequences for employees found to have violated the Ordinance.

II. Effects Bargaining Allegation

Even when an employer has no obligation to bargain over a particular decision, it nonetheless must provide notice and an opportunity to meet and confer over any

reasonably foreseeable effects the decision may have on matters within the scope of representation. (*County of Santa Clara* (2019) PERB Decision No. 2680-M, pp. 11-12.) The employer violates its duty to bargain if it fails to provide adequate advance notice, and in such circumstances the union need not demand to bargain effects as a prerequisite to filing an unfair practice charge. (*County of Santa Clara* (2013) PERB Decision No. 2321-M, pp. 30-32 (*Santa Clara*).) However, where an employer does provide adequate notice, the union must request to bargain any reasonably foreseeable effects on negotiable matters. (*Id*. at p. 30.) The union's request to bargain need not be formalistic or burdensome, nor anticipate every imaginable effect a proposed change may have, but rather must only identify negotiable areas of impact, thereby placing the employer on notice that it believes the employer's proposed decision would affect one or more negotiable topics. (*County of Sacramento* (2013) PERB Decision No. 2315-M, p. 9*; Rio Hondo Community College District* (2013) PERB Decision No. 2313, p. 13.)

An employer normally may not implement the decision while effects bargaining continues and instead must wait until the parties have reached agreement or impasse over the negotiable effects of the decision. (*Santa Clara*, *supra*, PERB Decision No. 2321-M, p. 25.) There is an exception, however, if the employer can establish each of three elements: (1) the implementation date was 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) the employer gave sufficient advance notice of the decision and implementation date to allow for meaningful negotiations prior to implementation; and

(3) the employer negotiated in good faith prior to and after implementation. (*Compton*, *supra*, PERB Decision No. 720, pp. 14-15.)

The County filed no exceptions related to the following factual findings and thus it is undisputed that: (1) the County did not notify the Association of the proposed Ordinance; Whittington learned of the proposed Ordinance by reviewing the FGOC's agenda; (2) after the Association demanded to bargain the decision and effects, the County gave notice on May 17 that the BOS's first reading of the Ordinance would occur on May 24; (3) the County withdrew that notice on May 20 and indicated that the first reading would be delayed until June; (4) the Association then asked Poole when the first reading would occur, and she replied that it was "put off until June 7th, but that assumes that we complete meeting with the Labor Organizations by then"; and (5) the County did not notify the Association that it considered negotiations to be complete nor that the BOS would therefore proceed with the first reading and subsequent consideration.[13]

The Association put the County on notice that the Association wished to bargain over not just workload and safety but also consequences to employees found to have violated the Ordinance. Starting with its May 6 letter to the County, the Association demanded to meet and confer over both the decision to adopt the Ordinance and its negotiable effects. In the Association's demand to meet and confer and the May 17 and 27 meetings, the Association made clear that its primary concern

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[13] The County's failure to provide adequate notice also prevents it from meeting the second element of the above-noted *Compton* test. The record also does not establish the first or third elements. In any event, the County's failure to file exceptions waived its affirmative defenses, including any *Compton* defense.

was the potential consequences for Ordinance violations. The Association made several proposals to address these concerns. We therefore reject any contention that the County had no duty to bargain over impacts on employees found to have violated the Ordinance. The fact that the Association claimed it had a right to bargain over the decision to adopt the misdemeanor provision—a claim we narrowly rejected above based on the unique circumstances of this case—is of no consequence to the Association's effects bargaining claim given that it adequately put the County on notice that it wished to discuss consequences for violating the Ordinance.

While an employer need not negotiate over a decision that is outside the scope of representation, it nonetheless must meet and confer over alternatives to the decision as part of effects bargaining. (*Sonoma*, *supra*, PERB Decision No. 2772-M, p. 54; *Anaheim Union High School District* (2016) PERB Decision No. 2504, pp. 10-11, 15 & adopting proposed decision at p. 41; *City of Sacramento* (2013) PERB Decision No. 2351-M, p. 22.) Thus, one purpose of effects bargaining is to permit the exclusive representative an opportunity to persuade the employer to consider alternatives that may diminish the impact of the decision on employees. (*Sonoma*, *supra*, PERB Decision No. 2772-M, p. 55; *San Mateo City School District* (1984) PERB Decision No. 383, p. 18.) Yet, the County refused to respond to the Association's proposed alternatives, such as exempting Association members from the criminal provision, or explaining why traditional disciplinary measures were not adequate to address Ordinance violations.

For these reasons, the County failed to bargain in good faith over consequences for Ordinance violations.

III. 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.) While our order comports with traditional PERB remedies, two aspects nonetheless warrant explanation.

First, when an employer's violation involves a failure to bargain effects, make-whole relief runs from the date any impacted employee began to experience harm until the earliest of: (1) the date the parties reach an agreement as part of complying with our effects bargaining order; (2) the date the parties have reached impasse and exhausted any post-impasse procedures that may be required or agreed upon; or (3) failure by the union to bargain in good faith. (*County of Ventura* (2021) PERB Decision No. 2758-M, p. 53; *County of Santa Clara*, *supra*, PERB Decision No. 2680-M, p. 14; *Bellflower Unified School District*, *supra*, PERB Decision No. 2385, pp. 13-14.)[14]

While acknowledging the availability of this limited make-whole remedy, the ALJ declined to order it, finding no evidence of actual impacts on employee safety or any evidence that "increased workload led to any negative employment actions, losses in

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[14] Our make-whole order covers only employees, not the Association. We express no opinion as to whether the MMBA may have properly entitled the Association to a make-whole remedy for bargaining expenses it would not otherwise have incurred but for the County's unlawful conduct, or litigation expenses in its separate litigation. (*Sacramento City Unified School District* (2020) PERB Decision No. 2749, pp. 12-14; *City of Palo Alto* (2019) PERB Decision No. 2664-M, p. 8, fn. 6.) The Association never sought the former type of make-whole order. While the Association did seek the latter type of make-whole relief, the Association failed to except from the proposed decision's denial of such relief.

wages or benefits, or any other harm." However, a finding that a respondent committed an unfair practice normally results in the opportunity for the charging party to establish, most often in compliance proceedings, that the respondent's conduct resulted in harm. (*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.) It is particularly appropriate to give the Association an opportunity to establish harm in compliance proceedings given our additional finding that the County violated its duty to meet and confer over the effects of Ordinance violations. While there were no instances of discipline or criminal liability as of the date the record closed, evidence in compliance proceedings may include harms manifesting at any time.

Second, the Association asks us to declare the Ordinance void in part. In *Sonoma*, *supra*, PERB Decision No. 2772-M, it was necessary to phrase our order in that manner to allow good faith negotiations to proceed. (*Id*. at p. 62.) Because the employer's unfair practice in *Sonoma* was placing a measure on the ballot without bargaining, and voters subsequently approved the measure, we had little choice but to declare the unlawfully adopted amendments void and unenforceable as to bargaining unit employees, thereby allowing the parties to consider alternatives to the initiative during negotiations and to effectuate new terms through any lawful means. Absent such an order, the parties would have had to bargain while constrained by a measure severely limiting their ability to agree upon or otherwise implement new terms. Our *Sonoma* order was therefore the minimum necessary to level the playing field and allow fair, good faith bargaining, including the potential for new terms to be achieved

through any lawful means. Here, the parties are unconstrained by any voter initiative. Accordingly, our order is worded differently than in *Sonoma* but nonetheless both restores the status quo and prospectively prevents application of the Ordinance during negotiations, as necessary to allow fair, good faith effects negotiations.[15]

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the County of Santa Clara violated the Meyers-Milias-Brown Act, Government Code sections 3503, 3505, 3506, and 3506.5, subdivisions (a), (b), and (c), and Public Employment Relations Board (PERB or Board) Regulation 32603, subdivisions (a), (b), and (c). The County did so when it adopted the Surveillance-Technology and Community-Safety Ordinance without providing the Santa Clara County District Attorney Investigators Association adequate notice and an opportunity to bargain over reasonably foreseeable impacts on terms and conditions of employment.

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

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[15] The parties may argue to the compliance officer as to the import (if any) of negotiations they may have undertaken during any timeframe before this decision becomes final. (Compare *County of Merced* (2020) PERB Decision No. 2740-M, pp. 21-22 [employer could not rely on negotiations undertaken before PERB decision became final, as such negotiations did not lead to agreement and occurred before employer fully remedied its unfair practice] with *Region 2 Court Interpreter Employment Committee & California Superior Courts of Region 2* (2020) PERB Decision No. 2701-I, p. 58 [where parties undertook negotiations in context of unremedied unfair practice but reached a superseding agreement, PERB deferred to agreement by discontinuing backpay remedy as of its effective date].)

A. CEASE AND DESIST FROM:

1. Enforcing or otherwise applying the Ordinance against Association-represented employees, until the earliest of: (1) the date the parties have ceased negotiating because they have reached agreement as part of complying with Section B of this Order; (2) the date the parties have reached impasse and exhausted any post-impasse procedures that may be required or agreed upon as part of complying with Section B of this Order; or (3) failure by the Association to request bargaining or to bargain in good faith as part of complying with Section B of this Order.

2. Denying bargaining unit employees the right to be represented by the Association.

3. Denying the Association the right to represent bargaining unit employees.

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

1. Upon request, meet and confer in good faith with the Association over the Ordinance's impacts on Association-represented employees' safety, workload, and the consequences for any violation of the Ordinance.

2. Make Association-represented employees whole for any losses resulting from the County's application of the Ordinance. 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 because of the County's application of the Ordinance.

4. The County's obligation to take the aforementioned affirmative actions shall continue until the earliest of the three circumstances noted in Section A(1) above.

5. 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 Association 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 Association. 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.[16]

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[16] In light of the ongoing COVID-19 pandemic, the County shall notify PERB's Office of the General Counsel (OGC) in writing if, due to an extraordinary circumstance such as an emergency declaration or shelter-in-place order, a majority of employees at one or more work locations are not physically reporting to their work location as of the time the physical posting would otherwise commence. If the County so notifies OGC, or if the Association requests in writing that OGC alter or extend the posting period, require additional notice methods, or otherwise adjust the manner in which employees receive notice, OGC shall investigate and solicit input from all parties. OGC shall provide amended instructions to the extent appropriate to ensure adequate publication of the Notice, such as directing the County to commence posting within 10 workdays after a majority of employees have resumed physically reporting on a regular basis; directing the County to mail the Notice to all employees who are not regularly reporting to any work location due to the extraordinary circumstance, including those who are on a short term or indefinite furlough, are on layoff subject to

6. 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 a designee. All reports regarding compliance with this Order shall be served concurrently on the Association.

Members Shiners and Paulson joined in this Decision.

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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-1403-M, *Santa Clara County District Attorney Investigators Association v. County of Santa Clara*, in which all parties had the right to participate, it has been found that the County of Santa Clara violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq., and PERB Regulations. The County did so when it adopted the Surveillance-Technology and Community-Safety Ordinance without providing the Santa Clara County District Attorney Investigators Association adequate notice and an opportunity to bargain over reasonably foreseeable impacts on terms and conditions of employment.

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 Ordinance against Association-represented employees, until the earliest of: (1) the date the parties have ceased negotiating because they have reached agreement as part of complying with Section B of this Order; (2) the date the parties have reached impasse and exhausted any post-impasse procedures that may be required or agreed upon as part of complying with Section B of this Order; or (3) failure by the Association to request bargaining or to bargain in good faith as part of complying with Section B of this Order.

2. Denying bargaining unit employees the right to be represented by the Association.

3. Denying the Association the right to represent bargaining unit employees.

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

1. Upon request, meet and confer in good faith with the Association over the Ordinance's impacts on Association-represented employees' safety, workload, and the consequences for any violation of the Ordinance.

2. Make Association-represented employees whole for any losses resulting from our application of the Ordinance. 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 because of our application of the Ordinance.

4. Our obligation to take these affirmative actions shall continue until the earliest of the three circumstances noted in Section A(1) above.

Dated: ______________________ COUNTY OF SANTA CLARA

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.