STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA FEDERATION OF INTERPRETERS, LOCAL 39000 THE NEWSPAPER GUILD-COMMUNICATION WORKERS OF AMERICA, Charging Party, v. ORANGE COUNTY SUPERIOR COURT & REGION 4 COURT INTERPRETER EMPLOYMENT RELATIONS COMMITTEE, Respondents.	Case No. LA-CE-37-I PERB Decision No. 2818-I May 5, 2022

Appearances: Weinberg, Roger & Rosenfeld by Anne I. Yen, Attorney, for California Federation of Interpreters, Local 39000 The Newspaper Guild-Communication Workers of America; Aleshire & Wynder by Joseph E. Wiley and Monna Radulovich, Attorneys, for Orange County Superior Court and Region 4 Court Interpreter Employment Relations Committee.

Before Banks, Chair; Shiners and Paulson, Members.

DECISION

PAULSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by California Federation of Interpreters, Local 39000 The Newspaper Guild-Communication Workers of America (CFI) to the proposed decision of an administrative law judge (ALJ). The complaint alleged that the Orange County Superior Court and/or the Region 4 Court Interpreter Employment Relations Committee (Region 4) violated the Trial Court Interpreter Employment and

Labor Relations Act (Court Interpreter Act)[1] by disciplining bargaining unit members based on the accuracy of their interpretation, without affording CFI an opportunity to meet and confer over the decision to implement the new discipline criterion or procedure and/or the effects of that decision. The ALJ dismissed the unfair practice charge and complaint, finding CFI failed to demonstrate a change in policy based on the narrow facts of the case, which included that the reprimand was based on conduct the bargaining unit employee admitted to in an investigatory interview.

Having reviewed the entire record and the parties' submissions in light of relevant legal authority, we hereby affirm the proposed decision based on the following findings and discussion.

FACTUAL AND PROCEDURAL BACKGROUND

CFI is an exclusive representative within the meaning of PERB Regulation 32035, subdivision (c). The Court is a trial court within the meaning of Government Code section 71801, subdivision (k), and PERB Regulation 32035, subdivision (b). Region 4 is a regional court interpreter employment relations committee within the meaning of Government Code sections 71801, subdivision (h), and 71807; a regional committee within the meaning of PERB Regulation 32035, subdivision (a); and an employer within the meaning of PERB Regulation 32035, subdivision (e). The Court is part of Region 4, which also includes trial courts in several other counties in Southern

[1] The Court Interpreter Act is codified at Government Code section 71800 et seq. Unless otherwise specified, all statutory references herein are to the Government Code. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

California.[2] The parties are therefore within the jurisdiction of PERB.

California courts provide the services of interpreters for litigants who are not proficient in English. At the time of the hearing in this matter, the Court employed 75 full-time interpreters. Pamela Santos is a certified Spanish language interpreter who has been employed by the Court since 1989, and served as a shop steward for CFI from 2011-2019. Michael Ferreira is a certified Spanish language interpreter who has been working in California courts since 1988 and is also the current CFI president. Ferreira participated in the most recent successor contract negotiations in Region 4 that occurred in 2018-2019.

Santos and Ferreira explained the process that interpreters undergo to become either registered or certified interpreters. High-frequency languages require certification, while more uncommonly used languages require that an interpreter be registered. The Judicial Council of California is responsible for testing interpreters to become certified or registered. The process to become certified requires more testing than the process to become registered.

Language Access Services manager Ana Parrack is responsible for receiving and investigating formal and informal complaints regarding the Court's Language Access Services. Parrack has been in her role for the last five years and was previously a Court Reporter and Interpretive Services supervisor.

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[2] Though the underlying unfair practice charge names Region 4 as a respondent, CFI does not contend that Region 4 itself made any unilateral change, instead including Region 4 because it would be a necessary party for a complete remedial order. Our discussion regarding liability accordingly focuses solely on the Court.

Relevant MOU and Policy Provisions

The parties' memorandum of understanding (MOU), dated July 31, 2014 – June 30, 2018, was expired during the period that is relevant to this case, but the parties stipulated that the terms of the MOU remained in effect. MOU Article 6, "Discipline Policy," includes, in relevant part:

> "[F]or employees in this bargaining unit, discipline up to and including termination shall be for cause and in accordance with the provisions of this policy. For cause is a fair and honest cause or reason, regulated by good faith."

Article 6 also includes an appeal process for some disciplinary actions, and indicates that preliminary discipline, including written reprimand, shall not be subject to appeal. The MOU does not describe specific grounds or causes for discipline, either in Article 6 or any other provision.

MOU Article 20, "Professional Status and Best Practice," states:

> "Court interpreters will perform their duties in accordance with the Judicial Council's Rules for Professional Conduct for interpreters. (Currently Rule 984.4[.]) An interpreter may not be disciplined for informing the Judicial Officer, in an appropriate manner, of conditions that impede his or her ability to perform complete and accurate interpretation or sight translation."

The parties stipulate that although Article 20 refers to "Rule 984.4," that rule was later replaced by California Rule of Court 2.890 (Rule 2.890), which was in effect during the relevant time period and is now the rule governing standards of conduct for interpreters.

Rule 2.890(b), titled "Complete and accurate interpretation" states:

> "An interpreter must use his or her best skills and judgment to interpret accurately without embellishing, omitting, or

> editing. When interpreting for a party, the interpreter must interpret everything that is said during the entire proceedings. When interpreting for a witness, the interpreter must interpret everything that is said during the witness's testimony."

Rule 2.890(h) "Assessing and reporting impediments to performance" states:[3]

> "An interpreter must assess at all times his or her ability to perform interpreting services. If an interpreter has any reservation about his or her ability to satisfy an assignment competently, the interpreter must immediately disclose that reservation to the court or other appropriate authority."

The parties also rely on the Professional Standards and Ethics for California Court Interpreters (the 'manual'), published by the Judicial Council. Santos confirmed that the manual contains the statewide standards that court interpreters follow. The purpose of the manual is "to inform interpreters of their professional and ethical responsibilities so that they are better able to deal with the difficulties that commonly arise in matters involving non-English-speaking parties in the judicial system." The manual includes guidance regarding "Complete and Accurate Interpretation" within the meaning of Rule 2.890(b).

CFI also cites to California Rule of Court 2.891 (Rule 2.891), titled "Request for court interpreter credential review." Rule 2.891 provides, in relevant part, that the Judicial Council, "as the credentialing body, has authority to review a credentialed interpreter's performance, skills, and adherence to the professional conduct

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[3] In addition, Rule 2.890 includes subdivisions addressing "Representation of qualifications," "Impartiality and avoidance of conflicts of interest," "Confidentiality of privileged communications," "Giving legal advice," "Impartial professional relationships," "Continuing education and duty to the profession," and "Duty to report ethical violations." (Cal. Rules of Court, rule 2.890(a), (c), (d), (e), (f), (g), (h), & (i).)

requirements of [R]ule 2.890, and to impose discipline on interpreters." Rule 2.891(b) further states:

> "Under the California Court Interpreter Credential Review Procedures, all court interpreters certified or registered by the council may be subject to a credential review process after a request for a credential review alleging professional misconduct or malfeasance. Nothing in this rule prevents an individual California court from conducting its own review of, and disciplinary process for, interpreter employees under the court's collective bargaining agreements, personnel policies, rules, and procedures, or, for interpreter contractors, under the court's contracting and general administrative policies and procedures." (Italics omitted.)

Complaint, Investigation, and Reprimand

The Judicial Council has a complaint procedure for litigants with complaints regarding the courts' Language Access Services. The complaint form includes a category titled "I am not satisfied with the services of the **interpreter**," where the complainant is asked to provide the name and badge number of the interpreter, date of service, location, case number and describe why the service was not satisfactory. (Emphasis in original.) Parrack testified that she has investigated four such complaints.

On or about January 16, 2019,[4] a litigant's attorney (hereafter, "Complainant") filed a complaint about interpreter Janet Suh's interpretation during a family law hearing on January 14. Complainant's description included that the interpreter "was unable to translate the questions as asked and failing [sic] to translate the witness's

[4] All further dates are in 2019, unless otherwise noted.

testimony . . . I had to address this problem over 5 times to the judge (that the questions/answers were not being translated accurately) during the [January 14] hearing, at the end of which, Ms. Suh said she had to recuse herself."

On April 17, Parrack and Human Resources analyst Chris Coombes convened an investigatory meeting to discuss this complaint with Suh. Santos attended the investigatory meeting as Suh's union representative. At the time Suh was a certified Korean language interpreter and a long-time employee of the Court.[5]

During the investigatory meeting, Parrack and Coombes reviewed and discussed portions of the transcript of the January 14 hearing with Suh and Santos. The transcript revealed that Complainant made several objections during her client's testimony regarding the accuracy of Suh's interpretations. The judge, at one point, asked Suh whether she agreed with Complainant's assertion about the correct interpretation of Complainant's client's testimony, and Suh then asked the court reporter to read back the question. After another objection over inaccuracy of interpretation, the judge asked Suh whether she wanted to correct her interpretation, to which Suh replied, "May I request the reporter? I think whatever she said." The testimony then resumed for several minutes before Complainant again notified the judge of her belief that the interpretation of her client's testimony was inaccurate. Complainant stated that the questions being asked of the witness and the witness's answers were not being interpreted correctly. At that point, Suh requested to be recused from her interpreting duties and the judge granted that request.

[5] Suh retired from the Court in 2021 and did not testify at the hearing.

During the investigatory meeting, Parrack explained the nature of the complaint, showed Suh a copy of highlighted excerpts of the transcript of the January 14 hearing, and proceeded to ask her a series of questions related to the complaint itself. Among her responses during the investigatory meeting, Suh stated that she lost focus about one hour into the January 14 hearing because she was experiencing severe back pain, which caused her to make some interpretation mistakes.[6]

On May 7, Parrack issued Suh a written reprimand describing the complaint and Parrack's subsequent investigation. The reprimand concluded that Suh's behavior during the January 14 hearing violated Rule 2.890(b), the Professional Standards and Ethics for California Court Interpreters, and Tenet Nine of the Code of Ethics for the

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[6] CFI excepted to this finding by the ALJ. We concur with the ALJ's finding that Suh admitted during the investigatory interview that she made mistakes at the January 14 hearing, and that these mistakes included incorrect or incomplete interpretation. While Santos' testimony was not entirely consistent with Parrack and Coombes on the extent to which Suh admitted to inaccurate interpretation during the investigatory meeting, Santos' notes from the investigatory meeting state that when asked if her interpreting on January 14 was up to the standards of Rule 2.890(b), Suh stated "There were unusual circumstances, I lost focus." On cross-examination, Santos further confirmed Suh admitted to mistakes:

> "Q And do you recall that Ms. Suh indicated that she had done all right initially, but after about an hour into the hearing, her back began to hurt her and she was in quite a lot of pain due to her back, and that that caused her to lose focus, and thus, she made some mistakes?
>
> "A Yes, I remember her saying that.
>
> "Q And she actually said that more than once. She said that two or three times when questioned, correct?
>
> "A Yes."

Court Employees of California.[7]

Also during the first half of 2019, another complaint about an interpreter's services resulted in the Court taking disciplinary action, but the details of that complaint and investigation are not part of the record. Nor does the record include the specifics of two other complaints investigated by Parrack which did not result in discipline. Before 2019, Parrack had never been involved in disciplinary action against an interpreter for alleged inaccuracy. Parrack testified that CFI was not involved in the three other investigations. Santos, in her role as a steward, was not aware of any prior disciplinary actions for interpreter accuracy. In her role as an employee, the Court has not tested or evaluated Santos for whether she provides accurate interpretation. She also has not seen any process at the Court for determining whether an interpreter is providing accurate interpretation. Ferreira similarly testified that he was not aware of any discipline for interpreter inaccuracy in his region, and gave examples of discipline issued by courts for insubordination, refusing to do unit work, misusing leave time, and failing to "follow[] the different tenets that the Court has, for example, for honesty and things of that nature."

CFI's Unfair Practice Charge

On September 16, CFI filed an unfair practice charge alleging the Court and Region 4 unilaterally changed policy in violation of section 71825, subdivision (c), of the Court Interpreter Act. The Court subsequently filed position statements in response. On October 14, 2020, PERB's Office of the General Counsel issued a

[7] The record does not contain Tenet Nine of the Code of Ethics.

complaint alleging that: (1) before May 7, 2019, the Court had a policy of not evaluating interpreter employees on the accuracy of their interpretative work; (2) after May 7, 2019, the Court changed this policy by "deciding to discipline bargaining unit member(s) based on the accuracy of their interpretations" and by "issuing bargaining unit member Janet Suh a written reprimand based on an alleged inaccuracy with an interpretation"; (3) this conduct occurred without prior notice to CFI in violation of the Court's duty to bargain in good faith with CFI; and (4) the same conduct also interfered with employee and employee organization rights in violation of the Court Interpreter Act.

On November 2, 2020, the Court filed its answer to the complaint denying all material allegations. When the matter did not resolve at an informal settlement conference, PERB conducted a videoconference formal hearing on April 6, 2021. On June 11, 2021, the parties filed closing briefs and the matter was submitted for proposed decision.

The ALJ issued the proposed decision on October 29, 2021, dismissing the complaint and underlying unfair practice charge because CFI failed to demonstrate that the Court and/or Region 4 changed policy when it issued the reprimand to Suh. CFI filed timely exceptions, challenging some of the ALJ's factual findings as well as the proposed decision's legal conclusion, and asserting that it had established an unlawful unilateral change. Respondents filed a timely response, urging the Board to affirm the proposed decision.

DISCUSSION

The Board resolves 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*.)

To establish a prima facie case that a respondent employer made an unlawful unilateral change, 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 decision without first providing adequate advance notice of the proposed change to the 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.)

Regarding the first element, there are three primary means of establishing that an employer changed or deviated from the status quo: (1) a deviation from a written agreement or written policy; (2) a change in established past practice; or (3) a newly created policy or application or enforcement of existing policy in a new way. (*Bellflower Unified School District*, *supra*, PERB Decision No. 2796, p. 10.)[8]

[8] As addressed in further detail *post*, 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.

CFI's exceptions, and the fundamental dispute between the parties, center on the first element of the prima facie case: whether the Court changed the status quo when it issued the reprimand to Suh. The proposed decision turned in part on the ALJ's finding that Suh admitted during the investigatory meeting that she had failed to recuse herself and made mistakes in her interpretation during the January 14 hearing. We agree that the facts in the record fail to establish that the Court altered the status quo when it issued the reprimand, though we expand upon the ALJ's analysis based on the parties' filings and our de novo review.

CFI premises its exceptions on its argument that in issuing Suh the reprimand, the Court either added new criteria for discipline or established a new procedure for evaluating interpreter accuracy. Disciplinary criteria and procedures, and procedures for evaluating employee performance, are within the scope of representation and subject to notice and meet-and-confer requirements. (See, e.g., *Los Angeles Unified School District* (2017) PERB Decision No. 2518, pp. 15-20; *Walnut Valley Unified School District* (1983) PERB Decision No. 289, p. 9.) While we find that the MOU, the parties' past practice, and existing policies do not foreclose discipline based on inaccurate interpretation, we note that neither these documents nor the hearing testimony demonstrate that the parties have established criteria or procedures the Court uses to evaluate accuracy. Moreover, as found by the ALJ, the particular facts in the record do not demonstrate that by issuing Suh the reprimand the Court has adopted a new disciplinary criterion or procedure. The Court received a complaint about Suh's performance, it interviewed Suh regarding the complaint, and based on Suh's responses to the investigation, including her admission that she made mistakes,

it issued her a written reprimand.

CFI's exceptions compare the circumstances here to *Los Angeles Unified School District*, *supra*, PERB Decision No. 2518. There, the Board found that the employer made a unilateral change in violation of the duty to bargain by instituting a new rating system for measuring teachers' performance and giving them feedback. (*Id*. at p. 46.) In the instant record there is no evidence that the Court adopted a rating system or other means of measuring interpreters' performance. We affirm the ALJ's conclusion that Parrack did not have to make an unqualified determination regarding the accuracy of Suh's interpretation, because her investigation corroborated the complaint when Suh admitted that she experienced physical pain during the January 14 hearing that caused her to lose focus and make mistakes.[9] The record evidence does not support CFI's claims that the limited facts surrounding Suh's reprimand constitute new Court criteria on interpreter accuracy and discipline.[10] The record also fails to illuminate the circumstances of the contemporaneous discipline of another interpreter based on a complaint about their interpretation, or of the other two complaint investigations where no discipline resulted, sufficient to support finding that the Court

[9] We do not find the parties' arguments aimed at the truth of the allegations contained in Suh's reprimand particularly illuminating in these circumstances. For example, while we do not discount that advocates at hearing may have tactical reasons to object to an interpreter's performance, such circumstances would not overcome Suh's admissions at the investigatory interview. Further, we note the parties' MOU specifically exempts written reprimands from the internal appeal process.

[10] That the interpreter evaluations in the record do not include a category for interpreter accuracy is likewise of limited value in this context, as the investigation into Suh and resulting reprimand do not involve a performance evaluation.

had established criteria or a rating system for accuracy. Without new disciplinary criteria or evaluation procedures, we turn to whether Suh's reprimand otherwise demonstrates a change in Court policy.[11]

CFI's exceptions make three main arguments in support of finding the Court changed its policy: (1) that the relevant MOU provisions do not include an agreement that the Court may assess inaccuracy of interpretation as a basis for discipline; (2) that the ALJ did not properly assess the evidence of past practice; and (3) that Rule 2.890 provides authority to the Judicial Council to issue discipline, not the Court. We consider each argument in turn.

Deviation from MOU

Resolving whether Suh's reprimand evidenced a change in policy by deviating from the parties' MOU requires us to interpret that MOU. Although PERB does not resolve contract disputes, PERB may interpret contractual provisions as necessary to resolve unfair practice allegations. (*County of San Joaquin* (2021) PERB Decision No. 2775-M, pp. 39-40; *Modoc County Office of Education* (2019) PERB Decision No. 2684, p. 15.) In *Lodi Unified School District* (2020) PERB Decision No. 2723 (*Lodi*), we held that the traditional rules of contract law guide interpretation of a collective bargaining agreement between a public employer and a recognized employee organization. (*Id*. at p. 12.) "A contract must be so interpreted as to give

[11] CFI's unfair practice charge, and the resulting complaint, do not allege that the Court deviated from the status quo by using the complaint form or investigating the complaint. CFI's exceptions express some issue with the use of the complaint form, but it failed to raise or brief whether this meets the requirements of the unalleged violation doctrine. We have discretion to consider the unalleged violation doctrine sua sponte, but we decline to do so in these circumstances.

effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (*Ibid*.) "[T]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (*Ibid*.) Thus, the Board in *Lodi* held that we "must avoid interpreting contract language in a way which leaves a provision without effect." (*Ibid*., citing *State of California (Department of Corrections)* (1999) PERB Decision No. 1317-S, p. 9.) Additionally, we have held that "[w]here contractual language is clear and unambiguous, it is unnecessary to go beyond the plain language of the contract itself to ascertain its meaning." (*Lodi*, *supra*, PERB Decision No. 2723, p. 12, citing Civ. Code, § 1638; *Marysville Joint Unified School District* (1983) PERB Decision No. 314, p. 9.)

CFI argues that Article 6's general provision, which requires that disciplinary action must be for fair and honest cause in good faith, does not reflect any mutual agreement to include alleged inaccuracy of interpretation as a criterion for discipline. CFI argues that a broad provision allowing discipline for cause cannot signify an agreement that an employer can adopt any new criteria for discipline without prior notice and opportunity to bargain.

We consider Article 6 in concert with the other relevant provisions of the MOU, because we interpret the provisions of an agreement together, "so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.) Article 6 itself requires that discipline be "for cause," which that provision defines as "a fair and honest cause or reason regulated by good faith." The plain language indicates that the parties agreed to use broad language which can

cover an array of disciplinary subjects rather than a detailed list of more specific causes of discipline.

Article 20 requires Court interpreters to "perform their duties in accordance with the Judicial Council's Rules for Professional Conduct for interpreters." Article 20 incorporates the Judicial Council's Rules for Professional Conduct, and the parties stipulate that in current practice, that includes Rule 2.890. Rule 2.890(b), titled "Complete and accurate translation," states that interpreters should use their best "skills and judgment" to interpret "accurately without embellishing, omitting, or editing[,]" and that when interpreting a witness's testimony, the interpreter "must interpret everything that is said during the witness's testimony." (Cal. Rules of Court, rule 2.890(b).) The subheadings of Rule 2.890 also include a variety of other conduct and performance related factors such as "Impartiality and avoidance of conflicts of interest," "Confidentiality of privileged communications," "Assessing and reporting impediments to performance," and "Duty to report ethical violations." (Cal. Rules of Court, rule 2.890(c), (d), (h), & (i).) Article 20 specifically notes that interpreters are bound by Rule 2.890, and the parties' MOU therefore requires interpreters to follow this specific set of rules that explicitly include complete and accurate translation. Article 20 also notes a facet of Rule 2.890 which shall not result in discipline: "An interpreter may not be disciplined for informing the Judicial Officer, in an appropriate manner, of conditions that impede his/her ability to perform complete and accurate interpretation or sight translation." Reading these provisions together, the plain language indicates that "cause" includes an interpreter failing to perform their duties in accordance with the Judicial Council's Rules for Professional Conduct, including

complete and accurate interpretation.

CFI cites *Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262 (*Fairfield-Suisun*) to support its contention that Article 6 and Article 20 do not contemplate discipline due to alleged inaccuracy because they do not state it with particularity. But *Fairfield-Suisun* is distinguishable on its facts, and does not stand for the proposition CFI cites. There, the parties' MOU required progressive discipline, with exceptions for safety and emergency. (*Id*. at pp. 3-4.) Without notifying the union, the employer adopted a zero-tolerance policy for employees in some classifications who refused random drug testing, and later disciplined an employee based on this zero-tolerance policy without following the MOU's progressive discipline provisions. (*Id*. at pp. 5-8.) The Board concluded that the district's zero-tolerance policy exceeded the scope of the exceptions in the parties' MOU, and therefore changed the parties' negotiated progressive discipline policy. (*Id*. at p. 12.) The Board found that refusing drug testing did not fall within the exceptions for safety or emergency, and thus the District unilaterally changed its contractual employee discipline policy by establishing and enforcing a zero-tolerance policy without meeting and negotiating. (*Id*. at pp. 12, 18.)

According to CFI, the circumstances here are analogous with *Fairfield-Suisun*, because the agreement that discipline shall be for cause does not constitute agreement that an employer can simply adopt new criteria. But in *Fairfield-Suisun*, the Board did not interpret a broad good cause provision, and the Board's interpretation of the specific safety and emergency exceptions to progressive discipline for those parties has no bearing on what might constitute cause under CFI and the Court's

MOU. The MOU does not define "cause," or provide any list of examples. But by its plain language, Article 6's requirement that discipline be for "fair and honest cause," read with Article 20 and the incorporated standards of Rule 2.890, encompasses components of interpreter job performance, including accurate and complete interpretation. Therefore, there was no change in status quo as set by the MOU.

Past Practice

CFI also argues that the parties' past practice supports the proposition that Suh's reprimand constituted a change in Court policy. It is not clear whether CFI relies on past practice to establish a firm policy, or to support reading the contract language to exclude inaccurate interpretation as a cause for discipline. We find CFI would not prevail under either theory.

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." (*County of Merced* (2020) 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 contract language. (*Antelope Valley Community College District* (2018) PERB Decision No. 2618, p. 21.) In such 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.)

In arguing that the Court changed its past practice, CFI relies on testimony from Santos and Ferreira that the ALJ omitted from the proposed decision. Both Santos and Ferreira confirmed that, to their knowledge, the Court had not disciplined any represented employees for alleged inaccuracy of interpretation before Suh. But this testimony is insufficient to meet the burden of showing a "regular and consistent" or "historic and accepted" practice. Santos, for example, testified that the Court has not tested or evaluated her for whether she provides accurate interpretation, nor has she seen any process at the Court for determining whether an interpreter is providing accurate interpretation. But neither of these statements stand in contrast to Suh's reprimand. Suh was shown the transcript and asked about her performance at the January 14 hearing. She was not tested or evaluated on her accuracy when the Court investigated the complaint, nor did the Court engage in a process to determine whether her interpretation was accurate, other than asking her about it and relying on her admissions that she made mistakes at the January 14 hearing. Further, it is undisputed that CFI is not involved in every disciplinary action, including the three other recent complaints Parrack investigated. Santos and Ferreira's lack of knowledge of discipline based on interpreter performance does not establish a Court policy that interpreters will not be disciplined based on the inaccuracy of their interpretation, and is insufficient to establish a regular and consistent past practice.

We also consider whether evidence of the parties' past practice helps interpret ambiguities in the MOU. As we have already noted, we find that the MOU's plain language incorporates Rule 2.890 into cause for discipline. Assuming for the sake of argument that there is some ambiguity about whether inaccurate interpretation can be

considered cause for discipline under Article 6, the evidence of past practice does not provide clarification. Ferreira testified that in the past, interpreters were disciplined for other types of conduct which also do not have specific criteria or standards embedded in Article 6, but are incorporated into Rule 2.890, such as failing to follow the Court's tenets for honesty. (See Cal. Rules of Court, rule 2.890(a).) CFI was not involved in the three other recent complaint investigations, so the testimony of CFI's witnesses is insufficient to establish that their lack of knowledge of discipline for inaccurate interpretation means the MOU should be interpreted to bar disciplining interpreters for failing to comply with Rule 2.890(b). Rather, as discussed *ante*, Article 6 incorporates Rule 2.890 as causes for discipline. Thus, the past practice evidence comports with the plain language of the MOU, and there is no contrary evidence suggesting a different interpretation.

New Application or Enforcement of Existing Policy

"PERB has always recognized newly created, implemented or enforced policy as subject to its unilateral action doctrine." (*Pasadena Area Community College District* (2015) PERB Decision No. 2444, p. 12, fn. 6.) CFI argues that the Judicial Council, not the Court, retains sole discretion to discipline employees based on violations of Rule 2.890. In support of this contention CFI relies on Rule 2.891, which provides that a certified or registered court interpreter may be subject to a credential review by the Judicial Council due to a complaint "alleging professional misconduct or malfeasance." (Cal. Rules of Court, rule 2.891(b) & (c)(1).) CFI argues that the words "misconduct or malfeasance" limit the complaint process to conduct issues, such as disclosing attorney-client communications or failing to disclose a conflict of interest.

CFI further argues that to the extent the complaint process encompasses complaints about inaccurate interpretation, the Rule states that the Judicial Council, not the employer court, "has authority to review a credentialed interpreter's performance, skills, and adherence to the professional conduct requirements of Rule 2.890, and to impose discipline on interpreters." (Cal. Rules of Court, rule 2.891.) But CFI ignores that Rule 2.891 also explicitly states that [n]othing in this rule prevents an individual California court from conducting its own review of, and disciplinary process for, interpreter employees under the court's collective bargaining agreements, personnel policies, rules, and procedures." (Cal. Rules of Court, rule 2.891(b).) Rule 2.891 by its plain language applies to credential reviews by the Judicial Council, and does not prohibit court-level discipline. Because the MOU incorporates Rule 2.890 into its causes for discipline, we do not find persuasive CFI's argument that only the Judicial Council has authority to discipline interpreters relative to their interpretive accuracy. Thus, CFI fails to demonstrate the Court enforced this policy in a new way.

In conclusion, CFI has not established a deviation from the MOU, violation of past practice, or enforcement of its disciplinary criteria or procedures in a new or different way based on the limited evidence in the record. We therefore affirm the conclusion that CFI failed to demonstrate that the Court changed policy when it issued the reprimand to Suh, and thus failed to establish a prima facie case of a unilateral change in violation of the Court Interpreter Act, section 71825, subdivision (c).

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-37-I are DISMISSED.

Chair Banks and Member Shiners joined in this Decision.