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

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 521, Charging Party, v. KERN COUNTY HOSPITAL AUTHORITY, Respondent.	Case No. LA-CE-1451-M PERB Decision No. 2847-M December 20, 2022

Appearances: Weinberg, Roger & Rosenfeld by Kerianne Steele and Corey Kniss, Attorneys, for Service Employees International Union, Local 521; Karen Barnes, Vice President and General Counsel, and Liebert Cassidy Whitmore by Adrianna Guzman and Anni Safarloo, Attorneys, for Kern County Hospital Authority.

Before Shiners, Krantz, and Paulson, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on both parties' exceptions to a proposed decision of an administrative law judge (ALJ). The ALJ found that Respondent Kern County Hospital Authority violated the Meyers-Milias-Brown Act (MMBA) when it claimed a categorical right not to process group, class, and consolidated grievances, thereby creating a new policy, or enforcing or applying an existing policy in a new way, without affording Charging Party Service Employees International Union, Local 521 (SEIU) notice and an opportunity to bargain.[1]

[1] The MMBA is codified at Government Code section 3500 et seq. Undesignated statutory references are to the Government Code.

The Authority excepts to certain liability conclusions in the proposed decision. SEIU excepts to the ALJ's proposed remedy, claiming the Authority should provide notice of this decision to all employees, rather than only to employees SEIU represents. As explained below, the Authority has not shown any error affecting the outcome and SEIU has not shown cause to adjust the ALJ's remedy. We therefore affirm the proposed decision.

FACTUAL AND PROCEDURAL BACKGROUND

Prior to July 1, 2016, the County of Kern operated Kern Medical, a health care network including an acute care hospital, primary care clinics, and specialty clinics. (*County of Kern and Kern County Hospital Authority* (2019) PERB Decision No. 2659-M, pp. 3-6 & adopting proposed decision at pp. 3, 9-12, 17-18.) On July 1, 2016, the Authority began operating Kern Medical as the County's legal successor. (*Id*. at pp. 1-3 & adopting proposed decision at p. 1; Kern County Hospital Authority Act, Health & Safety Code section 101852 et seq. (KCHAA).) At that time, the Authority became the employer of Kern Medical's employees.

SEIU has exclusively represented multiple Kern Medical bargaining units at all relevant times, both before and after the Authority took over operations from the County. At the time of the transfer of control, the County and SEIU were parties to a memorandum of understanding (MOU) effective March 2015 to August 2017. The KCHAA required the Authority to extend the MOU for up to 24 months following the transfer unless the Authority and SEIU mutually agreed otherwise. (Health & Saf. Code, § 101853.1, subd. (d).) The MOU therefore continued in effect until July 2018. The Authority and SEIU ultimately negotiated a successor MOU effective from

September 2018 through October 2020.

I. The MOU's Grievance and Arbitration Procedures

Article VIII of the parties' MOU, which details grievance and arbitration procedures, remained unchanged from the 2015-2018 MOU to the 2018-2020 MOU. Article VIII included the following relevant provisions.

Section B defines a grievance as a "complaint by an employee, alleging a violation of this MOU, rules and regulations or policies governing personnel practices and working conditions" or when "[an] employee believes an injustice has been done because of an unfair application or deviation from a departmental policy."

Section C excludes from the grievance and arbitration procedure any grievance filed more than 20 days after an employee knew of the occurrence, disputes involving bargaining impasses, and disputes concerning performance evaluations, certain disciplinary matters and work assignments, as well as classification and salary decisions.

Section E lists various "rights and restrictions." Among these are "the right of any employee to present a grievance individually" and the right to "have a representative present at all steps of the grievance procedure," provided the representative is "from within a recognized employee organization" and the representative's identity is "made known to management prior to a scheduled grievance meeting." Section E also guarantees employees the right to reasonable leave for processing a grievance. This provision does not distinguish between an employee as a grievant and an employee acting as a union representative.

Section E.7 provides: "Grievances of an identical nature concerning the same

subject matter may be consolidated." Beyond this sentence, Article VIII says nothing about grievances involving more than one employee. The record includes no evidence of bargaining history or discussion in subsequent negotiations of the consolidation provision in Section E.7, the definition of a grievance, or the rights, restrictions, and exclusions found in Article VIII.

Sections F and G include a multi-step process for informal and formal grievance resolution. Following the third step, an employee who is not satisfied with the Authority's resolution of a grievance may "submit the grievance through the Union to arbitration." If SEIU decides not to advance a dispute to arbitration, "the employee shall have no independent right to advance the matter to arbitration."

Section H governs the last step of the process, arbitration. It refers to "the parties" without defining the term. For example, Sections H.1 and H.2 provide that if "the parties" are unable to resolve a dispute at prior steps of the process, "the parties" may select an arbitrator by alternately striking names from a list. Section H.6 makes the arbitrator's decision binding on "all parties," while separately referring to "the grievant" in defining a limit on the amount of back pay owed. The first sentence of Section H.7 requires "the Authority and the grievant" to split the arbitrator's fee, while the second sentence of this section states: "Each party shall bear its own costs relating to arbitration, including but not limited to, witness fees, transcriptions and attorney fees."

II. Evidence of Group, Class, and Consolidated Grievances from 2015-2019

The record includes evidence of four grievances in which SEIU and/or bargaining unit employees pursued group, class, or consolidated grievances against

the County and/or the Authority: (1) the Kane grievance, which SEIU filed with the County in 2015 on behalf of an SEIU bargaining team member and other unnamed employees; (2) the Venegas grievance, which SEIU steward Encarnacion Venegas filed in April 2016 on behalf of himself and several other affected Kern Medical employees; (3) the Lerdo grievance, which consisted of a letter signed by nine SEIU-represented employees, presented by SEIU staff to the Authority in August 2018; and (4) the Halsell grievance, signed by Nancy Halsell and 22 other employees, which SEIU presented to the Authority in July 2019.

In only one of these four cases does the record reflect that the County or the Authority addressed SEIU's ability to pursue a group, class, or consolidated grievance. Specifically, in responding to the Lerdo grievance, Authority Vice President of Human Resources Lisa Hockersmith wrote SEIU as follows:

> "Although the Memorandum of Understanding (MOU) does not expressly authorize the filing of group grievances, we recognize that it does allow grievances alleging similar facts to be consolidated. Accordingly, we are treating this 'group' grievance as SEIU's request to consolidate what would otherwise be individually filed grievances."

Hockersmith closed this grievance response by asserting that SEIU needed to supply further information about the misconduct alleged.

At all relevant times, SEIU used a software database to track grievances, and the union labeled each grievance in the database as "individual," "group," or "class." Ronald Hansen, who worked as a paid SEIU staff member from August 2015 until February 2021, testified that the "group" designation meant a grievance signed onto by more than one named employee, while the "class" designation meant a grievance SEIU filed on behalf of unnamed employees usually identified by a description, such

as all employees affected by a particular policy. However, the record includes no evidence that SEIU discussed these designations with the County or the Authority. Moreover, the record reflects that the parties often used the terms "group," "class," and "consolidated" in such an overlapping manner that it is not possible to delineate clear boundaries between these terms.

III. The Alleged Unilateral Change

In January 2019, SEIU filed a grievance on behalf of Eva-Marie Dominguez, a technician at Kern Medical. The grievance concerned Dominguez's four-day absence from work and whether the Authority should count these days as paid time off or deduct the time from a different leave bank. In January 2020, shortly before a scheduled arbitration of the Dominguez grievance, SEIU sought to amend the grievance by adding at least four other employees whom it alleged were similarly situated to the grievant. In a letter dated January 13, 2020, the Authority opposed SEIU's requested amendment. The Authority focused its opposition on two alternative grounds, claiming that: (1) the MOU bars group or class grievances altogether and permits consolidated grievances only by mutual agreement, meaning the Authority had discretion to refuse all group, class, and consolidated grievances; and (2) in any event, SEIU had waited so long to amend its grievance that the Authority would be prejudiced by the amendment.

SEIU counsel responded the next day. She asserted that the Authority's position on group, class, and consolidated grievances was a unilateral change that had a significant impact on the SEIU bargaining units and might give rise to an unfair practice charge. SEIU thereafter withdrew its request to amend its grievance and

asserted that if the arbitrator sustained the grievance, then SEIU would argue for including similarly situated employees as part of the remedy. However, the arbitrator denied the grievance on its merits, thereby ending the arbitration process.

DISCUSSION

When resolving exceptions to a proposed decision, the Board applies a de novo standard of review. (*County of Santa Clara* (2019) PERB Decision No. 2629-M, p. 6.) 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 affect the outcome. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 5.)

In its exceptions, the Authority argues that SEIU untimely filed its charge, did not prove a prima facie case, and waived its right to bargain over processing of group, class, and consolidated grievances. Although the proposed decision adequately addressed these issues, we summarize and supplement the ALJ's analysis on the most critical points. Lastly, we address SEIU's contentions about the proper remedy.[2]

I. The Authority's Statute of Limitations Defense

Absent a recognized exception, PERB cannot issue a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (*Coachella Valley Mosquito and Vector Control Dist.*

[2] The parties' exceptions leave several parts of the proposed decision unchallenged, including the ALJ's conclusions that: (1) the record did not prove a "regular and consistent" or "historic and accepted" practice of allowing or prohibiting group, class, or consolidated grievances; and (2) an employer's unilateral change derivatively interferes with union and employee rights. These issues are therefore not before us.

v. California Public Employment Relations Bd. (2005) 35 Cal.4th 1072, 1077.) Before a complaint issues, a charging party bears the burden to allege facts that would, if proven, establish timeliness. (*Los Angeles Unified School District* (2014) PERB Decision No. 2359, pp. 3, 30.) After a complaint issues, a respondent bears the burdens of pleading untimeliness as an affirmative defense in its answer, and then proving that the statute of limitations bars the charge. (*Id*. at p. 30.)

The limitations period begins to run on the date the charging party knew, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177, p. 4.) The limitations period for a unilateral change allegation begins to run when the charging party has actual or constructive notice of the respondent's clear intent to implement the change in policy, provided there is no conduct after that date evincing a wavering of such intent. (*Regents of the University of California (Davis)* (2010) PERB Decision No. 2101-H, p. 16.)

The Authority contends that Hockersmith's 2018 response to the Lerdo grievance put SEIU on notice about the Authority's position on group, class, and consolidated grievances, and that no evidence indicated its position subsequently wavered. However, as noted above, the Authority evaluated the Lerdo grievance on its merits rather than rejecting it on procedural grounds. Hockersmith did comment on the procedural posture of the grievance, labeling it as a "'group' grievance" and stating that while the MOU "does not expressly authorize the filing of group grievances, we recognize that it does allow grievances alleging similar facts to be consolidated." This language, however, did not state a firm position on group, class, or consolidated

grievances, but merely described what Article VIII does and does not say. Contrary to the Authority's argument, Hockersmith's 2018 grievance response did not assert a categorical right to reject group, class, or consolidated grievances. Instead, we find it was too ambiguous to put SEIU on notice that the Authority believed SEIU had no right to file or pursue a grievance seeking relief for multiple employees.

The Authority's decision to evaluate the Lerdo grievance on its merits not only highlighted the ambiguity of Hockersmith's 2018 grievance response, but also evinced a wavering of intent. The Authority evidenced further wavering of intent in 2019 when it processed the Halsell grievance on its merits without objecting to it as a group grievance or even mentioning that 23 employees signed the grievance. Thus, Hockersmith's grievance response, particularly when seen in light of other group, class, or consolidated grievances that the County and/or the Authority processed before and after the Lerdo grievance, lent itself to a reasonable belief that SEIU had the right to have the Authority consider the merits of such grievances. The Authority's January 2020 statement, however, stood in stark contrast, stating that SEIU could only pursue such an approach with the Authority's approval.

For the foregoing reasons, Hockersmith's response to the Lerdo grievance does not prove that SEIU knew or should have known in 2018 that the Authority was asserting a categorical right to reject group, class, and consolidated grievances. That notice did not come until January 2020, when the Authority asserted this position in response to SEIU's motion to amend the Dominguez grievance. We therefore affirm the ALJ's decision to reject the Authority's statute of limitations defense.

II. SEIU's Prima Facie Case

The MMBA requires public agencies to meet and confer in good faith with recognized employee organizations on wages, hours, and other terms and conditions of employment. (MMBA, § 3505.) A unilateral change to a matter within the scope of representation is a per se violation of the duty to meet and confer. (*Sacramento City Unified School District* (2020) PERB Decision No. 2749, p. 7.) To establish a prima facie case of an unlawful unilateral change, a charging party must prove that: (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 (*Bellflower*).)

In its exceptions, the Authority does not challenge the ALJ's conclusions as to the final three elements. Instead, it argues that SEIU cannot prove the first element: a change in the status quo. There are three primary means of proving that an employer changed or deviated from the status quo. Specifically, a charging party satisfies this element by showing any of the following: (1) 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*, *supra*, PERB Decision No. 2796, p. 10.)

Although SEIU initially argued that it could prove all three types of changes, the ALJ found that SEIU established only the third type of change: a newly created policy or application or enforcement of existing policy in a new way. Because neither party has asked us to review the ALJ's conclusions as to the first two types of changes, we consider only the third category.

The Authority asserts that its January 2020 opposition to SEIU's motion to amend the Dominguez grievance merely restated the status quo as already reflected in the parties' MOU and Hockersmith's 2018 response to the Lerdo grievance. We conclude, however, that the Authority's January 2020 opposition announced a new policy where there was none before—or applied or enforced existing policy in a new way—by declaring that the MOU bars group or class grievances and grants the Authority unilateral authority to refuse to consolidate grievances.

There are multiple factual and legal reasons that the Authority's position was a new one. First, Article VIII of the parties' MOU is ambiguous on the questions at issue. The Authority argues that Article VIII, Section E.7, which provides that "[g]rievances of an identical nature concerning the same subject matter may be consolidated," indicates that both parties must agree to consolidate grievances and therefore grants the Authority the right to veto any group or class grievance by simply withholding its consent to consolidation. However, Section E.7 makes no reference to mutual agreement and can just as reasonably be interpreted as providing SEIU with a right to consolidate identical grievances, with or without the Authority's consent. (See, e.g., *Deaton Truck Line, Inc. v. Local Union 612, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of America* (5th Cir. 1963) 314 F.2d 418, 422 [where

grievance procedure used the word "may" in the phrase "the dispute may be submitted" to arbitration, the phrase provided each party with the right to require the other to arbitrate] [citing *United Steelworkers of America v. American Mfg. Co.* (1960) 363 U.S. 564, 565, fn. 1].) This constitutes one independent basis for finding the Authority unilaterally instituted a new policy.

Second, we reject the Authority's argument that the MOU implicitly disallows group and class grievances by defining a grievance as a "complaint by an employee" and using other similar singular phrasing. As explained further *post* at pages 14-16, *Omnitrans* (2009) PERB Decision No. 2010-M (*Omnitrans I*) and related cases hold that only clear and unambiguous MOU language can bar a union from pursuing collective relief through a grievance, and an MOU does not satisfy that standard where it merely defines the grievant as a singular "employee" and does not explicitly exclude group and class grievances. (*Id*., adopting proposed decision at p. 5; *Chula Vista City School District* (1990) PERB Decision No. 834, p. 22 (*Chula Vista*) [because employees have statutory right to act collectively through their chosen representative, unions have statutory right to challenge contractual violations on a collective basis].)[3]

The Authority's position is also untenable because it has failed to consistently express what differences (if any) it sees between group, class, and consolidated grievances. As already noted, Hockersmith's 2018 response expressed that the "group" Lerdo grievance was equivalent to consolidated grievances. That response,

[3] Under PERB precedent, "clear and unmistakable" has the same meaning as "clear and unambiguous." (*County of Merced* (2020) PERB Decision No. 2740-M, p. 10, fn. 7 (*Merced*).)

together with other record evidence regarding the Lerdo, Kane, Venegas, and Halsell grievances, further confirm that the Authority's January 2020 position went well beyond merely reaffirming an allegedly consistent MOU interpretation that the Authority claims was already in place.[4]

We therefore conclude that the position the Authority asserted in January 2020, claiming that the parties' MOU granted it the right to reject group, class, or consolidated grievances on purely procedural grounds, materially altered the status quo in a manner that could affect future cases. (See, e.g., *Sacramento City Unified School District*, *supra*, PERB Decision No. 2749, pp. 8-9 [employer engaged in unilateral change by refusing to allow arbitrator to decide arbitrability dispute].)[5]

III. The Authority's Waiver Defense

The Authority asserts contractual waiver and waiver by inaction. As to each of these arguments, the Authority bears the burden of proving clear and unmistakable waiver, viz., that SEIU intentionally relinquished its right. (*City of Culver City* (2020) PERB Decision No. 2731-M, p. 13, and adopting proposed decision at p. 23 (*Culver*

[4] When considering the meaning of ambiguous contract language—including if a respondent asserts an MOU-based defense—we consider past practice as one interpretive tool even absent a practice that is "regular and consistent" or "historic and accepted." (*Merced*, *supra*, PERB Decision No. 2740-M, p. 13, fn. 9.)

[5] As noted above, the Authority raised two arguments in its January 2020 opposition to SEIU's motion to amend the Dominguez grievance. Beyond asserting its unilateral discretion to reject group, class, and consolidated grievances, the Authority also claimed SEIU was tardy in its attempted amendment. SEIU has not asserted that this second ground was a unilateral change. We express no opinion whether SEIU waited too long before asking to amend the Dominguez grievance. Moreover, because the Authority's exceptions do not assert that PERB should have deferred the instant charge to arbitration, we do not consider that issue.

City).) We resolve any doubt against finding waiver. (*Merced*, *supra*, PERB Decision No. 2740-M, p. 10.)

A. Contractual Waiver

The Authority relies on MOU Article VIII as a contractual waiver of two different MMBA rights: SEIU's right to file union grievances on behalf of multiple employees and SEIU's right to bargain before the Authority changes the status quo. We address the two waiver questions together, because the clear and unmistakable standard governs each of them. First, however, we review an exclusive representative's statutory right to file grievances pursuing collective relief.

Chula Vista, *supra*, PERB Decision No. 834 held that the Educational Employment Relations Act (EERA) grants an exclusive representative the right to file grievances in its own name.[6] The Board based this holding on EERA section 3543.1, subdivision (a), which states in relevant part: "Employee organizations shall have the right to represent their members in their employment relations with public school employers." Critically, *Chula Vista* noted that this statutory right is based on the fundamental principle that employees have the right to act collectively through their union:

> "The system of labor relations created by the EERA envisioned employees acting collectively through a chosen representative to bargain with their employer about matters within the scope of representation. The grievance procedure is a contractual tool for enforcing the results of a negotiated agreement. For contract violations to be grievable and arbitrable only by the initiation of an individual employee runs counter to the EERA's statutory system of

[6] EERA is codified at section 3540 et seq.

> collective action. In a system of collective bargaining, the ability to challenge contractual [*sic*] violations must lie with the party that negotiated the contract, i.e., the exclusive representative. Any other system makes the viability of the contract dependent upon the willingness of each unit member to stand individually."

(*Id*. at p. 22; see also, e.g., *Mt. Diablo Unified School District* (1990) PERB Decision No. 844, adopting proposed decision at pp. 18-19.)

The MMBA mirrors EERA in providing unions with a "right to represent": "Recognized employee organizations shall have the right to represent their members in their employment relations with public agencies." (MMBA, § 3503.) In *Omnitrans I*, *supra*, PERB Decision No. 2010-M, we found that the MMBA, like EERA, provides an exclusive representative with a statutory right to file union grievances seeking relief on a collective basis. (*Id*., adopting proposed decision at p. 5.) Any waiver of this union right must be clear and unmistakable. (*Ibid*.)

The Authority argues that Article VIII limits the grievance procedure to single employee grievances, except where the parties mutually agree to consolidate identical grievances. But as already noted, Article VIII is far from clear and unmistakable on this point. The article makes no mention of group or class grievances, and it can reasonably be construed to mean that SEIU has the right to consolidate identical grievances, with or without the Authority's consent. (See *ante* at pages 11-12.) Evidence concerning past group, class, and consolidated grievances, including the Lerdo grievance and the Authority's response thereto, similarly undercut the argument that Article VIII is a clear and unmistakable waiver. Moreover, while Article VIII defines a grievance as a complaint by "an employee," in *Omnitrans I*, *supra*, PERB Decision No. 2010-M, we held that a grievance procedure which repeatedly referred to the

grievant as "the employee" did not waive the union's statutory right to seek collective relief. (*Id*., adopting proposed decision at pp. 3, 5, 7.)[7]

The Board has only once found partial waiver of a union's right to file certain types of grievances. In *Trustees of the California State University* (1995) PERB Decision No. 1094-H, the grievance procedure stated that a "union grievance" was available only as to one contract article, and an arbitrator had interpreted that provision to disallow any other type of union grievance. (*Id*., adopting warning letter at pp. 1-2.) Here, in contrast, the MOU does not explicitly mention group grievances, class grievances, or union grievances, and it allows consolidated grievances.

Furthermore, reading Article VIII, Section B to mean that any grievance must be a complaint by an employee would leave SEIU with no ability to enforce union rights in the MOU. Such a result is typically not a fair interpretation of contractual intent, which is another reason that contractual language referring to the grievant as an employee does not waive a union's right to use the grievance procedure to pursue collective relief. (*Omnitrans II*, *supra*, PERB Decision No. 2143-M, p. 7.)

Finally, the Authority's position violates fundamental principles of contract interpretation by rendering superfluous Article VIII, Section C.6, which bars SEIU from

[7] In *Omnitrans* (2010) PERB Decision No. 2143-M (*Omnitrans II*), we considered the same MOU language at issue in *Omnitrans I*, this time in the context of a unilateral change allegation. The employer refused to process a grievance filed by the union's president alleging violations of several MOU articles, claiming among other things that the grievance procedure did not allow the union to file grievances in its own name and that the union president lacked standing to file a grievance because he was not himself an "employee" as defined by the MOU. (*Id*. at p. 7.) We again found no clear and unmistakable waiver and therefore concluded that the employer unlawfully changed the status quo by refusing to process the union's grievance. (*Id*. at pp. 7-8.)

using the grievance procedure for impasse resolution. This provision would be unnecessary if SEIU were already subject to a broader exclusion by virtue of being an employee organization rather than an "employee."

For these reasons, we reject the Authority's contractual waiver defense.[8]

B. Waiver by Inaction

To prove waiver by inaction, it is necessary to prove "conscious abandonment" of the right to bargain. (*Culver City*, *supra*, PERB Decision No. 2731-M, p. 18.) Showing that a union consciously abandoned its right to bargain typically involves proof that "the union had clear notice, meaning *advance knowledge*, of the employer's intent to change policy with sufficient time to allow a reasonable opportunity to bargain about the change and then failed to request negotiations." (*Id*., adopting proposed decision at pp. 25-26 [internal quotation marks omitted].)

The Authority argues that SEIU waived its right to bargain by not demanding bargaining after Hockersmith responded to the Lerdo grievance in 2018. Before assessing this argument, we briefly explain how it fits with the related statute of limitations issue discussed *ante*. If Hockersmith's grievance response had announced a new policy, that would have triggered the statute of limitations on filing a unilateral change charge. But even in that hypothetical case, announcing a new policy as a fait

[8] We need not resolve whether the MOU allows SEIU to file a group or class grievance, or to consolidate identical grievances over the Authority's objection, because as noted *ante* at p. 11 neither party has asked us to consider whether the Authority unilaterally deviated from the MOU. Rather, the most we determine is that the MOU was ambiguous and there was no clear rule or policy prior to January 2020, meaning that the Authority implemented a new rule, or enforced or applied an existing rule in a new way.

accompli would not trigger a duty to demand bargaining and cannot support a waiver defense. (*Merced*, *supra*, PERB Decision No. 2740-M, p. 20.) Thus, waiver and timeliness normally apply in separate circumstances: announcing a fait accompli can trigger the statute of limitations for a unilateral change charge but cannot support a waiver by inaction defense, while *proposing* a new policy does not trigger the statute of limitations but can lead PERB to find waiver by inaction if the union does not respond to the proposal within a reasonable time.

Here, Hockersmith's 2018 response to the Lerdo grievance neither announced nor proposed a new policy. As explained *ante*, Hockersmith's grievance response did not announce a firm policy that the Authority had a unilateral right to reject group, class, and consolidated grievances, meaning it did not trigger the statute of limitations for filing a unilateral change charge. Moreover, the Authority does not and cannot contend that Hockersmith *proposed* a new policy in her 2018 grievance response, meaning that SEIU had no obligation to demand to bargain and its failure to make such a demand thus did not waive any bargaining rights.

IV. The ALJ's Proposed Remedy

The ALJ issued a standard order requiring the Authority to physically post and electronically distribute a notice to ensure that all affected employees learn the outcome of this matter. (*City of Sacramento* (2013) PERB Decision No. 2351-M, pp. 44 [adding electronic distribution to PERB's standard notice posting remedy].) Relying on *City and County of San Francisco* (2017) PERB Decision No. 2536-M (*San Francisco*), SEIU urges the Board to require posting and distribution in a manner calculated to reach all Authority employees, rather than merely all SEIU-represented

employees. We ordered such a remedy in *San Francisco* because the employer maintained an unreasonable rule affecting all of its employees, not just those represented by the charging party union. (*Id*. at p. 45.) In contrast, here the record does not prove that the Authority announced a new policy or policy interpretation with respect to any employees outside the SEIU-represented bargaining units. We therefore find no cause to order broader notice posting and distribution.

ORDER

Based on the foregoing and the entire record in the case, the Public Employment Relations Board (PERB) finds that the Kern County Hospital Authority violated the Meyers-Milias-Brown Act, Government Code section 3500 et seq. (MMBA), when it unilaterally adopted a new policy, or applied or enforced existing policy in a new way, without affording SEIU notice and an adequate opportunity to bargain. By the same conduct, the Authority interfered with the rights of employees to participate in activities the MMBA protects, and also denied SEIU its right to represent employees in their employment relations with the Authority. All other allegations are hereby DISMISSED.

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

A. CEASE AND DESIST FROM:

1. Adopting new policies, or applying or enforcing existing policies in a new way, relating to group, class, or consolidated grievances, without affording SEIU adequate advance notice and an opportunity to bargain to impasse or agreement.

2. Interfering with the rights of employees to participate in activities the MMBA protects.

3. Denying SEIU its right to represent employees in their employment relations with the Authority.

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

1. Upon SEIU's request, meet and confer in good faith about policies relating to group, class, and consolidated grievances.

2. Within 10 workdays following the date this decision is no longer subject to appeal, post at all work locations where notices to SEIU-represented employees are posted, copies of the Notice attached hereto as an Appendix. An authorized agent of the Authority must sign the Notice, indicating that the Authority will comply with the terms of this Order. The Authority shall maintain the posting for a period of 30 consecutive workdays and shall also distribute it by electronic message, intranet, internet site, and other electronic means the Authority uses to communicate with employees in SEIU's bargaining units. The Authority shall take reasonable steps to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.[9]

[9] In light of the ongoing COVID-19 pandemic, Respondent shall notify PERB's Office of the General Counsel (OGC) in writing if, due to an extraordinary circumstance such as an emergency declaration or shelter-in-place order, a majority of employees at one or more work locations are not physically reporting to their work location as of the time the physical posting would otherwise commence. If Respondent so notifies OGC, or if Charging Party requests in writing that OGC alter or extend the posting period, require additional notice methods, or otherwise adjust the manner in which employees receive notice, OGC shall investigate and solicit input from all parties. OGC shall provide amended instructions to the extent appropriate to ensure

3. Provide PERB's General Counsel, or the General Counsel's designee, with written notification of all actions taken to comply with this Order, as well as any such further reports as the General Counsel or designee may direct; and concurrently serve SEIU with all such notifications and reports.

Members Shiners and Paulson joined in this Decision.

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adequate publication of the Notice, such as directing Respondent to commence posting within 10 workdays after a majority of employees have resumed physically reporting on a regular basis; directing Respondent to mail the Notice to all employees who are not regularly reporting to any work location due to the extraordinary circumstance, including those who are on a short term or indefinite furlough, are on layoff subject to recall, or are working from home; or directing Respondent to mail the Notice to employees with whom it does not communicate through electronic means.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. LA-CE-1451-M, *Service Employees International Union, Local 521 v. Kern County Hospital Authority*, in which all parties had the right to participate, the Public Employment Relations Board found that the Kern County Hospital Authority violated the Meyers-Milias-Brown Act, Government Code section 3500 et seq. (MMBA), when it unilaterally adopted a new policy, or applied or enforced existing policy in a new way, without affording Service Employees International Union, Local 521 (SEIU) notice and an opportunity to bargain.

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

A. CEASE AND DESIST FROM:

1. Adopting new policies, or applying or enforcing existing policies in a new way, relating to group, class, or consolidated grievances, without affording SEIU adequate advance notice and an opportunity to bargain to impasse or agreement.

2. Interfering with the rights of employees to participate in activities the MMBA protects.

3. Denying SEIU its right to represent employees in their employment relations with the Authority.

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

1. Upon SEIU's request, meet and confer in good faith about policies relating to group, class, and consolidated grievances.

Dated: _____ KERN COUNTY HOSPITAL AUTHORITY

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.