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

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 521, Charging Party, v. COUNTY OF SANTA CLARA, Respondent.	Case No. SF-CE-1859-M PERB Decision No. 2900-M April 23, 2024

Appearances: Weinberg, Roger & Rosenfeld by Kerianne R. Steele and Shane Reed, Attorneys, for Service Employees International Union Local 521; Nancy J. Clark and Raphael N. Rajendra, Attorneys, for County of Santa Clara.

Before Banks, Chair; 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 complaint alleges that Respondent County of Santa Clara violated the Meyers-Milias-Brown Act (MMBA) by refusing to meet and confer with Charging Party Service Employees International Union Local 521 (SEIU).[1] Specifically, SEIU claims the County unlawfully refused to bargain before its Board of

[1] The MMBA is codified at Government Code section 3500 et seq. Undesignated statutory citations refer to the Government Code. To "meet and confer" under the MMBA means to bargain. (*County of Santa Clara* (2021) PERB Decision No. 2799-M, p. 15, fn. 9.) We use the term "bargain" except when quoting sources that use the phrase "meet and confer."

Supervisors (BOS) approved the County medical staff organization's proposed bylaw revisions, which included new standards for SEIU-represented physician assistants (PAs) to receive or maintain practice privileges at County hospitals.[2]

The ALJ found the County did not have a duty to bargain over the BOS decision to approve the bylaw revisions. However, the ALJ found the County violated its duty to bargain with SEIU, prior to the BOS vote, over the decision's effects on terms and conditions of employment. Having considered the issues de novo, we affirm in part and reverse in part. As we proceed to explain, the County violated its bargaining duties both with respect to the BOS decision and the effects thereof. Finally, addressing SEIU's exceptions on remedial issues, we reject SEIU's suggested change to PERB precedent on litigation expenses, but we clarify make-whole principles relevant to determining damages for bargaining and representation costs.

FACTUAL AND PROCEDURAL BACKGROUND

When this dispute arose, SEIU and the County were parties to a memorandum of agreement (MOA) effective from March 2020 through June 2023. The MOA covered eight County bargaining units, including the Administrative, Professional, and Technical (APT) unit. Through the MOA's recognition clause, the County recognized SEIU as the exclusive representative of all APT unit employees, including PAs.

I. The County's Hospital System and its Medical Staff Organization

The County owns and operates Santa Clara Valley Healthcare (SCVH), which includes three acute care hospitals and various outpatient clinics. The County BOS

[2] "Practice privileges" means permission to render services to patients.

serves as the governing board of SCVH. The BOS, as part of its overall administrative and professional responsibility for SCVH under state and federal law (Health & Saf. Code, § 1250, subd. (a); 42 U.S.C. § 482.12), must "take all reasonable steps" to assure compliance with the MMBA and other applicable laws. (Cal. Code Regs., tit. 22, § 70701, subd. (a)(5).)

California law requires SCVH to have an "organized medical staff," which means that acute care hospital physicians, dentists, podiatrists, and clinical psychologists have certain self-government rights through their medical staff organizations. (Health & Saf. Code, §§ 1250, subd. (a), 32128, subd. (a); Bus. & Prof. Code, § 2282; Cal. Code Regs., tit. 22, § 70701, subd. (a)(1)(F).) PAs have no voting rights in such organizations. (Cal. Code Regs., §§ 70701, subd. (a)(1)(E), 70703, subd. (a)(1).)

A medical staff organization's bylaws, rules or regulations must establish criteria and standards for medical staff membership and practice privileges. (Bus. & Prof. Code, § 2282.5, subd. (a)(1); Cal. Code Regs., tit. 22, § 70703, subd. (b).) Such bylaws, rules, and regulations are subject to approval by the hospital's governing board, but the board may not unreasonably withhold approval. (Bus. & Prof. Code, § 2282.5, subd. (a)(6); Cal. Code Regs., tit. 22, § 70701, subd. (a)(8).) Both the governing board and the medical staff organization "shall act exclusively in the interest of maintaining and enhancing quality patient care." (Bus. & Prof. Code, § 809.05, subd. (d).)

In this decision, we refer to the SCVH medical staff organization as the "Enterprise Medical Staff" (EMS) or, when quoting the parties, the "Medical Staff." We refer to its executive committee as the "Enterprise Medical Executive Committee"

(EMEC). The practice privilege criteria in the EMS bylaws apply to all medical providers wishing to practice at SCVH, including PAs.

II. State Licensing Requirements for PAs

PAs are Allied Health Professionals (AHPs), which means they are non-physicians who render services to patients pursuant to physician supervision. (Cal. Code Regs., tit. 22, § 70706.1, subd. (b).) To practice in California, a PA must hold a license from the Physician Assistant Board, a division of the California Department of Consumer Affairs.

III. Standards for PAs to Receive or Maintain SCVH Practice Privileges as of 2020

Prior to the events giving rise to this dispute, the EMS bylaws stated that AHPs were eligible for practice privileges at SCVH "if they hold a license, certificate or other credentials in a category of AHPs that the Governing Body (after securing [EMEC] comments) has identified as eligible, and only if the AHPs are professionally competent and continuously meet the qualifications, standards and requirements set forth in the Medical Staff Bylaws and Rules."

IV. The Parties' 2019-2021 Grievance Proceedings Over Discipline Against a PA

In 2019, SEIU filed a grievance on behalf of a County PA named Susan Irizarry. The grievance challenged the County's decision to place Irizarry on unpaid leave for allegedly failing to maintain a required professional certification. An arbitrator sustained SEIU's grievance in a March 2021 decision. Since that decision is now final, and the parties were the same as they are in this case, we accept the arbitrator's relevant factual findings as true. (Code Civ. Proc., § 1287.6 ["An award that has not been confirmed or vacated has the same force and effect as a contract in writing

between the parties to the arbitration"]; see also *JPV I L.P. v. Koetting* (2023) 88 Cal.App.5th 172, 192 [collecting cases on collateral estoppel effect of arbitration decisions]; *State of California (Correctional Health Care Services)* (2024) PERB Decision No. 2888-S, pp. 23-28 [discussing PERB's application of collateral estoppel] [judicial appeal pending].)

As relevant here, the arbitrator found as follows. When Irizarry began working in SCVH's surgery department in 2015, EMS granted her practice privileges. At that time, she held both a license from the Physician Assistant Board and a certificate from the National Commission on Certification of Physician Assistants (NCCPA). The applicable renewal criteria for surgery privileges required a PA *either* to maintain NCCPA certification *or* to complete 50 continuing education credits in a two-year renewal cycle. Although Irizarry maintained her PA license at all relevant times, and she completed at least 50 continuing education credits in the 2017-2019 renewal cycle, pregnancy complications prevented her from obtaining additional credits she would have needed to maintain her NCCPA certification at that time. On this basis, the County placed her on unpaid leave. In the arbitration hearing, County Director of Advanced Practice Karen Ketner testified that the County's PA job description and the EMS bylaws required Irizarry to maintain her NCCPA certification. However, the arbitrator concluded this testimony was incorrect.[3]

[3] The arbitrator found Ketner testified in an aspirational manner, as she had repeatedly asked the County to require PAs to maintain NCCPA certification. The arbitrator, noting that Ketner had not yet succeeded in establishing that requirement, concluded that if "that requirement was necessary for patient safety standards," then "presumably there would have been a much more vigorous effort to approve it than the languishing requests to do so for now three years."

V. SEIU's Request to Bargain Before the BOS Voted on EMS Bylaw Revisions

On August 27, 2020, EMEC preliminarily approved substantial revisions to the EMS bylaws. With respect to practice privileges for AHPs, the revisions included the following language:

> "An AHP is eligible for Practice Privileges in the hospital if the AHP meets all of the following:
>
> "(a) Holds a license and certificate, or other legal credential in a category of AHPs in which the Governing Body has identified as eligible to apply for Practice Privileges as stated in these Bylaws:
>
> "1. Any license and certification, or other legal credential that is required for initial licensing or Practice Privileges must be maintained at all times for an AHP to be eligible for Practice Privileges."

On August 31, 2020, the County sent SEIU a copy of the bylaw revisions EMEC had preliminarily approved. On September 1, 2020, SEIU demanded to bargain and requested relevant information. By e-mail dated September 9, 2020, County Labor Relations Director Matthew Cottrell provided certain information SEIU had sought and indicated that he "would like to set up a meeting with SEIU to explain how the medical staff side of the hospital works."

VI. The County's Refusal to Bargain

On September 21, 2020, the parties met regarding the proposed bylaw revisions. The County admitted that BOS approval was necessary for the revisions to take effect. However, the County flatly refused to bargain with SEIU, instead insisting that the meeting was purely informational. SEIU asked whether PAs who do not qualify for practice privileges under the revised bylaws could work for the County, and

the County stated that they could not. SEIU noted that while the existing EMS bylaws used disjunctive language in requiring AHPs to hold a license, certificate, *or* other credentials, the proposed revisions would require AHPs to hold "a license *and* certificate, or other legal credential" (emphasis supplied). SEIU asked whether the County would grandfather in everyone who did not meet the new standard or alternatively give them a grace period to obtain any newly required certificate. The County stated that EMS, not the County, would make all such determinations.

After the parties met on September 21, 2020, SEIU repeatedly sought to schedule further meetings in advance of the BOS vote on the bylaw revisions. But the County never agreed to meet for a second time. Although Cottrell e-mailed SEIU on October 7, 2020, stating that another County representative would schedule such a meeting, no County representative ever followed through on this promise. SEIU tried again to schedule additional meetings by sending an e-mail dated November 8, 2020, but the County never responded. On December 15, 2020, the BOS approved the revised EMS bylaws.

VII. The Parties' Litigation History

When SEIU initiated this case in February 2021, the parties were already litigating two related legal proceedings. First, as noted above, SEIU filed a grievance in 2019 after the County placed Irizarry on unpaid leave. That proceeding ended with the arbitrator's March 2021 decision.

Also in 2019, SEIU filed an unfair practice charge based in part on the County's actions vis-à-vis Irizarry (Case No. SF-CE-1764-M).[4] After SEIU amended the charge multiple times, PERB's Office of the General Counsel (OGC) issued a complaint alleging (among other things) that the County's actions regarding Irizarry unilaterally changed policy by requiring PAs to maintain NCCPA certification as a condition of continued employment.

On July 6, 2021, four months after the arbitrator sustained the Irizarry grievance, the parties settled Case No. SF-CE-1764-M. The settlement agreement required the County to post a notice stating as follows:

> "We are providing this communication at the request of SEIU Local 521 pursuant to a settlement agreement reached through a process administered by the Public Employment Relations Board.
>
> "Pursuant to an Arbitration Decision in SEIU Grievance No. 79989-2019 (SEIU Local 521/Susan Irizarry v County of Santa Clara), the Arbitrator found that the County violated the MOA by not permitting Ms. Irizarry to work 'because of a claimed requirement that [the County] continued to inform PAs about that they maintain their NCCPA certification,' and that '[t]here was no opportunity for the Union to meet and confer on the imposition of such a requirement.' Based upon his findings, the Arbitrator ordered the County to restore Ms. Irizarry's lost wages and benefits and return Ms. Irizarry to active employment.
>
> "Last month, the County proposed to amend the Physician Assistant job description. The County and SEIU Local 521 will meet and confer over the County's proposal."

[4] We take administrative notice of the record in Case No. SF-CE-1764-M. (*Lake Elsinore Unified School District* (2019) PERB Decision No. 2633, adopting proposed decision at p. 3, fn. 2.)

As indicated in the above-quoted language, in June 2021 the County had proposed to amend its PA job description, and SEIU then demanded to bargain over the County's proposal. The record does not reflect whether or how those negotiations concluded. Nor is there any allegation in this case that either party violated the MMBA while bargaining over the PA job description.

In January 2022, OGC issued a complaint in this case. The complaint alleges the following facts regarding the parties' interactions over the EMS bylaw revisions:

> "5. On or about September 1, 2020, Charging Party demanded to meet and confer regarding the proposed revisions to the Bylaws.
>
> "6. On or about September 21, 2020, Respondent met with Charging Party to discuss the proposed revisions to the Bylaws, but Respondent asserted that the meeting was strictly informational and that it was not required to meet and confer regarding the Bylaws.
>
> "7. On or about October 1, October 7, and November 8, 2020, Charging Party requested to schedule a time to meet and confer regarding the proposed revisions to the Bylaws, but Respondent has made no attempt to schedule the requested meet and confer.
>
> "8. On or about December 15, 2020, Respondent's Board of Supervisors approved the proposed revisions to the Bylaws concerning minimum qualifications for employment and the minimum requirements to possess privileges to practice.
>
> "9. Respondent engaged in the conduct described in paragraph 8 without having negotiated with Charging Party 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."

Prior to the formal hearing in this matter, the ALJ issued a ruling that limited the scope of an SEIU subpoena. The ALJ then held the formal hearing in July 2022 and, after receiving post-hearing briefs, issued the proposed decision in August 2023.

SEIU filed four exceptions to the proposed decision, challenging: (1) the ALJ's decision to limit the scope of an SEIU subpoena;[5] (2) the ALJ's conclusion that the County had no decision bargaining obligation; (3) the ALJ's failure to find that the County and EMS have a single-employer and/or joint-employer relationship with PAs; and (4) the ALJ's proposed remedy.

The County filed a single cross-exception, which relates to the ALJ's conclusion that the County violated its effects bargaining obligation. In this exception, the County objects to the scope of effects the ALJ found bargainable, but the County concedes that the ALJ properly found a violation as to one category of effects. Specifically, the County argues: "Had the ALJ limited her discussion about bargainable effects to SEIU's concern about what happens to a PA's County employment if they do not maintain NCCPA certification and therefore lose privileges, there would be no reason for this cross-exception . . . The County does not dispute its obligation to meet and confer now, at SEIU's request, regarding SEIU-identified effects on County employment of Medical Staff's Bylaw revisions." In contrast, the County's exception

[5] The ALJ found that records reflecting deliberation over revisions to the EMS bylaws fell within the qualified internal collective bargaining protection explained in *Pasadena Area Community College District* (2022) PERB Order No. Ad-490, pp. 6-18. However, there is no cause to address this exception in the present procedural posture, as SEIU prevailed even without obtaining all the records it sought.

asks us to conclude that the ALJ erred by including EMS's "disciplinary and investigatory processes" as bargainable effects.

DISCUSSION

In resolving exceptions, the Board applies a de novo standard of review. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 5.) However, the Board need not address alleged errors that would not affect the outcome. (*Ibid*.)

Here, the only conduct alleged in the complaint is that the County refused to bargain before its BOS approved the EMS bylaw revisions. SEIU did not seek to amend the complaint to cover other conduct. Nor has SEIU at any point argued that the ALJ or the Board should address other conduct pursuant to the unalleged violations doctrine. Accordingly, we confine our liability analysis to whether the County violated the MMBA when it refused to bargain before its BOS approved the EMS bylaw revisions. Given the limited nature of the complaint's claims, there is no cause to decide whether EMS ever serves as a County agent in any respect or has an employer-employee relationship with PAs, for collective bargaining purposes, pursuant to the single-employer doctrine and/or the joint-employer doctrine.

Because the County concedes that it had a duty to bargain certain effects, and that it refused to bargain, the main questions before us are: (1) whether the County also had a decision bargaining duty (see Part I, *post*); (2) the scope of bargainable effects (see Part II, *post*); and (3) the appropriate remedy (see Part III, *post*).

I. Decision Bargaining Analysis

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. (*Kern County Hospital Authority v. Public Employment Relations Bd.* (2024) 100 Cal.App.5th 860, __, 2024 WL 1154291, at *10 (*KCHA v. PERB*); *City and County of San Francisco* (2022) PERB Decision No. 2846-M, pp. 9-10 (*San Francisco I*).)

Moreover, where it is unclear whether the employer has a duty to bargain, it must meet with the exclusive representative in good faith to clarify the extent to which all or part of its contemplated change is subject to bargaining. (*Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375, p. 10 [failure to seek clarification violates the duty to negotiate in good faith]; accord *City of Palo Alto v. Public Employment Relations Bd.* (2016) 5 Cal.App.5th 1271, 1309 [a party asserting it need not bargain over a topic has a duty to meet with its counterpart, give its rationale, and enter into negotiations over any aspects that, after clarification, fall within the scope of bargaining]; *Cerritos Community College District* (2022) PERB Decision No. 2819, pp. 23-24, fn. 9 [employer obligation to clarify]; *State of California (Department of Personnel Administration)* (1986) PERB Decision No. 574-S, p. 16 [same].)

In its submissions to the Board, the County does not contend that it bargained in good faith to impasse or agreement. Nor does it claim that the bylaws revision on AHP practice privileges lacked a generalized effect or continuing impact. Accordingly, we consider the other elements of a unilateral change charge, beginning with whether the BOS decision to approve a bylaw revision on AHP practice privileges fell within the scope of representation, as that question lies at the heart of the parties' dispute.[6]

A. Scope of Representation

Under the MMBA, the scope of representation "shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." (§ 3504.)

If precedent does not already delineate whether a matter falls within the scope of representation, the first analytical step is to place the matter in one of three categories, 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

[6] There is no reason to analyze whether any other part of the bylaw revisions fell within the scope of representation, as the complaint does not challenge any of the other revisions.

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.'" (*San Francisco I*, *supra*, PERB Decision No. 2846-M, pp. 15-18, citing *International Assn. of Fire Fighters, Local 188, AFL-CIO v. Public Employment Relations Bd.* (2011) 51 Cal.4th 259, 272-273 (*Richmond Firefighters*).)

Accordingly, the threshold question is to determine which of the three categories described in *Richmond Firefighters* applies. (*San Francisco I*, *supra*, PERB Decision No. 2846-M, pp. 17-18.) Further analysis is necessary only if a decision falls into the third category. In that instance, PERB first determines whether the decision has "a significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees" that "arises from the implementation of a fundamental managerial or policy decision." (*Id*. at p. 18, citing *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623 638.) The "significant and adverse" standard requires PERB to look at effects from the perspective of a reasonable employee. (*County of Sonoma* (2023) PERB Decision No. 2772a-M, pp. 16-22.) If there are significant and adverse effects, the remaining question is whether "the employer's need for unencumbered decision-making in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question." (*Id*. at pp. 14 & 23; *San Francisco I*, *supra*, pp. 18-19.)

For most types of decisions, we need not "reinvent the wheel" by applying the *Richmond Firefighters* framework from scratch, because precedent establishes subject-specific standards that show how the framework applies to a given topic. (*County of*

Santa Clara (2023) PERB Decision No. 2876-M, pp. 24-25 [judicial appeal pending]; *Oakland Unified School District* (2023) PERB Decision No. 2875, p. 16, fn. 11 (*Oakland*); *San Francisco I*, *supra*, PERB Decision No. 2846-M, p. 18, fn. 15.) One such standard, relevant here, is that job qualifications fall within the scope of representation unless the employer does no more than comply with an externally imposed change. (*County of Sacramento* (2020) PERB Decision No. 2745-M, pp. 17-18 (*Sacramento County*).) "[W]hen external law establishes immutable provisions in an area otherwise within the scope of representation, matters are negotiable only to the extent of the employer's discretion, that is, to the extent that the external law does not 'set an inflexible standard or [e]nsure immutable provisions.'" (*Id*. at p. 18 [quoting *Berkeley Unified School District* (2012) PERB Decision No. 2268, p. 9 and *San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 864-865].)

Practice privilege qualifications are not identical to job qualifications, but the two topics are closely related, as shown by the Irizarry arbitration and the County's post-arbitration efforts to change its PA job description to require PAs to maintain NCCPA certification. Thus, while there is no PERB precedent specific to practice privileges, the circumstances of this case show why precedent on job qualifications is a persuasive guide. SEIU raised with the County that the BOS was preparing to vote on bylaw revisions that would change qualifications for PAs to hold practice privileges. SEIU specifically pointed out to the County a proposed revision that would change disjunctive language to conjunctive language, requiring PAs to earn and maintain both a license and a certificate or other credential to have practice privileges. SEIU asked whether PAs who do not qualify for practice privileges under the revised bylaws could work for

the County, and the County stated that they could not. In these circumstances, we find the standard set forth in *Sacramento County*, *supra*, PERB Decision No. 2745-M, p. 18, applies equally to practice privileges.

The County's reply in support of its cross-exception accedes to the standard set forth in *Sacramento County*, *supra*, PERB Decision No. 2745-M, while arguing that "external law leaves the County no relevant discretion." But the record does not bear this exaggerated conclusion. The fact that the County's BOS has a limited role in changing EMS bylaws does not equate to the existence of an immutable, externally imposed mandate. (*Id*. at p. 18.) Rather, BOS retained certain discretion and the County had to negotiate to the extent of that discretion. (*Ibid*.) Here, the extent of the County's discretion was that its BOS could not unreasonably withhold approval. (Bus. & Prof. Code, § 2282.5, subd. (a)(6); Cal. Code Regs., tit. 22, § 70701, subd. (a)(8).) Thus, while the County might lawfully tell SEIU in negotiations that its BOS had little choice absent clear problems with the proposed revisions, that is not what the County did. Indeed, at a minimum, the County had a duty to continue meeting with SEIU to clarify the extent of any decision bargaining obligation and to bargain effects. Instead, it flatly refused to bargain.[7]

[7] Selectively quoting from precedent such as *Hongsathavij v. Queen of Angels/Hollywood Presbyterian Med. Ctr.* (1998) 62 Cal.App.4th 1123, 1130, fn. 2, the County suggests that a medical staff organization must be fully independent of the hospital's governing board. These citations, often taken out of context, do nothing to undermine the nuanced legal framework explained *ante* at page 3, which rendered the EMS proposed bylaw revisions ineffective absent approval by the BOS, while also mandating that the BOS could not unreasonably withhold its approval.

Nor would the County prevail even if we had found practice privileges to be distinct enough from job qualifications that we should disregard precedent on qualifications. Specifically, and as an alternative conclusion, applying the *Richmond Firefighters* framework afresh (and assuming for the sake of argument that the County's changes fall within the third *Richmond Firefighters* category), the County had a decision bargaining duty for multiple reasons. First, from the perspective of reasonable employees, changes that make it more difficult to earn and maintain practice privileges have a significant and adverse impact, potentially even causing them to lose their employment altogether. And the County does not have a need for unencumbered decision-making that outweighs the benefit to employer-employee relations of bargaining. In fact, as the arbitrator in the Irizarry matter aptly noted, the relaxed pace of proposed changes in this area belies any argument that patient safety would be at risk if the County had to slow down enough to bargain before its BOS voted on bylaws that changed practice privilege standards.

Moreover, it is instructive to compare this case to an earlier one that also involved action by the County's BOS. In *County of Santa Clara*, *supra*, PERB Decision No. 2799-M, the BOS ordinance at issue primarily concerned protecting County residents' privacy by limiting use of surveillance technology. Thus, although the ordinance could affect County employees' terms and conditions of employment, it focused on constituent privacy rather than on employment-related matters. (*Id*. at pp. 18-24.) The ordinance was therefore akin to a law enforcement agency's use-of-force policy or decision to adopt body-worn cameras, which trigger effects bargaining, and it was unlike a decision focused on improving public safety via changing

investigation or discipline practices for law enforcement officers. (*Id*. at pp. 20-21.) Accordingly, the *Richmond Firefighters* balancing test for category three decisions tipped against finding a decision bargaining obligation, and we found the County needed to bargain effects but not the decision. (*Id*. at p. 22.) This comparison further confirms that qualifications for practice privileges fall within the ambit of a traditionally bargainable subject, because they operate directly on employee requirements, rather than focusing on another topic and only indirectly impacting employees.[8]

As noted, the new AHP practice privilege qualifications tie in with two issues the County admits fall within the scope of representation: its adverse action against Irizarry and its related effort to change the PA job description. To require decision bargaining only over the job description changes, but not over the BOS decision whether to approve new practice privilege qualifications, would put form over substance. And it would allow the BOS to create facts on the ground without engaging in decision bargaining, potentially rendering futile the parties' negotiations over the PA job description. Labor law is not "nearly so brittle, arbitrary, or inconsistent." (*County of San Joaquin* (2021) PERB Decision No. 2761-M, p. 45, fn. 23.) Accordingly, we

[8] Furthermore, in *County of Santa Clara*, *supra*, PERB Decision No. 2799-M, we found it relevant that a superior court had already found the privacy ordinance applied to non-employees as well as employees, and the union had not appealed that decision. (*Id*. at p. 23.) Here, the County's briefs regarding the parties' exceptions make no explicit argument based on whether AHPs who are not County employees practice at SCVH. But even had the County not waived any such argument, and assuming the record could support such an argument, the AHP practice privilege revisions were manifestly focused on an employment-related issue and primarily operated on County employees, which would distinguish this case from *County of Santa Clara*, *supra*, PERB Decision No. 2799-M.

effectuate the MMBA's purposes by finding that the County must bargain, to the extent of the discretion vested in its BOS, over bylaw revisions on AHP practice privileges. During such negotiations, SEIU may discuss with the County any reasons why the BOS could reasonably withhold approval absent adjustments. While the scope of negotiations may be more constrained than in other negotiations with the County, this constraint does not permit the County to flatly refuse to bargain.[9]

Finally, the County claims its BOS is not bound by the MMBA when it operates as the SCVH governing board. The County cites *Vanoni v. County of Sonoma* (1974) 40 Cal.App.3d 743, 750-751 (*Vanoni*) for the proposition that BOS "actions as the Hospitals' Governing Board cannot be imputed to the County government." But *Vanoni* involved separate boards of separate entities—a county's board of supervisors and a flood control and water conservation district board of directors—where the same members sat on the two bodies. (*Ibid*.) The County BOS is a unitary governing body, unlike the separate entities in *Vanoni*. Moreover, *Vanoni* did not interpret the MMBA, and the decision is also inapposite given that the County owns and operates SCVH. More generally, it would be unreasonable, decades after the MMBA's enactment, to suddenly interpret it to contain such a significant exception. Indeed, MMBA section 3504.5, subdivision (a) explicitly requires any governing body of a public agency, or board or commission designated by law, to provide notice and an opportunity to

[9] In the alternative, even assuming for the sake of argument there was basis to doubt the extent of its bargaining duty, the County at least had a duty to meet with SEIU in good faith and seek to clarify. (See *ante* at p. 12.) Instead, it engaged in an outright refusal to bargain, and after promising to continue meeting, it blatantly broke that promise.

bargain before enacting any ordinance or regulation relating to any matter within the scope of representation.[10]

B. Change in or Deviation from the Status Quo

There are three primary means of establishing that an employer changed or deviated from the status quo. (*San Francisco I*, *supra*, PERB Decision No. 2846-M, p. 23.) Specifically, a charging party satisfies this element by showing any of the following: (1) a change in or 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. (*Id*. at pp. 22-23; accord *KCHA v. PERB*, *supra*, 100 Cal.App.5th 860, __, 2024 WL 1154291 at *10; *id*. at *19, fn. 23.)

Taking the bylaw revisions on AHP practice privileges at face value, they make all three types of changes. At earlier stages of this case, the County claimed there was no material change in practice privilege requirements. However, as noted *ante*, we have accepted as true the arbitrator's March 2021 decision finding that this claim was false, at least during fall 2020 when the County refused to bargain.[11]

In any event, the County's submissions to the Board abandon any claim that there was no material change. The County now admits the change, stating that the bylaw revisions "require AHPs to hold and maintain both a 'license' and a 'certificate,'"

[10] While MMBA section 3504.5, subdivision (a) includes an emergency exception, the County makes no argument based on that exception.

[11] The record does not reflect whether the County subsequently changed its PA job description after bargaining with SEIU as part of settling Case No. SF-CE-1764-M.

meaning that they "need to maintain certification issued by [NCCPA], even if they also held a PA license."

Instead of arguing that the bylaw revisions made no material change to practice privilege qualifications, the County now makes a different claim: that the revisions did not alter "disciplinary and investigative processes" such as "the extent to which PAs and other medical professionals could be represented during the Medical Staff's investigatory interviews or hearings associated with the peer-review process." But it does not matter whether the bylaw revisions altered EMS investigative or enforcement processes, as no such issue is before us. Rather, as noted, the only change at issue in the complaint is that the BOS "approved the proposed revisions to the Bylaws concerning minimum qualifications for employment and the minimum requirements to possess privileges to practice." Moreover, as discussed *post* at pages 23-24, the fact that the change at issue related to practice privilege standards does not prevent SEIU from proposing procedural enhancements that might counteract any negative consequences of the new standards.

For the foregoing reasons, SEIU has established that the County violated its duty to bargain in good faith, and its duty to clarify its decision bargaining obligation, before its BOS decided whether to approve the bylaw revisions. We therefore overrule the ALJ's determination that the County had no decision bargaining duty. While normally this distinction impacts the remedy we order (*The Accelerated Schools* (2023) PERB Decision No. 2855, pp. 18-19 [distinguishing between standard decision bargaining remedy and standard effects bargaining remedy]), here that is not the case. For the

reasons explained *post* at page 26, we do not void the BOS decision at issue but rather hold employees harmless until good faith bargaining is complete.

II. Effects Bargaining Analysis

Irrespective of whether a decision falls within the scope of representation, if the decision has reasonably foreseeable effects on represented employees' terms and conditions of employment, the employer must provide adequate advance notice and opportunity to bargain in good faith over the decision's implementation and effects. (*Richmond Firefighters*, *supra*, 51 Cal.4th at pp. 265 & 276.) For the sake of brevity, we use the word "effects" as shorthand for the broad category that comprises both the effects and implementation of a decision on a non-mandatory bargaining subject. (*Oakland*, *supra*, PERB Decision No. 2875, p. 10.) Negotiations over implementation typically include proposed alternatives. (*Id*. at p. 11.) For instance, even though an employer has no duty to bargain over a decision to lay off employees, the California Supreme Court has noted that the scope of required effects bargaining includes "the timing of layoffs and the number and identity of the employees affected." (*Richmond Firefighters*, *supra*, at pp. 265, 276.) 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. (*Oakland*, *supra*, p. 11.) Effects bargaining violations are equally harmful as decision bargaining violations, as each disrupts and destabilizes employer-employee relations. In other words, the effects bargaining obligation is not an inferior duty. (*Ibid*.)

Here, the Irizarry case amply demonstrates how AHP practice privilege standards can foreseeably impact employees. Moreover, there is no question that the

County failed to provide adequate notice and opportunity to bargain over effects. Nor does the County claim that it can establish a defense under *Compton Community College District* (1989) PERB Decision No. 720 (*Compton*), which allows an employer to implement its decision before completing effects negotiations if it 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. (*Id*. at pp. 14-15.)[12]

The County now admits that it had a duty to bargain effects and that it failed to comply with that duty. The County's admission is a nuanced one, however. As noted *ante*, the County admits a duty to bargain over certain effects, including topics related to County employment consequences for loss of practice privileges. Such proposals might cover, for instance: (1) a grace period before any disciplinary consequence for loss of practice privileges, to allow a PA to regain such privileges; and/or (2) other assistance with respect to earning, maintaining, or regaining practice privileges.

[12] In any event, we agree with the ALJ that no *Compton* defense is available on these facts for two independent reasons. First, while one County witness believed it was important to implement the bylaw revisions promptly, no record evidence indicated any set deadline for implementation, much less that the BOS had to act in December 2020. Second, even when a party can establish such a deadline, it still must bargain as practicable before implementation, and continue bargaining thereafter, but the County did neither.

In contrast, the County urges that it has no duty to bargain over proposals about investigation or enforcement mechanisms for ascertaining whether an AHP meets practice privilege standards, because responsibility for making changes to such mechanisms lies foremost with EMS and the County cannot make changes on its own, without EMS. This claim ignores both the requirement that an employer bargain to the extent of its discretion, as well as an equally important principle: a bargaining party can lawfully make a proposal that is contingent on its counterpart attempting in good faith to convince a third party to take a specified action. (See, e.g., *State of California (Department of Personnel Administration)* (1998) PERB Decision No. 1249-S, adopting warning letter at p. 4 [employer lawfully proposed that union support specified future legislation].) Particularly given that certain changes are impossible absent approval from both EMS and the County BOS, and since the governing legal framework requires the two entities to collaborate with one another, we find no cause to impose artificial limits on the types of proposals SEIU may make pertaining to the effects of changing practice privilege standards. As with proposals over the BOS decision to approve the bylaw revisions, the County may lawfully explain in bargaining why certain changes might require multiple steps, including one or more in which it might have at most a persuasive role.[13]

[13] As noted *ante* at p. 11, the complaint only alleges that the County failed to bargain before its BOS voted to approve the bylaw revisions, and we therefore express no opinion whether EMS ever acts as a County agent or has an employer-employee relationship with PAs pursuant to the single-employer or joint-employer doctrines. Thus, there is no cause to consider how any such conclusion might change the nature of the parties' negotiations.

For these reasons, we affirm the ALJ's conclusion that the County violated its effects bargaining duty and we decline the County's request to make certain topics off limits in such negotiations.

Finally, the County's bargaining violations derivatively interfered with protected union and employee rights. (*City and County of San Francisco* (2023) PERB Decision No. 2858-M, p. 14, fn. 8 (*San Francisco II*).)

III. SEIU's Exceptions as to the Proper Remedy

The Legislature has vested PERB with broad authority to decide what remedies are necessary to effectuate the purposes and policies of the MMBA and the other acts we enforce. (MMBA, § 3509, subd. (b); *Mt. San Antonio Comm. College Dist. v. Public Employment Relations Bd.* (1989) 210 Cal.App.3d 178, 189.) PERB remedies must serve the dual purposes of compensating for the harm a violation causes and deterring further violations. (*County of San Joaquin v. Public Employment Relations Bd.* (2022) 82 Cal.App.5th 1053, 1068.) Moreover, a "properly designed remedial order seeks a restoration of the situation as nearly as possible to that which would have obtained but for the unfair labor practice." (*Modesto City Schools* (1983) PERB Decision No. 291, pp. 67-68.)[14]

[14] Notably, PERB augments customary remedies if they are inadequate based on unique aspects of a violation or set of violations. (*Regents of the University of California* (2021) PERB Decision No. 2755-H, p. 56 [non-customary remedies are "appropriate in a variety of circumstances, including: where conduct was egregious, intentional, systematic, or repeated; or whenever customary remedies are insufficient, including but not limited to as a result of the nature of the conduct, workforce language or literacy issues, or significant time has passed since the violation"].)

SEIU raises multiple issues in its exceptions related to the proper remedy. First, SEIU points out that PERB's standard remedy for a unilateral change includes invalidating a decision made in violation of the duty to bargain. However, this case involves unusual circumstances. SEIU-represented PAs are a small fraction of those covered by the EMS bylaw revisions, and the complaint targets only one paragraph of the extensive bylaws. For these unique reasons, our order enforces the MMBA by requiring the County to hold SEIU-represented PAs harmless until good faith negotiations are complete, akin to our order in *County of Santa Clara*, *supra*, PERB Decision No. 2799-M, p. 31.[15]

Second, SEIU asks us to augment customary means of affording employees notice of this decision by ordering the County to provide spoken notice. However, SEIU has not established that customary notice mechanisms are insufficient. (See *County of San Joaquin (Sheriff's Department)* (2018) PERB Decision No. 2619-M, p. 14, fn. 14; *Alliance College-Ready Public Schools et al.* (2017) PERB Decision No. 2545, pp. 17-18; cf. *Mt. San Jacinto Community College District* (2023) PERB Decision No. 2865, pp. 42-43 [spoken notice needed to "blunt the impact of the District's unlawful conduct, which may otherwise persist to some degree"].) Moreover, footnote 22 on page 39, *post*, allows SEIU to ask OGC to augment our notice post order, if needed.

[15] When the record closed, the County and SEIU were negotiating over PA job specifications, and we do not know the outcome of those negotiations. The parties may argue to the compliance officer as to the import (if any) of the negotiation over PA job specifications and any outcome of that negotiation. (See *County of Santa Clara*, *supra*, PERB Decision No. 2799-M, p. 30, fn. 15.)

In its main arguments regarding the proper remedy, SEIU urges that we amend our established make-whole standards to include attorney fees based on hours spent successfully litigating this case, and SEIU further requests that we apply existing standards to grant it an array of bargaining and representation damages related to the County's violation. We address these arguments below.

A. Make-Whole Principles

To serve the dual purposes of a remedial order noted above, PERB must expunge the consequences of an unfair practice and restore "the economic status quo that would have obtained but for the respondent's wrongful act." (*County of Kern & Kern County Hospital Authority* (2019) PERB Decision No. 2659-M, p. 26 (*Kern County*); *City of Pasadena* (2014) PERB Order No. Ad-406-M, p. 13 (*Pasadena*). cf*. Local Joint Executive Bd. of Las Vegas v. NLRB* (9th Cir. 2018) 883 F.3d 1129, 1139-1140 [failure to afford full make-whole relief was abuse of discretion].)[16] We therefore attempt to "recreate the conditions and relationships that would have been had there been no unfair labor practice, even when doing so necessarily entails some degree of uncertainty as to the precise relationships." (*Pasadena*, *supra*, PERB Order No. Ad-406-M, p. 13.) While make-whole relief therefore must typically rely on estimates, such estimates are preferable to allowing uncertainty—caused by unlawful

[16] Although California public sector labor relations precedent frequently protects employee and union rights to a greater degree than does federal precedent governing private sector labor relations, PERB considers federal precedent for its potential persuasive value. (*El Centro Regional Medical Center* (2024) PERB Decision No. 2890-M, p. 8, fn. 6 (*El Centro*).)

conduct—to leave an unfair practice without a fully effective remedy. (*San Francisco II*, *supra*, PERB Decision No. 2858-M, pp. 14-15.)

For all categories of make-whole relief, a charging party normally has the burden to establish in compliance proceedings the nature and extent of compensable harms that resulted in material part from the respondent's violations. (*San Francisco II*, *supra*, PERB Decision No. 2858-M, p. 15; *Antelope Valley Community College District* (2023) PERB Decision No, 2854, p. 7; *Regents of the University of California* (2021) PERB Decision No. 2783-H, p. 32 (*Regents*).)

1. Current Standards on Costs of Litigation, Bargaining, and Representation

Except in cases in which there is a statutory right to attorney fees (see § 3551.5, subd. (b); § 3558, subd. (d)(4)), PERB usually follows the "American Rule," pursuant to which a successful party normally has no claim to fee shifting. (*Sacramento City Unified School District* (2020) PERB Decision No. 2749, p. 12 (*Sacramento City*).) Rather, a party in a PERB case seeking to recover attorney fees and costs for litigation work done in relation to the same case must normally show that its opponent maintained a claim, defense, or motion, or engaged in another action or tactic, that was without arguable merit and pursued in bad faith. (*Palomar Health* (2024) PERB Decision No. 2895-M, p. 63 (*Palomar*) [judicial appeal pending].)

However, we apply a different standard when deciding if a respondent found to have committed an unfair practice must pay attorney fees and costs related to a separate proceeding—whether the proceeding is in court, in arbitration, or in a separate PERB charge or representation matter. (*City and County of San Francisco* (2024) PERB Decision No. 2891-M, p. 24 (*San Francisco III*).) A charging party need

not establish an egregious violation; instead, the charging party need only establish that it (or a party in privity with it) engaged in the separate proceeding in material part to remedy, lessen, make up for, or stave off the impacts of the unfair practice at issue. (*Ibid*., citing *Victor Valley Union High School District* (2022) PERB Decision No. 2822, pp. 23-24 (*Victor Valley*); *Sacramento City*, *supra*, PERB Decision No. 2749, pp. 11-12; *City of San Diego* (2019) PERB Decision No. 2464a-M, p. 4 (*San Diego*); *Omnitrans* (2009) PERB Decision No. 2030-M, p. 30; *County of San Joaquin (Health Care Services)* (2003) PERB Decision No. 1524-M, p. 3 (*San Joaquin Health*).)

Similarly, a charging party can obtain damages for increased bargaining or representation costs, resource diversion, or waste of resources resulting in material part from a violation, irrespective of whether the violation was egregious. (See, e.g., *San Francisco III*, *supra*, PERB Decision No. 2891-M, pp. 24-25, citing *San Francisco II*, *supra*, PERB Decision No. 2858-M, pp. 15-17 and *Alliance Judy Ivie Burton Technology Academy High et al.* (2022) PERB Decision No. 2809, pp. 14, 31-32 & 34 (*Alliance*).) Moreover, particularly given SEIU's focus on legal expenses in its exceptions, it is noteworthy that bargaining or representation damages may include fees based on consulting with an attorney, and/or an attorney's appearance at the bargaining table or in another representational context. (See, e.g., *National Labor Relations Bd. v. Ampersand Publishing, LLC* (9th Cir. 2022) 43 F.4th 1233, 1238-1239.) However, such damages normally do not include fees for any stage of researching or drafting the charge at issue, nor work on later stages of the case (*ibid*.), except in unusual circumstances not at issue here (see, e.g., *Bellflower Unified School*

District (2022) PERB Decision No. 2544a, p. 51, fn. 32 [discussing ancillary enforcement proceedings] (*Bellflower*).)

2. SEIU's Argument for Fee-Shifting as a Standard Remedy

SEIU claims that a successful charging party in a PERB proceeding should recover attorney fees in that case without showing that its opponent maintained a litigation stance that was without arguable merit and pursued in bad faith. One basis for SEIU's argument is that litigation costs are a direct harm, or at least an indirect, foreseeable harm, of the violation.

SEIU primarily points our attention to a decision of the National Labor Relations Board (NLRB): *Thryv, Inc.* (2022) 372 NLRB No. 22 (*Thryv*). There, the NLRB clarified that make-whole relief includes both "direct" and "indirect but foreseeable" economic harms resulting from a violation (*id*. at p. 7), a principle that the NLRB summarized as constituting a "direct or foreseeable" standard (*id*., *passim*). The NLRB then provided examples of harms falling under this standard, including, but not limited to: lodging, food, child care, and transportation expenses incurred because of an unlawful termination; legal costs and fees incurred after an employer unlawfully caused an employee to be arrested; costs incurred because of unlawfully assigned new duties; costs associated with searching for work, or with accepting and performing an interim job, after an unlawful termination; harms associated with a defined contribution plan, including both lost contributions and resulting lost investment growth; medical costs incurred because of a violation, including out-of-pocket bills, premiums, copayments, coinsurance, and deductibles; interest and late fees on credit cards; penalties from early retirement withdrawals needed to cover living expenses; harms related to

hardships in paying off a mortgage or car loan; and adverse tax consequences from receiving a lump-sum award. (*Id*. at pp. 7-9 & 13-14.) However, the NLRB noted that it does not apply the "direct or foreseeable" standard to cover a successful party's claim for automatic fee shifting. (*Id*. at p. 12, fn. 13.)[17]

SEIU also cites a second NLRB decision: *Grill Concepts Services* (2022) 372 NLRB No. 30 (*Grill Concepts*). There, the NLRB ordered an employer to reimburse bargaining costs to both the charging party union and its employee negotiators. (*Id*. at pp. 2-3.)

To contextualize SEIU's arguments, we begin by noting that PERB remedial standards already cover most direct or foreseeable harms resulting in material part from a violation. The American Rule on fee shifting is an exception to this principle, as are the prohibition on awarding monetary relief for emotional pain and suffering (*Trustees of the California State University (East Bay)* (2013) PERB Order

[17] *Thryv*, *supra*, 372 NLRB No. 22 notes that the NLRB had initially solicited party and amici briefs regarding "consequential damages," but after further consideration it determined that label is not the most apt means to describe indirect but foreseeable harms flowing from a statutory violation. (*Id*. at pp. 8-10.) This is primarily true, the NLRB explained, because "consequential damages" is a common law term, but the NLRB's mission is to safeguard public rights and its remedies are statutory ones not grounded in common law, leaving it unfettered by causation principles that apply to remedying private injuries. (*Id*. at pp. 9-10.) The NLRB observed that in performing this mission, it learns from experience and frequently updates its remedial approach. (*Id*. at p. 9.) Moreover, the NLRB noted that while compliance proceedings can often occur without a hearing, an evidentiary hearing is a fully acceptable means of resolving complex compliance matters. (*Id*. at p. 12.) Because an NLRB compliance officer requires evidence of harm, such proceedings are not an opening for speculative remedies. (*Ibid*.)

No. IR-56-H, p. 4, fn. 5) and the statutory bar against damages or expenses an employer incurs in relation to a strike.[18]

Outside of these exceptions, a successful charging party can normally recover compensation for direct or foreseeable harms resulting in material part from a violation. (See, e.g., *Palomar*, *supra*, PERB Decision No. 2895-M, pp. 63-67 [legal expenses related to defending against employer's lawsuit seeking to enjoin certain union activity]; *San Francisco III*, *supra*, PERB Decision No. 2891-M, p. 26 [potential recovery of costs resulting from failure to provide information]; *San Francisco II*, *supra*, PERB Decision No. 2858-M, p. 17 [bargaining costs]; *Victor Valley*, *supra*, PERB Decision No. 2822, pp. 23-24 [cost of deposition defense]; *Alliance*, *supra*, PERB Decision No. 2809, pp. 14 & 31-32 [organizing and bargaining costs materially caused by unfair practice]; *Bellflower*, *supra*, PERB Decision No. 2544a, pp. 46-50 [lost dues]; *Sacramento City*, *supra*, PERB Decision No, 2749. p. 21 [attorney fees for litigating petition to compel arbitration necessitated by employer's violation]; *San Diego*, *supra*, PERB Decision No. 2464a-M, p. 4 [fees for litigating quo warranto suit to rescind voter initiative unlawfully placed on the ballot]; *Omnitrans*, *supra*, PERB Decision No. 2030-M, p. 30 [fees union paid for defense of criminal case resulting from employer's unfair practice].)[19]

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[18] The bar on strike-related damages is codified at MMBA section 3509, subdivision (b), and in comparable provisions in the other statutes we enforce.

[19] PERB also compensates harms that employees incur in material part from a violation, irrespective of whether the employees themselves were charging parties. (See, e.g., *Bellflower*, *supra*, PERB Decision No. 2544a, pp. 33-41, 44-46 [medical and retirement losses, costs associated with job search or new job, and tax neutralization]; *Regents*, *supra*, PERB Decision No. 2783-H, p. 32 [costs associated

While PERB's remedial standards already encompass the categories of relief explained in *Thryv* and *Grill Concepts*, SEIU urges that PERB should as a matter of course order reimbursement of litigation expenses to a successful charging party in a PERB proceeding. SEIU argues that this rule would vindicate the principle that "California public sector labor relations precedent protects employee and union rights to a greater degree than does federal precedent governing private sector labor relations." (*San Francisco II*, *supra*, PERB Decision No. 2858-M, p. 16, fn. 9.)

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with discipline or unpaid leave and out-of-pocket vaccine costs]; *State of California (Correctional Health Care Services)* (2021) PERB Decision No. 2760-S, pp. 36-48 [retroactive reclassification]; *County of Ventura* (2021) PERB Decision No. 2758-M, pp. 54-56 [fees paid to tax preparer or other professionals because of violation]; *Lodi Unified School District* (2020) PERB Decision No. 2723, p. 21 [compensating employees who were deprived of choice as to when to use accrued leave]; *City of San Gabriel* (2020) PERB Decision No. 2751-M, pp. 32-33 [order to reinstate unlawfully withdrawn proposal, afford union option to accept it, and (if accepted) retroactively provide wage increases]; *Kern County*, *supra*, PERB Decision No. 2659-M, pp. 24-27 [rescinding subcontract and noting that make-whole relief is proper when subcontract causes layoff or subcontractor's employees would have earned more had they been public employees]; *Contra Costa County Fire Protection District* (2019) PERB Decision No. 2632-M, p. 62 [to remedy employer's discriminatory bargaining, damages are based on benefit provided to comparator employee group that did not engage in protected activity]; *Capistrano Unified School District* (2015) PERB Decision No. 2440, pp. 45-53 [reinstatement and back pay for discharge caused in part by refusal to allow union representation] (*Capistrano*); *Pasadena*, *supra*, PERB Order No. Ad-406-M, p. 8 [compensation for extra work estimated based on pay to other employee groups and at other employers]; *San Joaquin Health*, *supra*, PERB Decision No. 1524-M, p. 3 [fees incurred for defense before hospital's medical evaluation committee]; *Los Angeles Unified School District* (2001) PERB Decision No. 1469, p. 11 [back pay and front pay to private sector employee terminated due to school district's violation]; *San Jacinto Unified School District* (1994) PERB Decision No. 1078, p. 4 & adopting proposed decision at pp. 38-39 [overtime due estimated based on average hours worked prior to unilateral change]; *San Mateo City School District* (1984) PERB Decision No. 375a [salaried teachers assigned more work owed extra hourly wages]; *Corning Union High School District* (1984) PERB Decision No. 399, pp. 16-17 [same].)

It is true that, at times, broader remedies are available under California public sector labor relations law, compared to the federal framework governing the private sector. For instance, in *San Francisco II*, *supra*, PERB Decision No. 2858-M, we noted that PERB awards bargaining-related damages without any need for the charging party to show that the respondent's violation was egregious. (*Id*. at p. 16, fn. 9.) As another example, in *Capistrano*, *supra*, PERB Decision No. 2440, pp. 45-53, we explained that PERB's make-whole standard for denial of representational rights is broader than the federal standard, in part because the NLRB altered its earlier precedent. (*Id*. at pp. 48-51.) In other instances, the exact relation of federal and PERB precedent is still less than clear.[20]

Significantly, however, there is no blanket rule that all California public sector remedial standards are necessarily broader than their federal counterparts. While PERB, like the NLRB, learns from experience and regularly reviews its remedial standards (see, e.g., *El Centro*, *supra*, PERB Decision No. 2890-M, pp.19-25 [adopting daily compound interest, in lieu of simple interest, for all monetary awards]), at this juncture we find no cause to deviate from the American Rule on fee shifting.

[20] For instance, we express no opinion as to the circumstances in which we should or should not apply the restriction on certain monetary damages for failure to bargain in good faith that the NLRB explained in *Ex-Cell-O Corp.* (1970) 185 NLRB 107 (*Ex-Cell-O*) [in the absence of a flagrant violation, improper to presume what contract terms employer would have reached via timely, good faith negotiations]. While we have cited *Ex-Cell-O* infrequently and in passing, the decision has drawn criticism (see, e.g., *International Union of Elec., Radio and Mach. Workers, AFL-CIO v. NLRB* (D.C. Cir. 1970) 426 F.2d 1243, 1249) and is potentially subject to further review at the NLRB (see, e.g., *Omni Excavators, Inc.* (2024) 373 NLRB No. 18, p. 4, fn. 8).

B. Application to SEIU's Claims

Applying our existing rule on attorney fees as a litigation sanction, the record does not indicate that the County asserted a frivolous, bad faith defense, and we therefore reject SEIU's attorney fees claim.

However, SEIU seeks other compensation that is consistent with make-whole principles. First, SEIU argues that the County must compensate PAs "for all costs associated with [NCCPA] licensing and testing," including "training and testing," as well as "transportation costs, internet expenses, cell phone expenses, etc." We agree that these categories are compensable to the extent SEIU can establish that the bylaw revision on AHP practice privileges materially increased such costs in a manner that is reasonably feasible to estimate.

Second, SEIU requests that we order compensation for bargaining and representation costs that increased, or which SEIU wasted or diverted, because of the County's violation.[21] We concur that such damages are compensable if they are reasonably feasible to estimate. Examples of damages due to SEIU and/or SEIU-represented employees include, but are not limited to: (1) compensation for wages or leave that SEIU-represented employees lost—or that SEIU reimbursed to employees—due to their efforts to bargain over AHP practice privileges (including reasonable bargaining preparation time) or because of their representational activities to stave off, lessen, remedy, ameliorate, or counteract the County's bargaining violation; and

[21] Notably, the charging party in *County of Santa Clara*, *supra*, PERB Decision No. 2799-M waived such arguments. (*Id*. at p. 28, fn. 14.) Similarly, in other past cases the charging party has not asked for bargaining and representation costs and/or not asked us to delineate what bargaining and representation costs are compensable.

(2) compensation SEIU paid for the purposes just mentioned to its own employees, or to contractors, attorneys, or other professionals (excluding litigation of this case), if such compensation increased, or reflected diverted or wasted resources, resulting in material part from the County's violation.

The parties met only a single time, on September 21, 2020, to discuss the pending bylaw revisions. SEIU's costs for that meeting are compensable, as the County's flat refusal to bargain meant that SEIU wasted resources on a futile meeting that could not serve its critical purpose of good faith bargaining. In compliance proceedings, SEIU has the burden of proving these damages and any other increased bargaining or representation costs, resource diversion, or waste of resources that it claims resulted in material part from the County's violation. For instance, SEIU has the burden of proof to the extent it claims the County's bargaining violation materially caused compensable harm during the parties' later negotiations over PA job specifications, and we express no opinion on that question at this stage.

For SEIU to satisfy its burden as to any damages category, it must establish a reasonably feasible means to estimate compensation. And if the County argues that a reasonable person could not have foreseen that a type of harm might ensue from a violation, the compliance officer shall assess whether the County's showing is sufficient to shield the County, in whole or in part, from that damages category.

ORDER

Based upon the foregoing and the entire record in this case, the Public Employment Relations Board (PERB) finds that the County of Santa Clara violated the Meyers-Milias-Brown Act, Government Code section 3500 et. seq. (MMBA) when its

Board of Supervisors (BOS) voted to approve revisions to the bylaws of the medical staff organization at Santa Clara Valley Healthcare (SCVH), without providing Service Employees International Union Local 521 (SEIU) adequate notice and an opportunity to bargain over the decision and/or the reasonably foreseeable impacts thereof.

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

A. CEASE AND DESIST FROM:

1. Taking adverse employment actions against SEIU-represented physician assistants (PAs) based on their failure to earn or maintain practice privileges, if such failure resulted in material part from the bylaw revisions the BOS approved on December 15, 2020, unless and until the County has bargained in good faith with SEIU over the matter of Allied Health Professional practice privileges and the effects and implementation thereof (to the extent of the discretion held by the County and its BOS), and the County has either: (a) reached agreement with SEIU and used best efforts to take all necessary and prudent steps toward finalizing and implementing all aspects of that agreement; or (b) concluded negotiations because SEIU has failed or refused to bargain in good faith or because the parties have reached a bona fide impasse and exhausted all required or agreed upon impasse resolution procedures.

2. Failing or refusing to afford SEIU adequate notice and opportunity to bargain in good faith over decisions involving mandatory bargaining subjects or bargainable effects of decisions involving non-mandatory bargaining subjects.

3. Interfering with protected union and employee rights.

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

1. Rescind any adverse employment action already taken against any SEIU-represented PA based on failure to earn or maintain practice privileges, if such failure resulted in material part from the bylaw revisions the BOS approved on December 15, 2020; and make whole any SEIU-represented PA who was subject to such adverse action.

2. For the period lasting from September 1, 2020, until the condition set forth in paragraph A(1) is satisfied, make whole SEIU and SEIU-represented County employees for harms resulting in material part from the County's refusal to bargain before its BOS approved practice privilege changes on December 15, 2020. Consistent with this decision, such harms shall include, but not be limited to: (a) extra costs for training, testing, licensing, and associated transportation, internet, or cell phone service that any SEIU-represented PA incurred in material part because of the practice privilege changes in the bylaw revisions; and (b) damages for increased bargaining or representation costs, resource diversion, or waste of resources, resulting in material part from the County's violation.

3. Augment any amounts due under this Order by providing interest accrued to the date of payment at an annual rate of seven percent, compounded daily.

4. Within 10 workdays after this decision is no longer subject to appeal, post at all work locations where notices to SEIU-represented SCVH employees are posted, copies of the Notice attached hereto as an Appendix. An authorized agent of the County must sign the Notice, indicating that the County will

comply with the terms of this Order. The County shall maintain the posting for a period of 30 consecutive workdays. The County shall take reasonable steps to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material. In addition to physically posting this Notice, the County shall communicate it by electronic message, intranet, internet site, and other electronic means the County uses to communicate with SEIU-represented SCVH employees.[22]

5. Notify OGC of the actions the City has taken to follow this Order by providing written reports as directed by OGC and concurrently serving such reports on SEIU.

Chair Banks and Member Paulson joined in this Decision.

[22] Either party may ask PERB's Office of the General Counsel (OGC) to alter or extend the posting period, require further notice methods, or otherwise supplement or adjust this Order to ensure adequate notice. Upon receipt of such a request, OGC shall solicit input from all parties and, if warranted, provide amended instructions to ensure adequate notice.

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-1859-M, *Service Employees International Union Local 521 v. County of Santa Clara*, in which all parties had the right to participate, the Public Employment Relations Board found that the County of Santa Clara violated the Meyers-Milias-Brown Act, Government Code section 3500 et seq. (MMBA) when our Board of Supervisors (BOS) voted to approve revisions to the bylaws of the medical staff organization at Santa Clara Valley Healthcare, without providing Service Employees International Union Local 521 (SEIU) adequate notice and an opportunity to bargain over the decision and/or the reasonably foreseeable impacts thereof.

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

A. CEASE AND DESIST FROM:

1. Taking adverse employment actions against SEIU-represented physician assistants (PAs) based on their failure to earn or maintain practice privileges, if such failure resulted in material part from the bylaw revisions the BOS approved on December 15, 2020, unless and until we have bargained in good faith with SEIU over the matter of Allied Health Professional practice privileges and the effects and implementation thereof (to the extent of our discretion), and we have either: (a) reached agreement with SEIU and used best efforts to take all necessary and prudent steps toward finalizing and implementing all aspects of that agreement; or (b) concluded negotiations because SEIU has failed or refused to bargain in good faith or because the parties have reached a bona fide impasse and exhausted all required or agreed upon impasse resolution procedures.

2. Failing or refusing to afford SEIU adequate notice and opportunity to bargain in good faith over decisions involving mandatory bargaining subjects or bargainable effects of decisions involving non-mandatory bargaining subjects.

3. Interfering with protected union and employee rights.

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

1. Rescind any adverse employment action already taken against any SEIU-represented PA based on failure to earn or maintain practice privileges, if such failure resulted in material part from the bylaw revisions the BOS approved on December 15, 2020; and make whole any SEIU-represented PA who was subject to such adverse action.

2. For the period lasting from September 1, 2020, until the condition set forth in paragraph A(1) is satisfied, make whole SEIU and SEIU-represented County employees for harms resulting in material part from our refusal to bargain before the BOS approved practice privilege changes on December 15, 2020, including:

(a) extra costs for training, testing, licensing, and associated transportation, internet, or cell phone service that any SEIU-represented PA incurred in material part because of the practice privilege changes; and

(b) damages for increased bargaining or representation costs, resource diversion, or waste of resources, resulting in material part from the County's violation.

3. Augment any amounts due by providing interest accrued to the date of payment at an annual rate of seven percent, compounded daily.

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.