**STATE OF CALIFORNIA**
**DECISION OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| PASADENA MANAGEMENT ASSOCIATION,<br><br>Charging Party,<br><br>v.<br><br>CITY OF PASADENA,<br><br>Respondent. | Case No. LA-CE-574-M<br><br>Administrative Appeal<br><br>PERB Order No. Ad-406-M<br><br>January 28, 2014 |

Appearances: Jeffrey W. Natke, Attorney, for Pasadena Management Association; Liebert Cassidy Whitmore by Bruce A. Barsook and Jennifer M. Rosner, Attorneys, for City of Pasadena.

Before Martinez, Chair; Huguenin and Banks, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the City of Pasadena (City) to the attached decision (Decision) of a PERB Board agent. The Decision determined that the City has not complied with the Board's previous order, in *City of Pasadena* (2011) PERB Decision No. HO-U-1023-M, for the City to compensate its underground crew supervisors with back pay and interest for financial losses suffered as a result of an on-call rotation schedule, which the City unilaterally implemented, in violation of the Meyers-Milias-Brown Act (MMBA or Act), Government Code sections 3503, 3505 and 3506.[1]

The City now advances several arguments as to why the underground supervisors affected by the on-call rotation schedule incurred no financial losses, and thus why no amount of back pay is appropriate. The Pasadena Management Association (PMA) is the exclusive

[1] The MMBA is codified at Government Code sections 3500 et seq.

representative of the underground supervisors and was the charging party in the underlying unfair practice proceedings. PMA disputes each of the City's arguments and proposes three alternative formulas for determining the appropriate amount of back pay. PMA also argues that the City's brief in opposition to the Decision was untimely filed and should therefore not be considered.

We hold that the City's brief was not a "statement of exceptions" subject to the 20-day time limit prescribed by PERB Regulations 32980, subdivision (c), and 32300, but an appeal of an administrative decision, subject to the 10-day timeline prescribed by PERB Regulations 32350 and 23260.[2] Nevertheless, under the circumstances of this case, we find good cause to excuse the City's untimely-filed brief. We agree, however, with PMA that several of the arguments included in the City's brief are either time-barred or, more precisely, precluded from consideration at this stage of the proceedings because the City did not previously except to the findings of fact and conclusions of law included in *City of Pasadena, supra*, PERB Decision No. HO-U-1023-M. To the extent we consider the arguments raised by the City's brief, we find no merit in them and adopt the back pay computation method used in the Decision, subject to the following discussion.

## PROCEDURAL HISTORY

On November 9, 2009, PMA filed the underlying unfair practice charge in this case. On December 1, 2010, PERB's Office of the General Counsel issued a complaint, which alleged that, on or about September 2, 2009, the City had unilaterally changed its policy for contacting and assigning underground supervisors during off-duty hours to respond to emergencies involving underground power lines. The essence of the policy change, as alleged

[2] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

in the complaint, was that the City eliminated its roster call-out procedure, whereby a dispatcher would attempt to contact each underground supervisor on the roster until one of the qualified employees was able and willing to respond to an emergency, and in its place implemented a stand-by call-out procedure (also referred to as an "on-call rotation schedule"), whereby underground supervisors were individually assigned to respond to emergencies occurring during a designated time frame.

After a two-day hearing, a PERB administrative law judge (ALJ) issued a proposed decision on October 27, 2011, which concluded that, by replacing the roster call-out procedure with the on-call rotation schedule, the City had unilaterally altered its policy for contacting and assigning underground supervisors to respond to emergencies occurring during their off-duty hours, in violation of the MMBA. The ALJ specifically found that no employees were disciplined under the previous roster system, even when they failed to return telephone messages requesting that they respond to an emergency. Under the roster call-out procedure when an underground supervisor failed to respond to a call, the dispatcher simply moved to the next individual on the City's roster of qualified employees, and continued to do so, until an underground supervisor responded who was able *and willing* to respond to the emergency.

By contrast, the ALJ noted that a September 2, 2009 memo announcing the newly-implemented stand-by call out schedule informed employees that participation in the stand-by rotation schedule was "mandatory," and that, "[f]ailure to respond to an outage as directed is considered dereliction of duty and insubordination." While the stand-by call-out schedule included no "fixed" or specified time period in which underground supervisors were required to respond to an emergency call, the ALJ found that they were, nonetheless, required to respond and could face disciplinary action if they failed to do so.

Additionally, the ALJ found that, whereas under the previous roster system, "no single employee was responsible for answering and responding to a specific call from the City dispatcher," under the newly-implemented stand-by rotation schedule, "one unit member at a time was primarily responsible for responding to all after-hours calls." The ALJ concluded that this additional element of individual accountability for employees assigned to the on-call rotation "fundamentally altered the process for distributing after-hours assignments," and that the effect of this change on unit members constituted a "significant and adverse change to working conditions."

In its post-hearing brief, the City asserted that underground supervisors were already required, as part of their existing job duties, to respond to emergencies whenever necessary, including during their off-duty hours. However, the ALJ specifically considered and rejected this argument. He reasoned that the policy change at issue in this case affected *how* the City notified and assigned off-duty employees to respond to emergencies, not whether underground supervisors were assigned new or additional job duties. The ALJ observed that, "although unit members in the Underground division were expected to respond to after-hours power outages," under the previous roster call-out procedures, "no single employee was responsible for answering and responding to a specific all from the City dispatcher." Consequently, "unit members in the Underground division occasionally did not report for duty even after receiving a call," yet "[n]one of these employees were disciplined." By contrast, under the standby rotation schedule, "one unit member at a time was primarily responsible for responding to all after-hours calls" and, by the City's own admission, an employee's "failure to respond to an outage as directed" would be "considered dereliction of duty and insubordination."

The ALJ's proposed decision included a remedial order which, among other things, required the City to make whole the affected underground supervisors by compensating them

with back pay, plus interest, for financial losses, if any, suffered as a direct result of the City's unilateral change from the roster call-out policy to the stand-by call-out policy. The proposed decision did not include a specific formula or method for computing the amount of back pay owed.

Neither party filed exceptions to the proposed decision within the 20 calendar days from the date of the proposed decision, as prescribed by PERB Regulation 32300. Accordingly, on November 23, 2011, it was designated *City of Pasadena, supra,* PERB Decision No. HO-U-1023-M and became final and binding on the parties.

In response to inquiries from PERB's Office of the General Counsel, on November 23 and December 20, 2011, the City filed initial and follow-up statements of compliance. The City's statements of compliance either failed to specify what measures had been taken to comply with the back pay award ordered by *City of Pasadena, supra,* PERB Decision No. HO-U-1023-M, or asserted that no amount of back pay was owed, because none of the affected employees suffered financial loss while assigned to the stand-by call-out procedure. In support of its position, the City asserted that PMA had presented no quantitative evidence or testimony as to the amounts of monetary loss incurred by the underground supervisors, and, consequently, that any award of "damages" would be too "speculative."

On January 4, 2012, PMA filed a statement with PERB, which identified four underground supervisors affected by the unilateral policy change and which asserted that each identified employee was owed back pay calculated at "time-and-a-half compensation (i.e. their overtime rate) for all off-duty hours served" over the course of the 27-month period when the stand-by schedule was in effect, plus interest computed at 7 percent.

On March 8, 2012, a Board agent conducted a status conference with the parties to determine whether the City had complied with the remedy specified in *City of Pasadena,*

*supra,* PERB Decision No. HO-U-1023-M, including that portion of the decision ordering back pay, if any, to the affected employees. The record does not indicate whether this "status" conference was designated or convened as an "inquiry" or "investigation," nor whether, in addition to the Board agent's fact-finding role, any attempt was made at this time to propose or mediate a settlement of any outstanding issues between the parties. However, at the Board agent's request, on April 23, 2012, the parties provided a stipulation of facts, which listed the number of hours each of the four underground supervisors identified by PMA had been assigned to "stand-by" duty before the unilaterally-imposed policy was rescinded. On May 1, 2012, the parties filed an amended stipulation of facts, which identified the applicable pay rates for each affected employee throughout the period when the unlawful policy was in effect. The parties further agreed that the back pay issues in dispute could be decided without a hearing on the basis of the above stipulated facts.

Following the submission of briefs on or about June 26, 2012, on September 10, 2012, the Office of the General Counsel issued its Decision, which was designated a "proposed decision." The cover letter accompanying the Decision instructed the parties that any "statement of exceptions to the proposed decision" should be filed within *20 days*, and in accordance with PERB's regulation governing *exceptions* to proposed decisions. However, the Decision itself informed the parties that any "appeal" from the decision to the Board itself should be filed in accordance with the *10-day* timeline and procedures specified in PERB Regulation 32360 for processing *appeals* from "administrative decisions."

On September 18, 2012, the Office of the General Counsel issued a notice of errata and additional instructions to the parties, which specified that any "statement of exceptions" to the Decision should be so designated and filed within the *20-day* timeline specified in PERB Regulation 32300.

On October 5, 2012, the City filed and served a brief captioned "Statement of Exceptions to Administrative Law Judge's Proposed Decision Dated September 10, 2012." The City's brief included four enumerated "exceptions."

On October 17, 2012, PMA filed its response, which PMA styled as a "Response to the City's Administrative Appeal," and which argued, that the City's brief should be rejected as untimely under the 10-day deadline for filing appeals from administrative decisions.

## THE BOARD AGENT'S DECISION

The Decision included findings of fact from the parties' stipulations and *City of Pasadena, supra,* PERB Decision No. HO-U-1023-M. It identified by name the four underground supervisors affected by the stand-by schedule and indicated for each employee the number of hours assigned to stand-by duty and their regular hourly rates of pay, as stipulated by the parties.

The Decision identified two issues: whether any employees represented by PMA had suffered financial loss as a direct result of the City's unilateral adoption of the stand-by schedule, and how the amount(s) of such loss, if any, should be calculated.

The Decision also included several conclusions of law. Foremost among these was the conclusion that, although "off-duty," the underground supervisors performed a service for the City while they were assigned to remain on stand-by for emergencies. The Decision noted that, while assigned to the stand-by rotation schedule, underground supervisors were required to stay geographically close to City facilities, remain in a constant "work-ready" state, and respond to any calls on a City-issued pager which the employees were required to carry and maintain at all times during their assigned stand-by shifts. The Decision characterized these responsibilities as "*mandatory additional duties* for which [the employees] were not paid"

(original emphasis), and concluded that, the affected employees had suffered financial loss as a direct result of the City's unlawful unilateral change in emergency response procedures.

The Decision considered and rejected what it characterized as the City's "uncertainty defense," i.e., the assertion that any amount of back pay would be too uncertain and speculative to include in an award. The Decision noted that any uncertainty as to the appropriate amount of back pay owed to the affected employees was due to the City's own failure to fulfill its bargaining obligation, and thus should not serve as a reason to absolve the City of liability for its unlawful conduct. While acknowledging that it would be "impossible to know with certainty what amount of compensation the parties may have agreed to had they participated in negotiations as required by law," the Decision concluded that *some* amount of compensation must be awarded to compensate employees for the financial loss of performing "extra work" or additional tasks assigned during off-duty hours, as a result of the City's change in emergency response procedures.

After rejecting PMA's suggestion that back pay be calculated at either time-and-one half or at each employee's regular hourly rates of pay for all hours assigned to the stand-by schedule, the Decision determined that the appropriate formula was to compensate employees at 35 percent of their regular hourly rate for all hours assigned to the stand-by schedule. This figure was arrived at as a rough average of the formulas for on-call compensation included in collective bargaining agreements for employees in other jurisdictions, including bargaining units of managers and certain non-exempt electrical distribution employees in the City and the nearby cities of Glendale and Burbank. The Board agent relied on private-sector authority for the use of alternative methods for computing back pay, including "reasonable approximations and averages," when more traditional methods of determining back pay are unavailable or impractical. (*NLRB Case Handling Manual, Part Three, Compliance Proceedings (NLRB*

*Compliance)*[3], *§§ 10540, 10548*; *Intermountain Rural Elec. Assn.* (1995) 317 NLRB 588, 588-589; *Great Lakes Chemical Corp.* (1997) 323 NLRB 749, 756.)

The Decision also explained that the formula used to calculate back pay should reflect an hourly increase received by each of the affected employees, beginning on or about January 4, 2010, i.e., during the 27-month period when the unilaterally-adopted policy was in effect. The amounts of each employee's hourly pay rates, including the January 2010 salary increase, were included in the parties' stipulation.

## DISCUSSION

### PMA's Timeliness Objections

Because they affect whether the Board should consider the City's arguments at all, we first address PMA's timeliness objections before proceeding to the substantive arguments raised in the parties' briefs. PMA asserts two reasons why the City's arguments are time-barred and/or should not be considered. First, PMA correctly notes that, if considered an administrative appeal, which is subject to the 10-day timeline specified by PERB Regulations 32980, subdivision (b), and 32360, plus the 5-day extension of time for service by mail pursuant to PERB Regulation 32130, subdivision (c), the City's brief was untimely, because it was not filed until October 5, 2012—more than 15 days after the Decision issued on September 10, 2012. Additionally, even if September 18, 2012 is considered the date the Decision—in its corrected form—was ultimately "issued," the City's brief would still be untimely, since it was not filed within the 10 days required for appealing an administrative

[3] The compliance provisions of the National Labor Relations Board's (NLRB) Case Handling Manual are available at: http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1727/CHMIII-2013.pdf

decision plus 5 additional days for service by mail. PMA also correctly observes that the City has not asserted any grounds for finding "good cause" to excuse a late filing in this case.

Second, PMA observes that, "to the extent the City is really trying to appeal [*City of Pasadena, supra*, PERB Decision No. HO-U-1023-M] itself, which awarded back-pay and interest," the arguments included in the City's brief are also "time-barred," because the factual and legal issues previously determined by the ALJ became final under Regulation 32305, as of November 23, 2011. As explained below, we understand PMA's second argument to assert not so much an issue of timeliness, as whether a matter that has already been decided and not appealed is procedurally precluded from reconsideration by PERB regulations and/or by the law of the case doctrine. We therefore discuss this issue below, separate from the issue of timeliness.

PERB Regulation 32980 governs decisions regarding compliance matters and appeals therefrom. Subdivision (a) of the regulation authorizes the General Counsel or his/her designate to "conduct an inquiry, informal conference, investigation, or hearing, as appropriate, concerning any compliance matter." Subdivisions (b) and (c) of the regulation clearly set forth the different procedures and different timelines for appealing an adverse decision involving compliance issues to the Board itself, depending upon whether the decision being appealed is an "administrative decision based on an investigation" or a "proposed decision based on a hearing." Specifically, subdivision (b) states that, "[i]f an administrative decision based on an investigation is issued, the decision may be appealed to the Board itself pursuant to Chapter 1, Subchapter 4, Article 3 of these regulations," which contains PERB's regulations governing *administrative appeals,* and which specifies *a 10-day* deadline for filing and serving such appeals. Conversely, subdivision (c) of PERB Regulation 32980 states that, "[i]f a proposed decision based on a hearing is issued, the decision may be appealed to the Board itself pursuant to Chapter 1,

Subchapter 4, Article 2 of these regulations," which is the article governing *exceptions* to a Board agent's *proposed* decision, and which requires that exceptions be filed and served *within 20 days of the proposed decision.*

In the present matter, no notice of hearing was issued and no hearing was convened in accordance with PERB regulations. By default, the compliance proceedings conducted by the Board agent were therefore an "investigation" resulting in an "administrative decision," rather than a "proposed decision" pursuant to PERB Regulation 32215. Although PERB Regulation 32207 permits parties to submit stipulated facts in *lieu* of a hearing, because no notice of hearing ever issued, Chapter 1, Subchapter 3 of PERB's regulations, which govern hearings and proposed decisions resulting from hearings, never came into play. Accordingly, pursuant to PERB Regulation 32980, subdivision (b), the Decision should have been deemed an "administrative" decision and any appeal therefrom should have been filed within 10-day time limit governing "administrative appeals." Because the City's brief was not filed within this time period, PMA is correct that it was untimely.

However, pursuant to PERB Regulation 32136, the Board may excuse a late filing for "good cause." The Board has generally found good cause when the explanation for the late filing was "reasonable and credible" and the delay did not cause prejudice to any party. (*Barstow Unified School District* (1996) PERB Order No. Ad-277.) For example, the Board has excused late filings caused by "honest mistakes," such as mailing or clerical errors. (See *Regents of the University of California* (2012) PERB Order No. Ad-396-H, pp. 2-3, and cases cited therein.) Because the Office of the General Counsel gave conflicting, and incorrect instructions to the parties, and because PMA has offered no evidence that it was prejudiced by the City's delay in filing its brief, the Board finds "good cause" and will accept the City's brief.

We next turn to the merits of the City's appeal. We first review the scope of the Board's authority to make remedial orders and then consider the grounds raised by the City for challenging the Decision.

The Board's Remedial Authority

MMBA section 3509 grants PERB broad authority to investigate, adjudicate and remedy unfair practices, as the Board deems necessary to effectuate the policies and purposes of the Act. Generally, an administrative agency's remedial orders will not be disturbed by a reviewing court "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." (*Virginia Elec. & Power Co. v. NLRB* (1943) 319 U.S. 533, 540; *Santa Monica Community College Dist. v. Public Employment Relations Bd.* (1980) 112 Cal.App.3d 684 (*Santa Monica CCD*); *J.R. Norton Co. v. Agricultural Labor Relations Bd.* (1987) 192 Cal.App.3d 874.)

In addition to a cease-and-desist order and posting requirement, the standard remedy for an employer's unilateral change is to order the employer to rescind the new or changed policy, to bargain with the exclusive representative upon request, and to make affected employees whole for any losses incurred as a result of the unlawful conduct. (*California State Employees' Assn. v. Public Employment Relations Bd.* (1996) 51 Cal.App.4th 923, 946.) When employees' work time is increased without a proportionate increase in pay, the employees are being paid less per unit of time worked than previously bargained for. In such circumstances, it is appropriate to make the affected employees whole for any additional time worked as a result of the unlawful action, either through compensatory time off, an award of back pay, or some combination thereof, as may be appropriate to the circumstances. (*Mark Twain Union Elementary School District* (2003) PERB Decision

No. 1548 (*Mark Twain*); *Oak Grove School District* (1986) PERB Decision No. 582; *Fountain Valley Elementary School District* (1987) PERB Decision No. 625.)

As with other remedies available to the Board, its leeway in computing back pay awards is fairly broad. So long as they have a rational basis and are not so excessive as to be punitive, back pay awards may appropriately serve both compensatory and deterrent functions. (*Mark Twain, supra,* PERB Decision No. 1548; *State of California (Secretary of State)* (1990) PERB Decision No. 812-S; see also *NLRB Compliance*, § 10536.1.) That is, they both reimburse employees for losses incurred as the result of an unfair practice and reduce an employer's financial incentive for refusing to honor its statutory duty to bargain collectively, by ensuring that the respondent does not retain the fruits of its wrongful conduct. (*Bertuccio v. Agricultural Labor Relations Bd.* (1988) 202 Cal.App.3d 1369, 1390-1391; *International Union of Electrical, Radio & Machine Workers v. NLRB* (*Tiidee Products I*) (D.C. Cir. 1970) 426 F.2d 1243.)

In determining the appropriate measure of damages, a back pay award should restore the economic status quo that would have obtained but for the respondent's wrongful act. (*Santa Clara Unified School District* (1979) PERB Decision No. 104, pp. 26-27.) The scope of the agency's authority thus includes "measures designed 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. (*Franks v. Bowman Transp. Co.* (1976) 424 U.S. 747, 769; *NLRB v. J. H. Rutter-Rex Mfg. Co.* (1969) 396 U.S. 258, 263; see also *Los Gatos Joint Union High School District* (1980) PERB Decision No. 120 (*Los Gatos*), p. 4, fn. 3.)

The Board may not sit in judgment of the substantive terms agreed to by parties, nor impose its own contractual terms, however desirable or reasonable they may appear to the

Board. (*Dublin Professional Fire Fighters v. Valley Community Services Dist.* (1975) 45 Cal.App.3d 116, 119; *Los Angeles County Employees Assn., Local 660 v. County of Los Angeles* (1973) 33 Cal.App.3d 1, 8 (*County of Los Angeles*); *H. K. Porter Co. v. NLRB* (1970) 397 U.S. 99, 106 (*H. K. Porter*).) However, absolute certainty is not required for computing the appropriate amount of back pay necessary to remedy unfair practices. A back pay award inevitably involves some ambiguity and estimation and is therefore "only an approximation, necessitated by the employer's wrongful conduct." (*Cobb Mechanical Contractors* (2001) 333 NLRB 1168, quoting *Bagel Bakers Council of Greater New York v. NLRB* (2d Cir. 1977) 555 F.2d 304, 305; *Los Gatos, supra*, PERB Decision No. 120, p. 4, fn. 3.) It follows from the rule prohibiting the Board from imposing contract terms that back pay cannot be awarded in cases involving bad faith bargaining because there is no objective way of determining what the parties would have agreed to, had they bargained in good faith. (*Ex-Cell-O Corp.* (1970) 185 NLRB 107; *H. K. Porter.*) The same is not true, however, in cases involving unilateral changes, where the employer's unilaterally implemented policy or practice provides some objective measure against the previous status quo, even if the precise measure of damages that resulted from the change may require estimates or approximations. (*Corning Union High School District* (1984) PERB Decision No. 399, pp. 7-8.)

Finally, pursuant to PERB's regulations and general principles of orderly process, parties are not free to use compliance proceedings to re-litigate factual issues previously decided in the same action. PERB recognizes and adheres to the policy that litigation shall not be had in a piecemeal fashion, so that when a party has a particular claim or defense in a pending cause of action, it must assert it in those proceedings, or it will be waived. (*Brawley Union High School District* (1983) PERB Decision No. 266a, pp. 3-4.)

The City's Grounds for Appeal

Whether the Stand-By Rotation Schedule Involved Additional Duties.

The City first disputes the Decision's finding that "the affected employees . . . were forced to perform *mandatory additional duties* for which they were not paid." (Original emphasis.) According to the City, under the previous roster call-out procedure, the underground supervisors were already required during their off-duty hours to stay close to City facilities, to remain in a work-ready state, to carry a City-issued pager, and to respond to pages regarding emergency situations. The City thus objects to this finding in the decision because, it asserts, "the evidence shows that placing [u]nderground [c]rew [s]upervisors on a stand-by rotation schedule did not subject them to additional duties."

We decline to pass on the merits of this argument, pursuant to PERB Regulation 32300, subdivision (c), which requires that exceptions to a proposed decision be timely raised, or else they are waived in subsequent proceedings before the Board. In the underlying decision in this case, *City of Pasadena, supra,* PERB Decision No. HO-U-1023-M, the ALJ determined that the City's change in practice from the roster call-out procedure to the stand-by call-out schedule "fundamentally altered *the process for distributing after-hours assignments*, including overtime assignments," and, that "the fact that unit members could no longer simply decline to respond to a dispatch call *demonstrates a significant and adverse change to working conditions*." (Emphasis added.)

In the ALJ's view, this change in the established practice was not merely tangential or *de minimus* because of the qualitatively different nature or degree of individual employee accountability that was introduced by the stand-by call-out procedure, and because, by the City's own admission, disciplinary action would result for an employee's failure to respond to an emergency dispatch after the new procedure went into place. In arriving at this conclusion,

the ALJ expressly considered and rejected the City's argument that underground supervisors were already required to respond to emergencies, either by the previous roster call-out procedure, or as a consequence of the City's discretion to assign new job duties reasonably encompassed by the underground supervisor classification. However, the ALJ reasoned that "The primary issue in this case is not whether unit members were assigned new job duties, but whether the City unilaterally changed the process for assigning work to unit members."

Thus, the finding of liability for a unilateral change in this case was not based on a theory of newly-added duties which were not reasonably comprehended by the existing classification, but on the ALJ's conclusion that additional and significant responsibilities or burdens were placed on employees during their "off-duty" hours as a result of the unilateral change in the City's emergency response assignment procedures. Underlying the ALJ's conclusion is the premise, which lies at the heart of the MMBA, that the employees' representative may have wished to bargain for some form of additional compensation, or for alternatives to the change in emergency response procedures, but that it was unable to do so, given the City's decision to implement those procedures without notice and reasonable opportunity for bargaining. (*County of Santa Clara* (2013) PERB Decision No. 2321-M; see also *NLRB v. Katz* (1962) 369 U.S. 736; *San Francisco Community College District* (1979) PERB Decision No. 105.)

The City filed no exceptions to the ALJ's proposed decision and, consequently, on November 23, 2011, that decision became final and binding on the parties to this case. (PERB Reg. 32305.) Under PERB Regulation 32300, subdivision (c), the City is not now free to re-litigate legal or factual issues previously decided in this case, absent "extraordinary circumstances," such as newly-discovered evidence or an intervening change in law, that would justify reconsideration of the ALJ's decision, pursuant to PERB Regulation 32410. The

City has pointed to no such "extraordinary circumstances" or any other reasons that would excuse the untimeliness of a request for reconsideration made more than 20 days after *City of Pasadena, supra*, PERB Decision No. HO-U-1023-M became final on November 23, 2011. Although the Board may consider a legal or factual issue which a party has failed to raise in a timely-filed exception (*Rio Hondo Community College District* (1979) PERB Decision No. 87, p. 3, fn. 3), it generally refrains from doing so, unless necessary to prevent an error of law or manifest injustice. (*Apple Valley Unified School District* (1990) PERB Order No. Ad-209a; *Mt. Diablo Unified School District* (1983) PERB Decision No. 373; *Fresno Unified School District* (1982) PERB Decision No. 208.) However, the City has cited no facts to suggest that the Board must disturb the finality of PERB Decision No. HO-U-1023-M in order to prevent an error of law or manifest injustice. Accordingly, we reject this argument.

Whether Employee Organizations May Bargain for Premium Pay Rates or Other Forms of Compensation Not Required by Substantive Wage and Hour Laws.

The City next disputes that *any* amount of back pay is owed to the underground supervisors because they are "exempt" employees, i.e., not subject to state or federal overtime laws, and because they allegedly performed no actual "work" while on stand-by. Both arguments lack merit.

First, we reject the City's contention that, as "exempt" employees, who were ostensibly already required to respond to emergencies during their off-duty hours, the underground supervisors suffered no financial loss as a result of the unilaterally-implemented rotation schedule. As explained above, *City of Pasadena, supra,* PERB Decision No. HO-U-1023-M determined that, as a result of the change in emergency response procedures, underground supervisors faced disciplinary action for their failure to respond to an emergency dispatch, whereas under the previous "roster call-out" procedure, no underground supervisors had faced

disciplinary action, even when they declined to respond to a dispatch. Even assuming that underground supervisors were, by virtue of their "exempt" status, "obligated" to respond to emergencies during their off-duty hours, the additional element of individual employee accountability, backed up by the threat of disciplinary action, constituted a new and significant responsibility for underground supervisors during their "off-duty" hours. Whether characterized as new duties or additional burdens on their existing off-duty hours, these facts formed the basis for the ALJ's finding of liability in PERB Decision No. HO-U-1023-M and, because the City filed no timely exceptions, we see no reason to disturb the Board agent's reliance on these same factual findings as the basis for computing the amount of back pay owed. In short, we need not determine that the City's change in emergency response procedures transformed *entirely* duty-free time into compensable "hours worked" within the meaning of state or federal wage and hour laws to uphold both the City's liability, as determined in PERB Decision No. HO-U-1023-M, and the back pay award computed in the subsequent Decision.

In *Healdsburg Union Elementary School District* (1994) PERB Decision No. 1033, the Board concluded that an employer had breached its duty to bargain when it unilaterally implemented a policy requiring kindergarten teachers to be present in their classrooms and to supervise students from 7:50 to 8:05 a.m., whereas previously the teachers had been on site, but had used the fifteen minutes immediately preceding classroom instruction as they saw fit. Because the additional burdens imposed on the teachers during the previously unstructured time had an effect on the length of the teacher's workday and/or the amount of work performed per unit of time, the employer's change in policy was negotiable. As part of the remedy in *Healdsburg*, PERB ordered the employer to provide the affected teachers with compensatory time off corresponding to the amount of additional hours worked as a result of the newly-implemented policy or, in the event the parties could not agree on the manner in which to

provide compensatory time, an award of back pay commensurate with the extra hours worked, plus interest. (*Id.* at pp. 11-12.) Although the appropriate "make whole" remedy for employees whose hours of work have increased as the result of a unilateral change may entail either compensatory time off, back pay, or some combination thereof (*Mark Twain, supra*, PERB Decision No. 1548, pp. 6-9), in the present case neither party has requested compensatory time off in lieu of back pay, and we find nothing objectionable in the Decision's exclusive focus on back pay as the appropriate "make whole" alternative under the circumstances.

Thus, whether underground supervisors have ever previously received premium pay rates for "overtime" while being "on call" is not determinative of whether they are entitled to back pay in the present circumstances. As explained in *City of Pasadena, supra,* PERB Decision No. HO-U-1023-M, the City sufficiently altered the nature of being "on call," when it unilaterally abandoned the previous roster call-out procedure and adopted in its place the on-call rotation schedule which had a "significant and adverse effect" on employee working conditions. The ALJ in PERB Decision No. HO-U-1023-M did not consider or decide the case on a theory that the City implemented new or changed overtime compensation policies. Rather, he determined that the newly-implemented on-call rotation schedule was a "significant and adverse" change from the previous roster call-out procedure.

The Decision likewise considered *but rejected* PMA's argument that overtime pay rates constituted the appropriate measure of damages for all time underground supervisors were assigned to the rotation schedule. Instead, the Decision looked to collectively-bargained terms affecting other bargaining units, both within the City's employ and in surrounding municipalities, to come to an approximate measure of the back pay necessary to make the underground supervisors whole. The City's reference to "overtime" is therefore both legally and factually irrelevant to any issues presented by the Decision.

The City similarly asserts that, under the Fair Labor Standards Act (FLSA), "even non-exempt employees do not automatically receive pay for being on stand-by." It asserts that federal law looks to two factors to determine whether time spent "on call" is compensable under the FLSA: (1) the degree to which the employee is free to engage in personal activities; and (2) the agreement between the parties. The City raised substantially the same arguments in its post-hearing brief, which were considered and rejected in *City of Pasadena, supra,* PERB Decision No. HO-U-1023-M. The wage and hour standards included in state and federal laws impose substantive minima below which employers and employee organizations may not bargain. Employers and employee organizations may bargain for wage and hour standards that *meet or exceed* the minimum standards of wage and hour laws. (*Barrentine v. Arkansas-Best Freight System, Inc.* (1981) 450 U.S. 728; *Livadas v. Bradshaw* (1994) 512 U.S. 107.) In fact, in its post-hearing brief, the City admitted that, while the underground supervisors are "exempt from overtime provisions of the Fair Labor Standards Act . . . as a result of prior negotiations with PMA, the City provides these employees overtime at a rate of time and one-half for all hours worked in response to work-related emergencies which occur beyond an employee's regular work schedule."

In any event, we are not concerned with enforcing the substantive rights of wage and hour laws. We are concerned with enforcing the *procedural* rights of the employees' representative to *bargain over whether* there shall be compensation and, if so, how it shall be calculated when the nature and degree of "personal time" afforded employees is fundamentally altered by a change in the employer's "on call" emergency response procedures. *City of Pasadena, supra,* PERB Decision No. HO-U-1023-M holds that such issues are indeed not "automatic," and that they must be bargained by public employers with the designated representatives of their employees. The City's failure to grasp that point has resulted in its

liability for back pay to the employees, which the Board agent in this case has done her best to calculate after the fact.

Although stated separately, the City raises a variant of the above argument, when it asserts that underground crew supervisors were "always subject to emergency call outs 24 hours, 7 days a week," and were therefore not subjected to any "additional duties" when the City unilaterally imposed the on call rotation schedule. We reject this argument for the reasons explained above.

Whether the Burdens Imposed by the City's On-Call Rotation Schedule Were Included in the Employees' Previously-Negotiated Salary Structure and Whether a PERB Back Pay Award Interferes with the City's Authority to Determine Employee Compensation.

The City also argues that computing a back pay award based on what could have been negotiated between the parties is improper, because it interferes with state constitutional provisions granting public agencies sole authority to determine the compensation of their employees. We reject this argument as well.

It is well settled that general laws seeking to accomplish an objective of statewide concern may prevail over conflicting local regulations, even if they impinge to some extent on aspects of local control. (*Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276; *Baggett v. Gates* (1982) 32 Cal.3d 128, 140.) Because labor unrest and strikes produce consequences that extend far beyond local boundaries, the Legislature may adopt statewide standards for uniform fair labor practices, notwithstanding the constitutionally-guaranteed authority of local entities to set employee compensation. (*Ibid.*)

Accordingly, in *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591 (*Seal Beach*), the California Supreme Court upheld the constitutionality of the MMBA's requirement that local agencies meet and confer with the exclusive representatives of their employees *before* determining employee compensation. As explained

in *Seal Beach* "While the Legislature established a *procedure* for resolving disputes regarding wages, hours and other conditions of employment, it did not attempt to establish *standards* for the wages, hours and other terms and conditions themselves." (*Id.* at p. 597, emphasis added.) Under *Seal Beach*, public employers are thus free to exercise their constitutional authority to determine terms and conditions of employment, so long as they fulfill their obligations to bargain collectively with the representatives of their employees.

The City's citation to *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278 (*County of Riverside*) is therefore misplaced. In that case, the Supreme Court struck down as unconstitutional a statute requiring counties to submit to binding arbitration unresolved issues arising in negotiations with fire fighters and police officers. *County of Riverside* was thus concerned with whether a third party may compel a public employer to adhere to *substantive, contractual* obligations on a prospective basis. The case did not address, much less did it reject, PERB's well-settled *remedial* authority to order an award of back pay for a public employer's violation of its duty to bargain under the MMBA. As explained in *County of Riverside*, the line drawn by the Supreme Court is between the authority of the Legislature to regulate labor relations and unconstitutional acts that would divest local agencies *entirely* of their authority to set employee compensation. (*Id.* at p. 287; see also *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 317.) In short, so long as the Legislature does not seek to impose *substantive* standards concerning employee wages, hours or working conditions, it may appropriately delegate its authority to PERB to administer and enforce the MMBA's *procedural* requirements for collective bargaining, which includes the authority to remedy unfair practices through back pay awards. (*Seal Beach, supra*, 36 Cal.3d 591, 597; *County of Los Angeles, supra*, 33 Cal.App.3d 1, 8.)

The Decision's back pay award is entirely consistent with the constitutional boundaries explained in *Seal Beach*, *County of Riverside* and other cases. Far from usurping the City's authority to set employee compensation, the Decision expressly relies on the hourly wage rates previously set *by the City* for calculating the amount of back pay owed to each affected employee. The Decision does not seek to compel the City to pay compensation at hourly rates or in amounts different from the terms that the City has already agreed to, as indicated in the parties' stipulation. Thus, the Decision does not, as the City claims, "improperly impose[] an overtime pay schedule on the City," nor "deprive[] it of the ability to set the compensation for its employees."

Nor does the Decision seek to award back pay beyond the period of liability determined by the ALJ or at any other time which would impair the City's ability to determine employee compensation or other substantive standards on a prospective basis. The City is free to bargain collectively with PMA for any future wages or wage rates, consistent with its obligations under the MMBA. In short, because the back pay award does not impose a prospective *substantive* obligation on the City with respect to employee compensation and seeks only to enforce PMA's *procedural* rights to bargain collectively, it does not exceed PERB's authority under the MMBA nor run afoul of well-settled constitutional boundaries. (*Seal Beach*, *supra*, 36 Cal.3d 591, 597; *County of Riverside, supra*, 30 Cal.4th 278, 289.)

Whether Similar Burdens Imposed on Other Employees' Off-Duty Hours May Serve as a Basis for Computing the Amount of Back Pay Owed in this Case.

The City also objects to the Decision's reliance on examples of "stand-by" work performed by other employees as a basis for calculating the appropriate amount of back pay owed to the underground supervisors in the present case. The City argues that the stand-by work performed by its underground supervisors is dissimilar to stand-by work performed by

non-exempt IBEW-represented employees of the City or to stand-by work performed by employees in nearby municipalities. We reject this argument, as it misstates the factual record, and is inconsistent with PERB precedent and the policies of the MMBA.

First, we agree with the Decision that, in the absence of notice and meaningful opportunity to bargain, PMA could not have anticipated that underground supervisors would be individually assigned to an on-call rotation schedule and required, upon threat of disciplinary action, to respond to emergencies. As determined in *City of Pasadena, supra*, PERB Decision No. HO-U-1023-M, this new procedure differed from the established practice that existed when the City and PMA negotiated the underground supervisors' compensation. There is no basis for accepting the City's assertion that the new responsibilities or burdens imposed by the stand-by rotation schedule were already contemplated and included in the underground supervisors' negotiated salary structure.

Moreover, this exception misstates the basis for the ALJ's finding of liability in *City of Pasadena, supra*, PERB Decision No. HO-U-1023-M and the basis for comparison used in the Decision's back pay award. The purpose of looking to the compensation structure of other employees whose employers have similar stand-by schedules was not that the other employees necessarily perform the same or similar *job duties* as those performed by the City's underground supervisors, but that, in return for the *additional burden* of being required to be on a stand-by schedule during ostensibly *off-duty* hours, the representatives of other employees have negotiated additional forms of compensation. What different groups of employees are assigned to do during regular working hours may, as the City argues, be an entirely different matter, but that is not germane to the facts of this case. As determined in PERB Decision No. HO-U-1023-M, the City's unilaterally adopted stand-by rotation schedule significantly and adversely affected working conditions during employees' ostensibly *off-duty* hours, and thus,

what other employee organizations have negotiated for a similar burden on other employees' off-duty hours may appropriately be used for determining the amount of back pay owed in this case for the City's failure and refusal to bargain with PMA.

The Decision's back pay award is, in principle, no different from the remedy ordered by PERB and affirmed by the California Court of Appeals in *Santa Monica CCD*, *supra*, 112 Cal.App.3d 684. In that case, rival employee organizations, the Santa Monica Faculty Association (Association), and the Santa Monica United Faculty Association (Part-Time Faculty), were simultaneously involved in salary negotiations with the employer. Both organizations had filed petitions to represent both full-time and part-time faculty in one bargaining unit, while the Association also sought certification of a smaller bargaining unit that would exclude part-time faculty. After each organization had prepared and presented its salary proposals for both full-time and part-time faculty, the employer authorized an 8 percent salary increase to full-time and part-time faculty, on the condition that both organizations waive all collective bargaining rights to additional compensation for the following school year. The Association accepted this proposal, while Part-Time Faculty refused. The employer then implemented the proposed pay increase for full-time employees, while salaries for part-time faculty remained frozen. Part-Time Faculty filed a charge, alleging that the employer had violated its duty of neutrality by favoring the Association in salary negotiations. PERB held that by granting pay increases to full-time faculty, while withholding the same increases from part-time faculty because of the refusal to waive collective bargaining rights, the employer had unlawfully discriminated in favor of the Association and against the Part-Time Faculty in violation of the Educational Employment Relations Act (EERA).[4] As part of the remedy, PERB

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

ordered the employer to pay the same 8 percent salary increase to part-time faculty which it had previously agreed to in negotiations with the Association.

While the underlying theories of liability are obviously different, the back pay awards in *Santa Monica CCD, supra,* 112 Cal.App.3d 684, and the Decision in the present dispute ultimately rely on the same underlying principles. In *Santa Monica CCD*, PERB determined that back pay was appropriate to compensate one group of employees who had suffered financial loss as the result of the employer's unfair practices. There was no way of knowing with certainty what Part-Time Faculty might have negotiated with the employer with respect to salary increases for part-time faculty in the absence of the employer's unlawful conduct. However, rather than leaving the employer's unfair practices unremedied because of some degree of uncertainty, PERB looked to similar circumstances, including salary increases the employer had agreed to with an employee organization representing other employees, to compute the appropriate amount of back pay for the employees directly affected by the unfair practice. The appellate court rejected the employer's petition and affirmed the remedy ordered by PERB, including the retroactive back pay award calculated at 8 percent plus interest for part time faculty members. (*Id.* at pp. 691-692.)

So it is here. As acknowledged in the Decision, there is no way of knowing with certainty what the City and PMA may have agreed to, had the City fulfilled its bargaining obligations and provided PMA with notice and opportunity to bargain before changing its emergency response procedures. However, rather than permitting the employer to evade liability because of uncertainty *caused by the employer's own unlawful conduct*, and thus leaving an unfair practice unremedied, the Decision appropriately looked to similar circumstances, including what the City has previously agreed to with a representative of other employees, and what other, nearby municipalities have agreed to with the representatives of their employees, to

determine the appropriate amount of back pay necessary to compensate the underground supervisors. Because the nature of the City's unilateral change has made it impractical to determine precisely what amount of back pay is owed to the affected employees, rather than leave the City's unlawful conduct partially unremedied, we agree with the Decision's reliance on reasonable approximations and averages as an appropriate, non-arbitrary alternative method for computing back pay. (*NLRB Compliance*, § 10548.2; see also *Intermountain Rural Elec. Assn., supra,* 317 NLRB 588, 590-91.) PERB is expressly authorized by statute to consider the compensation and negotiated terms and conditions of employment of other, similarly-situated employees as a basis for comparison when making fact-finding recommendations at impasse (EERA, § 3548.2, subd. (b)(4)), and we find nothing objectionable, in principle, to using the same procedure here, when the absence of a negotiated pay rate is itself due to the respondent's failure and refusal to bargain.

In private-sector labor relations, the NLRB and the federal courts have long held that any uncertainties as to the appropriate remedy for an unfair labor practice must be resolved against the respondent whose unlawful conduct made such doubts possible. (*Newcor Bay City Div. of Newcor, Inc.* (2010) 2010 NLRB LEXIS 190, 102-103; *International Brotherhood of Teamsters, Local Union No. 469 (Coastal Tank Lines)* (1997) 323 NLRB 210; *Cascade Employers Assn., Inc.* (1960) 126 NLRB 1014, 1016; *Medo Photo Supply Corp. v. NLRB* (1944) 321 U.S. 678, 686-687.) In *Fresno County Office of Education* (1996) PERB Decision No. 1171, PERB adopted this rule in the context of an employer's assertion that a back pay award should be offset where the employee has failed to mitigate his or her damages. (*Id.* at p. 2, fn. 1, citing *J. H. Rutter-Rex Mfg. Co.* (1971) 194 NLRB 19, 24.) We see no reason to limit the rule's application to mitigation of damages issues.

## ORDER

Upon the findings of fact and conclusion of law in this case, and the entire record, the Public Employment Relations Board (PERB or Board) concludes that the City of Pasadena (City) failed to comply with the order in *City of Pasadena* (2011) PERB Decision No. HO-U-1023-M, and the September 10, 2012 decision, as amended on September 18, 2012, by failing to compensate underground supervisors with back pay as ordered.

Pursuant to the Meyers-Milias-Brown Act (MMBA), section 3509(a) and section 3541.3(i) and (n) of the Government Code, the City, its governing board and its representatives are hereby ORDERED:

> TAKE THE FOLLOWING AFFIRMATIVE ACTIONS TO EFFECTUATE THE POLICIES OF THE MMBA, THE BOARD'S PRIOR ORDER IN *CITY OF PASADENA* (2011) PERB DECISION NO. HO-U-1023-M, AND THE SEPTEMBER 10, 2012 DECISION, AS AMENDED ON SEPTEMBER 18, 2012:

1. Within fifteen (15) days of the service of a final decision in this matter, pay the following underground crew supervisors—Geoff Barsi, Curtis Schultz, Micko White and Wayne Reigelman—the appropriate amounts of back pay owed, as set forth in the Board's September 10, 2012 administrative decision, plus interest at the rate of seven (7) percent per annum, for each pay period that the affected employees were scheduled to perform stand-by work on the City's stand-by rotation schedule.

2. Within ten (10) workdays of service of a final decision in this matter, post at all work locations where notices to employees in the City are customarily posted, copies of the Notice attached hereto as an Appendix, signed by an authorized agent of the City. Such posting shall be maintained for at least thirty (30) consecutive workdays. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the City to communicate with its

employees. The City, its governing board and its representatives shall take reasonable steps to ensure that the posted Notice is not reduced in size, defaced, altered or covered by any material.

3. Written notification of the City's actions taken to comply with this Order shall be made to the General Counsel of PERB, or her designee. All reports regarding compliance with this Order shall be concurrently served on the Pasadena Management Association, or its representative, pursuant to PERB regulations.

Chair Martinez and Member Huguenin joined in this Decision.

APPENDIX

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

After an investigation in Unfair Practice Case No. LA-CE-574-M, *Pasadena Management Association v. City of Pasadena*, in which all parties had the right to participate, and a review of the entire record in this matter, the Public Employment Relations Board (PERB or Board) has found that the City of Pasadena (City) failed to comply with the order in PERB Decision No. HO-U-1023-M, for the City to compensate its underground crew supervisors with back pay and interest for financial losses suffered as a result of an on-call rotation schedule, which was unilaterally implemented, in violation of the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3505 and 3506.

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

TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE MMBA, THE BOARD'S PRIOR ORDER IN *CITY OF PASADENA* (2011) PERB DECISION NO. HO-U-1023-M, AND THE SEPTEMBER 10, 2012 DECISION, AS AMENDED ON SEPTEMBER 18, 2012:

1. Within fifteen (15) days of the service of a final decision in this matter, pay the following underground crew supervisors—Geoff Barsi, Curtis Schultz, Micko White and Wayne Reigelman—the appropriate amounts of back pay owed, as set forth in the Board's September 10, 2012 administrative decision, plus interest at the rate of seven (7) percent per annum, for each pay period that the affected employees were scheduled to perform stand-by work on the City's stand-by rotation schedule.

Dated: _____ CITY OF PASADENA

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.

**STATE OF CALIFORNIA**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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|---|---|
| PASADENA MANAGEMENT ASSOCIATION,<br><br>Charging Party,<br><br>v.<br><br>CITY OF PASADENA,<br><br>Respondent. | UNFAIR PRACTICE<br>CASE NO. LA-CE-574-M<br><br>PROPOSED DECISION<br>(COMPLIANCE)<br>(September 10, 2012) |

Appearances: Jeffrey W. Natke, Attorney, for Pasadena Management Association; Bruce A. Barsook and Jennifer M. Rosner, Attorneys, Liebert Cassidy Whitmore, for the City of Pasadena.

Before Mary Weiss, Senior Regional Attorney.

## PROCEDURAL HISTORY

On November 22, 2011, the Public Employment Relations Board (PERB) issued PERB Decision No. HO-U-1023-M in the underlying unfair practice case. The Administrative Law Judge (ALJ) concluded in his Proposed Decision that the City of Pasadena (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3505, and 3506[1] on September 2, 2009, by unilaterally implementing a Stand-By call-out procedure for bargaining unit members in the Underground division who are represented by the Pasadena Management Association (Association). The ALJ ordered the City to, inter alia, take certain affirmative actions designed to effectuate the policies of the MMBA. At section B of the ALJ's order, the City was required to:

> (2) Compensate any Association unit members in the Underground division for financial losses, if any, that occurred as a direct result of the City's unlawful unilateral action. Any financial losses should be augmented with interest at a rate of seven percent per annum; [and] (3) Rescind any discipline issued

[1] The MMBA is codified at Government Code section 3500 et seq.

> to Association unit members in the Underground division and expunge any records of such discipline....

On November 23, 2011, the City filed its initial statement of compliance and on December 8, 2011, PERB notified the City that its statement did not provide any information establishing that the City had complied with sections B.2 and B.3 of the Order.

On December 20, 2011, the City responded and stated as follows, "B2. There were no financial losses that occurred as a result of the City's actions. [The Association] did not present any quantitative evidence or testimony as to monetary losses for being placed on a rotation schedule. Indeed, any such damages would be speculative. B3. No discipline was issued to [Association] members as a result of the City's implementation of the rotation schedule."

On January 4, 2012, the Association filed a statement with PERB that provided, in relevant part: "[T]here were four underground crew supervisors who were forced to serve on Stand-By under the unlawfully imposed policy. Those members are Micko White, Wayne Reigelman[], Curtis Schultz, and Geoff Barsi....Compliance has not been achieved, and will not be achieved, until Mr. White, Mr. Reigelman, Mr. Schultz, and Mr. Barsi are provided time-and-a-half compensation (i.e., their overtime rate) for all off-duty hours served on Stand-By, plus 7% interest."

On March 8, 2012, PERB conducted a status conference with the parties to enable the Board agent to gather information regarding whether compliance had been achieved.

On April 23, 2012, the Parties filed a Joint Stipulation of Facts listing the amount of hours each of the four affected employees had been placed on Stand-By duty while the policy was in place. On May 1, 2012, the Parties filed an amended Joint Stipulation of Facts stipulating as to the pay rates for each affected employee.

The case was assigned to the undersigned for the purpose of making both legal and factual determinations, and identifying the steps necessary for the City to achieve compliance with section B.2 of the ALJ's Order. The Parties agreed to submit the matter for determination based on the Parties' briefs filed on or about June 26, 2012.

## FINDINGS OF FACT

The ALJ's Order required the City to: "Compensate any Association unit members in the Underground division for financial losses, if any, that occurred as a direct result of the City's unlawful unilateral action. Any financial losses should be augmented with interest at a rate of seven percent per annum."

The parties' April 23, 2012 stipulation agreed that during the period the Stand-By policy was in place, Mr. Barsi was placed on Stand-By duty for 2,639 hours, Mr. Schultz was placed on Stand-By duty for 2,296.2 hours, Mr. White was placed on Stand-By duty for 2,592 hours, and Mr. Reigelman was placed on Stand-By duty for 2,509.7 hours. The parties' May 1, 2012 stipulation agreed that each of the four affected employees was being paid at the regular rate of pay of $56.2518 per hour on September 2, 2009, the date the City unilaterally imposed the Stand-By policy. On January 4, 2010, each of the four affected employees began earning a regular rate of pay of $58.5019 per hour.

The Association contends that the affected employees suffered a significant hardship when they were placed on Stand-By duty because the new policy essentially placed the assigned employee on "house arrest." The performance of Stand-By duty included remaining close to the City facilities, remaining in a work ready state, maintaining the pager, and responding to pages. The employee could not travel far and had to limit his activities so that he would be ready for work and could respond within a certain time. Such availability and

readiness was mandatory because an employee's failure to perform Stand-By duty was a basis for discipline under the new policy.

The Association contends each affected employee is entitled to overtime (1.5 times the regular pay rate) for each hour the employee served on Stand-By duty. Alternatively, the Association contends affected employees should be compensated at the regular pay rate or at rates similar to those paid for similar Stand-By work in nearby municipalities or other City bargaining units. In support of the latter contention, the Association provided copies of Stand-By provisions contained in the Burbank and Glendale Memoranda of Understanding (MOUs) as well as Pasadena's MOU with the International Brotherhood of Electrical Workers, Local 18 (IBEW) represented bargaining unit.

The City contends no monetary damages may be awarded because any award now would be speculative since the parties never established how Stand-By duty hours would be compensated. The City also contends no monetary award should be made because bargaining unit members never received compensation for Stand-By under the prior policy and because the affected employees are already compensated in their salary structure.

## ISSUES

(1) Did any unit members represented by the Association suffer financial losses as a direct result of the City's unlawful unilateral action?

(2) If financial losses were suffered, what is the proper amount of compensation?

## CONCLUSIONS OF LAW

### Financial Losses

The normal remedy for a unilateral change is to restore the status quo by rescinding the change and making affected employees whole for any losses suffered as a result of the change. (*California State Employees Assn. v. Public Employment Relations Bd.* (1996) 51 Cal.App.4th

923, 946; accord *San Jacinto Unified School District* (1994) PERB Decision No. 1078, p. 38 [*San Jacinto*] ["It is also appropriate to make employees whole for any losses, economic or otherwise, suffered as a result of the District's unilateral actions"].) An order for back pay will be made part of a "make whole" remedy only if the record establishes that the unilateral change caused employees to suffer a financial loss. (See, e.g., *Dublin Prof'l Fire Fighters, Local 1885 v. Valley Community Svcs. Dist.* (1975) 45 Cal.App.3d 116, 119 [*Dublin*]; *Long Beach Community College District* (2009) PERB Decision No. 2002 [*Long Beach*]; *Desert Sands Unified School District* (2004) PERB Decision No. 1682 [*Desert Sands*]; *San Jacinto*, *supra*, PERB Decision No. 1078.)

In *Long Beach*, *supra*, PERB Decision No. 2002, the employer unlawfully imposed a 4/10 work schedule and the ALJ properly ordered the employer to provide back pay to employees who used vacation credits or compensatory time to avoid working a ten hour day. (*Id.* at p. 6.) However, the ALJ refused to award overtime because the record did not establish that the employer eliminated or reduced overtime hours to which the employees otherwise would have been entitled. (*Id.* at p. 18.) In *San Jacinto*, *supra*, PERB Decision No. 1078, the employer was ordered to provide back pay when employees lost the opportunity to work hours the employees were entitled to work.

In *Desert Sands*, *supra*, PERB Decision No. 1682, the employer unlawfully transferred overtime work to other employees. The Board ordered the employer to cease and desist, but did not order back pay to the employees affected by the unlawful transfer of overtime work because neither the work hours nor wages of the affected employees were changed because of the transferred work. (*Ibid.*) In addition, the ALJ noted in her proposed decision that, the affected employees had even more work after the unlawful transfer. (*Ibid.*)

The City contends the affected employees in this case are like the employees in the cases of *Dublin Fire Fighters*, *supra*, 45 Cal.App.3d 116, *Long Beach*, *supra*, PERB Decision No. 2002, and *Desert Sands*, *supra*, PERB Decision No. 1682, and should be similarly denied monetary compensation. The facts at issue here and the facts surrounding the cases cited by the City, however, are distinguishable. In the cases cited by the City, the employees suffered *the lost opportunity to perform work* during the period that the employer maintained a unilaterally imposed policy. The employees did not actually perform any work for which they were not paid. In contrast, the affected employees here did not have work taken away, nor did they lose an opportunity to work. Instead, the affected employees here were forced to perform *mandatory additional duties* for which they were not paid. The performance of Stand-By duty included remaining close to the City facilities, remaining in a work ready state, maintaining the pager, and responding to pages. Failure to respond while on mandatory Stand-By duty was cause for discipline. It follows that the employees here are distinct from employees in the above-cited cases who lost work opportunities. Given this distinction, the Board's and Court of Appeal's refusal to award back pay or monetary damages where employees lost work opportunities has no application to the facts at issue here.

Certainly the employees here performed a service when they were placed on Stand-By duty and neither party disputes the fact that the employees were not paid. Indeed, over the 27 months the unilaterally imposed Stand-By policy was in place, each affected employee performed thousands of hours of Stand-By duty without pay. Performance of duties without pay is a financial loss.

Proper Compensation for Financial Loss

The City contends that absent negotiation, a back pay award for Stand-By time would be *speculative* and *uncertain*, and for this reason there can be no award of monetary damages.

The City's "uncertainty" defense must be rejected for the simple reason that it was the City itself that implemented the Stand-By policy without providing the Association with notice and opportunity to negotiate the policy. Had the City negotiated with the Association regarding the policy, the parties would have had the opportunity to negotiate an appropriate rate of compensation for serving on Stand-By duty. The City's conduct in imposing the new policy without meeting and conferring with the Association, which the ALJ found to be in violation of the MMBA, led to the lack of an established rate of pay. The lack of an established rate of pay resulting solely from the City's unlawful conduct may not now be relied upon by the City to support its proposition that no back pay should be awarded. Under equitable principles, the City's "unclean hands" must prevent it from now taking advantage of its own refusal to negotiate and the Association should not be excluded from recovery because of the employer's unlawful conduct. (See, e.g., *Small v. Avanti Health Sys.* (9th Cir. 2011) 661 F.3d 1180,1197 [the Ninth Circuit Court of Appeal rejected the employer's argument that a remedy would be uncertain and prejudicial because that argument would lead to the conclusion that the court could never order parties to bargain in good faith. The court held that the union should not bear the burden of recovering from the employer's illegal activities and weighing these competing interests, the balance of equities favored the relief sought by the union].)[2]

The parties' failure to reach agreement over what constitutes the proper compensation does not bar PERB from determining the proper remedy. (*Corning Union High School District* (1984) PERB Decision No. 399 [*Corning*].) In *Corning*, the Board stated the ALJ "erred in finding that the parties' failure to negotiate a fixed formula compensating employees for their lost preparation periods precludes compensation." (*Id.* at p. 8.) The Board ordered the employer to restore the status quo ante by granting each employee paid time off in an amount

[2] It is appropriate for the Board to take guidance from federal labor law, where statutory principles are similar. (*Firefighters v. City of Vallejo* (1974) 12 Cal.3d 608.)

equivalent to the amount of time lost as a result of the unilateral change, with the parties to agree as to the manner in which such time off will be granted, or, if the employee was no longer in the employer's employ or the parties could not agree over the manner, employees would receive monetary compensation commensurate with the additional hours worked. (*Id.* at p. 16.)

It is impossible to know with certainty what amount of compensation the parties may have agreed to had they participated in negotiations as required by law. The Association contends the rate of pay should be the overtime rate, the regular pay rate, or a rate similar to those paid in other bargaining units and nearby municipalities. The City does not suggest any amount or method for calculating a rate of pay for hours employees worked on Stand-By duty.

The objective in determining back pay is to reconstruct as accurately as possible what employment and earnings the employee would have had during the back pay period had there not been an unlawful action. (NLRB Case Handling Manual, Part Three, Compliance Proceedings, § 10540 [*NLRB Compliance*].) The determination of back pay is not based on an unattainable standard of certainty, rather, it must merely be based on a reasonable method and reasonable factual conclusions. (*Ibid.*) Where the parties offer alternative formulas for determining back pay, the Board must decide which is the most accurate method. (*Atlantic Veal & Lamb, Inc.* (2010) 355 NLRB No. 38, fn. 5.) It should be easy to understand and to apply. (*NLRB Compliance*, *supra*, at § 10540.1.) The method selected for calculating back pay must depend on the facts and circumstances of the particular case. (*Ibid.*) Average hours or earnings and the consideration of earnings of comparable employees is proper. (*Id.*, at § 10540.3.) Back pay must also be based on changes in wage rates or other compensation that take place during the back pay period. (*Ibid.*) The Board is required only to utilize a

nonarbitrary formula designed to produce a reasonable approximation of what is owed. (*Great Lakes Chemical Corp* (1997) 323 NLRB 749.)

The City draws a comparison between employees affected under the Stand-By policy and bargaining unit employees represented by IBEW, arguing that affected employees are already compensated because they have a City provided vehicle to take home and use if they need to respond while on Stand-By. IBEW represented employees, on the other hand, as non-exempt employees, must be paid time and a half when they are called out to an emergency, they must respond within 15 minutes, and they do not have a City provided vehicle. The City contends affected employees receive a higher base salary than exempt IBEW represented employees as a *negotiated benefit* and that the lack of Stand-By pay is part of affected employees' *negotiated* salary structure. The City's argument is unpersuasive because the City provides no evidence demonstrating that the Association had knowledge that the City was going to implement a mandatory Stand-By policy when the parties last negotiated the affected employees' rates of pay. Without evidence that the Association had knowledge that the affected employees would be subject to the mandatory Stand-By policy, it is not possible that the obligation to perform duties under the mandatory Stand-By rotation was part of the affected employees' *negotiated* salary structure.

Overtime Pay

In support of its argument that overtime is the appropriate rate of pay, the Association relies on PERB's decision in *Oakland Unified School District* (1983) PERB Decision No. 367. There, the employer unilaterally removed overtime work and PERB ordered the employer to compensate affected employees at the overtime rate for all overtime hours they would have worked had it not been for the unilateral change. (*Ibid.*)

This case does not involve the removal of overtime work. While it is true, as the Association contends, that Stand-By hours were in addition to regular hours, and as such may have resulted in "overtime" under an analysis of hours worked per day or week in excess of the regular time limits, nothing in the parties' stipulation or the order provides evidence of when Stand-By hours were accrued in addition to regular hours, so it is not possible from the record to determine how many hours, if any, devoted to the performance of Stand-By duty would have been entitled to an overtime rate. Even if such evidence were provided, there is no precedent or other evidence demonstrating Stand-By hours, as a rule or example, have been paid at an overtime rate.

Regular Pay

In support of its argument that the regular pay rate is the appropriate compensation, the Association relies on *Corning*, *supra*, PERB Decision No. 399, wherein affected employees were awarded time off or regular pay for the unlawfully removed preparation hours. *Corning* involved a unilateral policy where teachers were forced to give up preparation hours and instead had to teach additional classes during their former preparation time. The Board accordingly awarded the teachers regular pay for the lost preparation hours. (*Ibid.*)

The facts in *Corning*, *supra*, PERB Decision No. 399, are similar to the facts here in that the employees had to perform extra work. However, the facts here are unlike the facts under *Corning* to the extent the facts here do not involve the unlawful removal of a formerly compensated time period. Where the court in *Corning* could look at the preparation time pay that existed prior to the employer's imposition of an unlawful unilateral policy, there is no such guidance here. There is simply no Board precedent or other evidence demonstrating Stand-By hours, as a rule or example, have been paid at a regular time rate.

35% Regular Pay Rate for Hours Served on Stand-By Duty

In Glendale, Stand-By is paid under the MOU at a rate equal to 35% of the regular rate for each hour served on Stand-By.

The MOU between the City of Glendale and the Glendale Management Association, effective July 1, 2010 through June 30, 2011 for General Managers, July 1, 2006 through June 30, 2014 for Sworn Fire Managers and July 1, 2007 through June 30, 2011 for Sworn Police Managers, provides the following Stand-By provisions in Article III:

> B. Stand-By Assignment – Glendale Water & Power (General Managers)
>
> 1. Payment
> Glendale Water & Power General Managers assigned to off duty Stand-By assignment, excluding Water Section employees assigned to Water Stand-By duty, shall be paid an assignment extra pay equal to 35% of their hourly rate of pay for each hour on Stand-By during the hours between the end of the normal field work schedule and the start of the next normal field work schedule.
>
> 2. Water Assignment Pay
> Glendale Water & Power General Managers in the classification of Water System Supervisor II shall not be entitled to Stand-By pay as defined in this section. In lieu of Stand-By pay, Water System Supervisor II shall receive an assignment pay, as defined in Article Two.
>
> C. Stand-By Assignment Limitations
>
> 1. Limitations
> Eligible General Managers shall receive Stand-By pay only for those hours on Stand-By assignment duty and shall not receive Stand-By pay for any overtime worked during those assigned Stand-By hours.
>
> 2. Non-Work Time
> It is understood that such time on Stand-By assignment is non-work time for the purposes of determining overtime compensation.
>
> 3. Full and Entire Compensation
> Except as otherwise provided for in this article, this compensation shall represent full and entire compensation for Stand-By assignment.

Regular Pay for Specified Number of Hours for Each Day Assigned to Stand-By Duty

The Stand-By provisions contained in the Pasadena IBEW MOU and the Burbank MOU provide Stand-By pay at the regular rate of pay for a specified number of hours depending on which day of the week the employee was on Stand-By: two hours of regular pay to employees on Stand-By on a weekday, three hours of regular pay for a Saturday, and four hours for a Sunday in Pasadena's IBEW Bargaining Unit and in Burbank.

The July 1, 2006 to June 30, 2010 MOU between the City of Pasadena and IBEW provides the following Stand-By provisions for bargaining unit employees who, notably, are supervised by the underground supervisors at issue herein:

> D. Stand-By pay
> Within 30 days of the City Council's adoption of this Memorandum of Understanding, Stand-By crews will be established to provide a guarantee that, in the event there is a problem on the electrical distribution system or street light and traffic control systems, there will be qualified personnel available to respond to system outages or emergencies. Stand-By crews will be formed on a *volunteer* basis. However, this program will only be implemented in those departments in which management determines that a sufficient number of employees sign up for the program. Once an employee signs up to be on Stand-By, the employee must remain on Stand-By for a twelve month period and comply with the procedures/ policies that have been established for the program. Prior to implementing the Stand-By program, Management will provide a copy of the proposed stand–by procedures and, upon request, meet and discuss any concerns the Union may have regarding the proposed procedures.
> ...
> *Employees on Stand-By will receive compensation as follows:*
> Two (2) hours of regular pay for being on Stand-By on a week day;
> Three (3) hours of regular pay for being on Stand-By on Saturday or on the employee's scheduled 9/80 day off;
> Four (4) hours of regular pay for being on Stand-By on a Sunday or on a City recognized holiday.

> The above compensation will be in addition to any normal shift or overtime compensation as specified in this Memorandum of Understanding.

(Italics added.)

The June 29, 2008 through June 23, 2012 MOU between the City of Burbank and the IBEW, Local 18, Unit 50 (Burbank IBEW MOU) provides the following Stand-By provisions at section E.6:

> E.6. Overtime Pay – Call Out Crew
> A call out crew for the Electrical Distribution Section has been established to provide a guarantee that, in the event there is a problem on the Electrical Distribution System, there will be qualified personnel available. Response time shall be limited to no more than one hour. Therefore, a forty (40) mile radius from BWP shall be established. Supervisors will take their assigned City vehicle home.
> ...
> E.6.b. Employees shall be compensated at a rate equal to two (2) hours pay per day of such assignment except that Saturday (or its equivalent) shall be compensated at a rate equal of three (3) hours pay and Sunday (or its equivalent) shall be compensated at a rate equal to four (4) hours pay. Holidays observed pursuant to the Memorandum of Understanding shall be compensated at the Sunday rate above. The above compensation will be in addition to any normal shift or overtime compensation as spelled out in the Memorandum of Understanding.

Under the circumstances in this case, where the parties did not negotiate the amount of compensation for the Stand-By work, the rates paid in other bargaining units and nearby municipalities would most closely reconstruct the employment and earnings the employees would have had during the back pay period. (*NLRB Compliance*, § 10540.) This will not result in a level of certainty over what the pay rate or method would have been, had there been negotiations, but such certainty is not required. (*Ibid.*) A back pay formula using the rates paid in other bargaining units and nearby municipalities is a reasonable method. (*Ibid.*)

The Stand-By work performed by bargaining unit members in the Underground division is similar to the Stand-By work performed by IBEW bargaining unit members in Pasadena and bargaining unit members represented by IBEW in Burbank. The IBEW–represented bargaining unit members in Pasadena are supervised by the Underground division employees at issue herein. The Underground division employees on Stand-By duty are responsible for maintaining the electrical distribution system and respond to system outages or emergencies just like employees in the IBEW Pasadena bargaining unit and the IBEW Burbank bargaining unit. The Pasadena IBEW MOU and the Burbank IBEW MOU each provide the following basic compensation for Stand-By work:

> Two (2) hours of regular pay for being on Stand-By on a week day;
>
> Three (3) hours of regular pay for being on Stand-By on Saturday [or its equivalent or on the employee's scheduled 9/80 day off];
>
> Four (4) hours of regular pay for being on Stand-By on a Sunday [or its equivalent or on a City recognized holiday].

It is appropriate to use the above-described method because the work and other conditions of employment are comparable, and the use of the formula is reasonable and a non-arbitrary solution to the problem that no level of compensation was ever negotiated between the parties. (*NLRB Compliance*, *supra*, at § 10540.3; *Great Lakes Chemical Corp*, *supra*, 323 NLRB 749.)

## PROPOSED COMPLIANCE ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it hereby is ORDERED that within 30 days of this order, the City shall provide data to the Association and PERB that shows the dates each affected employee performed Stand-By work between the period from September 9, 2009, the date the City implemented the policy, to

November 11, 2011, the date the City rescinded the policy. The data must also note whether the dates fell on or after January 4, 2010, when each of the four affected employees received an increase to their regular rate of pay. The data to be provided must contain sufficient detail to determine whether each date would be considered a regular weekday, a Saturday, a Sunday, an "equivalent" Saturday, the employee's scheduled 9/80 day off, an "equivalent" Sunday or a City recognized holiday. The City shall also provide to the Association and PERB the City's calculation of back-pay for each affected employee based on the formula set forth in this order and the data regarding the dates the Stand-By work was performed.

Within 60 days of this order the Association is to provide to the City and PERB its concurrence with or objection to the City's provision of data and its calculation of back-pay for each affected employee based on the formula set forth in this order and the data regarding the dates the Stand-By work was performed. If the Association objects to the City's data, the Association shall specify the perceived deficiency. If the Association objects to the City's calculation, the Association shall set forth its own calculation based on the formula set forth in this order and the City provided data and shall state why its calculation is different.

If there is no dispute between the parties as to the amounts owed to the employees, the City shall pay to each affected employee within 90 days of this order the amount owed plus interest at the rate of seven percent per annum from each pay period that the Stand-By work was performed. Upon payment of back-pay and interest to each affected employee, the parties shall report to the undersigned PERB Agent the payment dates and amounts.

In the event, however, the Association objects to either the data provided or the City's calculations, PERB will inform the parties of further compliance measures to be taken in this case.

Right to Appeal

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)

Mary Weiss
Senior Regional Attorney