STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

REGISTERED NURSES PROFESSIONAL ASSOCIATION, Charging Party, v. COUNTY OF SANTA CLARA, Respondent.	Case No. SF-CE-1872-M PERB Decision No. 2820-M May 12, 2022

Appearances: Weinberg, Roger & Rosenfeld by Xochitl Lopez, Attorney, for Registered Nurses Professional Association; Mary Malysz, Deputy County Counsel, 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 appeal by Registered Nurses Professional Association (RNPA) from the dismissal of its unfair practice charge against County of Santa Clara. RNPA's charge, as amended, alleged that the County violated the Meyers-Milias-Brown Act (MMBA) by unilaterally issuing Clinical Nurses new assignments without providing RNPA notice and an opportunity to bargain over the decision or its effects.[1] PERB's Office of the General Counsel (OGC) found that the new assignments were reasonably comprehended within the nurses' existing assignments, and therefore

[1] The MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all further statutory references are to the Government Code.

dismissed the amended charge for failure to state a prima facie case.

We review OGC's dismissal de novo. (*City and County of San Francisco* (2020) PERB Decision No. 2712-M, p. 2.) At this stage of an unfair practice case, the charging party's burden is not to produce evidence, but merely to allege facts that, if proven true in a subsequent hearing, would state a prima facie violation. (*Ibid*.) We do not resolve conflicting factual allegations or make conclusive factual findings. (*Ibid*.) Rather, we assume that the charging party's factual allegations are true, and we view them in the light most favorable to the charging party. (*Ibid*.) We therefore do not rely on the respondent's factual statements if they explicitly or implicitly create a material factual conflict with charging party's version of events, even if the respondent's contentions appear better supported, or more persuasive, than the charging party's contrary allegations. (*Ibid*.) We direct OGC to issue a complaint if we find one or more contested, outcome-determinative facts (or mixed questions of law and fact), or if the parties' positions reveal contested, colorable legal theories. (*Id*. at p. 3.)[2]

Applying these standards to the allegations in this case, we grant RNPA's appeal and direct OGC to issue a complaint consistent with this decision.

FACTUAL ALLEGATIONS

The County is a public agency within the meaning of MMBA section 3501, subdivision (c). RNPA, a recognized employee organization within the meaning of MMBA section 3501, subdivision (b), exclusively represents the County's registered

[2] OGC must issue a complaint based on all legal theories for which the alleged facts state a prima facie case, even if a charging party has neglected to assert one or more colorable theories. (*San Jose/Evergreen Federation of Teachers, AFT Local 6157, and American Federation of Teachers, AFL-CIO (Crawford et al.)* (2020) PERB Decision No. 2744, p. 23*; Hartnell Community College District* (2015) PERB Decision No. 2452, pp. 53-54.)

nurse (RN) bargaining unit. RNPA and the County are parties to a memorandum of understanding, effective January 27, 2020, through October 29, 2023.

The RN bargaining unit includes Clinical Nurses working at Santa Clara Valley Medical Center. Clinical Nurses primarily perform bedside nursing, which includes monitoring individual patients' heart rhythms by reviewing EKG or telemetry strips, as part of caring for the "whole patient."

The County also employs Monitor Technicians, who are in a bargaining unit represented by Service Employees International Union Local 521. Monitor Technicians, who are supervised by RNs, typically work in a central monitoring room (CMR) where they simultaneously monitor EKG or telemetry strips from up to 40 patients at a time.

The County's Nursing Standards Manual includes a telemetry policy adopted between 2008 and 2012. The policy states:

> "Patients will be placed on telemetry, monitored and responded to in a methodical process that allows for safe care. Daily management of telemetry patients (i.e. completing patient assignment sheet, printing strips) will be completed using a prescribed sequence of steps. To ensure safe care, individual roles and responsibilities, when applicable, will be identified in each section of the policy. Cardiac rhythm is observed continuously by a trained telemetry monitor technician or RN. Any significant alarms or changes are escalated to an RN. Registered nurses can be designated as the monitor technician if they have completed the VMC telemetry class and competency."
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> [¶] . . . [¶]
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> ". . . In a situation when there is no [Monitor Technician] available, an RN who works as a telemetry nurse can work as the [Monitor Technician]." (Emphasis supplied.)

The gravamen of RNPA's case consists of two allegations. RNPA first states that, prior to the events giving rise to this case, the County did not "regularly" assign Clinical Nurses to the CMR to watch multiple telemetry monitors for an entire shift. The County seemingly concurs to one degree or another, alleging that it assigned nurses to fill in for Monitor Technicians only when they were taking breaks or out sick. To the extent there may be a difference in these factual assertions, at this stage RNPA's allegations control.

RNPA further alleges that around late December 2020 or early January 2021, it learned the County had begun regularly assigning Clinical Nurses to work shifts in the CMR that the County had previously assigned to Monitor Technicians. The County responds to this allegation as follows: "The *only* change RNPA alleges is that Clinical Nurses are now being required to watch multiple telemetry monitors at once for a whole shift. Even if this were true (which it is not), such an assignment is reasonably comprehended within the scope of existing job duties; therefore, RNPA cannot demonstrate a duty to negotiate the alleged change." (Emphasis original.)

DISCUSSION

To establish a prima facie case that a respondent employer made an unlawful unilateral change, a charging party union that exclusively represents a bargaining unit must prove: (1) the employer changed or deviated from the status quo; (2) the change or deviation concerned a matter within the scope of representation; (3) the change or deviation had a generalized effect or continuing impact on represented employees' terms or conditions of employment; and (4) the employer reached its decision without first providing adequate advance notice of the proposed change to the union and bargaining in good faith over the decision, at the union's request, until the parties

reached an agreement or a lawful impasse. (*Bellflower Unified School District* (2021) PERB Decision No. 2796, p. 9.)

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

OGC found that RNPA failed to allege facts that would, if proven, establish that the County materially changed nurses' assignments. We review applicable precedent and apply that precedent to RNPA's allegations.

I. Precedent Regarding Changes to Work Assignments[3]

If an employer changes employee assignments or duties without providing the exclusive representative union with notice and an opportunity to meet and confer, outside of any contractual right it may have, there are several means by which a union can establish a unilateral change. (See *Cerritos Community College District* (2022) PERB Decision No. 2819, p. 30 (*Cerritos*) [discussing alternate means of establishing prima facie case].) Here, since there is no allegation that the County materially altered nurses' overall workload, changed performance standards, or transferred work within

[3] The term "assignment" has different meanings depending on context. It can mean an individual job duty or task, a position or post, or, as here, a set of duties an employer requires an employee to perform on a given day. (https://www.merriam-webster.com/dictionary/assignment#:~:text=Definition%20of%20assignment,by%20authority%20a%20homework%20assignment [as of May 9, 2022]; https://www.thesaurus.com/browse/assignment [as of May 9, 2022].)

or away from the nurses' bargaining unit, the critical question is whether the County issued nurses new assignments that were not "reasonably comprehended" within their existing assignment or set of duties. (*Id.* at pp. 30-31; *Oakland Unified School District* (2003) PERB Decision No. 1544, pp. 5-8 & adopting warning letter at p. 2 (*Oakland*).)[4]

PERB precedent does not provide an exact meaning of "reasonably comprehended." And it is not possible to articulate a definition that anticipates every potential future scenario. It is clear, however, that "reasonably comprehended" is an objective standard that refers to what a reasonable employee would comprehend based on all relevant circumstances, including, but not limited to, past practice, training, and job descriptions. (*Rio Hondo Community College District* (1982) PERB Decision No. 279, pp. 17-18 [while catchall language in job description is insufficient to overcome evidence of contrary past practice, PERB interprets job descriptions in the context of employees' overall role].) For instance, the Board has found new duties were not reasonably comprehended within an existing assignment when they required employees to obtain additional credentialing. (*Mt. San Antonio Community College District* (1983) PERB Decision No. 297, p. 11.)

Past PERB decisions have stated that if a new assignment is reasonably comprehended within employees' existing assignments, the new assignment is not

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[4] While we apply the "reasonably comprehended" standard if an employer adds a job duty or issues a new assignment, we may apply other means to determine materiality in other circumstances. As we noted in *Cerritos*, *supra*, PERB Decision No. 2819, p. 30, such other contexts include, but are not limited to, changes that impact workload or performance standards (see, e.g., *County of Kern* (2018) PERB Decision No. 2615-M, p. 10 & adopting proposed decision at p. 11), or changes that transfer duties to other employees within the bargaining unit or outside the unit (see, e.g., *Desert Sands Unified School District* (2001) PERB Decision No. 1468, pp. 3-4).

within the scope of representation. (See, e.g., *Davis Joint Unified School District* (1984) PERB Decision No. 393, p. 26.) Placing the "reasonably comprehended" question in the scope of representation inquiry is, in part, an historical artifact. For much of PERB's history, Board precedent consolidated the unilateral change test into just two elements. The first element was whether the employer implemented a change in policy concerning a matter within the scope of representation, thereby simultaneously asking whether the employer made a change and, if so, whether it fell within the scope of representation. (See, e.g., *Oakland*, *supra*, PERB Decision No. 1544, p. 5 & adopting warning letter at p. 2.) The Board now uses the four-part test set forth *ante* at pp. 4-5, where change to status quo and scope of representation are separate elements. Under the modern, four-part test, the "reasonably comprehended" question is more integral to determining whether the employer changed the status quo than it is to deciding whether a specified topic is a mandatory or permissive subject of bargaining. In future unilateral change cases, Board agents should recognize job duties and assignments as generally falling within the scope of representation and apply the "reasonably comprehended" standard as part of determining whether an employer changed or deviated from the status quo.[5]

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[5] While this distinction is unlikely to change the outcome in a unilateral change case, it would matter more in a failure to bargain case arising during contract negotiations. For instance, if a bargaining party proposes to change existing job duties, and the other party claims that it is a permissive subject of bargaining and refuses to negotiate, PERB must determine whether the refusing party was privileged to do so. While *Davis*, *supra*, PERB Decision No. 393, fell into that category, its analysis appears unsound, suggesting a party's bargaining proposals on employee duties could alternately qualify as mandatory or permissive depending on scant wording changes. Notably, *Cerritos*, *supra*, PERB Decision No. 2819, disavowed any broad reading of *Davis* (*id.*, at p. 31), and we have no cause in this case to consider whether a bargaining party can lawfully decline to bargain merely because its

II. Application to RNPA's Allegations

As the above discussion indicates, to apply the "reasonably comprehended" standard we compare past duties or assignments to new duties or assignments, through the eyes of a reasonable employee. Doing so here, we find there are one or more material facts in dispute, meaning that OGC must issue a complaint and the case must proceed to a hearing, absent settlement.

A. Clinical Nurses' Past Assignments

RNPA claims that, prior to the events giving rise to this case, the County had not regularly assigned Clinical Nurses to work full shifts in the CMR alongside or in place of Monitor Technicians. The County responds that "it has been the consistent practice that [nurses trained in telemetry] fill in for technicians when none are available, i.e., on meal or rest breaks or out sick." As noted *ante*, it is unclear to what extent the County's position conflicts with RNPA's allegation that the County had in the past not "regularly" assigned Clinical Nurses to work in the CMR for entire shifts. At this stage of proceedings, we do not rely on the respondent's responses where, as here, they may create a material factual conflict with charging party's allegations. Moreover, even assuming for the sake of argument there is no dispute that Clinical Nurses have in the past filled in for Monitor Technicians when they are on meal or rest breaks or call out sick, this practice would not necessarily provide the County with a defense if it thereafter began issuing Clinical Nurses assignments to fill Monitor Technician shifts on a truly "regular" basis, viz., when Monitor Technicians are not on breaks or out sick.

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counterpart proposes to change employees' existing duties.

B. Clinical Nurses' Alleged New Assignments

RPNA alleges that the County has deviated from an established past practice, created a new policy, or applied an existing policy in a new way by regularly assigning Clinical Nurses to work full Monitor Technician shifts in the CMR. As noted above, the County denies that it began regularly assigning Clinical Nurses to work full shifts in the CMR and, in the alternative, argues that such allegations do not state a prima facie case. The County's factual denial is of no import because at this stage we assume RNPA's allegations are correct and view them in the light most favorable to RNPA.

Nor does the County succeed in its alternative argument that, accepting RNPA's allegations, the changes at issue were "reasonably comprehended" within nurses' traditional assignments. Depending on the extent of the change (if any) that the ultimate record in this matter reveals, we are unable to rule out the possibility that reasonable nurses would find such a change to be a material one.

While the County points to the telemetry policy included in its Nursing Standards Manual, that policy does not, by itself, necessarily establish that regularly assigning nurses a full day of such monitoring in the CMR, alongside or in place of Monitor Technicians, is reasonably comprehended within nurses' previous assignments. For instance, depending on how the County applied the policy in the past, it may only establish that nurses read EKG and telemetry strips intermittently as part of a wide array of bedside duties, while perhaps also filling in for Monitor Technicians in the CMR in limited circumstances.[6] As noted already, RNPA may or may not be able to establish a violation, depending on the nature of those

[6] We express no opinion whether a patient care policy bears the same weight as a job description in applying the "reasonably comprehended" standard.

circumstances, and the nature of nurses' current assignments. We are therefore not able to resolve this case without factual findings based on a full evidentiary record.[7]

Because there are one or more contested, outcome-determinative facts (or mixed questions of law and fact), OGC should issue a complaint alleging that the County violated the MMBA by materially changing Clinical Nurse job assignments without providing RNPA notice and an opportunity to meet and confer.

ORDER

Case No. SF-CE-1872-M is hereby REMANDED to the Office of the General Counsel for further case processing consistent with this decision.

Chair Banks and Member Paulson joined in this Decision.

[7] The record will also permit us to resolve any other disputes the County may raise regarding RNPA's prima facie case, as well as any affirmative defense the County chooses to assert. (See, e.g., *City of Culver City* (2020) PERB Decision No. 2731-M, p. 18 [A clear and unambiguous contract provision can establish a waiver defense. A unilateral employer policy cannot establish a waiver, but an employer may establish waiver by showing that it provided an exclusive representative with advance notice and an opportunity to bargain over a proposed policy, and the exclusive representative then agreed to the policy or declined to bargain over it. In the latter instance, there is no written waiver, as it is the union's conduct that would establish waiver]; *County of Kern*, *supra*, PERB Decision No. 2615-M, p. 8 [if a respondent follows a nondiscretionary pattern of change, then it acts consistently with the dynamic status quo and therefore does not commit a unilateral change].)