

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



NATIONAL UNION OF HEALTHCARE
WORKERS,

Charging Party,

v.

SALINAS VALLEY MEMORIAL
HEALTHCARE SYSTEM,

Respondent.

Case No. SF-CE-857-M

PERB Decision No. 2524-M

March 21, 2017

Appearances: Siegel LeWitter Malkani by Latika Malkani, Attorney, for National Union of Healthcare Workers; Littler Mendelson by Thomas J. Dowdalls, Robert Hulteng, Jason E. Shapiro, Attorneys, for Salinas Valley Memorial Healthcare System.

Before Gregersen, Chair; Banks and Winslow, Members.

DECISION

WINSLOW, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions by National Union of Healthcare Workers (NUHW) to a proposed decision (attached) by an administrative law judge (ALJ) dismissing the complaint issued by the Office of the General Counsel (OGC) and NUHW's underlying unfair practice charge. The complaint alleged that the Salinas Valley Memorial Healthcare System (Hospital) violated the Meyers-Milias-Brown Act (MMBA or Act)¹ by unilaterally changing its policy regarding the rebidding of schedules and shifts vacated by employees laid off in June 2011.

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

The complaint alleged that this conduct constituted a violation of sections 3503, 3505, and 3506 of the Act and PERB Regulation 32603, subdivisions (a), (b), and (c).²

The Board itself has reviewed the entire record in this matter, including the pleadings, the hearing record, the proposed decision, NUHW's exceptions, the Hospital's response, and the parties' supplemental briefs filed at the Board's request. Based on this review, we conclude that the ALJ's factual findings are adequately supported by the evidentiary record and, except where noted below, his conclusions of law are well reasoned and in accordance with applicable law. We therefore adopt the proposed decision as the decision of the Board itself as modified and supplemented by the discussion below.

PROCEDURAL SUMMARY

This is the second of two unfair practice complaints against the Hospital concerning layoffs of unit employees that took place in late 2010 and in June 2011. On December 17, 2010, NUHW filed an unfair practice charge (Case No. SF-CE-797-M) alleging that the Hospital had failed to bargain over the decision to implement the December 2010 layoffs, failed to bargain over the effects of the layoff, and failed to provide relevant and necessary information. On April 7, 2011, the OGC dismissed the charge. NUHW appealed that dismissal. The Board reversed the dismissal, in part, in *Salinas Valley Memorial Healthcare System* (2012) PERB Decision No. 2298-M, and directed the OGC to issue a complaint based on the allegation that the Hospital had failed to bargain over the effects of the December 2010 layoff.³ That case concluded in June 2015 when the Board issued *Salinas Valley Memorial*

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

³ PERB upheld the dismissal of allegations that the Hospital failed to bargain over the decision to implement the December 2010 layoffs and failed to provide relevant and necessary information.

Healthcare System (2015) PERB Decision No. 2433-M (*Salinas I*), dismissing the complaint. The Board determined that the Hospital had not refused or failed to negotiate over the effects of the December 2010 layoffs, and based on *Compton Community College District* (1989) PERB Decision No. 720 and its progeny, the Hospital was permitted to implement those layoffs even though negotiations over the effects of the layoffs had not concluded. (*Salinas I* at pp. 15-18.)

The present case arises from the parties' dispute over a second round of layoffs in June 2011. NUHW filed an unfair practice charge on June 28, 2011, alleging in relevant part that after the December 2010 layoffs, the Hospital unilaterally changed its policy over how remaining positions will be filled, specifically by implementing a process of rebidding within departments that have a vacancy.

A complaint issued on August 14, 2012, alleging that the Hospital had unilaterally changed its policy for rehiring by implementing a policy of rebidding within particular departments when a vacancy arose without providing NUHW an opportunity to meet and confer over the decision to implement the change in policy and/or the effects of the change in policy.

The hearing occurred on February 26-27, 2013. On the second day of the hearing NUHW moved to amend the complaint to include allegations that the Hospital unlawfully refused to bargain over the effects of layoffs. The ALJ denied the motion and issued a proposed decision on June 24, 2013, dismissing the complaint and underlying unfair practice charge. On July 30, 2013, NUHW filed timely exceptions to the proposed decision and on September 3, 2013, the Hospital filed a timely response to those exceptions.

Pursuant to requests by the Board, the parties also filed supplemental briefs, the substance of which we discuss *infra*.

FACTUAL SUMMARY

NUHW has represented the unit of service, technical and clerical employees at the Hospital since October 2010, when it decertified the predecessor exclusive representative of this unit, Service Employees International Union-United Healthcare West (SEIU). SEIU and the Hospital had entered into a collective bargaining agreement (CBA) effective August 14, 2006, to August 8, 2010. The CBA is silent regarding rebidding, either as to when the process is triggered or as to a procedure.

Rebids Prior to 2011

Rebidding is a process to reassign work schedules in a particular department or occasionally across departments. Rebidding takes place either subsequent to or as part of a new Hospital staffing plan, caused either when the workload requires additional shifts, or when the number of employees working a particular shift had to be reallocated because of a change in the volume of work. On at least one occasion, rebidding took place when SEIU brought to the Hospital's attention an inequity in the way weekend shifts were assigned. In the past, employees were permitted to bid on the new schedules and/or assignments by seniority within classification and by department, and thereby select a new schedule and/or assignment. According to Bev Ranzenberger (Ranzenberger), the Hospital's vice president of operations, the Hospital had a practice of giving SEIU and employees 30 days' notice prior to a rebid. Between 1999 and 2010 there were eight instances of rebidding, all of which are described in the proposed decision.

NUHW and the Hospital dispute whether the Hospital negotiated with SEIU prior to conducting rebids. What is evident from the record is that in each instance of rebidding, the Hospital notified SEIU that it believed a rebid was necessary and explained the reasons for the rebid. These discussions sometimes occurred in formalized labor-management meetings, but

not always in that forum. On at least one occasion, in 2008, the Hospital presented statistics to support its decision to make the changes that required the rebid and engaged in a dialogue with SEIU over the need for the rebid. SEIU ultimately concurred about the need for the rebid and it went forward. As Ranzenberger explained, in all of the rebids before 2011, management and SEIU were able to mutually agree to the rebid process.

SEIU never filed a grievance or unfair practice charge or otherwise protested the rebids and never asserted that the Hospital had refused to negotiate over conducting a rebid in a particular instance.

Negotiations Concerning Rebidding in 2011

In November 2010, the Hospital notified NUHW secretary-treasurer John Borsos (Borsos) that due to worsening finances, it was considering layoffs. Borsos demanded that the Hospital bargain over the decision to lay off as well as the effects of the layoffs, but the parties were unable to reach agreement on the effects of these layoffs before they were implemented in late December 2010. Negotiations over the effects of the December 2010 layoffs continued into the early part of 2011.

The parties began negotiations for a successor CBA in early 2011. The Hospital appointed two bargaining teams. One team was to negotiate the successor CBA, and the other team, headed by Ranzenberger and Ann Kern (Kern), the Hospital's director of labor relations, was to bargain over effects of the layoffs. In April or May 2011, the Hospital notified NUHW of the possibility of further layoffs affecting an additional 146 employees, and invited negotiations on the effects of those layoffs. Negotiations ensued and bargaining sessions were held in May and June 2011. The effective date of the layoffs was postponed from mid-June to late June 2011.

On June 6, 2011, the Hospital provided NUHW with a “PROPOSAL TO NUHW RE: JUNE, 2011 LAYOFFS.” (Respondent Exh. 2.) Page three of that document proposed rebids in two of the departments represented by NUHW: Surgical Sterile Processing Department and Materials Management Department. The proposal also included the names of employees to be laid off, the reductions in layoffs due to resignations, the new work schedules to be implemented for retained employees, recall rights, and other items. NUHW responded to the proposal by demanding to bargain over how the work would be done after the layoffs.

On or about June 9, 2011, during negotiations over the effects of the layoffs, the Hospital submitted a new proposal entitled “June 9, 2011 Proposal to Rebid NUHW employee Schedules Due to June 2011 Reduction in Force.” (Charging Party Exh. 2.) The document stated, in relevant part:

The following schedule is a proposal from the hospital to rebid the schedules in departments where elimination of a position will open a shift(s) to personnel within the department. Past practice has been to rebid schedules to allow staff the opportunity to choose alternate schedules, by seniority. The schedule changes have already been proposed to you. This is the schedule for rebid only. The affected employees will be informed of new schedules no later than 48 hours prior to bid date.

This proposal added eight additional departments subject to rebid. The proposal also stated that licensed vocational nurse (LVN) positions had been removed from all departments except the mother-baby unit, and that the certified nurse aid position would be subject to rebid.

June 16, 2011, was to be the “bid date” for both certified nurse aids and LVNs. NUHW specifically demanded to bargain over matters related to this rebid as well as over the movement of LVN work to CNAs and registered nurses.

NUHW viewed these proposed rebids as a way for the Hospital to avoid using seniority in the order of layoff, and it further objected to the rebids because, according to Borsos,

NUHW had still not been adequately informed about specifics of the layoffs and its effects. Borsos also protested that the Hospital was going forward with rebids despite the CBA language regarding layoffs and in the absence of any CBA provisions giving authority for rebidding.⁴

On or about June 15, 2011, NUHW proposed language which stated, in relevant part:

4. Salinas Valley Memorial Hospital agrees that it will not make any unilateral changes, including the rebidding of any department, without the expressed written approval of the union.

(Charging Party Exh. 11; Reporter's Transcript, Vol. I, p. 65.)

The Hospital did not accept NUHW's proposal. On June 21, 2011, NUHW went on strike. The following day, the Hospital locked out the NUHW-represented bargaining unit.

On June 23, 2011, Borsos wrote a letter to Hospital Chief Executive Officer Lowell Johnson (Johnson), objecting to the impending layoffs scheduled for June 24, because they would unilaterally change terms and conditions of employment prior to a bargaining impasse.

(Charging Party Exh. 3.) Borsos identified the terms and conditions the Hospital was required to negotiate, including the number of employees to be laid off; the timing of the notice; the manner in which the work would be performed by the employees remaining after the layoff; the health and safety of the remaining employees; the transfer of bargaining unit work to employees outside the bargaining unit; the introduction of new technology or equipment and changes to the manner in which work is performed as a result of such introduction; and application of seniority and recall rights.

With respect to rebidding, Borsos also wrote that:

⁴ The expired CBA is silent on rebidding and neither party claims that rebidding is covered by the CBA.

Despite the absence of agreement with the union or the parties reaching impasse, the hospital has begun taking steps to implement unilateral changes to working conditions including the initiation of a rebid process in two departments—Materials Management and Nursing—and the further implementation of a number of other changes related to the effect of the proposed layoffs.

In fact, the hospital did not propose a specific schedule for initiating rebids until June 5, 2011, a process and a schedule that we did not agree nor did we reach impasse on.

[¶ . . . ¶]

By this letter, we hereby demand that the hospital delay the unlawful implementation of proposed layoffs and their effects, scheduled to commence tomorrow, June 24, 2011 . . .

(Charging Party Exh. 3.)

On or about June 24, 2011, the Hospital commenced the layoffs and the partial rebid of schedules and shifts for the LVN position. (Respondent Exh. 6.)⁵ Rebids in environmental services, materials management, nutritional services and the emergency departments had occurred earlier in June. Prior to rebidding these departments, the Hospital did not declare impasse on the issue of rebidding or any other subject. The only counter proposal NUHW offered regarding rebidding was the one of June 15, 2011, proposing that rebidding occur only with NUHW's consent.

At the time that the rebids occurred, the Hospital and NUHW were still in the process of bargaining over the effects of the layoffs and the terms of the successor CBA.

⁵ Although the Hospital's June 9, 2011 proposal listed June 16 as the date on which rebidding for LVNs and certified nurse aids would commence, the record is ambiguous whether any rebids took place on that day.

ALJ PROPOSED DECISION

The ALJ framed the issue as follows: “Did the Hospital unilaterally change policy by conducting the rebid for departmental assignments following the layoffs?” (Proposed decision, p. 13.) NUHW claimed that the Hospital had repudiated an existing unwritten policy that required the Union’s consent to each rebid. The Hospital asserted that the evidence failed to establish that it ever agreed that negotiations were required over the decision to conduct a rebid.

The ALJ found that rebids conducted prior to 2011 occurred when workload changes required rescheduling or reassignment of employees, or when fewer employees were needed for a particular job, or when new shifts were added. On these occasions, the Hospital notified employees and SEIU 30 days in advance and a union representative was permitted to be present when the employees selected their new schedules or assignments on the basis of seniority. Thus, the ALJ concluded that SEIU was aware of the rebidding practice and the total number of rebids established the consistency of the practice. He further concluded that because SEIU had not objected to any rebid or demanded to negotiate over it, the practice was accepted by both parties. Since SEIU did not file any grievances or demand to bargain over an adoption of a purported new policy, the ALJ concluded that “the rules of waiver by inaction prevents it from doing so now.” (Proposed decision, p. 15.)

The ALJ rejected NUHW’s argument that the past practice required negotiation and consent of SEIU before rebidding could take place. He found the evidence presented by NUHW on this point unconvincing because witnesses’ testimony lacked specificity. NUHW’s witnesses never contradicted the Hospital witnesses’ testimony that they were unaware of SEIU’s belief that rebidding must be specifically negotiated in each instance. The fact that there was not a single instance of SEIU objecting to a decision to rebid or engaging in

negotiations to prevent a rebid was cited as further support of the ALJ's conclusion that the past practice did not include a requirement of negotiations or assent by SEIU before a rebid could occur.

The ALJ relied on the doctrine of waiver to reject NUHW's version of the past practice: "When a potentially negotiable decision is implemented eight times over a 10 year period with notice to the union but without evidence of an objection, the employer is entitled to conclude that the practice is one accepted by the union. Although waivers of the right to negotiate are not lightly inferred, the evidence here is sufficient to overcome that admonition." (Proposed decision, pp. 15-16.) Therefore, the evidence was insufficient, according to the ALJ, to demonstrate that the Hospital reversed its rebid policy when it proposed and conducted rebids in June 2011. The proposed decision concluded: "The Hospital has demonstrated that it acted in conformity with a past practice of conducting rebids to reassign employees to different work schedules and/or assignments without any requirement for negotiations of its decision." (Proposed decision, p. 17.)

Finally, the ALJ rejected NUHW's attempt to expand the scope of the dispute, concluding that the complaint did not include a claim that the Hospital failed to bargain over the effects of layoff. He also affirmed his denial of NUHW's motion to amend the complaint to include allegations regarding the Hospital's failure to bargain the effects of the June 2011 layoff.

EXCEPTIONS AND SUPPLEMENTAL BRIEFS

NUHW excepted to the proposed decision, primarily asserting that the ALJ erred in finding that there was a past practice that permitted the Hospital to rebid without first obtaining SEIU's consent, and that he erroneously concluded that SEIU had waived NUHW's right to negotiate over the policy of rebidding. Specifically, NUHW asserts: "The predecessor union's

decision not to challenge a process they had agreed to does not amount to a waiver of the present union's ability to challenge a policy change to the practice the parties had historically followed with respect to rebidding." (Charging Party's Exceptions, p. 15.)⁶

NUHW also excepted to the ALJ's conclusion that the complaint did not include a claim that the Hospital had refused to bargain over the effects of the June 2011 layoffs, and his denial of NUHW's motion to amend the complaint to include such allegation.

The Hospital filed no cross-exceptions and urges affirmance of the proposed decision, asserting that the ALJ correctly concluded that the past practice in question permitted the Hospital to rebid positions without first negotiating with and obtaining SEIU's approval. The Hospital also asserts that the ALJ correctly denied NUHW's motion to amend the complaint after considering the fact that the motion was made on the last day of the hearing and that the Hospital did not have prior notice of the effects bargaining claim.

The Board's Request for Further Briefing

On June 10, 2015, the Board requested further briefing on the following questions:

1. Does an employer's duty to maintain the status quo in negotiable terms and conditions of employment after the expiration of an MOU include the duty to continue unwritten past practices agreed to by a predecessor union after that union is decertified? If so:
 - a) Does the new union's objection to the practice reinstate the employer's duty to bargain over the practice with regard to the June, 2011 rebid?
 - b) Are the parties bound by the past practice until a new agreement is reached?

⁶ NUHW did not except to the ALJ's factual finding that it was either unwilling or uninterested in making any proposals during negotiations over the effects of the June 2011 layoffs on the subject of rebidding or reallocation of work, even though it had made proposals regarding other effects of the layoffs, such as recall rights, severance pay, unemployment benefits and layoff protocol. (Proposed decision, pp. 6-7, 17.)

2. In light of *USC University Hospital & National Union of Healthcare Workers* (2012) 358 NLRB No. 132 and *Eugene Iovine, Inc.* (1999) 328 NLRB 294, among other cases, does SEIU's failure to object to past rebids between 2001 and 2010 impact the right of NUHW to demand negotiations over rebidding? Why or why not?

Both parties submitted supplemental briefs in response to these questions. In its reply supplemental brief, NUHW informed the Board that after its exceptions were filed the parties negotiated over rebidding procedures, including those associated with subsequent layoffs. NUHW asserted that "while the parties' [*sic*] maintain their dispute whether or not a unilateral change occurred in this case, under these circumstances NUHW no longer seeks an order requiring the employer to bargain over rebidding procedures, and NUHW no longer seeks the remedy to restore the status quo as it existed before the June, 2011 rebids were conducted." (Charging Party's Supplemental Reply Brief, p. 5.) Instead, NUHW seeks only a determination concerning the rights and obligations of the parties regarding unwritten past practices and whether a predecessor union's waiver or acquiescence affects the rights and duties of the parties after decertification. NUHW further contends that the Board may determine these issues without necessarily determining "whether the parties did in fact bargain to impasse, or whether the employer implemented prematurely, since those later determinations relate to the necessity of the remedy, as opposed to the duties." (Charging Party's Supplemental Reply Brief in Support of Exceptions, p. 6.)

In response to NUHW's representations, the Board sent out a second inquiry to the parties asking them to explain whether there is an ongoing or live case and controversy presented by the exceptions to the proposed decision. The Hospital argued in reply that based on NUHW's representations, any decision rendered in this case would constitute an advisory opinion and because the Board does not issue advisory opinions, the Hospital requested the

case be dismissed as moot. In its reply to our inquiry, NUHW explained that it intended to argue in its earlier Supplemental Reply Brief that PERB should consider issuing an order for declaratory relief, given the unique circumstances of this case. But in light of NUHW's reading of the Board's inquiry and the Hospital's objections to any declaratory relief award, NUHW withdrew its argument for declaratory relief.⁷ NUHW further argued the matter was not moot because the parties had not reached any agreement that settles the issue in this case and it has not waived its right to pursue this charge.

DISCUSSION

Mootness

PERB has held on more than one occasion that a case in controversy does not become moot merely because the wrongful conduct has ceased. (*Amador Valley Joint Union High School District* (1978) PERB Decision No. 74, p. 5 ["In cases clarifying parties' rights and obligations under a new law, the public interest is served by deciding the underlying [dispute]."]; *City & County of San Francisco* (2009) PERB Decision No. 2041-M, p. 4-5; *County of Riverside* (2010) PERB Decision No. 2132-M. See also *Oakland Unified School District v. Public Employment Relations Board* (1981) 120 Cal.App.3d 1007 [unfair practice alleging unilateral change not rendered moot by subsequent agreement].) As the Board held in *California School Employees Association and its Shasta College Chapter #381 (Parisot)* (1983) PERB Decision No. 280a, a complaint "is not moot when any material question concerning an alleged violation of the charging party's rights remains to be answered. The fact

⁷ NUHW did not retreat from its earlier factual representation that it no longer sought a remedy of restoration of the status quo ante or an order requiring the Hospital to bargain over rebidding procedures.

that because of ‘changed conditions the relief originally sought . . . cannot be granted’ does not lead to a contrary result.”

Because of the importance of the issues presented concerning the legal effect of actions by a predecessor union, and because there remains a live controversy over whether there was a unilateral change, we do not consider this case moot. Nor do we believe that NUHW disclaiming its interest in a bargaining order or a make whole remedy relegates our efforts to an advisory opinion. PERB does not issue advisory opinions or generalized declarations of law, untethered to controversies presented to the Board. (*Santa Clarita Community College District (College of the Canyons)* (2003) PERB Decision No. 1506, pp. 27-28.) However, we are not without authority to determine the rights and obligations of the parties, where, as here, there is a live controversy and the matter is not moot.

There is a distinction between advisory opinions and decisions that declare the rights and duties of litigants where there is an actual controversy before the Board. While some of our decisions have stated that PERB does not issue advisory opinions or provide declaratory relief (*Jefferson School District* (1980) PERB Order No. Ad-82, p. 13 (*Jefferson*); *County of Orange* (2006) PERB Decision No. 1868-M, p. 7), other decisions have limited the restraint to “advisory opinions.” (*County of Contra Costa* (2014) PERB Order No. Ad-410-M, p. 13; *California State University Employees Union, SEIU Local 2579, CSEA (Sarca)* (2006) PERB Order No. Ad-351-H.) Regardless of the terminology used, what is apparent in each of these decisions is the Board’s refusal to offer an opinion where there is no actual controversy between the parties. As the Board noted in *County of Orange* at p. 7: “. . . the Board, and for that matter, the public, is better served when the Board focuses on the resolution of specific legal disputes rather than the resolution of abstract differences of legal opinion.” Where we part company with *County of Orange* and *Jefferson* is their apparent conflation of “advisory

opinion” with “declaratory relief.” Declaratory relief as conceived in California Code of Civil Procedure, section 1060, provides that any person “who desires a declaration of his or her rights or duties with respect to another . . . may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action . . . [and] may ask for a declaration of rights or duties. . . .” Courts have distinguished between declaratory relief and advisory opinions and held that the latter are forbidden in actions brought for declaratory relief. (*Winter v. Gnaizda* (1979) 90 Cal.App.3d 750. See also *Baxter Healthcare Corp. v. Denton* (2004) 120 Cal.App.4th 333; *Alameda County Land Use Assn. v. City of Hayward* (1995) 38 Cal.App.4th 1716 [entitlement to declaratory relief requires an actual controversy which admits definitive and conclusive relief, as opposed to an advisory opinion on a hypothetical state of facts].)

This distinction is sensible, and we take this opportunity to clarify that PERB does not issue advisory opinions, but declaratory relief is not an advisory opinion, as it resolves an actual dispute or controversy between parties. Neither our precedent nor enabling statutes constrain the Board from providing declaratory relief.

In this case there remains an actual case in controversy between the parties. We will therefore consider the issues presented in the case, taking into consideration NUHW’s disclaimer of interest in a bargaining order or any back pay.

Scope of the Complaint and Motion to Amend Complaint

Before discussing the merits of this case, we first address NUHW’s exception concerning the scope of the complaint and to the ALJ’s denial of its motion to amend the complaint. The complaint in this case reads in pertinent part:

3. Before June 6, 2011, Respondent’s policy concerning procedures for rehiring was outlined in Article 11, subdivision B(2) of the parties’ Memorandum of Understanding, which states

that “Seniority for long term layoff shall be Hospital wide within a job classification.”

4. On or about June 6, 2011, Respondent changed this policy by implementing a policy of rebidding within particular departments when a vacancy arose.

5. Respondent engaged in the conduct described in paragraph 4 without prior notice to Charging Party and without having afforded Charging Party an opportunity to meet and confer over the decision to implement the change in policy and/or the effects of the change in policy.

6. By the acts and conduct described in paragraphs 4 and 5, Respondent failed and refused to meet and confer in good faith. . . .

We concur with the ALJ’s determination that the complaint did not encompass a general claim for failure to bargain over the effects of the June 2011 layoffs. The complaint specifically limits its allegations to the rebid of vacant positions subsequent to June 6, 2011. Even assuming that rebidding is an effect of layoffs in this instance, the complaint does not encompass a more comprehensive list of effects of layoffs and does not allege that the Hospital refused or failed to meet and confer over effects of layoffs generally. We therefore find no merit in NUHW’s assertion that the complaint encompasses the allegation that the Hospital refused to bargain in good faith over the effects of layoffs. There is no basis for expanding the scope of the complaint beyond the wording therein or beyond the ALJ’s formulation of the issue to conform to the evidence presented: “Did the Hospital unilaterally change policy by conducting the rebid for departmental assignments following the layoffs.” (Proposed decision, p. 13.)

With respect to NUHW’s exception to the ALJ’s denial of its motion to amend the complaint to include a claim that the Hospital failed to bargain over the effects of layoffs, we deem this exception abandoned by NUHW and dismiss it on that basis. As previously noted,

NUHW has represented that the parties have negotiated over rebidding procedures and has disclaimed any interest in a bargaining order or a return to the status quo ante prior to June 2011. In light of this, combined with NUHW's position that it seeks only a determination regarding past practices and whether a predecessor union's acquiescence in a practice binds the successor union, it is fair and appropriate to conclude that NUHW has abandoned its claim that the Hospital failed to bargain over the effects of the 2011 layoffs.

Past Practice Regarding Rebidding

To state a prima facie case for an unlawful unilateral change, it must be established that: (1) the employer took action to change policy; (2) the change in policy concerns a matter within the scope of representation; (3) the action was taken without giving the exclusive representative notice or opportunity to bargain over the change; and (4) the action had a generalized effect or continuing impact on terms and conditions of employment. (*Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262; *County of Santa Clara* (2013) PERB Decision No. 2321-M.) As more recently noted in *Pasadena Area Community College District* (2015) PERB Decision No. 2444, p. 12:

The gravamen of any unilateral action is exclusion of employees through their chosen representative from participation in the decision-making process. Whether a unilateral action is the creation, implementation or enforcement of policy, or a change to existing policy as contained in a written agreement, in written employer rules or regulations, or in an unwritten established past practice, our statutes require an employer contemplating a change in policy concerning a matter within the scope of representation to provide the exclusive representative notice and an opportunity to bargain.

A policy may be established by written agreement, written employer rules or regulations, or regular and consistent past practice. Since there is no written agreement between the Hospital and either NUHW or SEIU regarding rebidding practices or procedures,

we must look to evidence of an unwritten past practice.⁸ For a past practice to be binding and subject to a unilateral change analysis, it must be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. (*County of Placer* (2004) PERB Decision No. 1630-M; *Riverside Sheriffs' Association v. County of Riverside* (2003) 106 Cal.App.4th 1285, 1291.) PERB has also described an enforceable past practice as one that is “‘regular and consistent’ or ‘historic and accepted.’” (*Hacienda La Puente Unified School District* (1997) PERB Decision No. 1186.)

Given the fact that NUHW decertified SEIU in October 2010, and that all the evidence of past practice regarding rebidding encompassed a period between 1999 and May 2010 when SEIU was the exclusive representative, we first consider whether the employer is obliged to maintain a past practice after the decertification of the exclusive representative that allegedly participated in the establishment of the practice or policy. Both parties agree and there is ample authority holding that a change in certification does not relieve the employer of its duty to maintain the status quo until such time as it reaches an agreement with the new union or a lawful impasse occurs. (*In Re More Truck Lines, Inc.* (2001) 336 NLRB 772, citing *Alpha Cellulose Corp.* (1982) 265 NLRB 177, 178, fn. 1; *Arizona Portland Cement Co.* (1991) 302 NLRB 36; *S. California Permanente Med. Group; & Kaiser Found. Hosps. & Nat'l Union of Healthcare Workers* (2011) 356 NLRB 783.)

⁸ It is the existence and nature of the past practice that is at issue in this case. The Hospital does not contend that the subject of rebids is outside the scope of representation, and NUHW does not assert that the Hospital failed to give it notice of the rebids in 2011. There is therefore no need to discuss these elements of the prima facie test.

Therefore, if there was a past practice regarding rebidding, the Hospital was obligated either to maintain it or to provide NUHW with notice and an opportunity to bargain over the procedure if it sought to change the policy.

The Practice of Rebidding Prior to 2011

Both parties acknowledged that rebidding occurred when circumstances required a reallocation of employees to different shifts or different assignments. But NUHW asserts that the binding practice required the Hospital to negotiate with and obtain approval by SEIU before implementing the rebids. The Hospital contends the opposite—that rebidding was never subject to negotiation or approval by SEIU, although the Hospital generally notified SEIU of the need for rebidding and permitted SEIU to observe the selection process to assure that it was conducted fairly. Both parties seem to agree that seniority was the guiding principle in determining which employee got first choice of the newly-configured schedules.

The record establishes that between 1999 and 2010 there were eight rebids. In most instances these rebids were necessitated by the Hospital discontinuing a program, such as the Meals on Wheels Program in 1999, changing schedules to require weekend work, or adding an evening shift due to an increase in the volume of work in the laundry department in 2005.⁹

Prior to each of these rebids, the Hospital notified SEIU of the need for the rebid, and there was some discussion, either with a union representative or at labor-management committee meetings. According to the evidence, there was never a disagreement between SEIU and the Hospital about the need for each of the rebids prior to 2011. SEIU participated in the rebids by watching the process to assure that it was conducted fairly and by order of

⁹ None of the rebids conducted when SEIU was the exclusive representative were caused by a layoff.

seniority. On one occasion, the parties entered into a non-precedential written agreement concerning the rebid and related issues.

SEIU never filed a grievance, demanded to bargain, or filed unfair practice charges over the rebids. Perhaps because of the history of mutual agreement as to the need for the rebids and therefore lack of protest, NUHW was not able to establish that there was a clear and unequivocal past practice that required SEIU's consent before a rebid occurred.

What is apparent from the record is that prior to 2011, when there was a need for reconfiguration of shifts, schedules, workload, or assignments, the Hospital notified SEIU of the need for a rebid (or as in the case of the 2004 rebid, SEIU brought a staffing inequity to the Hospital's attention), there was some discussion between the Hospital and SEIU, and in each pre-2011 instance, SEIU agreed to the rebid.

We agree with the ALJ that in June 2011 the Hospital acted in conformity with a past practice of conducting rebids without any requirement for negotiations with or consent by SEIU. NUHW failed to show that the Hospital understood that it was required to obtain SEIU's consent before a rebid could occur.

In its supplemental brief the Hospital urges that the complaint must be dismissed if the Board concludes there was no past practice regarding rebidding. According to the Hospital, if there was no past practice, there could be no unilateral change in a past practice and therefore no violation of the MMBA. This argument misreads the well-established law against unilateral actions on matters within the scope of bargaining.¹⁰

¹⁰ Although we conclude that the Hospital acted in conformance with the past practice on re-bidding, we note the error of its assertion that there must be a past practice for there to be an unlawful unilateral action.

As recently noted in *Pasadena Area Community College District, supra*, PERB

Decision No. 2444, p. 12, fn. 6:

PERB has long recognized the following three general categories of unlawful unilateral *actions*: (1) changes to the parties' written agreements; (2) changes in established past practice; and (3) newly created, implemented or enforced policy. . . . PERB has always recognized *newly created, implemented or enforced policy* as subject to its unilateral action doctrine. (*Gonzales Union High School District* (1993) PERB Decision No. 1006, adopting ALJ's Proposed Dec., pp. 20-21 [additional payroll deductions to cover premium increases constituted a new policy where negotiated funding mechanism could not absorb increases]; *Healdsburg Union Elementary School District* (1994) PERB Decision No. 1033, adopting ALJ's Proposed Dec., pp. 16-20 [early morning student supervision beyond the normal workday constituted a new practice notwithstanding varying informal practices at different school sites]; accord *San Joaquin County Employees Assn. v. City of Stockton* (1984) 161 Cal.App.3d 813, 819 [employer response to increased health insurance premiums].)

(Emphasis in original.)

Even if there was no past practice regarding rebidding, the Hospital was still obligated to bargain over the procedure by which work schedules, hours, shifts, and assignments are changed because those matters are within the scope of representation. Because NUHW did demand to bargain over rebidding when the Hospital notified it of its proposal to do so in early June 2011, we next consider whether the Hospital complied with that obligation, or whether it was excused from negotiating with NUHW over rebids because of any waivers or acquiescence by the predecessor representative, SEIU.

Waiver of the Right to Bargain Over Rebids

The ALJ concluded that because SEIU never demanded to bargain over the adoption of a new unwritten policy, i.e. the rebid, "the rules of waiver by inaction prevents it from doing so now." (Proposed decision, p. 15.) To the extent this infers that SEIU and NUHW were the

same organization, we disagree. The waivers or acquiescence in a practice by a predecessor union cannot bind a successor exclusive representative.

Under NLRB precedent, the alleged waiver by SEIU of the right to bargain over a mandatory subject of bargaining does not bind the successor union, NUHW.¹¹ In *USC University Hospital & National Union of Healthcare Workers* (2012) 358 NLRB No. 132 (*USC*), a case addressing the same predecessor and successor unions, and a similar issue as in the present case, the NLRB upheld an ALJ decision which states, in relevant part:

. . . perhaps the SEIU, through its past practice, had waived its right under the terms of the contract to receive written notice directed to a union representative of the Hospital's intent to change the work schedule of unit employees. However, a newly certified Union, such as the NUHW, cannot be held to the predecessor union's failure to enforce provisions in a collective-bargaining agreement. The Board has specifically held that acquiescence to unilateral employer actions by a predecessor union is not imputed to a newly certified incumbent union. *Eugene Iovine, Inc.*, 328 NLRB 294, 296-297 (1999) (predecessor union acquiescence to employer reduction of employee hours not imputed to newly certified union); also see *University of Pittsburgh Medical Center*, 325 NLRB 443, 443 (1998) (waiver by predecessor union found inapplicable to incumbent union).

(*Id.* at p. 1216)

In *Eugene Iovine, Inc. & Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO* (1999) 328 NLRB 294 (*Iovine*), the NLRB rejected the employer's argument that it was permitted to unilaterally reduce working hours because such discretionary reduction was established as a past practice with a predecessor union. The employer also argued that the predecessor union's acquiescence in that past practice gave further license to

¹¹ When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

unilaterally implement reduction in work hours. The NLRB held: “The acquiescence of the employees’ former bargaining representative in the employer’s unilateral action in the past is not binding upon the newly certified union . . . What the other union did at another time when it represented these employees cannot be binding on this new unit and the labor organization the employees have chosen to represent them.” (*Id.* at p. 297. See also *Porta-King Bldg. Systems, Div. of Jay Henges Enterprises, Inc. v. NLRB* (8th Cir. 1994) 14 F.3d 1258, 1262.) The policy underpinning this rule was well stated in *Presbyterian University Hospital* (1998) 325 NLRB 443, 447: “It would be a patent subversion of that right [to bargain through representatives of their own choosing] to allow employees to select representation and at the same time bind them to practices that may have developed between their prior representatives and an employer. Indeed, those past practices may have in some way contributed to the rejection of representation by that union and the selection of new union representation.”

Since SEIU was a separate, previously certified predecessor union, and there was no allegation or evidence that NUHW was an alter ego of SEIU, any alleged acquiescence by SEIU to the Hospital’s purported unilateral actions does not bind NUHW, a separate employee organization.

Therefore, NUHW could revive the Hospital’s duty to bargain over the proposed June 2011 rebid by simply demanding to do so. As PERB held in *San Jacinto Unified School District* (1994) PERB Decision No. 1078:

The fact that the District has previously changed work schedules of maintenance and operations employees without bargaining does not preclude CSEA in this instance from effectively demanding to bargain over the District’s September 1992 action. “[A] union’s acquiescence in previous unilateral changes does not operate as a waiver of the right to bargain for all times.” (See *Johnson-Bateman Co.* (1989) 295 NLRB No. 26 [131 LRRM 1393].)

(*Id.*, proposed decision at p. 23.)

NUHW did in fact demand to bargain over the Hospital's proposal to rebid various positions in June 2011, and the Hospital's duty to bargain over rebids was fully revived by NUHW.

However, as noted earlier, the Hospital was obligated to maintain the status quo after certification of a new exclusive representative unless a new agreement or impasse was reached. (*In Re More Truck Lines, Inc.*, *supra*, 336 NLRB 772; *Arizona Portland Cement Co.*, *supra*, 302 NLRB 36.) As we have determined with the ALJ, the status quo regarding rebids permitted the Hospital to rebid assignments without the agreement or permission of the exclusive representative. This is what occurred in June 2011, and the Hospital did not violate the MMBA when it conducted those rebids even though it had not completed negotiations over the rebids. We affirm the dismissal of the complaint.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, the complaint and underlying unfair practice charge in Case No. SF-CE-857-M, *National Union of Healthcare Workers v. Salinas Valley Memorial Healthcare System*, are hereby DISMISSED.

Chair Gregersen and Member Banks joined in this Decision.

On August 31, 2012, the Hospital filed its answer to the complaint, denying the material allegations and raising affirmative defenses.

On October 15, 2012, an informal settlement conference was held, but the matter was not resolved.

On February 26 and 27, 2013, a formal hearing was conducted in Oakland. On May 31, 2013, the matter was submitted for decision with the submission of post-hearing briefs.

FINDINGS OF FACT

NUHW is an “employee organization,” within the meaning of section 3501(a), and an “exclusive representative” of a bargaining unit of public employees, within the meaning of PERB Regulation 32016(b). The Hospital is a “public agency” within the meaning of section 3501(c).

NUHW represents a unit of service, clerical and technical employees. These employees perform the functions of housekeeping, dietary, non-registered nursing, admitting, and materials management.

NUHW was certified as the exclusive representative in October 2010, following a successful election challenge to Service Employees International Union, United Healthcare Workers West (SEIU). The representing chapter of SEIU was previously known as Local 250, prior to a merger of two chapters within California.

John Borsos is NUHW’s vice-president. Immediately prior to the change in representation, Borsos served as the director of SEIU’s hospital division, covering all California, non-Kaiser, acute care facilities. He supervised the bargaining of contracts for these operations.

The last collective bargaining agreement between SEIU and the Hospital covered a term of August 14, 2006 through August 8, 2010. Borsos did not conduct the negotiations for

that agreement but supervised the lead negotiator who did. Before NUHW and the Hospital could undertake successor contract negotiations, the Hospital informed NUHW of significant financial issues it was facing resulting from reduced patient census. As a result of these challenges, the Hospital determined it was necessary to implement a reduction in force.

Bev Ranzenberger was the Hospital's vice president of operations at time of this dispute. She oversaw a number of departments including human resources. Ann Kern is the director of the Hospital's human resources department. In November 2010, Ranzenberger and Kern notified Borsos of the Hospital's intention to conduct layoffs. Some layoffs occurred in December 2010. Borsos objected to the Hospital's failure to provide clear information about the positions being reduced or the scope of the reductions.³

Beginning in early 2011, progress on the contract negotiations was slowed by the circumstances related to the layoffs. NUHW attempted to defend its positions in both arenas at the same time. When successor agreements began in earnest around April 2011, NUHW believed that the Hospital's claims of financial distress were greatly exaggerated.

Announcement of the June 2011 Layoffs and Commencement of Effects Bargaining

By e-mail dated April 13, 2011, Kern informed NUHW of its intent to conduct a second round of layoffs scheduled for June 15, 2011, encompassing approximately 107 full-time equivalent positions (FTE) and 146 employees. The e-mail was addressed to Borsos, Chief Steward Marilyn Benson, Executive Chair Esther Fierros-Nunez. Benson had been the chief steward for SEIU Local 250 and United Healthcare Workers West. She participated in all bargaining sessions dating to the 1970s.

³ In *Salinas Valley Memorial Healthcare System* (2012) PERB Decision No. 2298-M, PERB reversed that portion of the dismissal of NUHW's unfair practice charge alleging a refusal to bargain effects of the layoffs.

Kern's e-mail notified NUHW that a financial incentive would be provided for voluntary separations in advance of the layoff and invited negotiations over the effects of the layoff. An attachment listed the classifications subject to reduction, with a corresponding number of FTEs and affected employees. The four classifications most impacted were environmental services aide (12 employees), nutrition services aide (13 employees), licensed vocational nurse (LVN) III (21 positions), and nurse aide (32 employees).

NUHW accepted the invitation to negotiate the effects. Ranzenberger and Kern were assigned responsibility for the effects bargaining. Borsos testified that the Hospital was resistant to engage NUHW in a meaningful way regarding the effects bargaining. The Hospital was again unwilling to provide specific information regarding who would be affected by the layoffs and how they would be affected.

Ranzenberger disputed this characterization. She cited the fact that the parties had a total of eight to nine meetings, that the Hospital shared the number of employees targeted, their departments, and the impacts on the remaining employees. At some point during these negotiations, the Hospital agreed to postpone the date of the layoffs by several weeks.

A written Hospital proposal dated June 6, 2011, corroborates Ranzenberger's position that the Hospital was attempting to provide current information to NUHW. The proposal recites three prior effects bargaining sessions in the month of May. It includes updated information regarding the total FTE reduction, by department, FTE level, job title, and name of the employee to be laid off. The proposal indicated reductions in the layoff achieved from voluntary resignations. It also indicated that new work schedules would be implemented for the retained employees and that a "rebid" would be conducted in two departments to allow those employees to select assignments according to shift. In an attachment the tasks of some of the assignments were listed. A revised summary indicated that the layoff list had been

reduced to 56 FTEs, spread over 78 employees. The June 6 proposal also listed the Hospital's position on recall rights. In response, NUHW demanded to bargain over how the work would be done after the layoffs.

At the next session, the Hospital passed a new proposal to NUHW. It was entitled "June 9, 2011 Proposal to Rebid NUHW Employee Schedules Due to June 2011 Reduction in Force." This proposal contained the list of targeted positions, reduced to 54 FTEs, spread over 76 employees. In addition to the two departments listed for rebidding in the June 6 proposal, the June 9 proposal included eight more departments. At this time the number of employees affected by the reduction in the classifications of both environmental services aide and nutrition services aide had been reduced to five. The number of employees in the LVN III and nurse aide classifications had been reduced to 17 and 15, respectively. The Hospital's proposal also indicated that LVN positions had been removed from all departments except the mother-baby unit. The proposal included the introductory statement:

The following schedule is a proposal from the hospital to rebid the schedules in departments where elimination of a position will open a shift(s) to personnel within the department. Past practice has been to rebid schedules to allow staff the opportunity to choose alternative schedules, by seniority. The schedule changes have already been proposed to you. This is the schedule for rebid only.

The rebid dates were listed for each department and were spaced over dates as early as June 13 through June 28, with some bids dates to be announced at a later time.

Borsos asserted that the proposal was delivered at a time when NUHW was still in the dark about the specific nature of the layoffs and its effects. The Hospital was proceeding despite the existence of contract language on layoffs and the absence of language providing authority for rebidding. Article 11, section B.1 states:

Seniority shall be department specific except as provided in [B]2. below. Effective September 30, 1995, there shall be three

seniority lists, one for full-time employees, one for part-time employees, and one for per diem employees. Seniority within each department shall be applied within a job classification as follows: first to full-time employees, second to part-time employees, and third to per diem employees.

Article 11, section B.2 states that “seniority for long term layoff shall be Hospital wide within a job classification.” From what NUHW had learned, the rebid in its view would be a means for the Hospital to evade the requirement of choosing employees to be laid off on the basis of seniority. Analogizing to the game of musical chairs, Borsos asserted that the nurses would be called to select one of the remaining positions. When all the positions were selected, those who had not selected a position would be out of a job. Also according to Borsos, the Hospital’s methodology was to first identify the number of work hours needed and then calculate the number of positions needed to cover these hours. NUHW objected to this as a violation of the seniority rule because the Hospital was not releasing per diem nurses, or at least allocating the hours assigned to them to the larger pool so as to reduce the impact on more senior staff.

Prior to the announcement of the rebids, the Hospital had announced that the nurse aide and LVN positions would be reduced from a 1.0 FTE to a 0.7 FTE per shift. The Hospital’s rationale was that more positions were needed than the number of positions that could be budgeted at full-time status in order to provide full seven-day per week coverage on two shifts.

Throughout the course of the eight or nine effects bargaining sessions, NUHW continued to object to the scope of the layoffs as being unjustified by the Hospital’s true financial condition. It was also either unwilling or uninterested in making any proposals on the subjects of rebidding or reallocation of work because it lacked sufficient information or because it believed any further implementation of the layoffs would result in a unilateral change to working conditions in terms of such issues as the number of employees to be laid

off, the manner in which the layoff will be implemented, the manner in which the work would be performed by the remaining employees, the transfer of bargaining unit work to those outside the unit, and seniority application and recall rights for employees. For example, in the nursing department, the layoff decision had resulted in the elimination of LVNs from certain departments, and the transfer of the work previously employed by those employees to other employees both in and outside of the unit. NUHW objected to the Hospital's decision to cease assigning LVNs to certain departments where the union believed the work was still needed. NUHW wanted assurances about how and what work would be performed after the rebidding. NUHW did offer proposals on effects on the subjects of recall rights, severance pay, unemployment benefits, and layoff protocol.⁴

Fierros-Nunez, the NUHW chair and a former chief steward for SEIU, works as a cashier in Patient Financial Services. She maintained that the rebid circumvented the policy of posting vacancies, and that with respect to the issues raised by the rebidding in general the Hospital had given insufficient lead time to complete the negotiations.

On June 10, 2011 NUHW gave notice of a strike. On June 15, the parties exchanged proposals designed to avert the strike. NUHW's proposal demanded that the Hospital cease making unilateral changes including, specifically, the rebidding of any department.

A strike occurred on June 21, followed by a June 22 lock-out by the Hospital. On June 23, the second day of the lock-out, Borsos wrote to Hospital Chief Executive Officer Lowell Johnson. Borsos restated that both the Hospital's layoffs and their effects were unlawful; that they amounted to unilateral changes because the Hospital had not completed negotiations on the effects of the layoff. In regard to the rebid process, Borsos stated:

⁴ Borsos maintained that NUWH submitted a proposal in the successor negotiations to address rebids. However, the proposal seeks to amend language on long term layoffs, and nothing in it addresses reassignment of employees to schedules following a reduction in force.

Despite the absence of agreement with the union or the parties reaching impasse, the hospital has begun taking steps to implement unilateral changes to working conditions including the initiation of a rebid process in two departments—Materials Management and Nursing—and the further implementation of a number of other changes related to the effect of the proposed layoffs.

In fact, the hospital did not propose a specific schedule for initiating rebids until June 5, 2011, a process and a schedule that we did not agree nor did we reach impasse on.

The Hospital responded by indicating its intention to proceed with the rebidding, while also communicating its intention to continue bargaining effects following the layoffs and new assignments.

The Prior Practice of Rebids

In the past the Hospital had conducted rebids to reassign work schedules in a department. Ranzenberger testified these have occurred in the past when there were reductions in the number of employees needed for a particular job assignment, when new shifts were added, or when the number of employees on a shift needed to be reallocated due to a change in the volume of work in the department. Ranzenberger added that the Hospital had a practice of giving the employees 30 days notice prior to a rebid and allowing employees to bid for schedules on the basis of seniority. A notice for a 2000 rebid for the materials management department shows only eight days notice, but no testimony was offered as to the discrepancy. The specific instances of rebidding are described below.

In 2009, there was a closure of an on-site laundry facility. The Hospital waited until there were sufficient vacancies in another department before consolidating the staff in the environmental services department and having the employees rebid into the schedules/work assignments of the remaining positions. The Hospital met with the union but not under the belief it had a duty to negotiate the decision to conduct the rebids. A “non-precedential”

agreement was executed by the parties containing a number of provisions related to the effects of the closure (e.g., preservation positions and movement to new classifications). The agreement includes concurrence as to some procedural aspects of the rebid. However, no NUWH witness testified that SEIU disputed the Hospital's right to reassign employees to new schedules through a rebid process.

In 2008, the laundry work shifted to later during the day due to a pattern of later patient discharges. The day shift staff was split and a later, staggered day shift was added. The environmental services employees were called in individually to select the early day schedule or the mid-day schedule.

In 2005, the environmental services department conducted a rebid when a change in laundry work resulted in the addition of an evening shift.

In 2004, a materials management department rebid occurred in a move toward equitable assignments, when senior staff was forced to participate in a rebid on schedules that included weekend shifts after having been permitted to select day shifts only.

In 2001 or 2002, the environmental services department held a rebid after deciding to change work schedules for efficiency purposes.

In 2000, the work of two departments in materials management was consolidated, together with the addition of an evening shift. New schedules were prepared and the incumbents bid on the shifts.

In 1999, a Meals on Wheels program was terminated, and there was a rebidding of schedules after the remaining work was redistributed so as to absorb the staff leaving the program. The same scenario occurred in 2010, when closure of a Starbucks shop resulted in the reduction of hours available, and employees bid on the schedules of the reallocated work. Part-time positions were eliminated and the work moved to full-time shifts.

NUHW's witnesses Benson and Fierros-Nunez testified that rebids only proceeded in the past with the express agreement of the union. Benson acknowledged rebids on multiple occasions but described only two: one was in nutritional services and the other was the 2004 rebid in the materials management department. She testified that an agreement for the nutritional services rebid to proceed was reached at a labor management meeting. As to the 2004 rebid, the evidence offered was only that Benson signed the rebid sheet acknowledging her agreement with the positions selected.

Fierros-Nunez stated that the Hospital would approach SEIU regarding a rebid and invite "discussion" about the rebid in the labor/management meetings or through a call from the human resources director. Management would tell the union, "This is what we have. This is what we would like to do." Fierros-Nunez added that the parties would "discuss all the pros and the cons about the situations . . . and come to an agreement, and then move forward." She further stated that the parties would not move forward if the union disagreed with it, but offered no details of an instance when that occurred.

Ranzenberger and Jeff Posnick, the administrative director of nutrition and environmental services, offered a different perspective. They testified that the Hospital announced to SEIU its decisions to proceed with prior rebids without ever considering the decision to be a negotiable matter. Posnick described the 2008 rebid, when the union representative "didn't want to do it," but the rebid proceeded nonetheless. Ranzenberger added that some "dialogue" took place prior to one rebid in a labor/management meeting, during which the Hospital provided statistics on the change in volume of laundry explaining the need for the change in schedules. The Hospital's 2004 letter to the employees and copied to Benson announcing the rebid asserts that management reserved the right to alter shifts on a periodic

basis dependent on departmental needs. It also advised employees that they were expected to perform all the duties of their classification.

NUHW provided no direct evidence of negotiations over the Hospital's practice of using rebids to reassign employees to different schedules. While she is not necessarily an expert on labor relations law, Fierros-Nunez repeatedly described the exchanges between management and SEIU as "discussions" not negotiations. The fact that they occurred in the parties' informal periodic labor/management meetings does not bolster her contention that the parties engaged in negotiations over the decision to proceed in this manner. NUHW witnesses failed to specify the content of these discussions (i.e., did they relate to the necessity of the reorganization, or the use of rebidding as the means to reassign shifts?; did they relate to the procedural mechanics of the rebid, or the rebid itself?) There is no evidence SEIU ever objected to the legality of the procedure through a demand for negotiations and no grievance was ever filed challenging a rebid as a violation of the contract. In a number of these rebids, SEIU representatives did attend the bidding and in some cases they signed the bid sheets upon their completion, but this only signified assent to the procedure after the fact.

The June 2011 Rebidding

Beginning in June 2011 the Hospital proceeded with the noticed rebids in the environmental services, materials management, nutritional services, and the emergency departments. Ranzenberger testified the Hospital's June 6 and 9 proposals were intended as notice to NUHW of the Hospital's need to rearrange schedules to accommodate the workload needs of the affected departments. She conceded the rebidding was an effect of the layoff. The rebid was noticed in conjunction with the layoff because those not identified for the layoff had the right to rebid, but if they chose to opt out, it would open a position for an employee who had received a layoff notice. Both the layoff and selection of schedules in the rebid were

done by seniority. In response to Borsos' communication that the rebid constituted a unilateral change, Ranzenberger asserted that the Hospital was permitted to proceed with the rebid both because it was necessary to complete the work and because it had been established as a past practice.

By e-mail dated June 28, 2011, Borsos registered NUHW's protest to Kern. He asserted that the rebids amounted to a unilateral change because they were not part of "the terms and conditions of the previous collective bargaining agreement, and not something we have either agreed to or reached impasse on." In response, Kern asserted that the rebids were needed to ensure operational efficiency following the layoffs. Kern added:

We have met 9 times since early April to discuss the effects of these layoffs. During these meetings we have offered information on the date of the reduction in force, the number of employees effected [sic], the classification of effected employees, the names of the individuals, how hours for certain individuals would be effected and how the work would be done without these individuals present. We have also stated on numerous occasions that effects bargaining may continue after the layoff date.

Kern also contended that the rebid process was a "clear past practice" not in conflict with the expired contract.

Fierros-Nunez testified that the 2011 negotiations over rebidding were different from previous rebids because the Hospital was unwilling to compromise, stating its decisions were driven by labor costs.

In the June rebids, as with prior rebids, employees only rebid on the schedules of their existing classifications. In some cases—in the environmental services and nutrition services rebids, for example—the creation of new schedules changed the nature of the work performed. Some of that was a function of the time of the shift; some was a result of the Hospital reassigning tasks within the shifts. For example, prior environmental services shift bidding included assignment to a particular area. Employees were assigned to float among different

locations in the Hospital. As in 2004, employees were advised in June 2011 that they should be prepared to work the full range of the duties within their job description during their shift.

ISSUE

Did the Hospital unilaterally change policy by conducting the rebid for departmental assignments following the layoffs?

CONCLUSIONS OF LAW

The complaint recites the language of the 2006-2010 MOU at Article 11, section B.2 providing that seniority for long term layoff shall be Hospital-wide within a job classification. The Hospital is alleged to have unilaterally replaced that policy with one of “re-bidding within particular departments when a vacancy arose.”

NUHW contends that the Hospital repudiated an existing unwritten policy that required the union’s affirmative assent to rebids on a case-by-case basis after assertion of its right to negotiate regarding the rebid. It also claims that the Hospital repudiated written policies regarding seniority and the consolidation of positions.

The Hospital contends that for more than a decade the Hospital had established an unwritten practice of changing employee work schedules in response to changes in work load and that the instances of prior rebids satisfies the legal standard for the establishment of such a policy or practice. Anticipating NUHW’s argument that the historical practice included a requirement for negotiations, the Hospital asserts that the evidence of discussions between SEIU and the Hospital fails to demonstrate the Hospital acquiesced in a requirement for negotiations over the decision or the methodology for conducting rebids.

Establishment of Rebidding as Past Practice

An established policy relating to terms and conditions of employment may be embodied in a collective bargaining agreement, or where the contract is silent or ambiguous

it may be determined from past practice. (*Grant Joint Union High School District* (1982) PERB Decision No. 196; *Rio Hondo Community College District* (1982) PERB Decision No. 279.) For a past practice to be binding, it must be (1) unequivocal, (2) clearly enunciated and acted upon, and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. (*Riverside Sheriffs' Assn. v. County of Riverside* (2003) 106 Cal.App.4th 1285, 1291; *County of Sonoma* (2012) PERB Decision No. 2242-M, p. 18.) PERB has also described an enforceable past practice as one that is “regular and consistent” or “historic and accepted.” (*City of Pinole* (2012) PERB Decision No. 2288-M, p. 5.)

The record establishes that on eight occasions in the past, when workload changes had prompted the need to reschedule existing employees to different shifts or give them different job assignments and/or schedules, a rebid was conducted. The record also fairly establishes that the Hospital notified the employees and SEIU in advance, and a union representative was allowed to be present. When SEIU participated as observers they apparently did so to ensure the process was fairly conducted. This sufficiently demonstrates that the union was aware of the practice of rebidding to reassign employees to new shifts or assignments. (*Cajon Valley Union School District* (1995) PERB Decision No. 1085, pp. 4-5 [practice of altering hours of vacant positions established without negotiations or actual notice to the union].) Whether SEIU was unaware of all of the rebids is immaterial; the total number of rebids and their purpose establishes the consistency of the practice as a means of reassigning employees. But the fact that SEIU was aware of the practice and never demanded negotiations as to the right of the Hospital to conduct rebids establishes that the practice was not only “historic,” but one “accepted by both parties.” (*Riverside Sheriffs' Assn. v. County of Riverside, supra*, 106 Cal.App.4th at p. 1291.) If the rebidding as a practice was not authorized by contract

language, SEIU was within its rights to demand to negotiate over the adoption of a new unwritten policy. (*Gonzales Union High School District* (1993) PERB Decision No. 1006, adopting administrative law judge's proposed decision at pp. 20-21; *Healdsburg Union Elementary School District* (1994) PERB Decision No. 1033, pp. 5-6.) Since it did not, the rules of waiver by inaction prevents it from doing so now. (*Cajon Valley Union School District, supra*, PERB Decision No. 1085, p. 6.)

In conceding that the practice of rebidding was not a new policy, NUHW argues that the policy also included the contingency that rebidding could only take place with the union's consent. This argument is unconvincing.

First, it is not supported by the evidence in the record. Fierros-Nunez and Benson were the NUHW witnesses who testified directly to this point, but their testimony lacked specificity, and nothing they offered directly contradicted the testimony of Ranzenberger and Posnick's that they were unaware of SEIU's belief that use of rebidding was a negotiable decision. The Hospital never publicly acknowledged the union's right to negotiate over rebidding. There is not a single instance of the union objecting to the decision and engaging in negotiations either successfully or unsuccessfully to prevent a rebid. The Hospital's 2004 letter of notice regarding the materials management rebid received by Benson asserts the management right to alter shifts dependent on department needs. Benson offered no testimony that she brought her disagreement with this point to the Hospital's attention. No evidence was offered to rebut Posnick's testimony that an SEIU representative objected to the 2008 rebid but the union failed to assert a right to negotiate that decision.

Second, the argument is inconsistent with the test for finding an unwritten past practice, which develops over time as one accepted by the parties. When a potentially negotiable decision is implemented eight times over a 10 year period with notice to the union but

without evidence of an objection, the employer is entitled to conclude that the practice is one accepted by the union. Although waivers of the right to negotiate are not lightly inferred, the evidence here is sufficient to overcome that admonition. (*Cajon Valley Union School District, supra*, PERB Decision No. 1085, adopting administrative law judge's proposed decision at pp. 28-29.) Since it is also clear from the Hospital's perspective as well that meeting and conferring over the decision to rebid was never the accepted practice, the evidence is insufficient to demonstrate that the Hospital undertook any "conscious or apparent reversal of a previous understanding" with respect to policy. (*Grant Joint Union High School District, supra*, PERB Decision No. 196, p. 8.)

NUHW further asserts that rebids had never been established as a means of reallocating employees to new positions or duties within the department in the context of a layoff. The fact that rebids for the purpose of reassigning employees within the department had never occurred in the context of a layoff is of no consequence. The impetus for the procedure was the same, namely, a need to rearrange employees' work schedules in response to a departmental reorganization. The policy in the past extended to the authority to require the employees to assume other tasks, which occurred when the Starbucks and Meals on Wheels programs were terminated, and when positions were consolidated in the materials management department. An employer generally retains the authority to reassign employees to different job duties so long as they are reasonably contemplated within the job description. (*Rio Hondo Community College District, supra*, PERB Decision No. 279, pp. 17-18; *Davis Joint Unified School District* (1984) PERB Decision No. 393, p. 26, fn. 11.) Here, employees rebid on positions within their classifications. No evidence was presented showing that employees were assigned job duties outside the scope of their job descriptions. NUHW never proposed a different

manner in which to reassign employees to cover the work of the departments within the context of the effects bargaining offered by the Hospital.⁵

The Hospital has demonstrated that it acted in conformity with a past practice of conducting rebids to reassign employees to different work schedules and/or assignments without any requirement for negotiations of its decision.

Repudiation of Written Policies

NUHW cites Article 11, section B.1, pertaining to seniority, claiming that per diem employees were to be laid off before part-time or full-time employees. NUHW provides little explanation for this theory of a violation. However, this was the theory advanced by Borso in his testimony at the hearing. The argument is without merit.

Section B.2 specifically refers to seniority for purposes of layoffs. Section B.1 refers to seniority for other purposes (“Seniority shall be department specific except as provided in [B]2. below.”). No evidence was presented as to how section B.1, which ranks employees by employment status on a departmental basis, would have applied in this case of layoffs in the nursing department.

Furthermore, the alleged violation of seniority arose as a theory based on NUHW’s claim that the hours of per diem employees should have been excluded in the process of developing the list of employees entitled to rebid. But the rebidding decision was announced after the Hospital compiled the layoff list and after it decided to reduce the hours of the regular

⁵ Although NUHW argues that the Hospital changed its policy by failing to give 30 days notice prior to the rebids, this does not amount to a conscious reversal of an existing policy given the circumstances of the case. (*Grant Joint Union High School District, supra*, PERB Decision No. 196, p. 8.) Ranzenberger did not disavow the Hospital’s policy of providing 30 days notice, even though 30 days notice was not provided for the June 2011 rebids. But here the rebids were tied to the layoffs in terms of timing in that employees choosing not to elect one of the available shifts would likely separate from employment allowing someone on the layoff list to select an assignment. Given the Hospital’s service needs in the wake of the layoffs, the reassignment of shifts had to coincide with the layoffs in order to ensure continuity of coverage for patients, as Kern informed NUHW.

nursing staff. These decisions were independent of each other. The rebid process was not the means by which employees were identified for layoffs or had their hours reduced. In addition, the per diem issue pertained only to nurses, not to other departments, but the complaint issued on the basis of a systemwide policy change.

Borsos alluded to seniority in a different manner with his musical chairs theory of the layoff. This theory has no support in the record. The Hospital calculated how many LVN positions were needed to fill the remaining shifts and conducted a rebid for that number of positions. The musical chairs theory only worked in reverse: if an employee eligible to bid chose not to accept an available shift and separated, an employee on the layoff list could bid for that position.

NUHW also argues that the Hospital breached contractual provisions prohibiting the consolidation of positions without mutual agreement of the parties. It does not cite the specific provision alleged to have been violated or quote its language. Based on the lack of analysis and the fact that the argument bears no relation to the allegations in the complaint, the argument must also be rejected.

Alternatively, NUHW raises both of the foregoing issues as unalleged violations involving a failure to bargain the effects of the layoffs. That issue is addressed below.

Other Issues Not Fully Bargained

Throughout initial exchanges over the Hospital's announcement of the rebids, Borsos attempted to prevent the rebids from proceeding by arguing that a number of issues arising from effects of the layoff were subject to negotiations that had not been completed. On June 23, 2011 Borsos identified nine different items constituting potential effects of the layoff and cited NUHW's demand to bargain over these matters. Notwithstanding the prior notice of

the rebidding, none of the nine effects specifically references rebidding.⁶ Even as to the rebid procedure, the union never offered an alternative proposal for reassigning employees to schedules so as to cover the remaining work. And there is no dispute that the employees rebid for their new assignments on the basis of seniority.

In its posthearing brief, NUHW renews its claims as to the effects-bargaining issues. NUHW contends that the complaint is sufficiently broad to allow these issues to be reached because they are inextricably linked with the rebid unilateral change allegation. Hewing to the language of the complaint, NUWH argues that one of the effects of the layoff cited by Borsos was “who was rehired and who was ultimately subject to a reduction in force.” This simply refers to the objection to the rebid (who was “rehired”) as well as Borsos’ layoff seniority violation theories.

NUHW also recites its attempt to amend the complaint on the second day of the hearing to allege that by “rebidding many departments without the Charging Party’s consent and without having reached impasse, the Respondent unilaterally implemented rehiring procedures and *otherwise unilaterally determined how the layoffs will impact employees who remained working in job classifications impacted by layoffs.*” (Italics added.) The motion was denied as untimely. NUHW’s argument is an attempt to litigate effects issues in the nursing department (and possibly effects pertaining to other departments) as unalleged violations. Because these allegations constitute independent violations (i.e., refusals to complete negotiations over the effects of the layoff generally), and no timely amendment to the complaint was obtained, they

⁶ The items were: the number of employees to be laid off; the timing of the notice; the manner in which the layoff would be implemented; the manner in which the work would be performed by the employees remaining after the layoff; the health and safety of the remaining employees; the transfer of bargaining unit work to employees outside the bargaining unit; the introduction of new technology or equipment and the manner in which work is performed as a result of such introduction; application of seniority and recall rights; and other related conditions of employment.

cannot be addressed. (*Tahoe-Truckee Unified School District* (1988) PERB Decision No. 668, p. 8; see also *City of Modesto* (2009) PERB Decision No. 2022-M, pp. 4-5 [motion made on second day of hearing prejudicial to the respondent].)

NUHW's post-hearing brief also fails to develop its argument explaining which specific effects it demanded to bargain and how it was denied sufficient opportunity to make and negotiate proposals regarding those effects. Most of the effects identified by Borsos on June 23, 2011, are unrelated to the rebidding and were not identified in the unfair practice charge. Thus, any claim that these other issues are intimately related to the allegations of the complaint *and* were fully litigated at the hearing must be rejected. (*Tahoe-Truckee Unified School District, supra*, PERB Decision No. 668, p. 9; *City of Modesto, supra*, PERB Decision No. 2022-M, pp. 4-8.) The unfair practice charge and other documents in this case make it clear that while the parties' meetings over effects bargaining constituted the context for the dispute, NUHW's unfair practice charge was not intended to raise an omnibus effects-bargaining violation. (Compare *Salinas Valley Memorial Healthcare System, supra*, PERB Decision No. 2298-M.)

Based on the foregoing, NUHW has failed to demonstrate that the Hospital breached its duty to meet and confer in good faith.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, the complaint and underlying unfair practice charge in Case No. SF-CE-857-M, *National Union of Healthcare Workers v. Salinas Valley Memorial Healthcare System*, are hereby DISMISSED.

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 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
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 before the close of business (5 p.m.) on the last day set for filing. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130.) A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 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, subd. (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).)