STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

TEAMSTERS LOCAL 856, Charging Party, v. COUNTY OF MERCED, Respondent.	Case No. SA-CE-1020-M PERB Decision No. 2740-M August 10, 2020

Appearances: Weinberg, Roger & Rosenfeld by Tiffany Crain Altamirano, Attorney, for Teamsters Local 856; Liebert Cassidy Whitmore by Che I. Johnson and Lars T. Reed, Attorneys, for County of Merced.

Before Banks, Krantz, and Paulson, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by Respondent County of Merced (County) to the attached proposed decision of an administrative law judge (ALJ). The complaint in this matter alleged that the County violated the Meyers-Milias-Brown Act (MMBA) and PERB Regulations by changing its mandatory overtime policy for correctional officers without providing Charging Party Teamsters Local 856 (Teamsters or Union) advance notice and an opportunity to meet and confer over the decision and/or the negotiable effects thereof.[1] The ALJ found a violation, and the County timely filed exceptions.

[1] The MMBA is codified at Government Code section 3500 et seq. Statutory references herein are to the Government Code, except where otherwise specified. PERB Regulations are codified at California Code of Regulations, title 8, section

We have reviewed the County's arguments, the Teamsters' response, and the evidentiary record. We find that the ALJ's factual findings and legal conclusions do not suffer from any error that would impact the outcome of this matter, though we supplement and adjust the ALJ's factual findings and correct the proposed decision with respect to several points of law.[2] Accordingly, we affirm and adopt the proposed decision as the decision of the Board itself, subject to and as supplemented by the following discussion.

FACTUAL SUMMARY

The County Sheriff's Department (Department) operates two correctional facilities with 24-hour staffing, seven days a week. The Union represents County Bargaining Unit 2, which consists of correctional officers. The Department requires correctional staff to work substantial overtime. When there are insufficient volunteers, the Department relies on mandatory overtime to maintain minimum staffing. In the two decades prior to the events at issue, the Department assigned mandatory overtime by reverse seniority, meaning that the Department would require the least senior person at a facility to hold over and work another shift.

In 2010, the parties negotiated an Overtime Standard Operating Procedure (Overtime SOP or SOP). The SOP included a mandatory overtime provision stating in relevant part:

31001 et seq.

[2] For ease of reference, we call attention to factual adjustments found below at page 7 and footnote 5, as well as to analytic adjustments found below at page 11, pages 20-23, and footnote 12.

"If the overtime becomes mandatory in nature, the Supervisor insomuch as possible will make their selection from available staff at the Facility requiring the coverage. The selection criteria will follow the <u>scheduled</u> overtime process, except the selection will start with the person with the least Seniority and the mandated person shall only be required to hold over for a maximum of one day. To maintain compliance with Penal Code 4021, gender may become a selection factor.

"Limiting factors must be taken into consideration (*see limitation of overtime*) when mandating overtime. Every effort will be made to limit the number of mandatory holdovers to no more than one day except in those cases where continuity of services is required.

[¶ . . . ¶]

<u>"Limitation of Overtime</u>
With the exception of exigent circumstances, no employee shall work more than two consecutive days of overtime, **<u>and each employee shall take one of their scheduled days off with no reporting to work.</u>**

"An employee will not be considered for mandatory overtime if it conflicts with a scheduled day off other than their regular days off. An employee will not be considered for mandatory overtime if they are currently working a schedule[d] overtime shift. If in the judgment of the designating supervisor the approval of overtime would constitute a safety concern for the employee, staff, inmates or the security of the facility, overtime will be limited." (All emphasis in original.)

Under the Overtime SOP, sergeants tracked correctional officers' overtime in an electronic spreadsheet. When the Department had to assign mandatory overtime to the most junior officer, the sergeant on duty consulted the spreadsheet to make sure the assigned officer was not held over for more than two days in a row.

In 2014, the parties agreed to a Memorandum of Understanding (MOU) that included language on overtime assignments. The MOU included Section H, entitled

"Unit 2 specific Rules and Regulations." Section H, in turn, contained a subsection entitled "Seniority," providing in relevant part:

> "Seniority shall be recognized in the event of:
>
> [¶ . . . ¶]
>
> "h. Overtime - Overtime shall be assigned on an equal basis except in those cases where continuity of service is required and shall be in accordance with Section 2, C of the Human Resources Rules and Regulations."[3]

The parties included the same language in their 2016-2018 and 2018-2019 MOUs.

In the course of revising the SOP multiple times between 2012 and 2016, the County relabeled the Overtime SOP as "Policy Number 01.12." A version of the SOP dated March 2016 added a policy statement in favor of assigning overtime on an equal basis while at the same time acknowledging that a collectively-bargained MOU would supersede the SOP, as follows:

> ***"'To the extent this policy has been superseded by the MOU, the MOU will be complied with. Per the MOU Overtime shall be assigned on an equal basis'***
>
> **"POLICY:** Merced County Sheriff's Office Corrections Division ensures that, in accordance with Merced County Human Resources Policy and Procedure, overtime will be assigned on a fair and equal basis. *(Section 2.M.2.h)"* (All emphasis and internal quotation marks in original.)

---

[3] Neither party argues that the "continuity of service" exception bears on this case. Nor do the parties rely to any significant extent on the County's Human Resources Rules and Regulations (HR Rules). We have nonetheless reviewed the HR Rules as part of reviewing all potentially relevant circumstances. Section 2.C of the HR Rules, entitled "Working Hours, Work Week and Overtime," does not aid either party's argument regarding the meaning of "on an equal basis." The same is true of HR Rules Section 2.M.2.h, which mirrors the MOU in providing that "[o]vertime shall be assigned on an equal basis except in those cases where continuity of service is required and shall be in accordance with Section 2, C."

In approximately October 2016, Teamsters steward Fred Swafford approached Captain Corey Gibson with a concern regarding the mandatory overtime policy's impact on female officers with less seniority. The County employed relatively few female officers, making it more difficult to comply with the California Penal Code's requirement that at least one female correctional officer be present during each shift at all facilities confining one or more female prisoners. As a result, female officers with less seniority were required to work a disproportionate and burdensome amount of overtime.

After Swafford raised this issue, the Department and the Union held at least three meetings in which they discussed the County's overtime policy. At the last of these meetings, attorney Ann Bennett represented the Teamsters. Bennett told management that the Union believed seniority should continue to be the basis for assigning overtime, but that she would go back to the membership to discuss the possibility of a new proposal.

On April 13, 2017, before the Teamsters offered a proposal or otherwise got back to the County, Gibson e-mailed Bennett that "the department is going to move forward with updates to the overtime policy. I have attached the policy." Gibson's e-mail cited the MOU language, "[o]vertime shall be assigned on an equal basis," as a justification for the change.[4]

The policy attached to Gibson's April 13 e-mail was a revised SOP dated April 12. The new SOP provided in part that:

---

[4] Although the parties could not recall the date of their last meeting, management's approximations place it roughly within the month prior to Gibson's April 13 e-mail.

> "If the overtime becomes mandatory in nature, the Supervisor insomuch as possible will make their selection from available staff at the Facility requiring the coverage. The selection criteria will follow the scheduled overtime process, except the selection will start with the lowest number of overtime hours worked during the reporting period with employee seniority being a tiebreaker.
>
> "The mandated employee shall only be required to hold over for one (1) day before it moves to the next employee with the lowest overtime hours worked. If all available employees meet these criteria and unless exigent circumstances exist, a maximum of two (2) consecutive days may be worked. To maintain compliance with Penal Code 4021, gender may be a selection factor."

Bennett responded on April 18, noting the parties had not completed the meet and confer process, and she proposed either April 25 or May 5 for an additional meeting. Gibson did not respond regarding the dates Bennett proposed. Rather, on Saturday, May 13, Gibson e-mailed Bennett to ask if she had spoken to the Union's membership about the overtime policy and noted that "Monday is shift change and I am eager to address the overtime issue." Gibson further stated that "if we are unable to agree to changes to the overtime policy to help make overtime equal we will be forced to eliminate the current overtime policy and follow the language in the MOU. Please let me know if you and your team would like to meet or what their desire is on this issue."

On May 16, before receiving any response to Gibson's May 13 e-mail, Captain Greg Sullivan issued a memorandum to all correctional officers. The memorandum stated in part that effective June 1, 2017, "Merced County Sheriff Correction's Policy 1.12 (Overtime) will be eliminated and replaced by the current MOU language pertaining to overtime."

The County proceeded to implement its new policy in June. Pursuant to instructions Gibson issued in an e-mail dated June 27, sergeants began tracking correctional officers' overtime hours over a rolling three-month period, such that when a fourth month started, the oldest month would fall off the recording period. Sergeants then used these records to assign mandatory overtime to officers with the least amount of overtime worked, using seniority only for tie-breaking purposes.

The parties began negotiating a successor MOU in July or August of 2018. After being unable to reach agreement on their overtime dispute, they agreed to close a deal on all other issues, while reserving the overtime dispute for subsequent negotiations pursuant to a reopener provision. The County invoked the reopener provision, and negotiations were underway as of the close of the formal evidentiary hearing in this matter on February 6, 2019. Two months later, in April 2019, the parties submitted their post-hearing briefs to the ALJ. More than two months after that, the County filed a request that PERB take official notice of a County Board of Supervisors resolution passed on June 18, 2019. In that resolution, the County imposed its Last, Best, and Final Offer (LBFO), a mandatory overtime policy substantially similar to the new policy the Department had adopted in 2017.[5]

---

[5] In ruling on requests to take "administrative" or "official" notice, PERB follows the California Evidence Code provisions regarding judicial notice. (*Santa Clara County Superior Court* (2014) PERB Decision No. 2394-C, p. 16.) The ALJ noted the County's request for official notice but did not rule on the request. We grant the County's request to the following extent. We take administrative notice of the resolution as an official act of a subdivision of the state. However, taking such notice provides evidence only that the County imposed its LBFO in June 2019. Administrative notice does not necessarily extend to all the hearsay facts, legal conclusions, and mixed conclusions of fact and law recited in the resolution, such as its recitations that the parties' reopener negotiations had ended in impasse after factfinding. (*Glaski v. Bank of*

DISCUSSION

When resolving exceptions to a proposed decision, the Board applies a de novo standard of review. (*County of Santa Clara* (2019) PERB Decision No. 2629-M, p. 6.) However, to the extent that a proposed decision has adequately addressed issues raised by certain exceptions, the Board need not further analyze those exceptions. (*Ibid*.) Here, the ALJ adequately addressed all the County's arguments. However, to provide further clarity and correct several immaterial errors, we supplement the proposed decision as follows.

A unilateral change to a matter within the scope of representation constitutes a per se violation of the duty to meet and negotiate. (*Stockton Unified School District* (1980) PERB Decision No. 143, p. 22.) To establish a prima facie case of an unlawful unilateral change, a charging party must prove that: (1) the employer took action to change policy; (2) the change concerns a matter within the scope of representation; (3) the change has a generalized effect or continuing impact on represented employees' terms or conditions of employment; (4) the employer reached its decision without first providing advance notice of the proposed change to the employees' union and bargaining in good faith over the decision, at the union's request, until the parties

---

America (2013) 218 Cal.App.4th 1079, 1090 ["Courts can take judicial notice of the existence, content and authenticity of public records and other specified documents, but do not take judicial notice of the truth of the factual matters asserted in those documents."]) That principle is particularly paramount here, where the Union disputes that the parties reached a bona fide impasse.

reached an agreement or a lawful impasse. (*City of San Diego* (2015) PERB Decision No. 2464-M, p. 51.)[6]

Regarding the first element, there are three primary types of policy changes: (1) deviation from the status quo set forth in a written agreement or written policy; (2) a change in established past practice; and (3) a newly created policy or application or enforcement of existing policy in a new way. (*Pasadena Area Community College District* (2015) PERB Decision No. 2444, p. 12, fn. 6.) Here, as discussed further below, in June 2017 the County changed an established past practice, adopted a new policy setting forth detailed new parameters for assigning mandatory overtime, and applied and enforced its mandatory overtime policy in a new way.

We supplement and adjust the ALJ's analysis related to the four main arguments the County makes in its exceptions. First, the County asserts that its past practice of assigning mandatory overtime based on reverse seniority conflicted with the parties' MOU, and as a result the County was entitled to alter its policy without bargaining, in order to comply with the MOU. Second, the County asserts that it engaged in good faith negotiations with the Teamsters, via informal meetings at the Department level, and these negotiations resulted in an impasse. Third, the County asserts that following the parties' Departmental-level meetings, the County provided the Teamsters with adequate advance notice of its policy change, but the Union did not request to bargain over the change or any impacts thereof, thus waiving any further right to meet and confer. Finally, the County asserts that even assuming it

[6] The County does not dispute that overtime scheduling falls within the scope of representation and that policies on this subject have a generalized effect and continuing impact on employment terms.

violated the MMBA, the ALJ's proposed remedy unduly interferes with the County's rights by forcing it to rescind a policy that it imposed after allegedly reaching a bona fide impasse in later negotiations.

A. The County's MOU-based defense

An employer may lawfully take unilateral action on a matter within the scope of representation if it can establish as an affirmative defense that an MOU clearly and unambiguously shows the Union waived its right to negotiate over changes to an employment term. (*City of Culver City* (2020) PERB Decision No. 2731-M, pp. 14-20; *Moreno Valley Unified School District* (1995) PERB Decision No. 1106, adopting proposed decision at p. 9; *Los Angeles Unified School District* (1984) PERB Decision No. 407, p. 5; *Marysville Joint Unified School District* (1983) PERB Decision No. 314, p. 2; *Grossmont Union High School District* (1983) PERB Decision No. 313, p. 4.)[7] "Public policy disfavors finding a waiver based on inference and places the burden of proof on the party asserting the waiver." (*County of Santa Clara* (2013) PERB Decision No. 2321-M, p. 19.) "[N]ot only must waiver be clearly established, but any doubts must be resolved against the party asserting waiver." (*Placentia Unified School District* (1986) PERB Decision No. 595, p. 8 (*Placentia*).)

The County argues that the parties' MOU contained an allegedly unambiguous mandate since 2014, and the County further asserts that it belatedly began complying with this mandate three years later, in June 2017. The supposed unambiguous mandate is the following sentence: "Overtime shall be assigned on an equal basis

[7] The Board has alternatively articulated the standard as whether contract language is "clear and unmistakable," which means the same as "clear and unambiguous." (*City of Culver City*, *supra*, PERB Decision No. 2731-M, p. 15, fn. 7.)

except in those cases where continuity of service is required and shall be in accordance with Section 2, C of the Human Resources Rules and Regulations."

We agree with the ALJ that the language at issue is susceptible to more than one interpretation, and we supplement the ALJ's analysis. As an initial matter, we note that the ALJ erred in a manner that has no impact on the outcome of this case: while the ALJ appeared to analyze the "clear and unambiguous language" question as part of the Teamsters' prima facie case, it properly falls within the employer's affirmative defense. For that reason, rather than the Teamsters bearing a burden to show that the language at issue is *not* clear and unambiguous, the County must show that the language is clear and unambiguous.

"Overtime shall be assigned on an equal basis" is not a clear statement of any method of assigning overtime; it has no singular meaning on its own. The County relies on a dictionary definition to argue that "equal" means "being the same for all members of a group." Thus, in the County's view, the Department must "assign the same amount of overtime to all correctional officers." While this is one potential meaning, it is far from the only interpretation. For example, "equal" can also mean "impartial," and the MOU provision at issue may mandate that the Department assign overtime on the basis of seniority without favoritism or discrimination. (Merriam-Webster Online Dictionary <https://www.merriam-webster.com/dictionary/equal> [as of July 20, 2020].) The Union interprets the language in this manner, claiming it means that the County must treat all officers comparably: as they gain seniority, they accrue greater rights to refuse overtime and thereby more certainty to organize their time.

The location and context of the sentence in question somewhat favors the parties' past interpretation over the County's new interpretation. Specifically, the key clause appears in the MOU's Seniority section and reads as follows: "Seniority shall be recognized in the event of . . . Overtime – Overtime shall be assigned on an equal basis except in those cases where continuity of service is required and shall be in accordance with Section 2, C of the Human Resources Rules and Regulations." Under the County's interpretation, seniority would be recognized as merely a tiebreaker when two officers have exactly the same number of overtime hours over the past three months and there is no other basis to choose which of the two should be involuntarily assigned the next overtime shift. Seniority would in such an instance have a largely temporary effect, causing a junior officer to be chosen for the first mandatory overtime assignment and then the more senior officer to be assigned the next such mandatory assignment—often the same week or sometimes even the same day if more than one mandatory overtime shift were required. In any meaningful timeframe, then, seniority would provide senior officers with minimal extra ability to protect their leisure or family time, as compared to less senior officers. This interpretation would stand out amidst the remainder of the MOU provision, which lists contexts in which seniority more meaningfully benefits senior employees (e.g., situations involving reduction in force, recall, bidding for shifts and work locations, scheduling, and vacations, to name a few). (See *Regents of the University of California (Irvine)* (2018) PERB Decision No. 2593-H, p. 11 [construction is disfavored to the extent it makes one item in a list markedly dissimilar from the others].) Thus, the context of the disputed phrase, even standing alone, leaves substantial doubt as to its meaning.

Other interpretive principles largely favor the parties' past interpretation, not the County's new interpretation. Most importantly, the County's new interpretation runs contrary to the parties' consistent past practice for the first three years after the parties ratified the 2014 MOU. In that timeframe, the parties continued their historic practice, signaling that the parties did not believe their 2014 MOU to constitute a change.[8] (*See Antelope Valley Community College District* (2018) PERB Decision No. 2618, p. 19 [The parties' past practice under the contract before the dispute arose is important evidence of their intent].)[9]

The County's new interpretation for assigning mandatory overtime is also at odds with the fact that even after June 2017, the County continued to follow the

---

[8] Moreover, after the County revised its Overtime SOP in March 2016, it included the direction that "overtime will be assigned on a fair and equal basis," and yet the parties continued their past practice.

[9] Past practice can be used to establish the status quo from which we assess an alleged unilateral change, and it can also be used as an interpretive aid in assessing ambiguous MOU language. In the former instance, a past practice establishes the status quo only if it was "regular and consistent" or "historic and accepted," but in the latter instance it need not be as definitive. (*Antelope Valley*, *supra*, PERB Decision No. 2618, p. 22.) Here, the parties' past practice met the higher standard, as it "regular and consistent," as well as "historic and accepted." Thus, the Union has established a change in past practice, though even if it could not meet that standard, there would still be no question that the County adopted a new policy setting forth detailed changed parameters for assigning mandatory overtime, and applied and enforced its mandatory overtime policy in a new way. Because we have found that the parties' past practice met the higher standard of being "regular and consistent" or "historic and accepted," a fortiori, it is more than strong enough to be a relevant factor in interpreting the MOU for purposes of resolving the County's MOU-based defense. We also note that the County offers no bargaining history or other relevant extrinsic evidence as to how the parties understood the language when they included it in the MOU.

parties' historic and accepted policy of granting more senior correctional officers priority for *voluntary* overtime shifts. Thus, while the key phrase—"overtime shall be assigned on an equal basis"—does not distinguish between voluntary and mandatory overtime, the County's new interpretation applies the phrase differently as between the two types of overtime. Had the parties intended a distinction between mandatory and voluntary overtime, they could have drafted language that includes such a distinction. They did not do so.

The County, in selectively reinterpreting "on an equal basis" only for mandatory overtime, thus further manifested what the record overwhelmingly demonstrates: the County was motivated to begin interpreting the MOU in a new way because it became aware that the historic interpretation, together with the Penal Code, forced junior female correctional officers to work a burdensome amount of mandatory overtime. The County apparently saw no equally compelling reason to adopt a new interpretation in which voluntary overtime would similarly be assigned based mainly on hours worked, rather than based mainly on seniority. This is a quintessential policy change, made for policy reasons—not simply a return to clear and unambiguous contract language.

In sum, were we required to interpret the ambiguous MOU provision definitively, the parties' historic interpretation would likely prevail. Resolving this case, however, does not require us to make such a definitive determination. The Union has established a change in policy three separate ways—a change in past practice, a new means of applying and enforcing an existing policy, and creation of a new policy.[10]

[10] The County crafted a wholly new policy containing significant discretionary features. For example, the new policy provided that the County would track overtime over a rolling three-month period, meaning that, for example, an employee who

The Union need not show that the new policy also departs from the parties' written agreement. The County raises the MOU as a defense, and that defense is untenable because the MOU is at least ambiguous.

B. The parties' Departmental-level meetings between October 2016 and April 2017

When the Union raised with the County that its mandatory overtime policy hurt junior female officers, the parties began meeting to look for a solution. There are at least two independent reasons why these meetings did not satisfy the County's obligation to provide notice and an opportunity to bargain before making a change in policy. First, the record does not show that the County gave notice of its eventual proposed change during these sessions, which the County characterizes as "informal" meetings.

Second, even had the parties been in negotiations over the County's proposed change, the County failed to complete negotiations to impasse or agreement. Although the County claims the parties reached an impasse, that is not the case. A bona fide impasse exists if the parties' differences are so substantial and prolonged that further meeting and conferring is futile, despite good faith negotiations that were free from unfair labor practices. (*City and County of San Francisco* (2020) PERB Decision No. 2691-M, p. 39 (*San Francisco*) [judicial appeal pending]; *San Ramon*

---

regularly works substantially more than average voluntary overtime and then takes a vacation could soon find herself at the top of the mandatory list. The MOU did not contain any language waiving the Union's right to bargain about such features, even assuming for the sake of argument that "on an equal basis" could only be construed in one manner. Such discretionary decisions further weaken the County's argument that it did nothing more than begin following clear and unambiguous contract language.

(2018) PERB Decision No. 2571-M, p. 6 (*San Ramon*); *County of Riverside* (2014) PERB Decision No. 2360-M**,** p. 13 (*Riverside*).) The party asserting impasse bears the burden of proving it, and therefore bears the risk of declaring impasse prematurely when parties were not objectively at impasse at the time. (*City of Glendale* (2020) PERB Decision No. 2694-M, p. 61 (*Glendale*) [judicial appeal pending]; *San Ramon*, *supra*, PERB Decision No. 2571-M, p. 6.)

In determining the existence of impasse on a given date, PERB focuses on numerous factors, including: the number and length of negotiation sessions; the extent to which the parties have exchanged information and thoroughly discussed proposals and counterproposals in good faith; and the nature of the unresolved issues and the parties' discussions of such issues to date. (*Glendale*, *supra*, PERB Decision No. 2694-M, pp. 60-61; *San Francisco*, *supra*, PERB Decision No. 2691-M, p. 39; *San Ramon*, *supra*, PERB Decision No. 2571-M, pp. 9-12; *Riverside*, *supra*, PERB Decision No. 2360-M, pp. 13-14.) Continued movement on minor issues will not prevent a finding of impasse if the parties remain deadlocked on one or more major issues. (*Glendale*, *supra*, PERB Decision No. 2694-M, pp. 60-61; *San Francisco*, *supra*, PERB Decision No. 2691-M, p. 39; *Regents of the University of California* (1985) PERB Decision No. 520-H, p. 17.) However, both parties must believe they are at the "end of their rope," which is typically negated if one party displays continuing movement, or if the other party references a deadline for completion of negotiations and acts in accordance with that deadline. (*Glendale*, *supra*, PERB Decision

No. 2694-M, pp. 60-61; *San Francisco*, *supra*, PERB Decision No. 2691-M, p. 39; *Riverside*, *supra*, PERB Decision No. 2360-M, p. 13.)[11]

Here, virtually all the above factors disfavor finding the parties were at impasse, even had the County already made its proposal for a policy change. The one fact the County has in its favor—Bennett's assertion that the Union was stuck on a seniority-based framework—was in context not a sign that the parties were approaching impasse, especially when paired with Bennett's contemporaneous statement that she would go back to the membership to discuss a counterproposal.

Moreover, when there is any doubt as to whether an impasse exists, the party asserting impasse should clarify. (*City of Salinas* (2018) PERB Order No. Ad-457-M, p. 5.)[12] Yet the County did not check with Bennett before issuing a new policy on April 12, 2017 and e-mailing it to the Union as a fait accompli the next day. As discussed further below, Bennett promptly responded to this e-mail, telling the County

---

[11] The time required for good faith negotiations will vary from negotiation to negotiation, depending on many factors. (*San Francisco*, *supra*, PERB Decision No. 2691-M, p. 39; *City of San Jose* (2013) PERB Decision No. 2341-M, p. 41.)

[12] The ALJ cited *City of Salinas*, *supra*, PERB Order No. Ad-457-M, together with MMBA section 3505.4 and PERB Regulation 32802, subdivision (a)(2), for the proposition that it is incumbent on the party declaring impasse to do so in writing. The outcome of this case does not turn on this conclusion, but we nevertheless adjust it to avoid confusion. The MMBA and PERB Regulations cited by the ALJ refer to a written declaration of impasse as the trigger for a union's deadline to seek factfinding. Thus, absent a written declaration by either party, it may become difficult for an employer to claim that a union was tardy in requesting factfinding, and by extension it may be difficult for such an employer to assert that it has exhausted its bargaining obligation. We do not address in this decision whether there are instances in which a party may rely on an oral declaration of impasse, particularly for purposes other than triggering a union's deadline to request factfinding under the MMBA.

that the parties were not at impasse and suggesting new bargaining dates. Far from agreeing to meet, however, the County at first failed to respond and then on Saturday, May 13, issued an ultimatum, demanding that the Union provide a proposal. But three days later, on Tuesday, May 16, without waiting for the Union to respond to the ultimatum, the County reconfirmed its unilateral action by announcing the new policy to affected employees.[13]

The record thus reveals that even though it was the Teamsters that raised the policy concern of unfairness to certain female correctional officers, the County did not have the patience to bargain the issue to agreement or bona fide impasse before making its change. While one could characterize the County's attitude charitably as one of fairness toward less senior female correctional officers, such a motivation would not privilege an employer to unilaterally change policy for union-represented employees without exhausting its bargaining obligation.

C. <u>The County's argument that the Union waived its right to bargain by failing to demand negotiations</u>

The County alleges the Teamsters failed to demand to bargain and thereby waived its right to do so. The County is mistaken for two independent reasons. First, if an employer comes to a firm decision before providing the union notice of a proposed change and an opportunity to bargain to agreement or impasse, then the union is not

[13] Among other problems with the County's position, it was not privileged to ignore the Union's request to meet again, as good faith negotiations must normally occur face-to-face unless both parties mutually agree otherwise. (*San Ramon*, *supra*, PERB Decision No. 2571-M, p. 9, and adopting proposed decision at pp. 37-38 & 42; *City of Selma* (2014) PERB Decision No. 2380-M, pp. 14 & 23, and adopting proposed decision at p. 10; *Modesto City Schools* (1983) PERB Decision No. 291, p. 35.) The parties in this matter negotiated well before the COVID-19 pandemic, and we do not consider what standards might apply in such unusual circumstances.

obligated to request bargaining, nor to accept an employer's offer to meet and confer after the employer has already reached a firm decision. (*County of Kern* (2018) PERB Decision No. 2615-M, p. 11 fn. 8 (*Kern*).) Second, a waiver of bargaining rights must be clear and unmistakable, demonstrating that a party intentionally relinquished its right to bargain. (*Los Angeles Unified School District* (2017) PERB Decision No. 2518, p. 39 (*LAUSD*).) As noted above, any doubts must be resolved against the party asserting waiver. (*Placentia*, *supra*, PERB Decision No. 595, p. 8.) Notably,

> "'[s]ilence, by itself is never clear and unambiguous.' [citation omitted] Thus, to find a waiver, there must be other indicators that the union intentionally relinquished its right to bargain. [citation omitted] Although an unreasonable delay in making a bargaining demand may be evidence of a waiver, the reasonableness of the delay turns on the specific facts of each case. [citations omitted] Moreover, the union must have had notice (i.e., advance knowledge) of the proposed change and then fail to request negotiations over the matter. [citation omitted]"

(*LAUSD*, *supra*, PERB Decision No. 2518, adopting proposed decision at p. 26.) Here, as discussed below and in the proposed decision, the County made a firm decision without affording the Union notice of its proposal and, in any event, the Union did not clearly and unmistakably demonstrate that it intentionally relinquished its right to bargain.

On April 13, 2017, Gibson wrote the Union that "the department is going to move forward with updates to the overtime policy. I have attached the policy." That e-mail sufficiently demonstrates that the County reached a firm decision without providing notice of a proposal and an opportunity to bargain. Even were that unclear, the County reconfirmed it had reached a firm decision a month later, on May 16, when

Sullivan issued a memorandum to all correctional officers informing them that the County was implementing a policy change effective June 1. Each of these unilateral communications indicated that the County's decision was a fait accompli (*Kern*, *supra*, PERB Decision No. 2615-M, p. 11), thereby foreclosing the opportunity to bargain over the decision and obviating any requirement that the Union demand to bargain.

Even though the Union had no duty to follow up with the County after receiving Gibson's April 13 e-mail and could have simply filed a unilateral change unfair practice charge, the Union sought to further engage with the County. Bennett responded to the April 13 e-mail on April 18, proposing to meet either April 25 or May 5. The County did not agree to meet, apparently based on an incorrect belief that it was sufficient to negotiate by e-mail and that it could deliver an ultimatum on May 13, and then not even wait for a response to that ultimatum before announcing its new policy to the correctional officers. For present purposes, we need not tarry long on this evidence that the County acted in bad faith, as the relevant point is that the Union's conduct did not demonstrate—indeed, it was antithetical to—an intentional relinquishment of its right to bargain.

D. The County's 2018 imposition

Based upon evidence introduced at the hearing in this matter, as well as taking administrative notice of a Board of Supervisors resolution, we have found that: (1) the parties began negotiating a successor MOU in July or August of 2018; (2) after being unable to reach agreement on their overtime dispute, they agreed to close a deal on all other issues, while reserving the overtime dispute for subsequent negotiations pursuant to a reopener provision; (3) the County invoked the reopener provision and

negotiations were underway as of the close of the hearing in this matter on February 6, 2019; and (4) on June 18, 2019, the County Board of Supervisors passed a resolution imposing its LBFO, a mandatory overtime policy substantially similar to the new policy the Department adopted in 2017. (See *ante* at p. 7 & fn. 5.)

In the County's view, even if it acted unlawfully in 2017, it had the right to impose terms after reopener negotiations and we should therefore exercise our discretion not to order a return to the status quo that existed prior to the County's 2017 change in policy. However, neither the facts nor the law supports this conclusion.

First, the record is insufficient to show that the County and the Union reached a bona fide impasse and completed factfinding in good faith before the County imposed its LBFO. As we explained *ante*, the County's request for official notice did not establish that the parties reached impasse, much less a bona fide, good faith impasse. If the County wished to establish such facts, it needed either to ask the ALJ to hold open the record, or to ask the ALJ or the Board to reopen the record, so that it could introduce competent factual evidence.

Second, even had the County established by a preponderance of the evidence all of the facts recited in its Board of Supervisors' June 2019 resolution, those facts would not privilege it to impose terms after impasse, because the County failed to restore the status quo to allow good faith negotiations during reopener bargaining. We explain.

An employer's right to impose terms is dependent on prior good faith negotiations from their inception through exhaustion of statutory or other applicable impasse resolution procedures. (*Glendale*, *supra*, PERB Decision No. 2694-M, p. 60;

San Ramon, *supra*, PERB Decision No. 2571-M, p. 6; *Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M, p. 54 (*Fresno*); *City of San Jose*, *supra*, PERB Decision No. 2341-M, p. 41.) Prior or contemporaneous unfair practices may interfere with the bargaining process and invalidate any impasse. (*Glendale*, *supra*, PERB Decision No. 2694-M, pp. 68-70; *Fresno*, *supra*, PERB Decision No. 2418-M, pp. 54-55.) Accordingly, as part of its required showing of a bona fide, good faith impasse, the employer must demonstrate that unfair practices did not infringe on good faith bargaining or otherwise contribute to the parties' deadlock. (*Glendale*, *supra*, PERB Decision No. 2694-M, pp. 68-70; *Fresno*, *supra*, PERB Decision No. 2418-M, pp. 54-55.)

The County fails to meet this standard. By unilaterally implementing its 2017 policy, the County unlawfully infected the subsequent reopener negotiations. Because the County failed to rescind its new policy before bargaining with the Union, the County improperly forced the Union to bargain from a disadvantage and made impossible the good faith give-and-take that is the essence of labor relations. (*Glendale*, *supra*, PERB Decision No. 2694-M, pp. 69-70 [a unilateral change "damages negotiating prospects" because the employer seeks to "negotiate from a position of advantage," and such a "one-sided edge to the employer surely delays, and may even totally frustrate, the process of arriving at a contract."] [internal citations omitted]; *Kern*, *supra*, PERB Decision No. 2615-M, p. 11, fn. 8 [restoring the status quo is a necessary condition for meaningful bargaining to occur]; *San Ramon*, *supra*, PERB Decision No. 2571-M, p. 15 [good faith bargaining is not possible when employer has already "imposed the very terms under discussion, thereby forcing [the

union] to start from a position of having to talk the [employer] back to the status quo."]; *City of Palo Alto* (2017) PERB Decision No. 2388a-M, p. 49 ["A policy change subject to the duty to meet and confer and implemented without meeting and conferring, is a fait accompli, which, if left in place, would compel the union to 'bargain back' to the status quo [citations omitted] and make impossible the give and take that are the essence of good faith consultation."]; *County of Santa Clara, supra,* PERB Decision No. 2321-M, p. 24 [bargaining "from a hole" is futile, and purpose of unfair practice charge is to restore the status quo so that "bargaining may proceed on a level playing field."])[14]

In sum, longstanding precedent required that, in order to permit good faith bargaining to occur, the County needed to restore the status quo—the historical practice the parties had followed for decades before the County preemptively changed the policy in response to the Union's own inquiry.

We find that the County's exceptions are not well taken, and we therefore affirm the proposed decision.

ORDER

Based upon the foregoing findings of fact, conclusions of law, and the entire record in this case, the Public Employment Relations Board (PERB) finds that the

---

[14] The County's failure to restore the status quo before negotiations also lessened the likelihood it could consider in good faith compromise approaches to overtime, such as using a hybrid of a seniority-based system and an hours-worked model. Indeed, the parties' neutral factfinder proposed such a compromise but apparently failed to convince the County to accept it. (*County of Merced and Merced County Correctional Officers Unit 2 Factfinding Report* (Moseley, May 24, 2019) PERB Case No. SA-IM-192-M, pp. 11-12; see *San Ysidro School District* (1997) PERB Decision No. 1198, p. 1 [Board may take official notice of its own records.])

County of Merced (County or Respondent) violated the Meyers-Milias-Brown Act (MMBA), Government Code § 3500 et seq. The County violated MMBA sections 3503, 3505, 3506, and 3506.5, subdivisions (a), (b), and (c), and therefore committed unfair practices under MMBA section 3509, subdivision (b), and PERB Regulation 32603, subdivisions (a), (b), and (c), when it decided to implement a new mandatory overtime policy for County correctional officers without satisfying the obligation to meet and confer with Teamsters Local 856 (Teamsters, Union, or Charging Party) before reaching that decision.

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

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and confer in good faith with the Teamsters regarding overtime policies for correctional officers in the County Sheriff's Department.

2. Interfering with the rights of employees to be represented by the Teamsters.

3. Denying the Teamsters the right to represent employees guaranteed by the MMBA.

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

1. Restore the status quo by rescinding all mandatory overtime assignment policies for County correctional officers that the County has imposed at any time since March 2017 and by resuming assignment of mandatory overtime to correctional officers using only the standards, criteria, methods and procedures that were in effect prior to the changes the County announced in April, May, and June of 2017.

2. Within 10 workdays following the date this decision is no longer subject to appeal, post at all work locations where notices to County employees in the bargaining unit represented by the Union are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the County, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. The Notice shall also be posted by electronic message, intranet, internet site, and other electronic means customarily used by the County to communicate with employees in the bargaining unit represented by the Union. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.[15]

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the

---

[15] In light of the ongoing COVID-19 pandemic, Respondent shall notify PERB's Office of the General Counsel (OGC) in writing if, due to an extraordinary circumstance such as an emergency declaration or a "shelter-in-place order," a majority of employees at one or more work locations are not physically reporting to their work location as of the time the physical posting would otherwise commence. If Respondent so notifies OGC, or if Charging Party requests in writing that OGC alter or extend the posting period, require additional notice methods, or otherwise adjust the manner in which employees receive notice, OGC shall investigate and solicit input from all parties. OGC shall provide amended instructions to the extent appropriate to ensure adequate publication of the Notice, such as directing Respondent to commence posting within 10 workdays after a majority of employees have resumed physically reporting on a regular basis; directing Respondent to mail the Notice to all employees who are not regularly reporting to any work location due to the extraordinary circumstance, including those who are on a short term or indefinite furlough, are on layoff subject to recall, or are working from home; or directing Respondent to mail the Notice to those employees with whom it does not customarily communicate through electronic means. (See *City of Culver City*, *supra*, PERB Decision No. 2731-M, p. 29, fn. 13.)

General Counsel's designee. The County shall provide reports, in writing, as directed by the General Counsel or his designee. All reports regarding compliance with this Order shall be concurrently served on the Union.

Members Banks and Paulson joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. SA-CE-1020-M, *Teamsters Local 856 v. County of Merced*, in which all parties had the right to participate, it has been found that the County of Merced (County) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq. by changing mandatory overtime policies for County correctional officers without satisfying the obligation to meet and confer with Teamsters Local 856 (Teamsters) over that decision.

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

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and confer in good faith with the Teamsters regarding overtime policies for correctional officers in the County Sheriff's Department.

2. Interfering with the rights of employees to be represented by the Teamsters.

3. Denying the Teamsters the right to represent employees guaranteed by the MMBA.

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

Restore the status quo by rescinding all mandatory overtime assignment policies for County correctional officers that the County has imposed at any time since March 2017 and by resuming assignment of mandatory overtime to correctional officers using only the standards, criteria, methods and procedures that were in effect prior to the changes the County announced in April, May, and June of 2017.

Dated: _____________________ County of Merced

By: ________________________________
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

TEAMSTERS LOCAL 856, Charging Party, v. COUNTY OF MERCED, Respondent.	UNFAIR PRACTICE CASE NO. SA-CE-1020-M PROPOSED DECISION (August 30, 2019)

Appearances: Weinberg Roger and Rosenfeld by Tiffany Crain Altamirano, Attorney, for Teamsters Local 856; Liebert Cassidy Whitmore by Che Johnson, Attorney, for County of Merced.

Before Katharine Nyman, Administrative Law Judge.

INTRODUCTION

An exclusive representative alleges in this case that a public agency employer made changes to its mandatory overtime policy without providing the exclusive representative prior notice and an opportunity to negotiate the decision and/or effects of the decision in violation of the Meyers-Milias-Brown Act (MMBA).[1] The employer denies any violation of law.

PROCEDURAL HISTORY

On July 31, 2017, the Teamsters Local 856 (Teamsters) filed an unfair practice charge with the Public Employment Relations Board (PERB or Board), claiming that the County of Merced (County) violated the MMBA by implementing a new mandatory

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

overtime policy. On September 5, 2017, the County filed a position statement in response to the charge.

On January 5, 2018, the Teamsters filed an amended unfair practice charge with the Board and on February 2, 2018, the County filed an amended position statement in response to the amended charge.

On February 12, 2018, the PERB Office of the General Counsel issued a complaint alleging a unilateral policy change in violation of MMBA sections 3503; 3505; 3506; and 3506.5, subdivisions (a), (b), and (c), and PERB Regulation 32603, subdivisions (a), (b), and (c).

On March 8, 2018, the County filed an answer to the complaint denying the substantive allegations and asserting multiple affirmative defenses.

An informal settlement conference was held on September 26, 2018, but the matter was not resolved.

The parties participated in a formal hearing on February 5 and 6, 2019 in Sacramento. The case was submitted for decision on April 12, 2019, after receipt of post-hearing briefs.

Following submission of post hearing briefs, the County filed a request for official notice of the "Resolution of the Board of Supervisors of the County Imposing the County's Last, Best, and Final Offer to Teamsters Local Union 856, Unit 2."

FINDINGS OF FACT

Parties and Jurisdiction

Teamsters is the exclusive representative of an appropriate unit of employees within the meaning of MMBA section 3501, subdivision (b) and PERB Regulation

32016, subdivision (b). It represents the County's Correctional Officers, who make up County Bargaining Unit 2. At all relevant times, Chris Navarro (Navarro), Megan Burke (Burke) and Kong Xiong (Xiong) were employed by the County as Correctional Officers in the County Sheriff's Department (Department) and were public employees within the meaning of MMBA section 3501, subdivision (d). In addition, Navarro has served as a Teamsters job steward for approximately seven years.

The County is a public agency within the meaning of MMBA section 3501, subdivision (c), and PERB Regulation 32016, subdivision (a). Corey Gibson (Gibson) is a Department Captain and is third in the hierarchy of Department positions, behind the Sheriff and Undersheriff. Marci Barrera is the County's Director of Human Resources.

Background

The County operates two correctional facilities. Combined, these facilities can house up to 670 inmates. These facilities are required to maintain 24-hour staffing, seven days a week. As a result, the Department must manage "tremendous amounts of overtime" for correctional staff.

Staff overtime opportunities are voluntary or mandatory. The Department utilizes mandatory overtime if there are inadequate staffing levels and lack of staff willing to take voluntary overtime.

Since as early as 2000, the Department's policy for the assignment of mandatory overtime was to assign it by seniority. This meant that the Department would mandate the least senior person working at the time to hold over for another shift.

In approximately 2010, the Department attempted to change the mandatory overtime policy through the use of a tracking system. At that time, the Correctional Officers were represented by the Merced County Sheriff's Employees Association (Association). Navarro, the then-president of the Association, objected to the change and filed a grievance. After engaging in discussions, the parties were able to reach an agreement with respect to how the assignment of mandatory overtime would be handled. The result of the parties' agreement was memorialized in a written policy titled "Overtime S.O.P" which stated the following with respect to "Mandatory Overtime":

> If the overtime becomes mandatory in nature, the Supervisor insomuch as possible will make their selection from available staff at the Facility requiring coverage. The selection criteria will follow the scheduled overtime process, except the selection will start with the person with the least Seniority and the mandated person shall only be required to holdover for a maximum of one day. To maintain compliance with Penal Code 4021, gender may become a selection factor.[2]

---

[2] California Penal Code section 4021 states:

> (a) Whenever any female prisoner or prisoners are confined in any local detention facility in the state there shall be an appropriately trained female custodial person assigned, available, and accessible for the supervision of the female prisoners.
>
> (b) It shall be unlawful for any officer, station officer, jailer, or custodial personnel to search the person of any prisoner of the opposite sex, or to enter into the room or cell occupied by any prisoner of the opposite sex, except in the company of an employee of the same sex as the prisoner. Except as provided herein, the provisions of this subdivision shall not be applied to discriminate against any employee

> Limiting factors must be taken into consideration (*see limitation of overtime*) when mandating overtime. Every effort will be made to limit the number of mandatory holdovers to no more than one day except in those cases where continuity of services is required.

In practice, Department Sergeants kept track of each Correctional Officer's overtime hours worked in a computer file. When it became necessary to assign mandatory overtime to the junior officer, the tracking document was consulted to ensure that that the person selected was not held over two days in a row.

In 2014, the parties concluded negotiations and reached agreement on a successor Memorandum of Understanding (MOU), which included, for the first time, language on the assignment of overtime. Section H of the MOU is entitled "Unit 2 specific Rules and Regulations." The first heading under this Section is "Working Hour, Work Week and Overtime." Paragraph 5 under this heading provides that

---

> by prohibiting appointment or work assignment on the basis of the sex of the employee.
>
> As used in this subdivision "station officer" means an unarmed civilian employee who assists a peace officer in the processing of persons who have been arrested and who performs duties including, but not limited to, booking and fingerprinting and maintaining custody and control of persons who have been arrested.
>
> As used in this subdivision, "employee" means a deputy sheriff, correctional officer, custodial officer, medical staff person or designated civilian employee whose duties may include, but are not limited to, maintaining custody and control of persons who have been arrested or sentenced, or both.

overtime compensation be paid at the rate of time and one-half, but is silent regarding the assignment of overtime. Another heading, "Seniority," is found under Section H. Paragraph 2 under the Seniority header states that:

> Seniority shall be recognized in the event of:
>
> […]
>
> h. Overtime – Overtime shall be assigned on an equal basis except in those cases where continuity of service is required and shall be in accordance with Section 2, C of the Human Resources Rules and Regulations.

This same language was incorporated unchanged into the parties' successor MOU from July 1, 2016 through June 30, 2018, and was most recently incorporated into the current MOU, which has a term of July 1, 2018 through June 30, 2019.

Between 2012 and 2016, the Overtime S.O.P. underwent multiple revisions, the most recent revision occurring in March 2016. In March 2016, the Department's Overtime S.O.P. was renamed "Policy Number 01.12," and stated:

> Merced County Sheriff's Office Corrections Division ensures that, in accordance with Merced County Human Resources Policy and Procedure, overtime will be assigned on a fair and equal basis. (*Section 2.M.2.h*)[[3]]

---

[3] Section 2.M of the County Human Resources Rules and Regulations, under the heading "Working Hours, Work Week and Overtime," is titled "Seniority. Section 2 states:

> h. Overtime – Overtime shall be assigned on an equal basis except in those cases where continuity of service is required and shall be in accordance with Section 2, C. For Bargaining Units 4, 5, 6, and 8 overtime shall be offered to qualified employees by seniority except in those cases where continuity of service is required.

The procedure for mandatory overtime outlined in Policy Number 01.12 used the identical language in the Overtime S.O.P., and stated, in relevant part:

> Mandatory Overtime:
>
> If the overtime becomes mandatory in nature, the Supervisor insomuch as possible will make their selection from available staff at the Facility requiring the coverage. The selection criteria will follow the scheduled overtime process, except the selection will start with the person with the least Seniority and the mandated person shall only be required to hold over for a maximum of one day. To maintain compliance with Penal Code 4021, gender may become a selection factor . . .

The March 2016 Policy Number 01.12 continued in place until Correctional Officer and Teamsters Job Steward Fred Swafford (Swafford) approached Gibson in October 2016. At that time, Swafford raised concerns that female Correctional Officers felt the seniority-based system of assigning mandatory overtime was not fair or equitable. Because of the requirements of California Penal Code section 4021, the younger female Correctional Officers in the Department were overworked as a result of their combined lack of seniority and gender.

The Department and the Teamsters began discussions to address the Department's mandatory overtime policy. These discussions lead to at least three formal meetings between the parties.[4] During these meetings, the parties discussed the Department's mandatory overtime policy, as well as other issues including the County's plans to build a new facility. At the last meeting between the Department

---

[4] Neither party recalled the exact dates of the three meetings, only that they occurred between October 2016 and April 2017.

and the Teamsters, only the Teamster’s negotiator and attorney Ann Bennett (Bennett) was present on behalf of the Teamsters. No other member of the Teamster’s negotiating team was present. During the meeting, Bennett told Gibson that the Teamsters were “just not willing to move on anything other than the old policy,” but that she would go back to the membership to discuss the possibility of a proposal.

Navarro testified that it is the general practice that at least one Teamsters negotiating team member is present during a meet and confer meeting. Stewards, specifically, are made aware of all meet and confer meetings that are scheduled to take place. When there is a meet and confer on a certain topic, there is also typically a membership vote that occurs as part of the process.

On April 13, 2017, Gibson sent an email to Bennett stating:

> Thank you and your membership for taking the time to meet in regards to overtime issues that are a constant challenge in our correctional facilities. I did take your membership’s concerns and their suggestions from our last meet and confer into consideration to add/change the new overtime policy. As I explained on the phone the other day, the department is going to move forward with updates to the overtime policy. I have attached the policy.
>
> It is the sheriff administration’s belief that our current overtime policy does not make overtime assigned on an equal basis, which is contrary to county rules and regulations and the MOUs with unit 2 and 12. We believe the updated policy does make overtime equal. Failing to address the current overtime challenge is not acceptable and we need to implement changes to the overtime policy that are not contradictory to the existing negotiated MOU. The MOU language is clear, it states: Overtime shall be assigned on an equal basis except in those cases where continuity of service is required and shall be in accordance

with Section 2, C of the Human Resources Rules and Regulations.

Moving forward we will be adhering to the MOUs and county rules and regulations. We will start with the new overtime policy at shift change on May 15th, 2017. Additionally, we will begin to track overtime hours starting May 1st, 2017.

Attached to the email was the Department's Overtime Policy Number 01.12 with a revision date of April 12, 2017. With respect to Mandatory Overtime, the revised policy stated:

If the overtime becomes mandatory in nature, the Supervisor insomuch as possible will make their selection from available staff at the Facility requiring the coverage. The selection criteria will follow the scheduled overtime process, except the selection will start with the lowest number of overtime hours worked during the reporting period with employee seniority being a tiebreaker.

The mandated employee shall only be required to hold over for one (1) day before it moves to the next employee with the lowest overtime hours worked. If all available employees meet these criteria and unless exigent circumstances exist, a maximum of two (2) consecutive days may be worked. To maintain compliance with Penal Code 4021, gender may be a selection factor.

On April 18, 2017, Bennett responded to Gibson, stating:

I have reviewed the proposed policy. While I appreciate that you feel it is necessary to immediately implement this policy, we have not completed the meet and confer process on this issue. Under the MMBA (Government Code section 3500 et seq.) the department has a duty to meet and confer, in good faith, until impasse, or until an agreement is reached. I propose that we meet on Tuesday the 25th at 11:00 am to discuss the matter. (I may also have availability after 3:00 that day.) If that date does not work I

> have availability on May 5th after 2:30. I am not available again until the 23rd of May. Please let me know what your availability is.

On May 13, 2017, Gibson sent an email to Bennett, checking in to see whether she had been able to speak with the Teamsters membership about the revised mandatory overtime policy, since “Monday [was] shift change and [he was] eager to address the overtime issue in the correction’s division.” Gibson further stated that if the parties were unable to agree to changes “to the overtime policy to help make overtime equal [the Department would be] forced to eliminate the current overtime policy and follow the language of the MOU.” Gibson then asked Bennett whether she and her team would like to meet, or “what their desire [was] on the issue.”

Three days later, on May 16, 2017, Captain Greg Sullivan issued Sheriff’s Memorandum #17-011, which states in relevant part:

> Effective, June 1, 2017, Merced County Sheriff Correction’s Policy 1.12 (Overtime) will be eliminated and replaced by the current MOU language pertaining to overtime.
>
> The MOU language: Overtime shall be assigned on an equal basis except in those cases where continuity of service is required and shall be in accordance with Section 2, C of the Human Resources Rules and Regulations.
>
> Sheriff Office Administration will be meeting with correctional supervisors in the coming weeks to develop an overtime plan to insure we follow the MOU.

On June 27, 2017, Gibson sent an email regarding “Overtime tracking” to the Correctional Sergeants. The email states:

> In an effort to following the current MOU with the Correctional Officers and Security Systems Operators in regards to mandatory overtime. We will begin to track

worked overtime to determine who is forced to hold for mandatory overtime starting on July 1st.

As the current MOU states ‘Overtime shall be assigned on an equal basis except in those cases where continuity of service is required…”

All worked overtime shall be tracked including hours worked in the facility, training, special details or teams. We will begin on July 1st with everyone starting with a zero balance. We will keep overtime records for three months at a time. Once a fourth month starts the oldest month will fall off the current tracking and go to an archived file. This will require the Sergeants to track the overtime daily, especially when this first begins. The sergeant doing time cards on Sunday should also verify overtime hours on the time cared compared to the overtime tracking sheet. We will keep the overtime tracker file on the X drive so that staff can see it and password protect it like the schedules.

Seniority, will only count as a tie breaker and should not be considered for any other purpose for mandatory overtime. Officers will be required to hold if they have the lowest amount of overtime hours worked until they have worked two days in a row of overtime beyond their scheduled shift. Only once they have worked two days in a row of overtime (voluntary or mandatory) will they be exempt from holding. It should be noted, that six hours of overtime beyond the officers scheduled shift is now considered a day of overtime for this purpose. Additionally, the facility that created the overtime is responsible for filing the overtime. Only after no one in that job classification at that facility is able to hold for the overtime based on hours worked or exemption should the other facility be used to fill overtime.

There will not be any formal policy presented or written in regards to this new overtime tracking system and is subject to change based on management discretion at any time.

Currently, overtime is being assigned in the Department pursuant to the Sheriff's Memorandum #17-011 as detailed in Gibson's June 27, 2017 email. A tracking mechanism is in place that tracks the overtime assigned during the prior three months and the current month for each employee. When the need for mandatory overtime arises, the supervisor consults the tracking mechanism, and assigns the mandated overtime to the employee that has worked the least amount of overtime during the most recent three-month period.

In July or August 2018, the parties began negotiations for the current MOU. During negotiations, Shelline Bennett (S. Bennett), attorney for the County, raised the issue of overtime. The parties engaged in back and forth over the issue exchanging proposals, but were unable to reach a resolution. On November 7, the parties reached a tentative agreement agreeing that:

> Upon written notification by either party, the parties will immediately re-open on Overtime MOU Section H. Seniority.2.h. Overtime and SOP.

The parties continued to meet and confer on the mandatory overtime issue, without reaching agreement. They declared impasse, and on March 29, 2019, Teamsters requested that PERB submit its request fact-finding. Following impasse, the County implemented its Last, Best and Final Offer, which included a mandatory overtime policy consistent with Sheriff's Memorandum #17-011, Gibson's June 27, 2017 email and the revised April 12, 2017 Policy Number 01.12.

ISSUE

Did the County violate the duty to meet and confer in good faith by changing the mandatory overtime policy, without providing the Teamsters notice and the opportunity to bargain that decision or the effects of that decision?

CONCLUSIONS OF LAW

Public agencies and recognized employee organizations have a mutual duty to meet and confer in good faith over matters within the scope of representation, as defined in MMBA section 3504. (MMBA, § 3505.) Unilateral changes to negotiable subjects are "per se" violations of the duty to bargain and violate MMBA Section 3506.5, subdivision (c). (*City of Livermore* (2014) PERB Decision No. 2396-M, p. 20.)

To establish a prima facie case for an unlawful unilateral change, the charging party must show by a preponderance of the evidence that: (1) the employer took action to change existing policy; (2) the policy change concerned 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 change has a generalized effect or continuing impact on terms and conditions of employment. (*City of Davis* (2016) PERB Decision No. 2494-M, p. 18, citing *Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262, p. 9; *Grant Joint Union High School District* (1982) PERB Decision No. 196, p. 10; *Walnut Valley Unified School District* (1981) PERB Decision No. 160, p. 5; see also *Vernon Fire Fighters, Local 2312 v. City of Vernon* (1980) 107 Cal.App.3d 802, pp. 822-823.)[5]

[5] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes

1. Change in Policy

The first element, whether the employer took action to change policy, is easily met in these circumstances.

Where an employer's change in policy is alleged to constitute an unfair practice, the operative date for the alleged violation is the date when the employer made a firm decision to change the policy, even if the change itself is not scheduled to take effect until a later date. (*City of Sacramento* (2013) PERB Decision No. 2351-M, p. 27, citing *Anaheim Union High School District* (1982) PERB Decision No. 201, *Eureka City School District* (1992) PERB Decision No. 955, and *Clovis Unified School District* (2002) PERB Decision No. 1504.)

Before May 16, 2017, the County's policy for assigning mandatory overtime was provided in the Overtime S.O.P. and its subsequent revisions, and stated that "the selection will start with the person with the least Seniority and the mandated person shall only be required to hold over for a maximum of one day." On May 16, the County made a firm decision to change the policy effective July 1, 2017 by eliminating the existing Overtime S.O.P. and starting selection for mandatory overtime "with the lowest number of overtime hours worked during the reporting period with employee seniority being a tiebreaker." The County's May 16 firm decision therefore constitutes a change in policy for purposes of a prima facie violation.

The County argues that the prior seniority-based overtime policy conflicted with the MOU requirement to assign overtime on an equal basis. Citing *Marysville Joint*

---

with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, pp. 616-617.)

Unified School District (1983) PERB Decision No. 314 and other cases, the County states that the existence of a policy that conflicts with the MOU does not nullify a party's right to adhere to and enforce the language of the MOU. Therefore, when a party acts in accordance with the MOU, even if it has not done so in the past, the action does not constitute an unlawful unilateral change. (*Ibid*.) According to the County, the revised mandatory overtime policy tracking overtime on a three-month rotational basis and assigning it to Correctional Officers with the least amount of overtime hours is, by definition, assigning overtime on an equal basis. Because the County was acting in accordance with the MOU when it stopped assigning overtime by seniority and implemented the new mandatory overtime policy, it was not required to negotiate over the decision with the Teamsters.

The County's argument requires examination of the specific language of the parties' MOU on the assignment of mandatory overtime. PERB uses general principles of contract interpretation in construing parties' agreements. (*County of Riverside* (2013) PERB Decision No. 2307-M, p. 18, citing *County of Ventura (Office of Agricultural Commissioner)* (2011) PERB Decision No. 2227-M.) Those principles include looking to the plain language of the contract to understand its meaning, and reading the entire contract as a whole such that each clause helps to interpret the other. (*County of Sonoma* (2012) PERB Decision No. 2242-M, pp. 15-16, citing Civ. Code, § 1641.) In areas where the contract is silent or ambiguous, PERB may look to other sources, such as bargaining history or past practice, to determine its meaning. (*County of Riverside*, p. 20, citing *Compton Community College District* (1990) PERB

Decision No. 790; *Rio Hondo Community College District* (1982) PERB Decision No. 279.)

Section 2h of the parties 2018-19 MOU, under the heading "Seniority" states that "[o]vertime shall be assigned on an equal basis." The question presented, therefore, is whether the plain meaning of the phrase "assigned on an equal basis" is clear and unambiguous so as to justify the County's implementation of the new mandatory overtime policy. I find it is not.

First, the County's argument focuses too literally on the "equal basis" language of the MOU. The policy implemented, however, did not assign mandatory overtime on a strictly equal basis. The new policy assigns mandatory overtime to employees "with the lowest number of overtime hours worked during the reporting three-month period with employee seniority being a tiebreaker." The County determined the reporting period to be three months, and included a seniority tie breaker. These two additional factors are not found in the equal basis language of the MOU, but instead are the County's interpretation of equal mandatory overtime distribution.

Second, the parties offer different interpretations of the meaning of the words "equal basis." The County argues that to assign mandatory overtime on an "equal basis" means to assign the same amount of such overtime to all Correctional Officers. The Teamsters argue that equal means that as an officer gains seniority in County service, her or she will be less likely to be held over for mandatory overtime. Both definitions arguably meet the standard of "equal basis." The parties' practice lends support to the definition supplied by the Teamsters, however.

The "equal basis" language was first placed in the parties' MOU in 2014, where it has remained unchanged for nearly five years. In 2014, the County was still following the original Overtime S.O.P. and assigning mandatory overtime based on seniority. After incorporation of the "equal basis" language in the parties' MOU, the parties continued to follow the original Overtime S.O.P. When the Overtime S.O.P. was revised in March 2016 as Policy Number 01.12 to include the statement that "overtime will be assigned on a fair and equal basis," the procedure for assigning mandatory overtime continued to be based on seniority. Given these facts, the plain meaning of the "equal basis" language in the parties' MOU is not sufficiently clear and unambiguous to justify the County's policy change.

Because there is ambiguity in the words "equal basis," and Section 2h provides no direction on how "equal" is to be determined, the County has not established its defense that the plain language of MOU Section 2h supports the County's policy change as consistent with the language of the MOU.

2. Scope of Representation

MMBA section 3504 defines the scope of representation as:

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

Assignments of overtime and employee work schedules directly relate to hours of employment and are within the scope of representation. (*Salinas Valley Memorial HealthCare System* (2017) PERB Decision No. 2524-M, p. 21; *Oakland Unified School*

District (1983) PERB Decision No. 367.) Therefore, any change to the County's overtime policy concerned a matter within the scope of representation.

3. Notice and Opportunity to Bargain

The parties began discussing changes to the mandatory overtime policy in October 2016, when Swafford approached Gibson with concerns over the disparity in assigned mandatory overtime experienced by female Correctional Officers. At that point, notice of a proposed change was not required, since the issue had been raised by the Teamsters, and the parties had begun discussing the matter.

Over the next few months, the parties had three meetings, during which they discussed changes to the mandatory overtime policy. At the last meeting, only Bennett was present for the Teamsters and she stated that the Teamsters "were just not willing to move on anything other than the old policy." The County argues that at this point, it reasonably believed there was no meaningful possibility of reaching agreement with the Teamsters, and that it was free to move forward with changes to the mandatory overtime policy. Essentially, the County argues that it engaged in good faith negotiations with the Teamsters, and that the parties had reached impasse.

Under PERB law, a bona fide impasse in bargaining occurs when the parties have considered each other's proposals and counterproposals, attempted to narrow the gap of disagreement and have, nonetheless, reached a point in their negotiations where continued discussion would be futile. (*County of Trinity (United Public Employees of California, Local 792)* (2016) PERB Decision No. 2480-M.) If the parties have reached this stage of negotiations, it is incumbent on the party declaring impasse

to provide a written declaration of impasse. (§3505.4, subd. (a); PERB Regulation 32802, subd. (a)(2); *City of Salina*s (2018) PERB Order No. Ad-457-M.)

The evidence does not establish that the parties reached impasse after the conclusion of the third meeting. Although during that third meeting Bennett had said to Gibson that the Teamsters were unwilling to move, Gibson also testified that the meeting concluded with Bennett wanting to go back to her membership to discuss the possibility of a proposal. Gibson's April 13, 2017 email to Bennett thanking the Teamsters for "taking the time to meet in regards to overtime issues," and explaining that the Department was going to move forward with the updated overtime policy, cannot be considered a written declaration of impasse. The email fails to use the word "impasse," and its contents, and the County's subsequent communications, do not demonstrate that the County believed the parties were at impasse on April 13.

In *City of Salina*s, *supra*, PERB Order No. Ad-457-M, the Board found that language that the employer had "fulfilled its obligation" to meet and confer and would proceed with implementing its proposed actions constituted a written declaration of impasse, even though the term "impasse" was not used. Significant to this finding was the fact that the employer did not respond to the union's immediate request for clarification of whether the employer had declared impasse.

Some similarities exist between Gibson's April 13, 2017 email and the correspondence by the employer in *City of Salina*s. Both writings contain a statement that the employer intends to move forward with an updated policy. However, unlike in *City of Salinas*, there is no statement in Gibson's April 13 email that the County believed that it had fulfilled its bargaining obligation to Teamsters. Like the charging

party in *City of Salinas*, the Teamsters immediately disputed that the meet and confer process had concluded. Within days of receiving Gibson's April 13 email, Bennett responded that the parties had "not yet completed the meet and confer process on this issue" and requested the County's availability to discuss the matter. However, unlike the employer in *City of Salina*s, Gibson did respond to Bennett. On May 13, Gibson sent an email to Bennett "checking in" with her to see if she had been able to speak to the Teamsters membership about the overtime issue. Gibson further stated that "if we are unable to agree to changes to the overtime policy to help make overtime equal we will be forced to eliminated the current overtime policy and follow the language in the MOU." Not only did the County respond to Bennett's request to continue meeting, the response is clear that Gibson's April 13 email was not a declaration of impasse and negotiations were still pending at that point.

Since negotiations were still pending when Gibson issued his April 13, 2017 email, it was incumbent on the County to provide the Teamsters with an opportunity to bargain. On April 15, Bennett requested additional bargaining dates from Gibson. Gibson responded on May 13 asking whether Bennett and the Teamsters would like to meet to discuss the issue. Gibson's response, however, came nearly 30 days after Bennett's April 18 email. The Sheriff's Memorandum #17-011 issued on May 16, just three days after Gibson's email to Bennett. Three days is not a reasonable amount of time to await a response from the Teamsters, given that Gibson took nearly 30 days to respond to Bennett's request to negotiate. Therefore, the County failed to provide the Teamsters with a reasonable opportunity to negotiate prior to changing its mandatory overtime policy.

4. Generalized Effect or Continuing Impact

The final issue in the unilateral change test is whether the respondent's conduct has a continuing impact on employees' terms and conditions of employment. The Board has found that changing employees' schedules on an ongoing basis has a continuing impact and a generalized effect on the terms and conditions of employment. (*Moreno Valley Unified School District* (1995) PERB Decision No. 1106, p. 9, citing *Jamestown Elementary School District* (1990) PERB Decision No. 795.)

It is undisputed that the County's change to the mandatory overtime policy was ongoing and applicable to all Correctional Officers. This element is established by the evidence, and the County does not contend otherwise.

Accordingly, the County unilaterally implemented a new mandatory overtime policy, a matter within the scope of representation, without notice and an opportunity to bargain. The fact that the parties engaged in subsequent negotiations over the issue does not change this analysis. As the Board has consistently held, agreeing to negotiate after a unilateral change does not negate the unlawfulness of the change. (*Redwoods Community College District* (1997) PERB Decision No. 1242.)

REMEDY

MMBA Section 3509, subdivision (b), authorizes PERB to order "the appropriate remedy necessary to effectuate the purposes of this chapter." (*Omnitrans* (2010) PERB Decision No. 2143-M, p. 8.) This includes an order to cease and desist from any unlawful conduct. (*Id*. at p. 9.) PERB's remedial authority includes the power to order an offending party to take affirmative actions to effectuate the purposes of the MMBA. (*City of Redding* (2011) PERB Decision No. 2190-M, adopting proposed dec.,

pp. 18-19.) In this case, the County violated the MMBA by unilaterally implementing a new mandatory overtime policy for all County Correctional Officers without providing notice and opportunity to the Teamsters to bargain over that decision.

PERB has the authority to order the County to restore the status quo ante and rescind any unilaterally adopted policy changes. (*County of Sacramento* (2009) PERB Decision No. 2045-M, pp. 3-4, citing *County of Sacramento* (2008) PERB Decision No. 1943-M.) That is appropriate here. The County is ordered to restore the status quo ante and rescind the unilaterally adopted mandatory overtime policy.

It is also appropriate to order the County to post a notice incorporating the terms of this order at all locations where notices to unit employees are usually posted. Posting of such a notice, signed by an authorized representative of the County, provides employees with notice that the County acted in an unlawful manner, must cease and desist from its illegal action, and will comply with the order. In addition to physical posting of paper notices, the notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the County to communicate with its employees in the bargaining unit represented by the Teamsters. (*City of Sacramento* (2013) PERB Decision No. 2351-M, pp. 44-45.) It effectuates the purposes of the MMBA to inform employees of the resolution of this controversy. (*Omnitrans*, *supra*, PERB Decision No. 2143-M, p. 9.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the County of Merced (County) violated the Meyers-Milias-Brown Act (MMBA) (Gov. Code, § 3500 et seq.). The County violated MMBA

sections 3503, 3505, 3506, and 3506.5, subdivisions (a), (b), and (c), and therefore committed unfair practices under MMBA section 3509, subdivision (b), and Public Employment Relations Board (PERB or Board) Regulation 32603, subdivisions (a), (b), and (c). These violations occurred by the County's decision to implement the new mandatory overtime policy for County Correctional Officers without satisfying the obligation to meet and confer with Teamsters Local 856 (Teamsters or Union) over that decision. All other allegations are dismissed.

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

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and confer in good faith with the Teamsters by unilaterally implementing a new mandatory overtime policy for Correctional Officers in the County's Sheriff's Department.

2. Interfering with the rights of employees to be represented by the Teamsters by the above-described conduct.

3. Denying the Teamsters the right to represent employees guaranteed by the MMBA.

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

1. Restore the status quo by rescinding the unilaterally imposed mandatory overtime policy for County Correctional Officers.

2. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the County's bargaining unit 2 customarily are posted, copies of the Notice attached hereto as an Appendix. The

Notice must be signed by an authorized agent of the County, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the County to communicate with its employees in the bargaining units represented by the Teamsters.

3. Within thirty (30) workdays of service of a final decision in this matter, notify the General Counsel of PERB, or his or her designee, in writing of the steps taken to comply with the terms of this Order. Continue to report in writing to the General Counsel, or his or her designee, periodically thereafter as directed. All reports regarding compliance with this Order shall be served concurrently on the Teamsters.

Right to Appeal

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

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-9425
E-FILE: PERBe-file.Appeals@perb.ca.gov

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

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135, subdivision (d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 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).)