

**OVERRULED IN PART by County of
Sacramento (2013) PERB Decision No. 2315-M**

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



SERVICE EMPLOYEES INTERNATIONAL
UNION LOCAL 535,

Charging Party,

v.

FRESNO COUNTY SUPERIOR COURT,

Respondent.

Case No. SA-CE-6-C

PERB Decision No. 1942-C

January 31, 2008

Appearances: Law Offices of Bennett & Sharpe by Thomas M. Sharpe, Attorney, for Service Employees International Union Local 535; Kronick, Moscovitz, Tiedemann & Girard by Marie A. Nakamura, Attorney, for Fresno County Superior Court.

Before Neuwald, Chair; McKeag and Rystrom, Members.

DECISION

RYSTROM, Member: This case comes before the Public Employment Relations Board (PERB or Board) on an appeal by Service Employees International Union Local 535 (Local 535) of the dismissal of its unfair practice charge against the Fresno County Superior Court (Fresno Court) by an administrative law judge (ALJ).

The complaint alleges that the Fresno Court, without prior notice or affording Local 535 the opportunity to bargain, changed its Realtime reporting¹ policy by requiring newly hired court reporters to sign an agreement mandating that they provide Realtime reporting services upon request. It further alleges that the prior policy allowed court reporters to choose whether or not they would sign an agreement committing them to provide Realtime reporting services for a pay differential. Local 535 claims that this unilateral change by the

¹Realtime reporting results in an instant translation of the court reporter's stenographic notes into English onto the computer screen in front of the judge.

Fresno Court violates the Trial Court Employment Protection and Governance Act (Trial Court Act)² sections 71631, 71633, 71634.2, 71634.2, 71635.1, 71639.1(c) and PERB Regulation 32606(a), (b) and (c).³

The Fresno Court responded that no unfair practice had occurred because this change was non-negotiable pursuant to the statutory exemptions in the Trial Court Act, the waiver language in the Local 535 representative agreement, and case law defining “terms and conditions of employment.”

The ALJ’s proposed decision dismissed the complaint concluding that no unfair practice had occurred. Local 535 filed a timely appeal.

Having reviewed the entire record in this case, the Board agrees with the ALJ that no unfair practice occurred and dismisses Local 535’s complaint based on the legal findings and reasoning below.

FINDINGS OF FACT

A. Agreements Between Local 535 and the Fresno Court Regarding Realtime Reporting:

It is undisputed that Local 535 is an exclusive representative within the meaning of PERB Regulation 32033(b) of an appropriate unit of employees and that the Fresno Court is a trial court within the meaning of the Trial Court Act section 71601(k) and PERB Regulation 32033(a). In these capacities, Local 535 and the Fresno Court negotiated certain terms regarding Realtime reporting in their written agreements which are set forth below.

²The Trial Court Act is codified at Government Code section 71600, et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

³PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

1. Memorandum of Understanding (MOU):

The MOU between Local 535, bargaining Unit 15 and the Fresno Court was effective from September 13, 2004 through September 13, 2007. Bargaining Unit 15 consists of “Court Professionals” which include court reporters.⁴

The Realtime terms negotiated for the MOU are contained in the “Realtime Differential” section of the MOU. These provisions are that court reporters who sign an agreement indicating that they will provide Realtime court reporting services upon demand for any judicial officer requesting such services shall receive a salary differential pursuant to the following terms: (a) Court reporters shall receive a differential of 1 percent of base salary for signing the agreement; (b) Any Court Reporter who has signed this agreement and who does not provide the Realtime court reporting services upon request by any judicial officer shall no longer be eligible to receive the salary differential; and (c) Additional Realtime salary differentials (to the above 1 percent) are: (a) 1 percent if the court reporter has passed the Fresno Court approved local Realtime test (for a total of 2 percent); and (b) 3 percent if a court reporter has been certified in Realtime court reporting by the National Court Reporters Association (for a total of 5 percent).

This section of the MOU also provides that: “Before implementation of the Realtime differential, the [Fresno] Court and Union [Local 535] agree to meet and confer regarding the policies and disciplinary procedures in sections 1, 2 and 3 [outlined above].”

2. First Side Letter (March 4, 2005):

⁴According to the MOU, in addition to court reporters, bargaining Unit 15 includes court personnel from accounting, archives, civil courts, court services “JAs and Court Reporters,” criminal courts, family court services, family support, jury, juvenile, master calendar, secretaries, traffic and outlying courts. (Art. XLII(C).)

The first side letter agreement to the MOU, executed on March 4, 2005, states the Fresno Court will implement the Realtime differential on February 28, 2005. It contains a repeat of the eligibility conditions for and amounts of the salary differentials found in the MOU and also provides: (1) the Fresno Court is responsible for the software used by judicial officers; (2) the Fresno Court will offer a court-approved local Realtime test once a month for the first three months after implementation; (3) how the determination will be made that a court reporter declines to or has a technical inability to provide Realtime services; and (4) that the consequence of failing to provide Realtime reporting upon request will be an ineligibility to receive the pay differential for six months. The side letter's term is six months.

3. Second Side Letter (September 8, 2005):

On September 8, 2005, a second side letter agreement was executed which incorporates the "Realtime Differential" clause in the MOU and provides implementation of the Realtime differential will be July 22, 2005. It repeats the technical requirements, local test and pay differential terms of the first side letter agreement and adds the following terms regarding declining Realtime assignments: (1) for the duration of this Side Letter Agreement the designated Local 535 representative and the Director of Court Operations will work together to identify, on a case-by-case basis, appropriate reasons a court reporter may cite as to why he/she cannot provide Realtime; and (2) both parties will collaborate to develop a progressive discipline process, to be implemented at the expiration of this side letter agreement. The second side letter specifies a term of six months.

4. Third Side Letter (April 17, 2006):

The third side letter agreement, executed on April 17, 2006, confirms the Realtime differential was implemented on July 22, 2005. This side letter repeats the technical

responsibilities, local test, and pay differential terms of the previous side letters. In addition, it specifies the progressive discipline process to be used for court reporters declining to provide Realtime assignments. This side letter was effective until the expiration of the MOU.

B. Realtime Court Reporting:

Not all certified shorthand reporters are capable of providing Realtime court reporting. Realtime reporting requires a court reporter to have their own laptop with special software installed. This laptop is connected to the court reporter's steno machine which converts the marks made by the steno keys instantly into English according to the court reporter's customized dictionary. The court reporter's laptop is connected to the judge's computer which receives the court reporter's instant rough English transcription of the proceedings. Court reporters provide this computer equipment and software. Additionally, court reporters must learn the technology to provide Realtime reporting on their own. The only compensation they receive for providing the Fresno Court with this additional skill and equipment is the increased pay differential negotiated in the September 2004 MOU and side letters described above.

1. The Fresno Court's job requirements for court reporters before the January 31, 2005 job description.

Prior to January 31, 2005, court reporters were not required to have the ability or equipment to provide Realtime reporting. Those who learned the technology and invested in the equipment and software had the option of signing an agreement committing to providing Realtime upon request. The signing of this agreement entitled the court reporter to the pay differential negotiated in the MOU.

Doreen Perkins (Perkins) was employed by the Fresno Court for over 26 years as a court reporter. She was chapter president of Local 535 which involved representing court employees for an estimated five years (2001 to 2006) and on the negotiating team for the MOU

and its three side letters described above. Perkins is certified to provide Realtime court reporting services, does so daily, and has provided Realtime reporting for the past 20 years. Perkins testified this method of court reporting became more common during the past five years.

2. The change in required skills and duties for court reporters after the Fresno Court's adoption of a court reporter job description on January 31, 2005.

In approximately the third week of January 2005, Rick Duran (Duran), the principal personnel analyst for the Fresno Court, told Gloria Cantu (Cantu) who was Local 535's union representative, that the Fresno Court did not have a job description for court reporters. Duran informed her that the Fresno Court was going to work on such a job description.

Shortly thereafter, Cantu received a phone call from Duran indicating that he had a proposed job description. Cantu told him to be sure and get a copy to Perkins because she was more knowledgeable as to what the court reporters' job entailed.

On January 26 or 27, 2005, according to her court log, Perkins found a copy of the court reporter job description on her desk. She did not know who put it there and was not aware of a court reporter job description in the past.

The newly created Fresno Court job description contained numerous requirements regarding Realtime capability. These were: (1) a "characteristic" of the job was utilization of the Realtime program; (2) an essential job duty was to provide Realtime reporting; (3) an ability to provide Realtime reporting was necessary; and (4) a minimum qualification was the possession and knowledge of Realtime transcription computer hardware and software and the ability to use Computer Aided Transcription (CAT) to provide Realtime transcription services.

Several of the above Realtime requirements had an asterisk referring to a paragraph which stated:

All Court Reporters hired after January 1, 2005 and all Court Reporters receiving the realtime differential shall be required to provide realtime. The Court Executive Officer may waive the realtime requirement for newly hired Court Reporters.

Perkins immediately reviewed this job description and informed Cantu that Perkins did not agree with the job description. Subsequently Perkins met with her supervisor, Fran Riley, and Duran about the job description and informed them of her disagreement with it. Duran responded that he did not need her input on the job description. Perkins never saw the job description again nor did she have any additional conversations with anyone about it.

The job description was approved on January 31, 2005, by the Court Executive Officer after which Duran provided a copy of it to Cantu by email.⁵

On February 4, 2005, Cantu sent Duran an email regarding the job description indicating she was not in agreement with a lot of the information on the job specification and requesting to meet and confer over it. At the hearing, Cantu testified that they basically wanted to bargain over the impacts. This was not mentioned in her February 4, 2005, email to Duran which stated:

Spoke with Doreen briefly and we are not in agreement as to the Court's proposed Court Reporter job specification. We are asking for a formal meet and confer upon my return. Have you secured any job specs from any other Courts in the State?

Duran responded by email on February 4, 2005 that:

The court had [sic] provided you the spec for review and we have reviewed your suggestions.⁶ The Court has no obligation to meet and confer with you as none of the reporters working

⁵No evidence was presented indicating the date the email providing the approved job description was sent to Cantu by Duran.

⁶No evidence was introduced indicating what these suggestions were or the circumstances of their communication.

conditions or classification will be impacted due to the implementation of their new spec.

On March 7, 2005, Cantu (who had been out on a medical leave) responded to Duran by email as follows:

I believe your position is incorrect. Tom Sharpe is looking into this matter as well. Can you tell me what the Court is basing it's [sic] position on?

Duran replied by email, dated March 14, 2005:

Gloria, saw this email when we spoke last week but didn't provide you a response. It's not a new classification and the reporters working conditions are not impacted. Also, we have mutually agreed upon the realtime pay differential implementation procedures which were negotiated in the MOU.

After this exchange of emails, Cantu could remember only one brief discussion with Duran which occurred following a meeting when he said something to her about the job description and she responded we're not in agreement and we didn't get a meet and confer. Duran replied that the Fresno Court was not required to meet with her about it. Cantu testified she could not remember if there was any effort by anyone to schedule a meeting. She said there was no bargaining over the court reporter job specification.

During February 2005, the Fresno Court posted a recruitment announcement (job posting) on its "Fresno County Superior Court Employment Opportunity" website and on all the bulletin boards within the court. This job posting closely tracked the Realtime reporting requirements in the court reporter job description. The job posting listed Realtime reporting under the essential job duties, required an ability to provide Realtime reporting and listed as one of the minimum qualifications that the court reporter must possess and have knowledge of Realtime transcription computer hardware and software as well as the ability to use CAT to provide Realtime transcription services.

According to the Fresno Court, Associate Executive Officer, Michael Weinberg (Weinberg), the above court reporter job posting was the first job recruitment for court reporters after the new job description was approved. It was circulated electronically to all Fresno Court employees except court reporters, because they were not directly hooked up to the internet system. Hard copies of the job posting were provided to court reporters. The Fresno Court did not send a hard copy to Local 535. Cantu and Perkins both testified that they did not receive a copy of the job posting.

In May 2005, Perkins learned from a newly hired Court Reporter, Tracy Barksdale (Barksdale), that she signed an agreement on May 3, 2005, mandating that she would provide Realtime reporting upon request. Barksdale gave Perkins a copy of this agreement and she immediately sent it to Cantu.

The agreement was titled: "Court Reporter Conditional Offer of Employment" (pre-hire agreement) and contained the following terms:

- (a) The job announcement for the court reporter position required the ability to provide Realtime reporting.
- (b) The requirement to provide Realtime reporting was explained to Barksdale during the oral interview for the job.
- (c) During the oral interview Barksdale agreed to provide Realtime reporting services if accepted for employment.
- (d) The Realtime reporting services requirement was discussed with her when she received a verbal offer of employment from the Fresno Court.
- (e) Barksdale will be required to sign a "Realtime Reporting Agreement"⁷ prior to commencing employment with the Fresno Court.

⁷This is the agreement referenced in the MOU which court reporters could sign to receive the pay differential negotiated in the MOU.

- (f) Barksdale will be required to provide Realtime reporting services upon the request of any judicial officer to whom she is assigned.
- (g) The refusal to provide Realtime reporting services upon request will result in Barksdale's rejection from employment during her initial rating period.
- (h) The refusal to provide Realtime reporting services if requested after Barksdale's completion of the initial rating period may result in the imposition of formal disciplinary action up to and including termination from employment with the Fresno Court.

Cantu confirmed that she received a call from Perkins about a court reporter who was required to sign the above pre-hire agreement. A few days later, Cantu was given a copy of the pre-hire agreement either from Perkins, Barksdale or both. Prior to this, Cantu did not have any knowledge of the pre-hire agreement.

It was stipulated by the parties that Barksdale was hired as a court reporter by the Fresno Court in May 2005, and was told by Fresno Court representatives that as a condition of her employment she was required to sign the pre-hire agreement. Four additional court reporters at various dates between May 2005 and May 24, 2006, were hired by the Fresno Court and each was told that as a condition of their employment they were required to sign a pre-hire agreement. All of these Fresno Court employees signed the required pre-hire agreements.

C. The Fresno Court's Need for Court Reporters with Realtime Capability:

Weinberg testified that Fresno Court has 18-20 trial court rooms which are equipped to accommodate Realtime court reporter services. The majority of the regularly assigned trial judges to these courtrooms use Realtime reporting. Fresno has a total of 50 court rooms countywide, thus approximately 30 do not have Realtime capacity. According to Weinberg, in those departments where there is a need based on evidentiary proceedings and a desire by the

judicial officer to have Realtime capability, the necessary computer cables will be installed giving Realtime capacity to additional courtrooms.

Prior to hiring new court reporters pursuant to the January 31, 2005, job description and resulting pre-hire agreements, only 13 of the Fresno Court's 34 court reporters signed agreements to provide Realtime reporting for the MOU's pay differential.

Weinberg, who was involved in the decision to make Realtime reporting an essential job duty, testified that it was the judges' and court executive officer's determination that Realtime reporting enhanced the efficient delivery of court services, affected the pace and flow of trial proceedings, and that a desirable goal was to over time achieve a workforce that was able to provide this function.

ALJ'S PROPOSED DECISION

The ALJ found that the Fresno Court made a change in its policy and that its decision to require new court reporters to provide Realtime reporting services was non-negotiable pursuant to Alum Rock Union Elementary School District (1983) PERB Decision No. 322 (Alum Rock). The ALJ also held that Local 535 did not request to bargain over the impacts of this non-negotiable decision.

The ALJ determined the Fresno Court did not bypass Local 535 by having newly hired court reporters sign the pre-hire agreements. She held that the pre-hire agreements simply reflected the requirement to provide Realtime reporting services in the court reporter job description adopted January 31, 2005, which was a non-negotiable decision.

LOCAL 535's APPEAL

Local 535 argues on appeal:

1. The ALJ misapplied the law in Alum Rock to the facts of this case in finding that the decision to require newly hired court reporters to provide Realtime reporting was non-negotiable.
2. Determining that Local 535 had not requested to bargain the impacts of the above decision was error, because when Local 535 requested a meet and confer it was refused by the Fresno Court.
3. Finding there was no bypass by the Fresno Court was improper because there was no dispute that Barksdale was told she would be required to sign a pre-hire agreement which specified as a condition of employment that she must provide Realtime reporting services which modified the existing MOU's policy pertaining to Realtime court reporting.
4. The terms of the pre-hire agreement that employees signing the agreements and failing to provide Realtime reporting services upon request could be subject to formal discipline including termination resulted in the following unfair practices: they undermined and modified the terms of the MOU and its March 4, 2005 side letter; they violated the terms of the MOU requiring that discipline be negotiated; and they constituted a bypass by the Fresno Court.

FRESNO COURT'S OPPOSITION

In addition to agreeing with the ALJ's legal reasoning and conclusion that there was no duty to bargain the decision to require new court reporters to provide Realtime reporting services, the Fresno Court contended that the ALJ should have reached the same conclusion pursuant to the Trial Court Act's scope of bargaining provisions.

The Fresno Court also argued that its decision to require new court reporters to possess Realtime reporting skills and to provide Realtime reporting upon demand was not negotiable because Local 535 waived its right to negotiate this decision in the Management Rights section of the MOU.

DISCUSSION

The issues raised by Local 535's complaint are whether the Fresno Court's requirement that new employees sign a pre-hire agreement mandating them to provide Realtime reporting services constituted both a unilateral change and a bypass of the exclusive employee representative in violation of the Trial Court Act.

Local 535 did not allege in its unfair practice charge or complaint that the Fresno Court's adoption of the Realtime requirements in the January 31, 2005, job description was an unlawful unilateral change. However, we find that it is this earlier decision by the Fresno Court that changed the qualifications and duties of newly hired court reporters in terms of the requirements to provide Realtime court reporting services. The pre-hire agreements were the means the Fresno Court chose to impose these Realtime requirements on newly hired court reporters.

As is explained more fully below, we find PERB cannot rule on the complaint's pre-hire agreement claims unless the Board first determines whether the adoption of the job description's Realtime reporting requirements constituted an unlawful unilateral change. Therefore our analysis of Local 535's complaint will first deal with the Fresno Court's adoption of Realtime requirements in its job description for court reporters and then with the complained of pre-hire agreements which newly hired court reporters were required to sign.

I. STANDARD OF REVIEW

PERB Regulation 32320 allows the Board to issue its decision based upon the record of the hearing and gives the Board broad discretion in its review of an ALJ's proposed decision. (Oakland Unified School District (2007) PERB Decision No. 1880.) The Board is free to draw

its own conclusions from the record apart from those made by the ALJ. (Woodland Joint Unified School District (1990) PERB Decision No. 808.)

The proper standard of PERB's review of an ALJ proposed decision is:

[W]hile the Board will afford deference to the hearing officer's findings of fact which incorporate credibility determinations, the Board is required to consider the entire record, including the totality of testimony offered, and is free to draw its own and perhaps contrary inferences from the evidence presented. (Santa Clara Unified School District (1979) PERB Decision No. 104 (Santa Clara).)

II. THE FRESNO COURT'S JANUARY 31, 2005, COURT REPORTER JOB DESCRIPTION

A. Can the Decision to Adopt the Realtime Requirements in the January 31, 2005, Court Reporter Job Description be Adjudicated by PERB as an Unalleged Violation?

PERB has established the principle whereby unalleged violations may be reviewed by the Board when the following requirements are met: (1) adequate notice and opportunity to defend has been provided the respondent; (2) the acts are intimately related to the subject matter of the complaint and are part of the same course of conduct; (3) the unalleged violation has been fully litigated; and (4) the parties have had the opportunity to examine and be cross-examined on this issue. (Tahoe-Truckee Unified School District (1988) PERB Decision No. 668 (Tahoe-Truckee); Santa Clara; Eureka City School District (1985) PERB Decision No. 481.) The failure to meet any of these requirements prevents the Board from considering the unalleged conduct as a violation. (Tahoe-Truckee.)

Additionally, we note that the unalleged violation must be within the applicable statute of limitations assuming it was alleged in the original unfair practice charge. Thus, if the violation cannot be justified as timely, it will not be considered even if all of the other requirements have been met.

We consider this issue bearing in mind the significant importance of giving all parties litigating disputes under California's public labor relations statutes adequate notice and a fair opportunity to litigate their claims. PERB must be very circumspect when determining whether to adjudicate an unalleged violation and should only do so if there is clear evidence that all of the above criteria have been met. Toward this end, it is strongly recommended that the evidence justifying the above criteria always be expressly enunciated, so that all parties are aware of the basis for finding that an unalleged violation can be heard without any unfairness.

We find that the evidence in the instant case justifies our consideration of whether the decision to adopt the Realtime requirements in the January 31, 2005, job description was an unlawful unilateral change on the following bases:

1. The Fresno Court had adequate notice that the uncharged violation was being litigated and the opportunity to defend.

The transcript of the hearing before the ALJ indicates that both parties litigated the terms of the job description as part of their case. A copy of the job description was introduced into evidence by both the Fresno Court and Local 535. Witnesses presented by Local 535 (Perkins and Cantu) testified extensively as to how they first learned of the job description, their reaction to it, and their request for a meet and confer on it. The Fresno Court's witness (Duran) testified about when the job description was approved and his communications with Cantu about it. Weinberg testified as to who made the decision to include the Realtime requirements in the job description and why they did so. Additionally, the emails containing the parties' communications about the job description were admitted into evidence.

In its post hearing opening brief, Local 535 stated that one of the issues before the ALJ was whether the Fresno Court could unilaterally create a job description requiring court reporters to provide Realtime reporting. Post hearing briefs by the Fresno Court argued that

its management rights clause in the MOU expressly gave it the right to determine the content of job classifications and that Local 535 did not request to bargain the effects of the Realtime requirements in the job description.

2. The job description was intimately related to the pre-hire agreements and was part of the same course of conduct.

The primary issue before the ALJ was whether the Fresno Court could unilaterally require reporters to provide Realtime reporting. The testimony on this issue indicated that this requirement was first put in the job description and was subsequently made part of the challenged pre-hire agreements.

Moreover, as will be shown below, the determination of whether the pre-hire agreement was an unlawful unilateral change depends on whether adding the Realtime reporting requirements in the job description was a lawful unilateral decision.

3. The Realtime requirements in the job description were fully litigated.

We conclude that this violation was fully litigated by both parties for the same reasons which support our finding that the Fresno Court had notice of the unalleged violation and an opportunity to defend.

Further evidence of such litigation in this case was the ALJ's proposed decision which contained rulings based on the evidence before her regarding the Realtime requirements in the job description.

4. The parties had the opportunity to examine and cross examine on the job description.

Our review of the transcripts indicates that both parties presented witnesses who laid the foundation for the admission of the job description into evidence and testified about the Realtime requirements in the job description and communications between the parties about

the job description. The Fresno Court adduced evidence showing why the job description's Realtime reporting qualifications and duties were added. As to all of this testimony, each party had the opportunity to cross examine the other's witnesses.

5. The unalleged violation falls within the Trial Court Act's limitations period.

The Trial Court Act has a six-month limitations period.⁸ The testimony in this case indicates that if the unalleged violation had been charged in the unfair practice claim filed on July 25, 2005, it would have been timely.

Local 535's witness, Cantu, testified she first learned of the job description being drafted in early February 2005, and that she directed it be provided to Perkins. Testimony indicated a copy of the January 31, 2005, approved job description was provided to Cantu by email after its approval.

B. Was the Addition of the Realtime Requirements in the Job Description a Unilateral Change of a Matter Within the Scope of Representation Without Notice or Opportunity to Negotiate?

On appeal Local 535 contends that the unilateral approval of the Realtime reporting requirements in the January 31, 2005, court reporter job description violated the Fresno Court's obligation under the Trial Court Act section 71634.2, to meet and confer in good faith regarding wages, hours and other terms and conditions of employment.

To determine if the Realtime requirements are an unlawful unilateral change we use the "per se" or "totality of the conduct" tests, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (County of Riverside (2003) PERB

⁸The Trial Court Act section 71825(c) provides, in pertinent part, that PERB "shall not issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge."

Decision No. 1577-M (Riverside) citing (Stockton Unified School District (1980) PERB Decision No. 143 (Stockton)).⁹

Unilateral changes are “per se” violations if the following criteria is established by a preponderance of the evidence: (1) the employer breached or altered the parties’ written agreement or past practice; (2) the action was taken before the employer notified the exclusive representative and gave it an opportunity to request negotiations; (3) the change was not merely an isolated breach of the contract or practice, but amounted to a change of policy that had a generalized effect or continuing impact upon terms and conditions of employment of bargain unit members; and (4) the change in policy concerned a matter within the scope of representation. (Riverside and cases cited therein.¹⁰)

We hold that the Realtime requirements in the January 31, 2005 job description changed past practices.¹¹ The evidence presented indicates that prior to the job description, it

⁹The Trial Court Act section 71826(b) provides that the language of the Trial Court Act is the same or substantially the same as that in the Meyers-Milias-Brown Act (MMBA) (the MMBA is codified at Gov. Code sec. 3500, et seq.) and shall be interpreted and applied in accordance with the judicial interpretations of the same language. Riverside applies the tests enunciated in Stockton in determining a violation under MMBA section 3505. Because that section is substantially the same as the Trial Court Act sections 71634.2 and 71601(e), we apply Riverside and Stockton herein.

¹⁰Vernon Fire Fighters v. City of Vernon (1980) 107 Cal.App.3d 803 [165 Cal.Rptr. 908]; San Joaquin County Employees Assn. v. City of Stockton (1984) 161 Cal.App.3d 813 [207 Cal.Rptr. 876]; Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196.

¹¹We do not find that the Realtime requirements in the job description altered the parties’ MOU. The MOU’s Realtime reporting provisions were limited to providing what the pay will be for those court reporters who sign a contract stating that the court reporter willingly agrees to provide Realtime reporting for the MOU’s pay differential. There is no indication in the MOU’s provisions that the parties bargained over whether providing Realtime would be required or voluntary. The MOU’s provisions indicate that the parties bargained over and agreed: (1) what the pay would be for court reporters who sign a contract obligating them to provide Realtime; and (2) that before the Realtime pay differential is implemented, the Fresno

was sufficient for court reporters to use only a stenograph machine to take down in shorthand the proceedings in their assigned courtrooms. The resulting steno notes were transcribed into English at a latter date and certified as the official transcript.

After the job description was adopted, these court reporting capabilities were not sufficient to qualify for a court reporter position with the Fresno Court. The Realtime requirements in the job description mandated that, in addition to taking down the proceedings in steno, court reporters must have the capability to provide Realtime services and that such services would be part of their duties. The effect of these Realtime requirements was that new court reporters must have additional equipment and software which would translate the steno key strokes into English instantaneously. Realtime reporting also required that the court reporter have the technological knowledge to use CAT and that they customize the dictionary in their Realtime software to transcribe words used in the courtroom which were not already in the software. The instant English transcript resulting from Realtime reporting is a rough draft only thus the certified English transcript of the court room proceedings still had to be produced.

These Realtime requirements had a generalized effect given they impacted the terms and conditions of all court reporters hired after the approval of the Realtime requirements in the job description. It is clear that Local 535 did not have an opportunity to meet and confer regarding these new requirements in the job description. After receiving a copy of the January 31, 2005, job description, Local 535 requested a “formal meet and confer” about it. The Fresno Court denied this request taking the position that it had no obligation to meet and confer over the contents of the job description.

Court and Local 535 would meet and confer regarding the policies and procedures for implementing the pay differential. (MOU, Art. LV – Realtime Differential.)

Given the above findings, deciding whether the Fresno Court's unilateral adoption of its January 31, 2005, job description for court reporters was a "per se" violation will turn on whether the decision to add the Realtime requirements was within the scope of representation. To make this ruling we first look to the provisions in the Trial Court Act defining scope of representation.

The Fresno Court contends that the decision to add the Realtime reporting requirements in its court reporter job description comes within two of the excluded matters in Section 71634(b): automation and delivery of court services. (Trial Ct. Act secs. 71634(b)(3) and (5), respectively.) We agree that the Fresno Court's decision to add Realtime requirements for all court reporters hired after January 1, 2005, fell within the Trial Court Act's exclusion of decisions on delivery of services.¹²

Trial Court Act section 71634 defines the scope of representation to be matters relating to wages, hours, and other terms and conditions of employment. This section also excludes from the scope of representation, decisions on a limited number of specified matters.

If the language of a statute is clear and unambiguous, then the intent of the Legislature is reflected in the plain meaning of the statute. (County of Imperial (2007) PERB Decision No. 1916-M and cases cited therein.¹³)

The Legislature clearly stated the purpose for these excluded matters in the Trial Court Act. Section 71634(b) provides that decisions regarding the enumerated matters should not be included in the scope of representation: "In view of the unique and special responsibilities of

¹²Having made this determination, we need not consider if the decision also fell within the automation exclusion.

¹³Barstow Unified School District (1996) PERB Decision No. 1138; North Orange County Regional Occupational Program (1990) PERB Decision No. 857.

the trial courts in the administration of justice.” Therefore, it is necessary that a trial court’s decision be consistent with the Legislature’s express purpose in carving out the exclusion in order to fall within an enumerated exclusion.

To determine if the Legislature intended that a particular decision falls within one of the Trial Court Act section 71634(b) exclusions, we must examine what the decision does and its purpose. To qualify as an exclusion under Section 71634(b), the decision must not only be a decision which reasonably falls within one of the excluded categories, but the reason for the particular decision must be for the purpose of carrying out the special responsibilities of the trial courts.

Consistent with the above, we analyze whether the decision of the Fresno Court to add Realtime reporting capability as a job requirement for all newly hired reporters was a decision for the delivery of court services which was made for the purpose of carrying out the special and unique responsibilities of a trial court.

Evidence from the Fresno Court’s associate executive officer, who was present when the decision to add these requirements was made, indicated that the Judicial Executive Committee as well as the Court Executive Officer determined that Realtime reporting enhanced the efficient delivery of court services, affected the pace and flow of trial proceedings, and that it was a desirable goal over time to achieve a workforce that was able to provide Realtime court reporting. No testimony was presented which controverted these facts.

The evidence indicates the Fresno Court’s decision to add the Realtime reporting requirement for all court reporters hired after January 1, 2005, was for the purpose of delivering a court service and was based on considerations consistent with the Legislature’s

justification for excluding decisions for the delivery of services from the scope of representation.¹⁴

This leaves the issue of whether the Fresno Court was obligated to meet and confer with Local 535 on the impact of the job description's Realtime reporting requirements. The Trial Court Act section 71634(c) requires that the impact from matters excluded under Section 71634(b) shall be included within the scope of representation as those matters affect wages, hours and terms and conditions of employment.

PERB has long held that a request to bargain the impact of a decision not within the scope of bargaining does not have to be in a particular form, but it must adequately signify the desire to negotiate on a subject within the scope of bargaining. (Newman-Crows Landing Unified School District (1982) PERB Decision No. 223 (Newman-Crows); City of Richmond (2004) PERB Decision No. 1720-M (Richmond).)¹⁵ A request to meet and confer over a non-negotiable decision will not be interpreted as a demand to bargain the effects of such a decision. (Ibid.) Any demand to bargain over effects must clearly identify the negotiable areas of impact. (Richmond.)

¹⁴This finding renders it unnecessary for us to examine if the decision to add Realtime reporting requirements was also non-negotiable because: Local 535 waived the right to bargain this decision under the Management Rights article of the MOU or the decision fell within the Fresno Court's management prerogative.

¹⁵In Richmond, a case brought under the MMBA, PERB held that the Newman-Crows rule resulting from an Educational Employment Relations Act (EERA) (the EERA is codified at Gov. Code sec. 3540, et seq.) case would apply under the MMBA noting that there is nothing in the text of the MMBA requiring a departure from the well established rule. For the same reasons, we find this Newman-Crows rule also applies to cases adjudicated under the Trial Court Act. Additionally, since the Trial Court Act's meet and confer requirements in Section 71634.2 are substantially the same as the MMBA's meaning of "Meet and confer in good faith" in Section 3505, they should be similarly interpreted. (See fn. 9 above.)

The ALJ found that Local 535's requests to bargain were limited to: Perkins' late January 2005 statements that she did not agree with the job description; Cantu's February 4, 2005 email requesting a "formal meet and confer," because they are not in agreement with the job specification; and Cantu's March 7, 2005 email that the Fresno Court's position claiming it did not have an obligation to meet and confer was incorrect. The ALJ held under Newman-Crows and Richmond that these requests were not sufficient.

We agree with the ALJ's findings as to what attempts were made by Local 535 to bargain on the impacts of the job description and with her legal conclusion that Local 535 did not request to bargain effects of the job description's Realtime requirements.¹⁶

III. WAS THE FRESNO COURT'S REQUIREMENT THAT NEWLY HIRED COURT REPORTERS SIGN THE PRE-HIRE AGREEMENT AN UNLAWFUL UNILATERAL CHANGE?

In its complaint, Local 535 alleges that before May 3, 2005, court reporters could choose whether or not to sign an agreement that they would provide Realtime reporting services for a pay differential. It further alleges that this policy was changed by requiring new employees to sign a pre-hire agreement obligating them to provide Realtime reporting services.¹⁷ According to Local 535, this constituted a unilateral change of a negotiable subject without prior notice or the opportunity to meet and confer.

Given that pursuant to the January 31, 2005, job description all new court reporters must provide Realtime court reporting as part of their duties, the Fresno Court's act in

¹⁶Similar to the instant case, in Richmond, the union requested to bargain over the decision to make layoffs but not the decision's effects. This was found not to be a sufficient request to bargain over effects.

¹⁷On appeal, Local 535 also argues that the pre-hire agreements altered the parties' written agreement by imposing discipline different from the MOU and the March 4, 2005 side letter. As is discussed more fully below, we do not address this issue because it was not raised by the allegations in Local 535's charge or complaint.

requiring newly hired court reporters to sign an agreement obligating them to provide these services is analogous to an assignment of Realtime reporting duties to these new court reporters.

“PERB has long held that the assignment of work, if reasonably related to existing duties, is a management prerogative.” (City & County of San Francisco (2004) PERB No. 1608-M (San Francisco).) Although San Francisco was an MMBA case, this holding applies equally to the Trial Court Act given the “scope of representation” provisions in MMBA section 3504 are the same as those in the Trial Court Act section 71634(a).¹⁸

Because the Fresno Court properly made Realtime reporting a duty of all court reporters hired after January 1, 2005, requiring newly hired court reporters to sign a pre-hire agreement obligating them to fulfill this duty is a proper assignment of existing duties and falls within the Fresno Court’s management prerogative under San Francisco.

IV. DID THE FRESNO COURT BYPASS LOCAL 535 WHEN IT REQUIRED NEW COURT REPORTERS TO SIGN THE PRE-HIRE AGREEMENTS AS A CONDITION OF EMPLOYMENT?

Local 535’s complaint alleges that by conditioning employment of new court reporters on their signing pre-hire agreements requiring them to provide Realtime reporting services, the Fresno Court bypassed Local 535.

The elements for bypass under the Trial Court Act are the same as those enunciated in County of Fresno (2004) PERB Decision No. 1731-M (Fresno) which dealt with a charge of bypass under the MMBA.¹⁹

¹⁸See footnote 9 above.

¹⁹Because statutory sections on which the bypass charge is based under the Trial Court Act are substantially the same as those in the MMBA, the sections should be similarly interpreted. (See fn. 9 above.)

An employer may not communicate directly with employees to undermine or derogate the representative's exclusive authority to represent unit members. (Muroc Unified School District) (1978) PERB Decision No. 80. [fn omitted.] Similarly, the employer violates the duty to bargain in good faith when it bypasses the exclusive representative to negotiate directly with employees over matters within the scope of representation. (Walnut Valley Unified School District) (1981) PERB Decision No. 160.) However, once a policy has been established by lawful means, an employer has the right to take necessary actions, including consulting with employees, to implement the policy. (Ibid.) To establish that an employer has unlawfully bypassed the union, the charging party must demonstrate that the employer dealt directly with its employees (1) to create a new policy of general application, or (2) to obtain a waiver or modification of existing policies applicable to those employees. (Ibid.)

In its appeal, Local 535 argues that by having court reporters sign the pre-hire agreements, the Fresno Court bypassed Local 535 because the pre-hire agreement's requirement for Realtime reporting services modified the existing MOU's policy pertaining to Realtime reporting.²⁰

We do not find the pre-hire agreement's terms that court reporters will provide Realtime reporting to be a modification of the MOU. As stated above, the MOU's Realtime reporting provisions were limited to the pay differential that reporters who signed agreements to provide Realtime reporting would receive and that the policies and procedures for implementing the Realtime pay differential would be negotiated.

We agree with Local 535 that requiring Realtime reporting was a change in the practice which existed prior to September 2004 when the MOU was executed. However, this past practice was not memorialized in the MOU.

²⁰Local 535 also argues there was a bypass based on the pre-hire agreements discipline provisions. We explain below why we do not address this bypass argument.

As is stated above, this past practice was changed by the Fresno Court's decision to add new qualifications and duties in the January 31, 2005, job description by requiring that all new court reporters would have to be capable of and would provide Realtime reporting services. Because we have determined that this change in a past practice was non-negotiable under the Trial Court Act's scope of representation provisions, the Fresno Court's implementation of the change is not an unlawful bypass. As stated in Fresno, once a policy is established by lawful means, an employer has the right to take necessary actions, including consulting with employees to implement the policy.

V. DID LOCAL 535 ALLEGE IN ITS COMPLAINT THAT THE DISCIPLINE TERMS IN THE PRE-HIRE AGREEMENT CONSTITUTED AN UNLAWFUL UNILATERAL CHANGE OR A BYPASS VIOLATION UNDER THE TRIAL COURT ACT?

Local 535 argues that the pre-hire agreement's disciplinary procedure terms were an unlawful unilateral decision and constituted a bypass of Local 535, because these terms differed from the MOU's provisions. Specifically, Local 535 contends that under the pre-hire agreement court reporters agreed that they could be subject to "formal disciplinary action, up to and including termination from employment," if they refused to provide Realtime reporting services. Under the MOU's terms, a refusal to provide Realtime reporting by those court reporters who signed agreements to do so resulted in a loss of the right to receive the Realtime premium.

The Fresno Court responds on appeal that this claim was not alleged in the unfair practice charge or pled in Local 535's complaint, but rather is a new contention made for the first time in Local 535's opening post-hearing brief.

Our examination of the record indicates that the Fresno Court is correct. The allegations in Local 535's complaint as well as its charge do not raise any issues regarding the

discipline language in the pre-hire agreements. The complaint, which mirrors Local 535's charge, limits its allegations to claiming that the pre-hire agreement changed policy by demanding that new employees sign an agreement requiring them to provide Realtime reporting services versus the MOU's provisions that allowed a court reporter to choose whether to provide Realtime reporting in return for pay differential.

PERB Regulation 32615(a)(5) requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." Thus, the charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S, citing United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944.)

The Board cannot adjudicate Local 535's claims based on the disciplinary procedures in the pre-hire agreement, because Local 535's factual allegations do not meet the requirements of PERB Regulation 32615(a)(5).²¹

ORDER

The unfair practice charge in Case No. SA-CE-6-C is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Neuwald and Member McKeag joined in this Decision.

²¹ Additionally, our review of the record indicates there were no contentions made by Local 535 prior to or during the hearing before the ALJ that Local 535 was also litigating the discipline language in the pre-hire agreement. Under the Board's criteria for adjudicating unalleged violations discussed above, the proceedings in this case do not allow us to rule on Local 535's unalleged contentions regarding the discipline language in the pre-hire agreement.