STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SOUTH PLACER FIRE ADMINISTRATIVE OFFICERS ASSOCIATION, Charging Party, v. SOUTH PLACER FIRE PROTECTION DISTRICT, Respondent.	Case No. SA-CE-380-M PERB Decision No. 1960-M June 10, 2008

Appearances: Carroll, Burdick and McDonough by Gary M. Messing and Jason H. Jasmine, Attorneys, for South Placer Fire Administrative Officers Association; Pinnell and Kingsley by Paul R. Gant, Attorney, for South Placer Fire Protection District.

Before McKeag, Wesley and Dowdin Calvillo, Members.

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the South Placer Fire Protection District (District) to an administrative law judge's (ALJ) proposed decision. In the proposed decision, the ALJ held that the District violated the Meyers-Milias-Brown Act (MMBA),[1] sections 3503 and 3505, and PERB Regulation 32603(a), (b) and (c),[2] when it unilaterally removed the Fire Marshall classification from the Battalion Chiefs bargaining unit represented by the South Placer Fire Administrative Officers Association (SPFAOA). The ALJ held that this action

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

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

violated the District's duty to meet and confer with SPFAOA before removing bargaining unit work from the Battalion Chiefs bargaining unit.

The Board has reviewed the entire record in this case, including but not limited to SPFAOA's unfair practice charge, the District's position statement, the complaint and the District's answer, the hearing transcripts and exhibits, the parties' post-hearing briefs, the ALJ's proposed decision, the District's exceptions and supporting brief, and SPFAOA's response thereto. Based upon this review, the Board affirms the ALJ's proposed decision and order consistent with the discussion below.

Neither party has excepted to the ALJ's finding that SPFAOA did not fail to exhaust its administrative remedies. Accordingly, we affirm the ALJ's decision on that issue but not the rationale underlying it. Thus, the ALJ's decision on the exhaustion of administrative remedies issue remains binding upon the parties, but shall have no precedential effect with respect to other cases. (PERB Regs. 32215 and 32300(c).)

BACKGROUND

On October 1, 2003, the District formally recognized SPFAOA as the exclusive representative of a bargaining unit containing three positions: Shift Battalion Chief, Emergency Medical Services Administrator and Fire Marshall. All three of these positions were within the Battalion Chief job classification. The District's recognition letter stated with respect to the Fire Marshall position:

> This position is included in the bargaining unit requested by the Association, but only for so long as the job description adopted by the Governing Board of the District continues to include a requirement that the Fire Marshall act as a Duty Chief and the employee remains qualified to act as a Duty Chief. The ability to act as a duty chief is the unifying characteristic of a bargaining unit consisting of Battalion Chiefs. Thus, the Fire

> Marshall position may remain in the Battalion Chief bargaining unit so long as he/she is required to act as a Duty Chief. [Underlining in original.]

When acting as Duty Chief, the Battalion Chief directly supervises all firefighting operations during a particular 24-hour shift. At the time of SPFAOA's recognition and for over a year thereafter, Fire Marshall Keith Burson (Burson) acted as Duty Chief on a regular basis.

On February 24, 2004, the District revised the Fire Marshall job description. The new description said that the Fire Marshall, "[i]f deemed qualified, and authorized by the Fire Chief, may act as a Shift Battalion Chief."[3] However, the revised job description did not eliminate the requirement that the Fire Marshall act as Duty Chief.[4] Both Burson and his successor as Fire Marshall, Lawrence Bettencourt (Bettencourt), continued to serve as Duty Chief from February 24, 2004 through June 28, 2006.

The District and SPFAOA signed a memorandum of understanding (MOU) on February 2, 2005. Section 7.1 of the MOU provides that SPFAOA is the exclusive representative of all employees in the classifications listed in Exhibit A, Salary Schedule. Exhibit A sets forth the salary steps for the Fire Marshall position. MOU section 4.2.1 establishes that the Fire Marshall is Fair Labor Standards Act (FLSA) exempt and receives 96 hours of administrative leave. Further, Section 17.1 of the MOU states that "the specific provisions contained in this MOU shall prevail over District policies, practices and procedures to the extent of a conflict."

---

[3]The District excepted to the ALJ's finding that the term Duty Chief is synonymous with Shift Battalion Chief. The record clearly shows that when acting as a Duty Chief, the Fire Marshall performs the duties of a Shift Battalion Chief. Therefore, this exception is without merit.

[4]The ALJ made this finding after weighing the conflicting testimony given at hearing. We defer to the ALJ's finding because it is based on the ALJ's evaluation of witness credibility. (Oakland Unified School District (2007) PERB Decision No. 1880.)

Finally, MOU Section 19.2 provides that the MOU "shall not be amended or supplemented except by agreement of the Parties which has been reduced to writing and signed by each."

In March 2005, SPFAOA learned that the District was negotiating terms and conditions of employment directly with Bettencourt. In response to SPFAOA's letter asking the District to cease direct negotiations with Bettencourt, the District stated that it believed the Fire Marshall position was no longer in the SPFAOA bargaining unit. This began a series of communications between the District and SPFAOA on the Fire Marshall issue. The parties began negotiations for a successor MOU in June 2005. In August 2005, each party made a written proposal aimed at removing the Fire Marshall from the bargaining unit. However, because the parties did not reach agreement on the issue, no change was made to the existing MOU.

On September 17, 2005, the Fire Chief recommended to the District's governing board that the Fire Marshall be reclassified to Assistant Chief with no change in duties. The Assistant Chief classification is not within the Battalion Chiefs bargaining unit. The District's Board of Directors approved the Chief's recommendation on September 21, 2005. SPFAOA filed the instant unfair practice charge on January 6, 2006.

DISCUSSION

Unilateral Change

It is undisputed that on September 21, 2005, the District reclassified the Fire Marshall position to Assistant Chief, a non-bargaining unit classification, without providing SPFAOA the opportunity to meet and confer over the change. Because the reclassification was within the scope of representation, and therefore subject to the meet and confer requirement, the District violated the MMBA by unilaterally removing the Fire Marshall position, and its associated bargaining unit work, from the Battalion Chiefs bargaining unit.

In determining whether a party has violated MMBA section 3505 and PERB Regulation 32603(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.)[5] Unilateral changes are considered "per se" violations if: (1) the employer implemented a change in policy concerning a matter within the scope of representation; and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Vernon Fire Fighters v. City of Vernon (1980) 107 Cal.App.3d 802 [165 Cal.Rptr. 908]; Walnut Valley Unified School District (1981) PERB Decision No. 160; San Joaquin County Employees Assn. v. City of Stockton (1984) 161 Cal.App.3d 813 [207 Cal.Rptr. 876]; Grant Joint Union High School District (1982) PERB Decision No. 196.)

The transfer of work from bargaining unit employees to those in a different or no bargaining unit is a subject within the scope of representation. (Building Material & Construction Teamsters' Union v. Farrell (1986) 41 Cal.3d 651 [224 Cal.Rptr. 688] (Farrell); Rialto Unified School District (1982) PERB Decision No. 209.) Accordingly, PERB has held that an employer may not unilaterally convert a bargaining unit classification to a non-unit classification and thereby remove work from a unit during the life of a collective bargaining agreement. (Regents of the University of California (1989) PERB Decision No. 722-H.)

The District argues in its exceptions that it had no duty to meet and confer with SPFAOA because the Fire Marshall position was not in the Battalion Chiefs bargaining unit at the time the position was reclassified to Assistant Chief. However, the plain language of the

[5]When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507].)

MOU indicates otherwise. If the language of a collective bargaining agreement is unambiguous, PERB must give the language its plain meaning. (Trustees of the California State University (1996) PERB Decision No. 1174-H; Marysville Joint Unified School District (1983) PERB Decision No. 314.) The MOU provides that the classifications listed in the salary schedule are covered by the MOU. The Fire Marshall classification is listed in the salary schedule. The MOU further provides that the Fire Marshall is FLSA exempt and receives 96 hours of administrative leave. Most importantly, the MOU places no conditions or limitations on the Fire Marshall's inclusion in the bargaining unit. Additionally, by its terms, the MOU remained in effect until December 31, 2005. Thus, when the District reclassified the Fire Marshall on September 21, 2005, the Fire Marshall position was clearly included in the Battalion Chiefs bargaining unit under the applicable MOU. Accordingly, the District violated the MMBA by removing the Fire Marshall, and the bargaining unit work he performed, from the Battalion Chiefs bargaining unit without providing SPFAOA the opportunity to meet and confer over the removal.

Notwithstanding the plain language of the MOU, the District argues that the Fire Marshall was not in the bargaining unit at the time of the reclassification because, as of February 24, 2004, the District no longer required the Fire Marshall to serve as Duty Chief. According to the District, the MOU incorporated the October 1, 2003 recognition letter's language that the Fire Marshall remained in the unit only so long as the position was required to serve as Duty Chief. Thus, the District argues, as of February 24, 2004, when the District's Board of Directors changed the position's job description to say that the Fire Marshall may serve as Duty Chief, the Fire Marshall ceased to be included in the bargaining unit.

As discussed previously, the MOU places no conditions or limitations on the Fire Marshall's inclusion in the bargaining unit. Furthermore, even if the MOU was ambiguous on

the issue, there is no evidence in the record that during MOU negotiations the parties discussed placing conditions on the Fire Marshall's inclusion in the unit. (See Los Angeles Unified School District (1984) PERB Decision No. 407 [PERB may consider bargaining history in interpreting ambiguous contract language].) Accordingly, there is no basis for concluding that the MOU incorporated the conditions from the October 1, 2003 letter. Moreover, the MOU explicitly states that its provisions prevail over contrary District policies or practices. Thus, the MOU's unconditional inclusion of the Fire Marshall in the bargaining unit trumps the District's prior conditional inclusion policy. Finally, the record shows that the February 2004 job description revision did not change the Fire Marshall's job duties because the Fire Marshall continued to serve as Duty Chief after the job description was revised. All of these findings further support the Board's conclusion that the Fire Marshall was included in the Battalion Chiefs bargaining unit and therefore the District's reclassification of the position constituted an unlawful unilateral transfer of bargaining unit work.

The District further argues that it had no duty to meet and confer over the reclassification because the decision to reclassify "falls purely within the District's managerial prerogative." In support of this argument, the District cites to various sections of its Employer-Employee Relations Resolution (EERR) that purportedly give the District the exclusive right to reclassify employees.[6] However, in Farrell, the California Supreme Court held that similar provisions in a city charter did not exempt the city from the MMBA's meet and confer requirements when transferring work outside of the bargaining unit. (Farrell, at

[6]Section 3.C. of the EERR allows the Fire Chief to modify the existing bargaining unit when changes to a position "may possibly" have eliminated the community of interest between that position and the rest of the positions in the unit. Section 3.C. requires that the Chief meet and consult with the appropriate union before making such a unit modification. Since the District did not consult with SPFAOA before removing the Fire Marshall from the Battalion Chiefs bargaining unit, EERR Section 3.C. provides no support for the District's action.

p. 668.) Moreover, there is no language in the MOU granting the District the right to reclassify employees without meeting and conferring over the reclassification. Accordingly, the District had no management prerogative to unilaterally reclassify the Fire Marshall to a classification outside of the Battalion Chiefs bargaining unit.

Finally, the District argues that SPFAOA waived its right to bring an unfair practice charge by agreeing that the Fire Marshall was outside of the bargaining unit. This argument relies on an August 8, 2005 letter from SPFAOA representative Joan Elliott (Elliott) to the District's Board of Directors. However, when viewed in context, the letter does not support the District's argument. In June 2005, the parties began negotiations for a successor MOU. The August 8, 2005 letter lists the conditions under which SPFAOA would agree to remove the Fire Marshall from the Battalion Chiefs bargaining unit. The letter concludes: "We look forward to the completion of our contract negotiations in the very near future." Nowhere does the letter indicate that SPFAOA agreed to the removal at that time. Rather, the letter is merely a proposal in the parties' ongoing MOU negotiations. Indeed, on August 15, 2005, the District's attorney responded to Elliott with clarifications of the conditions for removal.

Further, MOU section 19.2 provides that the MOU can only be modified by a document signed by both parties. The record is devoid of any document signed by both parties in which SPFAOA agreed to remove the Fire Marshall from the bargaining unit. Consequently, because SPFAOA never agreed to remove the Fire Marshall from the Battalion Chiefs bargaining unit, the union did not waive its right to bring the instant unfair practice charge.

Statute of Limitations

The District also excepts to the ALJ's finding that the instant unfair practice charge was filed within the six-month statute of limitations period. The Board affirms the ALJ's finding

because SPFAOA filed the charge less than six months after it learned of the District's clear intent to remove the Fire Marshall position from the Battalion Chiefs bargaining unit.

PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd. (2005) 35 Cal.4th 1072 [29 Cal.Rptr.3d 234].) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) The statute of limitations is an affirmative defense which has been raised by the respondent in this case. (Long Beach Community College District (2003) PERB Decision No. 1564.)

The District argues that SPFAOA "was specifically aware of the District's determination to consider the Fire Marshall outside the bargaining unit no later than March 10, 2005" and thus was required to file its unfair practice charge by September 10, 2005. In a unilateral change case such as this one, the statute of limitations begins to run "when the charging party has actual or constructive notice of a clear intent to implement the action which constitutes the basis of the unfair practice charge." (Los Angeles Unified School District (1996) PERB Decision No. 1181.) The District relies on the fact that it consistently told SPFAOA as early as March 2005 that it considered the Fire Marshall position to be outside of the bargaining unit. However, the communications between SPFAOA and the District on this issue between March 2005 and August 2005 show that there was a genuine dispute over the Fire Marshall's inclusion in the unit. Moreover, the August letters between the parties indicate that they were attempting to reach agreement on the issue as part of ongoing contract negotiations. None of these letters communicated to SPFAOA the District's clear intent to reclassify the Fire Marshall position to Assistant Chief. In fact, as the record demonstrates,

SPFAOA did not have notice of the District's clear intent to implement until the District's Board of Directors formally approved the reclassification on September 21, 2005. Thus, SPFAOA had until March 21, 2006 to file an unfair practice charge based on the reclassification. SPFAOA's filing of its charge on January 6, 2006, therefore was well within the six-month statute of limitations.

CONCLUSION

Based on the foregoing, the Board finds that the District violated MMBA sections 3503 and 3505, and PERB Regulation 32603(a), (b) and (c), by removing the Fire Marshall position from the Battalion Chiefs bargaining unit without providing SPFAOA the opportunity to meet and confer over the reclassification. The Board also finds that the instant unfair practice charge was timely filed because SPFAOA filed the charge within four months of receiving notice of the District's clear intent to remove the Fire Marshall position from the bargaining unit.

ORDER

Based on the entire record in this case, it has been found that the South Placer Fire Protection District (District) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503 and 3505, and Public Employment Relations Board (PERB) Regulation 32603(a), (b) and (c) (Cal. Code of Regs., tit. 8, sec. 31001 et seq.), when it unilaterally removed the Fire Marshall classification from the Battalion Chiefs bargaining unit represented by the South Placer Fire Administrative Officers Association (SPFAOA).

Pursuant to the Government Code, MMBA section 3509(a) and EERA section 3541.3(i), it is hereby ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Refusing to negotiate in good faith with SPFAOA by unilaterally reclassifying the Fire Marshall, a bargaining unit position, to Assistant Chief, a non-bargaining unit position, and thereby transferring bargaining unit work out of the unit;

2. Interfering with the right of employees to be represented by SPFAOA by the conduct described in paragraph A.1. above;

3. Denying SPFAOA the right to represent its members by the conduct described in paragraph A.1. above.

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

1. Make employees and SPFAOA whole for any losses suffered as a result of the conduct described in paragraph A.1. above;

2. Return to the status quo that existed at the time the District took the action described in paragraph A.1. above;

3. Within ten (10) workdays following the date this Decision is no longer subject to appeal, post at all work locations where notices to employees are customarily posted, copies of the Notice attached hereto. The Notice must be signed by an authorized agent of the District, indicating the District 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.

4. Written notification of the actions taken to comply with the Order to the General Counsel of PERB, or the General Counsel's designee. The District shall provide

reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on SPFAOA.

Members McKeag and Wesley 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-380-M, South Placer Fire Administrative Officers Association v. South Placer Fire Protection District, in which all parties had the right to participate, it has been found that the South Placer Fire Protection District (District) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503 and 3505, and California Code of Regulations, title 8, section 32603(a), (b) and (c) when it unilaterally removed the Fire Marshall classification from the Battalion Chiefs bargaining unit represented by the South Placer Fire Administrative Officers Association (SPFAOA).

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

A. CEASE AND DESIST FROM:

1. Refusing to negotiate in good faith with the SPFAOA by unilaterally reclassifying the Fire Marshall, a bargaining unit position, to Assistant Chief, a non-bargaining unit position, and thereby transferring bargaining unit work out of the unit;

2. Interfering with the right of employees to be represented by SPFAOA by the conduct described in paragraph A.1. above;

3. Denying SPFAOA the right to represent its members by the conduct described in paragraph A.1. above.

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

1. Make employees and SPFAOA whole for any losses suffered as a result of the conduct described in paragraph A.1. above;

2. Return to the status quo that existed at the time the District took the action described in paragraph A.1. above.

Dated: _____ SOUTH PLACER FIRE PROTECTION DISTRICT

By: _____
Authorized Agent

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