STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

STANISLAUS CONSOLIDATED FIREFIGHTERS, LOCAL 3399, Charging Party, v. STANISLAUS CONSOLIDATED FIRE PROTECTION DISTRICT, Respondent.	Case No. SA-CE-711-M PERB Decision No. 2231-M January 20, 2012

Appearance: Wylie, McBride, Platten & Renner by Carol L. Koenig, Attorney, for Stanislaus Consolidated Firefighters, Local 3399.

Before Martinez, Chair; Dowdin Calvillo and Huguenin, Members.

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Stanislaus Consolidated Firefighters, Local 3399 (Local 3399) from a Board agent's partial dismissal of its unfair practice charge. The charge alleged that the Stanislaus Consolidated Fire Protection District (District) violated the Meyers-Milias-Brown Act (MMBA)[1] by: (1) engaging in unlawful surface bargaining; (2) unilaterally eliminating a negotiated contract provision relating to union access rights without satisfying its bargaining obligation; (3) unilaterally changing a negotiated contract provision relating to "mergers and consolidations" without satisfying its bargaining obligation; (4) unilaterally eliminating a past practice of allowing the use of union leave time from a "Union Time Bank" to participate in union activities, including attendance at city council meetings when "State of

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

the District" addresses were made, without satisfying its bargaining obligation; (5) failing/refusing to provide relevant and necessary information relating to a promotional hiring; (6) refusing to promote an employee in retaliation for his protected conduct; (7) interfering with employees' exercise of rights by stating that it was not "wise" to represent members seeking to promote to management positions; (8) bargaining to impasse a non-mandatory subject of bargaining; and (9) eliminating union access rights and the "Union Time Bank" in retaliation for protected conduct.[2] The Board agent determined that allegations 1, 2, 3, 5, 8 and 9 failed to state a prima facie case and issued a partial dismissal of these allegations.[3]

The Board has reviewed the entire record in this matter. Based on the Board's review and in view of the relevant law, the Board reverses the partial dismissal of the charge and directs that a complaint be issued for the reasons discussed below.

BACKGROUND

Charge Allegations Regarding Union Access

Local 3399 is the exclusive representative of the fire suppression and prevention bargaining unit within the District. Local 3399 and the District entered into a Memorandum of Understanding (MOU) effective July 1, 2006 through June 30, 2010. The MOU provision at issue here is Section 20-2, which states in full:

> Station Coverage During Union Meetings – The District shall allow the union president or his representative to move his engine to the station holding the meeting. His station will be covered by an additional on-duty crew. The president or his representative

[2] The Board agent directed the issuance of a complaint based on allegations 4, 6 and 7.

[3] Local 3399 did not appeal the Board agent's determination that allegations 1, 3, 5 and 8 failed to state a prima facie case. Accordingly, neither the allegations mentioned in footnote 2 nor the allegations mentioned in this footnote are currently before the Board. The Board's decision herein discusses the facts and issues relevant to allegations 2 and 9 only.

> shall make prior notification to the Duty Chief, and the Duty Chief shall make the necessary arrangements of moving personnel, engines or providing coverage. The Duty Chief can make a determination that emergency situations or operational needs override the ability to provide coverage.
>
> An example of some of the scenarios is as follows: Assuming that the meeting was held at Station 32, due to the short distance and acceptable response times, station 31 and 33 will be allowed to attend unless prior commitments have been made. Station 31 and 33's area shall be covered from Station 32 by the respective engines or cover engines. The station 32 or station 33 crew shall provide the coverage if the union president or his/her representative is on duty at station 34 or station 36.[4]

The parties applied Section 20-2 to permit Local 3399 to hold union meetings at fire stations and to permit on-duty personnel to participate. On June 10, 2010, the District's Board of Directors (board) met with the Fire Chief and decided in closed session to remove Section 20-2 from the MOU. By memorandum dated June 14, 2010, addressed to fire engineer and Union President, Derek Nichols (Nichols)[5], Fire Chief Stephen Mayotte (Fire Chief) proposed the elimination of Section 20-2:

> Continuing to utilize District Facilities for Union Meetings and allowing on-duty crews to attend Union Meetings, can no longer be considered beneficial to the best interests of the District or the constituents we serve.
>
> The District is proposing to eliminate Section 20-2 of the Memorandum of Understanding, no longer allowing Union Meetings to be held at District Facilities and no longer allowing on-duty personnel to participate.

[4] Under this section of the MOU, Local 3399 was allowed to hold union meetings in the morning at shift change time. There were three shifts: the off-duty shift, the off-going shift and the oncoming shift. Holding meetings early in the morning at a District fire station at or near shift change time allowed as many members as possible to attend. Both the off-duty and off-going shifts could attend as they were not on duty, and the oncoming shift could attend as their duties permitted.

[5] Nichols served as union president from January to December 2010.

> In order to facilitate a location where Union Meetings may be held, President Brown has offered to discuss the use of the "Union Hall" for future meetings.
>
> I would like to schedule a meeting this week so we can meet and confer per Section 2-4 of the Memorandum of Understanding.
>
> Please contact me at your convenience in order to establish a meeting time.
>
> Thank you.

On July 6, 2010, the Fire Chief and all five members of the District board met with Nichols and fire captain and union negotiation team member, Rick Bussell (Bussell) to discuss the District's proposal. When asked why he was proposing to eliminate Section 20-2, the Fire Chief responded that it did not foster good employer-employee relations. When asked to confirm whether he was referring to three then recently filed grievances, the Fire Chief responded, "Uh . . . ya." Nichols informed the Fire Chief that Local 3399 did not agree to removal of Section 20-2 from the MOU.

On July 7, 2010, Nichols sent the Fire Chief an e-mail summarizing the meeting. Nichols wrote, in pertinent part:

> All five District Board members along with yourself . . . overwhelmingly agreed that it was no longer beneficial to the best interest of the District, because of District / employee relations, pertaining to the 3 current individual grievances, to allow on duty Union personnel to attend union meetings and the meetings can no longer be held at District Facilities. You also stated that if the relationship between the Board and the Union improve [sic] that you would reinstate Section 20-2 back into the MOU. You concluded the meeting by stating that this action would be carried out under the operational need clause with in [sic] our MOU despite our opposition.
>
> Although we honored the change at our Union meeting today I am not sure what the next step is for the removal of Section 20-2 and how we inform the members of the change? If the Section is removed by a side letter we would like to include the statement that says "if the district / employee relations improves, the

> District would be willing to reinstate Section 20-2 into the 2006-2010 MOU.["]

The Fire Chief then clarified in an e-mail dated July 8, 2010, that "[i]t's the totality of the situation including employer-employee relations which led the District to make the decision." The Fire Chief also replied that a side letter might work or because the parties were in negotiations over a successor agreement, a "re-write of the section is easily achieved." The District never proposed a side letter nor offered a rewrite of Section 20-2.

Nichols replied to the Fire Chief's e-mail on July 8, 2010, as follows:

> We obviously disagree on the conversation that took place at the Meet & Confer meeting, so maybe we can agree in the future that we either record the meetings or include the secretary to take minutes and mutually agree on the verbiage before we adjourn.
>
> April 16th was a date that the District Negotiators set as the last day for the District and the Union to bring new items to the table for the current negotiations. Apparently the District did not feel Section 20-2 was a concern at that time because they did not request that item be included in the current negotiations. So in negotiating in good faith we can not just re-write a section of the MOU without these negotiations.
>
> Since this removal of the Section has already been enforced at our July 7th meeting we feel to protect the interests of our members we need some sort of legal document signed by all the persons involved explaining the reason for the removal and by what authority they had for the removal.

The Fire Chief responded by e-mail on July 8, 2010, which states in pertinent part:

> This had nothing to do with the regular on-going negotiations taking place between 3399 and 911 Consulting Group. I was aware of the restrictions regarding new items not being brought forward after your April meeting, so there was no reason to involve 911 Consulting Group at this late date. The MOU allows for this type of activity and we're attempting to follow that process (Section 2[-]4).
>
> This is considered an operational need for the District and is being handled that way. I can draft a letter of agreement for signatures from both 3399 and the District, as needed.

In Nichol's final reply to the Fire Chief in this e-mail string on July 8, 2010, Nichols wrote:

> Sense [sic] the MOU is a legal contract I think we need some sort of signed documentation that states what the operational need was to remove Section 20-2 from our contract. I don't think a letter of agreement is the answer, sense [sic] we did not agree to the removal and I wouldn't be able to find any one to sign it anyway.

By letter dated July 12, 2010, addressed to Nichols, the Fire Chief communicated management's decision regarding Section 20-2 as follows:

> In order to meet the current operational needs of the District and in accordance with MOU Article II, Sections 2-3 and 2-4,[6] Management has decided to eliminate the use of District Facilities for Union Meetings. In addition, on-duty personnel will no longer be allowed to attend Union Meetings.
>
> The decision to eliminate the practice regarding Union Meetings comes from the ever-increasing work load responding to emergency incidents, training, prevention and public service events, etc. The change is being made in an effort to restore lost work time, ensure adequate emergency response coverage and potentially see an improvement in employer-employee relations.

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[6] Section 2-3 of the MOU provides:

> The Union recognizes the need for the District to exercise its judgment in managing its operations, and agrees that the District shall have the right to regulate the use of all equipment and other property of the District, establish new, or close down stations, or departments thereof, or expand, reduce, alter or combine any job or department, operation or function, determine number and location of stations and the work to be done, methods or procedures used in performance of work, complement of employees needed or assigned to a particular function, and to maintain discipline among its employees.

Section 2-4 of the MOU provides:

> The District and Union representatives will meet and confer at times mutually agreed by the parties for the purpose of discussing changes that impact this Memorandum of Understanding and are being contemplated by the District that may affect the employees.

> According to MOU Article II, Section 2-3, the District has the right 'to exercise its judgment in managing its operations, and agrees that the District shall have the right to regulate the use of all equipment and other property of the District'.
>
> The District has followed MOU Article II, Section 2-4 and held a meet and confer on Tuesday, July 6, 2010, at 10[:]00 hours.
>
> Thank you for your cooperation, please contact me with questions regarding this issue.

On August 12, 2010, Nichols and union Vice-President Matt Criswell (Criswell) met with the District board in closed session to complain that Section 20-2 was arbitrarily removed from the MOU. Directors Richard Heckendorf and Armando Garcia responded that the MOU was not a binding contract, only an agreement. District board President RaeLene Brown (Brown) assured Nichols and Criswell that the District board would look into the matter and get back to them. That never happened.

Meanwhile, the District and Local 3399 had begun negotiations over a successor agreement.[7] At no time during these negotiations did the District make a proposal that Section 20-2 be eliminated from the successor agreement. The parties ultimately reached a TA, which modified Section 4.4 of the MOU regarding "Step Increase upon Promotion," included a Side Agreement regarding in-house promotions, but otherwise continued in effect "[a]ll other terms and conditions of the July 1, 2006-June 30, 2010 Memorandum of Understanding." The District Board approved the TA on September 9, 2010.

[7] The first meeting to negotiate a successor agreement occurred on March 5, 2010. The parties continued to meet through the months of March, April, May, June and July. At the July 9, 2010, negotiation session, the District declared impasse. After the parties were unsuccessful in setting up an impasse meeting, by letter of July 29, 2010, the District presented its last, best and final offer. The parties resumed negotiations and on August 24, 2010, the parties reached a tentative agreement (TA) for the 18-month term covering July 1, 2010 through December 31, 2011.

Because the TA contained no changes to Section 20-2, Local 3399 at first believed that Section 20-2 was still a part of the parties' agreement. On November 10, 2010, the Fire Chief presented the successor agreement to Local 3399 for signature before taking it to be printed. Upon review of the document, Local 3399 discovered that Section 20-2 had been physically deleted from the agreement.[8] Local 3399 asked the Fire Chief to put Section 20-2 back into the agreement because it had not been negotiated out. The Fire Chief refused. Local 3399 then refused to sign the agreement unless Section 20-2 was reinserted back into the agreement. In response, despite having reached a TA, the District threatened imposition of terms and conditions of employment including deletion of Section 20-2. Imposition of terms and conditions was placed on the agenda for the December 9, 2010, District board meeting. After a presentation by Local 3399's attorney objecting to the proposed District board action and a closed session discussion, the District board announced that it was temporarily postponing imposition.

Since July 2010, Local 3399 has not been allowed to hold union meetings at the District's fire stations. Nor have on-duty personnel been allowed to participate.

Charge Allegations Regarding the Union Time Bank

MOU Section 23-2 entitled Union Time Bank provides:

> Union Time Bank was developed to allow members to attend Union business without placing a financial burden upon the District. Union agrees to donate one hour of vacation time per month to the time bank from each of its members. Use of the time bank is established through District Policy with agreement of the Union.

[8] In a version of the successor agreement, identified in the footer of the document as "2010 – 2011 M.O.U. Amended 10-14-2010," Section 20-2 does not exist.

The District Policy regarding the Union Time Bank referred to in Section 23-2 is memorialized as Article C-54 in a memorandum dated May 14, 2010.[9] Under Article C-54, each member can donate one hour of vacation leave per month to the Union Time Bank to be used for "meeting and conferring, handling grievances, representing members and other legitimate Association business."

On November 11, 2010, Nichols and Bussell submitted "Time Off Request Form[s]" seeking permission to use four hours of leave from the Union Time Bank in order to attend a Riverbank city council meeting on November 22, 2010.[10] District board President Brown was to give a "State of the District" address. In the past, the District had encouraged employees to attend.

By memorandum dated November 18, 2010, the Fire Chief denied Nichol's and Bussell's time-off requests "due to the proposed need not falling under legitimate Association business as per policy." By memorandum dated November 23, 2010, Nichols and Bussell filed a "Union Time Bank Denial – Step 2 Grievance" with Battalion Chief, Mike Wapnowski (Wapnowski or Battalion Chief). By memorandum dated November 29, 2010, Wapnowski denied the grievance. By memorandum dated December 13, 2010 to the Fire Chief, Nichols and Bussell elevated their grievance to Step 3. The Fire Chief's denial of their grievance by memorandum dated December 14, 2010, stated in pertinent part:

> Since the use of the release time bank will continue to be a contentious issue between the District and the Local, I can't justify spending any more staff time arguing over the issue. The following shall occur immediately:

[9] The May 14, 2010, memorandum superceded a Union Time Bank policy statement of September 9, 2008.

[10] Riverbank is one of the jurisdictions served by the District.

> The Union Firefighters Release Time Bank will be discontinued and dissolved. The time will be returned to each contributing employee per policy.

At Step 4 of the grievance process, the District board President upheld the Fire Chief's denial by memorandum dated December 20, 2010, which stated in pertinent part:

> In our opinion, the [District] Board wishes to remove all sources of conflict with Local 3399 and therefore does not wish to continue a policy that brings discord between us.

By memorandum dated December 23, 2010, Nichols and Bussell informed the District board President that Local 3399 intended to move their grievance to Step 5 of the grievance process (adjustment board).

In response to an e-mail dated January 5, 2011, from fire engineer and new union president, Nicholas Meigs (Meigs), requesting leave from the Union Time Bank, the Fire Chief responded by e-mail, stating "[t]he constructive end served by the elimination of the time release bank is no further misunderstandings, grievances or complaints regarding its use." The Fire Chief's e-mail goes on to state, "At the time I thought the release bank was a good idea, in concept I still do." The e-mail concludes, in pertinent part:

> Employer/employee relations will continue to struggle as long as the only way we communicate is via the grievance procedure and/or through legal counsel. The District remains reactionary to these types of communications and has no alternative than to respond quickly and decisively in these situations. The District will continue to reduce the opportunities for grievances, complaints or disagreements whenever possible. Speaking for Management and the District Board, if Labor is interested in improving relations, then returning to open discussions instead of grievances and legal actions is the solution.

DECISION OF THE BOARD AGENT

Regarding the unilateral change allegations discussed in Section II of the partial dismissal, the Board agent acknowledged that union access rights are matters within the scope of representation, citing *Woodland Joint Unified School District* (1987) PERB Decision

No. 628. The Board agent then concluded that there are no facts in the record to show that the District implemented a policy or modified a past practice to eliminate union access rights under Section 20-2. The Board agent reasoned that Section 20-2 was still in effect because the District board approved the TA, which purportedly continued in effect the terms and conditions of the expired MOU, and never adopted an agreement that excluded the provision at issue. The Board agent also stated that the charge allegations were deficient from a pleading standpoint in their failure to describe whether Local 3399 made specific requests to use District facilities to conduct union meetings and, if so, the dates the requests were made, the individuals who made the requests, the individuals who were denied, etc., citing *State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S (*Food and Agriculture*).

Regarding the retaliation allegations discussed in Section V of the partial dismissal, the Board agent confined the analysis factually to the District's removal of Section 20-2 from the MOU.[11] The Board agent viewed the charge as alleging discrimination between groups of employees based on one group's protected activity. The Board agent found that the charge did not allege with specificity when the grievances were filed and whether the Fire Chief was aware of them. The Board agent then concluded that the charge failed to state a prima facie case under *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416 (*Campbell*), as discussed in *State of California (Department of Personnel Administration)* (2011) PERB Decision No. 2106a-S, because it was not predicated on differential treatment between two groups of employees.

[11] As discussed below, the charge, as amended, makes two retaliation claims, one based on removal of Section 20-2 and a second based on elimination of the Union Time Bank. The Board agent appears to have overlooked the second basis.

DISCUSSION

A. Unilateral Change

The issue presented is whether Local 3399 has sufficiently alleged that the District's conduct relative to Section 20-2 constitutes a prima facie violation of the rules prohibiting unilateral change. MMBA section 3505 provides in pertinent part:

> The governing body of a public agency . . . shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment . . . and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.
>
> 'Meet and confer in good faith' means that a public agency, . . . and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year.

PERB Regulation 32603(c)[12] makes it an unfair practice under the MMBA for a public agency to "[r]efuse or fail to meet and confer in good faith with an exclusive representative as required by Government Code section 3505 . . . ."[13]

In determining whether a party has violated MMBA section 3505 and PERB Regulation 32603(c) by failing to meet and confer in good faith, 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. (*Omnitrans* (2009) PERB Decision No. 2030-M (*Omnitrans*).) A "per se" violation of the duty to bargain in good faith will be

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

[13] Under MMBA section 3509(b), a complaint alleging any violation of the MMBA "shall be processed as an unfair practice charge" by the Board.

found where there has been a unilateral change in the status quo concerning a negotiable subject of bargaining. (*Ibid.*)

The right to bargain may be waived only by means of a waiver established by "clear and unmistakable" language in the contract. (*Grossmont Union High School District* (1983) PERB Decision No. 313 (*Grossmont*); *Amador Valley Joint Union High School District* (1978) PERB Decision No. 74 (*Amador Valley*).) Otherwise, the duty to bargain in good faith over negotiable matters is continuous and binds both labor and management not only through the life of the agreement but also during negotiations after the term of the agreement has expired up to the point of impasse.[14] (*California Public Sector Labor Relations* (2011) § 10.03[1]; *San Joaquin County Employees Association v. City of Stockton* (1984) 161 Cal.App.3d 813, 819 [while parties are in process of negotiating a new contract, the current contract and its terms and conditions remain in effect and cannot be altered]; *County of Alameda* (2006) PERB Decision No. 1824-M.) Also, offering to negotiate after a unilateral change has already been imposed does not negate the unlawfulness of the prior conduct because "the employer's *fait accompli* thereafter makes impossible the give and take that are the essence of labor negotiations." (See *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, 823 (*Vernon Fire Fighters*).)

A unilateral change violation will be found if certain criteria are met. Those criteria are: (1) the employer breached or altered the parties' written agreement or its own established past practice; (2) such action was taken without giving the other party notice or an opportunity to bargain over the change; (3) the change was not merely an isolated breach of the contract, but amounts to a change in policy (i.e., it has a generalized effect or continuing impact upon

[14] If impasse is subsequently broken, the bargaining obligation revives. (*Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 899.)

bargaining unit members' terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. (*Vernon Fire Fighters*; *West Side Healthcare District* (2010) PERB Decision No. 2144-M; *Omnitrans*.)

Taking the last criterion first, as the Board agent in this matter correctly observed, an employee organization's access to a public employer's facilities is a matter within the scope of representation under MMBA section 3504.[15] As the Board in *Omnitrans* stated:

> Considering the language of the MMBA in light of the well-established implied right of access grounded in the non-interference and non-discrimination provisions of other labor relations statutes, we hold that the MMBA grants a recognized employee organization a right of access to a public agency's facilities for the purpose of communicating with employees subject to reasonable regulation by the public agency.

Accordingly, we find that Section 20-2 implicates a negotiable matter within the scope of representation. The District's assertion that the elimination of Section 20-2 constitutes a managerial decision pertaining to coverage of response areas that is outside the scope of representation is, therefore, rejected.

To the extent the District is arguing that Local 3399 waived its statutory bargaining rights by agreeing to the management rights clause in Section 2-3 of the MOU, the District is mistaken. Waiver of the statutory right to meet and confer must be established by "clear and unmistakable" language. (*Grossmont*; *Amador Valley*.) Moreover, even if Section 2-3 constituted a clear and unmistakable waiver of Local 3399's statutory bargaining rights, such a

[15] MMBA section 3504 defines "scope of representation" to 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." (See also MMBA § 3507, subd. (a)(6) [allowing a public agency to adopt "reasonable rules and regulations" for employee organization access to work locations after good faith consultation with employee organization].)

waiver would not remain in effect beyond the negotiated term of the MOU. (See *Antelope Valley Unified High School District* (1998) PERB Decision No. 1287.)

Regarding the issue of whether the District breached or altered the parties' written agreement or its own established past practice under the first criterion, Local 3399 alleges that Section 20-2 was removed from the parties' agreement and that the District has refused to reinsert it. In fact, in the version of the agreement presented by the District to Local 3399 for signature, Section 20-2 is indeed missing. The District appears to have repudiated this provision of the expired MOU. While the parties disagree as to whether the District had the right to do so, they appear to agree that Section 20-2 is for all practical purposes not a provision that the District believes it is bound to follow.

The Board agent, however, concluded that Section 20-2 is still in effect, reasoning that the TA, with few exceptions not relevant here, continued in effect the terms and conditions of the expired MOU, and that the parties did not adopt a successor agreement that explicitly excludes Section 20-2. The facts, as alleged, however, indicate that Local 3399 has not been allowed to hold meetings at District fire stations pursuant to Section 20-2 since July 2010. This allegation is consistent with the District's actions. There is no better illustration of the District's act of repudiation than its taking an electronic version of scissors and cutting the disputed provision right out of the very document intended to memorialize the parties' agreement.[16]

Regarding the issue of whether the District's action was taken without giving the other party notice or an opportunity to bargain, by its letter of June 14, 2010, the District advised Local 3399 of the "proposed" change and offered to meet and confer. The "meet and confer"

[16] See, e.g., 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 806, p. 726 [if statements or conduct of promisor amount to a repudiation, the injured party may treat the repudiation as an anticipatory breach].

was held on July 6, 2010, and in an e-mail string between Nichols and the Fire Chief attempting to memorialize what had occurred at this meeting, the Fire Chief stated that Section 20-2 has "nothing to do with the regular on-going negotiations." Rather, according to the Fire Chief, "[t]his is considered an operational need for the District and is being handled that way." By its letter of July 12, 2010, the District explained that while it believed it was complying with its meet and confer obligation under Section 2-4 by holding the July 6, 2010, meeting, its decision to eliminate Section 20-2 was based on Section 2-3, the management rights clause of the expired MOU.

Under MMBA section 3505, the parties are under mutual obligation, not just to meet and confer, but to meet and confer in *good faith*, which includes exchanging information, opinions and proposals and endeavoring to reach agreement on matters within the scope of representation. The District asserts that Local 3399 "was afforded proper notice of the District's proposal to remove Section 20-2 and afforded the opportunity to meet and confer regarding removal even thought [sic] the District was not required to meet and confer." The District cannot have it both ways. It cannot, on the one hand, profess to be in compliance with its bargaining obligations by offering to meet and confer and, on the other, assert that it has no bargaining obligations based on management prerogative.

Regarding the issue of whether the change amounts to a change in policy rather than an isolated contract breach, a change in policy is one that has a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment. (*Omnitrans*.) The Board has found a "continuing impact" where the breaching party asserts that the change was authorized by the collective bargaining agreement. (*Ibid.*; *Fremont Unified School District* (1997) PERB Decision No. 1240.) The District asserts that the elimination of Section 20-2 was authorized by Section 2-3 of the MOU. Given the continuing impact of the

position taken by the District, the change regarding Section 20-2 amounts to a change in policy, not an isolated contract breach.

We plainly disagree with the Board agent that Local 3399 failed to meet its pleading burden under *Food and Agriculture*. The Board agent appears to have relied on a statement in the warning letter adopted, along with the dismissal, as the decision of the Board itself in that case, stating that the charge failed to describe "any specific conduct on any specific date by any specific agent of the state." The detailed factual allegations in this case bear no resemblance to the vague, conclusory and bald assertions in *Food and Agriculture*. We thus conclude that Local 3399 has alleged sufficient facts to state a prima facie case that the District's conduct in repudiating Section 20-2 constitutes a prohibited unilateral change in terms and conditions of employment in violation of MMBA section 3505 and PERB Regulation 32603(c).

B. Discrimination/Retaliation and Interference under MMBA Section 3506

The issue presented is whether Local 3399 stated a prima facie case that the District violated MMBA section 3506 and PERB Regulation 32603(a) when it eliminated Section 20-2 from the parties' agreement and abolished the Union Time Bank. MMBA section 3506 provides:

> Public agencies and employee organizations shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502.[17]

[17] PERB Regulation 32603(a) makes it an unfair practice for a public agency to:

> Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

Section 3502 provides, in pertinent part:

> Except as otherwise provided by the Legislature, public employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.

The Board agent concluded that the charge failed to state a violation of the kind described in *Campbell*.[18] As the Board agent correctly observed, there are no allegations of discrimination as between different groups of employees.[19] Discrimination of the kind involved in *Campbell*, however, is not the only theory of liability implicated by the factual allegations in this case.

We have long held that an employer violates the law when it interferes with the rights of employees or discriminates/retaliates against employees because of their exercise of statutory rights. To establish a prima facie case of discrimination/retaliation, a charging party must allege that the employer acted with an unlawful motive. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).) By contrast, to establish a prima facie case of interference, the charging party need not allege an unlawful motive but only that the respondent's conduct tends to or does result in harm to employees' rights. (*Carlsbad Unified*

[18] In *Campbell*, the employee organization exercised its protected rights by using an impasse procedure contained in the meet and confer rules adopted by the employer. The employer then denied a previously-agreed to retroactive salary adjustment to employees represented by the employee organization but did not deny the adjustment to employees not represented by the employee organization. The court ruled that the employer had engaged in conduct "inherently destructive" of employees' rights.

[19] The Board agent also found that the charge did not allege with specificity when the grievances were filed and whether the Fire Chief was aware of them. Regarding Section 20-2, Local 3399 alleged that the Fire Chief acknowledged the existence of three recently filed grievances at the meeting of July 6, 2010. Regarding the Union Time Bank, Local 3399 alleged the specific dates on which the grievances were filed and the denial of the grievances at Step 3 by the Fire Chief himself.

School District (1979) PERB Decision No. 89 (*Carlsbad*); *Sacramento City Unified School District* (1982) PERB Decision No. 214.)

1. Discrimination/Retaliation

To prove a discrimination/retaliation violation under the MMBA, a charging party bears the initial burden of establishing that: (1) the employee engaged in protected activity; (2) the employer knew of the activity; (3) the employer took adverse action; and (4) the protected activity was a motivating factor in the employer's decision to take that action. (*Novato*.) The fourth element has been described as follows:

> Unlawful motive is the specific nexus required in the establishment of a prima facie case. Direct proof of motivation is rarely possible since motivation is a state of mind which may be known only to the actor. Unlawful motive can be established by circumstantial evidence and inferred from the record as a whole.

(*Trustees of the Cal. State Univ. v. Public Employment Relations Bd.* (1992) 6 Cal.App.4th 1107, 1124.)

Types of circumstantial evidence probative of unlawful motive include: (1) timing of the employer's adverse action (*North Sacramento School District* (1982) PERB Decision No. 264); (2) disparate treatment (*Regents of the University of California* (1984) PERB Decision No. 403-H); (3) departure from standard procedures (*Santa Clara Unified School District* (1979) PERB Decision No. 104); (4) inadequate, inconsistent or shifting justification for the adverse action (*Novato*); (5) cursory investigation (*State of California (Department of Parks and Recreation* (1983) PERB Decision No. 328-S); and (6) anti-union animus (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M).

In *Social Workers' Union, Local 535 v. Alameda County Welfare Dep't* (1974) 11 Cal.3d 382, 388, the California Supreme Court stated that the MMBA "ensure[s] a public employee's right to engage in a wide range of [employee organization] activities without fear

of sanction . . . ." The Board has found that filing a grievance is one type of protected activity. (See, e.g., *Bay Area Quality Management District* (2006) PERB Decision No. 1807-M; *City of Modesto* (2008) PERB Decision No. 1994-M [asserting rights established by negotiated agreement constitutes participation in activities of employee organization].) Thus, the first element of the prima facie case is satisfied.

The Fire Chief knew of the protected activity, having acknowledged the three earlier grievances at the July 6, 2010, meeting and having personally participated in the grievances concerning the Union Time Bank. The second element of the prima facie case is also satisfied.

Regarding the third element, the removal of Section 20-2 from the parties' agreement and the elimination of the Union Time Bank constitute actions adverse to the interests of the individual employees engaged in the protected activity and to the interests of the bargaining unit as a whole. Section 20-2 concerned union access rights and the Union Time Bank policy allowed employees to donate one hour per month of their earned vacation leave to a time bank used to facilitate legitimate organizational activities. Using a reasonable person standard, we consider the type of actions taken by the District to have an adverse impact on employment. (*Newark Unified School District* (1991) PERB Decision No. 864.) Therefore, they constitute adverse actions for purposes of satisfying the third element of the prima facie case.

Regarding the fourth element, there is both direct and circumstantial evidence of the District's unlawful intent in taking these two actions. Local 3399 alleged that the earlier grievances were filed "recently" in relation to the action taken by the District to remove Section 20-2 from the parties' agreement. The timing element is also met in regard to the elimination of the Union Time Bank in that it occurred in the context of the protected activity

itself. The Fire Chief declared the Union Time Bank abolished when he denied the Union Time Bank grievances at Step 3.[20]

Moreover, Local 3399 alleged that at the July 6, 2010, meeting, the Fire Chief admitted that Section 20-2 was removed because of the filing of three recent grievances.[21] The Fire Chief made similar admissions in the context of the Union Time Bank grievances. The Fire Chief stated, "[t]he constructive end served by the elimination of the time release bank is no further misunderstandings, grievances or complaints regarding its use."

The removal of Section 20-2 and the elimination of the Union Time Bank may have indeed reduced the number of grievances filed. If that occurred, it would not have been as a result of improvements in the parties' relationship but rather as a result of the employees being deterred by fear, reasonable in the circumstances, of losing other negotiated contract provisions and established policies. No employee should be fearful that by engaging in the protected

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[20] The Fire Chief stated:

> Since the use of the release time bank will continue to be a contentious issue between the District and the Local, I can't justify spending any more staff time arguing over the issue. The following shall occur immediately:
>
> The Union Firefighters Release Time Bank will be discontinued and dissolved. The time will be returned to each contributing employee per policy.

[21] When Nichols asked the Fire Chief to confirm at the July 6, 2010, meeting whether the Fire Chief was referring to three then recently filed grievances when he said that Section 20-2 did not foster good employer-employee relations, the Fire Chief responded, "Uh . . . ya." When Nichols e-mailed the Fire Chief to summarize what had occurred at the July 6, 2010, meeting, he wrote:

> All five District Board members along with yourself . . . overwhelmingly agreed that it was no longer beneficial to the best interest of the District, because of District / employee relations, pertaining to the 3 current individual grievances, to allow on duty Union personnel to attend union meetings and the meetings can no longer be held at District Facilities.

activity of filing a grievance, he or she risks the types of retribution to the entire bargaining unit alleged to have occurred here. Accordingly, we find that Local 3399 has stated a prima facie case of discrimination/retaliation under *Novato*.[22]

2. Interference

The allegations show a prima facie case of *Carlsbad* interference, a type of conduct also prohibited under the authorities set forth above. The courts have described the elements of an interference violation under the MMBA as follows:

> All [a charging party] must prove to establish an interference violation of [MMBA] section 3506 is: (1) That employees were engaged in protected activity; (2) that the employer engaged in conduct which tends to interfere with, restrain or coerce employees in the exercise of those activities, and (3) that [the] employer's conduct was not justified by legitimate business reasons.

(*Public Employees Association of Tulare County, Inc. v. Board of Supervisors of Tulare County* (1985) 167 Cal.App.3d 797, 807.)[23]

In an interference case, once the charging party demonstrates that the respondent's conduct tends to or does result in harm to employees' rights, the burden shifts to the respondent to produce a legitimate business reason for its conduct.

> 3. Where the harm to employees' rights is slight, and the employer offers justification based on operational necessity, the

[22] See also *Cupertino Union Elementary School District* (1986) PERB Decision No. 572 involving the layoff of a group of employees because of participation in protected activities by members of that group. As the Board stated: "Where an employer's decision to lay off a group of employees is unlawfully motivated by the union activism of some members of the group, the layoff is unlawful as to the entire group."

[23] In cases arising under the MMBA, PERB "shall apply and interpret unfair labor practices consistent with existing judicial interpretations of [the MMBA]." (MMBA, § 3509, subd. (b).)

> competing interest of the employer and the rights of the employees will be balanced and the charge resolved accordingly.
>
> 4. Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available.

(*Carlsbad,* at pp. 10-11.)

Turning to the factual allegations in this case, the circumstances surrounding the District's removal of Section 20-2 from the parties' agreement and its decision to abolish the Union Time Bank provide a sufficient basis upon which to conclude that Local 3399 has stated a prima facie case of *Carlsbad* interference. In each instance, employees have asserted their protected right to utilize the grievance procedures in order to resolve their disputes with the District, procedures agreed to by the District in the parties' MOU. In each instance, the District appears to have responded at least in part by taking something away, not just from the employees who filed the grievance but from the entire bargaining unit: a provision of the MOU itself in one instance, and an established policy implementing a Union Time Bank in the other. Grievance procedures are a fundamental labor relations tool for resolving disputes in the workplace. The overall effect of the District's conduct, whether intended or not, is to discourage employees from utilizing this tool and, in so doing, from asserting their rights under the statutory scheme. Accordingly, we find that Local 3399 has stated a prima facie case that the District's conduct tended to or did result in harm to employee rights under the *Carlsbad* interference standard.

In reversing the partial dismissal, the Board makes no final determination about Local 3399's allegations. The record adequately speaks to the issue of the status of Section 20-2 for purposes of determining whether a prima facie case has been stated.[24]

ORDER

The Public Employment Relations Board hereby REVERSES the partial dismissal of the unfair practice charge in Case No. SA-CE-711-M and REMANDS this case to the Office of the General Counsel for issuance of an amended complaint consistent with this Decision.

Members Dowdin Calvillo and Huguenin joined in this Decision.

[24] The facts alleged in the charge, as amended, are deemed true for purposes of this appeal. (See *Amador Valley*; *San Juan Unified School District* (1977) EERB Decision No. 12. [Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board (EERB)].)