STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 465, AFL-CIO, Charging Party, v. IMPERIAL IRRIGATION DISTRICT, Respondent.	Case No. LA-CE-1482-M PERB Decision No. 2861-M May 8, 2023

Appearances: Ochoa Law by Ricardo Ochoa, Attorney, for International Brotherhood of Electrical Workers, Local 465, AFL-CIO; Liebert Cassidy Whitmore by Mark Meyerhoff and Kevin Chicas, Attorneys, for Imperial Irrigation District.

Before Banks, Chair; Krantz and Paulson, Members.

DECISION

BANKS, Chair: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by Imperial Irrigation District and cross-exceptions by International Brotherhood of Electrical Workers Local 465, AFL-CIO (IBEW) to a proposed decision of an administrative law judge (ALJ). The parties' dispute is set against the initial stages of the COVID-19 pandemic. On March 21, 2020,[1] the District proclaimed a local emergency in response to the novel COVID-19 coronavirus, whereby it directed its staff to "take the necessary steps for the protection of life, health and safety" and approved the District General Manager to take "necessary

[1] All dates hereafter refer to 2020 unless otherwise noted.

actions." On March 26, the District notified IBEW of its plan to sequester a set of critical employees onsite at its facilities to ensure continued energy and water service to its communities.

Negotiations began on April 8 and continued apace. From the outset and throughout bargaining, the District claimed it had the ability to unilaterally impose terms pursuant to section 3504.5 of the Meyers-Milias-Brown Act (MMBA), which provides for an emergency defense; yet, the District also stated that it preferred to reach an agreement with IBEW prior to implementing an employee sequestration policy.[2]

Over the next 10 days, the parties exchanged several proposals and eventually narrowed their outstanding issues to only two, compensation and staffing methodology for sequestration if the District could not enlist a sufficient number of volunteers. On April 17, the District sent IBEW a fourth counterproposal and stated that it would likely be the District's last offer as implementation was imminent. IBEW sent the District a fifth counterproposal on the same day, but the District did not respond to it anytime thereafter. Instead, on April 20, the District implemented its "Emergency Policy Pursuant to California Government Code Section 3504.5 Re Sequestration of Critical Employees" (Sequestration Policy), which impacted unit employees' terms and conditions of employment including their hours of work, seniority, and overtime compensation. On April 25, the District began sequestering selected employees at its facilities in 21-day periods. During this time, employees worked daily 12-hour shifts,

[2] The MMBA is codified at Government Code section 3500 et seq. All further statutory references are to the Government Code.

followed by 12-hour non-productive periods, and resided at worksites in individual recreational vehicles (RVs) the District provided. The District never returned to the bargaining table after implementation.

In the course of bargaining, IBEW also sent requests for information (RFIs) to the District on April 13 and April 16. The District never responded to either request.

The proposed decision concluded that the District refused and failed to meet and confer in good faith with IBEW over the Sequestration Policy, unilaterally implemented the Sequestration Policy, and failed to respond to the two RFIs, in violation of the MMBA.

We have reviewed the record and the parties' arguments in light of applicable law. Like the ALJ, we find that the District violated the MMBA. However, we depart from the proposed decision's reasoning, as well as from its remedial order.

FACTUAL BACKGROUND[3]

The District is a public agency within the meaning of MMBA section 3501, subdivision (c) and PERB Regulation 32016, subdivision (a).[4] IBEW is the exclusive representative of approximately 900 employees in the District's Rank and File Unit.

The District provides water to 500,000 acres of agricultural land and several cities in the Imperial Valley. It also supplies energy to approximately 150,000 customers throughout its service area, which encompasses the Imperial Valley and the Coachella Valley. As a "balancing authority," the District maintains the balance of

[3] Neither party excepted to the ALJ's factual findings. We therefore draw the majority of our factual background from the proposed decision.

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

any energy coming in and going out. The District is also an energy transmission operator, monitoring voltage from the high level to end-use customers. The District is responsible for balancing the load, maintaining its local grid, and ensuring that it does not cause harm to any of its neighboring utilities, which are all part of the larger Western Interconnection grid, and successively larger energy grids that tie nearly the entire country together.

At all times relevant, the District's General Manager was Enrique "Henry" Martinez and the District's Assistant General Manager was Sergio Quiroz. The District's Manager of Human Resources, William "Dan" DeVoy, had been serving in that position for 15 years as of the formal hearing in this matter. The District's Energy Operations and Infrastructure Manager was Mario Escalara, and the Assistant Energy Manager was Mat Smelser. The Water Manager was Michael Pacheco.

IBEW's Business Manager and Financial Secretary was Nathaniel Fairman. He had served in those roles for approximately five years as of the formal hearing. Fairman and DeVoy served as chief negotiators for the Sequestration Policy.

Memorandum of Understanding (MOU) and Related Policies.

The District and IBEW were parties to an MOU that expired on December 31, 2020. MOU Article 3, section D states: "If this Agreement does not cover a specific term and condition of employment within the scope of representation, but a District Policy and Procedure does cover such specific term and condition of employment, the District Policy and Procedure shall apply." MOU Article 16 states: "The following [District] Policy and Procedures, which are attached hereto and incorporated by reference, shall be modified for members of IBEW." Among the District policies listed thereafter is Policy Number 4221 (Policy 4221), "Working Hours and Wages for

Nonexempt Employees."

Policy 4221 provides in pertinent part:

"**2. <u>Scope</u>**

"This policy applies to all nonexempt employees of the Imperial Irrigation District.

[¶] . . . [¶]

"**4. <u>DEFINITIONS</u>**

"A. <u>Workday</u> – A workday for the purposes of compensation is any consecutive twenty-four (24) hour period beginning at the same time each calendar day. The district's workday begins at 12 midnight and ends at 11:59 p.m. each day.

"B. <u>Workweek</u> – A workweek for the purposes of compensation is any seven (7) consecutive days starting with the same calendar day and time each week. The district's workweek begins every Friday at the midpoint of each employee's regular daily work schedule.

[¶] . . . [¶]

"D. <u>Regular Hours</u> – the 8, 9, 10 or 12 hours per workday and 40 hours per workweek during which an employee earns their regular rate of pay.

"E. <u>Hours Worked</u> – In accordance with applicable State and Federal law, time in which the employee is suffered or permitted to work shall be considered hours worked. Hours worked shall not include unpaid meal periods. Time employee spends on district property for the convenience of the employee is not hours worked for compensation purposes.

"F. <u>Overtime</u> – Hours worked in excess of regular full-time hours worked in one workday (8, 9, 10 or 12 hours) and

in excess of 40 hours worked in one workweek.

[¶] . . . [¶]

"H. Regular Pay Rate – The rate of pay an employee earns for work performed during regular hours of work. Biweekly pay is generally based on 2080 hours of work at the regular rate of pay annually.

[¶] . . . [¶]

"J. Overtime Pay Rate – The rate of pay an employee earns for hours worked during overtime hours . . . The overtime rate is one and one-half (1½) times the employee regular pay rate. The overtime rate is double the employee's regular rate of pay for the following job classifications only:

"Lineman, Apprentice
"Lineman, Senior Apprentice
"Lineman, Journeyman
"Lineman, Leader
"Lineman, Foreman
"Power Troubleshooter
"Power Troubleshooter, Leader
"Power Troubleshooter, Foreman
"Line Equipment Operators

"K. Double-Time Pay Rate – The rate of pay an employee earns for hours worked during certain overtime hours. The double-time rate is two (2) times the employee's regular rate.

[¶] . . . [¶]

"N. Biweekly Schedule Workers – Those employees who work a schedule of flexible hours that are equivalent to not more than 80 hours in a pay period. The biweekly work schedule may not coincide with the biweekly pay period and these employees may be assigned either a

biweekly pay rate or an hourly pay rate depending on the scheduling of hours.

[¶] . . . [¶]

"**5. POLICY**

"A. Change in Work Schedule – The regular work schedule of an employee may be changed by supervision in response to workload requirements. When it is not possible to give an employee twelve (12) hour notice of a change in work schedule, the employee shall be compensated at the overtime pay rate for the regular hours worked during the first day of work on the new schedule . . .

[¶] . . . [¶]

"E. Regular, Biweekly and Shift Work Schedules – There are four regular work schedules to which employees may be assigned during the workweek. They are:

"(1) Five eight-hour days [5/8s],
"(2) Four 10-hour days [4/10s],
"(3) Eight nine-hour days and one eight-hour day per 80-hour pay period [9/80s], and
"(4) Six 12-hour (6/12) days and one eight-hour day per 80-hour pay period (12/80s).

"Biweekly and shift schedule workers may be assigned to work rotating schedules to provide 24 hours per day/seven days per week coverage.

"F. Continuous Overtime – Hours worked during the regular work schedule will be at the regular pay rate. The first four (4) hours of overtime work that occurs after the end of the regular work schedule will be compensated at the regular overtime pay rate and any additional overtime hours worked (beyond the first four (4[)] hours of overtime) will be compensated at the double-time pay rate.

"When an employee is called out to work during overtime hours and the same call-out work continues into his or her regular work schedule the employee will be paid at the overtime pay rate until the end of the regular work schedule or the end of the call-out work, whichever comes first. Notwithstanding the foregoing, no overtime or double time shall be paid for work performed during an employee's regular work schedule/shift, regardless of the reason or type of work performed.

"G. Non-Working Fridays and Saturdays – On non-working Fridays and Saturdays, hours worked during the employee's regular daily (8-, 9-, 10- or 12-hour) work schedule will be paid at the overtime (1½) rate. Work after the employee's regular daily work schedule until the beginning of the next regular work shift will be at the double-time pay rate.

"H. Sundays – Hours worked on Sunday will be paid at the double-time pay rate. Sunday will be deemed to fall on the second day of a two-day-off schedule, on the third day of a three-day-off schedule, and on the fourth day of a four-day-off schedule."

[¶] . . . [¶]

A "Sample Overtime Chart" inserted between sections 5.F and 5.G of Policy 4221 illustrates various overtime scenarios in tables. For 24 hours worked on a "Working Day," employees on a "5/8" regular schedule receive 8, 4, and 12 hours "Straight" time (at the regular pay rate), "Overtime," and "Double Time" pay, respectively; employees on a "4/10" regular schedule receive 10, 4, and 10 hours of such pay; employees on a "9/80" regular schedule receive 9, 4, and 11 hours of such

pay; and employees on a "6/12"[5] regular schedule receive 12, 4, and 8 hours of such pay. For 24 hours worked on a "Non-Work Day (Friday, Monday,[6] Saturday)," "5/8" employees receive 8 hours "Overtime" pay and 16 hours "Double Time" pay; "4/10" employees receive 10 and 14 hours of such pay; "9/80" employees receive 9 and 15 hours of such pay; and "6/12" employees receive 12 and 12 hours of such pay. On a "Non-Working Friday for 9/80," such employees receive 8 hours of "Overtime" and 16 hours of "Double Time." Finally, on Sundays, all regular schedule employees receive up to 24 hours of double time.

DeVoy testified that employees in water-related classifications, unlike employees in energy-related classifications, were exempt employees under the federal Fair Labor Standards Act (FLSA).[7] Fairman testified, however, that employees in water-related classifications receive overtime pay for work beyond their regular work schedule in the same manner as the undisputedly non-exempt employees in energy-related ones.[8]

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[5] Or "12/80."

[6] Unlike the Sample Overtime Chart, the text of Policy 4221 does not refer to Monday as a "Non-Work Day." We infer, however, that Monday may be a Non-Work Day for employees not on a 5/8 schedule.

[7] The FLSA is codified at 29 U.S.C. § 201 et seq.

[8] The ALJ did not resolve this testimonial dispute. In other circumstances, this might require the Board to remand or to make a credibility determination itself. (See *Regents of the University of California* (2020) PERB Decision No. 2704-H, pp. 16-21.) However, as we explain in Section IV, *post*, we need not do so here as the parties will have an opportunity to present relevant documentary and testimonial evidence about this issue, among others, in compliance.

March 21, 2020: The District's Board of Directors Proclaim a Local Emergency and Authorize General Manager to Take Necessary Actions as a Result of COVID-19.

At a special meeting on March 21, the District's Board of Directors passed and adopted District Resolution No. 11-2020 (Resolution 11-2020), "Proclamation of a Local Emergency," in which the District's Board, in light of the COVID-19 pandemic, "proclaims the existence of a local emergency as of March 19, 2020 and directs District staff to take the necessary steps for the protection of life, health and safety." Furthermore, "during the existence of said local emergency, the powers, functions, and duties of the District shall be those prescribed by state law and by ordinances and resolutions of the Imperial Irrigation District Board of Directors." Finally, Resolution 11-2020 stated "that all departments of the District shall review and revise their department emergency and contingency plans to address the risks COVID-19 poses to their critical functions in coordination with the District's Emergency Management Office."

Minutes of the special meeting reflect that District General Manager Martinez "reported on a number of different actions taken throughout the week in response to the COVID-19 event" and highlighted, among others, "[l]ooking at critical areas requiring operations on a 24/7 basis" and "developing contingency plans to ensure that the district has adequate staffing and to maintain contracting forces available to augment staff in case of a shortage." Following Martinez's report, the District approved "that the general manager take the necessary actions as a result of COVID-19 coronavirus." Neither Resolution 11-2020 nor the minutes of the special meeting mention sequestration of employees, by that term or another. Martinez, however, testified that he and the District's Board discussed sequestration during the closed

session, which would not be reflected in the minutes.[9] District Manager of Human Resources DeVoy testified that, "probably within th[e] week after[ ]" the special meeting, "the District had decided . . . that it would likely need to sequester employees."

March 26 to April 6: The Parties Engage in Preliminary Discussions Regarding Sequestration.

On March 26, DeVoy e-mailed Fairman: "Attached is the letter that is going out to employees that may be asked to volunteer for shelter-in-place operations." The letter read:

> "Your position as [job title] has been identified as critical to the continued operation of the [department, e.g. System Operations Center]. As the COVID-19 pandemic spreads and intensifies, it may be necessary to sequester [District] employees critical to the continued service of electricity and water to our communities. Sequestering (also referred to as 'shelter in place') would involve being located on-site at or near the [District] facility in which you currently work for 24 hours per day, during work and off work hours, for a period of time, the length of which is unknown at this time. This action would only be taken as a measure of last resort determined to be necessary to ensure that [the District] may continue to provide essential utility service to its customers. If sequestering is determined to be necessary, those employees staying on-site will be provided with necessities, including food and shelter, as well as feasible recreation.
>
> "We are asking staff members working in critical job positions, such as yours, to volunteer for sequestration on-site in the event it is determined that such a measure of last resort is warranted. Given the critical and unique importance of your position, we are requesting that you volunteer to be sequestered, if necessary. We do not yet

[9] Martinez further testified that sequestration was also discussed at subsequent District Board meetings in both open and closed sessions.

> have the logistics fully resolved for sequestering . . . you on-site, including the amount of pay you will receive for this extended work effort, but we are developing that information as quickly as we can to more fully inform you and will provide that to you as soon as we are able to do so.
>
> [¶] . . . [¶]
>
> "I am confident that you will not take this situation lightly as you weigh the relative hardships this choice will impose and you should certainly discuss this with your family. But understand that the district likewise does not take this lightly and is requesting volunteers now only because the crisis is worsening at such a fast speed that we must plan for worst case scenarios that give us some control over our response instead of being forced into less collaborative reactions. If you are willing to step up and volunteer, please notify your supervisor **no later than Monday, March 30, 2020**."

(Brackets and bold in original.)

At the formal hearing, Martinez explained that the "logistics" mentioned in the second paragraph of the letter involved identifying sequestration locations, the number of employees to be sequestered at each location, and food and amenities to be provided to sequestered employees. According to Martinez, "it was close to a month before we got everything together" and the District was logistically able to sequester employees.

Other than a possible phone call, DeVoy's March 26 e-mail was the first communication between the District and IBEW regarding sequestration. As of that date, the District had not yet indicated to IBEW whether it had decided to sequester employees. IBEW subsequently approved sending the letter to bargaining unit employees.

On March 27, a District-initiated conference call took place between Fairman, DeVoy, and Quiroz. The District informed IBEW that it was looking into sequestration but did not indicate that it had decided one way or the other to sequester bargaining unit employees. Fairman responded that "two focal points for sequestration that [IBEW] had were ensuring nobody was forced to sequester and they would be paid continuously the entire time that they were sequestered." Fairman also "talked about negotiating a policy with the District."

On April 2, Fairman e-mailed DeVoy, stating: "I was just sent these agreements that were reached last week at Grant Public Utility District [or PUD], Seattle Public Utilities, Avista, PUD of [C]helan [C]ounty, and [S]nohomish PUD."[10] Fairman added: "In case the [District] wants to consider any of these work practices [I']d be willing to meet and confer."

On April 6, Fairman again e-mailed DeVoy. Fairman wrote: "Attached you will find an agreement we were just able to negotiate with SDG&E [San Diego Gas & Electric] regarding the sequestration of transmission system operators in RVs for 14 weeks."[11] Fairman added: "I am hearing that [the District] is working on . . . a policy about this and would like to be involved as early as possible in framing any agreement

[10] The four public utilities or utility districts are located in the State of Washington. Avista is a private energy company.

[11] SDG&E is a private energy company. The agreement between IBEW and SDG&E, which Fairman signed on behalf of IBEW, established two workgroups that would be sequestered at SDG&E Mission Control "[o]n a fourteen (14) day rotational basis," with each day spent in sequestration consisting of a 12-hour "Working Shift" and a 12-hour "Resting Shift," and provided that "[a]ll hours that a Sequestered [employee] spends on Working Shifts, and Resting Shifts, will be paid at double the [employee] base pay hourly rate."

as important as this." Fairman closed: "Please let me know if you have any draft policies you are working on you can share and what, other than the letter we already approved, has been communicated to our members in the switching control center."

April 8 to April 13: The Parties Begin to Exchange Proposals Over a Sequestration Policy.

On April 8, DeVoy e-mailed Fairman, stating: "Please review the attached documents regarding the ongoing [COVID]-19 emergency, meet & confer, and proposal regarding sequestration." DeVoy asked Fairman: "Are you available for a call at 3:00 p.m. today to discuss?" Attached to the e-mail was a letter from DeVoy to Fairman bearing the same date, that stated in pertinent part as follows:

> "In the interest of transparency and open communication, this letter is offered to share the District's position regarding the meet and confer requirements under the [MMBA] as it responds to the COVID-19 emergency. In addition, this letter is intended to notify the Union of the District's probable need to change the schedules of certain unit members in order to ensure that the District can continue to provide essential services, such as the distribution of energy and water to customers in the District's service territory.
>
> "Pursuant to this authority, over the last two weeks the District has and will continue to take a number of legislative and administrative actions to address rapidly changing events brought on by COVID-19. To the extent these actions constitute a change in the terms and conditions of employment in the District's represented bargaining units, the District is invoking the provisions of California Government Code section 3504.5, which authorizes the District in cases of emergency to take immediate unilateral action without prior notice or meeting with the recognized employee organization. The statute also requires the District to provide the employee organization with notice and an opportunity to meet at the earliest practicable time following the unilateral action in question.

> "The District is requesting to meet with the Union to discuss the District's probable need to implement schedule changes for employees within the unit pursuant to the emergency provisions of Government Code section 3504.5. Despite the District's ability to impose these terms without prior notice or meeting, the District would prefer to reach an agreement, if possible, with the Union prior to needing to implement the action. Specifically, the District believes that it will need to change the schedules of employees within the classifications identified in the attached proposal and to require such employees to remain on-duty for consecutive 24-hour periods. The offer to meet prior to emergency implementation of a schedule change is not intended to interfere with the District's need to implement such a change pursuant to Government Code section 3504.5 even if the parties cannot reach an agreement prior to implementation."

In addition to the letter to Fairman, DeVoy also attached a proposed letter of understanding (LOU) entitled "Sequestering During Emergency Operations Specific to COVID-19 – Coronavirus Pandemic." The proposed LOU identified a dozen Water and Energy Department job classifications "required to perform critical functions at Critical Operations Centers." Included among these job classifications was, for example, the Electric Systems Operator classification in the District's Energy Department. District Assistant Energy Manager Smelser explained at the hearing that, in line with the District's dual function as a balancing authority and a transmission operator, "one operator is balancing the system to make sure we deliver energy without any issues, and the [other] operator is monitoring voltage, coordinating switching, etcetera." Smelser noted that these positions are difficult to fill as they require extensive training and, for those in transmission roles, certification by the North American Energy Reliability Council. Smelser opined that if the employees occupying them were to become unavailable due to COVID-19, the consequences would be "catastrophic."

District Energy Operations and Infrastructure Manager Escalara similarly testified that "if we were to all of a sudden have a reduction in available staff [at the gas turbine] in Niland, we would then have to . . . take those units offline."[12] If this were to happen at the El Centro Generation Station, Escalara testified, "we would have a lot of large iron just sitting idly," representing "about . . . a third of the capacity within [the District]," the result being that "we would have rolling blackouts." DeVoy testified that Martinez directed him "to start . . . meeting with IBEW about potential sequestration" "[i]n a sense of partnership and transparency and trying to work together to put things in place before we had to [unilaterally] implement and sequester."

DeVoy's April 8 letter was the first time the District expressed its position that it could impose terms unilaterally, without prior notice or negotiating, pursuant to MMBA section 3504.5.

Water Manager Pacheco testified that employees in the water-related classifications listed in the proposed LOU required sequestration. He noted that a shortage of employees in these hard-to-fill classifications would likewise have "pretty bad" consequences, up to having to order water once a week rather than once a day, which would result in "high carryovers"—i.e., the inability to fulfill water orders from farmers in a timely fashion—and "[w]e would have spilled a lot of water."

Under the heading "Critical Positions," the proposed LOU stated:

> "Once the District identifies the need for sequestration, Management will ask for volunteers for pre-identified critical positions. If more employees volunteer than are needed,

[12] The District ultimately decided not to sequester employees in one of these classifications, Hydro Operator.

positions will be filled according to seniority. If an insufficient number of employees volunteer, Management will designate individuals to fill the vacant positions by lowest to greatest seniority, with appropriate qualifications."

The proposal further stated under the heading "Guidelines":

"At the time of sequestration, the District will begin operating under the following guidelines in terms of its employees:

"1. The District will solicit volunteers in Critical Operational Centers to be sequestered, at the specified locations on three-week rotation for the first group with the ability to extend.

"2. Only predetermined critical positions and job classifications will be staffed at the Critical Operational Centers during the sequestration period.

"3. Employees will stay at the worksite 24 hours a day, seven days a week for the identified sequestration period. The first sequestration period shall be 21 days with the ability to extend or rotate another volunteer group after the initial sequestration period is complete.

"4. At the time of the initial selection process, the District will establish a list of volunteers to participate in the three-week sequestration period. This list will be established in order based upon seniority. Once selected to be sequestered, volunteers will be scheduled to work 21 days, 12-hour shifts, followed by 12 hours of rest-time.

"5. The District may terminate the sequestration period by providing employees with a 12-hour notice.

"6. This LOU is not intended to set a precedent for [the] future or intended to permanently modify the terms and conditions of the Memorandum of Understanding Agreement currently in place.

> "7. During the sequestration period no visitors will be allowed at Critical Operational Centers including family members, friends, and others."

In addition, under the heading "Sequestration at Work" the proposal stated:

> "Employees who fill positions supporting a 24-hour critical operation will be required to 'sequester' for a period of twenty-one (21) or more days, depending on the operational needs of the department. During this period the employee shall be housed in a location provided by the District and employee shall not leave the work area. Contact between those in sequestration and those not sequestered will be highly restricted."

As later implemented, this sequestration changed the regular work schedule of employees that were sequestered from 8, 9, 10 or 12-hour shifts to 12-hour shifts across the board.

Under the heading "Compensation," the proposal stated: "Employees identified as 'Critical' employees, volunteering to 'sequestration' required to support a 24-hour operation will work 12-hour shifts respectively per day for a predetermined time frame based on the required 'sequestration' time." This statement was followed by a chart showing how sequestered employees would be paid for their 12 "Productive Hours" and their 12 "Non-productive/Rest Period" hours on each of the seven days of each week in sequestration. Regarding "Productive Hours," the chart indicated that sequestered employees would receive 12 hours of "straight" time pay on days one through three of each week; 4 hours of straight and 8 hours of "one & one-half" time pay on day four; 12 hours of one and one-half time pay on days five and six; and 12 hours of "double" pay on day seven. Regarding "Non-productive/Rest Period" hours, the chart indicated that sequestered employees would receive 12 hours of straight

time pay on each of the seven days of the week for a total of 84 hours. Thus, sequestered employees would receive the equivalent of 196 hours at their regular rate of pay each week.[13]

Later on April 8, Fairman e-mailed DeVoy that he was not available for a call that day but would be available the next day. Fairman also stated:

> "Every single agreement that I have sent you, both from public agencies and private utilities, have the workers being paid doubletime [*sic*] for the entire time they are sequestered so I cannot begin to describe my disappointment in this initial proposal that has our members being only compensated at the straight time rate like it's business as usual. Like they are not sacrificing time away from their families. Like they can just pick up and go home to see their kids at any time. [¶] This is NOT business as usual. This is a one in one hundred year event. Every other utility and public agency is treating it as such. [Y]ou will absolutely see that much in any counter proposals we will consider."

Fairman also sent DeVoy a sequestration agreement between a different IBEW local and Southern California Edison (SCE) dated April 2.[14]

On April 9, the parties convened via conference call. Fairman testified that District Assistant General Manager Quiroz stated "the District ha[d] to be ready to go shortly depending on the state of the county." Quiroz stated "it might be maybe two or three weeks, that we were getting ready to . . . put[ ] things in place to sequester." The District also commented several times during the call that "they reserve[d] the right to

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[13] (124 x 1 = 124) + (32 x 1.5 = 48) + (12 x 2 = 24) = 196.

[14] SCE is a private energy company. The agreement between IBEW and SCE provided that during sequestration, hours worked and off-duty "Sleep and Rest" hours would be paid alike at a "Double Time" rate.

implement, but they wanted to bargain with [IBEW] to come to an agreement." During the meetings that followed as discussed below, the District made similar statements approximately four or five times. DeVoy stated more than once during these meetings that the District did not have an obligation to negotiate the sequestration policy prior to implementation, and Fairman never informed DeVoy that MMBA section 3504.5 or the District's invocation of that section was an issue.

Later on April 9, Fairman e-mailed DeVoy IBEW "Counter #1" proposing additions and deletions to the District's proposed LOU. In the "Critical Positions" section, IBEW revised the District's proposed language as follows:[15]

> "Once the District identifies the need for sequestration, Management will ask for volunteers for pre-identified critical positions. If more employees volunteer than are needed, positions will be filled according to *classification* seniority. If an insufficient number of employees volunteer, *then the District may fill shifts with Management employees within the Department as required to maintain the continuity of service. If it becomes necessary for a non-represented employee to perform bargaining unit work, it shall be limited to only when necessary. In either circumstance, the acting manager shall notify Human Resources/Labor as soon as possible but in no more than twenty-four (24) hours. Human Resources/Labor will make notification to the Union.* ~~*Management will designate individuals to fill the vacant positions by lowest to greatest seniority, with appropriate qualifications.*~~"[16]

[15] Hereafter, a party's additions are represented by italics and deletions are represented by strikethroughs.

[16] IBEW Counter #1 also inquired into the number of bargaining unit employees in each of the job classifications of "[e]mployees required to perform critical functions at Critical Operations Centers" and thus, per the proposed LOU, subject to sequestration.

In the "Guidelines" section, IBEW Counter #1 added:

> "*If at any point during their resting-time, a Sequestered Employee must perform work activities, the Sequestered Employee will receive pay at double their base pay hourly rate for all hours worked while on a Resting Shift in addition to any pay received in accordance with the 'Compensation' section of this Agreement.*"

Also among these changes were the following additions under "District Responsibilities":

> *"5. The District shall provide a family meal delivery stipend to each employee during their sequestration in the amount of $100.00 per day of sequestration for the purchase and delivery of food to the employee's home.*
>
> *"6. At the end of the Sequestered Employees 21 day shift they shall be provided a paid 'Recovery Time' off of work for a period of two weeks paid at 80 hours of the employee's straight time hourly wage."*

Finally, under the section entitled "Compensation," IBEW Counter #1 replaced the chart in the proposed LOU with the following statement: "*All hours that a Sequestered Employee spends on their 12 hour working shifts and 12 hour resting shifts will be paid at double the employees base pay hourly rate.*" Thus, sequestered employees would receive the equivalent of 336 hours at their regular rate of pay each week.[17]

On April 10, DeVoy e-mailed Fairman "District Counter #1," modifying IBEW Counter #1, and invited Fairman to a call that day. District Counter #1 accepted in part and revised in part the IBEW-proposed language under the heading "Critical

[17] (7 x 24 = 168) x 2 = 336.

Positions" as follows:[18]

> "Once the District identifies the need for sequestration, Management will ask for volunteers for pre-identified critical positions. If more employees volunteer than are needed, positions will be filled according to ***classification*** seniority. If an insufficient number of employees volunteer, *then the District may fill shifts with hourly and*[19] *Management employees within the Department as required to maintain the continuity of service. If it becomes necessary for a non-represented employee to perform bargaining unit work, it shall be limited to only when necessary. ~~In either circumstance, the acting manager shall notify Human Resources/Labor as soon as possible but in no more than twenty-four (24) hours. Human Resources/Labor will make notification to the Union. Management will designate individuals to fill the vacant positions by lowest to greatest seniority, with appropriate qualifications.~~*"

As indicated in the quote above, the District accepted IBEW's insertion of the word "classification" into the first sentence and its deletion of the last sentence.

District Counter #1 also proposed changes to the IBEW-proposed language under the headings "Guidelines," "Employee Responsibilities," and "District Responsibilities," including the following under "Guidelines":

> "If at any point during their resting-time, a Sequestered Employee must perform work activities, the Sequestered Employee will receive pay at *one and one-half times* their

[18] The District's agreements to IBEW-proposed changes were represented by yellow highlighting, which is replaced hereafter with underlining. The status of language that was not highlighted or stricken through is unclear, as IBEW proposed the language, but the District's formatting did not indicate whether the District accepted or rejected it.

[19] The words "hourly and" were added by the District, although this is not reflected in the formatting. Hourly employees are bargaining unit employees.

> <u>base pay hourly rate for all hours worked while on a Resting Shift in addition to any pay received in accordance with the "Compensation" section of this Agreement.</u> *Employees will receive payment and not accrue compensatory time during the sequestration period.*"

As indicated in the quote above, the District accepted IBEW's addition of the first sentence, but only agreed to one and one-half time pay instead of double time pay, and proposed to add the last sentence.

In addition, District Counter #1 accepted the IBEW-proposed family meal delivery stipend of $100.00 per day.

With respect to the IBEW-proposed "Recovery Time," District Counter #1 instead proposed the following:

> "*At the end of the Sequestered Employees 21 day shift, the Employees shall be ~~provided a paid~~ credited with 24 hours of vacation to be used immediately after the sequestration period. If the employee does not take the 24 hours of vacation within the pay-period following the end of their sequestration period, the employee will forfeit this time. This time shall not be carried forward. ~~off of work for a period of two weeks paid at 80 hours of the employee's straight time hourly wage.~~*"

Finally, under the heading "Compensation," District Counter #1 repeated the District's original proposal in the proposed LOU (i.e., 40 hours of straight time, 32 hours of one and one-half time, and 12 hours of double time pay for "Productive Hours" and 84 hours of straight time pay for "Non-productive/Rest Period" hours per week).[20]

[20] District Counter #1 also identified the number of bargaining unit employees who would be subject to sequestration, which totaled 29 out of the approximately 900

On the same day, April 10, the parties again met via conference call. Later that day, Fairman e-mailed DeVoy: "[I] am very surprised to see how much language that we have exchanged we now have consensus on." Fairman expressed his belief that there were "only 3 outstanding issues," namely, (1) "[IBEW's] opposition to forcing Employees into sequestration," (2) "The length of the 'recovery' time," and (3) "Compensation." Fairman attached IBEW Counter #2 to his e-mail, which modified District Counter #1. IBEW Counter #2 accepted the District-proposed language under "Critical Positions," with the exception of the words "hourly and," as well as the District's counterproposal that work during a "Rest Shift" would be compensated with one and one-half time pay instead of double pay. IBEW Counter #2 demanded that the District-proposed 24 hours of vacation at the end of a sequestered employee's 21-day shift be increased to 40 hours. Finally, under the heading "Compensation," IBEW Counter #2 repeated IBEW's original proposal of providing double time pay for all hours.

Still later that day, DeVoy sent Fairman District Counter #2. That proposal (1) insisted on the inclusion of the words "hourly and" in the language under "Critical Positions," (2) accepted IBEW's demand that the District-proposed vacation at the end of a sequestered employee's 21-day shift be increased to 40 hours, and (3) repeated the District's original compensation proposal in the proposed LOU.

On April 11, the parties met again via conference call. Fairman testified that during this meeting, Quiroz stated that "there was a reduction in revenue because of

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District employees represented by IBEW.

the COVID-19 pandemic" but did not quantify that reduction.

On April 13, Fairman e-mailed DeVoy IBEW Counter #3 and offered to continue discussions during the remainder of that day and the next. IBEW Counter #3 proposed the following regarding "Critical Positions":

> "Once the District identifies the need for sequestration, Management will ask for volunteers for pre-identified critical positions. If more employees volunteer than are needed, positions will be filled according to classification seniority. If an insufficient number of employees volunteer, then the District may fill shifts with ~~*hourly and*~~ Management *and/or salaried*[21] employees within the Department as required to maintain the continuity of service. *Understanding that employees may have circumstances preventing them from an assignment as challenging as this (i.e. being a single parent, childcare needs, dependent care, personal medical constraints, claustrophobia etc.) nobody shall be forced against their will to sequester against their will.* [*Sic*] If it becomes necessary for a non-represented employee to perform bargaining unit work, it shall be limited to only when necessary."

IBEW Counter #3 again repeated IBEW's original proposal that sequestered employees receive double time pay for all hours.

April 13: IBEW Sends the District an RFI.

In a separate e-mail on April 13, Fairman sent DeVoy an RFI "to properly understand the effects a 'sequestration in place' would have on our IBEW . . . members employed at the Imperial Irrigation District, and to be able to continue to negotiate those effects properly and effectively." IBEW requested the following information:

> "1. Any and all identified protective measures or 'logistics'

[21] Salaried employees are not bargaining unit employees.

the [District] will enact to prevent a 'sequestered employee' from coming in contact with a 'non-sequestered employee' working in the same work location during the 21-day sequestration period . . .

"2. The names, job titles, work locations, and classification seniority of every [District] employee who has volunteered to sequester.

"3. Define the positions and number of employee [*sic*] per position that will sequester at each site . . .

"4. The name of the facility [the District] is using to test employees for COVID-19 and a link to their website.

"5. The number of employees at each sequestration location . . . who will be working their normal shifts while the sequestered employees will be on site broken down by classification and job site.

"6. The proposed shift schedule for all of the sequestered employees and non-sequestered employees for the duration of the first 21-day sequestration period and each subsequent event for as long as the District has forecasted . . .

"7. Photographs of the RVs employees will be sleeping in and links to the rental company website.

"8. A Map of each location . . . that shows the location of the sleeping quarters, work locations, and Emergency Evacuation Plans for employees to follow in the event of an emergen[c]y while in sequestration . . .

"9. The name of the company the District will use to provide meal to sequestered employees and a link to their website."

IBEW asked the District to provide this information "in an expedited manner."

The District never responded to IBEW's April 13 information request nor

provided any of the requested information.

April 15: The District Sends Counter #3.

On April 15, DeVoy e-mailed Fairman District Counter #3 and stated his availability for a call that afternoon.

District Counter #3 responded to IBEW's latest proposal regarding "Critical Positions" as follows:

> "Once the District identifies the need for sequestration, Management will ask for volunteers for pre-identified critical positions. If more employees volunteer than are needed, positions will be filled according to classification seniority. If an insufficient number of employees volunteer, then the District may fill shifts with *hourly and* Management *and/or salaried* employees within the Department as required to maintain the continuity of service. ~~*Understanding that employees may have circumstances preventing them from an assignment as challenging as this (i.e. being a single parent, childcare needs, dependent care, personal medical constraints, claustrophobia etc.) nobody shall be forced against their will to sequester against their will.*~~ If it becomes necessary for a non-represented employee to perform bargaining unit work, it shall be limited to only when necessary."

Most significantly, in its third counterproposal the District for the first time changed its position regarding compensation by eliminating straight time pay for "Productive Hours." Specifically, the District now proposed that, for "Productive Hours," sequestered employees would receive 12 hours one and one-half time pay on days one through six and 12 hours of double time pay on day seven. Regarding "Non-productive/Rest Period" hours, the District proposed as before that sequestered employees would receive 12 hours of straight time pay on each of the seven days of the week.

Fairman responded to DeVoy that morning, inquiring: “Your counter only talks about the pay for the first 7 days. Under this proposal what would be the pay for days 7-21?” DeVoy replied later that day, “Each 7-day period is the same.”

April 16: IBEW Sends Counter #4 and a Second RFI.

On April 16, Fairman e-mailed DeVoy IBEW Counter #4. The proposal regarding “Critical Positions” in the latest counteroffer provided:

> “Once the District identifies the need for sequestration, Management will ask for volunteers for pre-identified critical positions. If more employees volunteer than are needed, positions will be filled according to classification seniority. If an insufficient number of employees volunteer, then the District may fill shifts with ~~*hourly and*~~ Management *and/or salaried* employees within the Department as required to maintain the continuity of service. *If not enough hourly and/or salaried employees volunteer then the District and the Union shall meet and confer immediately with the intent of exploring every option at our disposal to fill these shifts. It is neither parties* [*sic*] *intent to sequester employees against their will.* If it becomes necessary for a non-represented employee to perform bargaining unit work, it shall be limited to only when necessary.”

Compensation remained the only other disagreement between IBEW and the District. IBEW Counter #4 moved away from demanding double time pay for all hours spent in sequestration, and instead proposed that for “On Shift Hours” (in lieu of the District’s “Productive Hours”), sequestered employees would receive 12 hours of straight time pay on day one, and 12 hours of double time pay on days two through seven. Regarding “Rest Period” hours (in lieu of the District’s “Non-productive/Rest Period” hours), IBEW proposed that sequestered employees would receive 4 hours of one and one-half time pay and 8 hours of double time pay on day one, and 12 hours of double time pay on all other days.

As part of the same April 16 e-mail, Fairman reiterated IBEW's outstanding April 13 RFI and propounded a second RFI seeking:

> "1. Provisions the [District] plans to follow or enact if they decide to 'force' an employee into sequestration against their will.
>
> "2. A description of how the [District] would treat an employee who refuses to 'sequester' or 'shelter in place' for 21 days for personal, family, or medical reasons.
>
> "3. If an employee is 'forced' against their will into sequestration, what federal law, state law, or local ordinance does the [District] point to in enacting these unprecedented measures?
>
> "4. Copies of any and all 'Sequestration Agreements' that any other Utilities . . . have signed that the [District] have in their possession that have a provision to 'force' employees into sequestration if the employer does not get enough volunteers.
>
> "5. Copies of any and all 'Sequestration Agreements' that any other Utilities . . . have signed that the [District] have in their possession.
>
> "6. Any historical evidence that the [District] has ever forced employees to live at work for 21 days in the past 100 years (from 1920-2020)."

As before, IBEW asked the District to provide this information "in an expedited manner." As with IBEW's April 13 RFI, the District never responded to IBEW's April 16 RFI nor provided the requested information. According to DeVoy, the District failed to respond to the RFIs because:

> "We were buried under just managing through COVID and the [Emergency Operations Center] was meeting three times a week. We were really going back and forth with proposals with IBEW that for me is light speed. And so, we

> were very busy with trading the proposals back and forth and then we implemented on the 20th or . . . 25th.
>
> [¶] . . . [¶]
>
> ". . . It was very busy and continued to be very busy actually through probably January or February of [2021]."

April 17: District Sends Counter #4 and Notice of Implementation; IBEW Sends Counter #5.

On April 17, DeVoy sent Fairman District Counter #4 and "a letter regarding implementation." He told Fairman that he would be available over the weekend to discuss the matters.

The District's Counter #4 regarding "Critical Positions" stated:

> "Once the District identifies the need for sequestration, Management will first ask for volunteers for pre-identified critical positions. If more employees volunteer than are needed, positions will be filled according to classification *seniority, however, the ultimate determination regarding staffing of positions will be at the discretion of the District taking into account the District's needs.*
>
> "If an insufficient number of employees volunteer, then the District may fill shifts with *hourly and* Management and/or salaried employees within the Department as required to maintain the continuity of service. The District will notify the union of the District's need to fill shifts and the *District will commence sequestration of employees until a sufficient number of employees are scheduled to ensure the continuity of service.* If it becomes necessary for a non-represented employee to perform bargaining unit work, it shall be limited to only when necessary."

During the parties' meetings prior to District Counter #4, the District never stated that the ultimate determination regarding staffing of positions should be at the discretion of the District.

The addition to District Counter #4 of the italicized language in the first paragraph quoted above appears to have resulted from a conversation between DeVoy and Smelser that took place at an unknown point in time. DeVoy asked Smelser, "What would work best for systems operations?" Smelser answered, "We should keep the crews together" because "21 days was going to be a stressful environment." Smelser was referring to five existing crews in his area that are "used to working with each other" and that he felt "would be more familiar and comfortable with each other to keep them together." DeVoy confirmed that he had a conversation with Smelser about staffing by seniority, during which Smelser stated he wanted to keep his crews together "for efficiency and safety" and that "[t]his seniority thing and breaking up crews doesn't work."

District Counter #4 also reflected a change with respect to compensation. The District proposed that for "Productive Hours," sequestered employees would receive 12 hours straight time pay on days one and two, 12 hours of one and one-half time pay on days three through six, and 12 hours of double time pay on day seven. Regarding "Non-productive/Rest Period" hours, the District proposed that sequestered employees would receive 12 hours of straight time pay on day one, 4 hours of straight time pay and 8 hours of one and one-half time pay on day two, and 12 hours of one and one-half time pay on days three through seven.

DeVoy attached a "letter regarding implementation" to his April 17 e-mail, which read:

> "The parties have been attempting to reach an agreement on this Sequestration Policy prior to the District needing to implement the sequestration of employees pursuant to Government Code section 3504.5. Due to current conditions, the District believes the implementation of this

> policy is imminent. Accordingly, this is likely the last proposal the District will be able to offer prior to the emergency implementation of sequestration. If the District must implement this policy prior to reaching any agreement, the District will continue to meet with the union regarding any changes the policy poses to the wages, hours or terms and conditions of employment.
>
> "Due to the imminent nature of the implementation of this policy, we remain available to discuss the proposal with the union at any time."

Fairman did not believe the District ever indicated that implementation of the sequestration policy was "imminent" prior to this letter. DeVoy testified that the District believed implementation was imminent "[b]ecause everything was in place," i.e., "[t]he logistics, getting all the RVs in places and permits with the county and electricity . . . to the RVs and getting all the catering and recreational equipment, everything was in place." He added: "We were ready to start testing employees prior to sequestration, and the general manager was ready to go."

For his part, Martinez decided to advise IBEW that sequestration was imminent because he was "looking at the positive rates that we were experiencing in Imperial County, the number of our own employees . . . testing positive," and that "[t]he concern that I had . . . was that some of our critical employees would be impacted and [that] ultimately at some point [we would] run out of bodies/employees to be able to sustain the operations for the District."

Later on April 17, Fairman e-mailed DeVoy:

> "Nice letter Dan.
>
> "With the [District] changing the language on the selection of sequestered employees going away from language we already agreed upon is regressive bargaining. We agreed

> [to] offer assignments by classification seniority, now it is '. . . **seniority, however, the ultimate determination regarding staffing of positions will be at the discretion of the District taking into account the District's needs.'** We have 3 proposals exchanged back and forth with the classification seniority order language black (signifying agreement) and now this language appears? On our last call I made the statement 'once we have a deal we can go out and solicit volunteers and if the deal is fair then I am sure that you won't have any problems getting volunteers' and that was not refuted. Whatever the district believes they need to do with next steps if they exclude the process we discussed with regards to soliciting volunteers by classification seniority or in any way retaliates against anyone for volunteering and then removing their names from the list we will be forced to take protective measures.
>
> "I also believe that Dan is using the threat of an emergency as a bargaining strategy which is bad faith. Very bad faith.
>
> "That being said. What you will see in our 'UNION COUNTER # 5' is the most movement that we have made in this entire process. We agreed to the entire proposed pay structure for the first 7 days of sequestration (That is why you will see it in black in our proposal).
>
> "What we do not believe is that after a worker has been sequestered for 7 days straight, without a day off, that their 8th day through their 21st day should not be paid at the same rate that their first days are. We are willing to make a concession on the sleep time for days 8-21 but the hours worked should be treated differently for obvious reasons.
>
> "We have shaved off over 50% of the economic value of our last proposal.
>
> "We are also still waiting on our information requests."

(Bold in original.)

DeVoy testified that he was not using the threat of an emergency as a

bargaining strategy, as alleged in Fairman's April 17 e-mail, because "[w]e actually didn't have an obligation to bargain before we implemented this."

IBEW Counter #5 proposed the following regarding "Critical Positions":

> "Once the District identifies the need for sequestration, Management will ask for volunteers for pre-identified critical positions. If more employees volunteer than are needed, positions will be filled according to classification seniority. If an insufficient number of employees volunteer, then the District may fill shifts with ~~*hourly and*~~ Management *and/or salaried* employees within the Department as required to maintain the continuity of service. *If not enough hourly and/or salaried employees volunteer then the District and the Union shall meet and confer immediately with the intent of exploring every option at our disposal to fill these shifts.* If it becomes necessary for a non-represented employee to perform bargaining unit work, it shall be limited to only when necessary."

Compensation remained the only other disagreement between the parties. IBEW Counter #5 proposed that for "On Shift Hours," sequestered employees would receive 12 hours of straight time pay on days one and two, 12 hours of one and one-half time pay on days three through six, and 12 hours of double time pay on days seven through twenty-one. Regarding "Rest Period" hours, IBEW proposed that sequestered employees would receive 12 hours of straight time pay on day one, 4 hours of straight time pay and 8 hours of one and one-half time pay on day two, and 12 hours of one and one-half time pay on days seven through twenty-one.

The District does not dispute that it never responded to IBEW Counter #5. DeVoy did not schedule another meeting to discuss the proposals because he believed sequestration was imminent and that the District needed to start testing employees for COVID-19 beforehand.

April 20: The District Abandons Further Negotiations and Implements the Sequestration Policy.

On the morning of April 20, Fairman e-mailed DeVoy:

> "I hope everyone had a good weekend with your loved ones. I am hearing that the district wants to start sequestration on Wednesday or Friday. We have sent a counter on 4/17 and our team is available all day today to continue discussions. If you would prefer to counter us and then set up a call please let me know. I believe our recent counter is a compromise that shows movement, good faith, and respects the fact that we are in a time crunch."

Shortly thereafter, DeVoy responded to Fairman: "I'll be sending you a letter today from Henry [Martinez] regarding implementation of sequestration." DeVoy followed up later that day by e-mailing Fairman: "Please find attached the letter from District General Manager, Henry Martinez[,] and the Emergency Policy Pursuant to California Government Code Section 3504.5 Re Sequestration of Critical Employees. Please let me know of any questions." Martinez's letter provided, in relevant part:

> "The District has now determined that it must take immediate steps to secure the delivery of essential and critical services, such as water and electricity, amidst the COVID-19 pandemic. As the threat of expansion of COVID-19 cases continues, these immediate steps include reducing the risk of critical employees contracting COVID-19. To achieve this, the District will implement an emergency policy for sequestration of critical employees until further notice. This action is taken pursuant to Government Code section 3504.5 and is consistent with Resolution No. 11-2020. Sequestration will commence with the day shift at 6:00 a.m. and the night shift at 6:00 p.m. on April 25, 2020.
>
> "In summary, the District contemplates that it will be required to sequester employees for 21-day periods during which the employee will work a 12-hour shift followed by a

> 12-hour rest time. If sequestering is required beyond the initial 21-day period, the District will recruit replacement teams for the additional period and rotate them thereafter. The District will continuously monitor the need to continue the sequestration of critical employees in light of current conditions related to COVID-19. Sequestered employees will be paid in compliance with applicable law.
>
> [¶] . . . [¶]
>
> "While the District appreciates the considerable time and effort spent by the Union discussing the terms under which sequestration would be undertaken, the imminent threat to the District's power and water delivery system pre-empts the desirability of reaching an agreed-upon transition to sequestration. Pursuant to Government Code section 3504.5, the District will meet and confer with the Union, as soon as practicable, following implementation of the sequestration. The terms that will govern the sequestration of employees are set forth in the attached 'Emergency Policy Pursuant To California Government Code Section 3504.5 Re Sequestration Of Critical Employees.'"

Prior to this letter, the District never indicated that it had a target date by which it wanted to begin sequestration.

In the attached Sequestration Policy, the section entitled "Critical Positions" was replaced by the following section entitled "Selection of Employees":

> "To best ensure proper staffing of critical positions, prior to the commencement of each sequestration period, the District will first ask for volunteers to fill the classifications identified above.
>
> "If more employees volunteer for any classification than are needed for the sequestration period, the District will attempt to select volunteers on the basis of seniority within the classification. However, consistent with the District's management rights, it will retain the discretion to make the ultimate determination as to staffing of critical positions**,**

> taking into account the present circumstances and the District's needs. Any employees who volunteered and were not selected for a sequestration period may receive priority to be selected for any following sequestration period.
>
> "If an insufficient number of employees volunteer for any classification than are needed for that sequestration period, the District will notify the union of the shortage of volunteers and attempt to fill any shortages as soon as possible. However, if a shortage of volunteers still exists, the District will select critical hourly, management and/or salaried employees for the sequestration period, as required, to maintain the continuity of service until a sufficient number of employees are scheduled. If it becomes necessary for a non-represented employee to perform bargaining unit work, it shall be limited to only when necessary."

The remainder of the Sequestration Policy tracked District Counter #4.

The District never responded to IBEW Counter #5 or to Fairman's April 20 invitation to "continue discussions." After extending that invitation, IBEW did not again demand to bargain about sequestration.

The District Sequesters Selected Employees by Department.

Subsequently, the District held three successive 21-day sequestration periods for affected bargaining unit employees in Energy Balancing and Transmission, all of which the District staffed with volunteers. By the third round, some of the volunteers were "duplicates." During sequestration, employees' contact with individuals outside of sequestration was highly restricted.

The District held two rounds of sequestration in Energy Generation; specifically, two rounds at the Gas Turbine in Niland and none in Hydro Operation. There was no shortage of volunteers. There were two rounds of sequestration in Water Control and

one at Imperial Dam, and the District selected volunteers based on seniority.[22]

On May 14, DeVoy sent Fairman an e-mail with the subject line "Recovery Time for Sequestered Employees." DeVoy advised Fairman that the District was removing the Sequestration Policy restriction on the 40 hours of post-sequestration vacation time. The District would now allow employees to bank unused leave time and the same rules that applied to vacation time would apply to this recovery time. DeVoy did not raise any other issues in his e-mail and closed by stating, "Please let me know of any questions." Fairman did not respond.

There is no evidence that the COVID-19 pandemic caused a financial emergency for the District, or that the District anticipated that the pandemic would create one. However, the District experienced unquantified "revenue losses" in missed payments for electricity by rate payers, as the District suspended disconnections and collections of late payments during the pandemic. In addition, the minutes of the June 2 District Board meeting reflect that as of May 22, the "estimated total" of "actual expenses since the coronavirus began" was $1.93 million. The majority of that amount was spent on sequestration.[23]

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[22] Sequestration started with approximately 30 employees Districtwide. According to Board minutes, the first round of sequestration involved 32 employees, the second round involved 28 employees, and the third round involved 10 employees. Each sequestered employee earned about $30,000 per round of sequestration.

[23] It is unknown what portion of these total expenses was due to additional compensation paid to sequestered employees. Given that sequestration began on April 25 and approximately 30 employees remained sequestered in the four weeks through May 22, total compensation paid to sequestered employees would account for approximately $1.2 million of the total sequestration-related expenses. (30 employees x 1 ⅓ rounds of sequestration x $30,000 per round of sequestration.) However, it is unknown how that total compensation compares to the employees' regular pay that

PROCEDURAL BACKGROUND

On October 16, IBEW filed the underlying unfair practice charge against the District. On December 28, PERB's Office of General Counsel issued a complaint alleging that on April 8, the District "invoked" the right to take immediate unilateral action to implement the Sequestration Policy pursuant to MMBA section 3504.5, and that on April 20, while meeting and conferring with IBEW about the sequestration terms, the District made a firm decision to change the status quo by implementing the Sequestration Policy. The complaint also alleged that the Sequestration Policy regressed from the District's prior proposal. Further, the complaint alleged that the District failed to respond to IBEW's April 13 and April 16 RFIs. In sum, the complaint alleged that the District's aforementioned conduct violated its duty to meet and confer in good faith with IBEW, interfered with the rights of unit employees to be represented by IBEW, and denied IBEW the right to represent said employees.

On January 19, 2021, the District filed its answer in which it admitted certain factual allegations, denied others, and raised several affirmative defenses, including that its conduct was lawful under MMBA section 3504.5, subdivision (b).

On March 10, 2021, the Office of the General Counsel conducted an informal settlement conference, but the parties were unable to settle the matter.

The ALJ held a formal hearing on June 29-30 and July 1-2, 2021. After IBEW and the District filed post-hearing briefs, the ALJ issued a proposed decision on April 18, 2022, finding that the District failed to bargain in good faith with IBEW by

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they would have earned even if they had not been sequestered.

unilaterally implementing the Sequestration Policy and failing to respond to IBEW's RFIs.[24] The District timely filed exceptions and IBEW timely filed cross-exceptions and a response to the District's exceptions. The District did not respond to IBEW's cross-exceptions.

The District excepts to the ALJ's conclusions that it unilaterally implemented the Sequestration Policy and failed to respond to IBEW's RFIs, and thereby bargained in bad faith. IBEW excepts to the ALJ's calculation of hours due to employees during the sequestration period, as well as to the ALJ's failure to find that the District's premature cutting-off of negotiations on April 20 constituted a per se violation of the duty to bargain in good faith. We address these exceptions below.

DISCUSSION

When resolving exceptions to a proposed decision, the Board applies a de novo standard of review. (*County of Santa Clara* (2019) PERB Decision No. 2629-M, p. 6.) Under this standard, we review the entire record and are free to make different factual findings and reach different legal conclusions than those in the proposed decision. (*City and County of San Francisco* (2021) PERB Decision No. 2757-M, p. 8.) However, the Board need not address issues that the proposed decision has adequately addressed or that would not impact the outcome. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 5 (*San Ramon*).)

Neither party disputes that the COVID-19 pandemic was a bona fide public

[24] The ALJ dismissed IBEW's allegation that the District's April 8 invocation of the right to take immediate unilateral action pursuant to section 3504.5 constituted a per se violation of the duty to meet and negotiate in good faith. IBEW did not except to this finding, making it final and binding on the parties but otherwise nonprecedential. (*County of Orange* (2018) PERB Decision No. 2611-M, p. 2, fn. 2.)

health emergency.[25] The primary question in this case is whether the public health emergency, standing alone, privileged the District to unilaterally impose the Sequestration Policy and compensation rates without first bargaining with IBEW to an agreement or overall impasse. As our precedent explains, an employer endeavoring to avail itself of the MMBA's emergency defense in section 3504.5, subdivision (b) must meet a high bar: it must not only prove the existence of an actual financial or other emergency, the employer must also show that the emergency left it with no alternative to the action taken and allowed insufficient time for meaningful negotiations before taking action. (*Calexico Unified School District* (1983) PERB Decision No. 357, adopting proposed decision at p. 20 (*Calexico*); *Lucia Mar Unified School District* (2001) PERB Decision No. 1440, adopting proposed decision at pp. 46-47.)[26] In

[25] Pursuant to Evidence Code section 452, subdivision (c), we take permissive administrative notice of the following as official acts of the executive department of the State of California (*Cabrillo Community College District* (2019) PERB Decision No. 2622, p. 10): (1) the Governor's March 4, 2020 Proclamation of a State of Emergency wherein he stated that, as of that date, there were 53 confirmed cases of COVID-19 in California, more than 9,400 Californians were in home monitoring based on possible travel-based exposure to the virus, and "officials expect the number of cases in California, the United States, and worldwide to increase"; and (2) Executive Order N-33-20, dated March 19, 2020, wherein the Governor noted that "in a short period of time, COVID-19 has rapidly spread throughout California, necessitating updated and more stringent guidance from federal, state, and local public health officials" and ordered all residents to "stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors." Additionally, we take permissive administrative notice of the Centers for Disease Control positive COVID-19 case rates in March 2020. From March 1 through March 28, 2020, positive rates from public health laboratories and clinical laboratories in the United States totaled 22,601. (*COVIDView: A Weekly Surveillance Summary of U.S. COVID-19 Activity* <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/past-reports/04032020.html> [as of May 8, 2023].)

[26] PERB recognizes a business necessity defense under all PERB-administered

emergencies where immediate adoption of a resolution without meeting and conferring is necessary, the statute further requires the employer to provide the exclusive representative "notice and opportunity to meet at the earliest practicable time following the adoption." (§ 3504.5, subd. (b).) We first address the parties' exceptions to the bad faith bargaining violations, then consider the District's emergency defense.

I. Bad Faith Bargaining – Per Se Violations

In determining whether a party has violated its duty to meet and confer in good faith, PERB uses a "per se" test or a "totality of conduct" analysis, depending on the specific conduct involved. (*City of Arcadia* (2019) PERB Decision No. 2648-M, p. 34 (*Arcadia*).) Per se violations generally involve conduct that violates statutory rights or procedural bargaining norms. (*Id*. at pp. 34-35.) Unlike the totality of conduct analysis, a per se violation requires no inquiry into the respondent's subjective intent or finding of bad faith. (*Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M, p. 15 (*Fresno*).) The ALJ found that the District committed two per se violations, both of which the District contests. IBEW also urges us to find an additional per se violation based on the District's premature abandonment of negotiations on April 20.

A. Unilateral Implementation of Sequestration Policy

To establish a prima facie case that a respondent employer made an unlawful unilateral change, a charging party union that exclusively represents a bargaining unit must prove: (1) the employer changed or deviated from the status quo; (2) the change

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statutes, which serves the same function as the MMBA emergency defense. We discuss the interchangeability of these defenses in Section III.A, *post*.

or deviation concerned a matter within the scope of representation; (3) the change or deviation had a generalized effect or continuing impact on represented employees' terms or conditions of employment; and (4) the employer reached its decision without first providing adequate advance notice of the proposed change to the union and bargaining in good faith over the decision, at the union's request, until the parties reached an agreement or a lawful impasse. (*Bellflower Unified School District* (2021) PERB Decision No. 2796, p. 9 (*Bellflower*).)

In its exceptions, the District does not dispute that the Sequestration Policy was within the scope of representation[27] and that it had a generalized effect or continuing impact on terms and conditions of employment. Moreover, the District does not specifically challenge the ALJ's finding that it implemented the Sequestration Policy before reaching an agreement or an overall impasse. Thus, we focus our analysis on whether the District changed or deviated from the status quo.

There are three primary means of establishing that an employer changed or deviated from the status quo: (1) a deviation from a written agreement or written policy; (2) a change in established past practice; or (3) a newly created policy or application or enforcement of existing policy in a new way. (*Bellflower*, *supra*, PERB Decision No. 2796, p. 10.) Two policy changes are at issue here: changes to employees' regular work schedules and compensation.

The District argues the ALJ erred in finding that it changed or deviated from the status quo by changing employees' regular work schedules. While the District

[27] Nor can there be any dispute that schedule changes fall within the scope of representation. (*State of California (Department of Mental Health)* (1990) PERB Decision No. 840-S, adopting proposed decision at p. 9.)

concedes that it changed employees' regular work schedules under the Sequestration Policy, it argues that it had the authority to do so pursuant to Policy 4221. We disagree.

Policy 4221, Section 5.A. states that "[t]he regular work schedule of an employee may be changed by supervision in response to workload requirements" with 12 hours' notice. In turn, Section 4.B. defines a workweek as "any seven (7) consecutive days starting with the same calendar day and time each week." Section 5.E. provides that there are "four regular work schedules to which employees may be assigned during the workweek": a 5/8, 4/10, 9/80, or 6/12 schedule. The District's claimed authority to change sequestered employees' regular work schedules rests on the term "may" in Sections 5.A. and 5.E. On the one hand, the District argues that the term "may" in Section 5.A denotes broad permission to change employees' regular work schedules at will. It offers a different interpretation of the term "may" in Section 5.E.; there, the District contends, "may" indicates possibility, such that the "four regular work schedules" in Section 5.E. should be read as merely suggestive rather than definitive. In sum, the District asserts that Policy 4221's lack of an express limitation on its authority to change employees' regular schedules vested it with broad, implied authority to implement any new schedule, provided the change was tied to workload requirements and that the District provided proper notice.

The District's suggested interpretation is untenable. It would divest Policy 4221 of any force, rendering the numbering of "four" meaningless and the defined "regular work schedules" as merely illustrative. Our analysis is supported by the canons of contract interpretation, including the maxim that we harmonize contract provisions to give meaning to each provision. (*San Francisco County Superior Court & Region 2*

Court Interpreter Employment Relations Committee (2018) PERB Decision No. 2609-I, p. 8.)

The District's interpretation also violates the principle that waiver of statutory rights must be "clear and unmistakable," and the evidence must demonstrate an "intentional relinquishment" of a given right. (*Modoc County Office of Education* (2019) PERB Decision No. 2684, p. 11.) To constitute a waiver, the contract language must "specifically reserve for management the right to take certain action or implement unilateral changes regarding the issues in dispute." (*Id*. at p. 12, internal citations omitted.) These principles further support the ALJ's conclusion that Policy 4221, read as a cohesive whole, allows the District only to change employees' work schedule to another of the four enumerated regular schedules in Section 5.E., and not to an entirely new schedule not contemplated by the policy.

With respect to compensation, the District does not dispute that employees were paid less pursuant to the Sequestration Policy than they would have been paid pursuant to Policy 4221. We revisit the specifics of the hours calculations in the remedy section, *post*.

Because the District conceded the remaining three elements, we find that IBEW established a prima facie case of unlawful unilateral change with respect to the Sequestration Policy.

B. Requests for Information

The District excepts to the ALJ's finding that it failed or refused meet and confer in good faith with IBEW by not responding to its April 13 and April 16 RFIs.

An exclusive representative is presumptively entitled to information that is necessary and relevant in discharging its representational duties or exercising its right

to represent bargaining unit employees regarding terms and conditions of employment within the scope of representation. (*Contra Costa Community College District* (2019) PERB Decision No. 2652, pp. 16-17; *Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, p. 17 (*Petaluma*).) In this context, the terms "necessary" and "relevant" do not have separate meanings. (*Petaluma*, *supra*, PERB Decision No. 2485, p. 21.) PERB uses a liberal, discovery-type standard, like that used by the courts, to determine relevance. (*Id*. at p. 17.) A party responding to an information request must exercise the same diligence and thoroughness as it would in other business affairs of importance. (*Sacramento City Unified School District* (2018) PERB Decision No. 2597, pp. 8-9 (*Sacramento*).) An unreasonable delay in providing information constitutes as much of a violation as an outright refusal. (*Petaluma*, *supra*, PERB Decision No. 2485, p. 20.)

A responding party's primary defenses to producing relevant information are waiver, privacy, undue burden, or an absolute or qualified privilege. (*County of Tulare* (2020) PERB Decision No. 2697-M, p. 14, fn. 9 (*Tulare); State of California (Department of State Hospitals)* (2018) PERB Decision No. 2568-S, pp. 13 & 15 (*Department of State Hospitals*).) A responding party waives any defenses to disclosure that it fails to raise promptly after receiving a request. (*Tulare*, *supra*, PERB Decision No. 2697-M, p. 14; *Department of State Hospitals*, *supra*, PERB Decision No. 2568-S, p. 16.) Moreover, if an information request requires clarification, is unduly burdensome, or seeks private information, the responding party is not permitted to deny the request outright and must instead offer to bargain in good faith regarding an appropriate accommodation. (*Sacramento*, *supra*, PERB Decision No. 2597, pp. 11-12; *Butte-Glenn Community College District* (2022) PERB Decision No. 2834,

p. 10.)

Here, there is no question that IBEW requested information relevant to representing unit employees regarding terms and conditions of employment within the scope of representation. The April 13 RFI requested, among other things, information relating to protective measures the District would take to ensure the integrity of sequestration, the number of positions and employees that would be sequestering at each site, and lodging and food arrangements for sequestered employees. As issues concerning health and safety, they are within the scope of representation and therefore presumptively relevant. (*County of San Joaquin* (2021) PERB Decision No. 2775-M, p. 41; *State of California (Department of Consumer Affairs)* (2004) PERB Decision No. 1711-S, p. 26.)

The same is true of IBEW's April 16 RFI, which requested information relating to a potential involuntary sequestration scenario, and specifically, how the District would handle such circumstances, as well as how it would treat an employee who refused to sequester. As the ALJ pointed out, discipline is within the scope of representation "both as to the criteria for discipline and as to the procedures to be followed." (*County of Monterey* (2018) PERB Decision No. 2579-M, pp. 11-12.)

The District has never contested the relevance of IBEW's requested information. Rather, the District objects to the ALJ's characterization of its failure to respond as a "total abandonment of its obligation to provide necessary and relevant information to IBEW upon request," explaining that it was consumed "just managing through COVID" and the various demands created by the pandemic until at least January or February 2021. It offers no other basis for its lack of response. Of the potential defenses available to the District, the only one with possible applicability in

these circumstances is undue burden. However, the District waived this defense by failing to affirmatively and timely assert its concerns to IBEW such that the parties could bargain over them. We thus affirm the ALJ's finding that the District failed or refused to respond to IBEW's April 13 and April 16 RFIs.

C. Prematurely Cutting Off Negotiations

We evaluate IBEW's argument that the District's abandonment of negotiations on April 20 constituted a per se violation of its duty to meet and confer in good faith, an issue the ALJ did not consider.

Impasse under the MMBA "exists where the 'parties have considered each other's proposals and counterproposals, attempted to narrow the gap of disagreement and have, nonetheless, reached a point in their negotiations where continued discussion would be futile.'" (*City of Long Beach* (2012) PERB Decision No. 2296-M, p. 15 [finding the employer implemented its planned furlough despite no evidence that the parties' negotiations had reached a point where further negotiations would be futile, regardless of whether the employer declared impasse].) "An employer may impose new terms after impasse only if it has bargained in good faith throughout negotiations, from 'inception through exhaustion of statutory or other applicable impasse resolution procedures,' and its 'conduct is free of unfair labor practices.'" (*City of Glendale* (2020) PERB Decision No. 2694-M, p. 60 (*Glendale*), quoting *San Ramon*, *supra*, PERB Decision No. 2571, p. 6.) A party asserting impasse bears the burden of proving it. (*Glendale*, *supra*, PERB Decision No. 2694-M, p. 61; *San Ramon*, *supra*, PERB Decision No. 2571-M, p. 6.) If there is doubt as to whether an impasse exists, the party asserting impasse has the burden to seek clarification of the other party's position. (*County of Merced* (2020) PERB Decision No. 2740-M, p. 17 (*Merced*); *City*

*of Salina*s (2018) PERB Order No. Ad-457-M, p. 5.)[28]

An employer that declares impasse without reaching a bona fide impasse after good faith negotiations, and then refuses to bargain further or proceeds to change employment terms, commits a per se violation. (*City of San Diego* (2020) PERB Decision No. 2747-M, p. 25; *San Ramon*, *supra*, PERB Decision No. 2571-M, p. 7, fn. 9.) In this case, as the ALJ found, the District did not declare impasse, and it would not have been appropriate for the District to do so given that the parties' differences were not "so substantial or prolonged that future meetings would be futile."[29] (*City of Long Beach*, *supra*, PERB Decision No. 2296-M, p. 15.) In the 10 days spanning April 8, when the District sent its first proposal, to April 17, when IBEW sent its fifth counteroffer, the parties reached agreements on a number of topics including the classifications and number of employees to be sequestered, an initial staffing selection process, various employee and District responsibilities, and length of sequestration. Indeed, by the end of April 10, the parties had already narrowed the issues to two: IBEW's opposition to forced sequestration and compensation. The parties had also substantially narrowed their differences on each of those issues.

While the District did not declare impasse, its April 20 letter was tantamount to an

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[28] Under the MMBA, only a written impasse declaration triggers a union's deadline to seek factfinding. (*Merced*, *supra*, PERB Decision No. 2740-M, p. 17, fn. 12.) Thus, absent a written declaration by either party, it is difficult for an employer to claim that a union was tardy in requesting factfinding, and by extension it is difficult for such an employer to assert that it has exhausted its bargaining obligation. (*Ibid*.)

[29] Because the District did not declare impasse, it follows that it did not exhaust the impasse process in Policy 4227, "Employer-Employee Relations," which includes procedures for meeting and conferring with exclusive representatives.

impasse declaration in that it indicated the District's intent to conclude negotiations and impose its own terms. Even had this letter expressly declared impasse, the District could not have proven that a bona fide impasse existed as of April 20, as there is insufficient evidence that further negotiations would have been futile. As in *City of Long Beach*, *supra*, PERB Decision No. 2296-M, pp. 15-16, and *San Ramon*, *supra*, PERB Decision No. 2571-M, adopting proposed decision at pp. 38-39, where the parties had made considerable movement in negotiations before the employers abruptly ended bargaining to unilaterally impose terms, here the District was not faced with a point where continued negotiations would be futile. Far from it. Negotiations had, in fact, been productive for the nine-day period in which the parties had been exchanging proposals. By its April 20 letter, the District abandoned any further negotiations and changed employment terms by implementing the Sequestration Policy. This conduct not only proves a prima facie case of unilateral change but also a prima facie case of outright refusal to bargain, a separate per se violation of the duty to meet and confer in good faith with IBEW.[30]

II. Bad Faith Bargaining – Totality of Circumstances

PERB applies the totality of conduct test to allegations of bad faith bargaining conduct that do not constitute a per se refusal to bargain. (*Arcadia*, *supra*, PERB Decision No. 2648-M, p. 35.)[31] Under the totality test, a party is permitted to maintain

[30] Rather than claiming that the parties reached impasse, the District stated in its April 20 letter to IBEW that it needed to implement the Sequestration Policy because of "the imminent threat to the District's power and water delivery system." In Section III, *post*, we evaluate the context of the District's implementation as part of its affirmative defense.

[31] The phrases "totality of circumstances" and "totality of conduct" are

a “hard bargaining” position on one or more issues, if the entire course of its bargaining conduct, both at the table and away from it, manifests good faith efforts toward reaching an overall agreement. (*San Ramon*, *supra*, PERB Decision No. 2571-M, pp. 7-8.) The ultimate question is whether the respondent’s conduct, when viewed in its totality, was sufficiently egregious to frustrate negotiations. (*Id*. at p. 7.)[32]

A single indicator of bad faith, if egregious, can be a sufficient basis for finding that a party has failed to bargain in good faith. (*City of San Jose* (2013) PERB Decision No. 2341-M, p. 19 (*San Jose*).) However, PERB generally considers multiple factors, including the following potential bad faith indicia: (1) failing to respond to proposals in a timely manner (*State of California (Department of Personnel Administration)* (1989) PERB Decision No. 739-S, pp. 4-5); (2) failing to explain a bargaining position in sufficient detail or to provide requested information supporting a bargaining position, without an adequate reason for such failure (*City of Davis* (2018) PERB Decision No. 2582-M, pp. 19-20; *San Jose*, *supra*, PERB Decision No. 2341-M, p. 42); (3) regressive bargaining (*Tulare*, *supra*, PERB Decision No. 2697-M, pp. 5-7); (4) reneging on tentative agreements or previously-agreed proposals (*Stockton Unified School District* (1980) PERB Decision No. 143, p. 31); (5) maintaining a

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interchangeable, and either phrase describes the operative test. (*County of Sacramento* (2020) PERB Decision No. 2745-M, p. 9, fn. 8.) While PERB frequently refers to bad faith bargaining under this test as “surface bargaining,” that label does not limit the scope of the relevant factors to only those involving superficial bargaining conduct. (*Ibid*.)

[32] PERB also considers whether the charging party engaged in bad faith conduct to a degree that mitigates the respondent’s bad faith conduct, if any. (*Fresno*, *supra*, PERB Decision No. 2418-M, p. 52.)

take-it-or-leave-it attitude (*San Ramon, supra,* PERB Decision No. 2571-M, pp. 8-9); (6) unilaterally setting a time limit on negotiations, rushing to impasse, or prematurely declaring impasse (*Arcadia*, *supra*, PERB Decision No. 2648-M, pp. 37-38; *San Ramon*, *supra*, PERB Decision No. 2571-M, p. 10); and (7) any other conduct that tends to frustrate negotiations without adequate reason.

Conduct sufficient to amount to one or more separate, contemporaneous unfair practices also indicates bad faith under the totality test. (*San Jose*, *supra*, PERB Decision No. 2341-M, pp. 21 & 43.) This includes both labor law violations away from the bargaining table and acts that could amount to a per se violation of the duty to bargain. (*City of Davis*, *supra*, PERB Decision No. 2582-M, pp. 9, 11-13.)

Here, based on indicators the ALJ noted and others we note below, we find that IBEW proved the District committed not only per se bargaining violations but also engaged in bad faith bargaining under the totality test. First, the ALJ correctly found that the District approached negotiations "with an attitude that is incompatible with good faith bargaining." On April 8, DeVoy wrote to Fairman, stating: "[O]ver the last two weeks the District has and will continue to take a number of legislative and administrative actions to address rapidly changing events brought on by COVID-19. To the extent these actions constitute a change in the terms and conditions of employment in the District's represented bargaining units, the District is invoking the provisions of California Government Code section 3504.5, which authorizes the District in cases of emergency to take immediate unilateral action without prior notice or meeting with the recognized employee organization." DeVoy further wrote: "The District is requesting to meet with the Union to discuss the District's probable need to implement schedule changes for employees within the unit pursuant to the emergency provisions of Government Code

section 3504.5. Despite the District's ability to impose these terms without prior notice or meeting, the District would prefer to reach an agreement, if possible, with the Union prior to needing to implement the action." Finally, DeVoy stated: "The offer to meet prior to emergency implementation of a schedule change is not intended to interfere with the District's need to implement such a change pursuant to Government Code section 3504.5 even if the parties cannot reach an agreement prior to implementation." The District also commented several times that "they reserve[d] the right to implement, but they wanted to bargain with [IBEW] to come to an agreement." During the meetings that followed, the District made similar statements approximately four or five times.

These repeated statements ignored the nature of an emergency defense. As discussed further in Section III, *post*, even when a sudden emergency resulting from circumstances beyond an employer's control leaves it no alternative but to take immediate action, there remains an obligation to bargain in good faith as time allows. (*Oxnard Union High School District* (2022) PERB Decision No. 2803, p. 45 (*Oxnard*).) By asserting from the onset of negotiations that it had no obligation to bargain with IBEW over the Sequestration Policy, and repeating that sentiment, the District disregarded the above precedent holding that even when an emergency allows temporary unilateral action, it does not simply extinguish the duty to bargain.

Another bad faith indicator is the District's reversal of its bargaining position without any explanation. District Counter #1 accepted IBEW Counter #1's proposal to select employees based on classification seniority in the event the District received a surplus of volunteers. Through multiple subsequent counterproposals by both parties, the accepted language remained intact. The District then reneged on that agreement

in District Counter #4 by adding a conditional statement reserving its own authority to determine staffing selection: "*however, the ultimate determination regarding staffing of positions will be at the discretion of the District taking into account the District's needs*." Moreover, at no point did the District explain its reneged position to IBEW, thereby depriving IBEW of "sufficient detail to 'permit the negotiating process to proceed on the basis of mutual understanding.'" (*County of Tulare* (2015) PERB Decision No. 2461-M, adopting proposed decision at p. 9.)

Similarly, we find another indicator of bad faith in the District's failure to respond to IBEW Counter #5 in any manner and without any explanation or rationale. (*City of Davis*, *supra*, PERB Decision No. 2582-M, p. 24; *Oakland Unified School District* (1981) PERB Decision No. 178, p. 8.) The District admitted at hearing that it neither scheduled a meeting to discuss IBEW's proposal nor responded to it.

Lastly, the District's three per se violations—unilateral implementation of the Sequestration Policy, failure to respond to IBEW's two RFIs, and premature abandonment of negotiations—are separate, contemporaneous unfair practices that serve as additional indicators of bad faith on the part of the District. (*San Jose*, *supra*, PERB Decision No. 2341-M, p. 21.)

We find, like the ALJ, that the totality of circumstances demonstrates the District bargained in bad faith with IBEW.

III. The District's Affirmative Defense

The District asserts that "the growing and imminent threat that the unprecedented COVID-19 pandemic posed to the District's ability to maintain critical operations"—that is, an emergency—absolved it of any duty to meet and confer with IBEW prior to implementing the Sequestration Policy. MMBA section 3504.5,

subdivision (b) provides:

> "In cases of emergency when the governing body or the designated boards and commissions determine that an ordinance, rule, resolution, or regulation must be adopted immediately without prior notice or meeting with a recognized employee organization, the governing body or the boards and commissions shall provide notice and opportunity to meet at the earliest practicable time following the adoption of the ordinance, rule, resolution, or regulation."

At the outset, we observe that the District began bargaining before its emergency implementation. Such level of engagement with IBEW in the face of an emergency of this magnitude is commendable and a strong management practice. However, as we proceed to explain, MMBA section 3504.5 allowed the District to sequester employees temporarily to protect the public, but the District acted far outside this defense by: (1) altering compensation, which the emergency did not necessitate; and (2) failing entirely to respond to IBEW Counter #5 and instead abandoning negotiations altogether.

A. PERB Precedent Regarding the Emergency and Business Necessity Defenses

The MMBA does not define what circumstances constitute an "emergency." In *Sonoma County Organization etc. Employees v. County of Sonoma* (1991) 1 Cal.App.4th 267 (*Sonoma*), the Court of Appeal found that the term "has long been accepted in California as an unforeseen situation calling for immediate action." (*Id*. at p. 276.) "[A]n emergency must have a substantial likelihood that serious harm will be experienced" and "is not synonymous with expediency, convenience, or best interests." (*Id*. at p. 277, internal citations omitted.)

While the statutory emergency defense is unique to the MMBA, the Board has

recognized an affirmative defense available under all PERB-administered statutes that serves the same function. This "business necessity" defense requires the employer to prove: (1) an actual financial or other emergency that (2) leaves no real alternative to the action taken and (3) allows no time for meaningful negotiations before taking action. (*Calexico*, *supra*, PERB Decision No. 357, adopting proposed decision at p. 20; *Lucia Mar Unified School District*, *supra*, PERB Decision No. 1440, adopting proposed decision at pp. 46-47.) In past decisions, the Board has treated the two defenses as interchangeable by requiring the same elements to establish either affirmative defense. (See, e.g., *Oxnard*, *supra*, PERB Decision No. 2803, pp. 44-45; accord *Santa Clara County Correctional Peace Officers' Assn., Inc. v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1032-1033 (*Santa Clara*).)

"[N]either exigent circumstances nor a business necessity completely absolves an employer of its duty to notify and bargain." (*Santa Clara*, *supra*, 224 Cal.App.4th at p. 1032; accord *County of Sonoma* (2021) PERB Decision No. 2772-M, p. 50, fn. 25.) Rather, the employer must bargain "to the extent that the situation permits." (*Santa Clara*, *supra*, 224 Cal.App.4th at p. 1032.) In a bona fide emergency, the employer need not await impasse before taking steps urgently needed to mitigate the emergency, but then the employer must continue bargaining to the extent practicable. (§ 3504.5, subd. (b).) Because an emergency is not a static event, changes taken in good faith reliance on a necessity defense should be limited to the timeframe that the emergency requires, and there remains an obligation to bargain in good faith as time allows. (*Oxnard*, *supra*, PERB Decision No. 2803, p. 45, citing *Pittsburg Unified School District* (1983) PERB Decision No. 318, pp. 17 & 20-21 [one aspect of employer's unlawful conduct was failure to limit its unilateral change to the period

necessitated by the alleged emergency].) For instance, even when a significant earthquake forced two hospitals to close and "swamped" the only functioning hospital in West Los Angeles, there was nonetheless time to bargain in good faith over staffing needs that developed over the ensuing weeks and months, and an employer violated its bargaining obligation by failing to do so. (*Oxnard*, *supra*, PERB Decision No. 2803, p. 45, citing *Regents of the University of California* (1998) PERB Decision No. 1255-H, adopting proposed decision at pp. 8, 35-37.)

In *City of Long Beach*, *supra*, PERB Decision No. 2296-M, the city argued that a fiscal emergency in the form of a $20 million budget shortfall excused it from bargaining over furlough policies. (*Id*. at p. 26.) After four months of bargaining over cost-savings measures, including furloughs, the city claimed "there was simply no more time available to delay the implementation of the furlough plan" and authorized implementation of mandatory furloughs. (*Id*. at p. 27.) The Board, noting that "an employer's generalized concerns about its future financial condition does not relieve it of the obligation to bargain" (*id*. at p. 26), found the city's claim of a financial emergency questionable because (1) the city had determined almost eight months *prior* to implementation that furloughs would be necessary, and (2) the city did not formally declare a fiscal emergency until two months *after* it unilaterally implemented its furlough plan. (*Id*. at p. 27.) Moreover, the Board found that even if the city had proven the existence of a financial emergency, the city failed to establish that it had no alternative to unilaterally imposing furloughs rather than completing bargaining. (*Id*. at pp. 27-28.) Accordingly, the Board found that the employer did not establish a defense under the *Calexico* standard. (*Id*. at p. 28.)

The Board similarly wove together precedent under the two defenses in *County*

of San Bernardino (Office of the Public Defender) (2015) PERB Decision No. 2423-M (*San Bernardino*). There, the union alleged that the county unilaterally changed its policy concerning the union's right to designate its own representatives to represent employees during disciplinary proceedings, as stated in the parties' MOU. The new policy effectively limited whom unit members could elect as representatives in such interviews. The employer asserted that it was excused from bargaining for "legitimate business reasons" and cited constitutional and ethical concerns with the union's selection of representatives. (*Id*. at p. 54.) The Board considered the employer's defense as a hybrid emergency-business necessity claim:

> "PERB has recognized that under exceptionally limited circumstances, an employer may be excused from negotiating on the basis of true emergency that provides a basis for claiming that a business necessity excused a unilateral change. However, to establish 'operational necessity' or 'business necessity' as a defense to a unilateral change, the employer must establish an actual financial or other emergency that leaves no alternative to the action taken and allows no time for meaningful negotiations before taking action. The alleged necessity must be the unavoidable result of a sudden change in circumstance beyond the employer's control."

(*Ibid*.) Under this standard, the Board concluded that the employer's defense failed because its proffered reasons for the change did not "rise to the required level of an unforeseen and unavoidable result due to a sudden change in circumstance beyond the employer's control." (*Ibid*.) The county failed to cite "evidence of any exigent circumstances that could justify its unilateral action" as it knew at least two years before it implemented its new policy that the union had appointed deputy district attorneys to serve as representatives for deputy public defenders in investigatory

interviews. (*Id*. at pp. 54-55.) Consequently, the Board rejected the county's claim that it was excused from bargaining by an emergent business necessity.

Similarly, the Court of Appeal recognized the congruity of the business necessity defense and MMBA emergency exception in *Santa Clara*, *supra*, 224 Cal.App.4th 1016. In that case, the parties' MOU provided for three types of work schedules, including one called the "12 Plan" consisting of seven 12.25-hour shifts for a total of 85.75 hours biweekly. (*Id*. at pp. 1023-1024.) The county, when subsequently faced with a budget deficit, considered multiple cost-savings measures, among them reducing the 12 Plan to a total of 80 hours biweekly. (*Id*. at pp. 1024-1025.) The parties met and conferred on three occasions over the intended schedule change but did not reach an agreement before the county implemented the reduced 12 Plan. The court rejected the county's business necessity defense, observing that the county's ability to engage in several bargaining sessions over a nearly three-week span undermined its claim that it faced an unforeseen emergency requiring immediate action. (*Id*. at pp. 1032-1033.) Under these circumstances, the court found that the county did not "establish a financial emergency or business necessity that would temporarily suspend the obligation to meet and confer before implementing a change . . . the circumstances here were more in the nature of foreseeable budget cuts than a temporary emergency requiring an immediate response." (*Id*. at p. 1033.)

In sum, an emergency defense is available under MMBA section 3504.5 and under all other statutes within PERB's jurisdiction through the business necessity defense.

B. Application of the MMBA Emergency Defense

As explained *ante*, the District had the burden to establish: (1) an actual financial or other emergency that (2) leaves no real alternative to the action taken and (3) allows no time for meaningful negotiations before taking action. (*Calexico*, *supra*, PERB Decision No. 357, adopting proposed decision at p. 20; *Lucia Mar Unified School District*, *supra*, PERB Decision No. 1440, adopting proposed decision at pp. 46-47.)

The District argues that the business necessity defense "only applies to financial emergencies, not emergencies that threaten health and safety," whereas the statutory emergency defense, the District claims, applies to health or safety emergencies. We have already disposed of this argument based on our explanation of the interchangeability of the emergency and business necessity defenses, *ante*. Indeed, the District's argument would imply—mistakenly—that a health or safety emergency has no import under most of the statutes we enforce, since they lack any provision comparable to section 3504.5. Moreover, while the District bases its argument on *Sonoma*, *supra*, 1 Cal.App.4th 267,[33] that decision does not stand for the proposition that section 3504.5, subdivision (b) applies only to public health and safety issues.[34]

[33] It is axiomatic that cases are not authority for propositions not considered. (*County of Orange* (2019) PERB Decision No. 2657-M, p. 15.)

[34] In *Sonoma*, *supra*, 1 Cal.App.4th 267, the county was faced with "a series of unpredictable rolling sickouts and strikes" by employees who were dissatisfied with the progress of contract negotiations. (*Id*. at p. 260.) According to the county, the rolling job actions significantly impaired the function of certain affected departments, in turn jeopardizing the continuity of public services. To address this issue, the county's board

Here, there was certainly an emergency. The COVID-19 pandemic was nascent in the United States and rapidly developing. The District's provision of electricity and water to residents of Imperial Valley was at risk of disruption. (*Oxnard*, *supra*, PERB Decision No. 2803, p. 45 [onset of COVID-19 pandemic presented an emergency that temporarily curtailed the employer's bargaining obligations, allowing it to require employees to telework "provided it bargained in good faith as time allowed"].)

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of supervisors adopted an emergency ordinance, effective immediately, that vested department heads with the authority to place employees participating in an "intermittent work stoppage" on "administrative unpaid absence." (*Id*. at p. 272.) The county board declared that the ordinance was necessary "to protect the public health and safety" and "to prevent the substantial impairment of County departmental operations." (*Ibid*.) After the adoption of the ordinance, the county offered to "meet and confer" with the union, which declined and instead filed a writ of mandate. The union alleged that the ordinance and actions taken pursuant to it were invalid because the county failed to meet and confer with the union prior to adoption of the ordinance. (*Id*. at p. 273.) The trial court agreed that no emergency existed at the time the county adopted the ordinance and issued a writ.

The Court of Appeal reversed. It framed the issue as "whether the County's noncompliance was excused by an emergency as expressly contemplated by the MMBA." (*Sonoma*, *supra*, 1 Cal.App.4th at p. 274.) In response, the appellate court found ample evidence of an "emergency warranting immediate adoption" of the ordinance, including the fact that the sickouts occurred in random departments, leaving the county unable to adequately substitute personnel and maintain public services. (*Id*. at pp. 277-278.) The appellate court concluded, "[v]iewing these manifold consequences, the County was amply justified in concluding that it confronted an 'emergency of grave character and serious moment' demanding immediate action." (*Id*. at p. 279, internal citation omitted.)

Contrary to the District's argument, the *Sonoma* court "emphasized the peril to public health as the most *obvious* factor justifying the County's determination that there was a 'substantial likelihood that serious harm [would] be experienced' if it took no action. But the fact that [the union's] 'sickouts' had adverse consequences in other areas can only have added to the County's concern." (*Sonoma*, *supra*, 1 Cal.App.4th at p. 279, italics added.)

While the pandemic permitted the District to sequester employees before it completed negotiations, the District failed to demonstrate that the emergency left it with no real alternative to altering the compensation framework before completing negotiations. The ALJ correctly found that the District never declared or faced an actual financial emergency, and the District does not dispute this finding. We agree with the ALJ that while the COVID-19 pandemic may have left the District with no alternative to sequestering employees who were in critical positions, the District did not prove it had no alternative to cutting off negotiations and unilaterally altering the pay scheme. Indeed, the record reveals other public and private sector employers similar to the District that agreed to pay double time for all sequestered hours, or otherwise reached agreement.

Despite the District's failure to establish the second prong of the emergency defense, we consider the third prong as prospective guidance for parties. We conclude that the circumstances here allowed very limited time before taking action to sequester employees, but imposed no rapid deadline on bargaining over compensation. The District was acting swiftly to procure the necessary items to sequester its employees while negotiating with IBEW. The District imposed the Sequestration Policy on April 20 because, by DeVoy's account, "everything was in place," i.e., the logistics, including permitting, housing, and catering. DeVoy stated, "We were ready to start testing employees prior to sequestration, and the general manager was ready to go." General Manager Martinez testified that the District implemented when it did because the positive rates for COVID-19 were climbing and he was concerned that "some of our critical employees would be impacted." Unlike the ALJ, we find these accounts to be mutually reinforcing rather than contradictory. The

District decided that implementation was necessary both because the increasing COVID-19 cases could jeopardize the health and availability of critical employees needed to sustain District operations, and because the District had the means to shelter its employees onsite starting April 25.

The District has therefore not established that it was excused from bargaining compensation under section 3504.5, subdivision (b), because it did not prove the second and third prongs of the defense. Moreover, even had it done so, the defense still requires an employer to meet and confer at the earliest practicable opportunity following implementation (§ 3504.5, subd. (b)), yet the District abandoned negotiations altogether contemporaneously with its implementation. Such negotiations could also have addressed how to exit the policies implemented in the face of a real but temporary emergency.

In its exceptions, the District claims it was under no further obligation to bargain after implementation because IBEW did not request to continue bargaining after the District began sequestration on April 25. We disagree. While the MMBA allowed for emergency implementation of sequestration under the existing compensation scheme, it required negotiations to continue as soon as practicable thereafter. When the District implemented sequestration, IBEW Counter #5 was still outstanding. Therefore, it was incumbent on the District to respond once time allowed.[35]

[35] The District notes that IBEW failed to request bargaining after DeVoy sent Fairman notice on May 14 that the District would be removing the Sequestration Policy restriction on usage of the 40 hours of post-sequestration vacation time, thereby allowing employees to bank unused time. While there is no complaint allegation relevant to that change, and we find no violation, the District's argument does not help it with respect to the complaint's actual allegations. DeVoy's e-mail did not refer to the

For the foregoing reasons, the District did not establish an emergency defense.

IV. Remedy

The proper remedy for an employer's unlawful unilateral change normally includes a cease-and-desist order, restoring the status quo ante,[36] a bargaining order, and make-whole relief including back pay and/or compensatory time off, benefits, and interest. (*Pittsburg Unified School District* (2022) PERB Decision No. 2833, p. 14; *City of Pasadena* (2014) PERB Order No. Ad-406-M, pp. 12-15.) We order these remedies here, as we discuss in detail below, where we also identify issues that may be relevant in compliance.

Both parties challenge the ALJ's calculations regarding the total number of hours to which employees are owed. The ALJ found that an employee with a regular work schedule of five 8-hour days per week (5/8 schedule) who was required to work seven 24-hour days, each comprised of 12 productive hours and 12 non-productive/rest hours, would have been entitled to compensation equivalent to 282 hours per workweek under Policy 4221. While IBEW's exceptions state that the

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parties' negotiations or indicate that the District was ready to resume those negotiations. We find no reason to consider DeVoy's letter an invitation to resume bargaining, nor did it put the onus on the union to create another offer in response to the District's fait accompli. (*County of Santa Clara* (2013) PERB Decision No. 2321-M, p. 24 [once an employer takes unilateral action on a matter within the scope of bargaining, the union is excused from demanding to bargain over that fait accompli].)

[36] An order to rescind the Sequestration Policy is proper, first, based on the violations found above. Moreover, even had the District followed the law, an emergency is not a static event, and the short-term pandemic emergency has subsided. At such point, an employer can no longer rely on a policy it had unilaterally implemented prior to reaching a bona fide impasse following good faith negotiations. (See *Oxnard*, *supra*, PERB Decision No. 2803, p. 45.)

District paid employees the equivalent of 238 hours' pay for each workweek under the Sequestration Policy, and the District has not contradicted that point so far, the parties are free to introduce contrary evidence in compliance.

The District argues that the correct starting point for calculating compensation is not a 5/8 schedule, but a 12/80 schedule, i.e., six 12-hour days and one 8-hour day per 80-hour pay period. Based on the District's calculations, each affected employee is therefore entitled to only 274 hours' pay for each week in sequestration. Although the District did not explain its calculations, this sum appears consistent with applying Policy 4221's Sample Overtime Chart as described on pages 8 and 9 of this decision to a 12/80 schedule.

We conclude that the District's briefing operates as a waiver, albeit one limited in scope. Accordingly, we find it appropriate to order the District to compensate each affected employee for at least 274 hours for each week in sequestration, less any hours equivalent it already paid to employees during their sequestration period(s). Our reasons for doing so are multiple. First, in its only exception related to the ALJ's proposed remedy, the District summarily agreed that 274 hours' pay per sequestration week is appropriate if the Board finds a bargaining obligation. The District thereby waived any argument that our remedial order should mandate payment for less than 274 weekly hours. (PERB Reg. 32300, subd. (e); *Pasadena*, *supra*, PERB Order No. Ad-406-M, p. 14 [a defense not raised will be deemed waived].) The District compounded this waiver when it failed to file a response to IBEW's cross-exceptions or a reply to IBEW's response. (PERB Regs. 32310, subd. (a); 32312, subd. (a).) In compliance, therefore, the District may not introduce evidence in support of liability for less than the 274 hours per week ordered herein. (*Bellflower Unified School District*

(2019) PERB Order No. Ad-475, p. 13.)

For its part, IBEW argues that we go further and find that all 21 days in sequestration, or 504 hours, were "hours worked" under the FLSA, 29 U.S.C. § 203 et seq.[37] IBEW's position is that because sequestered employees "were never relieved of duty" over the sequestration period, the "Continuous Overtime" provision in Policy 4221 applied. Under that provision, employees are entitled to one and one-half times the regular pay rate for the first four hours worked after the end of their regular schedule, and double time for any additional overtime hours thereafter. Thus, by IBEW's estimation, each employee is entitled under Policy 4221 to 331 ⅓ hours at their regular rate of pay for each week in sequestration.

We cannot agree with IBEW's reading of the FLSA and Policy 4221. IBEW's argument that each 21-day sequestration period constituted a single shift is incompatible with the reality that the District relieved employees of duty every 12 hours of each day they were in sequestration. Neither party presented us with significant briefing or record evidence on these points, but parts of IBEW's own proposals tend to undercut its position. Beginning with IBEW Counter #1, IBEW proposed the following language: "If at any point during their resting-time, a Sequestered Employee must perform work activities, the Sequestered Employee will

[37] FLSA provides that a non-exempt employee "must be compensated for all hours worked," which includes "[a]ll time during which an employee is required to be on duty or to be on the employer's premises or at a prescribed workplace" and "all time during which an employee is suffered or permitted to work whether or not he is required to do so." (29 C.F.R. § 778.223, subd. (a).) "Thus, working time is not limited to the hours spent in active productive labor, but includes time given by the employee to the employer even though part of the time may be spent in idleness." (29 C.F.R. § 778.223, subd. (b).)

receive pay at double their base pay hourly rate for all hours worked while on a Resting Shift in addition to any pay received in accordance with the 'Compensation' section of this Agreement." In District Counter #2, the District accepted all the aforementioned language except the compensation rate, changing it to one and one-half times the regular pay rate. The District also added that employees would receive payment for such work rather than accrue compensatory time. IBEW accepted these proposals in IBEW Counter #2. Thus, IBEW acknowledged that the 12 hours of non-productive/rest time were distinct from potential "hours worked" during that period. Moreover, DeVoy testified that he was not aware of any sequestered employee working in excess of the 12-hour daily schedule during the sequestration period, but "[t]here may have been one or two occasions or a very small number of occasions where somebody may have been called in to fill in during their rest time." In those instances, DeVoy stated that the District paid employees for one and one-half times the regular pay rate for "hours actually worked," in addition to the one and one-half time the regular pay rate employees were being paid for their rest time. We therefore reject IBEW's exception. Even so, we reiterate that the District has ceded any ability to argue that 238 hours per week was the appropriate measure of compensation.

In sum, we order the District to compensate each affected employee for at least 274 hours for each week in sequestration, less any hours equivalent it already paid to employees during the sequestration period(s). The parties may negotiate over the nature and amount of backpay and/or compensatory time off to provide sequestered employees the most appropriate remedy for their individual situation. (*Corning Union High School District* (1984) PERB Decision No. 399, p. 10.) In compliance proceedings, the hearing officer shall allow the parties to introduce relevant evidence

respecting any of the following: which of the four regular work schedules each affected employee worked prior to sequestration; the actual amount of compensation and hours equivalent each affected employee was paid for each week in sequestration; the amount of backpay and/or compensatory time off each employee is entitled to receive in accordance with Policy 4221 based upon the hours they were regularly scheduled to work and application of the Sample Overtime Chart as described on pages 8 and 9 of this decision, to the extent greater than 274 hours per week for any individual employee. The parties may also introduce evidence as to whether employees in water-related classifications receive overtime pay for work beyond their regular work schedule and, if so, the amount of compensation they are due.

ORDER

Upon the foregoing factual findings and legal analysis, and the entire record in the case, the Public Employment Relations Board (PERB) finds that the Imperial Irrigation District (District) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3506.5, subdivision (c), when it failed and refused to meet and confer in good faith with the International Brotherhood of Electrical Workers Local 465 (IBEW) and failed to respond to two information requests from IBEW. By this conduct, the District also derivatively violated section 3506.5, subdivisions (a) and (b).

Pursuant to Government Code section 3509, we hereby ORDER that the District, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing to meet and confer in good faith with IBEW.

2. Interfering with the rights of bargaining unit employees to be represented by IBEW.

3. Denying IBEW its right to represent bargaining unit employees.

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

1. After this decision is no longer subject to appeal, within 30 days of a request from IBEW, supply all outstanding information responsive to IBEW's April 13 and April 16 information requests.

2. Within 10 workdays after this decision is no longer subject to appeal, rescind the Sequestration Policy.

3. Make affected employees whole, including but not limited to paying them back pay and/or compensatory time off equal to the amount of overtime pay they lost as a result of the implementation of the Sequestration Policy, plus seven percent interest.

4. Within 10 workdays after this decision is no longer subject to appeal, post at all District locations where notices to employees in IBEW's bargaining unit are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this Order. Such posting shall remain in place for a period of 30 consecutive workdays. The District shall take reasonable steps to ensure that the Notice is not altered, defaced, or covered with any other material. In addition to physically posting this Notice, the District shall post it by electronic message, intranet, internet site, and other electronic means the District uses to communicate with employees in the bargaining unit represented by IBEW.[38].

[38] Either party may ask PERB's Office of the General Counsel (OGC) to alter or

5. Notify OGC of the actions the District has taken to follow this Order by providing written reports as directed by OGC and concurrently serving such reports on IBEW.

Member Paulson joined in this Decision.

Member Krantz's concurrence begins on page 71.

extend the posting period, require further notice methods, or otherwise supplement or adjust this Order to ensure adequate notice. Upon receipt of such a request, OGC shall solicit input from all parties and, if warranted, provide amended instructions to ensure adequate notice.

KRANTZ, Member, concurring: I agree with the majority's liability findings. I also agree with the majority on the proper non-monetary remedies. As to monetary relief, I agree that the District's exceptions constitute a partial waiver. Specifically, the District wrote as follows:

> "Exception is taken to the ALJ's finding, at page 60 of the proposed decision, that an employee with a regular work schedule of five 8-hour days per week would be entitled to compensation equivalent to 282 hours at his or her regular rate for each week in sequestration under Policy 4221.
>
> "This finding is excepted to because it mistakenly assumes that employees subject to sequestration worked a five 8-hour day schedule. In reality, the subject employees worked a 12-hour shift under Policy 4221. Therefore, an employee with a regular work schedule of six 12-hour days and one 8-hour day per 80-hour pay period would be entitled to compensation equivalent to 274 hours at his or her regular rate for each week in sequestration under Policy 4221."

Because I do not discern a basis for employees to be owed more than stated in the above concession, I believe it would have been proper to simply direct the compliance officer to: (1) award 274 hours of weekly pay to sequestered employees who had worked a 12/80 schedule prior to sequestration or whom the District could lawfully have moved to a 12/80 schedule at the start of sequestration; and (2) otherwise award employees 282 hours of weekly pay. Under any scenario, I agree with the majority that the compliance officer must offset the actual amount of pay employees earned for each sequestration week and must award seven percent annual interest.

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. LA-CE-1482-M, *International Brotherhood of Electrical Workers Local 465 v. Imperial Irrigation District*, in which all parties had the right to participate, the Public Employment Relations Board (PERB) has found that the Imperial Irrigation District (District) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3506.5, subdivision (c), when it failed and refused to meet and confer in good faith with the International Brotherhood of Electrical Workers Local 465 (IBEW) and failed to respond to two information requests from IBEW. By this conduct, the District also derivatively violated section 3506.5, subdivisions (a) and (b).

As a result of this conduct, PERB has ordered us to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Failing to meet and confer in good faith with IBEW.

2. Interfering with the rights of bargaining unit employees to be represented by IBEW.

3. Denying IBEW its right to represent bargaining unit employees.

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

1. After this decision is no longer subject to appeal, within 30 days of a request from IBEW, supply all outstanding information responsive to IBEW's April 13 and April 16 information requests.

2. Within 10 workdays after this decision is no longer subject to appeal, rescind the Sequestration Policy.

3. Make affected employees whole, including but not limited to paying them back pay and/or compensatory time off equal to the amount of overtime pay they lost as a result of the implementation of the Sequestration Policy, plus seven percent interest.

Dated: _____ Imperial Irrigation District

By: _____
Authorized Agent

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