*** * * JUDICIAL APPEAL PENDING * * ***

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

REGISTERED NURSES PROFESSIONAL ASSOCIATION, and SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 521, Charging Parties, v. COUNTY OF SANTA CLARA, Respondent.	Case No. SF-CE-1796-M PERB Decision No. 2876-M October 17, 2023

Appearances: Weinberg, Roger & Rosenfeld by Kerianne R. Steele and Xochitl Lopez, Attorneys, for Registered Nurses Professional Association and Service Employees International Union Local 521; Jackson Lewis by Gina M. Roccanova and Gabriel N. Rubin, Attorneys, and County of Santa Clara Office of the County Counsel by James R. Williams, Richard M. Shiohira, and Samuel J. Cretcher, Attorneys, for the County of Santa Clara.

Before Krantz, Paulson, and Nazarian, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on cross-exceptions to a proposed decision of an administrative law judge (ALJ). The dispute arose in the early months of the COVID-19 pandemic, and it centers on the nature of an employer's bargaining obligations when faced with an emergency. Respondent County of Santa Clara argues that the pandemic suspended its duty to afford Registered Nurses Professional Association (RNPA) and Service

Employees International Union Local 521 (SEIU) (collectively, the Unions) notice and an opportunity to bargain regarding emergency measures. The Unions disagree.

PERB's Office of the General Counsel (OGC) issued a complaint alleging that the County violated the Meyers-Milias-Brown Act (MMBA) when it changed terms and conditions of employment, implemented new policies, and applied or enforced existing policies in a new way, while failing to bargain in good faith with the Unions over these decisions and/or their negotiable effects.[1] The complaint also alleged that the County failed to respond to requests for information and bypassed the Unions by dealing directly with bargaining unit employees.

The ALJ held a 19-day formal hearing and issued a proposed decision concluding that even though the pandemic qualified as an emergency within the meaning of MMBA section 3504.5, the County nonetheless violated its bargaining obligations. The ALJ found that most of the County's changes involved mandatory bargaining subjects and the County therefore had a duty to bargain over the decision itself. In contrast, the ALJ found that one decision involved a non-mandatory bargaining subject, meaning the County only had a duty to bargain over the implementation and effects of its decision.[2]

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

[2] "Non-mandatory" describes subjects about which parties need not bargain, although they may choose to do so. (*Cerritos Community College District* (2022) PERB Decision No. 2819, p. 19 (*Cerritos*).) These topics can equally be referred to as being "permissive," or as falling outside the "scope of bargaining" or "scope of representation." (*Ibid*.) Although such topics are sometimes labeled "non-negotiable," that is imprecise because it could also mean illegal bargaining subjects.

Having reviewed the record and considered the parties' arguments, we conclude as follows: (1) The County could take necessary measures to save lives without first reaching an impasse or agreement with the Unions, but it nonetheless had a duty to provide notice and an opportunity to bargain in good faith to the extent practicable in the particular circumstances; and (2) The County failed to comply with this duty.[3]

FACTUAL AND PROCEDURAL BACKGROUND[4]

The County is a public agency within the meaning of MMBA section 3501, subdivision (c). Among the County's many functions, it provides medical services through a county health system that includes the Santa Clara Valley Medical Center (SCVMC) hospitals and clinics.

RNPA represents a unit of approximately 3,000 registered nurses (RNs) working for the County. SEIU represents a unit of approximately 11,000 County employees, including Licensed Vocational Nurses (LVNs), Community Workers, and Facilities Maintenance Representatives.

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[3] The ALJ also sustained the claim for failure to provide information and dismissed the direct dealing claim. Because no party challenged the ALJ's proposed order requiring the County to supply the Unions with information they requested, we incorporate that order into our remedy without expressing any opinion on it. Furthermore, we exercise our discretion not to resolve the Unions' exception regarding direct dealing, as resolving that claim would not impact our order even were we to sustain the exception. (*The Accelerated Schools* (2023) PERB Decision No. 2855, p. 3 (*Accelerated Schools*).)

[4] The parties accede to most of the ALJ's factual findings, which we incorporate and supplement below. While the County characterizes some of its exceptions as involving factual issues, most are mixed issues of fact and law.

At all relevant times, the County had Memoranda of Understanding (MOUs) in effect with both RNPA and SEIU. Sections 8.14 and 8.15 of the County-RNPA MOU covered float assignments to specified SCVMC locations. Section 8.11 and Appendix E, Section E.17.12 of the County-SEIU MOU covered float differentials at specified SCVMC locations.

I. The County and State Issue Initial COVID-19 Orders

On February 3, 2020,[5] the County Director of Emergency Services declared an emergency in response to COVID-19. Even before then, the County had activated its Emergency Operations Center to coordinate public health responses to the pandemic.

On February 10, the County Board of Supervisors ratified and extended the February 3 emergency declaration.

On March 4, California Governor Gavin Newsom declared a state of emergency due to COVID-19.

On March 16, the County issued a shelter-in-place order, which it amended on March 31. This order required all individuals in the County to shelter in their places of residence and leave only to provide or receive essential services or perform essential work. The order directed the cessation of non-essential business at physical facilities.

II. The County Scales Back Health Care Services

Beginning in mid-March, the County reduced the need for on-site staff at County clinics by announcing new ambulatory and surgical care guidelines, converting many appointments to phone visits, and cancelling many procedures.

[5] All dates hereinafter refer to 2020 unless otherwise noted.

On March 25, the County e-mailed nurses stating that the County anticipated scaling back services at several SCVMC clinics.[6] The e-mail stated the County planned to create a labor pool through which nurses would be diverted to other facilities. County management asked nurses to rank their preferred facilities.

In or around late March or early April, the County scaled back services at some SCVMC clinics.

The County did not afford the Unions advanced notice of the above actions. Nonetheless, on March 30, SEIU e-mailed the County about rumors of planned closures and related reassignments. SEIU asked to discuss the decision's impact before any clinic closure or staffing changes occurred.

On April 7 and 9, RNPA requested to bargain with the County about how the County decision to scale back clinic services would impact nursing staff.

III. The County Amends Its Policies on Disaster Service Workers

The California Emergency Services Act (CESA; Gov. Code, § 3100, et seq.) designates all public employees, including county employees, as disaster service workers (DSWs). Section 3100 states CESA's purpose as follows:

> "It is hereby declared that the protection of the health and safety and preservation of the lives and property of the people of the state from the effects of natural, manmade, or war-caused emergencies which result in conditions of disaster or in extreme peril to life, property, and resources is of paramount state importance requiring the responsible efforts of public and private agencies and individual citizens. In furtherance of the exercise of the police power of the state in protection of its citizens and resources, all public employees are hereby declared to be disaster

[6] Except where context dictates otherwise, "nurses" includes RNs and LVNs.

> service workers subject to such disaster service activities as may be assigned to them by their superiors or by law."

The County's Emergency Management Ordinance likewise designates all County employees as DSWs and provides that all County officers and employees are "charged with duties incident to the protection of life, property, or environment" in the event of an emergency.

In December 2008, the County amended its Policy and Procedure Manual by adding a policy titled "County Employees serving as Disaster Service Workers," which we refer to as the 2008 policy. It spans just over 2 pages and includes 10 questions and answers labeled as "frequently asked questions" (FAQs).

On or around April 13, 2020, the County issued three documents related to DSW matters without affording the Unions notice or an opportunity to bargain. We refer to these, collectively, as the 2020 documents. While they included some language based on the 2008 policy (as well as other language based on the CESA and the Labor Code), the 2020 documents also included significant provisions that added to or otherwise differed from those sources. The 2020 documents are lengthy, confusing, and difficult to summarize, in part because two of the three 2020 documents contained FAQs, each of which differed substantially from the FAQs in the 2008 policy. We summarize the three documents as follows.

A. Updated Document Titled "County Employees Serving as Disaster Service Workers"

This document updated and substantially altered the 2008 policy bearing the same name. The updated 2020 version is much longer than the 2008 document, spanning 17 pages. Two of these pages include FAQs. The updated FAQs are

numbered 1-4 followed by 6-7, with number 5 apparently omitted in error. Some of the FAQs in the updated document resemble FAQs in the 2008 document, but others diverge sharply. One significant difference is apparent in comparing Question No. 6 in the two versions. In the 2008 policy, FAQ No. 6 reads:

> "What is the responsibility of the DSW?
>
> "When the County Executive proclaims a countywide emergency, *employees need to take care of their families first and ensure their safety*; follow their department's reporting instructions; be prepared to be assigned to any type of disaster service activity. This assignment may be consistent with the employee's normal work duties and/or may require the employee to work at locations, times and conditions, other than the employee's normal assignment." (emphasis added.)

In contrast, the new version's FAQ No. 6 reads:

> "Can I refuse a Disaster Service Worker assignment?
>
> "All County employees are obligated to serve as Disaster Service Workers under the California Constitution and state law [citation omitted]. County Disaster Service Workers must perform a Disaster Service Worker assignment faithfully. This is a condition of employment, and therefore, *failure to accept and/or perform a Disaster Service Worker assignment may lead to discipline, including termination of employment. An employee cannot refuse a Disaster Service Worker assignment unless the employee has a legitimate qualifying reason, which the County must approve.*" (emphasis added.)

B. Document Titled "Disaster Service Worker County Employees Frequently Asked Questions Sheet COVID-19 Pandemic"

In contrast to the County's general DSW policy discussed immediately above, this four-page document was specific to the immediate COVID-19 emergency. It contained only FAQs, none of which were the same as the FAQs in the 2008

document or the 2020 update discussed above. Some of the FAQs, however, were relevant to the County's threat of discipline for turning down a DSW assignment without approval. Specifically, the COVID-specific FAQs stated that an employee could be approved to refuse a DSW assignment during the COVID-19 emergency based on being the sole parent of a child whose school or daycare closed, but an employee would not be approved merely based on living with a medically vulnerable family member.

C. Document Titled "County Employee Serving as Disaster Service Worker (DSW) Deployment Procedures"

This single-page document covers the internal procedures that the County's Personnel Unit and the County's various departments must follow when interacting with one another over DSW deployments.

IV. The County Assigns Nurses to Privately-Owned Skilled Nursing Facilities

In late March and early April, skilled nursing facilities (SNFs) and long-term care facilities experienced staffing shortages and a rapid increase in COVID-19 infections. The County considered several options to address these circumstances, including establishing County-run SNFs and assigning County employees to work at privately-owned SNFs.

On March 27, the County's Director of Ambulatory Quality Education and Standards, Ofelia Hawk, e-mailed several managers. Hawk's e-mail requested that nurses volunteer for assignment to potential County-run SNFs. County managers shared Hawk's message with nurses, and several nurses responded by volunteering to help. The County did not notify the Unions prior to distributing Hawk's e-mail message.

The County created a nurse labor pool for possible assignment to SNFs. This pool primarily included nurses who either volunteered or who worked at clinics where the County had scaled back services. As of March 27, the County had made no decision regarding whether pool nurses might be assigned to privately-owned SNFs and/or to potential County-run SNFs.

On April 2 and 3, the County trained several nurses in preparation for assigning them to SNFs.

Two privately-owned SNFs located in the County, The Ridge and Canyon Springs, had particularly acute staffing needs. On April 4, The Ridge administrator Sean Kimball e-mailed County Administrator Nelda David, stating: “We need staff ASAP. Most of our nurses are getting sick. We’re down to one nurse and our [Director of Nursing] this morning. We could use all the help right now!” Around the same time, Canyon Springs administrator Benton Collins informed the County that his facility was experiencing a COVID-19 outbreak and a severe staff shortage that would require patients to move to County hospitals.

The County was concerned that staffing shortages at The Ridge and Canyon Springs would require the SNFs to evacuate patients to County hospitals. The County believed evacuation would spread infection to County hospitals, decrease the number of acute hospital beds available for patients needing a higher level of care, and result in poor outcomes—including death—for transferred patients. As a result of these

concerns, the County decided on April 6 to assign nurses at least to Canyon Springs, and possibly to The Ridge as well.[7]

The Unions learned of the County's SNF assignment decision when they received an e-mail message, titled "Courtesy Notice on DSW assignments," that County Labor Relations Director Matthew Cottrell sent at 1:25 p.m. on April 6. Both Unions responded to Cotrell's e-mail message within several hours, and both Unions requested to bargain regarding the County's decision.

On April 7, the County met with RNPA to discuss nurse assignments to SNFs. During this meeting, RNPA first learned that nurses were already on their way to begin their first shift at Canyon Springs. RNPA requested to bargain the terms and conditions of employment surrounding the assignment, including safety protocols, but the County was unwilling to do so. RNPA expressed outrage that the County assigned

[7] The County reached a staffing agreement with Canyon Springs on April 6, but never reached an agreement with The Ridge. Although one County nurse worked at The Ridge for a single shift on April 7, the parties dispute whether that was an inadvertent miscommunication or part of the County's alleged unilateral changes. The nurse involved, Crystal Mana-Ay, received an April 6 text message directing her to report to The Ridge the next day but also indicating that The Ridge had not yet signed a contract, and promising Mana-Ay that she would receive later confirmation. Mana-Ay never heard anything further and therefore reported to The Ridge on April 7. The County informed Mana-Ay later that day that she should not return to The Ridge, and thereafter the County did not assign any other nurse to work there. Ultimately, it does not matter how we characterize these facts, as Mana-Ay's shift at The Ridge was just one of multiple SNF assignments over multiple weeks; the other assignments were all to Canyon Springs. Because the County admits that the Canyon Springs assignments were intentional, we need not resolve the parties' dispute about whether Mana-Ay's single shift at The Ridge was inadvertent.

nurses to perform potentially dangerous duties without providing RNPA notice and opportunity to bargain over safety precautions.

Canyon Springs personnel oriented County RNs who began working there and allowed them to shadow other staff. Some of the RNs who worked at Canyon Springs e-mailed Hawk after their shifts, raising concerns about inadequate training, lack of personal protective equipment (PPE), and staffing ratios.

Between April 7 and 24, County representatives met with SEIU multiple times to discuss SNF assignments. In these discussions, the County listened to SEIU's concerns and proposals, and answered some of SEIU's questions, but denied that the meetings were bargaining sessions. The County did not submit any written proposals to SEIU.

On April 12, SEIU sent the County a proposed side letter on selection for DSW work. As part of its written explanation, SEIU stated:

> "Based on our experience troubleshooting the Skilled Nursing Facility (SNF) assignment and now seeing many different DSW assignments being implemented throughout the County we believe a meet and confer discussion about creating a framework about how we will work together to ensure the safety of the public and our members is urgently needed. While the current processes in place used to resolve issues can be effective we don't believe they are sufficient, nor are they expeditious enough to ensure a safe working environment for County employees, as exemplified by the SNF assignment . . . . a draft side letter is attached for your review.
>
> "We would like to schedule a meeting as soon as possible to discuss a written agreement that would outline a set of agreed upon commitments throughout this emergency. [SEIU] and its members are unequivocally committed to protecting the health and safety and preservation of the

> lives and property of the people of the County of Santa Clara from the effects of the COVID-19 virus, which if not abated could result in conditions of disaster or in extreme peril to life, property, and resources.
>
> "In addition to being required by law, meeting with the employees' labor representatives and leadership will help assure that the County of Santa Clara has the benefit of the union's expertise in foreseeing and preventing avoidable exposure to COVID19 by represented employees, patients and the public. This is why we are making ourselves available any day of the week, any hour of day, to meet via video conferencing to discuss these important matters. Please contact us immediately to schedule this. We can arrange the Zoom call using our account.
>
> [¶] . . . [¶]
>
> "[W]e are still very concerned about the idea of having our members, public employees, staff a private for profit operation, especially where County resources are already stretched to the limit and we face concerns about PPE shortages in County facilities. We believe this deserves further discussion and consideration. We are confident we can come to an agreement on this specific issue concurrently to a broader agreement about Disaster Service Worker assignments no matter where they are."

On April 14, the County e-mailed SEIU in relevant in part:

> "The County is also operating under Government Code Section 3504.5(b) (MMBA emergency exception), pursuant to the declared local emergency, the County will provide notice and opportunity to meet 'at the earliest practicable time,' but we have no obligation to meet and confer on DSW assignments or enter into sideletters regarding such matters. The County will notify SEIU and, by extension, all other labor organizations, of its responsible, thoughtful, and immediate response to circumstances arising on a daily basis, which necessitate critical time-sensitive responses,

> without the benefit of a full meet and confer process generally available under normal circumstances. . . .
>
> "As seen by our actions the County has continued to provide opportunities to meet on issues that have arisen out of the current emergency. We have held at least two meetings to address the SNF assignments and work out logistics, assignments, PPE concerns as well as the plan going forward as well as providing direct contact to the managers on site and in charge to deal with issues as they arise. . . . These notices and meetings are happening on a regular basis and the County has provided the union with ample opportunities to voice concerns and suggestions during this emergency period."

On a near daily basis between April 7 and 24, the County met with RNPA about RN assignments to SNFs. RNPA sought to bargain mainly over RN selection, PPE and other safety issues, housing stipends or pay for hotel stays, staffing ratios, and hazard pay.[8] The County met with RNPA representatives, listened to their suggestions and ideas, and answered some of their questions. The County did not submit any written proposals to RNPA.

In the period from April 7-24, the County assigned 17 nurses to Canyon Springs. After April 24, the County ceased assigning nurses to any SNF, as by that time the County had helped Canyon Springs secure registry staffing.

On May 1, RNPA e-mailed the County and requested to bargain over the selection method and deployment list for any future DSW assignments. An hour later,

[8] Section 8.17 of the County's MOU with RNPA, titled Hazard Duty, identifies six work locations at which RNs earn a premium due to hazardous circumstances. SNFs are not one of the six specified work locations. County nurses had not previously worked at privately-owned SNFs, and the County operated only one SNF, which it acquired in 2019.

the County responded to RNPA along the same lines as it had written to SEIU, including the following assertions:

> "County employees are required to perform duties as DSWs, as directed by the County, in the event of a Disaster. Employees may be assigned by the County to fulfill emergency action needs outside the course and scope of their regular job duties. When serving as a DSW, an employee may also be directed to report to a different supervisor and/or to work at a different location than normal in order to fulfill the DSW role.
>
> "The County is also operating under Government Code Section 3504.5(b) (MMBA emergency exception), pursuant to the declared local emergency, the County will provide notice and opportunity to meet 'at the earliest practicable time,' but we have no obligation to meet and confer on DSW assignments or enter into sideletters regarding such matters. The County will notify RNPA and, by extension, all other labor organizations, of its responsible, thoughtful, and immediate response to circumstances arising on a daily basis, which necessitate critical time-sensitive responses, without the benefit of a full meet and confer process generally available under normal circumstances. We will continue to provide notice and meet if requested as soon as practicable when RNPA represented employees are assigned as DSWs."

V. The County Assigns SEIU-Represented Employees to Motels

The County was concerned about COVID-19's impact on people experiencing homelessness, including those living in congregate shelters where residents are in close physical proximity to one another and therefore at particular risk for contagion. Exacerbating these concerns, people experiencing homelessness tended to have more health conditions potentially placing them at greater risk for serious illness or death if they contracted COVID-19.

As one response, the County explored offering new options to people experiencing homelessness, in lieu of congregate shelters. One option the County considered was the Western Motel, which the County owned. The County also considered contracting with privately-owned motels.

On or around March 17, the County assigned two SEIU-represented employees, Arthur Zamarron and Raul Martinez, to prepare the Western Motel for potential use. Zamarron and Martinez were classified as Facilities Maintenance Representatives, a classification that normally includes duties such as being a liaison between tenants and building operations, reviewing building issues, and referring them for resolution.

The County did not afford SEIU any notice before it assigned SEIU-represented bargaining unit members to work at motels.

Zamarron told SEIU Chief Steward Jason Dorsey about the motel deployment. On March 20, Dorsey e-mailed Zamarron's manager to demand that the County meet and confer before assigning SEIU bargaining unit employees to work at the Western Motel.

SEIU met with the County on March 22 to discuss Western Motel assignments. During the meeting, the County stated that SEIU bargaining unit employees were merely preparing the motel property to be occupied and that the County would give notice to SEIU before further deployment.

The Western Motel was vacant on the days Zamarron worked there, and the County ultimately decided not to offer spots in the motel to people experiencing homelessness. Instead, the County determined that privately-owned motels were a

better option. The County contracted with privately-owned motels to house people experiencing homelessness, and the County contracted with nonprofit organizations to staff these motels. However, some of the nonprofits did not have enough staff. The County therefore decided to assign SEIU-represented employees, including Community Workers, to work at the motels.

On April 13, the County e-mailed four SEIU bargaining unit employees stating that they were being activated as DSWs and should report the next day to either the Holiday Inn Express in Sunnyvale or the Hotel E Real in Santa Clara. The County assigned the employees to conduct door-to-door wellness checks at the motels, among other duties.

The County did not provide SEIU with prior notice of these assignments. On April 14, SEIU requested to meet about the assignments and receive advance notice of further assignments. In or around the same period, SEIU also proposed a side letter for DSW assignments within the Social Services Agency.

On April 15, the County e-mailed SEIU, in part:

> "As to advance notifications, the County is operating under Government Code Section 3504.5(b) (MMBA emergency exception), pursuant to the declared local emergency, the County will provide notice and the opportunity to meet 'at the earliest practicable time,' but we have no obligation to meet and confer on DSW assignments or enter into sideletters regarding such matters."

The County e-mailed SEIU again on April 23, reiterating the County's position that while it was required to meet with SEIU at the "earliest practicable time," and was doing so, it did not need to "meet and confer on DSW assignments or enter into sideletters regarding such matters."

In early May, the County assigned additional SEIU bargaining unit employees to work at motels, including Debbie Silva, a Rehabilitation Counselor, and Eric Martinez, a Probation Community Worker. In her role as a Rehabilitation Counselor, Silva normally conducted court-ordered jail assessments of incarcerated individuals' substance use and recommended in-custody treatment programs to the court and arranged transfer to post-release programs. Silva also fielded calls to the County's call center to assist individuals requesting access to the County's drug and alcohol services. Silva had worked remotely since 2017. In his role as a Probation Community Worker, Eric Martinez was assigned to Juvenile Probation, where he maintained statistics, conducted client meetings and urinalysis collections, and otherwise assisted the unit as needed.

Silva, Eric Martinez, and other County employees attended a training from May 5-7 and began working at a Best Western Motel on May 8. The County contracted with a private nonprofit organization known as Abode Services to run this motel, but Abode had insufficient staff to do so. SEIU-represented employees back filled for the missing Abode staff. Their duties, which were entirely new to them, included: cleaning; performing intakes with new residents suspected of being COVID-19 positive; taking residents' temperatures; delivering food; conducting wellness checks; bagging belongings of residents who had abandoned their rooms or been evicted; and researching information on housing options, including by calling to check on income requirements, availability, and waitlists. Employees received little to no training in most of these tasks, including on procedures for dealing with needles and other hazardous materials, even though they encountered such risks as part of their

newly assigned duties. In contrast, the County did train employees on one new duty: how to administer naloxone to residents experiencing an opioid overdose.

Silva and Eric Martinez were still working at the Best Western Motel as of the August hearing dates in this matter. At that point the County had extended their assignments to December 31.

Between April 20 and early May, the County met with SEIU almost daily to discuss DSW assignments. During those meetings, SEIU and the County discussed the role of the assignments, PPE, interactions with motel residents, trash removal, laundry, food delivery, shift schedules, and other issues. While the County answered some of the questions SEIU posed and listened to SEIU's concerns, the County asserted it had no duty to meet and confer regarding the assignment of bargaining unit workers to motels.

The Unions filed this charge on May 6, and OGC issued the complaint on June 2. The parties participated in 19 formal hearing days, by video conference, between August 2020 and March 2021. The parties then filed two rounds of post-hearing briefs in September and October 2021. The ALJ issued the proposed decision on January 23, 2023. All parties filed exceptions and responses. The predominant issues on appeal involve the County's asserted emergency defense.[9]

[9] The Unions requested oral argument. The Board typically denies such requests if there is an adequate record, the parties had a reasonable opportunity to present briefs, and the issues before the Board are sufficiently clear that oral argument is unnecessary. (*City of Culver City* (2020) PERB Decision No. 2731-M, p. 2, fn. 2.) We deny the request for oral argument based on these criteria and given that this decision follows several others in which the Board explained employers' bargaining duties when the COVID-19 pandemic commenced.

DISCUSSION

When resolving exceptions to a proposed decision, the Board applies a de novo standard of review. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 5.) However, the Board need not address issues that the proposed decision has adequately addressed or that would not impact the outcome. (*Ibid*.)

In Parts I and II, we conclude that the Unions established a prima facie case that the County violated its duty to bargain over DSW-related decisions and the effects of its decision to scale back services at its medical clinics. Part III analyzes the County's emergency defense. There, we conclude that the need to save lives meant that the County's bargaining duty did not include a requirement for it to reach impasse or agreement before taking emergency measures, but the County nonetheless failed to comply with its continuing duty to provide notice and to bargain in good faith as practicable. Finally, Part IV briefly explains the remedies warranted in these circumstances.

I. Decision Bargaining Claims: Prima Facie Case

To establish a prima facie case that a respondent employer violated its decision bargaining obligation, an exclusive representative must prove: (1) the employer changed or deviated from the status quo; (2) the change 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 employees' union and bargaining in good faith over the decision, at the union's request, until the parties

reached an agreement or a lawful impasse.[10] (*Bellflower Unified School District* (2021) PERB Decision No. 2796, p. 9 (*Bellflower*).)

While the County's exceptions are mainly premised on its emergency defense, it also challenges the first two elements of the Unions' prima facie case. We consider each in turn.

A. Change in Status Quo

There are three primary means of establishing that an employer changed or deviated from the status quo. (*Bellflower*, *supra*, PERB Decision No. 2796, p. 10.) Specifically, a charging party satisfies this element by showing any of the following: (1) a change in or 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. (*Ibid*.) The record here establishes all three types of changes.

1. The County's New DSW Policies

As noted above, the 2020 documents comprised three new or updated policies. We focus on the first two, because the third fell outside the scope of representation as it was related to internal procedures and only incidental to employment conditions (see *post* at pp. 26-27 & fn. 12), and SEIU does not assert a claim for failure to bargain over the effects of that County action.

[10] To "bargain" has the same meaning as to "meet and confer" or to "negotiate," and we use the terms interchangeably. (*Oxnard Union High School District* (2022) PERB Decision No. 2803, p. 30, fn. 14. (*Oxnard)*.)

In the first document, the County significantly expanded its pre-existing 2008 policy and materially changed its meaning. The County eliminated the 2008 policy's assurance that in an emergency, employees needed to take care of their families and ensure their safety first. And the County added very different language warning employees that they could be terminated for failure to accept assigned DSW duties. Meanwhile, the second document is a quintessential example of a newly created policy where there was none before, as it lays out multiple rules specific to COVID-19, including the rule that employees could not refuse a DSW assignment because they need to protect a medically vulnerable family member from COVID-19.

The County argues that it made no material change because, it claims, employees were subject to discipline for refusing DSW assignments even prior to April 2020. The County bases this argument mainly on testimony from its former Chief Operating Officer, Miguel Marquez. However, Marquez merely answered in the affirmative when he was asked whether, before the pandemic, County employees were subject to discipline for refusing to carry out tasks assigned to them by a supervisor. Marquez's vague and conclusory testimony regarding prior discipline is not tied to refusal of a DSW assignment, or to the DSW policy at all. Even assuming for the sake of argument that Marquez intended to reference refusing a DSW assignment, we would still find a material change. A reasonable employee would find it material to receive explicit notice of the threat of discipline for refusing a DSW assignment—even to protect a medically vulnerable family member. This is especially true given that the

prior version of the policy assured employees that they should prioritize protecting their families.[11]

2. The County's SNF and Motel Assignments

A charging party can establish that new job duties materially deviated from the status quo by showing that new duties or assignments are not "reasonably comprehended" within employees' prior duties or assignments. (*State of California (California Correctional Health Care Services)* (2022) PERB Decision No. 2823-S, p. 10 (*CCHCS*); *County of Santa Clara* (2022) PERB Decision No. 2820-M, p. 7; *Cerritos*, *supra*, PERB Decision No. 2819, pp. 30-31.) "Reasonably comprehended" is an objective standard that refers to what a reasonable employee would comprehend based on all relevant circumstances, including, but not limited to, past practice, training, and job descriptions. (*CCHCS*, *supra*, p. 10; *County of Santa Clara*, *supra*, PERB Decision No. 2820-M, p. 6, citing *Rio Hondo Community College District* (1982) PERB Decision No. 279, pp. 17-18 [while catchall language in job description does not overcome evidence of contrary past practice, PERB interprets job descriptions in the context of employees' overall role].) To apply the "reasonably comprehended" standard, we compare past duties or assignments to new duties or assignments, through the eyes of a reasonable employee. (*County of Santa Clara*, *supra*, PERB Decision No. 2820-M, p. 8.)

[11] Employees required to care for certain family members can use leave, but there are limits on the length of such leaves and on the compensation that employees receive while on leave.

The County's DSW reassignments were not "reasonably comprehended" within employees' prior assignments. Reasonable nurses would see a material change in being assigned to work under supervision of private sector managers at a non-County SNF, where nurses were unfamiliar with the standards and procedures they were expected to follow. Nor was working at motels reasonably comprehended within SEIU bargaining unit employees' existing job duties. The County did not establish that any of the employees assigned to motels had ever worked in motels or performed any (much less all) of the duties assigned there. And the Unions called witnesses who established the opposite. For these reasons, the DSW assignments to SNFs and motels changed the status quo.

B. Scope of Representation

MMBA section 3504 defines the scope of representation as including "wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." Where precedent is not already clear on whether a matter falls within the scope of representation, we begin by placing the matter in one of three categories, each with its own implications for the scope of representation: (1) "decisions that 'have only an indirect and attenuated impact on the employment relationship' and thus are not mandatory subjects of bargaining," such as advertising, product design, and financing; (2) "decisions directly defining the employment relationship, such as wages, workplace rules, and the order of succession of layoffs and recalls," which are "always mandatory subjects of bargaining"; and (3) "decisions that directly affect

employment, such as eliminating jobs, but nonetheless may not be mandatory subjects of bargaining because they involve 'a change in the scope and direction of the enterprise' or, in other words, the employer's 'retained freedom to manage its affairs unrelated to employment.'" (*City and County of San Francisco* (2022) PERB Decision No. 2846-M, pp. 15-18 (*San Francisco*), citing *International Assn. of Fire Fighters, Local 188, AFL-CIO v. Public Employment Relations Bd.* (2011) 51 Cal.4th 259, 272-273 (*Richmond Firefighters*).)

For decisions in the third category, bargaining is required if "the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business." (*Richmond Firefighters*, *supra*, 51 Cal.4th at p. 273.) We apply this balancing test in two steps. First, looking at the matter from the perspective of a reasonable employee, we assess whether the decision's implementation will significantly and adversely impact wages, hours, or other terms or conditions of employment. (*San Francisco*, *supra*, PERB Decision No. 2846-M, p. 18, citing *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 638; *County of Sonoma* (2023) PERB Decision No. 2772a-M, p. 16 (*Sonoma*).) If there is a significant and adverse effect, we must resolve whether "the employer's need for unencumbered decision-making in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question." (*San Francisco*, *supra*, PERB Decision No. 2846-M, pp. 18-19.)

For many types of decisions, we need not "reinvent the wheel" by applying the *Richmond Firefighters* framework from scratch, because precedent establishes subject-specific standards that show how the framework applies to a given topic.

(*Accelerated Schools*, *supra*, PERB Decision No. 2855, p. 15; *San Francisco*, *supra*, PERB Decision No. 2846-M, p. 18, fn. 15.) One such standard, relevant here, is that material changes to job assignments and duties generally fall within the scope of representation. (*County of Santa Clara*, *supra*, PERB Decision No. 2820-M, p. 7; *Cerritos*, *supra*, PERB Decision No. 2819, pp. 30-31.) This standard includes an exception if external law leaves the employer no discretion, but if external law does not completely resolve the issue, the employer must bargain to the extent of its retained discretion. (*County of Sacramento* (2020) PERB Decision No. 2745-M, pp. 17-18.)

Here, we have considered the County's argument based on an external law, CESA, which fully resolves that County employees are DSWs. Accordingly, the employees' status as DSWs is not subject to bargaining. But the CESA leaves the County with substantial discretion. For instance, it neither mandated the changes the County chose to make nor the safeguards and compensation the Unions sought. Thus, the CESA does not eliminate the duty to bargain. Nor did the Unions seek to bargain over matters that CESA settled. For instance, RNPA wrote the County as follows: "County Employees are required to perform duties as the DSW. We are not denying that duty. We need to meet and ensure that all safety precautions for our members will be considered in addition to hours and working conditions. We need to meet at the earliest practicable time."

A second subject-specific standard, also relevant here, relates to disciplinary rules and procedures. Because such matters lie at the core of traditional labor relations, workplace policies generally fall within the scope of representation if they

materially alter employees' disciplinary risks. (*Sonoma*, *supra*, PERB Decision No. 2772a-M, p. 24; *Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262, p. 12; *Trustees of the California State University* (2003) PERB Decision No. 1507-H, adopting proposed decision at pp. 12-13; *State of California (Water Resources Control Board)* (1999) PERB Decision No. 1337-S, pp. 7-8.) This standard, too, has an exception: a new policy does not trigger decision bargaining—even though it has disciplinary consequences—if those consequences are incidental to a decision unrelated to employee or labor relations. *San Bernardino Community College District* (2018) PERB Decision No. 2599 (*San Bernardino*) noted this difference in discussing a college's decision to track a security officer's vehicle using GPS and to use the data for discipline. (*Id*. at pp. 8-12.) The college's primary goal was to check if the employee was leaving his designated area. (*Id*. at pp. 10-11, fn. 8.) The Board contrasted that employment-related decision with one in which an employer's decision to install surveillance equipment is "not primarily about monitoring employees while they provide public services, and is instead installed, for instance, to deter members of the public from committing crimes, to apprehend such persons who do perpetrate crimes, to protect public property, or to keep staff and members of the public safe." (*Ibid*.) In the latter circumstance, the employer need only bargain effects, such as how surveillance might be used in relation to evaluations or discipline. (*Ibid*.)

Here, two of the three 2020 documents made an employment-oriented change by adding a disciplinary warning and cutting language that had urged employees to

take care of their families first.[12] The County's SNF and motel assignments similarly were focused on employment. It is not enough for the County to argue that it made these changes to serve the public better. Indeed, in *San Bernardino*, *supra*, PERB Decision No. 2599, the employer's goal in placing a GPS on the security officer's truck was ultimately to improve public services by monitoring the officer. (*Id*. at pp. 10-11, fn. 8.) Because it sought to accomplish its purpose by changing an employment term or condition, the employer had a decision bargaining duty. (*Ibid*.) In contrast, where the purpose of a change is to safeguard the public as a general matter, not mediated mainly through altering an employment practice, then only effects bargaining is required. (*Ibid*.; *Sonoma*, *supra*, PERB Decision No. 2772a-M, pp. 24-25; *County of Santa Clara* (2021) PERB Decision No. 2799-M, pp. 21-22.)

Thus, the relevant subject-specific standards demonstrate why the County's new assignments and policies were critical to defining the employment relationship rather than altering the overall direction of the County's enterprise, meaning the changes fall within the second *Richmond Firefighters* category.

In the alternative, however, even if we were to "reinvent the wheel" by applying the *Richmond Firefighters* framework from scratch, and even assuming for the sake of argument that the County's changes fall within the third *Richmond Firefighters* category, we would reach the same conclusion. First, the SNF and motel assignments had a significant and adverse effect on employment conditions, a point that the County

[12] The third document fell outside the scope of representation as it was related to internal procedures when County departments interacted with each other regarding DSW assignments, and it was only incidental to employment terms and conditions.

does not contest. A reasonable County nurse would have had this belief based on the County's sudden change in DSW policies and related assignment to work under different policies and procedures in a privately-owned SNF during the pandemic, with no County supervision, inadequate training, and insufficient PPE. The adverse effect was even more significant for employees assigned to motels. At the Best Western Motel, for instance, the County imposed new duties without adequate training even though the new duties were unrelated to the employees' prior duties and exposed them to COVID-19.[13]

Second, we balance the County's interests with the Unions' interest in protecting its members through training, PPE, and other safeguards, as well as in bargaining for hazard pay or other compensation for the DSW assignments at private SNFs and motels. In assessing the County's interest, we consider assignment and disciplinary issues as they exist in general, not during an emergency. This is because the emergency characteristics of the situation come into play later, when we consider the County's emergency defense and decide which steps (if any) the County was permitted to take without completing negotiations. Thus, although "time may be of the essence during a pandemic, that consideration goes to the limitations on bargaining obligations when an emergency compels an employer to act rapidly, which we discuss in [a] following section; it does not, however, turn the topic into a non-mandatory subject of bargaining." (*Oxnard*, *supra*, PERB Decision No. 2803, p. 43.) The County's interest in protecting the public is therefore satisfied (see pp. 32-37, *post*), and fair

[13] While the County asserts that reassigned employees would have risked infection in their regular assignments, their new assignments increased the risk.

collective bargaining is needed to satisfy the urgent union interest in protecting and compensating the essential workers serving the public during a once-in-a-century pandemic.

The County posits that the health and safety issues and other working conditions associated with the DSW assignments were not susceptible to resolution through collective bargaining because those issues would be moot by the time bargaining became practicable. However, this argument misunderstands the core duty at stake which we explain in full *post* at pages 33-34: bargaining was practicable even in the early weeks of the pandemic, and the emergency did not shield the County from that duty; rather, the pandemic merely allowed the County to take certain emergency measures before bargaining was complete.

Finally, this case differs from *Regents of the University of California* (2021) PERB Decision No. 2783-H (*Regents*), where the Board held that an employer had a duty to bargain effects, but not its decision, before implementing a flu vaccination policy during the COVID-19 pandemic. (*Id*. at pp. 27-31.) A vaccine requirement is fundamentally different given herd immunity principles, and indeed we held that the policy was not amenable to bargaining because it was not employee-specific, as it applied to everyone who studied, lived, or worked at the University. (*Id*. at p. 26.) Moreover, the subjects that the Unions in this case sought to negotiate can equally be seen as effects of the DSW assignments, yet the County refused to bargain over side letters on those topics. Thus, even were we inclined to find only an effects bargaining obligation as in *Regents*, the County would still have violated the MMBA.

For the foregoing reasons, the Unions established a prima facie case that the County failed to afford them adequate notice and opportunity to bargain before implementing the first two 2020 documents related to DSW policies and issuing its SNF and motel DSW assignments.

II. Effects Bargaining Claim: Prima Facie Case

The MMBA's duty to bargain in good faith extends to the implementation and effects of a decision that has a foreseeable effect on matters within the scope of representation, even where the decision itself falls outside the scope. (*County of Santa Clara* (2019) PERB Decision No. 2680-M, pp. 11-12.) Thus, even when an employer has no obligation to bargain over a particular decision, it nonetheless must provide notice and an opportunity to meet and confer over any reasonably foreseeable effects the decision may have on matters within the scope of representation. (*Ibid*.) The employer violates its duty to bargain if it fails to provide adequate advance notice, and in such circumstances the union need not demand to bargain effects as a prerequisite to filing an unfair practice charge. (*Id*. at p. 12.)

For the sake of brevity, we use the word "effects" as shorthand for a broad category that comprises both the effects and implementation of a decision on a non-mandatory bargaining subject. (*Richmond Firefighters*, *supra*, 51 Cal.4th at pp. 265, 276; *City of Glendale* (2020) PERB Decision No. 2694-M, p. 54, fn. 12; *County of Santa Clara*, *supra*, PERB Decision No. 2680-M, p. 12; *City of Palo Alto* (2017) PERB Decision No. 2388a-M, p. 40; *County of Santa Clara* (2013) PERB Decision No. 2321-M, p. 25, fn. 16.) Negotiations over implementation typically include proposed alternatives. (*Accelerated Schools*, *supra*, PERB Decision No. 2855, p. 14,

fn. 8; *Oxnard*, *supra*, PERB Decision No. 2803, p. 52; *County of Santa Clara*, *supra*, PERB Decision No. 2799-M, p. 27.) For instance, even though an employer has no duty to bargain over a decision to lay off employees, the California Supreme Court has noted the scope of required effects bargaining includes "the timing of layoffs and the number and identity of the employees affected." (*Richmond Firefighters*, *supra*, 51 Cal.4th at pp. 265 & 276.) Thus, one purpose of effects bargaining is to permit the exclusive representative an opportunity to persuade the employer to consider alternatives that may diminish the impact of the decision on employees. (*Accelerated Schools*, *supra*, PERB Decision No. 2855, p. 14, fn. 8; *Oxnard*, *supra*, PERB Decision No. 2803, p. 52; *County of Santa Clara*, *supra*, PERB Decision No. 2799-M, p. 27.)

Here, no party has asked us to review the ALJ's conclusion that the County had to bargain effects—but not its decision—when it temporarily scaled back services at certain clinics. Moreover, the County concedes that it implemented this change without providing advance notice to either Union. In the absence of advance notice, the Unions had no duty to demand negotiations and the County cannot assert waiver as a defense. (*Oxnard*, *supra*, PERB Decision No. 2803, p. 51; *County of Santa Clara*, *supra*, PERB Decision No. 2321-M, p. 30.)

Ultimately, the outcome of the effects bargaining claim, like the above-discussed decision bargaining claims, turns on the County's emergency defense, to which we now turn.

III. The Emergency Defense

The County asserts that once its governing body declared a COVID-19 related emergency, MMBA section 3504.5 "effectively plac[ed] a stay on the bargaining

obligation." That belief, which the County asserted in its dealings with the Unions throughout the relevant timeframe, is incorrect and caused the County to violate the MMBA. As we proceed to explain, the County had a duty to bargain with the Unions throughout the relevant timeframe, but the emergency nature of the pandemic allowed it to take emergency measures even during such negotiations.

A. Employers' Rights and Duties in Emergency Circumstances

As a preliminary matter, it bears noting that while the County frames its defense as arising under MMBA section 3504.5, that section's explicit terms apply only to changes that an employer's governing board makes by adopting an "ordinance, rule, resolution, or regulation."[14] Here, the County's Board of Supervisors declared an emergency on February 10 but did not enact any of the changes at issue. Rather, County managers did so several months later. This is of no moment, however, because under all PERB-administered statutes, a non-statutory business necessity defense is available for any emergency measure an employer must take, no matter how accomplished. (*Imperial Irrigation District* (2023) PERB Decision No. 2861-M, pp. 55-56 (*Imperial*).)

[14] 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."

The same test applies, irrespective of whether an employer asserts the MMBA's statutory emergency defense, the non-statutory business necessity test, or both: An employer first must establish: (1) an actual emergency that (2) leaves no real alternative to the emergency measure(s) taken and (3) allows no time for meaningful negotiations before taking such action(s). (*Imperial*, *supra*, PERB Decision No. 2861-M, pp. 56 & 60.) Here, the County established that its actions were urgently needed to save lives. Accordingly, while normally the County could not act on a mandatory subject without first reaching an agreement with the exclusive representative or reaching an impasse and exhausting impasse procedures (*Bellflower*, *supra*, PERB Decision No. 2796, p. 9), here the County's duties did not include waiting for impasse or agreement before acting.

But the fact that the defense applies does not completely absolve the employer of its duty to afford a union with notice and the opportunity to bargain; rather, the employer must afford the union these rights "to the extent that the situation permits, although an impasse is not necessary." (*Santa Clara County Correctional Peace Officers' Assn., Inc. v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1032.) Thus, although an employer facing a true emergency can implement emergency measures before it reaches an impasse or an agreement, the employer must provide notice and opportunity to bargain to the extent practicable at all times. (*Imperial*, *supra*, PERB Decision No. 2861-M, p. 56.) For instance, "when a devastating earthquake forced two hospitals to close and 'swamped' the only functioning hospital in West Los Angeles, the Board found there was 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.)

Imperial, *supra*, PERB Decision No. 2861-M applied this important rule, holding as follows:

> "[E]ven 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. By asserting from the onset of negotiations that it had no obligation to bargain . . . 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."

(*Id*. at p. 53 [citation omitted].)

Prior to *Imperial*, we noted the same principle in *Oxnard*, *supra*, PERB Decision No. 2803: "The onset of the COVID-19 pandemic presented an emergency that temporarily curtailed the District's bargaining obligations because the District had to act almost overnight to protect staff, students, and their families from a transmissible, life-threatening virus." (*Id*. at p. 45.) From the briefing in this matter, it appears that the word "curtailed" contained sufficient ambiguity that the above passage from *Oxnard* required clarification, which *Imperial* subsequently provided. The meaning, as noted above, is that an employer facing a true emergency can take emergency measures without first reaching agreement or impasse, but the duty to afford notice and to bargain in good faith continues as much as is practicable, both before and after the employer implements emergency measures.

Finally, because an emergency is not a static event, changes taken in good faith reliance on a necessity defense must be limited to the timeframe that the emergency requires. (*Imperial*, *supra*, PERB Decision No. 2861-M, p. 56; *Oxnard*, *supra*, PERB Decision No. 2803, p. 45.) Thus, when the emergency lapses, the employer has a duty to honor a union's request to rescind emergency measures the employer implemented without completing negotiations.

B. The County's Legal Misinterpretation

Although the County could take necessary measures to save lives without first reaching an impasse or agreement with the Unions, it nonetheless had a duty to provide notice and an opportunity to bargain in good faith to the extent practicable in the particular circumstances. Unfortunately, the County violated the MMBA by wrongly asserting, throughout the relevant timeframe, that it had no duty to engage in good faith bargaining toward potential side letters of agreement. This was incorrect, because COVID-19 required rapid action, but did not eliminate the need to bargain in good faith even while taking such actions. Indeed, other California public entities found it possible to bargain and reach written agreements during the difficult early months of the pandemic (*Oxnard*, *supra*, PERB Decision No. 2803, p. 57; see also *id*. at pp. 4-19), and the record does not establish adequate reasons why the County was any different.

The County did meet with the Unions, on a near-daily basis in several of the pandemic's early weeks.[15] But a party cannot satisfy its duty to bargain in good faith merely by meeting and discussing a topic as it explicitly denies any duty to bargain. (*City of San Ramon*, *supra*, PERB Decision No. 2571-M, p. 15 [agreeing to meet for the sake of good labor relations does not satisfy bargaining obligation where employer denies obligation to bargain]; *Rio Hondo Community College District* (2013) PERB Decision No. 2313, adopting proposed decision at p. 5 [same].)

This case provides one illustration as to why a party cannot satisfy its duty to bargain by denying it has such a duty while agreeing to meet as a courtesy. When the Unions proposed side letters, thereby attempting to put agreements into writing or at least crystallize the parties' respective positions to open the door toward later compromises, the County stated that it would not engage in such negotiations. Rather, the County characterized the meetings as an opportunity for the Unions to "voice concerns and suggestions."

Certain parts of the County's legal interpretation were close to accurate. For instance, in its April 23 e-mail to SEIU, the County wrote that it "will not bargain to impasse over its COVID-19 responsive measures at this time." The County was correct to the extent this referenced its right to take emergency measures without first bargaining to impasse or agreement. And the same e-mail correctly noted that the County was making itself available to meet. However, because the e-mail also

[15] The County's ability to engage in near-daily meetings with the Unions further undermines its claim that time did not permit bargaining near the outset of the pandemic.

reiterated the County's refusal to bargain over side letter terms, it was part of the County's consistent policy blocking the Unions from asserting their rights to bargain as practicable over all aspects of DSW assignments, including selection of employees, training, staffing ratios, PPE and other safety measures, workload, leaves or accommodations for special circumstances, and hazard pay.[16]

The County's flat denial of its obligation to bargain means this case does not turn on more nuanced determinations as to how early it was practicable to give notice of the emergency measures at issue. Nonetheless, the record shows no reason why the County could not have generally provided the Unions notice when the County was still considering these measures. In some instances, this would have allowed negotiations to begin before a decision was finalized. Even when that was not possible, it would typically have allowed at least a preliminary bargaining session (if not more) before employees were notified. And even had the parties been unable to reach agreements, earlier notice would have made it clear the County was doing all it could to bargain, leading to more harmonious labor relations in a difficult period.[17]

IV. Remedial Issues

A failure to comply with bargaining obligations during an emergency can warrant an order to bargain, make-whole relief, rescission of changes, a

[16] As noted above, the parties had existing MOU provisions on float assignments and hazard pay but had not contemplated MOU provisions for assignments to private SNFs and motels during a pandemic, making those obvious points for the parties to negotiate.

[17] Among many examples of issues that could have been ameliorated was Mana-Ay working a day at The Ridge even though the County was never able to reach a staffing agreement with The Ridge.

cease-and-desist order, and a notice-posting order, among other remedies. (*Imperial*, *supra*, PERB Decision No. 2861-M, pp. 64-69.)

Here, we first order the County to bargain in good faith and cease and desist from further violations. We also order the County to post and communicate the attached notice, both physically and electronically. Given the sweeping nature of the County's assertion of emergency powers to disregard the MMBA, we order that the physical posting should occur County-wide.

There is no claim for make-whole relief before us, as the proposed order did not provide for such relief and the Unions do not challenge that omission. Nevertheless, nothing in this decision bars the parties from negotiating make-whole relief, either as part of complying with the bargaining order or otherwise.

Finally, we do not consider whether rescission would be appropriate even in the face of continuing emergency circumstances, as it is undisputed that the COVID-19 emergency has lapsed. Because changes taken in reliance on an emergency defense must be limited to the timeframe that the emergency requires (see *ante* at p. 35), the County must honor any request that one or both Unions may make to rescind, as to their respective bargaining units, either the SNF and motel assignments, one or both of the first two 2020 documents, or any combination thereof.

ORDER

Based upon the foregoing factual findings and legal analysis, and the entire record, the Public Employment Relations Board (PERB) finds that the County of Santa Clara violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3504.5, subdivision (b), 3505, and 3506.5, subdivision (c), when it failed and refused

to afford Registered Nurses Professional Association (RNPA) and Service Employees International Union Local 521 (SEIU) (collectively, the Unions) notice and an opportunity to meet and confer in good faith over: (1) assignments to skilled nursing facilities (SNFs) and motels; (2) new and amended disaster service worker (DSW) policies; and (3) the effects of scaling back services at certain medical clinics. The County also violated MMBA section 3506.5, subdivision (c) by failing to provide information the Unions requested. Finally, the County's conduct also derivatively interfered with the rights of bargaining unit employees to be represented by the Unions and derivatively denied the Unions' right to represent bargaining unit employees in violation of MMBA sections 3506 and 3506.5, subdivisions (a) and (b). All other claims in the charge and the complaint are DISMISSED.

Pursuant to MMBA section 3509, subdivision (b), we hereby ORDER that the County, its governing board and its representatives shall, after this decision is no longer subject to appeal:

A. CEASE AND DESIST FROM:

1. Failing or refusing to bargain in good faith with the Unions as required under the MMBA.

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

3. Denying the Unions their right to represent bargaining unit employees.

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

1. Upon request by RNPA and/or SEIU, bargain in good faith with the requesting Union(s) over DSW assignments and the two documents issued on or around April 13, 2020, titled as follows: “County Employees Serving as Disaster Service Workers,” and “Disaster Service Worker County Employees Frequently Asked Questions Sheet COVID-19 Pandemic.”

2. To the extent requested by RNPA and/or SEIU, rescind any COVID-related DSW assignments still in effect involving bargaining unit employees of the requesting Union(s).

3 Upon request by RNPA and/or SEIU, rescind one or both of the two documents issued in April 2020 that are listed by name in paragraph B(1), as to bargaining unit employees represented by the requesting Union(s).

4. Upon request by RNPA and/or SEIU, bargain in good faith with the requesting Union(s) over the effects of the County’s decision to scale back services at medical clinics in March and/or April 2020.

5. Within 30 days of a request from SEIU, provide SEIU with the following information: the results of the survey sent to RNPA and SEIU bargaining unit employees titled “COVID-19 Emergency: County of Santa Clara Employee/Disaster Service Worker,” the process for which the County intended to seek volunteers for the deployment to SNFs, what measures Canyon Springs had made to address their staffing shortage, and what measures the County had taken to secure registry services.

6. Within 30 days of a request from RNPA, provide RNPA with the following information, if these documents are within the County's possession: The ATD exposure control plans and Cal/OSHA logs for Canyon Springs and The Ridge for the applicable time period.

7. Post at all County work locations copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the County, indicating that the County will comply with the terms of this Order. Such postings shall remain in place for a period of 30 consecutive workdays. The County shall take reasonable steps to ensure that the Notice is not altered, defaced, or covered with any other material. In addition to physically posting the Notice, the County shall communicate it by electronic message, intranet, internet site, and other electronic means the County uses to communicate with employees.[18]

8. Notify OGC of the actions the County has taken to follow this Order by providing written reports as directed by OGC and concurrently serving such reports on RNPA and SEIU.

Members Paulson and Nazarian joined in this Decision.

[18] Any of the parties may ask PERB's Office of the General Counsel (OGC) to alter or 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.

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. SF-CE-1796-M, *Registered Nurses Professional Association & Service Employees International Union Local 521 v. County of Santa Clara*, in which all parties had the right to participate, the Public Employment Relations Board (PERB) has found that the County of Santa Clara violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq. by failing and refusing to afford Registered Nurses Professional Association (RNPA) and Service Employees International Union Local 521 (SEIU) (collectively, the Unions) notice and an opportunity to meet and confer in good faith over: (1) assignments to skilled nursing facilities (SNFs) and motels; (2) new and amended disaster service worker (DSW) policies; and (3) the effects of scaling back services at certain medical clinics. The County also violated the MMBA by failing to provide information the Unions requested.

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

A. CEASE AND DESIST FROM:

1. Failing or refusing to bargain in good faith with the Unions as required under the MMBA.

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

3. Denying the Unions their right to represent bargaining unit employees.

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

1. Upon request by RNPA and/or SEIU, bargain in good faith with the requesting Union(s) over DSW assignments and the two documents issued on or around April 13, 2020, titled as follows: “County Employees Serving as Disaster Service Workers,” and “Disaster Service Worker County Employees Frequently Asked Questions Sheet COVID-19 Pandemic.”

2. To the extent requested by RNPA and/or SEIU, rescind any COVID-related DSW assignments still in effect involving bargaining unit employees of the requesting Union(s).

3 Upon request by RNPA and/or SEIU, rescind one or both of the two documents issued in April 2020 that are listed by name in paragraph B(1), as to bargaining unit employees represented by the requesting Union(s).

4. Upon request by RNPA and/or SEIU, bargain in good faith with the requesting Union(s) over the effects of the County's decision to scale back services at medical clinics in March and/or April 2020.

5. Within 30 days of a request from SEIU, provide SEIU with the following information: the results of the survey sent to RNPA and SEIU bargaining unit employees titled "COVID-19 Emergency: County of Santa Clara Employee/Disaster Service Worker," the process for which the County intended to seek volunteers for the deployment to SNFs, what measures Canyon Springs had made to address their staffing shortage, and what measures the County had taken to secure registry services.

6. Within 30 days of a request from RNPA, provide RNPA with the following information, if these documents are within the County's possession: The ATD exposure control plans and Cal/OSHA logs for Canyon Springs and The Ridge for the applicable time period.

Dated: _____ County of Santa Clara

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.