STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, LOCAL 2076, Charging Party, v. COUNTY OF ORANGE, Respondent.	Case No. LA-CE-960-M PERB Decision No. 2611-M December 19, 2018

Appearances: Rothner, Segall & Greenstone, by Ellen Greenstone and Hannah S. Weinstein, Attorneys, for American Federation of State, County & Municipal Employees, Local 2076; Mark R. Howe, Supervising Deputy County Counsel, and Gabriel J. Bowne, Senior Deputy County Counsel, for County of Orange.

Before Winslow, Shiners, and Krantz, Members.

DECISION

SHINERS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by the County of Orange (County) to the attached proposed decision of an administrative law judge (ALJ). As relevant here, the County challenges the ALJ's conclusions that the County violated the Meyers-Milias-Brown Act (MMBA)[1] when it: (1) interfered with American Federation of State, County, and Municipal Employees, Local 2076's (Local 2076 or Union) rights to access employees at their workplace and to communicate with employees about grievances; (2) unilaterally changed policies and practices for requesting and using release time; and (3) retaliated against County Social Services Agency

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

(SSA) employees and Local 2076 representatives Nellie Le Gaspe (Le Gaspe) and Terri Whitney (Whitney) by disciplining them for engaging in protected activity.[2]

Based on our review of the proposed decision, the entire record, and relevant legal authority in light of the parties' submissions, we conclude that the ALJ's factual findings generally are supported by the record and that his conclusions of law are well reasoned and consistent with applicable law. Therefore, to the extent they are consistent with our discussion below, we adopt them as the decision of the Board itself.[3]

DISCUSSION

1. Interference with Workplace Access Rights

On April 23, 2014, three County employees who were Local 2076 site representatives spent approximately 30 minutes distributing Union surveys to employees at their work stations in the SSA's Eckhoff building. An SSA manager directed the three employees to leave. Later that day, the County's human resources manager directed Local 2076 to immediately stop distributing surveys "to employees in work areas during work time." The ALJ found that this

[2] The ALJ also concluded that Local 2076 failed to prove that the County: (1) unilaterally changed existing policies by requiring Union site representatives or stewards to use an AFSCME Release Time (ART) form to submit release time requests; (2) unilaterally imposed a new requirement that Local 2076 representatives taking release time inform their supervisors within 15 minutes if there will be a delay in returning to work; (3) unilaterally revised its Administrative Policies and Procedures by making grievance forms available online; or (4) retaliated against SSA employees and Union representatives Lupe Arias and Raymond Hartwell for engaging in protected activity. Because neither party excepted to these conclusions, they are not before the Board on appeal. Accordingly, the ALJ's conclusions regarding these issues in the attached proposed decision are binding only on the parties. (PERB Regs. 32215, 32300, subd. (c) [PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.]; *City of Torrance* (2009) PERB Decision No. 2004, p. 12.)

[3] Specifically, we address 12 of the County's 24 exceptions: Exceptions 1-5, 9, 14-15, 18, and 20-22. We do not address the County's remaining exceptions because they involve issues that are thoroughly and correctly addressed in the proposed decision. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 5.)

interfered with protected rights but the County asserts that its directive was a reasonable regulation.

The MMBA affords both employee and non-employee representatives of employee organizations access to areas in which employees work, subject to reasonable employer regulation. (*County of Riverside* (2012) PERB Decision No. 2233-M, p. 8.) Any such regulation must be both necessary to the employer's efficient operations or safety of employees or others, and narrowly drawn to avoid overbroad, unnecessary interference with the exercise of statutory rights. (*Ibid.*) Moreover, an employer's otherwise lawful access restrictions may nevertheless interfere with protected rights when applied discriminatorily against unions or protected activity. (*Sierra Sands Unified School District* (1993) PERB Decision No. 977, adopting proposed decision at pp. 11-12 & fn. 12; see, e.g., *West Contra Costa Healthcare District* (2010) PERB Decision No. 2145-M, pp. 19-20 [sign-in requirement did not constitute interference because employer imposed same requirement on other members of the public wishing to access the same areas].)

Because "work time is for work," an employer may restrict non-business activities during work time but "it may not single out union activities for special restriction, or enforce general restrictions more strictly with respect to union activities." (*Regents of the University of California (Irvine)* (2018) PERB Decision No. 2593-M, p. 8 (*Regents (Irvine)*); *Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, p. 50 ["Examples [of non-business activities] may include selling candy bars . . . , establishing an office pool [for] the Super Bowl, or selling raffle tickets for [a] social or a political cause. Whatever the occasion or cause, if the limited intrusion into worktime and work areas is

permitted, it cannot be denied for other, equally or less intrusive solicitation or concerted employee activities"].)

We affirm the ALJ's conclusion that the County disparately enforced restrictions on non-business activities in work areas during working time. Local 2076 presented credible evidence that the County was aware of and permitted employee-run social committees to fundraise for office parties, birthday celebrations, and other social events or team-building activities during other employees' work time. Specifically, SSA management allowed the social committees to have unmanned food shops, permitted staff to purchase shop items in support of committee activities during their work time, and allowed committee members to sell items from cubicle to cubicle. As the County conceded in its post-hearing brief, the social committees' activities occasionally cause a "small disruption . . . to working time."

In contrast, SSA Regional Manager Lorraine Perez Daniel (Perez Daniel) directed the three Local 2076 site representatives to leave after overhearing them ask employees about working conditions or work issues related to ongoing grievances. Thereafter, SSA Human Resources Manager Diane Greek directed Local 2076 to stop distributing surveys to employees in work areas during work time, referencing earlier incidents related to Local 2076's solicitation activities. Because they expressly singled out union activity as being inappropriate, these directives were facially discriminatory and not neutral prohibitions against non-business activities during work time. (See *Regents (Irvine), supra*, PERB Decision No. 2593-M, p. 5 [employer discriminated against protected activity by issuing prohibition that explicitly singled out union-related discussions rather than applying equally to all non-business activities during work time].) By allowing some minimally intrusive non-business activities in employees' work area during work hours, the County cannot simultaneously prohibit

employees from engaging in a similar level of communication merely because it involves employee organization activities. (*State of California (Departments of Personnel Administration, Banking, Transportation, Water Resources and Board of Equalization)* (1998) PERB Decision No. 1279-S, adopting proposed decision at pp. 47-53 (*DPA*).)[4]

The County responds that Local 2076's survey distribution activities were dissimilar to the social committees' activities. First, the County argues that survey distribution at employees' cubicles causes more disruption to its operations and work time than any intrusion by the social committees. But both Local 2076 President Raymond Hartwell (Hartwell) and Chief Steward Patricia Cortez (Cortez) testified that they spoke to individual employees for a few seconds each to explain the survey and request their participation.[5] Regional Manager Perez Daniel estimated that eight to ten other employees in her work area *could have* heard the individual conversations. On her testimony alone, the County suggests that this "had the

[4] Because the ALJ did not so find, and because it would not materially affect the remedy, we find it unnecessary to decide whether SSA management's allowance of "incidental personal conversations between employees" while on duty would be sufficient to support a finding of interference in the absence of the social committees' activities.

[5] The County asserts that Hartwell's and Cortez's testimony is not credible because they were unsure of specific details related to their survey distribution activities. On the first day of the hearing, Hartwell did not recall one of three locations, Eckhoff, at which he distributed surveys, yet he subsequently provided a detailed description of events that transpired there. We do not find Hartwell's testimony incredible, especially considering that he also testified on the first day that he spent a matter of minutes distributing surveys at two other worksites, which is consistent with his later testimony about Eckhoff. Cortez provided conflicting information about a sign-in sheet at Eckhoff on day one, two, and five of the hearing. It is not clear, however, why confusion regarding this single detail should render her otherwise consistent testimony about the distribution activities, including the length of time that she spent at each cubicle, not credible. Further, the County fails to cite any conflicting testimony or evidence that the Board should credit instead of Hartwell's and Cortez's testimony. In fact, Regional Manager Perez Daniel, who oversaw the Eckhoff location, testified that Local 2076 representatives were present at the site for approximately 25 minutes, including additional time they spent speaking with management representatives, which is consistent with Hartwell's and Cortez's testimony.

potential to create a significant disruption to working time" because the employees could also have listened while their coworkers spoke with Local 2076 representatives in adjacent cubicles. But the County failed to present any other evidence demonstrating that employees actually listened to and were distracted by the individual conversations. Absent contradictory evidence that Local 2076's actions were actually more disruptive than the social committees', the unrebutted evidence supports the ALJ's finding that these brief encounters had no greater impact on productivity than social committee fundraising activities.

The County also argues that the social committees' activities served a vital business and operational interest—increasing morale, team building, and generating a productive workforce—and the ALJ thus wrongly characterized those activities as "non-business activities" on par with Local 2076's survey distribution. We have consistently held that management may not regulate workplace access based on which non-business activities, in its view, promote workforce morale. For instance, in *DPA*, the State argued that certain morale-boosting activities, including e-mails announcing employee bicycle rides and cookie sales, were "part of the corporate culture and therefore State business." Rejecting this argument, the Board found that distinguishing between e-mails based solely on their union content was discriminatory and interfered with employees' statutory rights. (*DPA*, *supra*, PERB Decision No. 1279-S, adopting proposed decision at pp. 50-52.) Likewise, in *Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C, a court employer faced allegations it had discriminatorily enforced an e-mail use policy based on the union-oriented content of an employee's emails. (*Id.* at pp. 9-10.) It attempted to distinguish its decision not to discipline employees who sent e-mails announcing births and birthday parties by arguing those e-mails were permissible business activities because they "promote[d] camaraderie and team spirit,

which in the view of . . . management, boost[ed] employee morale and . . . productivity." The Board, however, found no reason to treat the similarly brief union e-mails any differently. (*Id.* at p. 16, fn. 13.)[6] Accordingly, the County's belief that the social committees are good for employee morale does not entitle it to grant committee members access to employees during their working time while simultaneously denying such access to Local 2076.

In sum, the County failed to present evidence that Local 2076's survey distribution activities: (1) threatened the County's efficient operations or the safety of its employees or others in ways the social committees' activities did not; and (2) that its enforcement of its policy was "narrowly drawn to avoid overbroad, unnecessary interference with the exercise of statutory rights." (See *County of Riverside*, *supra*, PERB Decision No. 2233-M, p. 8.) By instead distinguishing between the two activities based solely on their content, the County's discriminatory application of an otherwise lawful regulation—that work time is for work—interfered with Local 2076's statutory access rights.

2. Interference with Bulletin Board Postings

The ALJ also determined that the County interfered with protected rights by removing two Workload Grievances posted by Local 2076 on its designated bulletin boards. The County does not dispute that it removed the postings but instead asserts that: (1) it had a legitimate business interest in removing "derogatory" materials from the bulletin boards; and (2) Local

[6] In *Napa Valley Community College District* (2018) PERB Decision No. 2563, we disapproved of *DPA*, *supra*, PERB Decision No. 1279-S and *Los Angeles County Superior Court*, *supra*, PERB Decision No. 1979-C to the extent they held that employees do not have a presumptive right to use their employer's e-mail system to send statutorily-protected communications. (*Napa Valley Community College District*, *supra*, PERB Decision No. 2563, pp. 18-19.) We did not, however, disapprove of the portions of those decisions holding that an employer may not treat communications related to union business or other protected activity less favorably than it treats other non-business communications.

2076 waived its statutory right to post the grievances by agreeing to contractual provisions rendering the parties' respective grievance files confidential.

We concur with and therefore will not disturb the ALJ's well-reasoned factual findings and legal conclusions, which adequately address the issues raised by the County's exceptions. We note that the ALJ did not have the benefit of our decision in *Chula Vista Elementary School District* (2018) PERB Decision No. 2586 (*Chula Vista*) when analyzing the County's claimed interest in removing "derogatory" materials from the bulletin boards, though applying the standard articulated in *Chula Vista* to the facts of this case produces the same result.

The Board has long held that "[e]mployee speech and conduct may lose statutory protection [when] found to be sufficiently opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice as to cause substantial disruption of or material interference in the workplace." (*Chula Vista, supra*, PERB Decision No. 2586, p. 16, citing *State of CA (Department of Corrections & Rehabilitation)* (2012) PERB Decision No. 2282-S, p. 7; *Rancho Santiago Community College District* (1986) PERB Decision No. 602, p. 13 (*Rancho Santiago*).) In *Chula Vista*, we clarified that our *Rancho Santiago* standard encompasses two different tests. The first is content-based and requires the party claiming that employee speech is unprotected to prove: (1) the employee's statement was demonstrably false; and (2) the employee knew his or her statement was false or acted with reckless disregard for whether it was true or false. The second is conduct-based and analyzes whether the manner in which an employee communicated with a manager or supervisor was so opprobrious or disruptive to operations that it lost its statutory protection. (*Chula Vista, supra*, PERB Decision No. 2586, pp. 16-18 & fn. 9.)

Because the County claims that the content of both grievances was derogatory and therefore unprotected, we briefly address its relevant exceptions under *Rancho Santiago*'s first standard. The grievances generally alleged that managers "blatant[ly] disregard" employee safety, use "intimidation" to discourage employees from raising workplace issues with Local 2076, and "intimidate and threaten" discipline for failing to satisfy unclear productivity standards. Under *Rancho Santiago,* we generally allow communications about working conditions some leeway for intemperate language without losing statutory protection. For example, in *Rancho Santiago,* we found newsletter articles comparing management to Nazis and Soviet KGB agents to be protected, notwithstanding their "exaggerated and overstated" language, because the underlying events described in the articles were widely known on campus and were described with sufficient detail to allow the reader to make his or her own judgment about the events. (*Rancho Santiago, supra*, PERB Decision No. 602, pp. 13-14.)

Here, although Local 2076's Workload Grievances were uncomplimentary to management, they were within the realm of rhetoric typically employed in labor disputes and which management is "likely to encounter at least occasionally in the routine course of business." (*Pomona Unified School District* (2000) PERB Decision No. 1375, p. 16.) Even if the grievances used exaggerated language—which is not clear from the record—the County failed to offer any evidence demonstrating that Local 2076 or the grievants knew the claims in the grievances were false or that they acted with reckless disregard for their truthfulness. Furthermore, the grievances described working conditions that were commonly known to employees in SSA where the grievances were posted. (See *Rancho Santiago, supra,* PERB Decision No. 602, pp. 13-14 [employee's language, though exaggerated, had "some basis in fact" and sufficiently described widely-known events, enabling the intended audience to

"draw[]its own judgments about both [her] articles and [the] events."].) Accordingly, the language of the grievances is protected under the MMBA, and the County's removal of the grievances from Local 2076's designated bulletin boards therefore interfered with the Unions' and employees' rights to communicate about working conditions.

3. Unilateral Changes to Release Time Policies and Practices

The ALJ found that the County committed several unilateral changes to its release time policies and practices by: (1) placing limits on the number of representatives eligible for release time for each given meeting; (2) requiring site representatives to identify the employee they were meeting with when submitting ART forms; (3) requiring forty-eight hours' notice of the need for release time; and (4) discontinuing past release time practices granting site representatives release time to file grievances in person at County offices. The County generally challenges these findings on the basis that it had a significant and nonnegotiable managerial or policy interest in taking such actions to curb release time abuse.

To prove an unlawful unilateral change under the MMBA, Local 2076 must establish that: (1) the County took action to change policy; (2) the change in policy concerns a matter within the scope of representation; (3) the action was taken without giving Local 2076 notice or opportunity to bargain over the change; and (4) the action had a generalized effect or continuing impact on terms and conditions of employment. (*Pasadena Area Community College District* (2015) PERB Decision No. 2444, pp. 11-12.)

As the ALJ correctly found, the County altered its release time policies and past practices without giving Local 2076 notice or an opportunity to bargain over the changes.[7]

[7] The County challenges the ALJ's conclusion that it violated past practices of allowing multiple union representatives to attend various meetings and granting release time for employees to file grievances in person at the County offices. Specifically, it argues that trends

These changes have a generalized effect or continuing impact on employees' terms and conditions of employment based on the County's continued assertion of a contractual or other legal right to unilaterally implement these changes. (*County of Santa Clara* (2015) PERB Decision No. 2431-M, p. 19.)

In its exceptions, the County's primary argument is that the changes were not within the scope of representation because they had "a negligible impact on the ability of representatives to utilize release time" while "the County had a significant managerial interest in curbing release time abuses." We disagree with both contentions.

It is well-established that union release time falls within the scope of representation because of its relationship to employer-employee relations and its direct impact upon employees' wages and hours of employment. (*Centinela Valley Union High School District* (2014) PERB Decision No. 2378, p. 8; *County of Riverside*, *supra*, PERB Decision No. 2307-M, p. 22; *City of Torrance* (2008) PERB Decision No. 1971-M, p. 24.) The County, citing *Claremont Police Officers Association v. City of Claremont* (2006) 39 Cal.4th 623 (*Claremont*), nonetheless claims it had no duty to meet and confer over the release time changes because their impact on wages, hours, and working conditions was de minimis.

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or experiences spanning periods of roughly eighteen months or one year, respectively, are of insufficient length to establish a past practice given the parties' lengthy relationship. The Board has consistently declined to promulgate a bright-line rule setting the length of time necessary to establish a past practice and we decline to do so here. We instead consistently describe a binding past practice as one which is "unequivocal, clearly enunciated and acted upon, and readily ascertainable *over a reasonable period of time* as a fixed and established practice accepted by both parties. . . . [We have also] described an enforceable past practice as one that is 'regular and consistent' or 'historic and accepted.'" (*County of Riverside* (2013) PERB Decision No. 2307-M, p. 20, emphasis added.) No magic number of months or years is required to develop a past practice. We must examine a variety of elements related to the parties' past practice on a case-by-case basis, including the consistency or fluctuation of that practice over a given period. Accordingly, we adopt the ALJ's well-reasoned conclusions that Local 2076 established the parties' unequivocal, fixed, and longstanding practices, which the County failed to rebut.

The evidence demonstrates that, as a result of the Release Time Guidelines Letter, the County no longer permits Local 2076 to bring additional site representatives to grievance, disciplinary, investigatory, interactive process, and other meetings for training purposes or to provide varying points of view reflecting cultural differences at issue in those meetings. Additionally, while the County occasionally waives noncompliance with the guidelines, witnesses credibly testified that there were at least some instances in which their supervisors denied release time requests for failure to comply with the new forty-eight hour notice requirement. Some employees also resisted identifying themselves on the new ART forms, and union representatives, therefore, could not identify to management the employees they planned to meet with during release time. The County thus denied several union representatives' release time requests, forcing the employees and representatives to meet on their own personal time. The County similarly discontinued existing past practices by rejecting release time requests to personally file grievances at County offices, causing union representatives to carry out union business on their personal time, rather than on release time as they would have under the prior practice.

Each of these changes resulted in denials of paid release time employees and their representatives would have otherwise received under the County's previous policies and practices. This case is thus unlike *Claremont, supra*, 39 Cal.4th 623, in which the court found that a requirement that police officers spend an additional two minutes gathering information at each traffic stop was not negotiable because it had a de minimis impact on the terms and conditions of employment. Here, the County's changes to its release time policies and practices had more than a de minimis impact on employees' wages and terms and conditions of employment.

Nor does the County's asserted managerial interest in curbing release time abuse excuse its bargaining obligation on the facts before us. First, the County's evidence supporting this claim focuses solely on Union President Hartwell's and Union Secretary and steward Le Gaspe's use of release time. This evidence does not show the rampant, County-wide abuses implied by the County's exceptions. Rather, it more accurately demonstrates that the decision was aimed at resolving internal workload and performance issues specific to Hartwell and Le Gaspe. As detailed above, however, the effect of the County's decision was much broader.

Second, the County's two witnesses rely on out-of-court complaints they received from Le Gaspe's direct supervisor to demonstrate that Le Gaspe took "a lot of time [on] Union meetings or activities" and failed to provide sufficient advance notice of her need for release time. However, Le Gaspe's direct supervisor did not testify and there is no other evidence supporting a finding that she abused release time. Absent such evidence, the two managers' testimony regarding verbal complaints they received is uncorroborated hearsay and cannot support a factual finding. (PERB Reg. 32176.) Hartwell's supervisor testified that he was routinely behind in completing work tasks but she did not specifically tie his performance issues to any abuses or violations of release time policies. And the County presented no evidence showing release time abuse by any other County employee. The County thus failed to prove that Local 2076 representatives were abusing release time.

Nonetheless, proving such abuse would not relieve the County of its obligation to bargain over changes to its release time policies. Conflicts over release time are well suited to "the mediatory influence of negotiations." (*Anaheim Union High School District* (1981) PERB Decision No. 177, p. 7.) Accordingly, release time policies are not a fundamental managerial prerogative. (*Id*. at p. 10.) Thus, even if the County had proven rampant release time abuse—

and it has not—that would not tip the balance in favor of allowing the County to unilaterally alter release time policies.

For these reasons, we dismiss the County's exceptions challenging the ALJ's conclusion that the County violated the MMBA by unilaterally changing release time policies and practices.

4. Retaliation Against Nellie Le Gaspe

The County also excepts to the ALJ's determination that it retaliated against Local 2076 Secretary and steward Le Gaspe because of her exercise of protected rights. Retaliation is demonstrated where: (1) the employee exercised rights under the MMBA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*County of Riverside* (2009) PERB Decision No. 2090-M, p. 25, citing *Novato Unified School District* (1982) PERB Decision No. 210, pp. 6-8.) If the charging party proves all the elements of a prima facie case, then the burden of proof shifts to the employer to establish that it had an alternative non-discriminatory reason for the adverse action, and that it, in fact, acted because of this alternative non-discriminatory reason and not because of the employee's protected activity. (*Palo Verde Unified School District* (2013) PERB Decision No. 2337, p. 31.)

On January 7, 2014, Le Gaspe, an intake worker at the SSA's Central Regional Office, interviewed a public benefits applicant, K.M.,[8] to determine her eligibility for benefits. During the interview, supervisor Tamera Bethune (Bethune) entered the room to inquire about another applicant assigned to Le Gaspe who had been waiting to be interviewed. Le Gaspe testified that Bethune's interrupting an ongoing intake interview and allegedly referring to the other

[8] To protect the applicant's privacy, we refer to her only by her initials.

applicant by name violated agency rules and protocol. According to Le Gaspe, K.M. requested, and Le Gaspe provided, a form to file a complaint against Bethune.

After the interview, Le Gaspe rescheduled her remaining interviews so she could report the incident to Tawnya Reveles (Reveles), a higher-level supervisor in Le Gaspe's and Bethune's chain-of-command. Le Gaspe testified that, when she arrived, she found Bethune already in Reveles' office, and that Reveles scolded her for being unprofessional and keeping other applicants waiting for extended time periods.

After the meeting, SSA Manager Raymond Perez (Perez) informed Reveles that K.M. had filed a complaint against Bethune. Reveles met with K.M. on January 9, 2014 to discuss her complaint. Reveles testified that K.M. told her that Le Gaspe was upset after Bethune left the room and coerced K.M. into filing a complaint. K.M. recanted her complaint and provided Reveles with a written summary of their discussion. Reveles testified that neither she nor any other supervisor spoke with Le Gaspe about K.M.'s second statement at this time. Thereafter, Reveles reassigned K.M. to another eligibility worker, resulting in a verbal confrontation between Reveles and Le Gaspe.

On or about May 12, 2014, Local 2076 filed two grievances regarding changes in working conditions that had occurred on an ongoing basis since late 2013. Le Gaspe, among others, signed the grievances, generally alleging an unsafe and hostile work environment; high stress and injury levels; lack of direction, training, and support from management; variances in performance expectations; unequal distribution of work; disparate treatment of union stewards for their grievance activity; and intimidating and threatening tactics by supervisors and management to keep eligibility workers from raising these issues.

After filing them, Local 2076 posted both Workload Grievances on its designated bulletin boards at different County worksites. After consulting SSA Human Resources, SSA management removed the grievances from the bulletin boards. At or about that time, Reveles told Le Gaspe that, in addition to the prohibition against posting the grievances to Local 2076 bulletin boards, she also could not display copies of the grievances in her cubicle.

In May 2014, another public benefits applicant filed a complaint against Le Gaspe. Reveles met with management and human resources to discuss disciplining Le Gaspe. After conducting a May investigatory interview with Le Gaspe, at which time she was permitted to respond to K.M.'s January allegations, both Perez and Reveles favored terminating her employment, but the County instead issued Le Gaspe a written reprimand on May 30, 2014.

As determined above, Le Gaspe engaged in protected activities in both her roles as Local 2076's secretary and steward. The County does not except to the ALJ's determination that the County had knowledge of those activities and that her written reprimand was an adverse action. Therefore, the only issues before the Board are whether the County's decision to issue a written reprimand was unlawfully motivated and, if so, whether the County established that it would have taken the same action in the absence of Le Gaspe's protected activity.

The County first asserts that the ALJ erroneously imputed union animus to Perez and Reveles even though they were not the same managers who made the decisions to remove Local 2076's Workload Grievances from the bulletin board or to implement unilateral changes to County release time policies. Outward expressions of animosity by an employer or one of its agents toward unions or other protected activity may support an inference of unlawful motive in a discrimination or retaliation case. (*City of Oakland* (2014) PERB Decision

No. 2387-M, pp. 19, 32.) The Board has thus found that separate but related unfair practices may provide circumstantial evidence of union animus, and therefore support the conclusion that adverse actions were taken because of that animus. (*Id.* at p. 27, fn. 9, citing *City of Torrance*, *supra*, PERB Decision No. 1971-M, p. 21, fn. 13 ["Employer statements alleged as interference violations are also relevant for inferring unlawful motive"].)

In *City of Torrance, supra*, PERB Decision No. 1971-M, the mayor-elect expressed to the union president his disappointment in her protected activities. He also told her that he would have a difficult time working with her organization as long as she remained the president. (*Id.* at pp. 3-4, 7, 19-21.) While it was the mayor who interfered with the union president's statutory rights, it was the city manager who decided to take the retaliatory action of demanding reimbursement for use of release time. (*Id.* at pp. 6-7.) Although there was "no direct evidence of [the mayor's] involvement in the adverse actions taken" against the president, the Board held that it was appropriate, based on the record as a whole, to impute his animus to the city manager. Through his high-ranking position, the Board believed the mayor was able to influence the city manager's decision either by directing the retaliatory action or by "tacitly approv[ing] of the city manager's actions." (*Id.* at p. 22.)

The facts of the present case are analogous. The County, through SSA's Human Resources, interfered with Local 2076's representation of employees and implemented unilateral changes to County release time policies. Both Perez and Reveles were either directly involved in or aware of those actions. First, Le Gaspe provided uncontested testimony that at or about the same time that management removed the grievances from Local 2076's bulletin boards, Reveles instructed Le Gaspe that she must also remove the grievances from her cubicle. Reveles thus personally participated in the County's interference with Le Gaspe's

right to communicate with other employees about grievances shortly before "consulting" on the County's investigation and subsequent discipline of Le Gaspe. Second, Reveles affirmatively testified that she "quarrel[ed]" with Le Gaspe about her habit of taking "excessive" release time or providing little to no notice of her need for such leave. Perez similarly testified that he received many supervisors' complaints about Local 2076's use of release time before the unilateral changes to those procedures in June 2014. He notified the SSA's Central Regional Office Human Resources of the issue and they instructed him to monitor use of release time on a continuous basis, during which time he was not satisfied with what he perceived as a misuse of release time that was "getting worse." Based on this evidence, we find that, in addition to other nexus elements thoroughly analyzed in the proposed decision, the ALJ properly imputed union animus to both Reveles and Perez.

The County also challenges the ALJ's conclusion that it failed to meet its burden to prove that it would have taken the same course of action even if Le Gaspe had not engaged in any protected activities. Specifically, the ALJ found that the County failed to prove that those responsible for issuing Le Gaspe's reprimand relied "in good faith" on K.M.'s complaint against Le Gaspe for her alleged coercive behavior during their January 7, 2014 meeting. The County asserts that the ALJ improperly imposed a new "good faith" evidentiary standard against it where none is required.

Where, as here, it appears that the employer's adverse action was motivated by both lawful and unlawful reasons, the question becomes whether the adverse action would not have occurred "but for" the protected activity. (*City of Oakland, supra,* PERB Decision

No. 2387-M, p. 17.) The County thus must establish both that it had a legitimate, non-discriminatory reason for taking the adverse action and that the reason proffered was, in fact, the reason for taking the adverse action. (*Ibid.*)

In retaliation cases, PERB does not determine whether the employer had cause to discipline the employee; rather, we determine only whether the employer took the action for an unlawful reason. (*Escondido Union Elementary School District* (2009) PERB Decision No. 2019, p. 21.) Accordingly, we must examine the record before us and the employer's proffered justifications to determine "whether the justification . . . was honestly invoked and . . . 'was, in fact the cause of the employer's challenged action.'" (*Palo Verde Unified School District*, *supra*, PERB Decision No. 2337, p. 32.) When the evidence shows the employer relied on an accusation that it did not believe in good faith to be true, we have found the justification for discipline to be a pretext for retaliation. (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M, adopting proposed decision at pp. 11, 19 [supervisor used an employee's allegedly false accusations, as reported to the supervisor by another employee, as pretext for retaliation because the supervisor did not believe in "good faith" the former had actually made a false allegation].)

Here the County did not present reliable evidence establishing that it honestly believed K.M.'s complaint against Le Gaspe before relying on it as a basis for discipline. As the ALJ noted, the County failed to resolve contradictory statements in K.M.'s initial complaint against Bethune and her subsequent complaint against Le Gaspe, which raised serious questions about K.M.'s credibility and thus the validity of either of her complaints. Nor did the County explain how it determined K.M.'s second complaint was more credible than Le Gaspe's response to it. Given the severity, as described by County witnesses, of Le Gaspe's alleged witness coercion

and confidentiality violations, at a minimum the County would be expected to determine whose account to credit. Had the County presented any corroborating testimony or evidence demonstrating that it had some basis to support its conclusions, the County's proffered justification may have been more credible. It instead appears that the County took K.M.'s second statement at face value.

Based on our review of the record, the ALJ did not hold the County to a new "good faith" standard requiring the County to prove that it had sufficient cause to discipline Le Gaspe as much as he noted the flaws in the County's justification. Consistent with longstanding precedent, we agree with the ALJ that the County failed to establish that the proffered reason was, in fact, the reason for taking the adverse action.

Even assuming the County sufficiently investigated and legitimately believed K.M.'s second complaint, it failed to provide any non-hearsay evidence from which the ALJ could find that the County actually reprimanded Le Gaspe for the conduct described in that complaint. The Board requires sufficient independent, non-hearsay evidence to conclude that the challenged action would have occurred in the absence of the employee's protected activity. (*Palo Verde Unified School District*, *supra*, PERB Decision No. 2337, pp. 19-25; *Escondido Union Elementary School District* (2009) PERB Decision No. 2019, p. 23 [hearsay alone "cannot suffice to meet the [employer's] burden of proof that it would have [taken the adverse action] even had the [employee not exercised protected rights]"]; see also PERB Reg. 32176.) In order to utilize K.M.'s second complaint in its defense, the County needed to present independent, non-hearsay evidence showing that the events used to justify the reprimand actually occurred. (*Palo Verde Unified School District*, *supra*, PERB Decision No. 2337, p. 23; *Escondido Union Elementary School District*, *supra*, PERB Decision No. 2019, p. 29.)

The County provided none, and therefore failed to prove that its proffered reasons for reprimanding Le Gaspe were the actual reasons it took that adverse action against her.[9]

ORDER

Based upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the County of Orange (County) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3505, 3506, and 3506.5, subdivisions (a), (b), and (c); and California Code of Regulations, title 8, section 32603, subdivisions (a), (b), and (c). The County violated the MMBA by: (1) interfering with American Federation of State, County, and Municipal Employees, Local 2076's (Local 2076) access rights and employees' ability to communicate with each other about protected subjects; (2) unilaterally changing policies concerning requesting and using release time; and (3) retaliating against Local 2076 representatives Nellie Le Gaspe and Terri Whitney. All other claims in the PERB complaint were either withdrawn or dismissed.

Pursuant to MMBA Section 3509, subdivision (b), it hereby is ORDERED that the County, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Unilaterally implementing policies within the scope of representation.

2. Interfering with Local 2076's right to represent its members, including, but not limited to, applying rules about non-business activity in the workplace disproportionately against protected activity.

[9] We reject the County's argument that evidence of other complaints against Le Gaspe should add to the reliability of the hearsay statements. The other complaints, while similarly concerning Le Gaspe's professional behavior, are unrelated to and do not establish the veracity of K.M.'s specific complaint. Moreover, those additional complaints are themselves uncorroborated hearsay that cannot support a factual finding.

3. Interfering with employees' rights, including, but not limited to, removing communications concerning subjects protected under the MMBA from Local 2076's designated bulletin boards.

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

1. Rescind the April 23, 2014 directive prohibiting Local 2076 from distributing surveys to employees.

2. Rescind the June 4, 2014 Release Time Guidelines letter and the associated AFSCME Release Time request form, to the extent that those documents are inconsistent with this decision.

3. Compensate Local 2076 site representatives for any financial losses incurred as a direct result of all unilaterally implemented release time policies. Any financial losses should be augmented by interest at a rate of 7 percent per annum.

4. Rescind the May 30, 2014 Written Reprimand issued to Nellie Le Gaspe.

5. Rescind the April 21, 2014 Memorandum of Expectations issued to Terri Whitney.

6. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all work locations where notices to employees in the Eligibility Unit bargaining unit customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the County, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. The Notice shall also posted by electronic message, intranet, internet site, and other electronic means customarily used by the County to communicate with employees in the Eligibility Unit. (*City of Sacramento* (2013) PERB Decision No. 2351-M.)

Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.

7. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board or the General Counsel's designee. The County shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on Local 2076.

Members Winslow and Krantz joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. LA-CE-960-M, *American Federation of State, County, and Municipal Employees, Local 2076 v. County of Orange*, in which all parties had the right to participate, it has been found that the County of Orange violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq. by: (1) interfering with American Federation of State, County, and Municipal Employees, Local 2076's (Local 2076) access rights and employees' ability to communicate with each other about protected subjects; (2) unilaterally changing policies concerning requesting and using release time; and (3) retaliating against Local 2076 representatives Nellie Le Gaspe and Terri Whitney.

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

A. CEASE AND DESIST FROM:

1. Unilaterally implementing policies within the scope of representation.

2. Interfering with Local 2076's right to represent its members, including, but not limited to, applying rules about non-business activity in the workplace disproportionately against protected activity.

3. Interfering with employees' rights, including, but not limited to, removing communications concerning subjects protected under the MMBA from Local 2076's designated bulletin boards.

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

1. Rescind the April 23, 2014 directive prohibiting Local 2076 from distributing surveys to employees.

2. Rescind the June 4, 2014 Release Time Guidelines letter and the associated AFSCME Release Time request form, to the extent that those documents are inconsistent with this decision.

3. Compensate Local 2076 site representatives for any financial losses incurred as a direct result of all unilaterally implemented release time policies. Any financial losses should be augmented by interest at a rate of 7 percent per annum.

4. Rescind the May 30, 2014 Written Reprimand issued to Nellie Le Gaspe.

5. Rescind the April 21, 2014 Memorandum of Expectations issued to Terri Whitney.

Dated: _____ COUNTY OF ORANGE

By: _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, LOCAL 2076, Charging Party, v. COUNTY OF ORANGE, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-960-M PROPOSED DECISION (April 29, 2016)

Appearances: Rothner, Segall & Greenstone, by Ellen Greenstone and Hannah S. Weinstein, Attorneys, for American Federation of State, County & Municipal Employees, Local 2076; Mark R. Howe, Supervising Deputy County Counsel, and Gabriel Bowne, Senior Deputy County Counsel, for County of Orange.

Before Eric J. Cu, Administrative Law Judge.

In this case, an exclusive representative accuses a public agency of interfering with rights protected under the Meyers-Milias-Brown Act (MMBA),[1] unilaterally changing negotiable policies, and retaliating against union activists. The public agency denies any violation.

PROCEDURAL HISTORY

American Federation of State, County & Municipal Employees, Local 2076 (AFSCME or Local 2076) filed the instant unfair practice charge with the Public Employment Relations Board (PERB or Board) on October 16, 2014. On February 10, 2015, the PERB Office of the General Counsel issued a complaint on Local 2076's behalf, alleging that the County of

[1] The MMBA is codified at Government Code Section 3500 et seq.

Orange (County) violated the MMBA and PERB Regulations[2] by restricting Local 2076 representatives from distributing surveys to represented employees, removing copies of filed grievances from union designated bulletin boards, unilaterally changing policies concerning release time use, refusing requests to negotiate over new grievance policies and procedures, and retaliating against current and/or former representatives Raymond Hartwell, Lupe Arias, Nellie Le Gaspe, Terri Whitney, and Tina Guillen because of their union activity. The County filed its answer to the PERB complaint on February 23, 2015, denying that its conduct violated the law.

An informal settlement conference was held on May 26, 2015, but the case did not settle. The formal hearing took place on August 31 and September 1 through 4, 2015.[3] On the last day of hearing, Local 2076 withdrew its claims that the County retaliated against Guillen. On October 12, 2015, Local 2076 filed a motion to make minor corrections to the transcript.[4] The parties filed closing briefs on December 4, 2015. On December 7, 2015, Local 2076 filed a table of contents and table of authorities as an addendum to its closing brief. At that point the record was closed and the matter was considered submitted for decision.

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

[3] In her opening remarks on the first day of hearing, counsel for Local 2076 suggested that AFSCME would be moving to amend the complaint to assert additional adverse employment actions taken against Hartwell, Le Gaspe, and Guillen. However, no such motion was ever made or ruled upon.

[4] No opposition to the motion was filed pursuant to PERB Regulation 32209. The motion is considered granted as part of the findings in this proposed decision, except as it pertains to proposal to change "wasn't following" to "was following" in Volume II, page 138, line 1. Based on both my recall of the testimony and my reviewing the audio files from the hearing, I find that the transcript correctly captured the witness's testimony.

FINDINGS OF FACT

The Parties

The County is a "public agency" within the meaning of MMBA Section 3501, subdivision (c), and PERB Regulation 32016, subdivision (a). Local 2076 is an "exclusive representative" within the meaning of PERB Regulation 32016, subdivision (b). Local 2076 represents what the parties call the "Eligibility Unit" consisting of non-supervisory employees in the County's Social Services Agency (SSA) who are responsible for determining the public's eligibility for various County-provided public assistance programs.

The Parties' Memorandum of Understanding

The parties were signatories to a Memorandum of Understanding (MOU) with an effective term of 2009 to 2012. Local 2076 President Hartwell said that the MOU was "in effect" until the parties reached a successor MOU in around October 2014. However, it was unclear from his testimony whether the parties reached a formal agreement to extend the 2009-2012 MOU, or whether the parties were simply operating under the terms of the expired agreement. The parties' successor MOU had a retroactive effective date and had a term of 2012 to 2016. References to the MOU in this proposed decision will be to the 2009-2012 MOU, unless stated otherwise.

The Grievance Procedure

The MOU at Article IX contains a grievance procedure for resolving contract disputes and certain disciplinary matters. Under Section 3, either individual employees, groups of employees, or Local 2076 may file grievances. Grievants may represent themselves or elect to be represented by Local 2076. Only previously designated Local 2076 site representatives are authorized to represent grievants in the process. Additionally, AFSCME business

representatives may participate starting at Step 2, and at earlier stages with the County's agreement.[5] Local 2076 is required to submit a list of its site representatives periodically to County Human Resources (HR).

Generally speaking, the grievance process includes the opportunity for informal resolution (Section 6), followed by three formal pre-arbitration Steps (Section 7). If the grievance is not resolved at Step 3, it will be referred to binding arbitration. Section 2, subdivision H, specifies that "[t]he County and AFSCME agree that their respective grievance files shall be confidential."

Section 5, provides for release time for grievants and/or site representatives. Grievants are entitled to reasonable time off, with pay, to attend grievance meetings with either the County or with a site representative. Additionally, "an authorized grievance/appeal representative" is entitled to reasonable paid time off to meet with either the County or the grievant, or to investigate the grievance. Grievants and site representatives must obtain permission from their supervisors, who determines whether the time off would unduly interfere with work operations. The MOU does not specify how much advance notice must be provided to the employee or representative's supervisor. These provisions remained essentially unchanged in the 2012-2016 MOU.

Other References to Union Representation in the MOU

The MOU contains other references to employees' right to be represented by Local 2076 in particular situations. Some of those references use language similar to Article IX,

[5] The record contains different terms for describing union representatives. Unless quoting a relevant source, this proposed decision will refer to County-employed Local 2076 officials as "site representatives." It is understood that this term is, more or less, interchangeable with the term "steward" or "grievance/appeal representative." This proposed decision will refer to AFSCME-employed staff assigned to assist Local 2076 in labor relations as "business representatives."

Section 5. For instance, in Article III, Section 1(C), employees who fail to pass probation may meet with management to discuss that outcome and may be represented in that meeting by "an authorized grievance/appeal representative." Under Article VIII, Section 7(B), employees who are required to attend investigatory meetings that might lead to discipline may be represented by "a Union Steward" or "an AFSCME staff representative." In Article VIII, Section 2(E), employees participating in a *Skelly* hearing[6] "may be represented in the disciplinary hearing by AFSCME."

Other Release Time Provisions in the MOU

The MOU contains other release time provisions including "Leave for Union Business" (Art. IV, § 8), AFSCME Union Officer Leave" (Art. IV, § 8), "AFSCME Union Officer Leave" (Art. IV, § 12), formal steward trainings (Art. XIII, § 8), and the "Union – Management Council" (Art. XXIII). The 2012-2016 MOU contains substantially similar language.

Bulletin Board Provisions in the MOU

Article XIII, Section 4, requires the County to provide Local 2076 with bulletin boards in SSA facilities "provided that such use does not interfere with the needs of the agency and material posted is not derogatory to the County, County employees, or other employee organizations." The 2012-2016 MOU contains substantially similar language.

The County Employee Relations Resolution

The County has an Employee Relations Resolution (ERR) that was adopted by its Board of Supervisors on May 15, 1990. Similar to MOU Article XIII, Section 4, ERR Section

[6] The term *Skelly* meeting or hearing refers to a pre-disciplinary hearing that complies with the due process requirements set forth in *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194. This hearing allows public employees to challenge the sufficiency of the evidence in certain proposed discipline. (*City of Modesto* (2008) PERB Decision No. 1994-M, p. 2, fn. 3.)

18, requires the County to provide exclusive representatives with use of bulletin board space "provided that such use does not interfere with the needs of the agency/department and the material posted is not derogatory to the County, County employees and officers, or other employee organizations."

ERR Section 15, provides recognized employee organizations with paid release time for up to three employees for negotiations. The requesting organization is required to provide at least two days' advance notice and the use of this release time must be reasonable and cannot interfere with County services. Both the limits on the number of representatives and the amount of notice may be waived by the County.

ERR Section 19 permits unions to distribute literature "during the non-working hours of the employees involved."

The Discipline Process

The County may issue discipline in the form of Written Reprimands, suspensions, and termination. In addition, the County has various non-disciplinary devices relevant to this case. Memoranda of Expectations (MOEs) are written statements of a supervisor's expectations to an employee. The document is intended to communicate a particular rule or policy. The document does not reside in the employee's personnel file. Instead, it stays in the supervisor's "drop file," until the employee's next performance evaluation. If, during that time, the supervisor feels that the reason for the MOE has been addressed, he or she may destroy the document. If the matter is not addressed, the MOE may be referred to in subsequent County actions. According to County HR supervisor and former "AFSCME Liaison" Ken Santini, MOEs typically have several levels of review involving both SSA management and HR.

Corrective Counseling Memoranda, or Summaries of Conference (SOCs) are written documents summarizing a counseling meeting between a supervisor and an employee about a performance issue. SOCs operate similarly to MOEs in that they are not disciplinary, do not reside in the employee's personnel file, and may be destroyed at the supervisor's discretion if he or she believes the subject matter of the SOC was adequately addressed. Corrective Action Plans (CAPs) are plans developed by an employee and his or her supervisor to address perceived performance deficiencies.

HR representative Gerlyn Bowman said that the County has issued MOEs to eligibility workers for issues such as failing to comply with established policy, unproductivity, and failure to follow directives.

The SSA

The SSA administers various County public assistance programs including Medi-Cal, food assistance (CalFresh), and work opportunity assistance (CalWORKS). The SSA has around 4,000 employees, including around 1,000 in the Eligibility Unit. Eligibility workers in Local 2076's unit meet with applicants for and recipients of public assistance to determine eligibility for one or more assistance program. There are multiple levels of supervisors and managers above eligibility workers in the SSA chain-of-command, many of whom are represented by other unions.

SSA has multiple locations throughout the County. Some locations are configured specifically for the types of benefits administered there, but for the most part, all locations have lobbies that are open to the public and secured areas that require permission to access. Eligibility workers meet clients and applicants in the lobby and escort them into the secured areas for interviews either in cubicle or in private interview rooms.

Employees working in cubicles are permitted to speak to one another throughout the day. Eligibility workers may have casual conversations and other interactions not directly pertaining to work. For instance, employees may circulate sympathy cards and birthday cards for others. According to Senior Employee Relations Manager Marc Gallonio, those gestures have a "very minimal impact [on work], and I think it's just a kindness, you know, human nature pieces of working with people."

The County also permits "social committees" or "staff advisory committees," where groups of employees sell food items or raffle tickets to fund office parties, birthday celebrations, and other "team-building" activities. According to SSA HR Manager Diane Greek, the committees have unmanned "food shops" in different buildings where staff may purchase items under the "honor system" to support of committee activities. Greek explained that the County condones this activity because she did not believe that committee members used staff time and because it was "one way to just get some fun into the workplace. [. . .] It helps build morale." Other witnesses explained that, in practice, SSA managers allow committee members to conduct activities during work hours using County resources. According to eligibility worker and Local 2076 steward Whitney, the "spirit committee" at her facility goes cubicle to cubicle during the day selling items. Eligibility worker and Local 2076 Chief Steward Patricia Cortez testified similarly. Both said that those activities were done with the knowledge of site management. There was no evidence of any limitation placed on social committee activities.[7] To the contrary, Greek suggested in her testimony that HR was not especially concerned with the composition and activities of the social committees.

[7] In contrast, Gallonio said that when HR heard that employees were conducting football betting pools in the office, it directed the employees involved to stop.

Most, if not all, SSA facilities have bulletin boards for Local 2076 use. Generally speaking, the bulletin boards are in the secured area of the facility such as in employee break rooms or hallways. For instance, at the Garden Grove Regional Center, Local 2076 has one bulletin board on each of the three floors on the facility.

Workload Increases and Work Process Changes at the SSA

In or around late 2013, the SSA and many of its assistance programs underwent substantial changes with the passage of the Patient Protection and Affordable Care Act (ACA or "Obamacare").[8] Benefits applications increased significantly afterwards. The ACA also substantially changed how to apply and enroll in some benefits programs. According to eligibility worker and Local 2076 President Hartwell, there was a "dramatic increase in workload. There was also chaos as a result of workers not getting any direction on how to process that increased workload." Eligibility supervisor Oralia Perez, testified similarly, stating that because of the changes "[e]verybody is overwhelmed with the new ACA, with Obamacare. So . . . I understood [eligibility workers'] frustration because they were all pretty frustrated. Systems weren't working."

In or around January 2014, Local 2076's stewards decided to circulate a survey among eligibility workers at the different SSA sites. The survey focused on employees' stress level, the amount of support from SSA management, whether they received "clear and concise directions" regarding the changes stemming from the ACA, and whether they believed their performance expectations were realistic. The survey also asked employees whether they were willing to participate in a public hearing on the matter and provided space for employees to

[8] Obamacare is a colloquial term for the ACA used in the record signifying that President Barack Obama campaigned for many of the changes to the U.S. healthcare system enacted through the ACA.

submit other comments or concerns. The survey explained that its purpose was to assist Local 2076 in raising eligibility workers' workload issues with SSA management.

Cortez drafted instructions for passing out the surveys. Those instructions direct stewards to comply with County orders to stop distributing the survey and then request clarification as to the County's reasoning. The instructions also state that stewards should encourage all eligibility workers to complete the surveys but should not "harass any member to fill out the survey." Stewards kept boxes at most sites where employees could return completed surveys.

Local 2076 site representatives distributed the surveys between January and April 2014. Among those participating in this activity were Cortez, Hartwell (who was Local 2076 Vice President at the time), Whitney, and then-Local 2076 President Sandra Fox. Lupe Arias, who was a steward at some point in 2014 did not distribute surveys, but maintained a survey collection box openly at her work station. Whitney also had a survey collection box at her desk.

The April 23, 2014 Encounter at the Eckhoff Building

On April 23, 2014, at around 11:30 a.m., Cortez, Fox, and Hartwell arrived at the SSA Eckhoff location to distribute surveys to unit members. They signed in as visitors. Cortez and Hartwell both testified that they spoke to each worker for a few seconds, just long enough to pass out the survey.[9] SSA manager Lorraine Perez Daniel said that she overheard Fox asking an employee whether there were any working conditions or work issues he or she wanted to report. It was unclear from her testimony whether Fox was engaging the employee in a

[9] Whitney similarly testified that she spoke to each employee for less than a minute when she distributed surveys in January 2014.

conversation or merely referring him or her to the Local 2076 survey about that issue. Fox did not testify.

After consulting with HR, Daniel directed the three to leave. According to Daniel, Fox said that Local 2076 had the right to be there and that they were investigating a grievance. Daniel reported the conversation back to HR, who again directed Daniel to instruct them to leave. However, by that time, all three Local 2076 representatives had left. They were in the building for less than 30 minutes in total. Cortez said that SSA management reacted similarly at other locations.

The April 23, 2014 Directive

On April 23, 2014, SSA HR Manager Greek e-mailed AFSCME business representative Sally Ramirez directing Local 2076 to immediately stop distributing surveys "to employees in work areas during work time." The e-mail refers to earlier e-mails sent on January 17, 2014, and August 20, 2013, containing similar directives issued to Local 2076 about solicitation activities in the past. Greek e-mailed Ramirez and other union representatives again on the issue on May 9, 2014. In that message, Greek said:

> AFSCME certainly has the right to survey their membership. What AFSCME does not have the right to do and what they are prohibited from doing is approach employees in County work areas or on County time. County work areas include reception areas, hallways and lobbies. Union representatives may, however, approach employees in areas that are otherwise open to the public for non-County business during nonworking time. The County email system may also not be used for distribution of union surveys.

The Workload Grievances

On or around May 12, 2014, Local 20176 filed two grievances relating to changes in working conditions caused by the ACA (Workload Grievances). The grievances were signed

by Cortez, Fox, Hartwell, Local 2076 Secretary and steward Nellie Le Gaspe, and Whitney, among others. In general, the grievances allege an unsafe and hostile work environment; high stress and injury levels; lack of direction, training, and support from management; variances in performance expectations; unequal distribution of work; and disparate treatment towards union stewards for their grievance activity. The grievances also allege misconduct by SSA supervisors and managers including, as relevant to this case:

> Management shows a blatant disregard for the health, safety and ergonomic issues of Eligibility Workers.
>
> Supervisors are using intimidation and directing Eligibility Workers not to inform the Union of taking on duties that are not in our job classification.
>
> Supervisors intimidate and threaten Eligibility Workers with disciplinary action on a regular basis by informing them that they are behind on their numbers, in spite of the fact that there is no set minimum or maximum standard for tasks, phone calls or applications that are to be done on a daily basis in writing.[10]

All of the above allegations were on the third of page of each Workload Grievance. The first page of each grievance was the County's standard grievance from listing Local 2076 and Cortez as the grievants. No allegations were listed on the first page. Both were still pending at the time of the hearing.

Removal of Grievances From Bulletin Boards

Shortly after filing, Local 2076 posted both Workload Grievances on its designated bulletin boards throughout the different SSA facilities. SSA management removed the grievances from the bulletin boards at HR's recommendation. Senior Employee Relations

[10] The first paragraph is in section "I" of one of the grievances and section "M" of the other. The second paragraph is in section "L" of one of the grievances and section "P" of the other. The third paragraph is in section "Q" of one of the grievances and is not included in the other.

Manager Gallonio testified that, in his view, the three allegations, excerpted above, violated the prohibitions on posting "derogatory" information against the SSA and employees in other unions contained in the MOU and in the County ERR. Gallonio also said that the postings violated the MOU provision concerning confidentiality of the parties' respective grievance files. There was no evidence that the County explained these positions to anyone at Local 2076 any time before the hearing in this case.

The County's Release Time Committee

In or around late 2012 or early 2013, County HR representatives began hearing complaints from SSA supervisors about Local 2076 site representatives' release time usage. Among the complaints received were that site representatives made requests without advance notice, did not always provide sufficient details about the request, and had too many representatives taking time off for a single event. According to SSA HR representative Jeff Griffin, HR felt the need to "realign" Local 2076's release time practices to be more consistent with the County's interpretations of the MOU. The County formed a committee to draft a document expressing the County's release time expectations.

The committee reviewed the MOU as well as a set of nearly identical MOEs issued to Local 2076 site representatives on or around June 9, 2009, about release time usage. In general, the MOEs stated that the County expected at least 24 hour notice for release time requests concerning disciplinary investigation meetings, *Skelly* meetings, and grievance meetings. A separate June 15, 2009 MOE was issued Fox, and stated:

> We do not expect you to provide the employee's name or details of the meeting. We understand that some meetings may be longer than expected. If a meeting runs longer than noted on your approved schedule, you are to call your supervisor immediately after the meeting to notify him of your delay.

According to SSA HR supervisor Santini, who assisted in drafting the MOEs, those comments were in response to concerns Fox raised about the level of detail required in release time requests. Santini also confirmed that, during the time he was assigned to review Local 2076 release time requests, the County did not require site representatives to identify the name of the employee at issue in their release time requests.

The June 4, 2014 Release Time Guidelines Letter

For internal reasons, the County's committee did not complete its work until June 2014. On June 4, 2014, Assistant HR Director Robert O'Brien issued a letter to Local 2076 entitled "Release Time Guidelines." O'Brien wrote that the purpose of the letter was to "reaffirm the County's expectations regarding release time to attend union activities for County employees who serve as local AFSCME executive board members and union stewards[.]" The letter includes multiple sections relevant to the present case.

One topic at issue was the number and type of Local 2076 representatives permitted to represent unit members in meetings with the County. The letter states:

> Whenever specified in the MOU that an employee has the right to be represented by "a Union Steward" or "an AFSCME staff representative", only one (1) representative, not several, will be allowed unless the County agrees to waive this requirement.

The letter further states that the County allows both a site representative and an AFSCME business representative to represent employees in meetings. Pursuant to this language, after June 4, 2014, the County began limiting the number of Local 2076 representatives eligible for release time for specific meetings. For instance, both Senior Employee Relations Manager Gallonio and Local 2076 Chief Steward Cortez testified that the County limited release time to just one site representative at each level of the grievance process, including individual Step meetings, mediation, and arbitration. Cortez also testified that the County permitted release

time for only a single Local 2076 representative for other meetings, disciplinary investigatory meetings, interactive process meetings, failure of probation meetings, and what she called workload management forums, where Local 2076 representatives meet with SSA regional management. Gallonio either agreed or did not dispute that the County limited the number of representatives allowed to take release time for each of these meeting types. Cortez explained that Local 2076 used to bring multiple site representatives to events for training purposes and in order to provide varying points of view due to cultural differences between the SSA facilities.

Cortez also said that, around the same time, the County refused to grant release time to stewards filing grievances in person at County offices.

The Release Time Guidelines letter also addresses the amount of notice required for release time requests. It states:

> Requests for AFSCME representatives and/or County employees to engage in union activity on paid work time (release time) must be made at least 48 hours before the activity is to occur. Failure to comply with the 48-hour notice may result in denial of the request. Under special circumstances, the County may agree to waive this timeline.

Gallonio testified that the County derived the 48-hour requirement based on two factors. First, the ERR requires 48-hour notice for release time requests for participating in negotiations. Second, Gallonio said the County believed that 48 hours was a reasonable amount of time that would give the County the opportunity to properly evaluate the request. No section of the MOU requires 48-hours advance notice for making a release time request and there was no evidence that such notice was ever previously required. Gallonio said that the County did occasionally waive this requirement, but did not know how many times.

The Release Time Guidelines letter included an AFSCME Release Time (ART) request form for submitting release time requests. The letter states that the form must be submitted via e-mail to both the requestor's immediate supervisor and to the e-mail address art@ssa.ocgov.com, an address monitored by HR. The attached form requires the requestor to identify him or herself, his or her supervisor, the name of the employee requiring union representation (if any), the date of the meeting, the start and end time of the meeting, the estimated return time, the type of meeting, and the location of the meeting.

Before this, there was no designated form for requesting release time. Cortez said that she used to e-mail her supervisor weekly updates of her release time needs and that she provided as much notice as possible for any request. She said that sometimes she had less than one day's notice about the need to attend a meeting on behalf of an employee. Cortez said that her requests were never denied, only rescheduled when there was a conflicting work meeting. There was no evidence of any release time requests being denied before June 4, 2014.

Cortez described her release time requests as "not detailed at all," but acknowledged describing both the subject matter and location of the activity requiring release time (i.e., "grievance, investigatory, going to the local office.") It is also fairly implied from her testimony that Cortez provided her supervisor with at least the approximate times for her request. She said that her supervisor sometimes ask her to reschedule a particular release time request because of a work meeting conflict. There would be no basis for that discussion if her supervisor did not know when Cortez would be away. According to Santini, Cortez's predecessor as Chief Steward submitted release time requests to her supervisor weekly, specifying nature of the meeting, the time needed to prepare, departure time, location, and estimated return time.

Cortez said that, after June 4, 2014, employees were unwilling to identify themselves on the ART forms. She said that the County has denied release time request because she declined to include the name of the unit member being represented and that she began meeting with employees for union business during her own personal time. Starting in around July 2014, Cortez began listing only the employee's initials, not the full name, on her ART forms. She did not discuss the matter with anyone at the County beforehand, but the County has approved some of those requests.

Finally, the Release Time Guidelines letter also requires that "[i]f a meeting runs longer than noted on the AFSCME representative's pre-approved schedule, he/she is expected to call his/her supervisor within 15 minutes of the originally scheduled estimated return time to notify the supervisor of the delay." It was unclear to what degree this was previously required.

On June 5, 2014, Cortez e-mailed Gallonio about whether the County had met and conferred with Local 2076 over the new release time request form. Gallonio replied that the County had not and did not believe that it was subject to negotiations. He also confirmed that the processes described in the Release Time Guidelines letter were effective immediately.

The Revised Administrative Policies and Procedures Manual

On July 9, 2014, the County issued revisions to its Administrative Policies and Procedures Manual. Relevant to this case, the revision included access to an electronic version of the County's universal grievance form used by all unions, including Local 2076. Fox e-mailed Gallonio and HR Manager Greek, stating that the change had not been negotiated with Local 2076. Around that time, the County confirmed that Local 2076 could file grievances using County equipment, including e-mail and fax machines.

Prior to this, the County provided paper copies of its grievance form that could be filled out in triplicate. At some point around two years ago, the County stopped printing those triplicate forms and its supply of those forms eventually dwindled. Cortez testified that she favored using the older forms because she could request that the County return one of the three copies of the form to her with a time-stamp indicating that the grievance was received by HR.

Arias's May 8 and 9, 2014 MOEs

Lupe Arias is an eligibility worker and was a Local 2076 steward from 2005 to some point in 2014. She worked with so-called "zero parent" clients, or clients where the children receive benefits but neither parent qualifies. Most of her clients are from undocumented families and most are primarily Spanish speaking. Her job was to review existing benefits recipients and determine whether they still qualify for benefits and whether the benefits amounts should change. This was accomplished by interviewing clients annually in an SSA facility. Afterwards, Arias enters the information gathered into the SSA system via computer which then calculates the amount of benefits the client is entitled to. She is expected to print out a statement of the information gathered, called a statement of facts, for the client to review and sign attesting to its accuracy. The Statement of Facts is then scanned and maintained in SSA's electronic files.

Starting in or around late 2013, Arias began falling behind in her work. Specifically, she said that she was unable to enter the information she received during interviews into the SSA system. She did, however, meet with all her clients annually. During the interview, she brought the Statement of Facts from the client's prior annual interview and asked the client whether any information had changed. Arias acknowledged this method of interviewing did not comply with SSA policy. She also admitted that failing to input client information could

result in the benefits issued being inaccurate. But, she said that, in most cases, clients benefits did not change from year to year because their income was so low to begin with. No contrary evidence was admitted. Arias said that she was up front with her supervisor, Annalynn Rebkowitz, about being behind in entering her paperwork into SSA's system.

In or around February 2014, Rebkowitz learned that SSA was missing information about how 12 of Arias's clients filed their income taxes. Collecting that information was a relatively new requirement and Arias admitted to not knowing at first that it was needed. Then, she had trouble reaching the clients to gather the missing information. Rebkowitz reviewed Arias's files and found multiple files that were missing the annual Statement of Facts. Rebkowitz testified that she contacted her own supervisor, Sussan Armstrong, who recommended that Rebkowitz investigate whether Arias was actually interviewing her clients every year. However, because neither Rebkowitz nor Armstrong spoke Spanish, Armstrong assigned Betty Maldonado, another supervisor, to contact Arias's clients. Maldonado is not in Arias's direct chain-of-command and did not testify. According to a report Maldonado created, she reached 6 of the 12 clients who all confirmed that Arias had, in fact, met with them. Rebkowitz never met with Maldonado about her investigation or findings.

Rebkowitz met with Arias on or around April 24, 2014. During the meeting, Arias acknowledged not following the typical SSA procedure for completing Statements of Facts and that she had fallen behind in entering new information into the SSA system. According to Arias, other employees were also behind and adopted similar practices as her own. However, it was unclear from the record whether she had first-hand knowledge of her co-workers' practices. During the meeting, Arias shared some personal distressing circumstances that might have impacted her work. The two collaborated on a plan to get Arias caught up with her

work. Rebkowitz also directed Arias to follow SSA procedures. Rebkowitz said that she intended to temporarily monitor Arias's scheduled recertification interviews to ensure that Arias was complying with SSA procedures.

On May 8, 2014, Rebkowitz issued Arias an MOE based on the April 24, 2014 meeting. The document reiterates that Arias was not following SSA interview procedures and had fallen behind in aspects of her work. The MOE directs Arias to follow procedures, describes the discussed plan for catching up, and states Rebkowitz' intent to monitor Arias's recertification interviews starting that month. Rebkowitz revised the MOE on May 9, 2014, at Arias's request, to specify that Rebkowitz would cease monitoring Arias's work under the terms of the MOE in July 2014. Rebkowitz consulted with Armstrong and HR representative Bowman when drafting the MOE. Bowman said that she had assisted in drafting MOEs for other eligibility workers for failing to follow SSA procedures. None of the others were active in Local 2076.

Arias filed a rebuttal to the MOE on May 16, 2014. Arias complained that Maldonado's investigation implied that she (Arias) had been dishonest about her work and that, to the contrary, Arias had always been up front about falling behind in her work. She also said that SSA had approved overtime for eligibility workers in her department which suggested that other workers were also behind. Arias said that she felt that the MOE was retaliation for her union activities and requested that the MOE be rescinded. There is no evidence of any response.

Arias had a regularly scheduled performance evaluation in August 2014. At that time, Rebkowitz determined that Arias was performing adequately and was complying with SSA procedures. She rated Arias as meeting her expectations in all areas. The evaluation did not

reference the MOE. In fact, Arias testified that no one in her chain-of-command ever raised the MOE again after it was issued.

Hartwell's April 21, 2014 SOC

Hartwell is an eligibility worker assigned to review current Medi-Cal benefits recipients and determine whether the beneficiary remains eligible and, if so, whether the benefits amount should change. Hartwell is responsible for meeting with clients periodically for re-certification meetings, to determine whether there were any changed circumstances that might affect their benefits. Hartwell also responds to other changes reported by clients.

In the past, work was assigned in Hartwell's department according to a case-based system. Under that system, eligibility workers were assigned a fixed number of cases and processed any updates for their assigned clients. In or around August 2013, Hartwell's department moved to a task-based system, where incoming work was broken down into discreet tasks that could be assigned to any eligibility worker. Under the new system, eligibility workers were also required to scan all documents received by clients so that any eligibility worker could work easily with any client file. Elizabeth Flores became Hartwell's supervisor around the time SSA implemented the task-based assignment system.

Under the task-based system, each eligibility worker is assigned new tasks as they come into the agency every day. For example, an assignment to interview a client in the office is considered one task. Entering information received during that meeting is considered another task. Most tasks take between 30 minutes and 2 hours to complete. As Local 2076 President, Hartwell has a 35 percent workload reduction according to the terms of MOU Article XIII, Section 7. Under the prior existing system, Harwell was assigned 35 percent fewer cases.

Hartwell said that it was not clear to him how his workload was being reduced under the task-based system.

Hartwell described the workload increases caused by both the ACA changes and the switch to the task-based system as "dramatic." Hartwell asked Flores for assistance because he felt like he was "drowning" in work and needed help. The two met regularly to discuss his workload and work output. She assisted Hartwell with prioritizing and organizing the work stored at his desk. She expressed concerns about the high number of pending tasks he had and how Hartwell's work would sometimes have to be reassigned to colleagues. She described Hartwell as "open to listen." She was similarly open to suggestions from Hartwell about how she could assist him with increasing his output. By February 2014, Flores reviewed SSA reports indicating that Hartwell had more than 200 pending tasks. Employees without any reduced workload typically have between 50 to 100 pending tasks each month and complete between 8 to 10 tasks each day.

In March 2014, Flores requested all the eligibility workers she supervised to provide to her all of their re-certification files as part of the department's plans to redistribute pending tasks. Hartwell was unable to comply with that request because he was scheduled to attend a meeting. She went to his workspace to retrieve the needed files herself. She said that she was unable to locate all the documents she sought.

In April 2014, Flores decided to issue Hartwell an SOC based on what she felt was a lack of progress in increasing his productivity and lack of workspace organization. When drafting the SOC, Flores referenced her prior meetings with Hartwell to improve productivity. Flores noted that SSA reports indicated that Hartwell had around 286 pending tasks in

February 2014 and 285 pending tasks in March 2014. By her calculation, Hartwell only completed around 2 tasks per available day at work or between 34 and 36 tasks per month.

Flores concluded in the SOC that Hartwell was not meeting her performance expectations because he completed significantly fewer tasks than his co-workers, even adjusting for his contractual workload reduction. She further concluded that Hartwell failed to follow her directives regarding completing specific tasks and that he did not comply with her March 2014 request to collect certain tasks. At the end of the SOC, Flores encouraged Hartwell to continue working to improve productivity and following directives. She said that she would continue meeting with him to assess his progress. Bowman said that SSA had issued similar counseling documents to other eligibility workers for lack of productivity, irrespective of their involvement in Local 2076.

Flores presented the SOC to Hartwell on April 21, 2014. During the meeting Hartwell expressed that he was "being set up for failure" with more work than he could handle. He also expressed the need for additional support and training and that his union duties, sometimes at the County's request, affected his productivity. He did not dispute the accuracy of any part of the SOC. Nor did Hartwell do so during his testimony at hearing. Instead, he asserted that the numbers did not reflect tasks that he started but did not complete, tasks that remained incomplete because of system malfunctions, time away from work due to required trainings and meetings, and tasks that required supervisor resolution. Hartwell did not submit any statement rebutting the SOC. At hearing, he said he was unsure whether the calculations were accurate but that he would have been satisfied with his performance even if it were true that he only completed around two tasks per day.

In or around August 2015, Hartwell's new supervisor issued him an MOE about his work performance. According to Hartwell, the document states that he "was not meeting their – the Agency goals for the amount of tasks that I was completing compared to coworkers." The MOE was not admitted into evidence and Hartwell's supervisor at the time did not testify. That month, Hartwell's supervisor also issued a performance evaluation rating him as "does not meet expectations" in three of five evaluation categories, including meeting work expectations and following directives. The supervisor gave Hartwell an overall score of "does not meet expectations." That document was not admitted into the record either.

Le Gaspe's May 30, 2014 Written Reprimand

Le Gaspe is an intake worker at SSA's Central Regional Office. Intake workers meet with public benefits applicants. After some initial steps, intake workers interview the applicants to determine eligibility for benefits. There are long wait times at the Central Regional Office due to the high volume of applicants every day. Le Gaspe said that applicants could wait between two to five hours before meeting with an intake worker. Tawnya Reveles, who is a supervisor in Le Gaspe's chain-of-command, agreed that applicants face long waiting periods.

On January 7, 2014, Le Gaspe interviewed applicant K.M.[11] During the interview, supervisor Tamera Bethune entered the interview room to inquire about another applicant assigned to Le Gaspe who had been waiting to be interviewed. Le Gaspe testified that interrupting an ongoing intake interview breached SSA protocol. She also testified Bethune referred to the other applicant by name, in violation of SSA confidentiality rules. Le Gaspe

[11] This proposed decision will use refer to SSA applicants and clients using initials to prevent unnecessary disclosure of the identities of people who either are receiving or have applied for County benefits. No clients or applicants testified at hearing.

testified that the applicant, K.M., was upset about the interruption and wanted to register a complaint against Bethune. According to Le Gaspe, K.M. asked Le Gaspe to repeat the name Bethune used so she (K.M.) could reference it in her complaint. Le Gaspe complied and also provided K.M. with paper to write out her complaint.

After the K.M. interview, Le Gaspe rescheduled her remaining interviews so she could report the incident to Reveles, a higher-level supervisor in the chain-of-command for both Le Gaspe and Bethune. Le Gaspe brought a Local 2076 steward with her to Reveles's office. Bethune was already in Reveles's office. Le Gaspe testified that Reveles "scolded" her for being unprofessional and keeping applicants waiting for extended time periods. Le Gaspe responded that she was doing her best and could not interview more than 6 to 10 applicants per day. Reveles did not testify about the substance of anything she said to Le Gaspe that day, but said that Le Gaspe "charged" into the office and was "very agitated, very elevated." Neither Bethune, nor the steward testified.

After the meeting, SSA manager Raymond Perez (also in Le Gaspe's chain-of-command), informed Reveles that K.M. had filed a complaint against Bethune. During the hearing, Mr. Perez[12] testified that, in his experience, all eligibility workers receive complaints but he estimated a higher than average number of applicants complained about Le Gaspe. Once received, complaints are usually referred to a supervisor who discusses it with the eligibility worker. She said that "most times," complaints are discussed with the eligibility worker at issue right away, but that management may need to discuss it first, depending on the

[12] There were multiple witnesses with the surname "Perez." In this proposed decision, Raymond Perez will be referred to as "Mr. Perez" and Oralia Perez will be referred to as "Ms. Perez."

circumstances. Mr. Perez said that he met with Le Gaspe weekly and discussed any complaints filed against her during those meetings.

In this instance, Reveles met with K.M. on January 9, 2014. According to Reveles, K.M. said that Le Gaspe was upset when Bethune entered the interview room the previous day and that Le Gaspe asked K.M. to file the complaint against Bethune. Reveles said that K.M. reported feeling "threatened and coerced" because she felt that refusing Le Gaspe's request might impact her benefits application. Again according to Reveles, K.M. recanted her complaint against Bethune and instead said it was only Le Gaspe who provided K.M. with the other applicant's name. K.M. provided a written statement to Reveles summarizing the discussion that day. Reveles reassigned K.M. to another eligibility worker.

After learning that K.M. had been reassigned, Le Gaspe went to speak with Reveles, who was meeting with Bethune and SSA manager Diane Gonzalez. Reveles told Le Gaspe that she had the discretion to reassign applicants to any eligibility worker. According to Reveles, Le Gaspe was yelling during the meeting. Reveles testified that, after being directed to lower her voice, Le Gaspe said "I'm not yelling but I'll show you yelling if you want." Le Gaspe denies making that statement or using an elevated voice. According to Le Gaspe, Gonzalez then said "Nellie, we know what you're up to. We know what you're doing." Le Gaspe said she felt intimidated by that comment and said "I'm not going to argue" over the reassignment, but that it "would have been nice to have known," beforehand. According to Reveles, it was Le Gaspe who said "I know what you're trying to do here," in an elevated voice as she was leaving Reveles's office. Gonzalez did not testify.

Around the same time, SSA received another complaint from applicant, J.U. He complained of waiting for six hours for his intake interview with Le Gaspe. According to the

written complaint, when J.U. informed Le Gaspe of how long he had been waiting, she said "she was going to put my file [at] the end of the stack" to make him wait all day. She also allegedly said "she could take 30 Day[s] if she well pleased." Le Gaspe denied these claims at hearing.

In May 2014, another applicant, J.N., registered a complaint against Le Gaspe about waiting for around nine hours for his intake interview. Reveles said she met with Le Gaspe about the complaint and counseled Le Gaspe about conducting interviews more expeditiously. According to Reveles, Le Gaspe replied in a "matter-of-fact" tone of voice that "mistakes like this are going to happen" and that she would "probably forget" the discussion. At hearing, Le Gaspe denied ever meeting with Reveles about the J.N. complaint and denied making the comments attributed to her by Reveles.

Reveles met with SSA managers and with HR to discuss disciplining Le Gaspe for the complaints and her responses. Mr. Perez said that he had previously discussed the client complaints with Le Gaspe during regular meetings, but he did not disclose at the time that the County was considering discipline. The County conducted an investigatory interview with Le Gaspe as part of its process. Both Reveles and Mr. Perez favored dismissing Le Gaspe because both felt that revealing an applicant's name publicly was a serious violation. However, the County ultimately decided to issue Le Gaspe a Written Reprimand. The discipline was issued on or around May 30, 2014.

Whitney's April 21, 2014 MOE

Whitney is an eligibility worker assigned to SSA's Garden Grove Regional Center. Employees at that location attend program meetings where SSA supervisors deliver instructions to staff about work processes. Whitney's supervisor, Oralia Perez, conducted one

such meeting on March 25, 2014, for around 30 eligibility workers, including Whitney. Ms. Perez described the meeting as a place for employees to get together to talk about work processes.

During the meeting, Whitney felt that some of Perez's instructions were incorrect, inconsistent with the established workflow, and contrary to State regulations. Whitney requested clarification about the conflicting information. Ms. Perez responded that SSA would look into Whitney's questions but that eligibility workers were required to comply with the new instructions right away. Whitney replied that it was improper to require employees to work with incomplete information and that she was going to raise the issue with Local 2076. Other eligibility workers had questions about the instructions as well and expressed multiple divergent interpretations of what was required.

According to Ms. Perez, Whitney was visibly upset during the meeting. She described Whitney as "pounding" the table and yelling for approximately two minutes. Ms. Perez said that it was "kind of hard to bring her back from that." Ms. Perez suggested to Whitney that the two of them discuss the matter further privately.

Ms. Perez said that after the meeting, both eligibility workers and supervisors expressed astonishment about Whitney's behavior at the meeting. Whitney said that other employees had expressed frustration at past program meetings, but Ms. Perez said she had not experienced any other employees expressing themselves similarly to Whitney. Ms. Perez reported what had happened to her supervisor Jamie Petersen.

Whitney met with Ms. Perez after the program meeting. Ms. Perez said she understood Whitney's frustration over the ACA changes and frequent changes. She asked that Whitney

direct questions about policies to her directly. There was no mention of any further action at the time.

At some point, Petersen contacted Ms. Perez. According to Ms. Perez, Petersen said that she had raised the issue of Whitney's conduct with the chain-of-command, and the consensus was that a MOE should be issued. Petersen did not testify. Ms. Perez agreed that Whitney's behavior that day was unacceptable. Ms. Perez participated in drafting the MOE.

On April 21, 2014, Ms. Perez requested to meet with Whitney. Whitney testified that Ms. Perez made it clear that she was going to issue Whitney "some kind of something." Whitney requested time to contact her Local 2076 representative and Ms. Perez initially agreed. However, on April 24, 2014, Ms. Perez e-mailed Whitney the MOE even though no meeting took place. In the e-mail, Ms. Perez said that Whitney refused to participate in the proposed April 21, 2014 meeting and that because the MOE was not considered disciplinary, union representation was unnecessary.

The MOE states that it was issued because of "unprofessional and inappropriate conduct in the workplace" during the March 25, 2014 program meeting. The MOE describes Whitney as raising her voice and pounding her finger on the conference table and states that her conduct was perceived as disrespectful, unprofessional, and disruptive. The MOE references two earlier MOEs issued to Whitney about her professionalism, dated November 15, 2012, and May 20, 2014. The April 24, 2014 MOE also references various policies concerning respectful, courteous, and professional conduct. It directs Whitney to exercise good judgment in work activities and follow established procedures at all times. Other than the instant unfair practice charge, Whitney took no steps to challenge the MOE.

ISSUES

I. Did the County unlawfully interfere with protected rights either by the April 23, 2014 directive to cease distributing Local 2076's workload surveys or by removing the two Workload Grievances posted by Local 2076 on its designated bulletin boards?

II. Did the County unilaterally change existing policies within the scope of representation concerning either release time or grievance filing?

III. Did the County unlawfully retaliate against either Arias, Hartwell, Le Gaspe, or Whitney, because of activity protected under the MMBA?

CONCLUSIONS OF LAW

I. Interference Claims

The PERB complaint alleges that the County interfered with both employee and organizational rights first by directing Local 2076 to stop distributing its workload surveys and then again by removing the Workload Grievances from Local 2076's designated bulletin boards. MMBA Section 3502 states in relevant part: "public employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." Public agencies may not unreasonably interfere with protected rights. (MMBA, § 3506; PERB Regulation 32603 subd. (a).) The test for whether a respondent has interfered with employee rights under the MMBA does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. (*City & County of San Francisco* (2011) PERB Decision No. 2206-M, warning ltr., p. 3; see also *Carlsbad Unified School District* (1979)

PERB Decision No. 89 (*Carlsbad USD*), pp. 10-11.)[13] The courts have described the standard as follows:

> (1) That employees were engaged in protected activity; (2) that the employer engaged in conduct which tends to interfere with, restrain or coerce employees in the exercise of those activities, and (3) that employer's conduct was not justified by legitimate business reasons.

(*Public Employees Assn. of Tulare County, Inc. v. Board of Supervisors of Tulare County* (1985) 167 Cal.App.3d 797, p. 807; *Carmichael Recreation & Park District* (2008) PERB Decision No. 1953-M, proposed dec., p. 19, citing *Carlsbad USD*.) If the charging party establishes that the employer's conduct interferes or tends to interfere with the exercise of protected rights, then the burden shifts to the employer to produce a legitimate reason for its conduct. (*Stanislaus Consolidated Fire Protection District* (2012) PERB Decision No. 2231-M (*Stanislaus CFPD*), p. 22.) The scale of the employer's burden depends on the degree of harm incurred. When the harm to protected rights is "slight," the employer may assert "operational necessity" as a defense and the Board will then balance the employer's asserted interests against the harm to employees' rights. (*Id*. at pp. 22-23, citing *Carlsbad USD*, pp. 10-11.) If, on the other hand, the harm is "inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available." (*Id*.; see also *Los Angeles Community College District* (2014) PERB Decision No. 2404 (*LACCD*), pp. 5-6.)

[13] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, p. 616; *Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M (*Santa Clara VWD*), p. 13, fn. 4.)

A. Alleged Interference With Survey Distribution

In *Omnitrans* (2009) PERB Decision No. 2030-M, the Board recognized that the MMBA does not expressly grant employee organizations a right of access to employer facilities. In comparing the MMBA with other labor relations statutes, including those without any explicit union access rights,[14] the Board found that a union's right to access its members is implicit under the provisions prohibiting employer interference and discrimination. (*Omnitrans* at p. 14-16.) In its own words, the Board held:

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

(*Id*. at p. 16.) Those access rights include "rights to solicit union membership and distribute union materials at the worksite." (*State of California (Employment Development Department)* (2001) PERB Decision No. 1365a-S (*EDDa*), p. 7.)

In defining union access rights, the Board considers whether the union activity at issue takes place in work areas and during working time. Employers may limit solicitation and other activities by union representatives to non-work areas and non-working time. (*County of Riverside* (2012) PERB Decision No. 2233-M, p. 9; *EDDa*, *supra*, PERB Decision No. 1365a-S, p. 9; see also *City of Porterville* (2007) PERB Decision No. 1905-M, p. 10, partially

[14] See the Educational Employment Relations Act (EERA), at Government Code Section 3540 et seq. [containing statutory access right], and the Higher Education Employer-Employee Relations Act (HEERA), codified at Government Code Section 3560 et seq. [containing statutory access right], the Ralph C. Dills Act (Dills Act), codified at Government Code Section 3512 et seq. [containing access rights defined by case law], and the National Labor Relations Act (NLRA) [containing access rights defined by case law].

overruled on other grounds in *Grossmont Union High School District* (2010) PERB Decision No. 2126, p. 2; see also *Peyton Packing Co*. (1943) 49 NLRB 828, p. 843.)

However, the employer may regulate union activity in non-work areas and during non-working time, only as is necessary to maintain order, production, or discipline. (*Omnitrans, supra*, PERB Decision No. 2030-M at pp. 17-18, citing *State of California (Employment Development Department)* (1999) PERB Decision No. 1365-S, *Republic Aviation v. NLRB* (1945) 324 U.S. 793, p. 803, fn. 10; see also *San Ramon Valley Unified School District* (1982) PERB Decision No. 230 (*San Ramon Valley USD*), pp. 12-13.) Thus, an employer may place limitations on "solicitation and distribution activities . . . [during] . . . employees' non-working time in non-working areas, and the employer bears the burden of proof that its restrictions on access are reasonable." (*County of Riverside, supra*, PERB Decision No. 2233-M, p. 9.) PERB found that vaguely worded restrictions that could reasonably be interpreted to restrict such activities in non-work areas and during non-working time may interfere with protected rights due to the tendency to chill legitimate activities. (*EDDa, supra*, PERB Decision No. 1365a-S, p. 10; see also *LACCD, supra*, PERB Decision No. 2404, p. 6.)

In *Omnitrans, supra*, PERB Decision No. 2030-M, the Board held that an employer interfered with protected rights by denying union access to a drivers assembly room that was used only occasionally for performing work. Most employees in the room were free to engage in non-work activity such as conversing or reading. (*Id*. at pp. 18-19, citing *United Parcel Service v. NLRB* (6th Cir. 2000) 228 F.3d 772, pp. 775-558.) In *EDDa, supra*, PERB Decision No. 1365a-S, the Board found that the employer could restrict a union-sponsored "unity break," where some employees took their breaks at the same time and held up signs at their desks supporting the union's bargaining positions. (*Id*. at pp. 3-4.) The Board reasoned that

the demonstration could be limited because it occurred in a work area during a time when employees were working. (*Id*. at pp. 9-10.) However, the employer's poorly defined prohibition of union activity "during state time or inside the [employer's] building" interfered with protected rights because those terms could reasonably be interpreted to restrict activity in non-work areas and/or non-working time. (*Id*. at pp. 10-11.) In *City of Porterville*, *supra*, PERB Decision No. 1905-M, the Board found that an employer did not unlawfully interfere with protected rights by denying access to a union representative speaking with a unit member in a work area after the unit member's lunch period ended. (*Id*. at pp. 10-11.)

The Board has also long found that an employer's otherwise lawful access restrictions may nevertheless interfere with protected rights when applied disproportionately against unions or protected activity. (*Sierra Sands Unified School District* (1993) PERB Decision No. 977, pp. 11-12, citing *State of California, California Department of Transportation, and Governor's Office of Employee Relations* (1981) PERB Decision No. 159b-S, p. 16.) In *State of California (Departments of Personnel Administration, Banking, Transportation, Water Resources and Board of Equalization)* (1998) PERB Decision No. 1279-S (*DPA*), the employer maintained policies prohibiting use of its internal communication systems, i.e., fax machines and e-mail, for any other purposes other than official business. (*Id*. at proposed dec. p. 48.) The Board held that even if the union did not have the protected right of access to use that equipment, the employer's selective enforcement of its non-business use ban interfered with protected rights. (*Id*. at

proposed dec. pp. 49-52.)[15] In *County of Riverside*, *supra*, PERB Decision No. 2233-M, the Board found that the employer could lawfully restrict union access to hospital areas that could disrupt patient care or disturb patients, but it could not apply those restrictions in a way that unreasonably inhibited access to non-work areas. (*Id*. at pp. 12-13.)

Turning to the facts of the present dispute, HR Manager Greek's April 23, 2014 directive to stop distributing surveys "in work areas during work time[,]" was not inherently problematic. (*County of Riverside*, *supra*, PERB Decision No. 2233-M, p. 9; *City of Porterville*, *supra*, PERB Decision No. 1905-M, p. 10; *EDDa*, *supra*, PERB Decision No. 1365a-S, p. 9.) The directive, however, cannot be viewed in isolation. PERB requires examination into the totality of the circumstances to determine whether unlawful interference has occurred. (*LACCD*, *supra*, PERB Decision No. 2404, proposed dec., p. 11, citing *Los Angeles Community College District* (1989) PERB Decision No. 748, proposed dec., p. 16.) The record shows that SSA permitted other non-business interactions among co-workers even in work areas and during working time. For example, witnesses testified that the County made no efforts to curb incidental personal conversations between employees. More significantly, the County is aware of and permits "social committees," where SSA employees fundraise for social events by selling food items to other employees at work. Greek stated her

[15] This proposed decision relies upon *DPA*, *supra*, PERB Decision No. 1279-S, for the narrow purpose of illustrating how applying facially neutral access limitations selectively against protected activity may interfere with protected rights. PERB's analysis in *DPA* that access rights not specifically identified in statutory language are dependent on whether the union can prove that usual means of communicating with its members is ineffective (*DPA* at proposed dec., p. 42), was later disfavored by the Board in light of its conclusion that union representatives have a presumptive right of access. (*County of Riverside*, *supra*, PERB Decision No. 2233-M, p. 7.) In addition, some may question the continued vitality of PERB's conclusion in *DPA* that employee union representatives do not have access rights to an employer's e-mail system in light of recent federal authority addressing that issue. (See *Purple Communications, Inc*. (2014) 361 NLRB No. 126, slip op. pp. 6-7, 12.)

belief that the committees arranged unmanned selling stations in different SSA facilities and that HR condoned the practice because no committee members actively operated the stations. However, Local 2076 presented unrebutted evidence that committee members openly solicited other employees while they were working with the knowledge of SSA management. There was no evidence that SSA sought to either curb committee-members' activities or limit employees from going to social committee selling stations to make purchases. In light of this evidence, I conclude that permitting some minimally intrusive non-business activities in employees' primary work area and during working hours, while rigidly enforcing a ban on similar activity by Local 2076, causes at least "slight harm" to protected rights. (*DPA*, *supra*, PERB Decision No. 1279-S, proposed dec. pp. 49-52.) The burden now shifts to the County to demonstrate the legitimacy of its actions.[16]

Regarding the County's asserted justification, I am sympathetic to the County's concerns about ensuring that "working time is for work." SSA clients and applicants typically face long wait times for service. As a corollary, eligibility workers carry heavy workloads when processing benefits applications. However, the County's argument is less convincing in light of other, incidental non-business activity allowed in SSA facilities. Its assertions are

[16] Local 2076 also argues that ERR Section 19 is facially invalid because it restricts union solicitation activity "during the non-working hours of the employees involved." In *San Ramon Valley USD*, *supra*, PERB Decision No. 230, the Board appeared to endorse the distinction made by the NLRB in *Essex International, Inc*. (1974) 211 NLRB 749, between limitations on union activity during "working hours" and "working time." In *Essex*, the NLRB found that rules restricting union activity during "working hours" unduly interfere with protected rights unless the employer clarifies that the restrictions do not apply during non-duty time during the workday. (*Id*. at p. 750.) PERB has similarly indicated that employers may clarify otherwise overbroad restrictions on union activity to counteract any coercive effect. (*LACCD*, *supra*, PERB Decision No. 2404, p. 12.) Here, I find that Greek's April 23, 2014 e-mail sufficiently clarified to Local 2076 that the County was only seeking to limit solicitation activities "in work areas and during working time."

particularly hard to square with its decision to condone the presence of social committees at SSA sites. The County acknowledges in its brief that the social committees might occasionally cause a "small disruption" to employee working time, but maintains that committee members did not conduct their activities during their working time. This position was contradicted by undisputed evidence that committee members used working hours to conduct committee activities in SSA work areas and during working time without restriction and in full view of site management.

Even if it were true that social committee members did not perform committee activities during working hours, there was also no evidence that the County limited other employees from using working time to visit committee selling stations or view committee flyers. That presents a useful analogy to the present dispute because the County does not contend that any site representatives should have been working when they were distributing surveys.[17] The issue, therefore, is whether Local 2076's surveying activity affected the productivity of the unit members being surveyed. Both Cortez and Hartwell testified that they spoke to each employee for just a few seconds, only long enough to request that the employee fill out the survey and explain where to return it. These brief encounters appear to have no greater impact on County productivity than employees visiting a social committee fundraising location or having other incidental non-business conversations while on duty. Similarly, although SSA manager Daniel said that she heard then-Local 2076 President Fox asking unit members about working conditions, it was not shown that those interactions were any longer or more disruptive than other permissible personal interactions condoned by SSA. Accordingly,

[17] The record shows that site representatives distributing surveys did so while on release time or during days they were not scheduled to work.

the County's asserted justification does not explain why it restricts Local 2076 activity but does not do so for other non-work activities.

The County also asserts that social committees benefit the County because they are "morale building." However, this position ignores how Local 2076's efforts to represent its members on matters of unit-wide concern could also improve employee morale. In sum, I conclude that Local 2076's surveying activities in April 2014 were no more intrusive than other minimal non-business interactions permitted in SSA facilities during working time and in work areas. The County has not met its burden of proving that this disproportionate ban on non-business activity serves a legitimate business purpose. Accordingly, the County's April 23, 2014 directives unlawfully interfere with protected rights in violation of MMBA Sections 3503, 3506, and 3506.5, subdivisions (a) and (b).[18]

B. Alleged Interference With Bulletin Board Postings

The PERB complaint alleges that the County further interfered with protected rights by removing the two Workload Grievances posted by Local 2076 on its designated SSA bulletin boards. Employees have the well-recognized protected right to discuss working conditions and grievances. (*LACCD*, *supra*, PERB Decision No. 2404, p. 8; *Ravenswood City School District* (1984) PERB Decision No. 469, proposed dec., p. 29, citing *North Sacramento School District* (1982) PERB Decision No. 264 (*North Sacramento SD*).) Undue restrictions on use of

[18] Relying on federal authority, the County also argues that it was permitted to deny access to its facilities because Local 2076 had other, more traditional means to communicate with the bargaining unit. As explained above, the Board has rejected that approach in favor of concluding that unions have a presumptive right of access to employer facilities, subject only to reasonable regulation. (*County of Riverside*, *supra*, PERB Decision No. 2233-M, p. 7.) The availability of alternatives is only relevant when examining the reasonableness of the employer's restrictions. (*Id*. at pp. 9-10.) Here, the existence of alternatives does not justify the County's discriminatory ban on union related non-business activity. I therefore reject the County's argument.

designated union bulletin boards may interfere with protected rights. (*County of Riverside*, *supra*, PERB Decision No. 2233-M, p. 11.) Accordingly, removing flyers posted on designated bulletin boards causes "at least slight harm" to protected rights. (*State of California (Department of Transportation)* (1983) PERB Decision No. 304-S (*DoT I*), proposed dec., pp. 20-21.)

The County acknowledges that Local 2076 has the right and interest to communicate with its bargaining unit via SSA bulletin boards and does not appear to dispute that removing Local 2076's postings negatively impacts that right. It instead asserts that it has the comparatively greater interest in maintaining "harmony in the workplace," and that allowing "inflammatory statements" to remain posted in areas accessible to employees outside the eligibility workers' unit and, in some cases, to the public, undermines SSA's operations. The County argues that it was authorized to remove Local 2076's Workload Grievances under existing bulletin board rules in the MOU and the County ERR prohibiting "derogatory" materials. The County also argues that the postings violate the parties' grievance procedure, which designates grievance files as "confidential."

Eligibility workers have a protected right to speak amongst themselves, and even to the public, about working conditions and matters germane to employees as employees. This right is rooted in employees' fundamental statutory right to form, join, and participate in the activities of their chosen employee organization. (*LACCD*, *supra*, PERB Decision No. 2404, p. 8.) For that reason, the Board has found that "[p]rotecting the parties' freedom of speech is particularly important in negotiations and grievance proceedings, which the Legislature has designated as the preferred alternatives to strikes and other forms of economic warfare for resolving disputes over wages, hours and working conditions." (*City of Oakland* (2014) PERB

Decision No. 2387-M, p. 23, citations omitted.) PERB often interprets this right robustly, allowing for a wide range of public commentary over matters of common concern such as employee safety, negotiations, and the effectiveness of the exclusive representative. (*Rancho Santiago Community College District* (1986) PERB Decision No. 602 (*Rancho Santiago CCD*), pp. 12-13.)

Even statements critical of management remain protected "to the extent that the 'purpose is to advance the employees' interests in working conditions.'" (*Oakland Unified School District* (2007) PERB Decision No. 1880 (*Oakland USD*), p. 21, quoting *Trustees of the California State University (Sonoma)* (2005) PERB Decision No. 1755.) Under these standards, complaints about workplace safety and statements about pursuing grievances both qualify as protected speech. (*State of California (Board of Equalization)* (2012) PERB Decision No. 2237-S (*BoE*), proposed dec., p. 17; *Los Angeles Unified School District* (1995) PERB Decision No. 1129 (*LAUSD*), proposed dec., p. 8, citing *Pleasant Valley School District* (1988) PERB Decision No. 708.)

Employers, by comparison, have a relatively limited interest in regulating the content of employee speech on protected subjects. Even where such speech is uncomplimentary to the employer, and even statements containing inaccuracies or exaggerations remain protected unless the statements are "so 'opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice' as to cause 'substantial disruption of or material interference with [the employer's] activities' that it loses its protected status." (*Oakland USD*, *supra*, PERB Decision No. 1880, p. 21, quoting *Rancho Santiago CCD*, *supra*, PERB Decision No. 602.)

In *Mt. San Antonio Community College District* (1982) PERB Decision No. 224 (*Mt. San Antonio CCD*), teachers distributed the flyers publicly during students' graduation

ceremony, accusing the employer of "bad management" that endangered the quality of the employer's education services. (*Id*. at p. 3.) The Board found that the flyers were protected "representational activities," and that the teachers had the right to interact with third parties "on matters which were of legitimate concern to teachers as employees." (*Id*. at pp. 6-7.) There was no evidence in that case that the handbilling detracted from the graduation ceremony. (*Id*. at p. 8.) The Board accordingly decided that the employer's action to discipline teachers involved in the distribution interfered with protected rights. (*Id*. at pp. 10-11; see also *Journey Charter School v. PERB* (2009) 169 Cal.App.4th 1076 (*Journey Charter School*), 1090-1092 [holding that teachers had the protected right to send a letter to parents of a school's students accusing accused the school of "fiscal mismanagement" creating a "risk of insolvency," among other failures]; *Rio Hondo Community College District* (1982) PERB Decision No. 260 (*Rio Hondo CCD*), p. 4 [using the word "chickenshit" towards the district superintendent in an assembly attended by faculty, staff, and management was protected].)

In *Rancho Santiago CCD*, *supra*, PERB Decision No. 602, the Board considered newsletters published and distributed by a faculty member likening the employer to "Nazi Germany" after it disciplined her for the content of prior newsletters, stating that the district used "fear and intimidation" to run the college. (*Id*. at pp. 2-3, 6-7.) The employee also did not limit her criticisms to her employer, described her union as "sell[ing] out" in negotiations and the "weakest in California." (*Id*. at pp. 10-11.) The Board concluded that employee had the protected right to comment on the subjects covered in her newsletter and that the language used was not so "flagrant, opprobrious or malicious as to lose its protected status." (*Id*. at pp. 13-14.) Notwithstanding the fact that teachers and students alike saw the newsletters (*Id*. at p. 2), the Board was not persuaded to find that the newsletter tended to disrupt school operations.

Instead, the Board found that the newsletters discussed matters that were widely known and discussed at the college and that readers could form their own opinions about her assertions. (*Id*. at pp. 13-14.)

In *Anaheim Union High School District* (2015) PERB Decision No. 2434 (*Anaheim UHSD*), PERB held that an employee who e-mailed the local press accusing his supervisor, without basis, of being a "sexual predator" was not a protected safety complaint because it was intentionally inflammatory, sent with reckless disregard for the truth, and appeared to be motivated primarily by his own personal confrontations with the supervisor. (*Id*. at proposed dec., pp. 80-81.) Likewise, in *Regents of the University of California* (1998) PERB Decision No. 1263-H, PERB found that an employee's criticism of a new sick leave policy "crossed the line of reasonableness," and lost any protected status. He said that the changes might force employees in the animal laboratory to work while sick, which could, in turn, infect the animals. PERB found those criticisms to be "reckless and inflammatory," because there was no evidence either that employees worked while sick or that human illness could transfer to the laboratory animals. (*Id*. at proposed dec., pp. 46-47.)

In *DoT*, *supra*, PERB Decision No. 304-S, a union posted a leaflet on the employer's bulletin boards detailing the employer's conflict with an employee who was fired and who later committed suicide. The leaflet suggested that the employer played a role in the employee's death, and accused the employer's supervisor in particular (identified by name), of harassment, maintaining double-standards, and drinking on the job. It also described the employer's justification for dismissal as supported by "chewing gum and bobby pins." (*Id*. at proposed dec., pp. 3-5.) The employer removed the leaflet, describing it as "not truthful," "grossly irresponsible," and "defamatory" against the employee's supervisor and to management in

general. (*Id*. at proposed dec., pp. 8-9.) PERB concluded that, while the leaflet was disparaging towards management, it did address matters of concern to employees, and the claims were not "sheer fabrications," noting that the employer never disputed any of the flyer's claims. (*Id*. at proposed dec., pp. 27-28.) There was no evidence that the leaflet caused any actual disruption or had a tendency to cause disruption in the workplace. (*Id*. at pp. 3, fn. 2, proposed dec., p. 29.)

In this case, there is no dispute that the Workload Grievances address primarily, if not exclusively, eligibility workers' working conditions, including safety complaints, unwarranted pressures from management, and lack of enforcement on rules about breaks and assigned working time. These are clearly protected subjects. (*BoE, supra,* PERB Decision No. 2237-S, proposed dec., p. 17; *LAUSD, supra,* PERB Decision No. 1129, proposed dec., p. 8; *Rancho Santiago CCD, supra*, PERB Decision No. 602, pp. 12-13.)

The County argues that it was privileged to remove the grievances due to the incendiary language used. It refers to Local 2076's claims that SSA, supervisors, and/or managers, "blatant[ly] disregard" employee safety, use "intimidation" to discourage employees from raising workplace issues with Local 2076, and "intimidate and threaten" discipline for failing to satisfy unclear productivity standards. I find this argument unpersuasive. Employees, including Local 2076 site representatives, are entitled to use uncomplimentary terms when criticizing the County about problems with working conditions. I do not find the statements so opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice that they lost protection under the MMBA. The terms used by Local 2076 were not more than strong language used to describe the bases for their complaints, i.e., that supervisors and managers were not cognizant of employee safety, discouraged reporting workplace conditions to the

union, and used the potential for discipline to stimulate employee productivity. As in *DoT I, supra*, PERB Decision No. 304-S, the County offered no evidence specifically refuting the accuracy of the claims in the grievances and it generally agrees that changes under the ACA caused a stressful environment at SSA. There was no showing that the postings actually caused any disruption within SSA. And other than broad arguments that it is "not hard to imagine" how the claims made in the Workload Grievances might impact other employees' work, there was no explanation on how claims made in a grievance tend to disrupt SSA work.

I am also not persuaded by the County's assertion that it had a heightened interest in removing the grievances because of the possibility that other SSA employees, and members of the public, might view the bulletin boards in question. As stated in *Regents of the University of California* (2012) PERB Decision No. 2300-H:

> A union's publicizing its dispute over terms and conditions of employment to the public at large as well as to its members and other employees goes to the essence of the employment relationship. Providing information to the public and urging it to support labor's demands with the public employer is one of the more important levers employees and their representative organizations have in securing demands over wages, benefits and other terms and conditions of employment.

(*Id*. at pp. 21-22.)

Moreover, speech does not lose its protection simply because it discusses the actions of other employees. (See e.g., *Rancho Santiago CCD*, *supra*, PERB Decision No. 602, pp. 10-11; *DoT I, supra*, PERB Decision No. 304-S, proposed dec., pp. 27-28.) As in *Rancho Santiago CCD*, pp. 13-14, these issues were widely known throughout the SSA, and employees reading the grievances could form their own opinions about the veracity of Local 2076's claims and the merit of the suggested solutions. It is more likely than not that any SSA supervisors and managers curious enough to review the posted grievances would also be savvy enough to

recognize that Local 2076's allegations were just that, claims to be discussed and resolved through the grievance process.[19] I also reject the argument that the grievances lost their protected status because members of the public may have had some limited access to some SSA bulletin boards. Both the courts and PERB have found that employees have the protected right to speak to even third party consumers of the employer's services about subjects germane to employees' interests as employees. (*Journey Charter School, supra*, 169 Cal.App.4th 1076, 1090-1092; *Rancho Santiago CCD*, pp. 2, 13-14; and *Mt. San Antonio CCD, supra*, PERB Decision No. 224, pp. 3, 6-7.) Therefore, I find that Local 2076 and its employees had a substantial protected interest in commenting about their changing working conditions and to discuss the subject matter of their filed grievances addressing those conditions. The County's asserted interest in workplace harmony and maintaining operational effectiveness do not outweigh the harm caused by interfering with these rights.

The County also argues that the confidentiality provision in the grievance procedure permits the County remove the Workload Grievances from its SSA bulletin boards. Citing a variety of federal decisions, the Board recently expressed its view that employer confidentiality rules should be viewed cautiously because of the potential for chilling employee speech and other protected activities. (*LACCD, supra,* PERB Decision No. 2404, pp. 6-7, citing *Flex Frac Logistics, LLC and Silver Eagle Logistics, LLC, as Joint Employers* (2012) 358 NLRB No.

[19] The evidence shows that the Workload Grievances were filed using the same forms used by all County unions, including those representing the County's supervisory and management units. In addition, the informal and formal steps of the parties' grievance procedure actually involves both supervisors and management. These facts all suggest that supervisors and managers are familiar enough with grievance handling to understand that assertions in a grievance are only the point of view of the grievants. The first page of each Workload Grievance lists Local 2076 as the grievants which reasonably minimizes any possibility that a casual reader would confuse the content of the grievance with a message endorsed by the County.

127, slip op. at p. 1 [holding that an overly broad confidentiality rule interfered with protected rights]; *Hyundai America Shipping Agency, Inc.* (2011) 357 NLRB No. 80, slip op. at p. 27 (*Hyundai*) [holding no legitimate business justification for a vague confidentiality rule that applied in all employee investigations].)[20] Although there may be specific circumstances where an employer's need for confidentiality might justify some adverse impact on employee rights, the employer must demonstrate the need for such confidentiality. (*LACCD*, p. 13.)

The NLRB further addressed this tension in *International Business Machines Corp.* (1982) 265 NLRB 638 (*IBM*). There, the employer maintained a rule prohibiting disclosure of its own internally generated personnel documents, including wage information. (*Id*. at p. 641.) The employer fired an employee for distributing a private document containing salary ranges and recommended salary increases for certain positions (*Id*. at pp. 641-642.) Noting the competitive hiring environment the employer operated in, the NLRB found that the employer had a legitimate business need for confidentiality of its own created salary survey compilations. The NLRB expressly distinguished the situation from cases where employers ban employees' own discussions about wages and other working conditions. It noted that the employer's rule did not forbid employees from compiling their own salary data or from discussing salaries or other terms of employment amongst themselves. (*Id*. at p. 638.) Other cases have held that confidentiality policies that directly prohibit employees from discussing protected subjects, such as wages, interfere with protected rights. (*Medeco Security Locks, Inc. v. NLRB* (4th Cir. 1998) 142 F.3d 733 (*Medeco Security*), pp. 747-748 [confidentiality statement preventing employee from discussing his own transfer and performance on an

[20] The cited conclusions in *Hyundai*, *supra*, 357 NLRB No. 80, were subsequently affirmed in *Hyundai American Shipping Agency, Inc. v. NLRB* (5th Cir. 2015) 805 F.3d 309, p. 314. The court's decision issued after the Board issued *LACCD*, *supra*, PERB Decision No. 2404.

engineering exam; *W.R. Grace Co*. (1979) 240 NLRB 813, pp. 815-816 [confidentiality rule prohibiting salary discussions].)

Here, I conclude that applying the confidentiality rule to prohibit employees from sharing their own information about their working conditions and their complaints to the County adversely impacts protected rights. (See *Medeco Security, supra*, 142 F.3d at pp. 747-748; *IBM, supra*, 265 NLRB 638; *W.R. Grace Co., supra*, 240 NLRB at pp. 815-816.) And it is unclear what justification the County has for this application. It does not argue that its interpretation of the confidentiality rule is necessary to preserve the integrity or efficacy of the parties' grievance process. Rather, it asserts that there are "a variety of reasons" for keeping the material confidential from other employees. Without further detail, I am unable to give this argument any weight. Accordingly, I conclude that employees' right to communicate about protected subjects outweighs any interest the County has in designating Local 2076's own grievance documents as confidential against its will. Applying the confidentiality rule in this manner interfered with employees' speech rights.

The County also points out that both the prohibition on "derogatory" postings and the grievance confidentiality rules were contained in the parties' MOU. It argues, essentially, that Local 2076 agreed to limitations on what could be posted on bulletin boards and on what grievance documents would remain confidential and that the County has a legitimate business interest in receiving the benefit of what it bargained for with Local 2076. I reject this argument. Contractual waivers or limitations of statutory rights are not lightly inferred. Quite the opposite, such waivers may only be established through "clear and unmistakable" language in the parties' agreement. (*Stanislaus CFPD, supra*, PERB Decision No. 2231-M, p. 13, citing *Grossmont Union High School District* (1983) PERB Decision No. 313; *Amador Valley Joint*

Union High School District (1978) PERB Decision No. 74 [concerning the statutory right to bargain over negotiable subjects]; *Omnitrans, supra,* PERB Decision No. 2010-M, pp. 5-7 [concerning a union's statutory right to file its own grievances]; *Oxnard Harbor District* (2004) PERB Decision No. 1580-M, pp. 8-10 [concerning the right to engage in sympathy strikes].)

In this case, nothing in either the MOU provisions addressing grievance files or bulletin boards states or implies that Local 2076 intentionally agreed to relinquish or limit the right of its members to speak about working conditions. In the absence of such clear and unmistakable language, I decline to infer any waiver of this statutory right. Furthermore, any waiver of statutory rights expires at the end of the contract. (*Stanislaus CFPD, supra,* PERB Decision No. 2231-M, pp. 14-15, citing *Antelope Valley Union High School District* (1998) PERB Decision No. 1287.) Here, the 2009-2012 MOU expired by its own terms on June 14, 2012. The parties did not reach a successor MOU until October or December 2014. Nor was there evidence of an agreement between the parties to extend the life of any waivers in the 2009-2012 MOU until its successor was negotiated. Thus, the County has not met its burden of proving that there were any contractual waivers in place when the County removed the Workload Grievances from Local 2076's bulletin boards in May 2014.

In sum, the County's decision to remove the Workload Grievances from Local 2076's designated bulletin boards caused at least slight harm to the protected right to communicate with unit members and with others over working conditions common to the entire bargaining unit. Although I recognize that the County has a genuine interest in preserving civility and efficiency in its operations, that interest does not authorize the County to restrict the protected statements in the Workload Grievance because of their content. Therefore, on balance, I

conclude that removing the workload grievances under these circumstances unlawfully interfered with protected rights in violation of MMBA Sections 3503, 3506, and 3506.5, subdivisions (a) and (b).

II. Unilateral Change Claims

The PERB complaint alleges that the County violated its duty to negotiate in good faith by unilaterally changing polices concerning release time and grievance filing. Unilateral changes to negotiable subjects are "per se" violations of the duty to bargain and violate MMBA Section 3506.5, subdivision (c). (*City of Livermore* (2014) PERB Decision No. 2396-M, p. 20.)

A. Alleged Changes to Release Time and Union Representation at Meetings

The PERB complaint alleges that, on or around June 4, 2014, the County unilaterally implemented new policies concerning release time and union representation by: (1) limiting the number of Local 2076 representatives at grievance meetings to a single site representative and no AFSCME business representatives; (2) requiring Local 2076 representatives to complete a newly developed release time request form; (3) requiring release time requests be made at least 48 hours in advance; and (4) requiring the Local 2076 representatives using release time to contact their supervisor within 15 minutes of any delays in the estimated return time. Both parties argue over the scope of the claims appropriate for decision in this case. These disputes are addressed here.

1. Claims in the PERB Complaint

The County maintains that the PERB complaint only addresses the *identity* of union representatives available at grievance meetings, i.e., whether both a Local 2076 site representative and an AFSCME staff representative may attend grievance meetings. The

County argues that the Complaint does not address the *number* of representatives eligible for release time. The PERB complaint states in relevant part that the County enacted a new policy "limiting representation at grievance Step meetings to *only one* (site) representative *and* excluding Charging Party's staff representatives[.]" (emphasis supplied.) The use of the conjunctive word "and" indicates that claim was intended to describe alleged changes to both the number of representatives eligible to attend grievance meetings and the identity or title of those representatives. I accordingly reject the County's narrower interpretation of the PERB complaint.

That said, Local 2076 did not present any evidence or argument supporting the allegation that the County prohibited AFSCME business representatives from attending grievance meetings. According to both Senior Employee Relations Representative Gallonio, and the June 4, 2014 Release Time Guidelines letter, no such prohibition was imposed. Accordingly, this claim is considered abandoned by Local 2076 and dismissed for lack of proof.

2. Local 2076's Asserted Unalleged Violations

In addition to the claims in the PERB complaint, Local 2076 alleges three other unilateral changes to release time polices. Those claims are best analyzed using PERB's unalleged violation doctrine. PERB may only consider "unalleged violations" when the following criteria are met:

> (1) adequate notice and opportunity to defend has been provided the respondent; (2) the acts are intimately related to the subject matter of the complaint and are part of the same course of conduct; (3) the unalleged violation has been fully litigated; and (4) the parties have had the opportunity to examine and be cross-examined on the issue.

(*Lake Elsinore Unified School District* (2012) PERB Decision No. 2241 (*Lake Elsinore USD*), p. 8, citing *County of Riverside* (2010) PERB Decision No. 2097-M; *Fresno County Superior Court* (2008) PERB Decision No. 1942-C; *Tahoe-Truckee Unified School District* (1988) PERB Decision No. 668.) The unalleged violation must also have occurred within the six-month statute of limitations period. (*Lake Elsinore USD*, p. 9.)

First, Local 2076 asserts that the June 4, 2014 Release Time Guidelines letter limited release time in other ways not described in the PERB complaint. According to Local 2076, the County also limited the number of union representatives eligible for release time in other types of meetings, namely employee discipline investigation meetings and meetings for employees being released within their probationary period. I find that all of the above criteria are satisfied regarding these claims. Local 2076 alleged in its original unfair practice charge that the Release Time Guidelines letter limited the number of representatives who could use release time for meetings other than just grievance meetings.[21] That assertion was repeated in Local 2076's opening statement at hearing. The County does not dispute that the letter describes similar release time limitations for both grievance meetings and for other meetings covered under the MOU. In both the letter and in the instant proceedings, the County asserts a single rationale for enforcing the asserted release time limitations in all of those meetings. Witnesses from both parties were examined and cross-examined extensively about the Release Time Guidelines letter, including the scope of the limitations in the letter and County's rationale. Under the circumstances I find it appropriate to consider whether the County limited the

[21] Local 2076's discussion of the alleged changes enacted through the Release Time Guidelines letter in its original unfair practice charge furthermore make the claims timely for purposes of the unalleged violation doctrine. (*Fresno County Superior Court*, *supra*, PERB Decision No. 1942-C, p. 17.)

number of Local 2076 representatives entitled to release time for other activity, as described in the Release Time Guidelines letter.

The second unalleged violation advanced by Local 2076 is that the County limited the number of representatives who could attend meetings not described in the Release Time Guidelines letter. Those meetings include workload management forums and interactive meetings to accommodate employees' medical limitations. I do not find that the elements of the unalleged violation standard are met for these claims. Neither type of meeting was described in Local 2076's unfair practice charge. Instead, the claims were raised initially on September 1, 2015, during Chief Steward Cortez's testimony at the second day of hearing. Local 2076 offered no explanation for not raising these issues sooner. According to Cortez, Local 2076 learned of these other changes on or around June 4,2014. Under the circumstances, these claims do not appear to have been raised within the six-month statute of limitation period for MMBA claims.[22] Because it was not claimed or proven that these other changes were the product of the Release Time Guidelines letter, I also find that there is an insufficient factual connection to Local 2076's existing claims to apply the relation back doctrine here. (See *City of Santa Monica* (2012) PERB Decision No. 2246-M, dismissal ltr., p. 6, citations omitted.) Accordingly, these claims will not be addressed further in this proposed decision.

The third unalleged violation raised by Local 2076 alleges that, after June 4, 2014, the County began denying release time requests for stewards to file grievances in person at County

[22] In *Los Angeles Unified School District* (2014) PERB Decision No. 2359, the Board found that the charging party bears the burden of establishing *timeliness* during the PERB Office of the General Counsel investigation of an unfair practice charge but that, after a complaint issues for a particular claim, then the respondent has the burden of proving *untimeliness* at hearing. (*Id*. at p. 3.) Because the General Counsel did not issue a complaint on Local 2076's unalleged violations, the holding from that decision does not apply here.

office locations. This claim was raised in Local 2076's original unfair practice charge. It was also addressed through witness testimony and other evidence. And while the PERB complaint does not specially describe this allegation, this claim is sufficiently related to the allegations in the PERB complaint addressing changes to the grievance filing process. Both parties discussed the claim in their closing briefs. For these reasons, consideration of this unalleged violation is appropriate.[23]

3. The Elements of the Unilateral Change Test

To establish a prima facie case for an unlawful unilateral change, the charging party must show that: (1) the employer took action to change existing policy; (2) the policy change concerned a matter within the scope of representation; (3) the action was taken without giving the exclusive representative notice or opportunity to bargain over the change; and (4) the change has a generalized effect or continuing impact on terms and conditions of employment. (*Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262 (*Fairfield-Suisun USD*), p. 9, citing *Grant Joint Union High School District* (1982) PERB Decision No. 196, p. 10; *Walnut Valley Unified School District* (1981) PERB Decision No. 160, p. 5; see also *Vernon Fire Fighters, Local 2312 v. City of Vernon* (1980) 107 Cal.App.3d 802, pp. 822-823.)

[23] Local 2076 suggests that other changes to release time/union representation policies occurred on or around the same time including: (1) providing only two hours of release time for investigating grievances or preparing for grievance meetings; (2) refusing release time requests to attend meetings regarding MOEs, SOCs, and CAPs issued to unit members; (3) refusing release time requests for meetings at AFSCME offices; (4) refusing release time requests for meetings scheduled on days adjacent to holidays; and (5) refusing site representatives' requests to use their own vacation time to attend meetings with the County. None of these issues was addressed in the "ARGUMENT" section of Local 2076's closing brief. Nor did Local 2076 request any specific remedy about any of these matters. Because these purported changes were not fully addressed or even clearly raised even as "unalleged violations," I decline to discuss them further in this proposed decision.

The parties do not dispute two of the four unilateral change elements here. There is no dispute that the County did not negotiate and refused to negotiate with Local 2076 over any of the alleged changes to release time. There is also no question that the County intended the release time policies to apply generally to all Local 2076 release time requests as part of the County's effort to create uniformity in SSA release time policies. Accordingly, the alleged changes have a continuing impact on the bargaining unit. (See *Moreno Valley Unified School District* (1995) PERB Decision No. 1106, proposed dec., p. 9.) Regarding the remaining two elements, this proposed decision will first address arguments over whether the alleged changes are within the scope of representation and then discuss whether each claim amounts to a change in policy.

a. Scope of Representation

MMBA Section 3504 defines the scope of representation as "all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." Under MMBA Section 3505, employers and recognized unions have the mutual duty to meet and confer in good faith over matters within the scope of representation. The County argues here that any changes to existing release time policies were not negotiable because the Release Time Guidelines letter, at most only "departs slightly" from existing release time requirements. For example, it argues that filling out the ART form adds "a negligible amount of work[,]" for site representatives.

The County supports its argument by citing *Claremont Police Officers Association v. City of Claremont* (2005) 39 Cal.4th 623 (*City of Claremont*). In that case, the court

considered the negotiability of a new policy requiring patrol officers to collect race and ethnicity data each time they stopped a driver or person. (*Id*. at p. 535.) It applied a three-part inquiry. Under the first part, the question is whether management action has a "significant and adverse effect on the wages, hours, or working conditions of the bargaining unit employees." (*Id*. at p. 632, citing *Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, p. 660.) If not, there is no duty to meet and confer over the action. If so, then second question is whether the "significant and adverse effect arises from the implementation of a fundamental managerial or policy decision." (*Ibid*.) If both of these first two questions are answered affirmatively, then the parties' competing interests are balanced and the action is subject to bargaining "only when the employer's need for unencumbered decisionmaking in managing its operations is outweighed by the benefit to the employer-employee relations of bargaining the action in question." (*Ibid*.) The court in applied that test and found that there was no duty to negotiate over the new reporting requirement because the report added only minutes to the officers' duties and accordingly did not have any "significant and adverse" effect on their employment. (*Id*. at p. 639.)

PERB has long considered the issue of employees' eligibility for release time to be within the scope of representation because of its relationship to employer-employee relations and its effect on employees' wages and hours. (*County of Riverside* (2013) PERB Decision No. 2307-M, p. 22, citing *Anaheim Union High School District* (1981) PERB Decision No. 177; *State of California (Department of Corrections & Rehabilitation, Avenal State Prison)* (2010) PERB Decision No. 2111-S. warning ltr, p. 3.) I am not privileged to depart from the Board's established position on this issue. Applying the negotiability test in *City of Claremont, supra,* 39 Cal.4th 623, would not change that conclusion. The alleged release time

request changes alter who may use release time, what activities it may be used for, and when and how requests are made. The fact that it might take site representatives only minutes to comply with the new conditions misses how these limitations impact employees' right to time off, wages, and labor relations in general. Cortez explained that she had to use her own personal time to carry out union business because the County denied her release time requests or because employees were unwilling to identify themselves on the ART form. She also said that Local 2076 lost the opportunity to get multiple stewards' perspectives to address disputes with the County during grievance or other meetings. Thus, I find that the alleged changes have a significant impact on wages, hours, and working conditions.

Under the remaining components of the test, I acknowledge that the County has an interest in maximizing employee productivity, but I do not conclude that such an interest translates into a fundamental managerial prerogative to unilaterally establish release time procedures. To the contrary, the Legislature felt that the issue of release time such a matter of mutual concern between employers and unions that it codified the right to release time into the text of the MMBA. (See Section 3505.3.) PERB has also long-held that neither party should individually be able to dictate release time rights and that, to the contrary, the mediatory influence of collective bargaining is the most effective way to address these disputes. (*Anaheim Union High School District*, *supra*, PERB Decision No. 177, pp. 6-8.) I reach the same conclusion here.

b. Change to Existing Policy

PERB's unilateral change analysis requires the charging party to demonstrate that the respondent made some kind of change to existing policy. PERB has recognized three general categories of unlawful unilateral actions: (1) changes to the parties' written agreement; (2)

changes in an established past practice;[24] and (3) newly created, implemented, or enforced policies. (*Pasadena Area Community College District* (2015) PERB Decision No. 2444, p. 12, fn. 6, citing *Fairfield-Suisun USD, supra*, PERB Decision No. 2262; *Grant Joint Union High School District, supra*, PERB Decision No. 196.) In this case, Local 2076 alleges five different release time policy changes.

i. Alleged Limitations on Release Time Representatives

Local 2076 alleges that the County enacted a new policy limiting the number of Local 2076 representatives who may take release time for grievance meetings as well as for discipline investigations and probationary release meetings. At issue is the following language from the Release Time Guidelines letter:

> Whenever specified in the MOU that an employee has a right to be represented by "a Union Steward" or "an AFSCME staff representative, only one (1) representative, not several, will be allowed unless the County agrees to waive this requirement.

This language implicates three sections of the MOU: (1) grievance representation at Article IX, Section 5 ["an authorized grievance/appeal representative"]; (2) probation failure meetings at Article III, Section 1(C) ["an authorized grievance/appeal representative"]; and (3) disciplinary investigations at Article VIII, Section 7(B) ["a Union Steward or an AFSCME staff representative"].

The County does not dispute that, prior to June 4, 2014, it granted multiple site representatives release time for all three of these types of meetings. Evidence of this practice dates back to at least late 2012 or early 2013. The County instead argues that it was authorized

[24] The Board has described established past practices as ones which are unequivocal, clearly enunciated and acted upon, and readily ascertainable for a fixed period of time and an established practice accepted by both parties. (*County of Riverside, supra*, PERB Decision No. 2307-M, p. 20, citations omitted.)

to adhere to contract-based limitations on release time contained in the MOU. *Marysville Joint Unified School District* (1983) PERB Decision No. 314 (*Marysville JUSD*), is one of the Board's leading decisions on the issue of managerial discretion under a contract. There, the parties' contract language entitled teachers to "one duty-free lunch break of no less than 30 minutes each day." (*Id*. at p. 2.) In the past, employees received a 50 to 55 minute lunch period but, amidst layoffs for other positions, the employer reduced the break to just 30 minutes. (*Id*. at pp. 4-5.) The Board found that there was no contractual guarantee to a longer break and that the employer's conduct was consistent with the its authority under the clear and unambiguous language of the agreement. (*Id*. at pp. 9-10.) The Board rejected the argument that the practice of offering a longer lunch period precluded any return to the 30-minute break specified in the contract. The Board held "[t]he mere fact that an employer has not chosen to enforce its contractual rights in the past does not mean that, ipso facto, it is forever precluded from doing so." (*Id*. at p. 10, citing *Rio Hondo Community College District* (1982) PERB Decision No. 279.)

In *County of Riverside*, *supra*, PERB Decision No. 2307-M, the Board stated, "*Marysville*, *supra*, PERB Decision No. 314, stands for the principle that if a contract provision is unambiguous and there is no subsequent mutual agreement to alter it, the employer is entitled to enforce the terms of the contract despite its prior failure to do so." (*Id*., at pp. 24-25.) The Board in *County of Riverside* concluded that *Marysville USD*, did not apply where the contract was silent and/or ambiguous on whether employees on union release time were eligible for shift differential pay. (*Id*., at p. 25.)

Discussing the County's argument in this case requires me to examine and interpret the language in the parties' MOU. When doing so, I am guided by traditional contract

interpretation principles, such as looking first to the language of the contract to ascertain its meaning and reading the entire agreement together as a whole such that each clause helps interpret the other. (*County of Sonoma* (2012) PERB Decision No. 2242-M, pp. 15-16, citing Civ. Code, § 1641.) The County is correct that the parties' MOU does describe the right to union representation in certain circumstances using a singular form. However, I do not agree that the use of this singular construction clearly and unambiguously limits Local 2076 to a single representative. Throughout the MOU, when the parties sought to describe a specific, defined number, they expressed that specific number both alphabetically and numerically.[25] The County offers no explanation as to why, if the parties intended on a specific number limit on release time use, the MOU does not express that number using the typical construction used ubiquitously elsewhere in the MOU. Nor was there any evidence extrinsic to the MOU demonstrating either that the parties intended the interpretation advanced by the County here, or that the parties ever accepted such an interpretation in the past. Accordingly, the holding from *Marysville JUSD*, *supra*, PERB Decision No. 314, does not apply here.

The June 4, 2014 Release Time Guidelines letter placed restrictions on release time use for certain meeting types where there were previously none. The change to release time

[25] For example, in the "DEFINITIONS" section, the MOU describes a full-time employee as one who is employed in "*one (1)*" or more positions with assigned hours equaling a full workweek. Article I, Section B, describes employee lunch periods as "a meal period of "*one (1)* hour" unless otherwise mutually agreed to. Article IV, Section (C)(1) states "[a]n employee shall not be entitled to more than *one (1)* [Nonoccupational Disability] Leave period per *twelve (12)* month period." That construction format is even followed in each of the MOU Articles at issue here. Article III, Section 1(D)(4), states that probationary employees "may not transfer from *one (1)* agency to another in the same class" without HR approval. Article VIII, Section 7(C), requires the County to inform employees about the results of any disciplinary investigations "within *four (4)* weeks from the date of the investigatory meeting[.]" Article IX, Section 3(C), specifies that if "the grievant is a group of more than *three (3)* employees, the group shall, at the request of the County, appoint *one (1)* or *two (2)* employees to speak for the collective group." (Emphasis supplied throughout.)

affected an area within the scope of representation, was not negotiated, and continues to be in effect. Accordingly, the County's change here was an unlawful unilateral change in violation of MMBA conduct violates the duty to meet and confer in good faith under MMBA Sections, 3505, 3506, and 3506.5, subdivision (c). (*City of Sacramento* (2013) PERB Decision No. 2351-M, p. 38; *County of Sacramento* (2009) PERB Decision No. 2045-M, p. 4.) That same conduct interfered with employees' right to be represented by Local 2076 and Local 2076's corresponding right to represent its members in violation of MMBA Section 3503, 3506.5, subdivisions (a) and (b). (*Ibid*.)[26]

ii. Alleged Changes in the ART Request Form

The PERB complaint alleges that the County further changed existing policy by requiring site representatives to use the ART form for release time requests. The form includes space to provide details about the request, including the type of activity, the date, time, and location of the activity, and the estimated departure and return times. Perhaps most significantly, the ART form also includes space to identify the unit member, if any, the release time would be used to represent. Representatives send the completed form to both their direct supervisor and to the e-mail address art@ocgov.com, an address monitored by HR. The

[26] The County also argues that Local 2076 failed to establish that any unilateral policy changes interfered with employee or union rights. In cases involving bargaining violations, in violation of MMBA Section 3506.5, subdivision (c), the Board has considered corresponding violations of subdivisions (a) and (b) to be derivative of the (c) violation. (*City of Inglewood* (2015) PERB Decision No. 2424-M, p. 9.) I reach the same conclusion here. Even if that were not the case, an employer's unilateral assumption of power over negotiable subjects has a destabilizing effect on labor relations, derogates the union's negotiating power and ability to represent its unit, and reduces the employer's accountability to both its employees and to the public. (*County of Santa Clara* (2013) PERB Decision No. 2321-M, p. 23.) These detrimental effects negatively impact both Local 2076's ability to represent the Eligibility Unit and employees' right to be represented by an exclusive representative.

County does not dispute that the ART form is both new and mandatory, but contends that the form merely compiled existing requirements for processing release time requests.

The record was unclear as to how much information site representatives provided when requesting release time. Most provisions in the MOU concerning release time allow the County to consider possible work disruptions when evaluating release time requests. (See e.g., (Art. IV, § 8, Art. IX, § 5(B).) This suggests that stewards are expected to give basic information about the time, date, and length of their absence. Local 2076 Chief Steward Cortez said she historically provided this type of information, as well as general information about the nature of her release time activity. County HR representative Santini said he reviewed other Local 2076 release time requests containing similar information. Overall, I find that there is insufficient information to conclude whether the sections of the ART form concerning the date, time, location, purpose, and anticipated length of absence amounted to a change in policy. Accordingly, to the extent that Local 2076 asserts that adding these requirements unilaterally changed existing policy, those claims are dismissed.[27]

On the other hand, Local 2076 did prove that the County imposed a new requirement that site representatives identify the employee at issue in their release time requests. Nothing in the MOU covers that obligation and no witness testified that it was ever required. In fact, the record states exactly the opposite. Cortez provided unambiguous and uncontradicted testimony that the County never required this before. In addition, in a June 15, 2009 MOE issued to Fox, the County stated "[w]e do not expect you to provide the name or details of the

[27] I also find insufficient evidence that requiring employees to submit the ART form to both site supervisors and to an HR e-mail address was a policy change. Both before and after June 4, 2014, SSA supervisors consulted with HR on release time requests. Moreover, I consider the County's internal deliberation process over release time requests to be a matter of managerial prerogative.

meeting[,]" in her release time requests. Santini also acknowledged that this was not required during the time he was the County's AFSCME Liaison.

The County admits that the name requirement was new. It instead claims that any change was later amended to only require that Local 2076 identify the employee by initials. Starting in on or around July 2014, Cortez began using employees' initials, not their full name, and the County has processed, and even granted some of those requests. In spite of this evidence, I reject the argument that no change has occurred here. There was no evidence that the County ever revised either the Release Time Guidelines letter or the ART form to eliminate the employee name requirement. Nor, was there evidence that the County ever otherwise communicated to stewards that initials would be accepted. Moreover, even a new policy that was fully rescinded constitutes a unilateral policy change under PERB's analysis. (*County of Sacramento* (2008) PERB Decision No. 1943-M, p. 12 ["The fact that the County reversed its position and restored the status quo before the new policy went into effect, does not cure the unlawful unilateral change."].) Because the County imposed a new requirement that changed a matter within the scope of representation without giving any opportunity for negotiations, the County violated the duty to meet and confer in good faith under MMBA Sections 3503, 3505, 3506, and 3506.5(a), (b), and (c). (*City of Sacramento*, *supra*, PERB Decision No. 2351-M, p. 38; *County of Sacramento*, *supra*, PERB Decision No. 2045-M, p. 4.)

iii. Alleged 48-Hour Notice Requirement

The record here is undisputed that the June 4, 2014 Release Time Guidelines letter imposed a new requirement that release time requests be made at least 48-hours in advance, unless waived by the County. The County contends that no violation occurred here because the County did in fact waive that requirement an unspecified number of times. As stated

above, even a fully rescinded unilateral change violates the duty to negotiate in good faith. (*County of Sacramento, supra*, PERB Decision No. 1943-M, p. 12.) Because the County imposed a new requirement that changed a matter within the scope of representation without giving any opportunity for negotiations, the County violated the duty to meet and confer in good faith under MMBA Sections 3503, 3505, 3506, and 3506.5(a), (b), and (c). (*City of Sacramento, supra*, PERB Decision No. 2351-M, p. 38; *County of Sacramento, supra*, PERB Decision No. 2045-M, p. 4.)

iv. Alleged 15-Minute Notice Requirement

The PERB complaint also alleges that the County imposed a new requirement that Local 2076 representatives taking release time inform their supervisors within 15 minutes if there will be a delay in returning to work. Neither party presented evidence about whether this was a new policy or whether it existed prior to June 14, 2014. For this reason, there is insufficient evidence of any change to a negotiable policy and this claim is therefore dismissed.

e. Alleged Denial of Release Time for Grievance Filings

Local 2076 alleges that, after June 4, 2014, the County began rejecting its requests for release time to file grievances in person at County offices. Cortez provided unrebutted testimony that the County granted release time requests for this purpose prior to June 4, 2014. After that date, Cortez said that County representatives informed her that release time would no longer be granted for this activity. The County does not dispute this testimony but contends that it was not required by the MOU to grant such requests. The County is correct that the MOU does not reference Local 2076's ability to use release time for filing grievances in person. Even so, the MOU's silence on this issue does not entitle the County to unilaterally

discontinue existing release time practices or impose new restrictions on the type of activities appropriate for release time.[28]

Furthermore, I decline to infer from the MOU's silence that Local 2076 has voluntarily waived the right to negotiate with the County over new release time polices or any other matter within the scope of representation. (*Berkeley Unified School District* (2004) PERB Decision No. 1729, warning ltr., p. 3, citing *CSEA v. PERB* (1996) 51 Cal.App.4th 923, pp. 938-940 [holding contract-based waiver of the right to bargain must "specifically reserve for management the right to take certain action or implement changes regarding the issues in dispute."].) Thus, because the County imposed a new requirement that changed a matter within the scope of representation without giving any opportunity for negotiations, the County violated the duty to meet and confer in good faith under MMBA Sections 3503, 3505, 3506, and 3506.5, subdivisions (a), (b), and (c). (*City of Sacramento*, *supra*, PERB Decision No. 2351-M, p. 38; *County of Sacramento*, *supra*, PERB Decision No. 2045-M, p. 4.)

[28] The County argues that Cortez's testimony alone is insufficient to establish a binding past practice because she had only been a steward for around one year before the alleged changes on June 4, 2014. I reject this argument. In *Willits Unified School District* (1991) PERB Decision No. 912, PERB found that an employer's decision to deny use of release time for a PERB settlement conference being used for contract negotiations violated both its practice of granting release time for negotiations and its historic practice of being "very liberal" in granting release time requests in general. (*Id*. at proposed dec., pp. 20-21.) There was no evidence of any release time request ever being denied. PERB did not see the need to specify the timeframe for the "liberal" practice regarding release time. As in that case, here, Cortez testified that the County had previously allowed release time for filing grievances. She also discussed the very liberal release time policy during her entire tenure as Chief Steward. Before June 4, 2014, she could not recall a request ever being denied. Cortez's testimony might be viewed with more suspicion if there was any showing that the County's practice in granting release time for grievance filing fluctuated at any time. There was no evidence of any release time requests being denied for any reason before June 4, 2014. Because nothing in the record states or implies that the County ever had a different policy or practice regarding release time for grievance filing, I find Cortez's testimony sufficient to demonstrate a binding past practice on this issue.

B. Alleged Changes to the Grievance Form

The PERB complaint alleges that, on or around July 9, 2014, the County revised its Administrative Policies and Procedures relating to grievance filing and refused Local 2076's demands to negotiate over the changes. There is no substantial dispute that grievance procedures are within the scope of representation (*County of Riverside* (2003) PERB Decision No. 1577-M, p. 6, citing *Anaheim City School District* (1983) PERB Decision No. 364, other citations omitted), that the County refused to negotiate with Local 2076 over the matter, and that the revisions at issue continue in effect today. The crux of the issue here is whether the County's actions amounted to a change in policy.

The County used to provide all of its unions with printed grievance forms but stopped that practice a few years ago. Instead, on July 9, 2014, the County made the grievance form available online to all of its unions, including Local 2076. At that point, union representatives could print the forms as needed. I find insufficient evidence of any policy change here. Both before and after the alleged change, the County provided Local 2076 with grievance forms. Whereas, before July 9, 2014, those forms were already pre-printed by the County, afterwards, Local 2076 representatives could simply print the forms themselves using County equipment for processing and filing.

Cortez expressed her opinion that this changed existing policy because she used to be able to file the triplicate form at County offices and receive one of the three copies back, time-stamped from the County for her own records. However, it was not established that the County ever refused to provide Local 2076 with time-stamped copies of its filed grievances after July 9, 2014. For instance, it is unclear why Local 2076 could not simply submit multiple copies of a completed grievance to the County, and request that one copy be time-stamped and returned

to Local 2076 after filing. In sum, Local 2076 did not establish that the County's July 9, 2014 revisions to its grievance Administrative Policies and Procedures amounted to an unlawful unilateral policy change. Accordingly, this claim is dismissed.

III. The Retaliation Claims

The PERB complaint, as amended at hearing, alleges that the County retaliated against four Local 2076 representatives, Arias, Hartwell, La Gaspe, and Whitney. To demonstrate that an employer discriminated or retaliated against an employee in violation of EERA Section 3506,[29] the charging party must show that: (1) the employee exercised rights under the MMBA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action *because of* the exercise of those rights. (*County of Riverside* (2009) PERB Decision No. 2090-M, p. 25, citing *Novato Unified School District* (1982) PERB Decision No. 210 (*Novato USD*), pp. 6-8, other citations omitted.) If the charging party meets all the elements of a prima facie case, then the burden of proof shifts to the respondent to establish that it would have taken the same actions even if the employee had not engaged in protected activity. (*Id*. at pp. 38-39.) Because the adverse action and nexus elements are heavily disputed here, this proposed decision will discuss some relevant legal authority regarding those elements followed by an analysis of whether Local 2076 has established its prima facie case in each of the four retaliation claims. Where appropriate, the County's own burden of proof will also be discussed.

A. Adverse Employment Actions

The Board applies an objective test when deciding whether action in question is adverse to employment. (*County of Contra Costa* (2011) PERB Decision No. 2174-M, p. 7.) The

[29] Neither the PERB nor Local 2076 alleges a violation of MMBA Section 3502.1.

central question is "'whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment.'" (*Id*. quoting *Newark Unified School District* (1991) PERB Decision No. 864, pp. 11-12.) Clearly, formal written discipline meets this standard. (*State of California (Department of Corrections & Rehabilitation)* (2012) PERB Decision No. 2282-S (*DCR*), p. 8; *Oakdale Union Elementary School District* (1998) PERB Decision No. 1246, pp. 16-17.) Similarly, documents threatening future discipline are also considered adverse. (*City of Long Beach* (2008) PERB Decision No. 1977-M, pp., 13; *Los Angeles Unified School District* (2007) PERB Decision No. 1930, proposed dec., p. 3.) Likewise, placing documents that could be used to support future discipline in an employee's personnel file may be adverse actions. (*Berkeley Unified School District* (2015) PERB Decision No. 2411, p. 22, citing *Alisal Union Elementary School District* (2000) PERB Decision No. 1412; *County of Riverside*, *supra*, PERB Decision No. 2090-M, p. 29.)

Even documents that are neither considered discipline nor placed in an employee's personnel file may adversely impact employment. For example, in *State of California (Department of Corrections)* (1998) PERB Decision No. 1292-S (*DoC*), the employer issued one of its employees a Letter of Instruction and a Counseling Memo on the same date concerning different subjects. The letter accused the employee of violating overtime and scheduling rules and stated that, while the letter itself was not an adverse personnel action, it would be placed in the employees file and be used to support future discipline. (*Id*. at proposed dec., p. 4.) The memo accused the employee of failing to follow procedures regarding receiving supervisorial approval before contacting the local police department for assistance. (*Id*. at proposed dec., pp. 4-5.) There was no reference in the memo to discipline

and no indication in the record that it was placed in the employee's personnel file. PERB concluded that both the letter and the memo were each adverse employment actions. (*Id*. at proposed dec., p. 10, fn. 3; see also *State of California (Department of Industrial Relations)* (1998) PERB Decision No. 1299-S, pp. 5, 10 [finding adverse a "performance deficiencies memorandum," describing an employee's shortcomings was adverse without reference to discipline and without placement in the employee's personnel]; *State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S [finding that a written "counseling device" circulated between supervisors but not placed in the employee's personnel file was adverse].)

On the other hand, employers may communicate with their employees in writing about their expectations. In *State of California (Department of Transportation)* (2005) PERB Decision No. 1735-S (*DoT II*), PERB found that an "expectations memorandum" clarifying an employee's own job duties—pursuant to her own request—was not an adverse employment action. (*Id*. at warning ltr., p. 4.) The memo referenced previous discussions about what was considered unacceptable behavior but did not expressly state that the employee's own actions were unacceptable. (*Id*. at warning ltr., p. 2.) It did not mention discipline and did not state that the document would reside in the employee's personnel file. (*Ibid*.) In *County of Riverside, supra*, PERB Decision No. 2090-M, the Board held that even a memo that both references the possibility of discipline and was placed in the employee's file was not adverse because it did not identify any performance deficiencies and "simply set forth reasonable expectations concerning office procedures." (*Id*. at p. 30.) In *State of California (Department of Parks and Recreation)* (1995) PERB Decision No. 1125-S (*Parks and Recreation*), PERB held that "corrective counseling memos" setting forth department procedures and existing

policy was not objectively adverse, notwithstanding the employees' subjective fear that the memos would be used for future discipline. (*Id*. at proposed dec., pp. 12, 21.)

B. Nexus

The charging party must also show that the employee's protected activity motivated the respondent's adverse employment actions. "'[D]irect proof of motivation is rarely possible, since motivation is a state of mind which may be known only to the actor. Thus, . . . unlawful motive may be established by circumstantial evidence and inferred from reading the record as a whole.'" (*Palo Verde Unified School District* (2013) PERB Decision No. 2337 (*Palo Verde USD*), p. 10, citing *Novato USD*, *supra*, PERB Decision No. 210, p. 6, other citations omitted; *San Bernardino City Unified School District* (2004) PERB Decision No. 1602, p. 21.) The timing between the employer's adverse actions and the protected activity is typically an important circumstantial factor to consider in establishing nexus. (*North Sacramento SD*, *supra*, PERB Decision No. 264, proposed dec., p. 22.) In general, the closer these two events are in time, the more likely there is to be a causal connection. (See *Calaveras County Water District* (2009) PERB Decision No. 2039-M, p. 8 [holding adverse actions occurring two months and three-and-half months after protected activities supported nexus]; *Los Angeles Unified School District* (1998) PERB Decision No. 1300 [holding that a time-lapse of five to six months did not support nexus].)

Temporal proximity, while demonstrative, is not a requirement of a prima facie case. In other words, "'the closeness in time (or lack thereof) between the protected activity and the adverse action goes to the strength of the inference of unlawful motive to be drawn and is not determinative in itself.'" (*California Teachers Association, Solano Community College*

Chapter, CTA/NEA (Tsai) (2010) PERB Decision No. 2096, p. 11, quoting *Metropolitan Water District of Southern California* (2009) PERB Decision No. 2066-M.)

Outward expressions of animus towards union or other protected activity may provide additional circumstantial evidence of nexus. (*Rocklin Unified School District* (2014) PERB Decision No. 2376, p. 7.) Along those lines, the Board has found that separate, but related, unfair labor practices may be used to infer union animus, and therefore support the conclusion that adverse actions were taken because of that animus. (*City of Oakland*, *supra*, PERB Decision No. 2387-M, p. 27, fn. 9, citing *City of Torrance* (2008) PERB Decision No. 1971-M, p. 21, fn. 13 ["Employer statements alleged as interference violations are also relevant for inferring unlawful motive."]; see also *Lake Tahoe Unified School District* (1993) PERB Decision No. 994, p. 15.) This is true even in cases where the separate violations do not, themselves, require a showing of motive. (*City of Oakland*, *supra*, p. 36, citing *E.L. Jones, Dodge* (1971) 190 NLRB 707, p. 708, fn. 6.) This is because, "when the natural and probable consequence of the employer's conduct is to discourage (or encourage) protected activity, such that the Board may fairly presume that the employer intended such a result." (*Hartnell Community College District* (2015) PERB Decision No. 2452, p. 20, citing *Santa Clara VWD*, *supra*, PERB Decision No. 2349-M, fn. 8; *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416, pp. 422-424; *American Ship Building v. NLRB* (1965) 380 U.S. 300, pp. 311-312; NLRB v. *Great Dane Trailers, Inc.* (1967) 388 U.S. 26, p. 32.)

For example, in *Golden Plains Unified School District* (2002) PERB Decision No. 1489, an employee claimed that she was not hired into a permanent position because she sought her union's assistance. There, the union intervened on the employee's behalf but the employer ignored the union's request for information about the teacher's non re-election. (*Id.*

at p. 9.) The Board found that, although the employee lacked standing to allege violations of the union's right to the requested information, evidence of those violations could be used to show animosity toward the union, which could imply nexus. (*Id*. at p. 9, fns. 11 and 12, citing *McFarland Unified School District* (1990) PERB Decision No. 786, proposed dec., pp. 40-41.)

In *City of Oakland*, *supra*, PERB Decision No. 2387-M, the Board found that the city attorney's threatening statements to the union's negotiators about the consequences of not accepting his bargaining proposals and direct dealing with unit members about those proposals constituted evidence that the employer harbored an unlawful motive when it laid off a member of the union's negotiating team. (*Id*. at pp. 36-39.)

Even unfair practices that occur after the adverse action at issue may evidence unlawful motive after considering the record as a whole to ascertain the respondent's motive. For instance, in *Anaheim UHSD*, *supra*, PERB Decision No. 2434, PERB found that the employer's decision to exclude a member of the union's negotiating team from bargaining violated the duty to negotiate in good faith. (*Id*. at pp. 28, proposed dec., p. 72.) PERB also relied, in part, on that violation to establish that the employer's *earlier* decision to terminate the employee was motivated by animus. (*Id*. at proposed dec., p. 91.) In *Shearer's Foods, Inc.* (2003) 340 NLRB 1093, an employer fired a union representative during an organizing drive for intimidating his coworkers. A month later, the employer held a meeting where the vice president of HR told employees that the union "only wanted the employees' money" and that the company president "would shut the plant down if the Union came in." (*Id*. at p. 1093-1094.) The NLRB concluded that those later statements, in conjunction with other factors, demonstrated that the earlier termination was motivated by union animus. (*Id*. at p. 1094.)

D. Arias' May 2014 MOEs

The record shows that Arias was a Local 2076 executive board member and/or steward in 2014. She was also involved in Local 2076's efforts to engage unit members over, and ultimately grieve, employees' workload concerns. Arias said that she openly maintained a box at her desk where unit members could submit completed surveys to Local 2076. These are protected activities. (See *Santa Clara VWD*, *supra*, PERB Decision No. 2349-M, pp. 27-29 [holding union office qualifies as protected activity]; *San Leandro Unified School District* (1983) PERB Decision No. 288 (*San Leandro USD*), pp. 5-7 [participating in grievance activity and organizing others to support a grievance was protected].) There is also sufficient evidence that the relevant individuals at the County were aware of this activity. Local 2076 periodically submits a list of its site representatives to County HR, and HR was involved in drafting Arias's MOEs. In addition, because Arias maintained her survey collection box openly at her desk, I find it more likely than not that her direct supervisor, Rebkowitz, knew that Arias was assisting the surveying efforts.

Regarding the third element of Local 2076's prima facie case, the County notes that it does not consider MOEs to be disciplinary and that MOEs are not placed in an employee's personnel file. It argues that Arias's MOEs in this case were merely counseling devices, akin to the "expectations memorandum" in *DoT II*, *supra*, PERB Decision No. 1735-S. However, I consider the MOEs in this case to be more serious. Here, the MOEs did not merely clarify Arias's existing responsibilities and expectations. Rather, Arias's supervisor, Rebkowitz, identified specific performance deficiencies, including that Arias was not completing her work properly and was not adhering to proper policies and procedures. It is true that the documents were not placed in Arias's personnel file, but it is also undisputed that Rebkowitz retained the

MOEs until she concluded that the perceived deficiencies were corrected. I find that the case is more like the counseling memo in *DoC, supra*, PERB Decision No. 1292-S, which was also not placed in the employee's file, but considered adverse because of the supervisor's critical comments about performance. Under the circumstances, a reasonable employee would find that his or her supervisor was dissatisfied with his or her work, that immediate corrective action was required, and that the failure to improve would result in discipline, a negative evaluation, or some other unfavorable action. Rebkowitz's testimony supports this conclusion. She said that she did not consider the MOEs to be punishment, but instead thought of them as tools to "get this stuff caught up before we had to take any other type of negative action." She continued "[w]e're going to fix it within this certain time frame, and if we don't then you would take the next step." Accordingly, Local 2076 has satisfied its burden of proving that Arias's May 2014 MOEs were adverse employment actions.

Regarding nexus, Rebkowitz issued Arias's MOEs on May 8 and 9, 2014. This was shortly after Local 2076 completed its workload surveying efforts from January to April 2014. As explained above, Arias openly maintained a collection box at her desk during this time period. I find that the closeness in time between these activities and the two MOEs supports Local 2076's nexus argument.

The record also reflects multiple attempts by the County to curb Local 2076's efforts to represent employees regarding their workload issues and to limit Local 2076 representation activity in general. As discussed above, applying its non-business activity policy disproportionately against Local 2076's surveying efforts and then removing posted grievances has a natural and probable tendency to inhibit that activity in the future and it can fairly be presumed that the County intended and even favored that result. The unilaterally imposed

limitations on release time activity has a similar effect. I note that Rebkowitz issued Arias the MOEs in May 2014, around a month before the County changed release time polices, However, I do not find the timing of these events to be determinative. Animus is a state of mind that can exist long before it is exhibited through action. (See e.g., *Anaheim UHSD*, *supra*, PERB Decision No. 2434; *Shearer's Foods, Inc.*, *supra*, 340 NLRB 1093.) Altogether, I find that these actions by the County demonstrate animosity for the very type of activity that Arias participated in. This animus, together with the suspicious timing of the MOEs, is sufficient to satisfy Local 2076's prima facie case for retaliation and the burden shifts to the County to prove that the action was taken for legitimate non-discriminatory reasons.

The respondent's burden of proof in retaliation cases requires it to establish both:

> (1) that it had an alternative non-discriminatory reason for the challenged action; and (2) that it acted because of this alternative non-discriminatory reason and not because of the employee's protected activity.

(*Palo Verde USD*, *supra*, PERB Decision No. 2337, pp. 18-19, citations omitted; see also *County of Orange* (2013) PERB Decision No. 2350-M, p. 16.) Under this standard, the Board has found that a significant failure of communication between an employee and his or her supervisor that had the potential to impact the employer's services may provide a legitimate basis for corrective action. (*Fall River Joint Unified School District* (1998) PERB Decision No. 1259, pp. 22-23.) Notwithstanding any protected activity, appropriate actions may be taken against an employee where the employer had reasonable doubts over whether the employee was performing effectively and was willing or able to follow existing directives. (*Coachella Valley Unified School District* (2013) PERB Decision No. 2342, proposed dec., pp. 4-27. On the other hand, adverse employment actions appear to be pretextual when the

criticisms lacked factual support. (*Chula Vista Elementary School District* (2011) PERB Decision No. 2221, pp. 6-7.)

Here, Arias admitted that she had not been following proper SSA procedures and that she was significantly behind in her work. The MOEs correctly assert that policies were not adhered to and direct Arias to follow those policies in the future. The MOEs also set a goal Arias to catch up on her work. Addressing these issues, both of which were undisputed, in a non-disciplinary document seems to be appropriate under the circumstances. Bowman also provided unrebutted testimony that the County has issued MOEs to other unproductive employees and those who were not following procedures, irrespective of their union status.

I reject Local 2076's assertion that Arias was treated disparately. Although she testified that other employees were also behind in their work and were also not following procedures, her testimony appears to be based solely in hearsay. Moreover, there was no evidence that the County knew about these other problems or if it ever took corrective action. Nor am I persuaded by Local 2076's argument that the County's investigation into Arias's work is cause for suspicion. The County's investigation was not alleged as an adverse action in the case and was not discussed in the MOEs. And as stated above, the significant findings in the MOEs were all admitted by Arias. Accordingly, I conclude that the County met its burden of proving both that it had non-retaliatory reasons to issue Arias the May 2014 MOEs and that it actually issued the MOEs for those alternate reasons. Local 2076's retaliation claim regarding these two MOEs is therefore dismissed.

D. Hartwell's April 21, 2014 SOC

Like Arias, Hartwell was a Local 2076 officer and steward. He remained in those positions throughout 2014. Hartwell was also active in Local 2076's efforts to address

workload issues, including surveying members, signing one of the two workload grievances, and posting the grievance on Local 2076 bulletin boards. These activities are protected. (*Santa Clara VWD, supra*, PERB Decision No. 2349-M, pp. 27-29; *San Leandro USD, supra*, PERB Decision No. 288, pp. 5-7.) Hartwell's SSA supervisor, Flores, acknowledged being aware of his role with Local 2076 in the SOC and during testimony at hearing. I find that the first two elements of a prima facie case are met here.

The County notes that SOCs, like MOEs, are considered non-disciplinary, and do not reside in employee's personnel files. It reasserts the argument that non-disciplinary documents not placed in an employee's official file are not adverse to employment. As with MOEs, the documents remain in existence with the employees' supervisor unless and until the supervisor determines that the performance issues have been adequately addressed. The SOC states that Hartwell did not meet Flores's performance expectations, failed to follow her directives, and failed to complete assigned tasks. Flores decided to issue the SOC because, from her perspective, she had been working with Hartwell for months without sufficient progress, and felt that she was "ready to give him something in writing instead of just a verbal guideline on how he is supposed to complete his work." Once again, I conclude that a reasonable employee would find this document to be adverse to employment because of the likelihood that the document could be used in future negative employment actions.[30]

Regarding nexus, Hartwell was an active Local 2076 officer and steward while he received the SOC. In addition, Hartwell assisted with surveying unit members on workload

[30] The record suggests that the County actually followed through with such negative employment actions in this case, issuing Hartwell a performance evaluation scoring him with the lowest possible rating in the areas of meeting agency work expectations and following directives, both areas identified as deficient in the SOC. The lawfulness of that evaluation was not directly at issue in this case.

issues in both January and April 2014, very close in time to the April 21, 2014 SOC. This timing supports Local 2076's nexus claim. And, as in Arias's case, I find that the County's intentional interference with Local 2076's representation and grievances about employee workload issues, and its unilateral changes to release time polices, demonstrates hostility towards the very type of activities Hartwell was engaged in at the time. Based on this hostility, and the suspicious timing of the adverse action here, I find that Local 2076 has met its burden of establishing a prima facie case for retaliation.

Regarding the County's burden of proof, PERB found no unlawful retaliation where adverse actions were taken in response to an employee's persistent failure to perform his job duties and where the employer followed a moderate course of progressive discipline. (*Riverside Unified School District* (1987) PERB Decision No. 639, proposed dec., p. 22.) In *City of Santa Monica* (2011) PERB Decision No. 2211-M, the Board found that the employer's action was justified by the employee's long history of complaints by others and the numerous past warnings about his performance deficiencies. (*Id*. at pp. 9, 17.) In contrast, in *Jurupa Community Services District* (2007) PERB Decision No. 1920-M (*Jurupa CSD*), the Board found an employee's dismissal to be pretextual where the employer's notice of termination included trivial incidents, exaggerations, and claims of wrongdoing not supported by reliable evidence. (*Id*. at proposed dec., pp. 17-19.)

Here, Flores informed Hartwell in the SOC that he was not performing at the level of other eligibility workers, even controlling for his contractual workload reduction. She directed Hartwell to County reports, which indicated that he was completing, on average slightly more than 2 tasks per day or between 34 and 36 tasks per month. Hartwell did not dispute any of these facts and although he was unable to confirm or refute the accuracy of the County's

reports, he testified that he would have been satisfied with only completing around 2 tasks per day. Although it is somewhat unusual that Flores refused Hartwell's requests for productivity goals, I find that Hartwell was sufficiently aware that performing two tasks per day was not adequate. Each task takes between 30 minutes and 2 hours to complete. Even assuming that Hartwell was assigned only the most time-consuming tasks, by Flores's estimation, Hartwell was only working around four hours per day. Flores had counseled Hartwell verbally about his productivity. She also verbally counseled him about maintaining his work area so that other employees could find needed documents. Hartwell does not dispute either that these verbal counselings occurred or that he failed to measurably improve afterwards. On the whole, I find that Flores had legitimate concerns about Hartwell's productivity and his workspace and that the non-disciplinary SOC was a reasonable tool to address her concerns.

I once again reject Local 2076's assertion of disparate treatment. Hartwell said that he was unaware of other eligibility workers who were disciplined or counseled for their productivity, but he also admitted that he would only know about such actions if reported to him by unit members. HR representative Bowman testified that the County has issued non-disciplinary counseling documents to others because of productivity issues. I find that the County proved that it would have sent Hartwell the SOC even if he did not engage in protected activity. Local 2076's retaliation claim regarding Hartwell's SOC is therefore dismissed.

E. Le Gaspe's May 30, 2014 Written Reprimand

Le Gaspe was both a Local 2076 officer and steward in 2014. She also signed one of the two Workload Grievances. This qualifies as protected activity. (*Santa Clara VWD, supra*, PERB Decision No. 2349-M, pp. 27-29; *San Leandro USD, supra*, PERB Decision No. 288, pp. 5-7.) The author of the Written Reprimand, SSA manager Mr. Perez, acknowledged being

aware of Le Gaspe's role in Local 2076. County HR was also made aware of this activity both when Local 2076 submits its list of officers and stewards and when Local 2076 filed the Workload Grievance bearing Le Gaspe's name. Written reprimands are considered formal discipline by the County and thus considered objectively adverse to employment. (*DCR, supra*, PERB Decision No. 2282-S, p. 8.) The County does not argue otherwise.

Regarding nexus, Local 2076 filed the Workload Grievance that Le Gaspe signed on May 12, 2014, just weeks before the County issued the Written Reprimand. This timing supports nexus. Additionally, I once again find that the County's interference with Local 2076's representation over workload concerns and its unilateral changes to release time policies demonstrates disapproval of the type of activity Le Gaspe's participated in. Both Mr. Perez and Reveles, who was also consulted when drafting the discipline, expressed dissatisfaction with Local 2076 stewards' release time activity. Thus, I conclude that there is sufficient evidence of nexus to support this retaliation claim, and Local 2076 has satisfied all the elements of its burden of proof.

Regarding the County's own burden of proof, the County contends that disciplining Le Gaspe was justified because she breached confidentiality and persuaded a client, K.M., to lie about her encounter with SSA supervisor Bethune. The County's evidence supporting this claim comes from K.M.'s complaints against Le Gaspe. Le Gaspe denied these accusations both during the County's investigation and during the PERB hearing. Le Gaspe said instead that it was Bethune who revealed confidential information after interrupting Le Gaspe's interview with K.M., and that she only repeated that information at K.M.'s request to substantiate K.M.'s complaint against Bethune. Neither K.M. nor Bethune testified and Reveles's account of what they said is all uncorroborated hearsay. K.M.'s written complaints

are also hearsay. Thus, to the extent that the County offered Reveles's testimony to establish what actually transpired with K.M., Le Gaspe's testimony is credited here. (*Woodland Joint Unified School District* (1987) PERB Decision No. 628, proposed dec., p. 29, ["when a party testifies to favorable facts, and any contrary evidence is within the ability of the opposing party to produce, a failure to bring forth such evidence will require acceptance of the uncontradicted testimony unless there is some rational basis for disbelieving it.'"], quoting *Martori Brothers Dist. v. ALRB* (1981) 29 Cal.3d 721, p. 728; see also *Jurupa CSD*, *supra*, PERB Decision No. 1920-M, proposed dec., pp. 20-21.)

Nor did the County prove that Reveles, or others involved with the discipline, had a good faith reason for believing the claims against Le Gaspe to be true. K.M.'s complaint against Le Gaspe actually recanted her earlier complaint against Bethune, which was consistent with Le Gaspe's explanation. These two flatly contradictory statements raise serious questions about K.M.'s credibility and about the validity of either complaint. It is possible that the County could have investigated the matter and simply determined that K.M.'s later complaint was more credible. But no witnesses provided any details about the County's investigation. Furthermore, neither Mr. Perez nor Reveles explained how the County determined that the second complaint, and not the one consistent with Le Gaspe's own account, was more credible. Nor was such a conclusion self-evident from the record at hearing. Under the circumstances, I find that there is insufficient evidence that those responsible for issuing the reprimand relied in good faith on K.M.'s complaint against Le Gaspe.

The claims in the Written Reprimand were not limited to those from K.M.'s second complaint. Le Gaspe was also accused of making other applicants wait for unreasonable periods of time and for rudeness. However, there was insufficient evidence that the County

would have disciplined Le Gaspe in a similar manner based only on these other claims. Both Mr. Perez and Reveles said that they favored discipline mainly because of the seriousness associated with breaching client confidentiality. The County laid to rest any argument that it would have issued the same discipline even without the K.M. complaint in its brief, stating "Le Gaspe was not disciplined for making a client wait – she was disciplined for persuading a client to lie and for breaching confidentiality." As discussed above, the County has not proven either that those accusations were true or that those involved in issuing the discipline had a good faith belief in their truth. Accordingly, the County's retaliatory discipline of Le Gaspe violated MMBA Sections 3506 and 3506.5, subdivisions (a) and (b).

F. Whitney's April 21, 2014 MOE

The record here shows that Whitney was a steward since 2013 and was involved in distributing workload surveys in January 2014. Like Arias, Whitney maintained a survey collection box openly at her workstation, and that her supervisor saw it. She also signed one of the two Workload Grievances filed on May 12, 2014. As explained above, these are protected acts. (*Santa Clara VWD*, *supra*, PERB Decision No. 2349-M, pp. 27-29; *San Leandro USD*, *supra*, PERB Decision No. 288, pp. 5-7.)

In addition, Whitney engaged in other protected activities during the March 25, 2014 meeting discussed in the MOE.[31] In that meeting, Whitney expressed frustration about the policy directive being discussed and requested clarification from management. From

[31] PERB applies its unalleged violations test to determine whether to consider retaliation claims based on protected activities not alleged in the PERB complaint. (*Lake Elsinore USD*, *supra*, PERB Decision No. 2241, p. 8.) Here, all those elements are met. The County unquestionably had notice that the Whitney's conduct during the March 25, 2014 meeting would be discussed. Both parties had the opportunity and did present evidence at hearing about Whitney's conduct that day. And both parties addressed whether Whitney's conduct was worthy of discipline.

Whitney's point of view, SSA was requiring eligibility workers to perform work outside the scope of their classifications, contrary to State regulations, and inconsistent with existing workflow. She also said during the meeting that she would raise these issues with Local 2076. As discussed in greater detail above, it is well-recognized that employees have the protected right to discuss working conditions with other employees. (*LACCD, supra*, PERB Decision No. 2404, p. 8.) In exercising this right, "'employee's right to engage in concerted activity may permit some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect.'" (*Rio Hondo CCD, supra*, PERB Decision No. 260 p. 12, quoting *NLRB v. Thor Power Tool Co*. (1956) 351 F.2d 584, p. 585.) PERB considers statements within their overall context to determine whether the statements are protected. (See *County of Riverside* (2010) PERB Decision No. 2119-M, p. 17, citing *Los Angeles Unified School District* (1988) PERB Decision No. 659.) Under that approach, analyzing the protected nature of an employee's outburst during an encounter with management, relevant factors for consideration may include the location of the encounter, the subject-matter of the employee's comments, the nature of the outburst, and whether the outburst was provoked by the employer's unfair labor practices. (*Plaza Auto Center, Inc*. (2014) 360 NLRB No. 117, slip op. at p. 11, citing *Atlantic Steel Co*. (1979) 245 NLRB 814.)

In *County of Riverside, supra*, PERB Decision No. 2090-M, the Board found that an engineer engaged in protected activity under the MMBA by complaining to management that the employer's work directives were violating State laws governing licensed engineers and by bringing those concerns to his union. (*Id*. at p. 26.) Whitney's complaints in this case similarly concerned matters common to all eligibility workers in her department, such as whether they should comply with rules that might be inconsistent with State regulations.

Whitney also said she would raise these issues with Local 2076. I find the subject matter of these statements to be protected. The location of the meeting also appears to be appropriate for a discussion on the topics Whitney raised. Ms. Perez described the program meeting as a place where people came together to talk about work processes. Other employees present expressed different interpretations of the process being discussed. Whitney's comments about those processes in this meeting do not seem out of place.

In terms of the nature of Whitney's outburst, the County described her conduct as "unprofessional and inappropriate," but I do not find the manner in which Whitney delivered her speech to be so "'opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice' as to cause 'substantial disruption or material interference with school activities' that it loses its protected status." (*Oakland USD*, *supra*, PERB Decision No. 1880, p. 21, quoting *Rancho Santiago CCD*, *supra*, PERB Decision No. 602, p. 13.) Employees engaged in concerted activities are entitled to some leeway for "impulsive behavior," "intemperate" statements, and "moments of animal exuberance." (*City of Oakland*, *supra*, PERB Decision No. 2387-M, p. 23, citations omitted.) Ms. Perez testified that Whitney interrupted her presentation at the meeting for around two minutes. She also said that Whitney "pounded" either her fist or her finger on the table during the meeting. This was not sufficient to strip Whitney's conduct of its protected status under the circumstances. Whitney did not use any vulgar, demeaning, or abrasive language. It is undisputed that other employees were frustrated by the changes taking place at the time. I find it likely that the attendees perceived Whitney's actions merely as an expression of those shared frustrations. In addition, Whitney's heightened reaction is more comprehensible in light of the fact that eligibility workers were being asked to follow a process before receiving clarity about whether the process violated State regulations.

Under the circumstances here, I do not conclude that Whitney's statements lost their protected status, notwithstanding the manner in which those statements were delivered.

Regarding the adverse action element, I conclude that Whitney's April 21, 2014 MOE was an adverse employment action. As in Arias's case, Whitney's MOE was more serious than merely clarifying or restating existing job duties. Ms. Perez identified specific performance deficiencies, describing Whitney's conduct "unprofessional and inappropriate." I find this document to be objectively adverse to employment because one would reasonably conclude that his or her supervisor was dissatisfied with the employee's performance and that failure to take corrective action immediately would have negative employment consequences.

The County acknowledges that Whitney's MOE was issued because of her conduct on March 25, 2014, conduct that I have concluded is protected under the MMBA. Under the circumstances, Whitney's conduct at the meeting cannot be separated from its protected status and the County cannot demonstrate that it would have issued the MOE even if Whitney had not engaged in protected activity. Therefore, the County's retaliatory action violates MMBA Sections 3506 and 3506.5, subdivisions (a) and (b).

REMEDY

MMBA Section 3509, subdivision (b), authorizes PERB to order "the appropriate remedy necessary to effectuate the purposes of this chapter." (*Omnitrans* (2010) PERB Decision No. 2143-M, p 8.) This includes an order to cease and desist from conduct that violates the MMBA. (*Id*. at p. 9.) PERB's remedial authority includes the power to order an offending party to take affirmative actions to effectuate the purposes of the MMBA. (*City of Redding* (2011) PERB Decision No. 2190-M, pp. 18-19.)

Where an employer's actions and directives interfered with protected rights, the Board considered it appropriate to rescind those directives and to cease and desist from interfering with protected rights. (*LACCD, supra*, PERB Decision No. 2404, p. 14; *County of Merced* (2014) PERB Decision No. 2361-M, p. 13.) In this case, it has been found that the County interfered with protected rights by its April 23, 2014 directive prohibiting Local 2076 from surveying its membership about protected subjects and by removing material discussing protected subjects from Local 2076's designated bulletin boards. The County is therefore ordered to cease and desist from this activity and to rescind the April 23, 2014 directive.

In unilateral change cases, PERB has the authority to order the County to restore the status quo ante and rescind any unilaterally adopted policy changes. In *California State Employees' Association v. PERB, supra*, 51 Cal.App.4th 923, p. 946, the court found:

> Restoration of the status quo is the normal remedy for a unilateral change in working conditions or terms of employment without permitting bargaining members' exclusive representative an opportunity to meet and confer over the decision and its effects. This is usually accomplished by requiring the employer to rescind the unilateral change and to make the employees "whole" from losses suffered as a result of the unlawful change.

(Citations omitted; see also *County of Sacramento, supra*, PERB Decision No. 2045-M, pp. 3-4, citing *County of Sacramento*, *supra*, PERB Decision No. 1943-M.) In this case, it has been found that the County enacted multiple unilateral policy changes through its June 4, 2014 Release Time Guidelines letter. In addition, the County also unilaterally enacted a policy to deny all release time requests for stewards seeking to file grievances at County offices. Based on these findings, the County is ordered to rescind the June 4, 2014 Release Time Guidelines letter, and the associated ART form, to the extent that those documents are inconsistent with the findings in this proposed decision. The County is further ordered to rescind its unilaterally

adopted policy of denying all release time requests for filing grievances in person. The County is also ordered to make whole those employees, if any, who suffered financial losses as a direct result of the unilaterally implemented policies. Financial compensation shall be augmented with interest at a rate of 7 percent per annum. (*County of Riverside, supra*, PERB Decision No. 2090-M, p. 43.)

In retaliation cases, appropriate remedies include rescinding any adverse material issued to the employee and/or maintained in the employee's personnel file, and make the employee whole. (*County of Riverside, supra*, PERB Decision No. 2090-M, p. 43.) Here, the County issued Le Gaspe's May 30, 2014 Written Reprimand and Whitney's April 21, 2014 MOE in retaliation for their protected activities. The County is ordered to rescind those documents and to expunge any record of those documents from Le Gaspe's and Whitney's respective personnel files. Finally, it is appropriate to direct the County to post a notice of this order, signed by an authorized representative of the County. These remedies effectuate the purposes of the MMBA because employees are informed that the County has acted in an unlawful manner, is required to cease and desist from such conduct, and will comply with the order. (*City of Selma* (2014) PERB Decision No. 2380-M, proposed dec., pp. 14-15.) The notice posting shall include both a physical posting of paper notices at all places where members of the Eligibility Unit are customarily placed, as well as a posting by "electronic message, intranet, internet site, and other electronic means customarily used by the [County] to communicate with its employees in the bargaining unit." (*Centinela Valley Union High School District* (2014) PERB Decision No. 2378, pp. 11-12, citing *City of Sacramento, supra*, PERB Decision No. 2351-M.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the County of Orange (County) violated the Meyers-Milias-Brown Act (MMBA), Government Code Sections 3503, 3505, 3506, and 3506.5, subdivisions (a), (b), and (c); and California Code of Regulations, title 8, Sections 32603, subdivisions (a), (b), and (c). The County violated the MMBA by: (1) interfering with American Federation of State, County, and Municipal Employees, Local 2076's (Local 2076's) access rights and employees' ability to communicate with its others about protected subjects; (2) unilaterally changing policies concerning requesting and using release time; and (3) retaliating against Local 2076 representatives Nellie Le Gaspe and Terri Whitney. All other claims in the PERB complaint were either withdrawn or dismissed.

Pursuant to MMBA Section 3509, subdivision (b), it hereby is ORDERED that the County, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Unilaterally implementing policies within the scope of representation.

2. Interfering with Local 2076's right to represent its members, including but not limited to, applying rules about non-business activity in the workplace disproportionately against Local 2076 activity.

3. Interfering with employees' rights, including but not limited to, removing communications concerning subjects protected under the MMBA from Local 2076's designated bulletin boards.

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

1. Rescind the April 23, 2014 directive prohibiting the distribution of surveys.

2. Rescind the June 4, 2014 Release Time Guidelines letter and the associated AFSCME Release Time request form, to the extent that those documents are inconsistent with this decision.

3. Compensate Local 2076 site representatives for any financial losses incurred as a direct result of all unilaterally implemented release time policies. Any financial losses should be augmented by interest at a rate of 7 percent per annum.

4. Rescind the May 30, 2014 Written Reprimand issued to Nellie Le Gaspe.

5. Rescind the April 21, 2014 Memorandum of Expectations issued to Terri Whitney.

6. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the Eligibility Unit bargaining unit customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the County, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material. The Notice shall also posted by electronic message, intranet, internet site, and other electronic means customarily used by the County to communicate with employees in the Eligibility Unit.

7. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by

the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on Local 2076.

Right to Appeal

Pursuant to California Code of Regulations, title 8, Section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960
E-FILE: PERBe-file.Appeals@perb.ca.gov

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or

filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)