STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNITED PUBLIC EMPLOYEES, INC., Charging Party, v. COUNTY OF SACRAMENTO, Respondent.	Case No. SA-CE-1060-M PERB Decision No. 2745-M September 18, 2020

Appearances: Angel Barajas, Business Agent, for United Public Employees, Inc.; Office of the County Counsel by Krista C. Whitman, Assistant County Counsel, for County of Sacramento.

Before Banks, 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 Sacramento to an administrative law judge's (ALJ) proposed decision. The complaint alleged that the County violated the Meyers-Milias-Brown Act (MMBA) and PERB Regulations[1] by failing to meet and confer in good faith over revisions to an Airport Operations Dispatcher class specification, which included new training and certification requirements. The ALJ concluded that the County violated its duty to bargain in good

[1] The MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all further statutory references are to the Government Code. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

faith by unilaterally implementing the new training and certification requirements after it abruptly ended negotiations over the revised class specification. The County argues the ALJ erred by deciding this case on a unilateral change theory instead of a surface bargaining theory. The County further contends it did not engage in surface bargaining.

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 erred by applying a unilateral change theory. We nonetheless find the County violated its obligation to meet and confer in good faith by engaging in surface bargaining over the revised Airport Operations Dispatcher class specification, as alleged in the complaint.

BACKGROUND[2]

I. The Parties and Their Collective Bargaining Agreement

The County is a public agency covered by the MMBA. United Public Employees, Inc. (UPE) is the exclusive representative of County employees in the Office Technical Bargaining Unit. The County and UPE were parties to a Memorandum of Understanding (MOU) covering the bargaining unit's terms and conditions of employment, which was in effect from July 1, 2013, through June 30, 2018.

MOU section 4.6, the waiver or zipper clause, states:

> "The parties acknowledge that, for the life of this [MOU], each voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to negotiate with respect to any subject or matter pertaining to or

[2] Neither party excepted to the ALJ's factual findings, which our review confirms are supported by the record.

covered by this [MOU], except as otherwise provided herein."

Attached to the MOU were a series of salary schedules addressing bargaining unit salaries for each fiscal year the MOU was in effect. The salary schedule for June 25, 2017, through June 23, 2018, defined the salary ranges for the Airport Operations Dispatcher I/II and Airport Operations Dispatcher Range B classifications.[3]

II. The Airport Operations Dispatcher Classifications and Change in Dispatch Systems

The County Department of Airports has approximately eleven Airport Operations Dispatchers II and three Airport Operations Dispatchers Range B. According to the existing job description for Airport Operations Dispatcher I/II, all dispatchers must have a clean criminal history and valid California Driver License, meet certain physical requirements, and pass a background check. All dispatchers must perform a variety of communications functions, including receiving, evaluating, and responding to requests for emergency and non-emergency services. Historically, when receiving an emergency call, the dispatcher would ask the caller basic details, including the "who, what, when, [and] where" of an incident. After gathering the information, the dispatcher terminated the call and then contacted medical, fire, law enforcement, or other appropriate personnel warranted by the emergency.

In 2016, the County Emergency Medical Services Agency (EMS Agency) notified County departments and outside agencies providing emergency medical

[3] The Airport Operations Dispatcher I/II is a single class with two salary levels. The Airport Operations Dispatcher Range B classification is the senior or lead classification with oversight over other dispatchers from shift to shift.

dispatch services that it would implement an updated Emergency Medical Dispatch Priority Reference System (EMD PRS notice) by May 2017 in order to establish minimum standards and requirements. Citing the California Health and Safety Code, Division 2.5; California Code of Regulations, Title 22, Division 9; and Emergency Medical Services Authority, Dispatch Program Guidelines, March 2003, EMSA #132 as authority for the new system, the notice required any dispatch unit accepting calls for emergency medical assistance from the public or medical personnel to use an Agency-approved EMD PRS.

The EMD PRS notice also required all emergency medical dispatchers to obtain and maintain an EMD Certification. To obtain a two-year certification, an emergency medical dispatcher must satisfy each of the following requirements: (1) be 18 years of age or older; (2) possess a high school diploma or general education equivalent; (3) possess a current, basic Healthcare Provider Cardiac Life Support card issued by the American Heart Association, American Red Cross, or an equivalent organization for adult and pediatric cardiopulmonary resuscitation; and (4) successfully complete an EMD PRS-approved course of training.

The initial training course requires approximately 40 hours of training. At the end of a cyclical two-year certification period, emergency medical dispatchers must have completed an additional 24 hours of Continuing Dispatch Education and submit an EMD recertification application to maintain their certification.

Initially, the County Department of Airports did not receive the EMD PRS notice. Shortly before the May 2017 implementation date, the EMS Agency informed the

Department of the EMD Certification requirement and extended the compliance date to October 1, 2018.

Ultimately, the County Department of Airports contracted with PowerPhone, one of the County's preferred vendors, to update its EMD PRS, resulting in new procedures for Airport dispatchers to follow when receiving an emergency call. Under the new procedure, the dispatcher taking the initial call works through a script containing a series of prepared questions for the caller, each question flowing from the caller's prior response. Simultaneously, a second dispatcher contacts and dispatches the appropriate personnel warranted by the emergency. The initial dispatcher does not terminate the call until the appropriate personnel arrive at the incident scene.

III. Negotiations Over the Airport Operations Dispatcher I/II Class Specification

After belatedly receiving notice of the new EMD PRS, the County Department of Airports initiated a classification study to determine whether to revise the Airport Operations Dispatcher I/II class specification to include the EMD Certification requirement. In December 2017 or January 2018, the County's Labor Relations Officer, Matt Connolly, notified UPE of the classification study. Connolly included the proposed class specification revisions and offered to meet and confer with UPE over both the specification revisions and the certification requirement.

The County's proposed revisions to the Airport Operations Dispatcher I/II class specification included, among other changes, a new certification requirement:

> "Incumbents in this class must obtain and maintain an Emergency Medical Dispatcher Certification issued by a contracted vendor chosen by the Sacramento County Department of Airports within one year of appointment and recertify every two years. Failure to obtain or maintain the appropriate certification may constitute cause for personnel

> action in accordance with Civil Service Rules or applicable bargaining agreement. Individuals who do not meet this requirement due to disability will be reviewed on a case-by-case basis."

After receiving the County's notice and proposed class specification revisions, UPE asked to meet with the County.

The parties first met on March 28, 2018. Connolly, among others, represented the County. UPE Business Agent Angel Barajas and UPE Board Members Rick Reeve and Jennifer Avalo were UPE's primary negotiators. During the meeting, the parties discussed the reason for the revised class specification. UPE voiced concerns regarding the EMD Certification requirement and whether employees who did not pass would be disciplined. Barajas also broached the topic of a wage increase for the Airport Operations Dispatchers I/II based on the certification requirement. Relying on the MOU's waiver clause, the County responded that it would not entertain any wage proposals during the classification revision negotiations. Instead, Connolly encouraged Barajas to present UPE's proposed wage increase for Airport Operations Dispatchers at the parties' main table negotiations for a successor MOU, which were occurring simultaneously.[4]

Connolly, however, was not part of the County's bargaining team for a successor contract nor in any other way involved in those negotiations. Rather, County Director of Labor Relations Robert Bonner represented the County. UPE Business Agent Michael Collins, Reeve, and Avalo represented UPE. At some point

[4] Negotiations for a successor MOU commenced in February 2018 and the parties met approximately every two weeks thereafter.

during those negotiations, believing the Airport Operations Dispatchers were already underpaid by thirty percent in general, UPE verbally broached the topic of a wage increase based on the EMD Certification requirement, though it never presented the County with a written proposal. On the County's behalf, Bonner rejected any further wage discussions with respect to the certification requirement and class specification, and responded that UPE should raise those concerns with Connolly at the class specification negotiations.[5]

On May 31, 2018, Connolly met with UPE a second time to discuss the revised class specification and EMD Certification requirement. During the meeting, the parties agreed to several class specification revisions. UPE, however, continued to assert that it also wanted to negotiate a ten percent base wage increase as part of the class specification negotiations, and Barajas presented a written proposal to that effect. Without reviewing the proposal, Connolly told UPE the County would not entertain any wage proposals at that time, again asserting that the class specification negotiations were not the appropriate forum and advising UPE to raise the topic at the main table negotiations. The County then caucused for approximately 20 minutes. When the

[5] According to the parties' negotiated ground rules, the parties were required to submit any proposals related to the successor contract by May 31, 2018. On April 18, 2018, UPE submitted a written proposal requesting an additional five percent increase in the hourly rate of pay earned by Airport Operations Dispatchers Range B because the lead position carried increased responsibilities, but the proposal did not cover Airport Operations Dispatchers I/II nor did UPE intend that the proposal address any issues related to the revised class specification. In the wake of Bonner's statement that main table negotiations were not the proper forum to negotiate a wage increase based on the certification requirement, UPE never introduced such a proposal at the main table. Ultimately, the parties agreed on a two and a half percent wage increase for the Range B classification.

County returned, Connolly informed UPE that the County was withdrawing the classification revisions. Connolly stated the County Department of Airports was required to comply with the certification requirement beginning October 1, 2018, and said the County was willing to discuss any effects associated with the requirement.[6] UPE requested to continue discussions regarding the wage issue, but the County left the negotiation table.

On June 21, 2018, Connolly e-mailed Barajas in response to an information request by UPE. In the e-mail, Connolly stated that although the County was not required to bargain the EMD Certification requirement, it remained willing to engage in effects bargaining. UPE did not request effects bargaining.

The County implemented the EMD Certification requirement in October 2018 but did not revise the Airport Operations Dispatcher I/II class specification. All Airport Operations Dispatchers employed at that time successfully completed the required training and obtained the initial certification.

IV. The Complaint and Proposed Decision

On June 20, 2018, prior to the County's October 2018 implementation of the EMD Certification requirement, UPE filed an unfair practice charge alleging that the County had engaged in "bad faith and surface bargaining" over the Airport Operations

[6] At both the March 28 and May 31, 2018 meetings, Connolly explained the County would do everything it could to ensure that all dispatchers successfully completed the EMD Certification process. Indeed, the record indicates that each dispatcher successfully did so. However, during the hearing, Connolly admitted the dispatchers must pass the certification test both initially and every two years thereafter, and that the County could pursue progressive discipline for failure to meet the certification or recertification requirements.

Dispatcher I/II class specification revisions by exhibiting a take-it-or-leave-it attitude with no genuine desire to reach agreement. On July 23, 2018, the County filed a position statement denying these allegations.

On January 8, 2019, PERB's Office of the General Counsel (OGC) issued a complaint alleging the County engaged in bad faith bargaining by acts and conduct including, but not limited to, four acts the County undertook on May 31, 2018: (1) abruptly ceasing negotiations after UPE proposed a wage increase, (2) withdrawing its classification study, (3) stating it would require the Airport Operations Dispatchers I/II to continue performing additional duties even without adding those duties to the class specification, and (4) stating it would deem any failure or refusal to comply with the EMD Certification requirement as insubordination subject to discipline.[7] On February 4, 2019, the County answered the complaint by denying the substantive allegations and asserting various affirmative defenses.

On April 11, 2019, the ALJ conducted a formal hearing. In its opening statement, UPE asserted it would show that the County "circumvent[ed] the meet-and-confer process by bargaining in bad faith" with "no genuine desire . . . to reach an agreement." In June 2019, both parties filed post-hearing briefs addressing whether, under PERB's totality of conduct standard, the County engaged in surface bargaining.[8]

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[7] The complaint also alleged that, by its same conduct, the County interfered with the rights of bargaining unit employees and denied UPE its right to represent bargaining unit employees.

[8] The Board has used "totality of conduct" and "totality of the circumstances" interchangeably when describing the standard for assessing bargaining conduct that is not per se unlawful but may nonetheless amount to bad faith bargaining—conduct the

On July 19, 2019, the ALJ issued her proposed decision concluding that the County made an unlawful unilateral change to terms and conditions of the dispatchers' employment by implementing the EMD Certification requirement. Prior to the proposed decision, UPE never attempted to amend the complaint to include a unilateral change allegation, nor did UPE raise it as an unalleged violation in its post-hearing brief.

DISCUSSION

When resolving exceptions to a proposed decision, the Board applies a de novo standard of review. (*County of Santa Clara* (2019) PERB Decision No. 2629-M, p. 6.) Under this standard, we review the entire record and are free to make different factual findings and reach different legal conclusions than those in the proposed decision. (*City of Milpitas* (2015) PERB Decision No. 2443-M, p. 12.)

The issue before us is whether the County violated its duty under MMBA section 3505 to meet and confer in good faith with UPE over the County's proposed revisions to the Airport Operations Dispatcher I/II class specification. The ALJ concluded that the County breached this duty by unilaterally implementing the EMD Certification requirement in October 2018. The County contends the ALJ should have decided this case based on the theory of liability specifically identified in the complaint—whether the County failed or refused to bargain in good faith by engaging in surface bargaining over the revised class specification. For the following reasons, we agree it was improper for the ALJ to analyze this case under a unilateral change

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Board frequently characterizes as "surface bargaining." We use "totality of conduct" here for consistency with our more recent decisions, cited *post*.

theory but nonetheless conclude the County violated its bargaining obligation by engaging in surface bargaining.

I. The Unalleged Unilateral Change

MMBA section 3505 requires a local public agency's governing body or its designated representative(s) to "meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of [] recognized employee organizations." PERB uses two different but related legal standards to determine whether this obligation was violated.

> "In determining whether a party has violated its duty to meet and confer in good faith, PERB uses a 'per se' test or a 'totality of the conduct' analysis, depending on the specific conduct involved and its effect on the negotiating process. (*City of Davis* (2018) PERB Decision No. 2582-M, p. 9.) Per se violations generally involve conduct that violates statutory rights or procedural bargaining norms. (*Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M, p. 13.)
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> "The totality of conduct test applies to bad faith bargaining allegations that our precedent has not identified as constituting a per se refusal to bargain. (*City of Davis*, *supra*, PERB Decision No. 2582-M, p. 9.) Under this test, the Board looks to the entire course of negotiations, including the parties' conduct at and away from the table, to determine whether the respondent has bargained in good faith. (*Ibid.*) The ultimate question is whether the respondent's conduct, when viewed in its totality, was sufficiently egregious to frustrate negotiations. (*Id*. at p. 10.)"

(*City of Arcadia* (2019) PERB Decision No. 2648-M, pp. 34-35.)

Although the same conduct may give rise to violations under both per se and surface bargaining theories, the arguments and defenses related to those different

theories necessarily differ. (*City of Roseville* (2016) PERB Decision No. 2505-M, pp. 15-16 (*Roseville*).) Accordingly, "[w]here conduct allegedly constitutes *both* evidence of the respondent's bad faith *and* a separate unfair practice, the essential facts for each theory of liability should be stated in the complaint and identified as separate unfair practices." (*Id.* at p. 15, original italics.)

"[A] complaint alleging surface bargaining will typically state that, by the totality of its conduct, *including but not limited to*, the conduct described in the complaint, the respondent has failed and refused to meet and confer in good faith." (*Roseville*, *supra*, PERB Decision No. 2505-M, p. 12, original italics.) The complaint thus "identifies the specific acts or indicia that are sufficient to state a prima facie case, while also giving the respondent notice that, under the totality of conduct test, these acts or indicia are not exhaustive of the evidence the charging party may present at hearing to prove the surface bargaining allegation." (*Ibid*.) In contrast, a complaint alleging a unilateral change—a per se violation—typically alleges that the respondent changed policy without affording the exclusive representative prior notice or an opportunity to meet and confer over the change or its effects. (E.g., *Modoc County Office of Education* (2019) PERB Decision No. 2684, p. 1; *City of Montebello* (2016) PERB Decision No. 2491-M, pp. 1-2, 8; *Regents of the University of California (Los Angeles)* (2012) PERB Decision No. 2257-H, p. 1; *County of Sonoma* (2012) PERB Decision No. 2242-M, p. 1, 10-11.)

In this case, the complaint alleged: "By the acts and conduct included in, but not limited to, those described in [this complaint], [the County] failed and refused to meet and confer in good faith with [UPE]." The complaint does not allege that the County

changed policy without providing UPE notice or an opportunity to meet and confer over the change or its effects. Consequently, the complaint alleged solely that the County engaged in surface bargaining, as indicated by a totality of its conduct; it did not also allege a per se violation under a unilateral change theory.

This omission, however, did not necessarily foreclose consideration of a unilateral change theory. When a party seeks to use evidence supporting a surface bargaining allegation to also prove an unlawful unilateral change, "then it must either: (1) move to amend the complaint to add the independent allegation, or (2) demonstrate that the unalleged violation doctrine has been satisfied." (*Davis*, *supra*, PERB Decision No. 2582-M, p. 13; *Roseville*, *supra*, PERB Decision No. 2505-M, p. 24.) "If the charging party does neither, then the evidence may only be considered to prove bad faith bargaining under the totality of the conduct test." (*Davis*, *supra*, PERB Decision No. 2582-M, p. 13.)

Here, UPE never sought to amend the complaint to include a unilateral change allegation based on the County's unilateral implementation of the EMD Certification requirement. As a result, the ALJ could not find the County liable under an independent, per se unilateral change theory unless she first determined that the unalleged violation doctrine was satisfied. (*Davis*, *supra*, PERB Decision No. 2582-M, p. 13.) But the ALJ did not make that threshold determination. Instead, she merely noted that "the facts proven in this case are more amenable to determining whether the County violated the same MMBA section and PERB Regulation [alleged in the complaint] by making an unlawful unilateral change to terms and conditions of employment." Because the ALJ failed to make the required finding that the unalleged

violation doctrine was satisfied, her decision to analyze the facts of this case under a unilateral change theory was erroneous. (*Ibid.*; see *Fresno County Superior Court* (2008) PERB Decision No. 1942-C, p. 15 ["it is strongly recommended that the evidence justifying the [unalleged violation] criteria always be expressly enunciated, so that all parties are aware of the basis for finding that an unalleged violation can be heard without any unfairness"].)

UPE argues the Board should find the unalleged violation criteria are met with regard to the unilateral change found by the ALJ. Nothing precludes the Board from considering an unalleged violation on exceptions to a proposed decision if all of the necessary criteria are met. (*Alliance College-Ready Public Schools* (2017) PERB Decision No. 2545, p. 13.) "Under the unalleged violations doctrine, PERB has the discretion to consider allegations not included in the charge or the complaint if: (1) the respondent has had adequate notice and opportunity to defend against the unalleged matter; (2) the unalleged conduct is intimately related to the subject matter of the complaint and is part of the same course of conduct; (3) the matter has been fully litigated; (4) the parties have had the opportunity to examine and be cross-examined on the issue; and (5) the unalleged conduct occurred within the same limitations period as those matters alleged in the complaint." (*Superior Court v. Public Employment Relations Bd.* (2018) 30 Cal.App.5th 158, 192-193.)

In *State of California (Department of Correctional Health Care Services)* (2019) PERB Decision No. 2637-S, although the complaint itself did not reference an employee's participation in certain protected organizing activities, the Board accepted her testimony about that conduct as evidence supporting her retaliation charge against

the State. (*Id*. at p. 13 [PERB may review unalleged protected activities where the unalleged violation doctrine is satisfied].) Notably, the Board found that the charging party provided adequate notice and an opportunity to defend because it included the protected activities in its amended unfair practice charge and in its opening statement, and the parties had an opportunity to fully litigate the issue because the charging party raised it repeatedly during its case-in-chief. (*Id*. at pp. 13-14.)

In contrast, the Board has held that a charging party fails to provide sufficient notice that it intends to litigate an unalleged violation where the first direct statement about the issue arose in the charging party's post-hearing brief. (*San Bernardino Public Employees Association (White)* (2018) PERB Decision No. 2572-M, pp. 12-13 [raising a claim for the first time in a post-hearing brief is not sufficient notice of an unalleged violation].)

In this case, UPE filed its unfair practice charge prior to the County's October 2018 implementation of the EMD Certification requirement and alleged only that the County had engaged in surface bargaining. During the hearing, which took place after the County's implementation, UPE similarly asserted in its opening statement that the County lacked genuine desire to reach an agreement during the parties' negotiations and instead engaged in surface bargaining. UPE did not once raise an independent unilateral change theory during PERB's investigatory or hearing processes. Nor did it raise the issue in its post-hearing brief, where UPE argued only that it had proven the County bargained in bad faith under the totality of the conduct test. On this record, we conclude the County had insufficient notice that a per se unilateral change theory

would be litigated in this case.[9] Accordingly, we cannot determine whether the County made an unlawful unilateral change but must instead decide whether the County engaged in bad faith bargaining under the totality of conduct test, i.e., surface bargaining, as alleged in the complaint. (*Davis*, *supra*, PERB Decision No. 2582-M, p. 13.)

II. Surface Bargaining

By finding a violation based solely on a unilateral change theory, the proposed decision erroneously failed to address the surface bargaining allegations included in the complaint or justify why those allegations need not be addressed. (*Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M, p. 20 (*Fresno IHSS*).) Because no additional evidence is necessary to decide the surface bargaining issue, in the interest of administrative economy and to expedite a final decision we shall decide this issue instead of remanding this case to the Division of Administrative Law. (*Regents of the University of California* (2012) PERB Decision No. 2300-H, p. 19, fn. 7; see PERB Regulation 32320, subd. (a)(1) [authorizing the Board itself to "[i]ssue a decision based upon the record of hearing"].)

[9] UPE contends the County had adequate notice of the unilateral change theory because the County argued in its post-hearing brief that the EMD Certification was outside the scope of representation. The respondent's brief is a relevant factor to consider where a charging party has referenced an unalleged issue at some point during the hearing. (*City and County of San Francisco* (2017) PERB Decision No. 2540-M, p. 34, vacated in part on other grounds by *City and County of San Francisco* (2019) PERB Decision No. 2540a-M.) But that is not the case here, where UPE made no statements at hearing regarding the EMD Certification requirement that might have put the County on notice that it needed to defend against a unilateral change allegation.

As noted *ante*, MMBA section 3505 requires the governing body of a public agency or its designated representative(s) to "meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of [] recognized employee organizations," and to "consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action." To comply with this duty, each party must "seriously attempt to resolve differences and reach a common ground." (*Los Angeles County Civil Service Com. v. Superior Court* (1978) 23 Cal.3d 55, 61-62, internal quotations and citation omitted.) Thus, a party may not simply go through the motions of negotiations while simultaneously engaging in conduct that delays or prevents agreement. (*Fresno IHSS*, *supra*, PERB Decision No. 2418-M, p. 14.)

Before addressing whether the County negotiated in good faith with UPE over the proposed revisions to the Airport Operations Dispatcher I/II class specification, we first must address the scope of the County's bargaining obligation. Specifically, the County asserts it was not required to negotiate over the EMD Certification requirement or UPE's wage proposal. For the following reasons, we disagree with both assertions.

A. EMD Certification Requirement

It is undisputed that changes to job specifications, including certification requirements and other qualifications, are within the scope of representation unless the changes at issue do no more than is required to comply with an externally-imposed change in the law. (*State of California (Department of Corrections and Rehabilitation, Ventura Youth Correctional Facility)* (2010) PERB Decision No. 2131-S, p. 5; *Healdsburg Union High School District and Healdsburg Union*

School District/San Mateo City School District (1984) PERB Decision No. 375, p. 69; *Alum Rock Union Elementary School District* (1983) PERB Decision No. 322, pp. 21-22; see *County of Orange* (2019) PERB Decision No. 2663-M, pp. 8 & 12-15 [noting exception for externally-imposed changes, and reversing erroneous precedent that had found change in certification requirement to fall outside the scope of representation].)

Attempting to invoke the exception, the County asserts it was not required to negotiate over the EMD Certification requirement because it is an external requirement imposed by the State. "[W]hen external law establishes immutable provisions in an area otherwise within the scope of representation, matters are negotiable only to the extent of the employer's discretion, that is, to the extent that the external law does not 'set an inflexible standard or [e]nsure immutable provisions.'" (*Berkeley Unified School District* (2012) PERB Decision No. 2268, p. 9 (*Berkeley USD*), quoting *San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 864-865 (*San Mateo City SD*).)

In support of its assertion, the County relies on the Emergency Medical Services System and Prehospital Emergency Care Personnel Act (EMS Act).[10] (Health & Saf. Code, § 1797 et seq.) The EMS Act establishes a two-tiered system between the State and county-designated local EMS agencies for the regulation of

[10] The County's exceptions mark the first time it identified specific statutory citations that it claims set an inflexible standard. Before the ALJ, the County instead referenced the EMD PRS notice itself, seemingly relying upon the three general and comprehensive statutory and regulatory citations therein. The County provides no explanation why it could not provide this newer evidence to the ALJ in the first instance. We nevertheless address the merits of the County's legal argument.

prehospital emergency medical services. (*County of San Bernardino v. City of San Bernardino* (1997) 15 Cal.4th 909, 914-916 (*San Bernardino*).) Under the EMS Act, "[e]ach county *may* develop an emergency medical services program. Each county developing such a program shall designate a local EMS agency which shall be the county health department." (Health & Saf. Code, § 1797.200, italics added.) "The local EMS agency, using state minimum standards, shall establish policies and procedures approved by the medical director of the local EMS agency to assure medical control of the EMS system. The policies and procedures approved by the medical director *may* require basic life support emergency medical transportation services to meet any medical control requirements including dispatch, patient destination policies, patient care guidelines, and quality assurance requirements." (*Ibid.*, italics added.)

While the EMS Act includes specific training requirements for certain classes of emergency personnel, e.g., lifeguards, firefighters, peace officers, and emergency medical technicians, it provides no guidance as to training or certification requirements for dispatchers of any kind. And while it grants a local EMS Agency authority to establish policies and procedures for dispatch, it does not mandate that dispatchers possess the particular EMD Certification the County proposed to add to the Airport Operations Dispatcher I/II class specification. Accordingly, the EMS Act does not "set an inflexible standard or [e]nsure immutable provisions" that would negate the County's duty to bargain with UPE over the EMD Certification requirement.

Relying on *San Bernardino*, *supra*, the County contends the EMD Certification requirement "was legally required" because it was adopted by the County EMS Agency under authority granted by the EMS Act. In *San Bernardino*, *supra*, the county

and a local EMS agency sought an injunction against a city located within the county, demanding the city's compliance with county emergency services protocols. Noting that the EMS Act generally "preempts conflicting local ordinances and regulations" (*San Bernardino*, *supra*, 15 Cal.4th at p. 922), the California Supreme Court ruled the city was obligated to comply with the county EMS agency's dispatch protocols (*id*. at pp. 925-929).

San Bernardino is distinguishable because it involved an agency separate from the county that voluntarily contracted for services with the county EMS agency, and thus contractually obligated itself to operate within the county's EMS system. (Health & Saf. Code, § 1797.201; see also Health & Saf. Code, § 1797.178 ["No person or organization shall provide advanced life support or limited advanced life support unless that person or organization is an authorized part of the emergency medical services system of the local EMS agency . . . "].) Here, the EMS Agency and the Department of Airports are both part of the County. Thus, the EMD Certification requirement is not being imposed by an EMS Agency outside of the County's control but rather by the County itself. Because the EMD Certification requirement is not mandated by State law or an outside agency, and instead was adopted at the County's discretion, the requirement is within the scope of representation and the County was obligated to meet and confer over its decision to adopt this requirement for Airport Operations Dispatchers.

B. Wage Proposal

Wages are expressly within the scope of representation under the MMBA. (MMBA, § 3504.) Nonetheless, the County argues it was not required to bargain with

UPE over its wage proposal related to the revised Airport Operations Dispatcher I/II class specification because the MOU's zipper clause constituted a waiver of UPE's right to bargain over wages during the MOU's term.

"Generally[,] a zipper clause gives both parties the right to refuse to bargain changes in all matters covered by the terms of the clause during the life of the agreement." (*Inglewood Unified School District* (2012) PERB Decision No. 2290, p. 12.) Here, the parties' zipper clause broadly states that each party is waiving the right to bargain over "any subject or matter pertaining to or covered by this [MOU], except as otherwise provided herein."[11] As a result, the County contends, UPE was required to make its wage proposal in successor MOU negotiations, not in the negotiations over the class specification revisions, and its failure to do so constituted a waiver of its right to negotiate over wages related to the revised class specification.

This, however, is not a case where the union sought a midterm wage increase because it was not satisfied with the wages agreed to in the MOU. Rather, UPE's wage proposal was made in response to the County's proposed revisions to the Airport Operations Dispatcher I/II class specification, which included a new training and certification requirement. It would be beyond any reasonable interpretation of the zipper clause—and patently unfair under these circumstances—to allow the County to

[11] In a prior case involving the same parties and the same zipper clause, we held that a union may rely on such a zipper clause "to refuse to negotiate a mid-contract change in a subject within the scope of bargaining, and prohibit an employer from implementing one." (*County of Sacramento* (2009) PERB Decision No. 2044, adopting proposed decision at pp. 12-13.) Here, however, we do not consider whether the zipper clause may have barred the County from making the changes at issue mid-contract because UPE did not make that assertion.

propose new terms and conditions of employment within the scope of representation while allowing it to simultaneously wield the zipper clause as a shield to prevent UPE from making integrally related counterproposals. Indeed, such conduct would constitute prohibited "'piecemeal' or 'fragmented' bargaining tactics, whereby one party insists on negotiating certain subjects in isolation from others, or seeks to impose arbitrary limits on the range of possible compromises it will consider." (*City of San Jose* (2013) PERB Decision No. 2341-M, p. 29; see *E. I. Du Pont de Nemours & Co.* (1991) 304 NLRB 792, 802 [in negotiations over creating a new classification, the employer's refusal to consider the union's proposals on subjects being negotiated concurrently in successor contract negotiations "unreasonably reduced the flexibility of collective bargaining and narrowed the range of possible compromises" in violation of its duty to bargain].)

Thus, once the County proposed the revised class specification it was obligated to negotiate at the same table over any proposals by UPE on related matters within the scope of representation, including its wage proposal.[12] (See *El Dorado County Superior Court* (2017) PERB Decision No. 2523-C, pp. 12-13 [once union agreed to resume negotiations for a comprehensive agreement it was estopped from insisting on negotiating over only a single issue, even if the parties' MOU authorized such single issue negotiations].)

[12] For this reason, the fact that UPE could have made its wage proposal in successor MOU negotiations did not entitle the County to insist that UPE do so. Nor did UPE's failure to do so constitute a waiver of its right to meet and confer over wages related to the County's proposed revisions to the Airport Operations Dispatcher I/II class specification.

C. Totality of Conduct

Having found that the scope of the County's bargaining obligation in negotiations over its proposed revisions to the Airport Operations Dispatcher I/II class specification included the EMD Certification requirement and UPE's wage proposal, we turn to whether the County, in fact, demonstrated the requisite good faith in those negotiations. Bargaining in good faith is a "subjective attitude and requires a genuine desire to reach agreement." (*Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9, 25.) Because the respondent's state of mind is rarely susceptible to direct evidence, specific conduct that may appear proper when viewed in isolation might, when placed in the narrative history of negotiations, demonstrate that the respondent was not negotiating with the requisite subjective intent to reach agreement. (*Roseville*, *supra*, PERB Decision No. 2505-M, p. 11; *Fresno IHSS*, *supra*, PERB Decision No. 2418-M, p. 14.) Thus, in surface bargaining cases, "[t]he Board looks to the entire course of negotiations, including the parties' conduct at and away from the table, to determine whether the respondent has bargained with the requisite intent to reconcile differences and reach agreement." (*Fresno IHSS*, *supra*, PERB Decision No. 2418-M, p. 14.) The ultimate inquiry in a surface bargaining case is whether the totality of "the respondent's conduct was sufficiently egregious to frustrate negotiations or avoid agreement." (*Id.* at p. 15; *City of Palo Alto* (2019) PERB Decision No. 2664-M, pp. 49-50; *City of San Ramon* (2018) PERB Decision No. 2571, p. 7 (*San Ramon*).)[13]

[13] The parties are not required to reach agreement, however, as adamant insistence on a bargaining position is not necessarily a refusal to bargain in good faith. (*Placentia Fire Fighters v. City of Placentia*, *supra*, 57 Cal.App.3d at p. 25; *Oakland*

The indicia of surface bargaining are many but we focus on those alleged by UPE: (1) refusing to make counterproposals or otherwise explain one's bargaining positions; (2) refusing to discuss a mandatory subject of bargaining or conditioning its discussion on prior agreement over other subjects; (3) a negotiator's lack of sufficient authority to conduct meaningful negotiations, thus delaying and thwarting the bargaining process; (4) adopting a "take-it-or-leave-it" approach to negotiations; and (5) per se violations such as an outright refusal to bargain and unilaterally-imposed employment terms.

Despite the County's initial offer to meet and confer with UPE over both the specification revision and the certification requirement, it exhibited a take-it-or-leave-it attitude with regard to both subjects. The County took the position that the EMD Certification requirement was not negotiable. It repeatedly rejected UPE's attempts to discuss a wage increase tied to the class specification revisions and directed UPE to raise the issue at main table MOU negotiations.[14] When UPE did so, the County's chief negotiator told UPE that wages related to the revised class specification must be discussed in negotiations over those revisions, not at the main table negotiations. When UPE presented a wage proposal at the parties' second meeting over the revised specification, the County—without reviewing the proposal—responded that it would

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Unified School District (1982) PERB Decision No. 275, p. 16.) "The obligation of the employer to bargain in good faith does not require the yielding of positions fairly maintained." (*NLRB v. Herman Sausage Co.* (5th Cir. 1960) 275 F.2d 229, 231.)

[14] Connolly's repeated statements that wages must be negotiated at the main table indicate he lacked authority to negotiate over wages, another sign of bad faith. (*State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2078-S, p. 8.)

not consider the proposal. After a 20-minute caucus, the County terminated the negotiations without further explanation. (See *San Ysidro School District* (1980) PERB Decision No. 134, p. 14 [“abrupt termination of negotiations, accompanied by a withdrawal of proposals” indicated bad faith bargaining].) At the time it unilaterally ended negotiations, the County had not made any counterproposals. (See *City of Selma* (2014) PERB Decision No. 2380-M, p. 13 [city’s presentation of its only proposal at the parties’ final meeting indicated bad faith bargaining].) Viewed as a whole, this conduct demonstrates the County lacked a genuine desire to reach agreement over the revised class specification.

Per se violations may also indicate the absence of subjective good faith in support of a surface bargaining charge. (*Fresno IHSS*, *supra*, PERB Decision No. 2418-M, pp. 16-17 [surface bargaining allegations require an examination of all evidence relevant to the respondent’s subjective intent, including separate unfair practices].) As noted, the County took the position during negotiations that the EMD Certification requirement was outside the scope of representation. Because, as found *ante*, the requirement was in fact within scope, the County’s refusal to negotiate over it constituted a per se refusal to bargain. Similarly, because the MOU’s zipper clause did not privilege the County to decline to bargain over UPE’s wage proposal, its refusal to do so constituted a per se refusal to bargain. (*Id.* at p. 15.)

Further, the County unilaterally imposed the EMD Certification requirement in October 2018. Because the certification requirement was within the scope of representation, the County could not implement the requirement unless it had first bargained with UPE to impasse or agreement. (*Public Employment Relations Bd. v.*

Modesto City Schools Dist. (1982) 136 Cal.App.3d 881, 900; *San Ramon*, *supra*, PERB Decision No. 2571-M, p. 6.) A bona fide impasse exists only when the parties' deadlock is the result of good faith negotiations. (*San Ramon*, *supra*, PERB Decision No. 2571-M, p. 6; *City of Selma*, *supra*, PERB Decision No. 2380-M, pp. 12-13.) Here, because the County did not negotiate in good faith, the parties had not reached a bona fide impasse when negotiations ended on May 31, 2018. The County thus was not privileged to implement any of its proposed revisions to the Airport Operations Dispatcher I/II class specification, including the EMD Certification requirement. (*City of Selma*, *supra*, PERB Decision No. 2380-M, p. 15; *Sierra Joint Community College District* (1981) PERB Decision No. 179, pp. 6-7.)

The totality of the circumstances, including the County's refusal to bargain with UPE over subjects within the scope of representation or make any counterproposals, its negotiator's lack of authority, its take-it-or-leave-it attitude, and its decision to suspend negotiations after two face-to-face bargaining sessions in favor of unilaterally implementing the certification requirement in October 2018, considered together, indicate that the County did not bargain in good faith over its proposed revisions to the Airport Operations Dispatcher I/II class specification. Accordingly, the County violated MMBA sections 3505 and 3506.5, subdivision (c) by failing and refusing to meet and confer in good faith with UPE. This conduct also interfered with the rights of bargaining unit employees to be represented by their chosen representative in violation of MMBA sections 3506 and 3506.5, subdivision (a), and with the right of UPE to represent bargaining unit members in violation of MMBA sections 3503 and 3506.5, subdivision (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 the authority to order an offending party to take affirmative actions designed to effectuate the purposes of the MMBA. (*Id*. at p. 10.)

A "properly designed remedial order seeks a restoration of the situation as nearly as possible to that which would have obtained but for the unfair labor practice." (*Modesto City Schools* (1983) PERB Decision No. 291, pp. 67-68.) In this case, the County bargained in bad faith by engaging in surface bargaining over its proposed revisions to the Airport Operations Dispatcher I/II class specification. The typical remedy for surface bargaining includes an order to cease and desist from negotiating in bad faith and from interfering with protected rights. (*Anaheim Union High School District* (2015) PERB Decision No. 2434, pp. 26-29.) Such an order is appropriate here.

Furthermore, in cases where an employer implemented changes to terms and conditions of employment within the scope of representation without first reaching a bona fide impasse in negotiations, PERB has ordered the employer to restore the status quo by rescinding the implemented terms and making employees whole for any losses suffered as a result of the unlawful implementation. (*San Ramon*, *supra*, PERB Decision No. 2571-M, p. 17; *City of Selma*, *supra*, PERB Decision No. 2380-M, pp. 24-25.) Such an order is necessary to assure meaningful bargaining by restoring the conditions that existed prior to the County's unlawful bargaining conduct, thereby

preventing the County from benefitting from its violation by forcing UPE to "bargain back" to the status quo. (*City of Palo Alto* (2017) PERB Decision No. 2388a-M, p. 49; *City of Pasadena* (2014) PERB Order No. Ad-406-M, p. 13.) We therefore will order the County to rescind the unilaterally implemented EMD Certification requirement and make employees whole for any losses incurred as a result of the implementation, with interest at the rate of 7 percent per annum.[15]

Because rescinding the certification requirement at this time could be contrary to UPE's assessment of the bargaining unit's best interest, UPE may elect to decline all or part of the relief we afford it by written notification to the County. (*County of Kern* (2018) PERB Decision No. 2615-M, pp. 11-12.) Moreover, in certain cases, the Board has stayed rescission orders for a period of time to allow the parties an opportunity to bargain over alternative remedies to potentially minimize disruption to the employer's operations. (*Ventura County Community College District* (2003) PERB Decision No. 1547, p. 30.) Accordingly, the order to rescind the EMD Certification requirement, including any accompanying make whole relief, shall be stayed for 90 days following the date this decision is no longer subject to appeal, so the parties can negotiate over possible alternative remedies in light of currently existing circumstances. If the parties fail to agree to an alternative remedy after 90 days from the date this decision is no longer subject to appeal, and UPE has not notified the County in writing that it declines

[15] Although at the time of the hearing all Airport Operations Dispatchers were EMD certified, it is possible that any such incumbent later failed to recertify and was consequently disciplined or discharged, or that an applicant was not hired or promoted as a result of the new certification requirement. We leave it to the parties in compliance proceedings to provide OGC with evidence as to whether any of these circumstances occurred.

all or part of the relief ordered, the orders to rescind the EMD Certification requirement and make employees whole shall go into effect.

Finally, PERB typically orders the party found to have committed an unfair practice to post a notice incorporating the terms of the order. Posting of such a notice informs employees of the resolution of the matter and of the employer's readiness to comply with the ordered remedy. (*Placerville Union School District* (1978) PERB Decision No. 69.) We order that remedy here.

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 Sacramento violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq., by failing and refusing to meet and confer in good faith with UPE regarding revisions to the Airport Operations Dispatcher I/II class specification. By this conduct, the County also interfered with the right of bargaining unit employees to participate in the activities of an employee organization of their own choosing and denied UPE the right to represent bargaining unit members in their employment relations with a public agency.

Pursuant to Government Code section 3509, subdivision (b), it hereby is ORDERED that the County of Sacramento, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and confer in good faith with UPE over revisions to the Airport Operations Dispatcher I/II class specification.

2. Interfering with bargaining unit employees' right to be represented by UPE.

3. Interfering with UPE's right to represent bargaining unit employees.

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

1. Rescind the EMD Certification requirement for all Airport Operations Dispatchers.

2. Make whole all employees for any losses incurred as a result of the County's implementation of the EMD Certification requirement, with interest at the rate of 7 percent per annum.

3. Meet and confer in good faith with UPE, upon request, over revisions to the Airport Operations Dispatcher I/II class specification.

4. With regard to the above provisions requiring the County to rescind the EMD Certification requirement and make affected employees whole, this Order shall be stayed for 90 days following the date this decision is no longer subject to appeal, during which the parties may meet and confer over a mutually acceptable alternative remedy. In the event no agreement is reached within 90 days, the stay will expire, and all provisions of this Order shall take effect, unless UPE notifies the County in writing before the end of the 90-day period that it declines all or part of such relief. The parties may mutually agree to extend the 90-day period, or lacking mutual agreement, may apply to the compliance officer to extend the stay if good cause is shown.

5. Within 10 workdays of the date this decision is no longer subject to appeal, post at all work locations where notices to employees in UPE bargaining units 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 30 consecutive workdays. The Notice shall also be sent to all bargaining unit employees by electronic message, intranet, internet site, or other electronic means customarily used by the County to communicate with employees in UPE's bargaining units. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.[16]

6. 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

[16] In light of the ongoing COVID-19 pandemic, Respondent shall notify PERB's Office of the General Counsel (OGC) in writing if, due to an extraordinary circumstance such as an emergency declaration or shelter-in-place order, a majority of employees at one or more work locations are not physically reporting to their work location as of the time the physical posting would otherwise commence. If Respondent so notifies OGC, or if Charging Party requests in writing that OGC alter or extend the posting period, require additional notice methods, or otherwise adjust the manner in which employees receive notice, OGC shall investigate and solicit input from all parties. OGC shall provide amended instructions to the extent appropriate to ensure adequate publication of the Notice, such as directing Respondent to commence posting within ten workdays after a majority of employees have resumed physically reporting on a regular basis; directing Respondent to mail the Notice to all employees who are not regularly reporting to any work location due to the extraordinary circumstance, including those who are on a short term or indefinite furlough, are on layoff subject to recall, or are working from home; or directing Respondent to mail the Notice to those employees with whom it does not customarily communicate through electronic means.

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 UPE.

Members Banks 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. SA-CE-1060-M, *United Public Employees, Inc. v. County of Sacramento*, in which all parties had the right to participate, it has been found that the County of Sacramento (County) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq., by failing and refusing to meet and confer in good faith with UPE regarding revisions to the Airport Operations Dispatcher I/II class specification. By this conduct, the County also interfered with the right of bargaining unit employees to participate in the activities of an employee organization of their own choosing and denied United Public Employees, Inc. (UPE) the right to represent bargaining unit members in their employment relations with a public agency.

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

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and confer in good faith with UPE over revisions to the Airport Operations Dispatcher I/II class specification;

2. Interfering with bargaining unit employees' right to be represented by UPE; and

3. Interfering with UPE's right to represent bargaining unit employees.

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

1. Rescind the EMD Certification requirement for all Airport Operations Dispatchers;

2. Make whole all employees for any losses incurred as a result of the County's implementation of the EMD Certification requirement, with interest at the rate of 7 percent per annum; and

3. Meet and confer in good faith with UPE, upon request, over revisions to the Airport Operations Dispatcher I/II class specification.

With regard to the provisions requiring the County to rescind the EMD Certification requirement and make affected employees whole, this Order shall be stayed for 90 days following the date this decision is no longer subject to appeal, during which the parties may meet and confer over a mutually acceptable alternative remedy. In the event no agreement is reached within 90 days, the stay will expire, and all provisions of this Order shall take effect, unless UPE notifies the County in writing before the end of the 90-day period that it declines all or part of such relief. The parties may mutually agree to extend the 90-day period, or lacking mutual agreement, may apply to the compliance officer to extend the stay if good cause is shown. Thereafter, UPE shall notify the Office of the General Counsel so that compliance proceedings may be initiated.

Dated: _____ County of Sacramento

By: _____
Authorized Agent

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