STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SEIU LOCAL 1021, Charging Party, v. COUNTY OF SONOMA, Respondent.	Case No. SF-CE-509-M PERB Decision No. 2242-M February 29, 2012

Appearances: Weinberg, Roger & Rosenfeld by Vincent A. Harrington, Jr., Attorney, for SEIU Local 1021; Renne, Sloan, Holtzman & Sakai by Timothy G. Yeung, Attorney, for County of Sonoma.

Before McKeag, Dowdin Calvillo and Huguenin, Members.

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the County of Sonoma (County) to the proposed decision of an administrative law judge (ALJ). The complaint alleged that the County violated the Meyers-Milias-Brown Act (MMBA)[1] by unilaterally changing its policy concerning retiree health insurance benefits without giving SEIU Local 1021 (SEIU) notice and an opportunity to meet and confer over the decision to implement the change in policy and/or the effects of the change in policy. Specifically, the complaint alleged that, on or about April 10, 2007, the County unilaterally changed the contribution amount from the same premium costs as it paid for current employees pursuant to the parties' memorandum of understanding (MOU) to a maximum of 85 percent of the lowest cost medical plan offered for

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

each level of health care coverage for eligible retirees and eligible dependents, without meeting and conferring with SEIU.

The ALJ determined that the County violated MMBA section 3505 and PERB Regulation 32603(c)[2] by unilaterally implementing a policy placing a prospective "cap" on premium contributions to future retirees. The ALJ also found that this conduct interfered with the right of County employees to participate in the activities of an employee organization of their own choosing, in violation of MMBA section 3506 and PERB Regulation 32603(a), and denied SEIU its right to represent employees in their employment relations, in violation of MMBA section 3503 and PERB Regulation 32603(b).

The Board has reviewed the proposed decision and the record in light of the County's exceptions and SEIU's response thereto, and the relevant law.[3] Based on this review, the Board reverses the proposed decision and dismisses the complaint and charge for the reasons discussed below.

BACKGROUND

The County is a public agency within the meaning of MMBA section 3501(c). SEIU is an employee organization within the meaning of Section 3501(a).

The County has provided retiree health insurance benefits since 1964. The Sonoma County Employees' Retirement Association (SCERA) administers retiree benefits. The County Employees Retirement Law of 1937, Government Code section 31450 et seq. (County

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

[3] The County's request for oral argument is denied. The Board historically denies requests for oral argument when an adequate record has been prepared, the parties had ample opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear to make oral argument unnecessary. *(Antelope Valley Health Care District* (2006) PERB Decision No. 1816-M; *Monterey County Office of Education* (1991) PERB Decision No. 913.)

Retirement Law), authorizes counties to provide retiree pension and health insurance benefits and also authorizes the establishment of a recognized association to represent the interests of retirees. (County Retirement Law, § 31693.) The Sonoma County Association of Retired Employees (SCARE) is the recognized organization for this purpose under the County Retirement Law. SCARE does not have any collective bargaining authority, but attempts to represent the interests of retirees in their dealings with the County. Under Section 31693 of the County Retirement Law, SCARE is entitled to receive reasonable notice of, and an opportunity to comment on, any proposed changes in health care benefits affecting retired employees.

For many years, all employees and retirees received the same health benefits. The County paid 100 percent of employee and retiree health benefit insurance premiums. In the mid-1980s, the County sought to modify its health benefits program by decreasing the County's contribution toward premiums and increasing employee and retiree co-payments. SEIU, however, was willing to maintain a different plan design at a higher cost to its members. In 1985, the County began to negotiate proposed changes to health benefits with the various County bargaining units. Because not all bargaining units agreed to the same health care benefits and contribution levels, the County decided to "link" health benefits for all retirees, regardless of the bargaining unit they retired from, to the benefit and contribution levels received by unrepresented administrative management employees. Under this approach, the County would not have to continuously track and adjust different retiree contribution levels based on future changes to premium contribution amounts negotiated in each unit. Indeed, the County lacked the ability to do so because the retirement system does not track retirees by bargaining unit. At the time, this decision appeared to be beneficial for retirees because administrative management generally received "the richest package" of health benefits among

County employees. The assistant County administrator at the time, Mike Chrystal (Chrystal), testified that the decision to link retiree health benefits to administrative management was communicated to the various bargaining units and SCARE representatives. Chrystal further testified that he did not hear any opposition to the linkage.

During negotiations in 1989 for a new contract, the County proposed establishing a two-tiered system that imposed a length of service requirement before an employee would be eligible to receive retiree health benefits. Existing employees would continue to be eligible for retiree health benefits without regard for their length of service. Employees hired after January 1, 1990, however, would have to work for ten years prior to becoming eligible to receive lifetime retiree health insurance, and would have to work for twenty years to receive additional coverage for a spouse or dependent. For the first time, language concerning retiree health benefits was placed in article 12 of the 1989-1992 MOU between the County and SEIU. The relevant MOU language stated:

> 12.9 Future Employee/Future Retiree Health Care
>
> 12.9.1 Health Plan – Retirees
>
> Currently, the County contributes to the cost of a health plan for its retirees and their dependents. For any employee who is newly hired or rehired by the County or any other agency covered by this Memorandum after January 1, 1990, this benefit shall only be available upon the employee's retirement under the following circumstances. With respect to the retiree, he or she must have been employed with the County for a period of at least 10 years (consecutive or nonconsecutive) after January 1, 1990, and must have been a contributing member (or a contribution was made on their behalf) of the County's Retirement System for the same length of time. Upon meeting these two conditions, the County shall contribute for the retiree only the same amount towards a health plan premium as it contributes to an active single employee in the same manner and on the same basis as is done at the time for other retirees who were hired or rehired before January 1, 1990. The retiree may enroll eligible dependents in the group health plan covering the retiree, but the retiree is responsible for the total dependent(s) premium(s). When such an

> employee has been employed (consecutive or non-consecutive) by the County for a period of at least 20 years after January 1, 1990, and has been a contributing member (or a contribution was made on their behalf) of the County's Retirement System for the same length of time the County shall also contribute for one dependent the same amount towards a health plan premium as it contributes to an active employee with one dependent in the same manner and on the same basis as is done at the time for other retirees who were hired or rehired before January 1, 1990. The retiree with 20 or more years of County service may enroll eligible dependents in the group plan covering the retiree, but the retiree is responsible for the total premium cost of more than one dependent. In no event shall employees hired or rehired after January 1, 1990 be entitled to receive greater contributions from the County for a health plan upon retirement than the County pays for employees hired or rehired before January 1, 1990 upon their retirement.

(Emphasis added.)

SEIU's chief negotiator, Michael Allen (Allen), testified that, during the 1989 negotiations, he understood the term "active" to mean someone within the bargaining unit. A County proposal dated August 8, 1989 regarding Article 12.9 contains a footnote, initialed by both Allen and County negotiator Ray Myers, stating "Intent: Co[unty] pay whatever it pays for active [employ]ee when retiree retires and treat retiree same thereafter as it treats active [employ]ee contributions."

As part of the 1989 negotiations, SEIU opted to pay a higher percentage of premiums rather than a flat rate in order to receive a higher level of benefits. Allen recalled that, during 1989 or the early 1990s, he heard reference to a linkage between administrative management and retirees, and that SCARE representatives did not take his advice to have retiree health benefits tied to current bargaining employees. Allen also testified that the negotiations focused on the eligibility, or "tiering" requirements for retiree health insurance, rather than on the details of the coverage because the benefit had been around for such a long time.

Since 1990, the County has continued to provide retirees with the same health insurance benefits it provides to unrepresented administrative management employees. Although the County has adjusted the percentage contribution rate over the years, the premium contribution rates actually paid by retirees have always been the same as those paid by unrepresented administrative management. During most of this same time period, the premium contribution rates paid by employees in the SEIU bargaining units have been different from those paid by administrative management and retirees. For example, a chart provided by the County shows that in 1993, the contribution rate for employees in the SEIU bargaining unit was 8 percent of the health care premium, while the rate for administrative management and retirees was 10 percent. In 1994, the contribution rate for bargaining unit employees was still 8 percent, while the rate for administrative management and retirees was 11 percent. In 1997 and 1998, the contribution rate for bargaining unit employees exceeded that of administrative management and retirees. In only seven out of the fifteen years between 1992 and 2007 have retirees and administrative management employees paid the same percentage amount for health insurance premiums as SEIU bargaining unit employees.[4]

Changes to the plan design and the linkage with administrative management were also discussed at meetings of the County's Joint Labor Management Benefits Committee (JLMBC) in 2003 and 2004. All employee organizations and SCARE are invited to attend these meetings, and all receive copies of the agendas and minutes whether they attend or not. Allen attended those meetings regularly on behalf of SEIU. At the meetings, County representatives distributed open enrollment booklets that identified the premium rates applicable to each plan. A separate booklet covered retirees. County Risk Manager Marcia Chadbourne testified that

[4] The chart submitted by the County also indicates that, even in those years where the percentage amounts were the same for retirees and SEIU bargaining unit employees, the actual amounts paid per year were different in several of those years.

the issue of the linkage between retirees and administrative management came up frequently at JLMBC meetings and that SCARE representatives would always make a point that the retirees were tied to administrative management so the County not make any changes for them.

During the course of two or three JLMBC meetings in 2003, the County discussed eliminating its pharmacy benefits for retirees and implementing the Medicare Part D pharmacy plan instead. However, the County did not make the change after the retirees emphasized that they were tied to administrative management, and if the County were to make any changes to the pharmacy benefit it would have to make the same change for administrative management because the retirees' benefits were tied to administrative management. At one point, Allen spoke up and said something to the effect of, "see, you should have let SEIU represent your interests, you know, instead of being tied to administrative management."

The minutes of the JLMBC meetings also reflect discussions about the link between retirees and administrative management for health care benefits. The minutes of the March 4, 2004 meeting state that, after a question was raised regarding whether active employees are funding the retiree health program, it was explained that active employees do not contribute to retiree medical benefits, the agreement made between SCARE and the County in 1985 ties retirees to administrative management costs, and that retirees are required to make the same contribution toward medical benefits as active administrative management employees. The minutes of the March 18, 2003 meeting indicate that health plan changes were discussed at that meeting and include, as an attachment, a chart showing agreed-upon changes to deductibles and co-payments for the various bargaining units that would become effective in July 2003 and July 2004. The chart indicates that different changes would be implemented at different times for the different bargaining units, and lists retirees for all units separately. The chart was also

included in the open enrollment booklets distributed to employees and retirees and made available at the JLMBC meetings.

Allen and other SEIU representatives were present at both of these meetings and others, but Allen stated that he did not recall the discussions of a linkage between retirees and administrative management. He did not, however, deny that such discussions occurred.

The linkage between retirees and administrative management is also identified in a four-page "Frequently Asked Questions" booklet produced in 2003 by the County's risk management staff and distributed to employees considering retirement and at retiree pre-planning workshops. The booklet states:

> WHO DETERMINES HOW MUCH I PAY FOR HEALTH INSURANCE?
>
> Retirees have traditionally been linked to county management concerning insurance contributions. Retirees pay a monthly contribution equivalent to management's bi-weekly contribution. Currently retiree's [sic] pay 15% of the total premium cost.

Finally, the existence of a linkage between retirees and administrative management is reflected in correspondence between SCARE representatives and the County. For example, a letter dated February 16, 2007 from Richard Gearhart, SCARE president and former director of human resources/personnel for the County, to the current director of human resources repeatedly asserts that retiree health insurance benefits are to be linked to administrative management. Similarly, a letter dated January 31, 2001, from then-SCARE President Maureen Latimer to Chrystal refers to the existence of that link since 1985.

In summary, the evidence demonstrates that, notwithstanding any ambiguity in the contract language and the subjective beliefs of SEIU representatives, the County had a longstanding practice of providing the same health insurance benefits to retirees as it did for unrepresented management, and that it provided different benefits to current SEIU bargaining

unit employees. SCARE supported and advocated for the continuation of this practice for over 20 years. The practice is reflected in documents distributed to employees and was discussed at JLMBC meetings in the presence of SEIU's representatives.

The County has never maintained records identifying retirees by bargaining unit or former employee classification. SCERA also does not have the ability to track individual retirees by bargaining unit and has never done so.

April 10, 2007 Resolution

Prior to 2007, the County paid 84 percent of the total premium for any medical plan for unrepresented management and retirees. On April 10, 2007, the County's Board of Supervisors adopted a resolution implementing changes to the health plan design and contribution methodology for unrepresented management employees and retirees, effective July 1, 2008. Under this plan, known as the "85-Y" plan, the County would limit its contribution to 85 percent of the lowest cost medical plan and cease making contributions that exceeded that amount until the lowest cost plan contribution reached that amount.

THE COUNTY'S EXCEPTIONS

The County advances four principal arguments. First, the County contends that the charge is time-barred because SEIU knew or should have known of the County's actual practice of linking retiree health benefits to administrative management more than six months prior to filing the charge. Second, the County asserts that the MOU language does not link retiree health benefits to current unit employees and that, therefore, the County did not engage in an unlawful unilateral change in an established policy or past practice. Third, the County contends that retiree health insurance benefits are not within the scope of representation. Finally, the County contends that the remedy imposed by the ALJ inappropriately extends to retirees who were not employees at the time the charge was filed.

DISCUSSION

Substantially the same issues raised in this case were presented to and decided by the Board in *County of Sonoma* (2011) PERB Decision No. 2173-M (*Sonoma County I.*) In that case, filed by a different labor organization against the County over identical contract language and the same April 10, 2007 resolution of the County Board of Supervisors, PERB determined that: (1) the charge was barred by the six-month statute of limitations because the alleged unilateral change had been in effect for many years before the filing of the charge; and (2) even if the charge was timely filed, the evidence failed to establish a unilateral change in an established past practice. Thus, the Board reversed the ALJ decision finding an unlawful unilateral change. Because of the substantial factual and legal similarities present in this case and *Sonoma County I*, we apply the same analysis.

Charge and Complaint

The charge in this case alleges, in relevant part:

> On or about April 10, 2007, the Board of Supervisors of the County, the chief managerial representatives of the County, adopted a Resolution, on information and belief, numbered 07-0269 which, among other things, purported to change the amount of the County's contribution for retired employees' health plan premiums from the amount the County contributed for an active single employee in the same amount and on the same basis, or in the case of employees with dependents, in the same amount, and on the same basis as it contributed for an active employee with one dependent, to a maximum of 85% of the total premium of the lowest cost medical plan offered for each level of coverage – i.e., employee only, employee plus one dependent, etc.

The complaint issued by the General Counsel alleges, in relevant part:

> 3. Before April 10, 2007, Respondent's policy with respect to contributions for health care benefits for eligible retirees and their eligible dependents was to pay the same premium costs as

> are required for current employees pursuant to Section 15[5] of the parties' Memorandum of Understanding.
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> 5.[6] On or about April 10, 2007, Respondent changed this policy by adopting Resolution No. 07-0267, which limits Respondent's contributions for health care benefits for eligible retirees and their eligible dependents to a maximum of 85 percent of the lowest cost medical plan offered for each level of health care coverage for eligible retirees and eligible dependents, regardless of which health care plan they are actually covered under.

In *Sonoma County I*, the original complaint contained identical language to the allegations of the complaint in this case. At the hearing in that case, however, the complaint was amended to clarify the allegations to read:

> 'Before April 10, 2007, 2007, Respondent's policy concerning health insurance contributions for current and future SCLEA retirees was directly tied to the contributions made for active SCLEA bargaining unit members. On or about April 10, 2007, Respondent unilaterally changed this policy by adopting Resolution No. 07-0267, which alters Respondent's health insurance contribution amount for current and future SCLEA retirees by tying them to the contributions made to active unrepresented management members.'

We do not find this pleading difference to have a material effect on the issues in this case. In both cases, the issue before PERB was whether the County unilaterally changed a past practice or policy of paying the same health care premium costs for retirees as it did for current bargaining unit employees to a cap of 85 percent of the lowest cost plan. As discussed in further detail below, both cases involved identical contract language that the Board in *Sonoma County I* found to be ambiguous. In both cases, the evidence in the record showed that the actual practice of the County over many years was to pay exactly the same percentage for

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[5] The reference to Section 15 was corrected at the hearing to Section 12.

[6] The complaint was amended at the hearing to eliminate paragraph 4, which was a duplicate of paragraph 3.

retirees as it did for unrepresented management and that it paid a different amount for current bargaining unit employees. Thus, the Board in *Sonoma County I* concluded that the evidence failed to establish a past practice of paying the same costs for retirees as it did for current bargaining unit employees.

Statute of Limitations

PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (*Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177 (*Gavilan*).)[7] A charging party bears the burden of demonstrating that the charge is timely filed. (*Tehachapi Unified School District* (1993) PERB Decision No. 1024; *State of California (Department of Insurance)* (1997) PERB Decision No. 1197-S.) In unilateral change cases, the limitations period begins to run when the charging party has actual or constructive notice of the respondent's clear intent to implement a unilateral change in policy, provided that nothing subsequently evinces a wavering of that intent. (*The Regents of the University of California* (1990) PERB Decision No. 826-H.) Thus, a charging party that rests on its rights until actual implementation of the change bears the risk of running afoul of the statute of limitations. (*South Placer Fire Protection District* (2008) PERB Decision No. 1944-M.) While an employer's official notice to the union is a factor in determining whether the employer made an unlawful unilateral change, such notice is not required in determining whether the charge was filed within the

[7] 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.)

statute of limitations; rather, the question is whether the union had or should have had knowledge. (*City of Alhambra* (2009) PERB Decision No. 2036-M, adopting ALJ's proposed decision citing *Gavilan* and *Grant Joint Union High School District* (1982) PERB Decision No. 196 (*Grant*).)

As in *Sonoma County I*, the complaint in this case alleges that the County's April 2007 resolution changed the County's policy on retiree health insurance contributions from a prior policy of paying the same premium costs on behalf of retires as it paid for current employees. However, such a change, if any, occurred not in April 2007 but much earlier in 1985, when the county began negotiating different health care benefits with different bargaining units, or in 1990, when the parties agreed to language in their MOU expressly addressing the issue of retiree health care benefits. The 2007 resolution did not change the existing practice linking retiree health care benefits to administrative management, but only changed the contribution rate for administrative management and, consequently, retirees. The 1990 MOU changes did not change the past practice regarding linkage, but only established a two-tier system of eligibility for retiree health care benefits.

The evidence established that the County had a practice for over 20 years of linking retiree health insurance benefits to benefits received by administrative management. In his capacity as SEIU's representative, Allen regularly attended JLMBC meetings where the linkage was discussed, most significantly the March 4, 2004, meeting for which the minutes specifically reflect that it was explained to those present that the agreement made between SCARE and the County in 1985 ties retirees to administrative management costs, and the March 18, 2003, meeting during which a chart showing agreed-upon health care plan changes shows retirees listed separately from bargaining unit employees. In addition, in 2003, there were extensive discussions at several JLMBC meetings about a proposal by the County to

eliminate the prescription drug benefit and implement the Medicare Part D plan. The retirees present at these meetings objected strenuously to the County's proposal, arguing that the County could not eliminate the benefit because the retirees' health benefits were linked to those of the administrative management employees. Indeed, Allen even commented that the retirees should have let SEIU represent their interests instead of being tied to administrative management. The agenda and minutes of those meetings were provided to SEIU and other employee organizations, whether or not they attended.

Given Allen's active participation in the JLMBC where the linkage between administrative management and retirees was clearly and openly discussed on many occasions, and given SEIU's status as the exclusive representative of bargaining unit employees and future retirees, we find it implausible that SEIU was unaware that the County had a practice for over 20 years of making contributions for retiree health benefits that differed from those paid on behalf of current bargaining unit employees. Thus, we conclude that SEIU knew or should have known of the County's practice of paying the same contributions for retirees as it did for administrative management long before April 2007. Accordingly, the charge filed on October 10, 2007 was not timely filed.

Unilateral Change

We next consider whether, even if the charge were timely filed, the evidence established an unlawful unilateral change. In determining whether a party has violated MMBA section 3505 and PERB Regulation 32603(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (*Stockton Unified School District* (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer breached or altered the parties' written agreement or its own established

past practice; (2) such action was taken without giving the other party notice or an opportunity to bargain over the change; (3) the change was not merely an isolated breach of the contract, but amounts to a change in policy (i.e., it has a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. *(Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802; *Walnut Valley Unified School District* (1981) PERB Decision No. 160; *San Joaquin County Employees Assn. v. City of Stockton* (1984) 161 Cal.App.3d 813; *Grant*.)

Written Agreement

SEIU asserts that the term "active employee," as used in Article 12 of the MOU, means current bargaining unit employee. The County, on the other hand, asserts that Section 12 codified the parties' existing practice of linking retiree health benefits to unrepresented management. As in *Sonoma County I*, we conclude that the identical contract language is ambiguous and does not clearly support either party's interpretation.

Although PERB does not have jurisdiction to resolve pure contract disputes, it may interpret contract language if necessary to do so to decide an unfair practice charge case. (*Regents of the University of California (Davis)* (2010) PERB Decision No. 2101-H (*Regents*); *County of Ventura* (2007) PERB Decision No. 1910-M.) In such cases, traditional rules of contract law guide the Board's interpretation of collective bargaining agreements. (*Regents*; *National City Police Officers' Assn. v. City of National City* (2001) 87 Cal.App.4th 1274, 1279; *Grossmont Union High School District* (1983) PERB Decision No. 313.) A contract must be interpreted so as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful. (Civ. Code, § 1636.) Where contractual language is clear and unambiguous, it is unnecessary to go beyond the plain language

of the contract itself to ascertain its meaning. (Civ. Code, § 1638; *City of Riverside* (2009) PERB Decision No. 2027-M; *Marysville Joint Unified School District* (1983) PERB Decision No. 314 (*Marysville*).) "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.) Thus, "the Board must avoid an interpretation of contract language which leaves a provision without effect." (*State of California (Department of Corrections)* (1999) PERB Decision No. 1317-S.) However, where the contract language is silent or ambiguous, the policy may be ascertained by examining past practice or bargaining history. (*Marysville* citing *Rio Hondo Community College District* (1982) PERB Decision No. 279 and *Pajaro Valley Unified School District* (1978) PERB Decision No. 51; *King City Joint Union High School District* (2005) PERB Decision No. 1777.)

The operative language of Section 12 states that the County "shall contribute for the retiree only the same amount towards a health plan premium as it contributes to an active single employee in the same manner and on the same basis as is done at the time for other retirees who were hired or rehired before July 1, 1990." Nowhere in the MOUs is the term "active single employee" (or "active employee") defined. While section 3.2 of the MOU defines "employee" as "any person legally employed by the County and a member of the bargaining unit represented by the Union," nothing on the face of the contract indicates that "employee" as used in Section 3.2 is synonymous with "active single employee" as used in Section 12. Such a construction would appear to be inconsistent with Section 3.1, entitled "Definitions Non-Application," which states: "None of the following definitions are intended to apply in the administration of the County Employee's Retirement Law of 1937 or to the County's Civil Service Ordinance nor the Rules of the Civil Service Commission."

Adding to this ambiguity is the language in Section 12 that specifies that retiree contributions are to be made "in the same manner and on the same basis" as is done for other retirees hired or rehired before July 1, 1990. In the absence of any further explanation of this provision, we find the contract language ambiguous as to the meaning of the term "active single employee" and the manner and basis upon which contributions are to be made.

Because the contract language is ambiguous, we look to extrinsic evidence to determine the parties' intent. The parties dispute the manner and basis in which contributions were made for retirees both prior to July 1, 1990 and thereafter. Witnesses for both parties acknowledged that the 1989 negotiations focused primarily on the County's "tiering" proposal that established waiting periods before employees hired after July 1, 1990 would be eligible to receive retiree health care benefits. In interpreting Section 12, SEIU relies on language of the "intent footnote" to the County's August 8, 1989 proposal, which states that the County will pay whatever it pays "for active employee when retiree retires" and will treat retirees "same thereafter as it treats active employee contributions." Allen also testified, however, that he was aware of statements from SCARE representatives indicating that retiree health benefits were tied to administrative management, and that he even chided them for not taking his advice to be linked to the bargaining unit employees. Thus, we do not consider the "intent footnote" on the August 8, 1989 proposal to be dispositive on the issue of the meaning of the disputed contract language.

Based upon our review of the MOU and the extrinsic evidence, we conclude that the MOU does not establish a written agreement to pay the same amount for retiree health insurance benefits as it pays for current bargaining unit employees. Therefore, we consider whether the County has breached an unwritten but established past practice.

Past Practice

For a past practice to be binding, it must be: (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. (*Desert Sands Unified School District* (2010) PERB Decision No. 2092; *Riverside Sheriff's Assn. v. County of Riverside* (2003) 106 Cal.App.4th 1285, 1291.) PERB has also described an enforceable past practice as one that is "regular and consistent" or "historic and accepted." (*Hacienda La Puente Unified School District* (1997) PERB Decision No. 1186, adopting proposed dec. of the ALJ, at p. 13; *County of Placer* (2004) PERB Decision No. 1630-M. See also, *County of Sacramento* (2009) PERB Decision No. 2043-M (*County of Sacramento I*); *County of Sacramento* (2009) PERB Decision No. 2044-M (*County of Sacramento II*); *County of Sacramento* (2009) PERB Decision No. 2045-M (*County of Sacramento III*) cases, finding 20-year practice of providing retiree dental and medical insurance to constitute a binding past practice.) The burden is on SEIU to establish that the County breached an established past practice. (*San Francisco Unified School District* (2009) PERB Decision No. 2057; *City of Commerce* (2008) PERB Decision No. 1937-M.) To do so, SEIU must plead and prove facts demonstrating the unequivocal, fixed, and longstanding past practice. (*Regents of the University of California* (2010) PERB Decision No. 2109-H.)

The evidence presented does not establish that the County had an unequivocal, clearly enunciated and acted upon, and readily ascertainable past practice, accepted by both parties, of linking retiree health insurance benefits to the benefits received by current bargaining unit employees. Nor does the evidence establish that such a practice was "regular and consistent" or "historic and accepted." As in *Sonoma County I*, while SEIU may have believed this to be the practice, it did not rebut the County's evidence that, in fact, the actual contributions paid by the

County on behalf of retirees since at least 1990 exactly mirrored those paid on behalf of unrepresented management, and were different from those paid on behalf of bargaining unit employees. Coupled with evidence that the linkage with administrative management was reflected in documents provided to potential retirees and discussed repeatedly at JLMBC meetings at which Allen and other SEIU representatives were present and whose agenda and minutes were provided to SEIU, correspondence with SCARE representatives, and the testimony of the County's witnesses that the County and SCARE lack the ability to track retirees by bargaining unit, we cannot conclude that SEIU established the existence of a binding past practice of linking retiree health benefits to the benefits received by bargaining unit employees. Accordingly, SEIU has not met its burden of proving a unilateral change in an established past practice.[8] Therefore, a prima facie case of unlawful unilateral change has not been established.[9]

[8] Because we find that SEIU failed to meet its burden of proving the existence of an established past practice, we need not reach the issue of whether the other elements of a prima facie case of unilateral change were met. Were we to do so, however, we would reject the County's argument that Section 31962 excludes the retiree health insurance benefits at issue in this case from the scope of representation. It is well established that, while an employer has no duty to bargain over retiree health insurance benefits, the future retirement benefits of current employees, including retirement health benefits, are mandatory subjects of bargaining. (*County of Sacramento I*; *County of Sacramento II*; *County of Sacramento III*; *Madera Unified School District* (2007) PERB Decision No. 1907.) While a subject governed by a mandatory statute that "clearly evidences an intent to set an inflexible standard or insure immutable provisions," (*San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850) may preclude collective bargaining over a subject governed by the statute (*Board of Education v. Round Valley Teachers Assn.* (1996) 13 Cal.4th 269), Section 31692 of the County Retirement Law expresses no such intent. Instead, it authorizes the County to amend or repeal an ordinance or resolution providing for such benefits, but is silent on the issue of whether such amendment or repeal may be bargained. Requiring the County to bargain prior to implementing such a change is not inconsistent with the language of Section 31692. Accordingly, we conclude that Section 31692 does not supersede the obligation to bargain over the retiree health benefits in this case.

[9] The County argues that the remedy imposed by the ALJ inappropriately extends to retirees who were not employees at the time the charge was filed. Because we dismiss the complaint, we need not reach this issue. However, were we to do so, we would reject the County's argument. (*County of Sacramento III*; *Holtville Unified School District* (1982) PERB Decision No. 250; *Corning Union High School District* (1984) PERB Decision No. 399.)

CONCLUSION

Having thoroughly reviewed the record in this case, we respectfully disagree with our dissenting colleague that the pleadings or facts of this case warrant a different decision than that reached by the Board in *Sonoma County I.* Instead, we find this case to be virtually identical both factually and legally. We therefore dismiss the complaint in this case.

ORDER

The complaint and underlying unfair practice charge in Case No. SF-CE-509-M are hereby DISMISSED.

Member McKeag joined in this Decision.

Member Huguenin's dissent begins on page 21.

HUGUENIN, Member, dissenting: One year ago a Board panel decided *County of Sonoma* (2011) PERB Decision No. 2173-M. That decision, which the majority here labels "Sonoma County I," held that an unfair practice charge, brought there by a law enforcement employees association, was not timely filed, and, alternatively, that a unilateral change was not established. In this case, the majority reaches identical conclusions. I do not.

I find that the charge here was timely filed. The conduct alleged here to constitute a unilateral change occurred in April 2007 six months to the day prior to the filing of the charge, not decades ago as the majority here finds.

I find that the County of Sonoma (County) has not proved by a preponderance of evidence that Service Employees International Union, Local 1021 (SEIU) agreed to, and incorporated into SEIU's MOUs with the County, a practice permitting the County to reduce at will the County's contribution to retiree and future retiree health care benefits from the SEIU bargaining unit, so long as the same reduced benefits were provided to the County's unrepresented management employees.

I conclude therefore that in April 2007, without negotiating with SEIU, the County reduced its retiree health care benefits contribution to a fixed percentage of the lowest cost plan, instead of continuing to pay a fixed percentage of that plan selected by the individual retiree, and by so doing violated the Meyers-Milias-Brown Act (MMBA).

Thus, I distinguish this case from Sonoma County I, and would affirm the proposed decision.