JUDICIAL APPEAL PENDING

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ESCONDIDO CITY EMPLOYEES ASSOCIATION, Charging Party, v. CITY OF ESCONDIDO, Respondent.	Case No. LA-CE-618-M PERB Decision No. 2311a-M May 11, 2016

Appearances: Hayes & Cunningham by Dennis J. Hayes and Gena B. Burns, Attorneys, for Escondido City Employees Association; Office of the City Attorney by Jeffrey R. Epp, City Attorney, Jennifer K. McCain, Assistant City Attorney, and Allegra D. Frost, Deputy City Attorney, for City of Escondido.

Before Winslow, Banks, and Gregersen, Members.

DECISION

GREGERSEN, Member: This case comes before the Public Employment Relations Board (PERB or Board) on cross-exceptions by both Escondido City Employees Association (Association) and the City of Escondido (City) to a proposed decision (attached) by an administrative law judge (ALJ). PERB's Office of the General Counsel issued its original complaint on December 5, 2011, alleging that the City violated the Meyers-Milias-Brown Act (MMBA)[1] by interfering with an Association president's ability to communicate Association matters during the work day and discriminating against the president by laying him off. At that time, the Office of the General Counsel issued a partial dismissal of an allegation that the City

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

transferred bargaining unit work to non-bargaining unit employees without meeting and conferring over the decision of such transfer.

After the Association successfully appealed the partial dismissal (See *City of Escondido* (2013) PERB Decision No. 2311-M), on remand from the Board, the Office of the General Counsel issued an amended complaint on April 5, 2013, adding the allegation that the City transferred bargaining unit work to non-bargaining unit employees without meeting and conferring over the decision of such transfer.

The complaint as amended alleges that the City interfered with and discriminated against the Association president in violation of MMBA sections 3503 and 3506, and PERB Regulation 32603, subdivisions (a) and (b),[2] and that the City's conduct in relation to the unilateral transfer of bargaining unit work outside the bargaining unit violated MMBA sections 3503, 3505, 3506.5, subdivisions (a), (b), and (c), and 3509, subdivision (b), and PERB Regulation 32603, subdivisions (a), (b), and (c).

In his proposed decision issued on November 17, 2014, the ALJ concluded that the City violated the MMBA by unilaterally transferring bargaining unit work outside of the unit without meeting and conferring over the decision of such transfer, and by interfering with an Association president's ability to communicate Association matters during the work day. The ALJ dismissed the claim that the City discriminated against the Association president by laying him off.

Both parties filed exceptions to the proposed decision and responses thereto. The City has requested oral argument, which the Association opposes.

[2] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. and may be found at www.perb.ca.gov.

The Board itself has reviewed the record in its entirety and considered the parties' exceptions and responses thereto. The record as a whole supports the ALJ's findings of fact, and the proposed decision is well-reasoned and consistent with applicable law. Accordingly, the Board hereby affirms the ALJ's rulings, findings and conclusions of law, subject to the following discussion of the parties' exceptions, and adopts the proposed decision as the decision of the Board itself, with the sole exception of the remedy, which we amend in response to issues raised by the exceptions. We also reject the City's request for oral argument, subject to the discussion below.

DISCUSSION OF CITY'S EXCEPTIONS

Transfer of Work

a. Timing of Decision to Transfer Bargaining Unit Work

1. City's Exception

The City excepts to the ALJ's conclusion that the City's March 3, 2010, decision to lay off code enforcement officers (which eventually took place on or about March 31 or April 1, 2010) was simultaneously a decision to transfer work. The City challenges the ALJ's conclusion that the explanation by code enforcement unit manager John Brindle (Brindle) of the recommended reorganization plan during the City's January 25, 2010, budget subcommittee session, which included eliminating work, was evidence that the decision to layoff was simultaneous with a decision to transfer work. According to the City, Brindle's presentation described the level of service reductions that would be necessary as a result of significant general fund budget cuts, but did not reference how the work would be done or whether work would need to be transferred as a result of the layoffs.

It then points to testimony by senior code enforcement officer Albert Bates (Bates), who directly supervised code enforcement officers but who was in a separate bargaining unit from the code enforcement officers:

> [U]pon the layoffs, the cases, the active cases that were being worked at the time of the layoffs were still present, still had to be worked. I was the only full-time code enforcement officer at that time, and I had inherited all of the cases, but I couldn't work them myself. So at that time, I started training the part-time officers to take over the duties and to learn the various aspects of the codes that we were responsible for as a unit so that they could take over the duties that had been performed by the full-time officers.

(Reporter's Transcript (RT) Vol. I, p. 165:4-12.)

According to the City, this testimony reflects "that he made the decision to transfer work and actually transferred the work after the layoffs were implemented . . . [and not] simultaneously with the decision to layoff." (City's Exceptions, p. 1.)

The Association counters that the proposed decision correctly determined that the decision to lay off the code enforcement officers was simultaneously a decision to transfer work outside of the bargaining unit.

2. Analysis

We reject the City's exception. The decision to layoff the full-time code enforcement officers had to have been made prior to or simultaneously with the decision to transfer work outside of the bargaining unit.

Bates' testimony indicates that the City's true intention as of the March 3, 2010, City Council meeting was to ultimately transfer the full-time work to the part-timers:

> Q After the March 2010 layoffs, did the City of Escondido cease providing the services that the full-time code enforcement officers provided?

A Partly, yes. Mostly, no. The yes part that was ceased was we stopped our proactive enforcement. The part we didn't cease was, again, the cases, the complaints still came to us, and the cases still had to be worked. And the part-time officers had to pick up, you know, and be trained in those duties and pick up that activity in terms of the cases they worked.

Q So after the March 2010 layoffs, were the part-time officers performing the work that the full-time officers had performed prior to the layoffs?

A Yes.

(RT Vol. I pp. 165-166 (Bates); emphasis added.)

Q And so after the March 2010 layoffs, did you train the part-time code enforcement officers?

A Yes, I did.

Q Okay. And did you work -- Did you train the part-time officers to do the work that the full-time officers had previously performed?

A I certainly tried.

Q And do you have any examples of the training that you had to provide to the part-time code enforcement officers?

A Yes. I trained them in aspects of the building codes, the building codes meaning the building code, the electrical, plumbing, mechanical codes, the housing code, dangerous building code, the aspects or the portions of the municipal code that were not part of the property maintenance ordinance, which are not great but includes the sections in the municipal code and amendments to the building and technical codes that are not generally part of those codes to begin with, as well as the zoning code pertaining to property, or excuse me, land use issues and approved or permitted uses and so on.

(RT Vol. I, pp. 166-167 (Bates).)

Q And why did you need to provide training to the part-time code enforcement officers after the March 2010 layoffs?

> A Because the work was there and had to be done, and they were the only people that I had to perform it.
>
> Q And do you recall any specific duties that the full-time code enforcement officers exclusively performed before the layoffs that the part-time officers started to perform after the layoffs?
>
> A With very few exceptions, and if you need, I can expand on that, but yes, the full-time officers were responsible wholly for enforcement of the housing code, dangerous building issues and a lot of the zoning, and certainly, most of the building things pertaining to dangerous buildings or anything that was getting into a technical nature.[3]

(RT. Vol. I, p. 168.)

Bates also testified that with regard to duties that the code enforcement division was no longer able to accomplish after the layoffs:

> We would often get complaints regarding substandard housing from a resident, the tenant, usually a renter, regarding substandard or <u>hazardous, unhealthy conditions</u> that they were living under through the landlord's lack of maintenance or practices or whatever. So once the layoffs occurred, I didn't have anybody other than myself that was trained to do that.

(RT Vol. I, p. 184; emphasis added.)

Regarding "Title 25" mobile home inspections, state law mandated the City to perform those inspections, but Bates held off on performing them with the hope that the City would reinstate former full-time code enforcement officer Sandra Moore (Moore), since part-timers were not properly trained to conduct them. (RT Vol. I, p. 208.)[4]

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[3] The one exception Bates noted was a part-time code enforcement officer who ceased employment with the City prior to the March 2010 layoffs.

[4] There was a discussion that the City Council was going to refer Title 25 duties back to the State of California (RT Vol. I, p. 144), but it eventually decided to keep that function in-house (RT Vol. II, p. 77-78).

Bates testified that when the City decided to cease proactive code enforcement, and instead focus resources on reactive code enforcement, that represented a drop-off in the caseload of "at least 30 percent and probably more . . . ." (RT Vol. I, p. 183.) However, even with the reduction of proactive enforcement, the remaining full-time duties (especially those involving hazardous and unhealthy building conditions) do not constitute the amount and kind of duties that the City could simply ignore.

This is especially so since the City also laid-off Senior Code Enforcement Officer Daniel Hippert, who, according to Bates, "had been in charge of supervising business licensing, so when he was laid off, I inherited that, also." (RT Vol. I, p. 197.) Therefore, Bates inherited not only the non-proactive duties of the laid-off code enforcement officers, but also the business licensing duties of at least one senior code enforcement officer, which Bates "knew very little about. . . ." (*Ibid*.)

Sometime after the layoffs, the City reinstated Moore as a full-time code enforcement officer because Bates was "begging" for full-time help. (RT Vol. I, p. 169.) Given these facts, the only likely scenario is that the City believed it needed to transfer the non-proactive full-time duties to the part-timers at the time it decided to lay off the full-time code enforcement officers. The fact that the work first went to Bates, a senior code enforcement officer, to divvy up should not alter the analysis, since the City was on reasonable notice that the remaining senior code enforcement officers would be unable to shoulder all of the former full-time non-proactive work and would have to delegate the work to the only other people in the City who could perform these tasks - the part-timers.

It is worth noting that Moore testified that after she was notified of her layoff and exercised her bumping rights by taking the code enforcement assistant position, but prior to the

implementation of the layoff, she was approached by code enforcement manager Leslie Milks (Milks) to do a caseload review, where Milks informed her that she would continue to work her existing cases after the layoffs happened. (RT Vol. I, pp. 215-216.)

The code enforcement assistant position to which Moore bumped was within the same bargaining unit as the code enforcement officers. (Proposed Dec., p. 7.) The complaint does not allege that the City transferred code enforcement officer work to other bargaining unit positions. Moore's testimony, therefore, would only be relevant to the extent it reflects the more general timing of the City's decision to transfer full-time officer work to non-bargaining unit part-time officers.

We therefore reject this exception.

b. Notice and Opportunity to Bargain

1. City's Exception

The City excepts to the ALJ's conclusion that the City failed to provide the Association with notice and an opportunity to bargain its decision to transfer work. According to the City, the proposed decision acknowledges that Barbara Redlitz (Redlitz), the City's community development director, explained the reorganization plan to the Association on March 15, 2010, but incorrectly concluded that Redlitz's explanation is irrelevant because the City did not provide an opportunity to bargain its decision to transfer work and the City made a firm decision to transfer work before providing notice to the Association.

The City quotes from *City of Sacramento* (2013) PERB Decision No. 2351-M (*Sacramento*):

> [T]he employer bears the burden of proving that the representative had notice of the proposed change *sufficiently in advance* of a firm decision or its implementation to permit the

> representative a reasonable opportunity for counterarguments or proposals, and that the representative failed to request bargaining or that its delay in doing so was so unreasonable as to constitute a "clear and unmistakable" choice not to pursue the matter.

(*Id.* at p. 39; italics in original; citations omitted.)

The City argues that it met its burden to prove that the Association had notice of the plan to transfer work sufficiently in advance of a firm decision or implementation. It asserts that Redlitz notified the Association of the plan seventeen days before the layoffs. It also asserts that Bates testified that the transfer of work did not occur until after the layoffs were implemented, and that Karen Tatge (Tatge), the Association's secretary, and Russell Lane (Lane), full-time code enforcement officer and former Association president, both testified that the Association was aware that work would be transferred to the part-time code enforcement officers. According to the City, the Association had actual notice of the plan to transfer work, and that seventeen days was sufficient time for the Association to request to negotiate and permit the Association to provide a counter argument or proposal.

The City also argues that Brindle's January 25, 2010, proposal to the budget subcommittee could not be considered a firm decision to transfer work, since it was a recommendation regarding the budget that did not state that work would be transferred to part-time officers.

The City further argues that once the Association received actual or constructive notice of the transfer of work, even without a formal offer to negotiate, the burden shifted to the Association to request bargaining. The City asserts that the March 4, 2010, letter by Deputy City Manager Gail Sullivan (Sullivan) to Association counsel Dennis Hayes (Hayes) did not, as the proposed decision concludes, "limit[] the scope of negotiations at the proposed meeting to the impact of the layoffs." (City's Exceptions, p. 4.)

According to the City, despite having ample time and opportunity to request to bargain the transfer of work after receiving actual notice of the reorganization, including at the March 15, 2010, negotiation meeting between the parties, the Association waived its right to negotiate the transfer by failing to request bargaining.

The Association counters that the proposed decision correctly concludes that the City failed to provide the Association with notice and an opportunity to bargain its decision to transfer the work of the full-time code enforcement officers, and that by March 4, 2010, the City had made a firm decision to lay off all of the full-time code enforcement officers and transfer the work. The Association argues that the City never gave a bargaining proposal to the Association concerning the transfer of work, but rather presented the Association with nothing more than a decision that was already made.

2. Analysis

We reject this exception. As explained above, by the time Redlitz explained the reorganization plan to the Association on March 15, 2010, the City had already made a firm decision to lay off all full-time code enforcement officers, and therefore had made a firm decision to transfer the remaining full-time work outside the bargaining unit to the part-timers. At that point, it would have been futile for the Association to request bargaining over the transfer. As the proposed decision notes, when a firm decision is made prior to an employer providing notice and an opportunity to negotiate a decision made by the employer that is within the scope of representation, the employer cannot defend on the ground that the Association failed to request or demand negotiations. (Proposed dec., p. 18; *County of Santa Clara* (2013) PERB Decision No. 2321-M, pp 28-29.)

Interference

a. City's Exception Concerning The Defense of Necessity

The City excepts to the ALJ's conclusion that by not calling any witness on the subject of the alleged disruption in the workplace, the City has failed to carry its burden on the necessity for the directive that Lane not speak to any employees about Association matters while in the office during business hours. According to the City, it introduced testimony of Lane's disruption in the workplace through Lane and Bates.

The City points to Lane's testimony agreeing "that any direction that was given to you was direction not to speak and be disruptive during working hours when you're expected to be doing your duties as a code enforcement officer." (RT Vol. I, pp. 111:27-112:2.)

The City also points to Lane's testimony that "I was called into Jon Brindle's office with Leslie Milks, and I was told that employees were upset about the layoffs, and I was causing them to get upset because I was discussing the layoffs and that I should cease talking about any layoffs." (RT Vol. I, p 95:24-28.)

The City also points to Bates' testimony that Lane's discussion of "layoffs during the workday . . . was a bit excessive," that he received complaints about "constant talk about the budget and pending layoffs and so on," and that "that type of constant talk about budget and impending layoffs by Mr. Lane contribut[ed] to the tense environment in the unit." (RT Vol. I, pp. 179:20-180:6.)

The Association argues that while there was some evidence presented showing that Lane was disruptive, the evidence is insufficient to justify the prohibition against Lane from communicating with represented employees. The Association argues that the employees' right to be represented by the Association without interference from the City, at a time when

employees were fearful of potential budget cuts and layoffs, outweighs the City's interest in keeping a calm workplace.

b. Analysis

We reject this exception. Lane's testimony merely summarizes the message that was given to him, but provides no facts indicating that he actually disrupted the workplace. Furthermore, this evidence (if cited for the truth of the facts alleged therein) would constitute hearsay that would carry no weight unless corroborated by non-hearsay evidence. (See PERB Regulation 32176 ["Hearsay evidence is admissible but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."].)

Bates never uses the term "disruptive" to describe Lane's actions. Bates testified that contrary to the complaints he received, Lane's discussion with other employees about the budget and pending layoffs "wasn't constant." (RT Vol. I, p. 180:1.) Even if Lane's actions were "a bit excessive" or "contribut[ed] to the tense environment in the unit," neither of these statements can be equated to Lane disrupting the workplace. Although some leeway must be allowed for impulsive behavior by employees engaged in protected activity (*State of California (Department of Transportation)* (1983) PERB Decision No. 304-S, p. 25), the fact that Bates used the word "contribute," as opposed to "cause," indicates that a tense environment already existed in the workplace prior to Lane making his statements to his co-workers, and there is no evidence that Lane caused any "disruption" that did not already exist in the workplace.

Additionally, while Bates testified that Lane made these comments "during the workday," Bates never testified that Lane made the comments during work time (as opposed to a lunch break, rest break, or other non-working time). Any statements that Lane made during non-work time about negotiable subjects or collective employment-related concerns shared by

other bargaining unit members (including budget concerns or pending layoffs), and that were not so opprobrious or disrespectful as to justify censure (*Regents of the University of California* (1998) PERB Decision No. 1263-H, p. 46), constituted protected activity for which the City could not take adverse action against Lane. (See, e.g. *City & County of San Francisco* (2011) PERB Decision No. 2207-M, attached dismissal letter, p. 5; *Richmond Unified School District/Simi Valley Unified School District* (1979) PERB Decision No. 99; *East Whittier School District* (2004) PERB Decision No. 1727; *Sweetwater Union High School District* (2014) PERB Order No. IR-58 at p. 11.) Therefore, the ALJ was correct in concluding that the City has failed to carry its burden on the necessity for the directive that Lane not speak to any employees about Association matters while in the office during business hours.

We therefore reject this exception.

Discrimination

a. City's Exception Concerning Nexus

The City excepts to the ALJ's reliance solely upon the hearsay testimony of Lane to conclude that Lane presented evidence of anti-union animus in terms of Milks' "overbroad verbal discipline," (proposed dec., p. 22),[5] specifically, testimony that Milks verbally disciplined Lane by telling him not to have conversations with employees about the layoffs and accusing Lane of leaking information, and that Brindle told Lane he should stop talking about layoffs.

The Association counters that the proposed decision correctly relied upon Lane's testimony. It argues that since the City did not make a hearsay objection to Lane's cited

[5] The ALJ considered Lane's testimony both in its analysis of the interference and the discrimination allegations. However, since subjective motivation is not an element of an interference charge, this discussion is more appropriately addressed to the nexus prima facie element of the discrimination allegation.

testimony, and did not present testimony or documentary evidence to explain or contradict Lane's testimony, it is improper for the City to now assert such an objection.

The Association also argues that Lane's testimony would have been admissible under California Evidence Code section 1220 as a party admission, since Milks (as manager of the code enforcement division) was an agent of the City, and her statements should be attributed to the City. The Association also argues that PERB should defer to the ALJ's credibility determination concerning Lane's testimony.

b. Analysis

We reject this exception. The probative value of Lane's testimony is not the underlying truth or falsity of Milks' or Brindle's statements, but rather its demonstration of alleged discriminatory or retaliatory motivation. Therefore, the statements do not meet the definition of "hearsay." (See Cal. Evid. Code, § 1200(a) ["'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing *and that is offered to prove the truth of the matter stated*"]; emphasis added; *Regents of the University of California (San Francisco)* (2014) PERB Decision No. 2370-H, p. 11; *Bellflower Unified School District* (2014) PERB Decision No. 2385, p. 9.)

Remedy

a. Amount

1. City's Exception

The City excepts to the ALJ's reinstatement of three of the five most senior code enforcement officer IIs laid off on April 1, 2010, with back pay (offset by earnings). The ALJ in fact issued a partial remedy reinstating and awarding make whole back pay to either:

(1) three of the five full-time code enforcement officer IIs; or (2) 60 percent of the laid off code enforcement officer IIs.

The City notes that in granting this remedy, the ALJ relied in part on the remedy in *City of Sacramento, supra*, PERB Decision No. 2351-M. In that decision, the employer laid off a number of bargaining unit employees, who then bumped into a lower classification in a different bargaining unit that had previously had overlapping duties with the higher classification. The employer then transferred some of the duties of the higher classification to the lower classification in the different bargaining unit.

PERB held that the employer failed to provide the employee organization with adequate notice of, and meaningful opportunity to bargain over, the negotiable decision to transfer duties from the relevant bargaining unit to another bargaining unit, or to bargain over the negotiable effects of a departmental reorganization and resulting layoffs of certain employees. The Board ordered, in part, that the employer, at the request of the employee organization, restore the prior status quo by reinstating certain employees; make the employee organization whole for all lost dues for the period of time the affected employees were demoted as a result of the unilateral transfer of bargaining unit duties out of the bargaining unit; and make the demoted employees whole for any loss in compensation and benefits suffered as a result of the employer's unlawful transfer of duties out of the bargaining unit.

The City asserts that the reinstatement and make-whole remedy from *Sacramento, supra*, PERB Decision No. 2351-M, is not an appropriate remedy in the present case for two reasons. First, the City claims that in *Sacramento*, the transfer of work happened before or at the same time as the layoff. By contrast, the City asserts, in the present case, the transfer of

work happened after the layoff, and that therefore the decision to lay off employees did not go hand-in-hand with the transfer of work.

Secondly, the City notes that in *Sacramento*, *supra*, PERB Decision No. 2351-M, the transfer of work involved the same employees, because the laid off employees bumped into lower positions where the work was transferred. By contrast, in the present case, the full-time code enforcement officers did not bump into lower positions, and the City negotiated the effects of the layoffs.

The City also cites to *Beverly Hills Unified School District* (1990) PERB Decision No. 789 (*Beverly Hills*) for the proposition that reinstatement and full back pay are not appropriate in the present case because such an order would unduly intrude upon the City's managerial prerogative to decide if layoffs are necessary.

The Association counters that to the extent that reinstatement and restoring the status quo was ordered by the ALJ, this was correctly decided.

2. Analysis

We reject this exception. In discussing the relative timing of the layoffs and the work transfer, it is important to note that in *Sacramento*, *supra*, PERB Decision No. 2351-M, the Board stated that:

> Where an employer's change in policy is alleged to constitute an unfair practice, the operative date for the alleged violation is generally the date when the employer made a firm decision to change the policy, even if the change itself is not scheduled to take effect until a later date. (*Anaheim Union High School District* (1982) PERB Decision No. 201; *Eureka City School District* (1992) PERB Decision No. 955; *Clovis Unified School District* (2002) PERB Decision No. 1504.)

(*Sacramento*, p. 27.)

The Board also stated:

> Nor do we agree that a decision to transfer work is nonnegotiable simply because it coincides with a decision to lay off all employees in a classification.

(*Id.* at p. 24.)

Therefore, the relevant dates for comparison purposes are the date of the City's firm decision to lay off employees and the date of its firm decision to transfer the work, as opposed to the dates of the actual layoff and transfer of work.

As noted above, the City's decision to transfer work in this case happened before or at the same time as the decision to lay off the full-time code enforcement officers. The facts in *Sacramento*, *supra*, PERB Decision No. 2351-M are therefore analogous to this case for purposes of crafting a remedy.

The City does not explain the relevance of the factual distinction between *Sacramento*, *supra*, PERB Decision No. 2351-M, where the transfer of work involved the same employees, and the present case, where the full-time code enforcement officers did not demote or "bump" into lower positions and the City negotiated the effects of the layoffs. An employee's contractual right to bump other employees under a collective bargaining agreement has no effect (beyond mitigation purposes) on the employee's right to a make whole remedy. Furthermore, the City's negotiation of the effects of the layoff does not rectify its failure to negotiate over the decision to transfer work, even if that decision was simultaneous with its decision to lay off the employees.

We also share the Association's position that unlike in *Beverly Hills*, *supra*, PERB Decision No. 789, where the employer intended to and did altogether cease providing the

services at issue, in the present case the City has not ceased the work, but instead continued and transferred the work to the part-time code enforcement officers.

We therefore reject this exception.

b. Time Period of Remedy

1. City's Exception

The City excepts to the ALJ's requirement of the City to provide full back pay to three of the five most senior code enforcement officer IIs from the date of their layoff on April 1, 2010. The City claims that in *Sacramento, supra*, PERB Decision No. 2351-M, a make whole remedy and reinstatement order were necessary to restore the status quo as it existed prior to the transfer of work because the transfer of work occurred before the layoffs. In contrast, according to the City, here the "status quo" would be the status as of April 1, 2010 (after the layoff, but before the alleged transfer of work).

The City argues that the Association's request for back pay and reinstatement goes beyond the status quo ante, and that if the Board determines that the City unlawfully unilaterally transferred work, the Board should order a remedy based on *Transmarine Navigation Corp.* (1968) 170 NLRB 389 (*Transmarine*), from remand in *NLRB v. Transmarine Navigation Corp.* (9th Cir. 1967) 380 F.2d 933 (*NLRB. v. Transmarine*), where wages and benefits are paid from the time the Board orders negotiations until the Board's conditions are met, would be more suited to the facts of this case.

2. Analysis

We reject this exception. The facts of *Transmarine, supra*, 170 NLRB 389 are distinguishable from the present case. In *Transmarine*, the NLRB ordered the parties to bargain over the effects of a non-bargainable closure of the employer's terminal. The National

Labor Relations Board (NLRB), however, did not order the employer to restore the status quo *ante*, because the employer's decision to close the terminal was "based solely on greatly changed economic conditions, to terminate its business and reinvest its capital in a different enterprise in another location as a minority partner. . . ." (*Transmarine*.) Specifically, the employer terminated its operations in Los Angeles and relocated in Long Beach as a minority partner in a joint venture based on the need by the employer's principal customer for larger shipyard facilities to service the new lines. (*NLRB. v. Transmarine*, *supra*, 380 F.2d at p. 934.)

In the present case, unlike in *Transmarine*, *supra*, 170 NLRB 389, the City's violation concerns a <u>decision</u> to change a negotiable subject (viz., the transfer of work outside the bargaining unit), not the <u>effects</u> of the exercise of a non-negotiable management prerogative. Furthermore, the City's budgetary concerns do not constitute the type of "greatly changed economic conditions" (*Ibid*.) (e.g., the termination of business) that would justify absolving the City of making employees whole for the entire period subsequent to its unfair practice.

The City's citation to *Ventura County Community College District* (2003) PERB Decision No. 1547 (*Ventura*) for purposes of awarding back pay is also inapposite. The paragraph in *Ventura* cited by the City concerns the charging party's request that the affected employees be assigned to teach certain academic courses and that the provisions of the parties' collective bargaining be applied to the academy where the bargaining unit work was transferred. The City ignores the very next paragraph pertaining to back pay, which cites solely to the lack of any loss of wages by the affected employees as a limitation on the back pay award.

Offset of Back Pay Liability

a. City's Exception

The City's excepts to the ALJ's failure to consider offsetting any back pay liability for the time during which the Association allegedly delayed in raising a claim of unilateral transfer of work. The City avers that although the Association filed its initial unfair practice charge on July 7, 2010, for unlawful prohibition of protected activity and retaliation, it was not until June 28, 2011, that the Association first alleged an unlawful transfer of work.[6] According to the City, the Association did not provide it with an opportunity to mitigate its liability during the one-year delay between July 7, 2010 and June 28, 2011. The City requests that it be allowed to offset any back pay by the one-year delay.

The City also excepts to the ALJ's failure to offset back pay liability for any time during which: (1) the employees were retired or would have been retired had they not been laid off; or (2) the City and the Association agreed to toll/place the matter in abeyance.

b. Analysis

The City does not cite to any authority to persuade us that lack of opportunity to limit its liability should be a consideration in the remedy. Even if it had, this issue is resolved by language in *City of Escondido*, *supra*, PERB Decision No. 2311-M, which stated:

> The initial charge sets forth two legal theories, "unlawful prohibition on protected activity" and "retaliation for protected activity." The amended charges set forth a new legal theory, "unlawful transfer of unit work." Despite the absence of the new legal theory in the initial charge, the original allegations included the following statement:
>
> > Since effectuating these layoffs in April 1, 2010, the City has increasingly utilized part-time Code Enforcement Officers, who are not in the ACE

[6] The actual date of the Association's first amended charge was July 15, 2011.

> unit, in order to fulfill the necessary City service while avoiding recalling Mr. Lane from layoff status.
>
> The new allegations in the amended charges concerning the transfer of unit work clarify these facts. The new allegations also add a new legal theory based on facts originally alleged.

(*Id.* at p. 7.)

As this language indicates, the City was put on notice as of July 7, 2010, that the Association had alleged facts sufficient to state a prima facie case of prohibited transfer of work. At that point, the City had full opportunity to limit its liability. It should be noted that the City does not specify how it might have mitigated damages as of July 7, 2010, nor does it indicate that it did limit its liability even after June 28, 2011. We therefore reject the exception concerning this issue.

With regard to offsetting for employees who retired prior to being laid off (if any exist), we agree with the City that it is entitled to an offset of any amounts these employees received as retirement annuities from the start of their retirement period to the date of reinstatement subject to Respondent meeting its burden of establishing proof of the amounts to be offset. (*Fresno County Office of Education* (1996) PERB Decision No. 1171.)

With regard to offsetting for planned retirement, the City points to the proposed decision's statement that "Lane had originally planned to retire one year later." (Proposed dec., p. 13) The City cites to no authority to persuade us that an employee's speculative date of retirement should offset back pay liability. Employees often decide to postpone previously planned retirement dates, especially in times of economic downturn. We therefore reject the exception concerning this issue.

With regard to offsetting for periods in which the case was tolled or placed in abeyance by the parties, the City cites only to a reference to the "Board file" in the transcript, and to "emails exchanged by the parties," to support its exception, without specifying which portion of the "Board file" or e-mails they refer to. (City's Exceptions, p. 10.) This exception fails to comply with PERB Regulation 32300[7] because it fails to "[d]esignate by page citation or exhibit number the portions of the record, if any, relied upon for each exception." (PERB Reg. 32300(a)(3).) The City has therefore waived this exception, and we reject it.

Other City Exceptions

The City's remaining exceptions concern: (1) the testimony of former code enforcement officer Stephen Jacobson (Jacobson) about rumors of potential layoffs; (2) the testimony of Lane as evidence that Jack Anderson, the City's chief negotiator, told Lane that "he had a target on his back" (City's Exceptions, p. 10); (3) the testimony of Lane as evidence that Milks repeatedly told Lane that the Association had no place in code enforcement and to stop talking to the Association; (4) the testimony of Association attorney Donna Butler as evidence that City Manager Clay Phillips stated that an employer could lay off an entire unit to sweep out undesirable employees; and (5) whether Bates acknowledged knowing the case management issues that arose with Lane and considered Lane to be very effective in achieving compliance, as he was a former police officer. Even if any of these findings by the ALJ were

[7] PERB Regulation 32300 states, in relevant part**:**

> (a) . . . The statement of exceptions or brief shall . . . (3) Designate by page citation or exhibit number the portions of the record, if any, relied upon for each exception . . . (b) Reference shall be made in the statement of exceptions only to matters contained in the record of the case . . . (c) An exception not specifically urged shall be waived.

incorrect, they would constitute non-prejudicial, harmless error that would not affect the outcome of this decision. We therefore reject these exceptions.

DISCUSSION OF ASSOCIATION'S EXCEPTIONS

Remedy

a. Association's Exception

The Association excepts to the ALJ's granting of only a partial remedy reinstating and awarding back pay to the affected employees (three of the five full-time code enforcement officer IIs). The ALJ issued the partial remedy on the basis that "the decision to transfer work was accompanied by a non-negotiable decision to restructure or change the direction of the code enforcement unit work so as to reduce the active caseload between 30 and 40 percent." (Proposed dec., p. 27.) The Association argues that, while the evidence at the hearing did show that after the layoffs, the City reduced services provided by the code enforcement department, the evidence also shows that it was not the work of the full-time code enforcement officers that was discontinued or reduced, and that their work was continued by the City and transferred to the part-time officers.

The Association also excepted to the ALJ's decision not to award to the Association lost dues for the employees who were laid off, citing to a similar remedy granted in *Sacramento*, *supra*, PERB Decision No. 2351-M. The Association notes that among the remedies requested in the Association's original unfair practice charge was "any other relief that PERB deems just and proper," and argues that "[b]ecause the ALJ found that the City violated the MMBA, . . . it is just for [the Association] to obtain all lost dues from the time that the [Association] members were laid off to the date of the final decision." (Association's Response to City's Exceptions, p. 3.)

b. Analysis

We reject the exception to the partial make-whole remedy. The City correctly points out in its response that, according to Bates, because of the elimination of proactive code enforcement, "the caseload dropped off at least 30 percent and probably more . . . It was a moving target. I'd say 30 to 40 percent." (RT Vol. I, p. 183.) The Association points to no evidence in support of its statement that "it was not the work of the full-time code enforcement officers that was discontinued or reduced." (Association Exceptions, p. 1.) Bates testified that many of the full-time cases were reviewed and closed. (RT Vol. I, p. 186.) This is direct evidence that in fact a substantial portion of the full-time code enforcement work ceased, at least a part of which was proactive enforcement.

We note that, according to the City's Exhibit L (labeled "HR Re-employment List"), Moore had the earliest hire date amongst her, Lane, Jacobson, and code enforcement officer Eric Field (Field).[8] Absent any evidence presented by the Association at the compliance phase to rebut this information, Moore would be included in the group of three individuals to be reinstated to the code enforcement officer II position and made whole. If she currently retains that position with the City, only the two former code enforcement officers with the greatest seniority after Moore are entitled to reinstatement and a make-whole remedy.

We will, however, revise the proposed remedy to award lost dues to the Association. We note the City's argument that since the ALJ's proposed decision did not award lost dues and the Association never made such a request during the hearing, the ALJ's decision not to

[8] As the ALJ noted in the proposed decision, following the layoffs, code enforcement officer Brian Gustafson was elevated to the position of code enforcement manager.

grant lost dues should not be disturbed because the Association failed to make such a request or provide any information regarding dues during the hearing.

However, we are persuaded that the reimbursement of dues is an appropriate award in this case.

The City shall remit to the Association a sum equivalent to dues or agency fees, with interest at 7 percent per annum that would have been remitted to the Association between March 31, 2010, and the date the affected employees are reinstated had the affected employees remained in the bargaining unit. (*Sacramento, supra*, PERB Decision 2351-M; *Regents of the University of California* (2014) PERB Decision No. 2398-H; *Hospitality Care Center* (1994) 314 NLRB 893, 895-896.)

With regard to the provisions of the Order requiring the City to make the Association and the affected employees whole for lost wages, benefits or other monetary compensation, we shall stay the order for 60 days during which time the parties may meet and confer over a mutually acceptable alternative remedy. In the event no agreement is reached within 60 days and the parties have not mutually agreed to an extension of time within which to continue negotiations, the stay will expire and the make whole and all other provisions of this Order shall take effect. We believe this is a prudent approach, since the parties are in a more favorable position to consider any developments since the close of the record when customizing the remedy.

DISCUSSION ON CITY'S REQUEST FOR ORAL ARGUMENT

We deny the City's request for oral argument. The City argues that oral argument would be appropriate and helpful to the Board because the proposed decision and exceptions to the proposed decision raise important issues, including: (1) what constitutes a firm decision;

(2) whether a unilateral transfer of work occurred; (3) the balance between the right of employee representatives to access employees and the employer's need to limit disruptions; and (4) the appropriate remedy.

The Board has held:

> Historically, the Board has denied requests for oral argument when an adequate record has been prepared, the parties have had an 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.

(*Los Angeles Community College District* (2009) PERB Decision No. 2059, p. 2.)

There exists an adequate record to decide this case, considering that a two-day hearing was held, the case has been briefed by both parties at length, each party filed an opening and opposing brief, and each party briefed the case for the Board's decision in *Sacramento, supra*, PERB Decision No. 2351-M.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it has been found that the City of Escondido (City) violated the Meyers-Milias-Brown Act (MMBA) by: (1) unilaterally transferring code enforcement officer II work to non-bargaining unit employees; and (2) directing City of Escondido Employees Association (Association) President Russell Lane (Lane) not to speak with employees at any time during the work day regarding Association matters. The City violated Government Code sections 3505 and 3506, and Public Employment Relations Board (PERB or Board) Regulation 32603, subdivisions (a) and (c). By this conduct, the City also denied the Association its right to represent employees in their employment relations with a public agency, in violation of Government Code section 3503 and PERB Regulation 32603, subdivision (b). Pursuant to

section 3509, subdivision (a) of the Government Code, it hereby is ORDERED that the City, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Unilaterally transferring code enforcement officer II work to non-bargaining unit employees without meeting and conferring with the Association.

2. Directing Association President Lane not to speak with employees at any time during the work day regarding Association matters.

3. Interfering with bargaining unit members' right to participate in the activities of an employee organization of their own choosing.

4. Denying the Association its right to represent employees in their employment relations with the City.

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

1. Offer immediate reinstatement, unless already reinstated, to three of the five most senior code enforcement officer IIs laid off on April 1, 2010, with back pay and benefits from the date of their layoff to the date of the offer of immediate reinstatement or date of actual reinstatement, if earlier. The City may offset outside or City employment interim earnings, as well as retirement annuity payments for any employees who may have chosen to retire from the City in lieu of layoff, against the back pay from the date of layoff to the date of the offer of immediate reinstatement, or actual reinstatement, if earlier. The City must pay interest at the rate of 7 percent per annum on the remainder of the back pay which has been offset by interim earnings or retirement annuity payments.

2. Remit to the Association a sum equivalent to dues or agency fees, with interest at 7 percent per annum, that would have been remitted to the Association between

March 31, 2010, and the date the affected employees are reinstated had the affected employees remained in the bargaining unit.

3. With regard to the above provisions requiring the City to make the Association and the affected employees whole for lost wages, benefits or other monetary compensation, this Order shall be stayed for sixty (60) days during which the parties may meet and confer over a mutually acceptable alternative remedy. In the event no agreement is reached within sixty (60) days and the parties have not mutually agreed to an extension of time within which to continue negotiations, the stay will expire and the make whole and all other provisions of this Order shall take effect.

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

5. Within thirty (30) workdays of service of a final decision in this matter, notify the General Counsel of PERB, or his or her designee, in writing of the steps taken to comply with the terms of this Order. Continue to report in writing to the General Counsel, or

his or her designee, periodically thereafter as directed. All reports regarding compliance with this Order shall be served concurrently on the Association.

Member Banks joined in this Decision.

Member Winslow's concurrence begins on page 30.

WINSLOW, Member, concurring: In my view, that part of the remedy in this case ordering the City of Escondido (City) to reimburse the Escondido City Employees Association (Association) for union dues and agency fees vindicates the Union's statutory right to those dues and fees. (MMBA section 3508.5; *Regents of the University of California* (2014) PERB Decision No. 2398-H, p. 37; *City of Sacramento* (2013) PERB Decision No. 2351-M; see also *Heartland Health Care Center* (2004) 341 NLRB 363; *Hospitality Care Center* (1994) 314 NLRB 893, 895-896.)

The Union is entitled to this objectively ascertainable remedy, and it should not be placed in a position of potentially trading or reducing its statutory entitlement of dues and fees for a better deal for the affected unit members. (*Berkeley Unified School District* (2012) PERB Decision No. 2268; *Chula Vista City School District* (1990) PERB Decision No. 834, p. 20 [statutory rights are non-mandatory subject of bargaining].) Therefore, as a general matter, I would exclude the dues reimbursement order from the 60-day stay. I concur rather than dissent on this point in this case because the Union has the option of resisting any attempt by the City to reduce the amount of dues and fees, knowing that if no agreement is reached at the end of 60 days, the City will be obliged to reimburse the Union in full measure for lost dues and fees.

APPENDIX

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

After a hearing in Unfair Practice Case No. LA-CE-618-M, in which all parties had the right to participate, it has been found that the City of Escondido (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq. by (1) unilaterally transferring code enforcement officer II work to non-bargaining unit employees; and (2) directing City of Escondido Employees Association (Association) President Russell Lane not to speak with employees at any time during the work day regarding Association matters.

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

A. CEASE AND DESIST FROM:

1. Unilaterally transferring code enforcement officer II work to non-bargaining unit employees without meeting and conferring with the Association.

2. Directing Association President Lane not to speak with employees at any time during the work day regarding Association matters.

3. Interfering with bargaining unit members' right to participate in the activities of an employee organization of their own choosing.

4. Denying the Association its right to represent employees in their employment relations with the City.

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

1. Offer immediate reinstatement, unless already reinstated, to three of the five most senior code enforcement officer IIs laid off on April 1, 2010, with back pay and benefits from the date of their layoff to the date of the offer of immediate reinstatement or date of actual reinstatement, if earlier. The City may offset outside or City employment interim earnings, as well as retirement annuity payments for any employees who may have chosen to retire from the City in lieu of layoff, against the back pay from the date of layoff to the date of the offer of immediate reinstatement, or actual reinstatement, if earlier. The City must pay interest at the rate of 7 percent per annum on the remainder of the back pay which has been offset by interim earnings or retirement annuity payments.

2. Remit to the Association a sum equivalent to dues or agency fees, with interest at 7 percent per annum, that would have been remitted to the Association between March 31, 2010, and the date the affected employees are reinstated had the affected employees remained in the bargaining unit.

3. With regard to the above provisions requiring the City to make the Association and the affected employees whole for lost wages, benefits or other monetary

compensation, this Order shall be stayed for sixty (60) days during which the parties may meet and confer over a mutually acceptable alternative remedy. In the event no agreement is reached within sixty (60) days and the parties have not mutually agreed to an extension of time within which to continue negotiations, the stay will expire and the make whole and all other provisions of this Order shall take effect.

Dated: _____ CITY OF ESCONDIDO

By: _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

ESCONDIDO CITY EMPLOYEES ASSOCIATION, Charging Party, v. CITY OF ESCONDIDO, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-618-M PROPOSED DECISION (November 17, 2014)

Appearances: Hayes & Cunningham LLP by Gena B. Burns, Attorneys, for Escondido City Employees Association; Office of the City Attorney by Jennifer K. McCain, Assistant City Attorney, and Allegra D. Frost, Deputy City Attorney, for City of Escondido.

Before Shawn P. Cloughesy, Chief Administrative Law Judge.

This case concerns allegations that a public agency unilaterally transferred bargaining unit work to non-bargaining unit employees without meeting and conferring over the decision of such transfer; interfered with a union activist's ability to communicate union matters during the work day and discriminated against the activist by laying him off in violation of the Meyers-Milias-Brown Act (MMBA or Act)[1] and PERB Regulations.[2] The public agency denies any violation of MMBA or PERB Regulation.

PROCEDURAL HISTORY

Escondido City Employees Association (Association) filed an unfair practice charge, first amended charge, and second amended charge against the City of Escondido (City) under

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

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

the MMBA on July 7, 2010, July 14, 2011, and October 11, 2011, respectively. On December 5, 2011, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint alleging that the City interfered with guaranteed rights by prohibiting an Association's officer from speaking with employees regarding layoffs and discriminated against him by laying him off, and dismissed an allegation regarding a unilateral transfer of bargaining unit work without meeting and conferring in good faith with the Association. The Association successfully appealed the partial dismissal. (See *City of Escondido* (2013) PERB Decision No. 2311-M.)

On April 5, 2013, the Office of the General Counsel issued an amended complaint adding the allegation that the City unilaterally removed and transferred the work of full-time code enforcement officers outside of the bargaining unit to part-time code enforcement officers. The complaint as amended alleges that the City's interference and discrimination in relation to the Association officer violated MMBA sections 3503 and 3506 and PERB Regulation 32603, subdivisions (a) and (b). The City's conduct in relation to the unilateral transfer of bargaining unit work outside the bargaining unit is alleged to violate MMBA sections 3503; 3505; 3506; and 3506.5, subdivisions (a), (b), and (c); and PERB Regulation 32603, subdivisions (a), (b), and (c).

On April 19, 2013, the City filed its answer to the amended complaint denying the material allegations and raising a number of affirmative defenses.

On May 10, 2013, an informal settlement conference was held, but the matter was not resolved.

On September 16 and 17, 2013, a formal hearing was conducted in Glendale.

On May 27, 2014, the matter was submitted for decision with the filing of post-hearing briefs.[3]

FINDINGS OF FACT

The Association is an employee organization within the meaning of MMBA section 3501, subdivision (a), and an exclusive representative of a bargaining unit of public employees within the meaning of PERB Regulation 32016, subdivision (b). The City is a public agency within the meaning of MMBA section 3501, subdivision (c).

The Association represents a unit of administrative, clerical, and engineering employees (ACE unit) assigned to various City departments, including the code enforcement officers (officers). At the time of this dispute, the Association and City were parties to a memorandum of understanding (MOU) that provided for layoffs of permanent employees in reverse order of seniority as determined by their length of City service.

Code Enforcement Officer Work

Code enforcement officer work consists of ensuring that citizens and businesses in the City are in compliance with the various municipal codes that relate to health and safety matters around land use. In the years preceding this dispute, the City employed full-time code enforcement officers, senior code enforcement officers, and code enforcement assistants to

[3] The post-hearing briefs were initially submitted on November 18, 2013. On December 24, 2013, PERB issued its decision in *City of Sacramento* (2013) PERB Decision No. 2351-M. Both parties agreed to participate in another informal conference on March 10, 2014, which did not resolve the matter, and to provide supplemental briefing on the impact of the *City of Sacramento* decision on this case.

cover the City's code enforcement work. Senior code enforcement officers are the direct supervisors of the code enforcement officers.[4]

Some years prior to this dispute, the City hired part-time officers to relieve the load of the full-time officers. This decision arose from a dispute between the Association and the City regarding payment of overtime for weekend work. The City wanted the full-time officers to regularly flex their schedule to provide weekend coverage without payment of overtime. The City assigned the part-time code enforcement officers (part-timers or part-time officers) some of the less complex work of the unit.

The newly hired part-time officers, who worked up to 20 hours per week, were at-will employees and considered to be "temporary" employees. As a result, they were not included in the bargaining unit. At the time of this current dispute, the City employed about eight part-time officers. The part-time officers were responsible for enforcing the property maintenance ordinance, covering such matters as trash and garbage, broken windows, abandoned vehicles, and zoning code provisions concerning business signage. One part-time officer worked exclusively on an abandoned vehicle abatement program and another on shopping cart retrievals. Part-time officers, as well as full-time officers, were utilized on the Appearance and Compliance Team (ACT), which conducted proactive monthly neighborhood sweeps focusing on the removal of trash, junk, and weeds.

Along with proactive enforcement, full-time officers were responsible for enforcing the building, housing, and zoning codes. The building codes include standards for electrical, plumbing, and mechanical systems, as well as hazardous conditions. The housing code

[4] The Association also separately represents the supervisory unit which includes the senior code enforcement officers. The amended complaint, however, specifically limits the removal of work allegations to the code enforcement officers.

contains habitability requirements for rental units. The zoning code includes provisions related to appropriate land use and permitted uses. In the past, if a potential building or housing code violation came to the attention of part-timer, he/she would refer the matter to one of the full-time staff.

The Code Enforcement unit's cases were generated from complaints by residents and businesses, as well as the code enforcement staff proactively charging violations of the City codes. The complaint process requires that a complaint be drafted describing the violation and identifying the specific provision(s) of the municipal code being violated. Building and housing code cases are complex and require technical knowledge of their provisions. Compliance cases sometime require testimony in court. Drafting a certificate of the existence of a public nuisance is similarly complex. Part-timers did not have the proper training and certification necessary to independently handle complaint cases, though they assisted full-timers in working up the cases.

The code enforcement assistant(s) handled mainly administrative tasks, including setting up the cases, initial data entry, distributing cases to the assigned officers, and serving customers at the front desk and over the telephone.

<u>The April 1, 2010 Layoff of Code Enforcement Officers</u>

Karen Tatge (Tatge) is employed as an administrative assistant in the City's water department. She has been the Association's secretary for the past 14 years. Tatge testified that near the beginning of the year, an unidentified code enforcement officer reported to the

Association that that the City was planning on laying off three officers, including Brian Gustafson (Gustafson), Eric Field (Field), and Association President Russell Lane (Lane).[5]

Beginning in January 2010, the City Council's budget subcommittee held a series of seven public meetings to discuss ways to address the City's ongoing budget deficit. The subcommittee's charge was to make recommendations to the full council on reducing expenditures while maintaining essential City services. The projected year-end deficit for the 2009-2010 fiscal year was $8.4 million. At one meeting, a recommendation was announced to cut the City's code enforcement budget by $685,000 for 2010-2011. During the January 25, 2010 budget subcommittee session, Jon Brindle (Brindle), the Code Enforcement unit's manager, explained a proposal to reduce code enforcement services by ceasing all proactive enforcement, mobile home enforcement, and other activities previously handled by the part-timers. Other subcommittee proposals included reductions to police, fire, parks, building maintenance, and libraries. On March 3, 2010, the subcommittee's recommendations were presented and adopted by the City Council. As a result of this action, the City Manager prepared a list of employees to be laid off.

On March 4, 2010, Deputy City Manager Gail Sullivan (Sullivan) wrote to the Association's legal representative Dennis Hayes (Hayes), informing the Association of the City's decision to lay off all five code enforcement officer IIs and one of the two senior code enforcement officers effective March 31, 2010. The need to address the City's deficit was the reason given for the layoffs. The code enforcement officer IIs to be laid off included Sandra

[5] The unidentified code enforcement officer was never identified and this hearsay testimony remained uncorroborated by a witness with direct knowledge of this "plan."

Moore (Moore) and Stephen Jacobson (Jacobson), Lane, Gustafson and Field.[6] The City's letter only offered the Association to bargain over the "impact of the layoffs."

Consistent with the existing contractual provisions on layoffs, the City permitted bumping by the laid off employees. The language of the MOU permits bumping by employees to a "lower job previously performed for which they meet the minimum qualifications and is capable of performing the essential functions of the position." Under this rule, only Moore was permitted to bump. Because Moore had prior service in a code enforcement assistant position, she retained employment by bumping the incumbent in that classification. The others were not allowed to exercise bumping rights as they had no prior service in a bargaining unit position.

On March 15, 2010, the City and the Association met to negotiate over the effects of the layoff.[7] The meeting lasted a little over two hours. The City was represented by Sullivan, Director of Human Resources Sheryl Bennett (Bennett), Assistant Director of Human Resources Matilda Hlawek (Hlawek), Director of Finance Gil Rojas, and Director of Community Development Department (Department) Barbara Redlitz (Redlitz). The Association was represented by Hayes, Lane, Tatge, and Ralph Ginese (Ginese).

The City presented a handout identifying all employees being laid off and indicating that only Moore had bumping rights. Next, the Association demanded that the City allow Lane and Field to exercise bumping rights into the existing part-time positions, because of prior

[6] Daniel Hippert (Hippert) was the senior code enforcement officer selected for layoff.

[7] The impact negotiations between the Association and the City included both the ACE and supervisory units.

service in those positions. The City rejected the proposal because the part-time positions were not in the bargaining unit.

Redlitz then described the reorganization plan following the layoff.[8] She explained how the code enforcement officer work would be continued after the layoffs, stating that part-timers would assume most of the remaining work, while all proactive enforcement activity would cease. Mobile home inspections, which were mandated by state law, would also cease.[9] Staff would no longer initiate compliance cases based on observations in the field and all cases would have to be initiated by a citizen complaint. Redlitz explained that a principal effect of the layoffs would be that compliance through the complaint system would take longer to achieve. The City confirmed that no full-time certified officers would remain after the layoff. The Association disputed the City's ability to adequately continue its code enforcement officer function using exclusively part-time officers due to their lack of expertise.

With these matters concluded, the City offered a proposal on severance benefits for the laid off employees. The Association requested modification of the initial severance package. The City caucused and returned with a second proposal. The second proposal included, in paragraph 8, a reaffirmation of the MOU's language, as follows:

> The City will continue to accomplish work internally within the City workforce and assign such work among various City departments. When extraordinary or specialty work must be accomplished, the City will seek the most cost effective resources to accomplish such work either through temporary employees or outside professionals.

[8] In March 2010, Redlitz was appointed as the Department Director and managed the divisions of building, planning, and code enforcement.

[9] By ceasing this function, the revenue generated from the state for handling those inspections would also cease.

No evidence was presented of any discussion of the meaning or effect of this language as it pertains to the question of use of part-time officers to cover the work previously performed by full-time employees. The City considers its part-time officers to be "temporary employees." Bennett testified that the Association had already "negotiated and agreed" to the City personnel rules pertaining to the order of layoff and the temporary status of part-time employees. At the March 15, 2010 meeting, the Association did not demand further negotiations on the issue of bumping part-time employees. The parties reached a tentative agreement on the severance issues based on the City's second proposal.

On March 17, 2010, the Association filed a grievance challenging the City's failure to allow full-time officers to bump part-time officers outside the unit. Since Gustafson, Hippert, and Moore had found other positions in the City, the grievance pertained only to Lane, Field, and Jacobson. The City Manager denied the grievance on April 1, 2010, and the City Council upheld the denial on May 19, 2010. Once the grievance was denied, the Association authorized the filing of the unfair practice charge alleging the unilateral transfer of work. In the meantime, on March 24, 2010, the City Council approved the parties' agreement on the severance package, which set forth the effective date of the layoffs as April 1, 2010.

Shortly after the layoffs, the parties commenced MOU negotiations. The Association did not raise the issue of bumping into part-time officer positions. After failing to reach an agreement, the City unilaterally imposed last, best, and final offer terms and conditions for the period of October 27, 2010 through June 30, 2011. In the negotiations, the Association tentatively agreed to language acknowledging the lowering of the salaries for officers.[10] When

[10] Bennett testified that the tentative agreement acknowledged the removal of code enforcement officer salaries from the salary schedule, but the document does not substantiate that claim.

the parties again failed to reach agreement for terms covering the period from July 2011 through June 2012, the City again imposed terms and conditions following impasse. Again, the Association did not demand to bargain over full-time code enforcement officer positions. The parties reached agreement on a successor agreement for a two-year term through June 30, 2014, with no language changes pertinent to the issues presented in this case.

Assignment of Work Following the April 1, 2010 Layoffs

Following the layoffs, Gustasfon was elevated to the position of code enforcement manager.[11] All of the active code enforcement cases were assigned to the remaining senior code enforcement officer, Al Bates (Bates), and to Gustafson. Bates reviewed all open compliance cases and reassigned them to the part-timers, based on his assessment of their abilities at the time. Consistent with Redlitz's testimony, the City ceased all proactive enforcement work and the state-mandated mobile home inspections.[12]

Because part-timers had not handled complaint cases prior to the layoffs, Bates began training the part-timers to assume the duties of the full-timers. Principally, this involved learning the relevant provisions of the building, housing, and zoning codes. When asked why

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[11] Brindle retired in March 2010 and was succeeded by Leslie Milks (Milks). Milks retired one month later, and was replaced by Gustafson.

[12] The City continued to conduct mobile home inspections required by the local rent control ordinance (triggered by a rent increase request). Part-timers had never performed this function either. In recommending to the City Council that the state inspections be canceled, Redlitz wrote that resuming that responsibility would require two additional code enforcement officers at an estimated annual cost of $180,000 (salary and benefits), which corresponds closely to the wages of full-time code enforcement officers.

Bates had to train the part-timers, he answered: "Because the work was there and had to be done, and they were the only people that I had to perform it."[13]

As a result of the cessation of proactive enforcement, the former full-time officer case load dropped between 30 and 40 percent. The rest of the former full-time officer work was performed by Bates and the part-timers. Bates considered it his department's responsibility to continue its mission of "full-time code enforcement" after the layoffs. He noted there were some codes that part-timers had never enforced.[14]

Once Moore began her work as the code enforcement assistant, Milks, who replaced Brindle as manager in March 2010, instructed her to continue working her existing caseload after the layoff. Moore objected that it was inconsistent with her new job classification and complained to Tatge. Milks then instructed her to continue at least some of her previous duties. The department eventually took measures to ensure Moore was not taking on duties outside of her job classification. Hlawek's notes of the March 15, 2010 meeting confirm that the City intended for Moore to be relieved of her code enforcement officer caseload.

On June 10, 2010, the City Council approved the reinstatement of Moore to the position of full-time officer, effective at the start of the fiscal year. In connection with that decision, the City later rescinded its decision not to enforce the mobile home state mandate and resumed that function. Upon her return, Moore focused on that work in addition to resuming her

[13] Only one part-timer had ever assumed responsibility for full-time duties in the past, and he worked under the direct supervision of Bates. That part-timer had ceased employment by the time of the 2010 layoffs. After the layoffs, Bates did not trust any of his part-timers to conduct housing code inspections without him being present.

[14] Moore testified that a number of the active cases could not be assigned to part-timers after the layoffs and essentially became inactive.

previous caseload. Moore recalled hearing Gustasfon say that the use of part-timer officers "just isn't working out."

Layoff of Lane and the Directive Not To Communicate with Members

Lane was hired by the City in 1999 as a part-time code enforcement officer. In 2000, he was promoted to a full-time officer and assigned to handle mobile home enforcement work. In 2008, he was appointed as a mobile home park inspector. Lane served as the Association president in 2008 and 2009. As a result of the 2009 layoffs, Lane exercised his bumping rights and demoted from a mobile home park inspector back to a code enforcement officer.

Lane believed the City had targeted him for layoff beginning in 2009. During the 2010 layoff process, Lane spoke at a City Council meeting where he professed his belief that he had been targeted because he was the Association president, and claiming that after receiving three layoff notices in just over a year he believed it was becoming "personal."

During the layoffs in 2009, City Manager Clay Phillips (Phillips) approached Lane and requested Lane's support in helping the City achieve its goals by having the Association accept cuts in benefits to avoid the potential for layoffs of 46 bargaining unit employees. Phillips told Lane, "Russ, you know I have to include you, you're the president of the [Association], to show the other employees." Expanding on this conversation, Lane testified that Phillips conveyed to Lane that his leadership in doing what was good for the City as a whole would be appreciated. Lane explained he would have to convince the Association's governing board of the same, because he could not make unilateral decisions as president under the union's revised bylaws. Lane conveyed Phillips's views to the board and the Association accepted the cuts to benefits. Lane would have been one of the 46 employees laid off.

In December 2009, leading to the 2010 round of layoffs, Jack Anderson (Anderson), the City's chief negotiator, suggested that Lane retire rather than resist the layoff. Lane had originally planned to retire one year later. Anderson stated to Lane that he had a "target on his back."[15] Lane believed Anderson meant that he was being "singled out by the administration" by virtue of his status as president.

In January 2010, Assistant City Manager Charlie Grimm (Grimm) suggested to Lane in a joking manner that he should take an early retirement. Milks, who had been the Association president prior to her promotion, also suggested early retirement, though no context for this statement was offered. Lane admitted that a number of employees, including himself, received emails from the City inquiring if they were going to retire.

When the City began the budget subcommittee meetings in January 2010, Lane attended the meeting in his capacity as Association president, asked questions for clarification, and reported to the members on the issue of layoffs.

As a result of these layoff discussions, the potentially affected unit members began approaching Lane to discuss the matter. Sometime in January or February, these conversations garnered the attention of Milks, who, according to Lane, began calling Lane into her office "on a daily basis" and "verbally disciplining" him for communicating with the employees about the subject. Milks was not Lane's direct supervisor at the time. Lane testified that the meetings occurred perhaps four times each week for a total of about 20 closed-door meetings. It even became a "joke" among the code enforcement staff. Milks repeatedly raised the issue of the Association having "no place in code enforcement" and that Lane should cease talking about the Association. She also accused Lane of "leaking" information.

[15] Anderson did not testify.

Eventually, Lane complained up the chain of command about the harassment and asked that it cease. Management inquired whether he wanted the matter formally reviewed, while warning him that only punitive actions could be reviewed. Later, Lane was directed to meet with Milks and her supervisor, Brindle. Brindle told Lane that whatever he was telling the employees was causing them to become upset, and that he should "cease talking about any layoffs."[16] Lane also testified that Brindle directed him not to "discuss the layoff during business hours while [he] was working" as it was disruptive during working hours and Lane needed to be completing his assigned duties. Lane admitted that employees frequently came to his desk during the approximately one-third of the day he was at his desk rather than in the field. In response, Lane put up a sign that indicated when he was on a break so as to be available. The sign did not satisfy Milks, who told Lane he could not talk to employees on his lunch break.[17] In short, Lane was directed not to discuss union business any time during the City's business hours while he was at his desk.

As a result of the directive, Lane informed employees they should direct all questions regarding layoffs to Milks. The Association attempted to get around the directive by having Vice President Ginese send emails to employees conveying Lane's messages. The City did not specifically bar Lane from speaking to employees by telephone.

Bates was aware of Lane's office conversations about the budget and layoff issues and thought it was a "bit excessive." He did not agree with one of the employees' complaints that the discussion was "constant." He believed those discussions contributed to a "tense

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[16] Neither Milks or Brindle were called to testify.

[17] Tatge corroborated Lane by stating that it sounded like Milks' order was not to talk at any time during the work day.

environment" in the workplace. Bates added that Lane, a former police officer, could be "in your face," unless you understood he was not intending to be intimidating. Nevertheless, some employees complained about his "behavior."

Jacobson was one of the officers who was laid off. He sought information about his job status from Lane after hearing rumors of impending layoffs prior to the winter holidays in 2009. He approached Lane during the work day. He could not recall if it was during break time, but conceded that it probably was not. He did not recall approaching Lane on multiple occasions. At some point, Lane told Jacobson he could no longer speak with him and directed all questions to Milks. Jacobson sensed the situation was tense simply due to the discussion of possible layoffs, and not because of anything Lane had caused.

Lane testified that he learned the original layoff plan included the positions less senior than his.[18] This information conflicted with the early information Tatge received, in which Lane was one of the original three. Lane further testified that around the same time he was directed to cease communicating with unit members, he was informed by the Association that a memorandum authored by Brindle had been left near the coffee machine and discovered by a member. The memorandum proposed to lay off a group of employees that included Lane with the highest seniority (i.e., a group beginning with Lane). When Milks found out the memorandum had been read, he called Lane into her office and blamed him for abdicating his responsibility as the Association president to admonish the employees who read the memorandum for having breached confidentiality.

In the meetings that occurred as a result of the City's offer to negotiate effects, Lane requested that the City do as it had done with the reduction in force in another bargaining unit

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[18] Lane was the third most senior of the five code enforcement officers.

and lay off part-time employees in order to preserve full-time positions. On March 15, 2010, Lane wrote to the City indicating his desire to bump into one of the part-time positions because of his prior service in that classification.

Bennett testified that the only reason Lane was laid off was because of the City's determination to reduce the level of services in the code enforcement unit.

Lane had only one prior instance of criticism by management, in March 2009, when Hippert, his direct supervisor at the time, placed him on a three-month performance improvement plan to improve his case management skills. This occurred after Lane's 2009 demotion in lieu of layoff. Although Bates never supervised Lane except for a brief period of time, and acknowledged knowing the case management issues that arose later, he considered Lane to be very effective in achieving compliance, as he was a former police officer.

Donna Butler (Butler), an attorney in the same firm as the Association's legal representative, Hayes, attended a professional seminar in February 2010 during which City Manager Phillips spoke on the topics of layoffs. The city manager from the City of Chula Vista was also a presenter at this session. During the question-and-answer period, a question was asked of the speakers about the possibility of removing problem employees though the layoff process. Phillips responded that this was not an appropriate use of the layoff process.[19] After that question was answered, Butler posed a follow-up question regarding the extent to which contractual bumping rights came into play.[20] In response this question, Phillips suggested that layoffs could be used as a way to eliminate more tenured employees which the

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[19] Phillips did not testify.

[20] Butler did not identify herself at the time as an attorney from the firm that represented the Association.

employer did not want to keep if they were not as good as the more recent hires. Phillips stated that by eliminating an entire unit of employees while following the applicable layoff procedures, specific employees whom the employer no longer wanted could be removed from the staff.

ISSUES

1. Did the City unilaterally transfer the work of full-time code enforcement officers to non-bargaining unit employees?

2. Did the City interfere with Lane's rights by its directive not to discuss union matters during the work day?

3. Did the City discriminate against Lane by laying him off?

CONCLUSIONS OF LAW

Code Enforcement Officer Work Transfer

Unilateral changes are considered "per se" violations of the duty to meet and confer in good faith if certain criteria are met. Those criteria are: (1) the employer took action to change policy; (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations; (3) the action was not merely an isolated breach of the contract or practice, but had a generalized effect or continuing impact upon bargaining unit employees' terms and conditions of employment; and (4) the change in policy concerns a matter within the scope of representation. (*Fairfield-Suisun Unified School District* (2012) PERB Decision 2262; *Grant Joint Union High School District* (1982) PERB Decision No. 196.)

The Association contends that the City was required to provide it with notice and an opportunity to negotiate the transfer of duties from the full-time officers to the part-time code

enforcement employees because, when an employer ceases all work in a bargaining unit classification and transfers that work to other classifications either within the unit or outside the unit, the decision is negotiable. (*Desert Sands Unified School District* (2010) PERB Decision No. 2092, p. 19 (*Desert Sands*).)

The City invites rejection of the Association's claim of unilateral transfer of work because the evidence fails to establish that "all" of the full-time officer work performed by the laid off officers was transferred to the part-timers, citing *City of Escondido*, *supra*, PERB Decision No. 2311-M, p. 11. The City relies on Bates's testimony that after he reviewed all of the active cases, he closed some, allowed some not to be worked, and reassigned only the remainder to the part-timers. In addition, the City reinstated Moore to her full-time officer position where she resumed her former caseload.

As noted above, in cases of unilateral changes, the employer is required to provide notice and an opportunity to negotiate a decision made by the employer that is negotiable. (*Grant Joint Union High School District*, *supra*, PERB Decision No. 196.) When a firm decision is made prior to such opportunity, the employer cannot defend on the ground that the union failed to request or demand negotiations. The essence of a unilateral charge is that the employer's decision is a fait accompli at the time the union becomes aware of it. (*City of Sacramento*, *supra*, PERB Decision No. 2351-M, pp. 33-34.) The City's first line of defense is that it had no duty to provide notice and an opportunity to bargain because its decision to transfer work from the full-timers to the part-timers was non-negotiable.

The Association's position based on *Desert Sands* supports its theory here. In *Desert Sands*, *supra*, PERB Decision No. 2092, the employer laid off all employees in a particular job classification (health technicians) and assigned the work that remained to other classifications

(nurses and paraeducators). The health technicians' work assisting special education students was transferred to either a higher level classification (nurses to perform health-related tasks) or to a lower level classification (paraeducators to perform routine toileting duties). Nothing in the Board's decision required that the union additionally demonstrate that the employer was required to provide the same level of servicing special education students in order to render the decision negotiable. The Association asserts that the removal of "all" the work from a particular classification renders inapplicable the "overlapping duties" exception to the duty to bargain as explained in *Eureka City School District* (1985) PERB Decision No. 481. For that purpose, the focus is on whether any work was left for officers to perform after the layoffs, not whether the level of services they performed was the same level of services performed by employees to whom the work was transferred.

In effect, the City's decision to remove the proactive enforcement work and the state-mandated mobile-home inspection from the code enforcement officer workload was not a transfer of work to another bargaining unit or to an unrepresented unit, as there was not a removal of work outside the unit. Such a decision would not be negotiable as it was a "change in the scope and direction of the enterprise" which was "economically motivated" and therefore not within the scope of representation. (*First National Maintenance v. NLRB* (1981) 452 U.S. 666, 677 and 680.) However, the removal of the rest of the code enforcement officer work resulted in a transfer of unit work so that unit employees now ceased entirely from

performing all of the duties that they once shared with non-unit personnel and such decision is negotiable. (*City of Sacramento*, *supra*, PERB Decision No. 2351-M, p. 16.)[21]

The City further argues that it provided notice of the transfers of duties at the March 15, 2010 meeting when Redlitz explained the reorganization plan. Even if this were so, it cites no evidence that it offered the Association an opportunity to bargain its decision to transfer work. Sullivan's March 4, 2010 letter to Davis explicitly limits the scope of negotiations at the proposed meeting to the impact of the layoffs. There can be no dispute that the decision to layoff, which occurred at the March 3, 2010 City Council meeting, was simultaneously a decision to transfer work. This conclusion is supported by Brindle's explanation of the recommended reorganization plan that included eliminating the proactive approach to enforcement, mobile home enforcement, and other activities previously handled by the part-timers. The firm decision to transfer work was made before there was any notice to the Association.

The Association has established that the decision to have part-time officers assume the work previously performed by full-time officers was a negotiable decision for which the City failed to provide notice and an opportunity to negotiate prior to adoption and implementation. (*City of Sacramento*, *supra*, PERB Decision No. 2351-M.) The City only offered the Association the opportunity to negotiate the effects of the layoffs.

Additionally, *City of Escondido*, *supra*, PERB Decision No. 2311-M, acknowledges that the allegation that Moore was subsequently reinstated and continued to perform the same full-time officer duties for the City as she did prior to the layoff, would not excuse the initial

[21] Because the City does not argue the "overlapping duties" exception to a unilateral transfer of bargaining unit work as explained in *Eureka City School District*, *supra*, PERB Decision No. 481, no analysis of that defense is required here. (See also *City of Sacramento*, *supra*, PERB Decision No. 2351-M.)

violation. (*Id.* at, pp. 10-11, citing *Desert Sands*, *supra*, PERB Decision No. 2092.) In regard to Moore's reinstatement, the City merely reprises an argument already rejected by PERB.

The City also argues that the Association waived its opportunity to negotiate the decision to transfer bargaining unit work. The City relies on the Association's failure to demand to bargain over the transfer beginning with the March 15, 2010 session on effects bargaining, and its failure to demand bargaining subsequently when the parties met for MOU negotiations. This argument is without merit. The language in paragraph 8 of the City's proposal states that the City will only attempt to use "temporary employees" for "extraordinary or specialty work" and code enforcement officer work is not of that kind. (See *City of Sacramento*, *supra*, PERB Decision No. 2351-M [broadly worded contractual language insufficient to establish a waiver of the right to negotiate over the elimination of an entire class of employees and the transfer of their surviving duties to employees in another bargaining unit].) In addition, even though that language was proposed on March 15, 2010, there is no evidence that its meaning or effect was discussed in terms of the work transfer issue. Thus, a clear and unmistakable relinquishment of the right to negotiate cannot be inferred in this case. (*Ibid.*)

<u>Interference With Right to Represent Unit Members</u>

Public employers are required to ensure that agents of the exclusive representative have access to employees at the work site. That right is presumptive, but will be balanced against justifiable concerns of the employer, including the potential for disruption in the employers operations and work processes. (*Regents of the University of California* (1983) PERB Decision No. 329-H.) The employer carries the burden of establishing the rule's necessity when it claims disruption. (*Ibid.*) An employer may not prohibit solicitation or other

organizational communication during non-work portions of the day. (*Long Beach Unified School District* (1980) PERB Decision No. 130 [rule limiting union contact to three non-working employees at a time not justified by any legitimate concern with disruptiveness; employees capable of expressing disinterest in the message]; *San Ramon Valley Unified School District* (1980) PERB Decision No. 230 [absolute ban on access to lunchroom unreasonable]; cf. *State of California (Employment Development Department)* (2001) PERB Decision No. 1365a-S [disruptive activity during work time].)

Lane presented evidence of anti-union animus in terms of Milks's overbroad verbal discipline for having conversations with employees about the layoffs in the workplace and her accusation of him leaking information and upsetting the employees. The latter attack amounted to interference with organizational activity based on the content of the message. By not calling any witness on the subject of the alleged disruption in the workplace, the City has failed to carry its burden on the necessity for the directive that Lane not speak to any employees about union matters while in the office during business hours. Nor was any evidence presented to demonstrate that the content of Lane's message was so opprobrious or disrespectful as to justify censure. (*Regents of the University of California* (1998) PERB Decision No. 1263-H, p. 46 [speech that is "opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice" is unprotected].) The restriction imposed on Lane was overbroad and therefore interfered with Lane's right to communicate.

Discrimination/Retaliation

The Association alleges the layoff was because of the City's discrimination/retaliation for Lane's MMBA protected activity. To demonstrate that an employer discriminated or retaliated against an employee in violation of MMBA section 3506 and PERB Regulation

32603(a), the Association must show that: (1) the employee exercised rights under the MMBA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action *because of* the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210, pp. 6-8 (*Novato*); *Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M, p. 13.)

1. Protected Activity and the City's Knowledge of that Activity

MMBA section 3502 provides in pertinent part:

> [P]ublic employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.

Lane was the Association President. When he lawfully acts in that capacity, he obtains protected status pursuant to MMBA section 3502.1. (*Santa Clara Valley Water District*, *supra*, PERB Decision No. 2349-M, pp. 16-30.) The record establishes that Lane engaged in protected activity by serving as president of the Association in the two years preceding his layoff and that he attempted to represent employees in regard to the layoffs. He attended the City Council budget subcommittee meetings, demonstrating his vigilance on the matter on behalf of the Association. The decision to layoff was made in the City Manager's office. City Manager Phillips knew of Lane's status as Association president as demonstrated by his discussion with him as to how the City could achieve its budget reductions with the Association's support. The first two elements of a prima facie case of retaliation have been met.

2. Adverse Action

The next issue is whether the City took an adverse action against Lane. A layoff is considered an adverse employment action. (*Regents of the University of California (Los*

Angeles) (2008) PERB Decision No. 1995-H.) The third element of a prima facie case of discrimination/retaliation has been met.

3. Unlawful Motive

The employer's unlawful motivation is thus an essential element of the charging party's case. In the absence of direct evidence, an inference of unlawful motive may be drawn from the record as a whole, as supported by circumstantial evidence. (*Novato, supra*, PERB Decision No. 210; *Santa Clara Valley Water District, supra*, PERB Decision No. 2349-M, p. 13.) Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S; (2) the employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104; (3) the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S; (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB

Decision No. 786); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive (*North Sacramento School District*, *supra*, PERB Decision No. 264; *Novato*, *supra*, PERB Decision No. 210).

The City's adverse action of laying off Lane followed closely in time to some of his protected activity. (*Moreland Elementary School District*, *supra*, PERB Decision No. 227.) Additionally, Milks displayed hostility toward Lane's protected activity by imposing an overbroad prohibition on union speech. (*Cupertino Union Elementary School District*, *supra*, PERB Decision No. 572.) Phillips's seminar statement about laying off an entire unit to sweep out undesirable employees also expressed the very plan in which a retaliatory layoff could be disguised and accomplished.[22] However, the hearsay/multiple hearsay testimony/evidence that Brindle had proposed a layoff of half the unit beginning with Lane cannot support a finding of nexus as the memorandum was never produced and the unidentified employee's report of the contents of the memorandum to Tatge cannot support a finding that such a recommendation was ever considered or adopted by the City Manager's office. Still on the strength of the factors of close timing, and Milks's and Phillips's comments, a prima facie case has been presented.

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[22] As the City Manager, Phillips can be viewed as the primary agent or representative of the City. As such, his comments made at a seminar regarding a subject which he was featured to speak as the City Manager and which he had authority to recommend to a City Council qualifies as an exception to the hearsay rule as an authorized admission. (Evidence Code section 1222; *O'Neill v. Novartis Consumer Health, Inc.* (2007) 147 Cal.App.4th 1388, 1403; *Thompson v. County of Los Angeles* (2006) 142 Cal.App.4th 154, 169.) It therefore can be relied upon to base a finding of fact.

4. City's Burden

Once the Association has established a prima facie case of retaliation, the burden shifts to the employer to show it would have imposed the adverse action even if the employee had not engaged in protected activity. (*Novato, supra*, PERB Decision No. 210; *Martori Brothers Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 729-730; *Wright Line* (1980) 251 NLRB 1083.) Thus, "the question becomes whether the [adverse action] would not have occurred 'but for' the protected activity." (*Martori Brothers*.) The "but for" test is "an affirmative defense which the employer must establish by a preponderance of the evidence." (*McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 304.) Additionally, as stated in *Palo Verde Unified School District* (2013) PERB Decision No. 2337:

> Once a charging party establishes a prima facie case of retaliation, the burden shifts to the respondent to establish both: (1) that it had an alternative non-discriminatory reason for the challenged action; and (2) that it acted because of this alternative non-discriminatory reason and not because of the employee's protected activity.

(*Ibid*., p. 31, *County of Orange* (2013) PERB Decision No. 2350-M, p. 16.)

The City's defense rests on its decision to lay off the entire unit in order to achieve the cost-savings goals set out by the City Council's budget subcommittee. This is unquestionably a neutral reason unrelated to union activity. The record supports this non-discriminatory objective being the actual reason for the decision to lay off all of the officers. The goal of $685,000 savings would not have been achieved by the layoff of only three officers, assuming an annual, per-employee cost of approximately $90,000 in salary and benefits and the addition of the layoff of one senior code enforcement officer. Nothing rebuts the legitimacy of the process resulting in the recommendation for the $685,000 figure. The Association offered no evidence that the code enforcement unit was the only City department to suffer layoffs. In

addition, there was no evidence of an initial proposal that three of the officers with *less* seniority than Lane were the only ones to be laid off. Questions to Lane as to whether he would retire would not be unusual when the City was in the process of encouraging attrition in order to reduce the number of layoffs required to achieve the budget cutting goals. The City has met its burden of demonstrating that Lane was laid off for an alternative non-discriminatory reason and acted on that reason and not because of Lane's protected activity. Accordingly, it is not found that the City discriminated/retaliated against Lane by laying him off.

REMEDY

Pursuant to section 3509(a), the PERB under section 3541.3(i) is empowered to:

> take any action and make any determinations in respect of these charges or alleged violations as the board deems necessary to effectuate the policies of this chapter.

In this case, it has been determined that the City breached its duty to meet and confer in good faith by unilaterally transferring code enforcement officer work to non-bargaining unit employees, in violation of MMBA sections 3503, 3505, 3506, and 3506.5(a), (b) and (c) and PERB Regulation 32603(a), (b), and (c). The City will be ordered to return to the status quo ante which existed prior to the implementation of the work transfer or, in other words, the implementation of the April 1, 2010 layoff. In the event the City chooses to transfer code enforcement officer II work to non-bargaining unit employees in the manner attempted here, it must give the Association reasonable notice and an opportunity to negotiate about that decision. Because the decision to transfer work was accompanied by a non-negotiable decision to restructure or change the direction of the code enforcement unit work so as to reduce the active caseload between 30 and 40 percent, only a partial remedy reinstating and awarding

make whole back pay to the affected employees (three of the five full-time code enforcement officer IIs or 60 percent of the laid off code enforcement officer IIs) is justified. (*City of Sacramento, supra*, PERB Decision No. 2351-M, pp. 47, 51; *Fairfield-Suisun Unified School District, supra*, PERB Decision No. 2262, pp. 18-19; *Desert Sands, supra*, PERB Decision No. 2092, pp. 31, 34.)

It is therefore appropriate to order the City to offer reinstatement to three of the five most senior code enforcement officer IIs,[23] with back pay from the date of their layoff on April 1, 2010 to the date of their offer of reinstatement or actual reinstatement, if earlier. The City may offset from its backpay liability any amounts the affected employees received in mitigation, typically "interim earnings" from other or City employment between the time of layoff and the time of the offer of reinstatement. (*Fresno County Office of Education* (1996) PERB Decision No. 1171; *California School Employees Association v. Personnel Commission* (1973) 30 Cal.App.3d 241; *NLRB v. Brown & Root, Inc.* (8th Cir. 1963) 311 F.2d 447.) The affected employees shall receive interest at the rate of seven percent per annum on the remainder of the back pay liability after deducting the offset.

As a result of the unilateral work transfer and the overbroad directive issued to Lane regarding speaking with employees during the work day, the City also interfered with the right of employees to participate in an employee organization of their own choosing, in violation of sections 3502 and 3506 and PERB Regulation 32603(a). As a result of both the unilateral work transfer and the overbroad directive, the City also denied the Association its right to represent employees in their employment relations with a public agency, in violation of

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[23] The evidentiary record reflects that the three code enforcement officers with the most seniority were Moore, Jacobson, and Lane.

section 3503 and PERB Regulation 32603(b). The appropriate remedy is to cease and desist from such unlawful conduct. (*Rio Hondo Community College District* (1983) PERB Decision No. 292.)

Finally, it is the ordinary remedy in PERB cases that the party found to have committed an unfair practice is ordered to post a notice incorporating the terms of the order. Such an order is granted to provide employees with notice, signed by an authorized agent, that the offending party has acted unlawfully, is being required to cease and desist from its unlawful activity, and will comply with the order. Thus, it is appropriate to order the City to post a notice incorporating the terms of the order herein at its buildings, offices, and other facilities where notices to bargaining unit employees represented by the Association are customarily posted. Posting of such notice effectuates the purposes of the MMBA that employees are informed of the resolution of this matter and the City's readiness to comply with the ordered remedy. (*Placerville Union School District* (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it has been found that the City of Escondido (City) violated the Meyers-Milias-Brown Act (MMBA) by (1) unilaterally transferring code enforcement officer II work to non-bargaining unit employees and (2) directing City of Escondido Employees Association (Association) President Russell Lane not to speak with employees at any time during the work day regarding union matters. The City violated Government Code sections 3505 and 3506 and Public Employment Relations Board (PERB or Board) Regulation 32603, subdivisions (a) and (c). By this conduct, the City also denied the Association its right to represent employees in

their employment relations with a public agency, in violation of Government Code section 3503 and PERB Regulation 32603, subdivision (b).

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

A. CEASE AND DESIST FROM:

1 Unilaterally transferring code enforcement officer II work to non-bargaining unit employees without meeting and conferring with the Association.

2. Directing Association President Russell Lane not to speak with employees at any time during the work day regarding union matters.

3. Interfering with bargaining unit members' right to participate in the activities of an employee organization of their own choosing.

3. Denying the Association its right to represent employees in their employment relations with the City.

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

1. Offer immediate reinstatement, unless already reinstated, to three of the five most senior code enforcement officer IIs laid off on April 1, 2010, with back pay from the date of their layoff to the date of the offer of immediate reinstatement or date of actual reinstatement, if earlier. The City may offset outside or City employment interim earnings against the back pay from the date of layoff to the date of the offer of immediate reinstatement, or actual reinstatement, if earlier. The City must pay interest at the rate of seven percent per annum on the remainder of the back pay which has been offset by interim earnings.

With regard to the above provisions requiring the City to make the affected employees whole for back pay, this Order shall be stayed for 60 days during which the parties may meet

and confer over a mutually acceptable alternative remedy. In the event no agreement is reached within 60 days and the parties have not mutually agreed to an extension of time within which to continue negotiations, the stay will expire and the "make whole" and all other provisions of this Order shall take effect.

2. Within 10 workdays of the service of a final decision in this matter, post at all work locations in the City, where notices to bargaining unit employees represented by the Association are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the City, indicating that the City will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

3. Within 30 workdays of service of a final decision in this matter, notify the General Counsel of PERB, or his or her designee, in writing of the steps taken to comply with the terms of this Order. Continue to report in writing to the General Counsel, or his or her designee, periodically thereafter as directed. All reports regarding compliance with this Order shall be served concurrently on the Association.

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

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

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

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

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)

APPENDIX

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

After a hearing in Unfair Practice Case No. LA-CE-618-M, *Escondido City Employees Association v. City of Escondido*, in which the parties had the right to participate, it has been found that the City of Escondido (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3505 and Public Employment Relations Board (PERB) Regulation 32603, subdivision (c), by unilaterally transferring code enforcement officer work to non-bargaining unit employees without meeting and conferring with the City of Escondido Employees Association (Association). The City also violated the MMBA, Government Code sections 3503 and 3506 and PERB Regulation 32603(a) and (b) by directing Association President Russell Lane not to speak with employees at any time during the work day regarding union matters.

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

A. CEASE AND DESIST FROM:

1. Unilaterally transferring code enforcement officer II work to non-bargaining unit employees without meeting and conferring with the Association.

2. Directing Association President Russell Lane not to speak with employees at any time during the work day regarding union matters.

3. Interfering with bargaining unit members' right to participate in the activities of an employee organization of their own choosing.

4. Denying the Association its right to represent employees in their employment relations with the City.

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

1. Offer immediate reinstatement, unless already reinstated, to the three of the five most senior code enforcement officer IIs laid off on April 1, 2010, with back pay from the date of their layoff to the offer of reinstatement or date of actual reinstatement if earlier. The City may offset the back pay from interim earnings. The City must pay interest at the rate of seven percent per annum on the remainder of the back pay which has been offset by interim earnings.

Dated: _____ CITY OF ESCONDIDO

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.