STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

STATIONARY ENGINEERS LOCAL 39, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, Charging Party, v. CITY OF SACRAMENTO, Respondent.	Case No. SA-CE-738-M PERB Decision No. 2351-M December 24, 2013

Appearances: Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for Stationary Engineers Local 39, International Union of Operating Engineers, AFL-CIO; Sacramento City Attorney's Office by Brett M. Witter, Supervising Deputy City Attorney, for City of Sacramento.

Before Martinez, Chair; Huguenin and Banks, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Stationary Engineers Local 39, International Union of Operating Engineers, AFL-CIO (Local 39) to the proposed decision of a PERB administrative law judge (ALJ). The ALJ dismissed the complaint and underlying unfair practice charge, in which Local 39 alleged that the City of Sacramento (City) violated the Meyers-Milias-Brown Act (MMBA),[1] by failing and refusing to bargain in good faith over the City's decision and the effects of that decision, to lay off every employee in the Supervising Dispatcher classification represented by Local 39, and to reassign the job duties of those employees to employees in the

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

Dispatcher III classification, which is in a separate bargaining unit represented by the Sacramento Police Officers Association (SPOA).

The Board has reviewed the entire record in this matter, including the complaint and answer, the transcript of the hearing before the ALJ, the parties' post-hearing briefs, the ALJ's proposed decision, Local 39's exceptions to the proposed decision, and the City's response thereto. Based on this review, we conclude that the ALJ disregarded undisputed evidence in the record that, by the time Local 39 learned of the City's plans to reorganize the Police Department Communications Center and transfer dispatcher duties out of Local 39's bargaining unit, the City, by its agent Captain Jacqueline Dowden (Dowden), had already begun implementing these plans by meeting with the affected employees and redistributing their "essential" job duties. Because the City thus failed to provide Local 39 with adequate notice of, and meaningful opportunity to bargain over, the negotiable decision to transfer duties from Local 39's bargaining unit to another bargaining unit, or to bargain over the negotiable effects of the Police Department reorganization and resulting layoffs of the Supervising Dispatchers, we reverse the proposed decision.

Because the City's failure and refusal to bargain in this case involved electronic communications with employees, to the exclusion of their bargaining representative, we also take this opportunity to review and update PERB's requirement that a respondent post notice to employees of its unfair practices. As discussed below, in addition to PERB's traditional paper posting requirement, respondents in unfair practice proceedings will henceforth be required to post notice by whatever electronic means they customarily use to communicate with employees.

FACTUAL BACKGROUND

Before July 2011, the City's Police Department included two "Dispatcher" series — the "Supervising Dispatcher" classification, which was part of the City's General Supervisory bargaining unit represented by Local 39, and the Dispatcher I, II and III classifications, which were, and continue to be, part of the Police Department bargaining unit represented by the SPOA.[2] With few exceptions, which are not at issue in this dispute, both the Supervising Dispatchers and the Dispatcher IIIs worked in the Police Department Communications Center and all of the Supervising Dispatchers employed by the City as of June 2011 had been promoted into that classification from the Dispatcher III position.

As of April 2011, when this dispute arose, the City and Local 39 were parties to a collective bargaining agreement (Agreement) covering the period 2010-2012. Article 15 of the Agreement defined "layoff" to include dismissal or displacement of at least one employee due to lack of work, lack of funds, or abolition of a position. Under the Agreement, layoffs were grievable, beginning at the third step of the grievance procedure, the final step before arbitration. Exhibit A to the Agreement also included so-called "regression ladders" for each class series through which employees may downgrade or "bump" as the result of a layoff. The regression ladder included in Exhibit A provided that employees in the Supervising Dispatcher classification could bump downward to the Dispatcher III, II or I classifications, despite that these positions were in a separate bargaining unit represented by SPOA.

[2] Before the events giving rise to this charge, the Supervising Dispatchers were sometimes referred to as "shift supervisors," while the Dispatcher IIIs were also known as "floor supervisors."

Until July 2011, when the Supervising Dispatcher positions were eliminated or, as the City contends, "unfilled," the duties of that position overlapped considerably with those of the Dispatcher III classification.[3] Common to all Dispatchers, including the Supervising Dispatchers, were two main functions: answering emergency calls over the City's 911 telephone line and using the Police Department radio to dispatch police officers to respond to emergencies. Witnesses for the City testified, without contradiction, that before July 2011, both Supervising Dispatchers and Dispatcher IIIs evaluated employees in the classifications below them, trained new personnel, responded to internal complaints from sworn peace officers and external complaints from the public, researched and prepared supporting documentation for such complaints, participated in drafting and amending departmental policy and procedure documents, completed work schedules for employees assigned to each shift, and authorized time off and approved overtime requests. According to the undisputed testimony of Communications Center

[3] In its answer to the complaint, the City denies that the Supervising Dispatcher classification was "eliminated," but admits that "all of the employees in the Supervising Dispatcher classification were laid off effective June 30, 2011." On cross-examination, Dowden, the former manager of the Communications Center, asserted the same point. It is undisputed that, before July 2011, the City employed seven Supervising Dispatchers, whereas after that date, no employees worked in that classification and most of the duties previously assigned to the Supervising Dispatchers were performed by the same individuals after they had accepted demotions to Dispatcher III positions in lieu of layoffs. In *Oakland Unified School District* (1983) PERB Decision No. 367 (*Oakland*), the Board rejected a similar "distinction without a difference" and, for similar reasons, we assign no significance here to the City's distinction between eliminating a classification and depopulating it entirely through layoffs or voluntary demotions in lieu of layoff. (*Id.* at p. 32 [rejecting employer's contention that, because it offered employees the opportunity to transfer to other positions before reducing the hours of their current positions, the reduction in hours was "voluntary" and therefore non-negotiable]; see also *Eureka City School District* (1985) PERB Decision No. 481 (*Eureka*), pp. 18-20; and *Arcata Elementary School District* (1996) PERB Decision No. 1163 (*Arcata*) [change in hours to "vacant" positions found negotiable when based on labor costs and not due to change in nature or scope of work performed].)

managers, if no Supervising Dispatcher was on duty, which was frequently the case due to staffing shortages, then the highest ranking Dispatcher III on that shift stepped in as the "acting shift supervisor" and performed all, or nearly all, of the duties normally assigned to the Supervising Dispatchers. Dispatcher IIIs assigned to work as acting shift supervisors for more than a month were entitled to receive out-of-class pay at the Supervising Dispatcher pay rate.

In or about April 2011, Dowden began meeting with staff, including the Supervising Dispatchers represented by Local 39, to identify and redistribute their job duties in anticipation of impending staffing cuts and a reorganization of the department. At the time, layoffs affecting the Supervising Dispatchers were already the subject of some rumors within the department, though, as yet, there had been no "official" notice either to Local 39 or to the employees. Supervising Dispatcher LaTonya McDaniel (McDaniel), one of the Local 39-represented employees whose position was eliminated as a result of the reorganization and transfer of duties, testified, without contradiction, that "Jackie," *i.e.*, Dowden, began meeting with the Supervising Dispatchers to identify and redistribute their job duties even before the employees received notice of the reorganization and layoffs. According to McDaniel:

> At that point, we hadn't been noticed that we were going to be – [¶] demoted, but after we had kind of gotten – After she had sat us down the second time and actually told us that our jobs were going to be eliminated and, you know, how much they could save by eliminating the jobs, she had a -- That second meeting was in her office, and she had, I guess, a new, like, org chart that was already written out on three-by-five cards to show what it would look like with the new supervisors or with the supervising dispatcher layer removed out.

It is also undisputed that the City gave Local 39 no notice of the reorganization and layoffs, and, consequently, that no Local 39 representative was present for any of the occasions

when Dowden met with the Supervising Dispatchers to identify and redistribute their job duties in anticipation of the reorganization and layoffs.[4]

On the evening of April 28, 2011, City Chief of Police Rick Braziel (Braziel) sent an electronic message to all Police Department employees, including the Supervising Dispatchers represented by Local 39, to inform them of plans to reorganize the department and eliminate 167 positions to address a $12.2 million budget shortfall for the coming year. The positions identified for elimination included all seven of the Supervising Dispatchers represented by Local 39. Braziel's message stated that the Supervising Dispatchers would have the option of bumping downward into their "previously held" Dispatcher III positions in lieu of being laid off, and that the Police Department "will be working with the unions and the City to ensure [that] we follow all applicable labor agreements, and civil service rules."

The message acknowledged that it was being sent to the employees in advance of notice to the unions representing City employees. The justification stated in Braziel's message for notifying the employees before their representatives was that the media had learned of the proposed budget cuts and that the Chief wanted employees to "have the information as quickly as possible." Braziel did not appear at the hearing and no other witness offered testimony in support of this explanation. Notwithstanding Braziel's stated intent to "work[] with the unions," no evidence was presented that he or anyone else acting on behalf of the City forwarded his

[4] Although it was uncontested by Dowden or any other witness, McDaniel's testimony on this point was not mentioned in the ALJ's findings of fact nor was its significance discussed in the ALJ's conclusions of law. As explained below, we regard the timing and sequence of these meetings between the manager of the facility and the affected employees to be a significant fact in our analysis of this case, particularly where the City has asserted an affirmative defense that Local 39 has waived any right to bargain over the decision or its effects by failing to request bargaining within a reasonable time of learning of the "proposed" changes.

email message to Local 39, or that the City otherwise attempted to contact Local 39 about the subjects discussed in Braziel's message to the employees.

Local 39's Business Representative Scherita Adams (Adams) testified that she and fellow Business Representative Marcia Mooney (Mooney) learned of the Chief's message "in May" or "a few weeks" or "a couple weeks" after April 28, when Braziel sent it to the employees. After learning of the message, Adams and Mooney met with the Supervising Dispatchers to discuss the bumping process and the duties they would perform as Dispatcher IIIs, in the event they chose to bump downward rather than accept layoffs.

In May and June 2011, Dowden continued to meet with the Supervising Dispatchers and employees from other bargaining units to redistribute their work assignments as part of the reorganization. After asking the employees to identify the essential tasks of their current positions, Dowden listed these duties on index cards, which she distributed to the staff. Dowden asked for volunteers to serve as the primary or backup person responsible for each task deemed essential.

On June 21, 2011, the City Council approved the proposed Fiscal Year 2011-2012 budget, which provided for the elimination of the 167 full-time equivalent positions from the Police Department. As described in Braziel's April 28 email message, all seven Supervising Dispatcher positions were among the positions to be eliminated.

On June 23, 2011, Local 39's Director of Public Employees, Joan Bryant (Bryant), sent a letter to Interim City Manager William Edgar (Edgar), demanding to meet and confer over the decision to eliminate the Supervising Dispatcher positions and the impact of transferring their duties from Local 39's bargaining unit to the Dispatcher III classification in SPOA's jurisdiction. Bryant's letter also demanded that the City cease making unilateral changes to negotiable

subjects and that the City maintain the status quo until the parties had met and conferred over the decision and its impact. The letter requested a meeting on June 28 or 29, 2011.

In response to Bryant's letter, on June 29, 2011, City officials met with representatives of Local 39. In attendance for Local 39 were Bryant, Union District Representative Steve Crouch, Adams, and Mooney. The City was represented by Labor Relations Consultant and Chief Negotiator Mark Gregersen (Gregersen), City Manager Edgar, Interim Deputy City Manager Betty Masuoka, and Director of Human Resources Geri Hamby. Gregersen testified that the parties met for about one hour and discussed only "preliminary" matters. Gregersen characterized the discussion as "upbeat" and "positive." On the same day, Local 39 filed the present charge.[5]

On July 1, 2011, the seven Supervising Dispatchers exercised their contractual bumping rights and accepted voluntary demotions to Dispatcher III positions in the SPOA's bargaining unit. As a result, seven of the ten Dispatcher IIIs already in the Police Department bargaining unit were displaced from their positions and "bumped" downward to Dispatcher II positions. Melanie Plummer, one of the seven former Supervising Dispatchers who bumped into a Dispatcher III position, later retired from her employment with the City. Otherwise, Katie Braverman's (Braverman) undisputed testimony was that, as of April 26, 2012, when this matter was submitted for decision to the ALJ, the remaining six affected employees continued to be classified and compensated as Dispatcher IIIs in the SPOA-represented Police Department bargaining unit.

[5] The record gives no indication whether either party requested further meetings and the proposed decision states, without explanation, that, after the June 29 "preliminary" discussion, no further meetings were scheduled or convened "*because* Local 39 filed this charge." (Emphasis added.) We are unaware of any authority suggesting that the filing of an unfair practice charge, after the charging party has requested bargaining, in any way affects the parties' respective rights and obligations to meet and confer over the subjects included in the request.

PROCEDURAL HISTORY

On June 29, 2011, Local 39 filed an unfair practice charge alleging, among other things, that the City was laying off all Supervising Dispatchers represented by Local 39 and reassigning their duties to a lower level classification represented by SPOA. The charge alleged, in pertinent part, that by these actions, the City was lending assistance to a rival employee organization, denying employees the right to be represented by Local 39, and refusing to bargain with Local 39 over decisions affecting employee working conditions and/or the effects of non-negotiable decisions.

On September 1, 2011, Local 39 filed an amended charge. The allegations concerning the Supervising Dispatchers included in the amended charge were identical to those in the original charge.

On September 26, 2011, PERB's Office of the General Counsel issued a complaint alleging that beginning in April 2011, the City had failed and refused to meet and confer in good faith when it removed work performed by the Supervising Dispatchers from Local 39's bargaining unit and transferred it to the Dispatcher III classification represented by SPOA, without providing Local 39 the opportunity to bargain over this decision and its effects.[6] The complaint alleged that the above actions were taken in derogation of the City's duty to bargain with Local 39, with derivative violations of Local 39's right to represent employees and of rights of employees to be represented by the exclusive representative, all in violation of the

[6] On that same date, the Office of the General Counsel also dismissed all unrelated allegations in the first amended charge pertaining to several groups of employees other than the Supervising Dispatchers. Local 39 did not appeal the partial dismissal.

MMBA sections 3503, 3505, 3506, and 3509(b), and PERB Regulation 32603, subdivisions (a), (b), and (c).[7]

On October 14, 2011, the City answered the complaint. The City's answer denied all material allegations and all violations of law alleged in the complaint and asserted various affirmative defenses, including that Local 39 had waived any right to bargain over the decision to transfer work from the Supervising Dispatchers to the Dispatcher III classification, or its effects on employees represented by Local 39.

An informal settlement conference on November 21, 2011, failed to resolve the dispute and the matter proceeded to a formal hearing on February 28, 2012. The parties filed post-hearing briefs on April 26, 2012, and the matter was submitted for decision, which issued on May 9, 2012.

THE PROPOSED DECISION

The ALJ framed the issue as whether the City refused to bargain in good faith over the decision to transfer Supervising Dispatcher job duties from Local 39's bargaining unit to the Dispatcher III classification in the SPOA-represented unit, and/or whether the City refused to bargain in good faith over the effects of that change in policy. The ALJ answered both questions in the negative.

The ALJ first determined that the transfer of duties from the Supervising Dispatchers to the Dispatcher III classification was "more appropriately characterized as a non-negotiable layoff" than a negotiable decision to transfer work from one classification to another. She found that the duties of the two classifications before July 1, 2011, overlapped significantly, and, consequently, that the facts of this case were controlled by *Eureka, supra,* PERB Decision

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

No. 481, where the Board held that a change in the distribution of shared duties between two classifications was not negotiable, unless one group of employees ceased to perform the work altogether, or that one group of employees began performing duties previously performed exclusively by another group. Although the proposed decision found that the Supervising Dispatchers ceased entirely to perform duties previously shared with the Dispatcher IIIs, the ALJ regarded cases such as *Calistoga Joint Unified School District* (1989) PERB Decision No. 744 (*Calistoga*) and *Desert Sands Unified School District* (2010) PERB Decision No. 2092 (*Desert Sands*) as distinguishable. According to the ALJ, unlike *Calistoga*, the overlapping duties of the Supervising Dispatchers and Dispatcher IIIs included nearly all of the duties performed by employees in the two classifications, as opposed to a single, overlapping job duty, as was the case in *Calistoga*. The ALJ also observed that, unlike *Desert Sands*, the layoffs and transfer of duties in the present dispute were the result of cuts in the City's budget, *i.e.*, a lack of funds, rather than a lack of work.

Having determined that the decision to transfer work from the Supervising Dispatcher classification to the Dispatcher III classification was not itself negotiable, the ALJ next concluded that Local 39 had waived any right to bargain over the negotiable effects of that decision by failing to make a timely request to bargain the effects of the decision to layoff the Supervising Dispatchers. Although employees testified that Dowden began meeting with the Communications Center staff and redistributing their job duties as of April 2011, in anticipation of the reorganization and layoffs, the proposed decision did not discuss this testimony or its implications of whether Local 39 had adequate notice of any negotiable decisions or negotiable effects stemming from the reorganization. The City admitted that it "did not provide formal written notice to Local 39 of its intent to eliminate the Supervising Dispatcher class in the Police Department layoff." However, the ALJ relied on Local 39's admission that, at some point "in

May" 2011, its representatives became aware of the City's plans to lay off the Supervising Dispatchers, and that Local 39 did not request bargaining until June 23, more than one month after learning of the Chief's message to employees, and two days after the City Council had adopted the 2011-2012 budget that included the announced position cuts.

Because Local 39 did not dispute that it learned of the City's decision to lay off the Supervising Dispatchers in May, the ALJ did not consider issues of inadequate notice or insufficient opportunity to bargain, and instead focused on whether Local 39's conduct, under a totality of circumstances test, constituted waiver by inaction. The ALJ's analysis focused on the lapse of about a month and a half between mid-May, when Local 39's representatives learned of Braziel's April 28 message to employees, and the end of June, when Local 39 made its formal demand to bargain the decision and its negotiable effects. The ALJ also observed that Local 39 "made a single request to bargain" and attended only one "preliminary" meeting with the City's representatives, before filing the present charge, while the City "quickly responded to the demand, scheduled a meeting, and met with the union within six days of the demand letter on one of the days proposed by Local 39." The ALJ concluded that "[u]nder the totality of circumstances presented, . . . [¶] . . . Local 39 has failed to meet its burden of proof that the City unlawfully refused to bargain in good faith over the decision to reassign Supervising Dispatcher job duties to Dispatcher IIIs after the layoff of Supervising Dispatchers, and/or the effects of that decision."

DISCUSSION

Whether a party has violated its duty to bargain in good faith under the MMBA is generally subject to the "totality of circumstances" test, which requires evidence of the respondent's subjective bad faith in how it approached or conducted itself in negotiations or impasse resolution procedures. (*Placentia Fire Fighters v. City of Placentia* (1976)

57 Cal.App.3d 9, 25; *Muroc Unified School District* (1978) PERB Decision No. 80 (*Muroc*).)[8] However, because certain forms of conduct have such potential to frustrate negotiations or undermine the authority of the bargaining agent, they are treated as *per se* violations of the duty to bargain for which there is no need to demonstrate that the respondent acted in bad faith. (*Pajaro Valley Unified School District* (1978) PERB Decision No. 51 (*Pajaro Valley*).) Examples of *per se* violations include pre-impasse unilateral changes to matters within the scope of representation (*Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, 823), similarly unilateral action with respect to the negotiable *effects* of a non-negotiable managerial decision (*Claremont Police Officers Ass'n v. City of Claremont* (2006) 39 Cal.4th 623 (*City of Claremont*); *County of Santa Clara* (2013) PERB Decision No. 2321-M (*Santa Clara*)), and direct communications with bargaining unit employees or other employer conduct that bypasses, circumvents or undermines the authority of the representative. (*City of San Diego (Office of the City Attorney)* (2010) PERB Decision No. 2103-M (*City of San Diego*).)

To prove a unilateral change, the charging party must establish that: (1) the employer made a firm decision or took action to change policy; (2) the change in policy concerns a matter within the scope of representation; (3) the action was taken without giving the exclusive representative notice or opportunity to bargain over the change; and (4) the action had a generalized effect or continuing impact on terms and conditions of employment. (*Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262 (*Fairfield-Suisun*); *Santa Clara, supra,* PERB Decision No. 2321-M, p. 21.) We first determine whether the decision at issue in the present charge – the transfer of work performed by Supervising

[8] When interpreting the MMBA, PERB may take guidance from cases interpreting the National Labor Relations Act and from cases interpreting California's other labor relations statutes with purposes and provisions similar to those of the MMBA. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 617 (*City of Vallejo*); *Agricultural Labor Relations Bd v. Superior Court* (1976) 16 Cal.3d 392, 412-413.)

Dispatchers to the Dispatcher III classification – involves either negotiable subjects or negotiable effects of non-negotiable decisions.

Negotiability of the Decision to Transfer Work from One Unit to Another

By itself, a decision to reorganize operations, eliminate or reduce services, and/or lay off employees is not within the scope of representation. (*International Assn. of Fire Fighters, Local 188, AFL-CIO v. Public Employment Relations Bd.* (2011) 51 Cal.4th 259 [layoffs]; *City of Richmond* (2004) PERB Decision No. 1720-M (*Richmond*) [reduction in services].) Likewise, the assignment of duties is generally not subject to negotiation, so long as the newly assigned duties are reasonably comprehended within the existing duties of the classification to which they are assigned. (*City & County of San Francisco (International Airport)* (2007) PERB Decision No. 1932-M.) The California Supreme Court has held that such matters implicate "fundamental management decisions" that are beyond the scope of representation, because they affect "the amount of work that can be accomplished or the nature and extent of the services that can be provided." (*Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651; *City of Claremont, supra,* 39 Cal.4th 623.)

In several cases, however, PERB has applied the *Anaheim*[9] test developed under the Educational Employment Relations Act (EERA)[10] to determine that a public employer's

[9] Under the test announced in *Anaheim Union High School District* (1981) PERB Decision No. 177 (*Anaheim*), a subject is negotiable if it is a statutorily-enumerated subject of bargaining or, if: (1) it is logically and reasonably related to wages, hours or other statutorily-enumerated subjects of bargaining; (2) it is of such concern to management and employees that conflict is likely to occur, and the mediatory influence of collective bargaining is an appropriate means for resolving such conflict; and (3) its designation as a negotiable subject would not significantly abridge the employer's freedom to exercise those managerial prerogatives (including matters of fundamental policy) that are essential to achieving its mission. PERB's *Anaheim* test has since been approved by the Supreme Court in *San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850.

[10] EERA is codified at section 3540 et seq.

decision to *transfer* work from exclusively-represented employees to non-bargaining unit personnel is negotiable, when it affects the wages, hours or working conditions of the employees from whom the work is transferred. (*Rialto Unified School District* (1982) PERB Decision No. 209 (*Rialto*); *Solano County Community College District* (1982) PERB Decision No. 219 (*Solano*); *Mount San Antonio Community College District* (1983) PERB Decision No. 334; *Alum Rock Union Elementary School District* (1983) PERB Decision No. 322; *Goleta Union School District* (1984) PERB Decision No. 391; *Ventura County Community College District* (2003) PERB Decision No. 1547 (*Ventura*).) The underlying rationale for these decisions is that the employer is not completely eliminating services or changing the scope or direction of its operations, but simply changing the identity of the personnel who will be assigned to perform the work. (*Arcohe Union School District* (1983) PERB Decision No. 360; *Solano, supra*, PERB Decision No. 219; *Fibreboard Paper Products Corp. v. NLRB* (1964) 379 U.S. 203, 213; *Furniture Rentors of America, Inc.* (1993) 311 NLRB 749, 749-751.)[11]

In *Eureka, supra,* PERB Decision No. 481, PERB recognized a limited exception to this line of cases, when the transferred duties were traditionally shared by employees in the separate units affected by the transfer. As explained in *Eureka*, a bargaining representative who challenges the transfer of work from its bargaining unit to other, non-unit personnel must establish that the duties were in fact transferred out of its unit. Where the work was performed exclusively by unit employees before the alleged transfer, or when, as a result of the transfer, the work is assigned exclusively to one group of employees, establishing that such work has in fact been transferred is relatively straightforward. However, where unit and non-unit personnel have previously shared the duties, the "transfer" may entail no more than increasing

[11] PERB has generally looked to private sector cases for guidance in defining non-negotiable management prerogatives. (*Arcata, supra,* PERB Decision No. 1163, p. 4.)

the amount of shared duties assigned to one group of employees at the relative expense of another. Under such circumstances, the decision to transfer part of the shared duties is not subject to negotiation, though the effects of that decision on employees' wages, hours or working conditions are negotiable. (*Eureka, supra*, at pp. 14-16.)

The exception recognized by *Eureka* thus stems from the evidentiary and conceptual problems of demonstrating that certain duties have, in fact, been transferred when more than one group of employees has already been performing those duties and the work continues to be shared after the alleged transfer of some of that work. (*Eureka, supra*, at p. 15.) Consequently, as the Board has clarified in subsequent decisions, the *Eureka* exception does not apply when the transfer of duties results in either: (1) unit employees ceasing *entirely* to perform the duties they previously shared with other non-unit personnel, or (2) non-unit employees performing duties that were previously performed *exclusively* by unit employees. (*Calistoga, supra,* PERB Decision No. 744; *Desert Sands, supra,* PERB Decision No. 2092.) In either case, there is no evidentiary or conceptual problem of identifying the transferred duties and demonstrating that one group of employees was affected by the transfer of duties because the duties in question either started out or ended up as the exclusive purview of one group, at the expense of another.

The Board recently applied the first of these "exceptions" to the *Eureka* exception in *City of Escondido* (2013) PERB Decision No. 2311 (*Escondido*), where the employer's decision to transfer work resulted in unit employees ceasing entirely, albeit temporarily, to perform work they had previously performed in tandem with employees of another unit. Although the employer in *Escondido* later resumed assigning the transferred duties to one unit employee, the Board held that simply reversing the decision to reassign duties would not cure the unilateral action, if the initial decision to transfer work should have been negotiable

because it had resulted, even temporarily, in a complete cessation of work being performed by unit employees. (*Ibid.*) In light of *Escondido* and similar cases, as well as language in the *Eureka* decision itself, we see no reason to expand the *Eureka* exception beyond the limited circumstances in which it arose.

Moreover, *Eureka, supra,* PERB Decision No. 481 also recognized that, even where a decision to reassign shared duties from one unit to another is not itself negotiable, the effects of that decision, such as a reduction in hours as a result of the transfer, are negotiable. (*Id.* at p. 17.) Although the substantive law governing effects bargaining over a decision to transfer work has not changed since *Eureka* (see *Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 900 (*Modesto City*); and *City of Claremont, supra,* 9 Cal.4th 623), the Board's recent decision in *Santa Clara, supra,* PERB Decision No. 2321-M, which did not appear until after the proposed decision in the present case, clarified the procedural requirements for providing notice and meaningful opportunity to bargain over the effects of an otherwise non-negotiable decision. As explained in *Santa Clara*, the same policy considerations that seek to promote collective bargaining and prohibit unilateral actions over negotiable subjects apply equally to effects bargaining, so that, absent a very limited set of exceptional or emergency circumstances, an employer must provide notice and a meaningful opportunity to bargain over the reasonably foreseeable effects of its managerial decisions *before* implementation. (*Santa Clara, supra*, at pp. 23-32 [overruling *Sylvan Union Elementary School District* (1992) PERB Decision No. 919 (*Sylvan*) and other cases relied on by the ALJ in the present case to find that Local 39 waived its right to bargain over negotiable effects of the decision to eliminate the Supervising Dispatchers classification and transfer their work to other employees].) Thus, even assuming the *Eureka* exception applies and a decision to transfer work is not itself negotiable, under *Santa Clara*, the employer

must still give notice and meaningful opportunity to bargain over the effects of the decision before its implementation.

In the present dispute, the ALJ determined that *Eureka, supra,* PERB Decision No. 481, was controlling and that the various "exception to *Eureka*" cases, such as *Calistoga, supra,* PERB Decision No. 744, and *Desert Sands, supra,* PERB Decision No. 2092, were distinguishable. According to the ALJ, unlike *Calistoga*, the Supervising Dispatcher and Dispatcher III classifications involved *several* overlapping duties, as opposed to a single job duty comprising the entire work of the bargaining unit employees affected by a transfer, while, unlike *Desert Sands*, the decision to lay off the Supervising Dispatchers was based on a lack of funds rather than a lack of work. The ALJ also reasoned that the contractual right of the Supervising Dispatchers, as set forth in Article 15 of the Agreement, to downgrade or "bump" into the unit where all or nearly all of their former duties were now assigned to Dispatcher IIIs, made the present case distinguishable from *Desert Sands*. The ALJ concluded that the decision to lay off the Supervising Dispatchers was not itself negotiable, and that, because Local 39 learned of the City's plans to lay off employees in mid-May 2011 but failed to request effects bargaining until June 23, 2011, approximately one week before the layoffs were take effect, Local 39 waived any right it may have had to bargain over the negotiable effects of the layoff decision. We take a different view.

We conclude that the City's decision to reassign duties from the Supervising Dispatchers to the Dispatcher III classification was fully negotiable for the reasons previously explained in *Desert Sands*. There were seven employees in the Supervising Dispatcher classification whose duties overlapped considerably with those of the Dispatcher IIIs in the separate bargaining unit represented by SPOA. As a result of the City's decision to eliminate the position and transfer work previously performed by the Supervising Dispatchers to the

Dispatcher III classification, *all* of the existing Supervising Dispatchers accepted demotions to Dispatcher III positions in lieu of being laid off. Although the overall amount of work may have contracted somewhat, the City admits that, after the change, the "essential" duties of the Supervising Dispatchers continued to be performed, in some cases even by the same employees, in a lower-classified, lower-paid job title in a separate bargaining unit represented by the SPOA. Because one group of employees, the Supervising Dispatchers, ceased entirely to perform the previously shared duties, there is no difficulty demonstrating that the City's decision to transfer the remaining dispatcher duties affected the wages, hours and working conditions of employees in that classification.

The facts of this case thus fall squarely within the holding of *Desert Sands, supra,* PERB Decision No. 2092, where, as the result of the employer's decision to lay off all of its special education health technicians, the duties previously shared by the health technicians and employees in the nurse and paraeducator classifications ceased entirely to be performed by the health technicians. As explained in *Desert Sands*, the *Eureka* exception, whereby a transfer of work is non-negotiable it merely changes the quantity of shared duties performed by one classification of employees at the expense of another, does *not* apply where, as a result of the transfer of duties: (1) *unit employees cease entirely to perform duties that they previously performed*, or (2) non-unit employees begin to perform duties that were previously exclusively performed by unit employees. (*Desert Sands, supra,* at p. 20.) The fact that contractual "regression ladders" permitted employees in the Supervising Dispatcher classification to bump downward to the Dispatcher III classification in lieu of layoffs does not fundamentally alter the analysis. All that really changed here as a result of the City's decision to transfer the

remaining amount of work was the identity of the employees assigned to perform the previously shared duties.[12]

The proposed decision's reliance on *Richmond, supra*, PERB Decision No. 1720-M and *City of Vallejo, supra,* 12 Cal.3d 608 is misplaced. Both of those cases considered whether a proposal to lay off employees or to otherwise reduce personnel is a non-negotiable managerial decision affecting the *level of services* to be provided and/or the *manner in which to provide* such services, as opposed to a fully-negotiable decision to transfer work from one group of employees to another. Nothing in the facts of either case suggests that the affected employees shared duties with any other employees either in another classification or in another bargaining unit. Indeed, because the employees in both cases were fire fighters, a fairly specialized occupation requiring considerable training, in the absence of facts to the contrary, we may presume that no other classification of employees was qualified to perform duties that overlapped with the fire fighters' duties. In any event, because neither case involved a proposal or a decision to transfer some or all work from one group of employees to another, neither *Eureka* nor *Desert Sands*, nor any other PERB case concerned with the transfer of work from one group of employees to another, ever came into play in either *City of Vallejo* or *Richmond.*

The ALJ also attempted to distinguish *Desert Sands, supra,* PERB Decision No. 2092, by noting that the layoff of Supervising Dispatchers was "not based on any lack of work but on the lack of funds and abolition/elimination of the Supervising Dispatcher positions." However, the proposed decision does not explain *why* an employer's asserted "lack of funds" would make its elimination of an entire class of employees and the transfer of their work to another

[12] Although many of the same individuals continued to perform the work, their "identity" certainly changed as a result of bumping downward into a lower-paid classification in a different bargaining unit.

bargaining unit any less negotiable than if the employer had instead asserted that its decision stemmed from a "lack of work." Nor do we find any support in PERB's case law for that conclusion. In *Newman-Crows Landing Unified School District* (1982) PERB Decision No. 223, the Board held that "the determination that there is insufficient work to justify the existing number of employees *or insufficient funds* to support the work force, is a matter of fundamental managerial concern which requires that such decisions be left to the employer's prerogative." (*Id.* at p. 13, emphasis added.) Thus, the Board made no distinction between a lack of funds and a lack of work for determining whether the decision to lay off employees is negotiable and we find no reason to do so here.

To the contrary, PERB has generally followed private-sector authority in holding that business decisions involving layoffs and/or the transfer or subcontracting of work are *more likely* to fall within the scope of representation when they are motivated by a lack of funds and the employer's desire to reduce its labor costs, than by a lack of work, particularly when the latter is the result of a change in the scope or nature of services offered. For example, in *Solano*, *supra*, PERB Decision No. 219, the Board ruled that the employer acted in derogation of its duty to bargain when, in anticipation of a lack of funds caused by the passage of Proposition 13, it unilaterally transferred work out of the classified employee bargaining unit and into the certificated employee bargaining unit and laid off classified employees previously assigned to perform that work. (*Id.* at pp. 8-9.) The employer's justification was an actual or anticipated lack of funds, yet nowhere in that case did the Board suggest that an asserted or projected lack of funds, as opposed to a lack of work, would make a decision to transfer work from one bargaining unit to another non-negotiable.

Similarly, in *Arcohe Union School District* (1983) PERB Decision No. 360 (*Arcohe*), a decision to subcontract custodial work was found negotiable, because the resulting diminution

of unit work had an impact on the terms and conditions of unit employees and necessarily "weaken[ed] the collective strength of employees in the unit and their ability to deal effectively with the employer." (*Id.* at pp. 5-6.) In *Arcohe*, the Board reasoned that no fundamental managerial prerogative was at stake, as evidenced by the fact that the same work continued to be performed, and that only the identity of the personnel who performed that work changed as a result of the decision to subcontract. While the Board recognized that "sound fiscal management" is a "significant concern" to public employers, because the employer's decision to subcontract services was motivated, at least in part, by a desire to reduce its labor costs, the Board held that such concerns are more properly addressed at the bargaining table and may not serve as an excuse for a public employer to avoid its bargaining obligation. (*Id.* at pp. 6-8 [relying on *Solano*, *supra*, PERB Decision No. 219, and other cases involving the transfer of bargaining unit work].)

Although alternatives to layoffs are analyzed as "effects" of the decision to layoff, PERB has similarly recognized that alternatives to layoffs, such as concessions in wages or benefits, are also appropriate matters for collective bargaining. (*San Mateo City School District* (1984) PERB Decision No. 383, p. 18 [expressly recognizing "options in lieu of layoff" as one of several negotiable "effects" of a layoff decision].) Whether in situations where the underlying decision is itself negotiable, such as a transfer of work from one unit to another, or in situations where only the "effects" of a layoff decision are negotiable, the rationale is essentially the same: because of the exclusive representative's unique ability to offer concessions in employee wages or benefits, such matters are *at least* as amenable to collective bargaining, and quite likely *more amenable*, than a "lack of work" situation involving an elimination, reduction or change in the kind of services offered. (See also *Rialto, supra,* PERB Decision No. 209, p. 8.)

Private-sector authorities have followed similar reasoning to conclude that the decision to transfer or subcontract bargaining unit work to non-unit personnel is *fully* negotiable when motivated by an employer's desire to reduce its labor costs, i.e., by a "lack of funds." (*Fibreboard, supra,* 379 U.S. 203, 213 [decision to replace employees with independent contractor performing same work under similar conditions is negotiable, since only the identity of the personnel performing the work changes, and not the nature or scope of the business].) Even where it does not turn solely on labor cost considerations, a decision to subcontract or transfer work is negotiable when it does no more than change the identity of the personnel performing the work, without a fundamental change in the scope and direction of the enterprise. (*Furniture Rentors, supra,* 311 NLRB 749, 749-751.) As in PERB's case law, the rationale for such decisions is that, because of its role as the bargaining representative, the union may be able to offer concessions in wages or benefits that would meet the asserted need to reduce operational costs, and thereby obviate or reduce the need to lay off employees or reassign their work to other personnel. (*City of Vallejo, supra,* 12 Cal.3d 608, 621-622 [timing *and number* of employees to be laid off negotiable]; and, *First National Maintenance Corp. v. NLRB* (1981) 452 U.S. 666, 680 [subcontracting decisions motivated by employer's desire to reduce enterprise costs "peculiarly suitable for resolution through the collective bargaining framework"].)

In short, we can find no support in PERB's decisional law, nor in persuasive private-sector authority, to conclude that a decision to transfer shared duties that results in one classification ceasing entirely to perform the work is nonnegotiable when due to a "lack of funds" rather than a "lack of work." We are thus not persuaded by the ALJ's rationale for distinguishing *Desert Sands, supra,* PERB Decision No. 2092.

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. *Desert Sands, supra,* PERB Decision No. 2092, *Escondido, supra,* PERB Decision No. 2311, and similar cases make clear that, even if a decision to abolish every position in a classification is not negotiable, when its practical result is that employees who previously performed shared duties cease performing the work entirely, but other personnel continue to perform some of the duties, the decision is negotiable, because all that is really changing is the identity of the persons assigned to perform the work. The Board has generally taken a pragmatic, rather than formalistic, approach to such questions to ensure that an employer may not, for example, evade its bargaining obligation by insisting that a classification continues to exist but is simply "unfilled," when the practical reality for employees, and the exclusive representative, is that no one continues to work in the "unfilled" classification. (*Desert Sands, supra,* at p. 20; *Oakland, supra*, PERB Decision No. 367, p. 32; *Eureka City Schools, supra*, PERB Decision No. 481, pp. 18-20; see also *Ventura, supra,* PERB Decision No. 1547, p. 25 [rejecting employer's characterization of its decision as "subcontracting," rather than transferring work among employees, where the result "would elevate clever legal writing above reality" and defeat the purpose of the collective bargaining statutes].)

The ALJ has also cited *Marysville Joint Unified School District* (1983) PERB Decision No. 314 and similar cases involving a contractual waiver of the right to bargain as distinguishable from *Calistoga, supra,* PERB Decision No. 744, and *Desert Sands, supra,* PERB Decision No. 2092. However, as the proposed decision acknowledges, the parties did not litigate or brief this issue and the language of Article 15 of the parties' MOU does not indicate that Local 39 clearly and unmistakably waived its right to bargain over the transfer of dispatcher duties to another bargaining unit. (*Building Material & Construction Teamsters'*

Union v. Farrell, supra, 41 Cal.3d 651; *Amador Valley Joint Union High School District* (1978) PERB Decision No. 74 (*Amador*).)

The layoffs and bumping rights provisions of Article 15 suggest that the parties contemplated that some or even all Supervising Dispatchers may "bump" downward to Dispatcher III positions *in the event of* a layoff due to lack of work, lack of funds, *or abolition of a position.*[13] However, contemplating *the procedure to follow* in the event of a layoff decision is not the same as *expressly waiving the right to bargain over a negotiable aspect of the decision.* In the absence of evidence to the contrary, we must presume that the parties' MOU is silent on the subject of transferring work from one bargaining unit to another and that Local 39 did not therefore waive its right to bargain such decisions, simply by agreeing to other contractual provisions specifying the bumping rights of employees in the event of a layoff. (*Mt. Diablo Unified School District* (1983) PERB Decision No. 373, p. 62; *Clovis Unified School District* (2002) PERB Decision No. 1504 (*Clovis*), p. 19.) Even if Local 39 had waived its right to bargain over the elimination of every Supervising Dispatcher position, the reasonable interpretation of Article 15 is that the elimination of the classification would stem from a discontinuation or reduction in services, not from a decision to continue assigning the same duties to substantially the same complement of employees, albeit in a lower-paid classification represented by another union.

Because a waiver cannot be based solely on broadly worded contractual language (*San Marcos Unified School District* (2003) PERB Decision No. 1508), and because there is no other evidence to suggest that Local 39 clearly and unmistakably relinquished its right to

[13] Ironically, the City insists that it has not abolished the Supervising Dispatcher position, but that it is currently "unfilled." Although, we find this distinction unpersuasive, it suggests that the City itself does not consider Article 15's language regarding the "abolition of a position" as constituting a contractual waiver of the right to bargain in this case.

negotiate over the elimination of an entire class of employees *and* the transfer of their surviving duties to employees in another bargaining unit, we do not infer here that Article 15 waives Local 39's right to bargain over otherwise negotiable aspects of the City's reorganization, including the transfer of Supervising Dispatcher duties to another bargaining unit. (*Long Beach Community College District* (2003) PERB Decision No. 1568, pp. 10-13; *Victor Valley Union High School District* (1986) PERB Decision No. 565 (*Victor Valley*), pp. 4-6.) Consequently, we conclude that the City's decision to transfer the Supervising Dispatchers' duties was fully negotiable.

The City's Firm Decision and its Effect on Terms and Conditions of Employment

There is no dispute that, incident to the decision to layoff all Supervising Dispatchers, the City made a firm decision to transfer previously shared duties from the Supervising Dispatchers to Dispatcher IIIs. The ALJ found, and the City does not dispute, that, "[e]ffective July 1, 2011, Braverman, McDaniel, and the five other Supervising Dispatchers employed by the City exercised their contractual bumping rights and demoted to Dispatcher III," and that, thereafter, the Supervising Dispatcher classification has remained "unfilled" and, for all practical purposes, eliminated.[14] Nor is there any dispute that the City acted on this decision. McDaniel testified, without contradiction, that Dowden began meeting with employees as early as April 2011, and continuing through May and June, to identify and redistribute the "essential" duties within the Communications Center, including duties performed by the Supervising Dispatchers.

[14] However, as discussed below, the record demonstrates that the City reached this firm decision and began implementing it, *even before* July 1, 2011. We thus reject the ALJ's finding that the decision to reassign Supervising Dispatcher job duties to Dispatcher IIIs occurred *after* the layoff of the Supervising Dispatchers.

Although the City contests whether it "eliminated" the Supervising Dispatcher classification or whether that position survives as an "unfilled" classification, regardless of how the matter is characterized, the City concedes that *all* of the employees in the Supervising Dispatcher classification demoted to Dispatcher III positions in lieu of layoff. The City further concedes that the demoted employees continue to perform the duties of their former positions, albeit for less compensation and at lower classified titles in a separate bargaining unit represented by another union.

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.) As explained in *Clovis, supra*, PERB Decision No. 1504, pp. 19-20, an employer's direct communications with employees to obtain a waiver or a change in policy regarding negotiable subjects is sufficient to demonstrate that the employer took a firm decision to alter its policies and that it acted on that decision. It would be anomalous to require the union to file a charge within six months of the employer taking a firm decision or dealing directly with employees, but to permit the employer to escape liability until some later date when its decision is scheduled to take effect. We therefore disapprove of *City of San Diego, supra,* PERB Decision No. 2103-M, p. 15, to the extent it holds that an employer's act of soliciting employees to waive a contractual right or to change an established practice is merely an "attempted" change in policy, rather than an *actual* change in policy, for the purpose of demonstrating that a unilateral change has occurred.

The City's decision to layoff and transfer duties obviously had a generalized effect or continuing impact on terms and conditions of employment. It affected the wages, hours and working conditions of the Supervising Dispatchers who were demoted in lieu of layoff, while the resulting diminution of work in Local 39's bargaining unit necessarily "weaken[ed] the collective strength of employees [still] in the unit and their ability to deal effectively with the employer." (*Arcohe, supra*, PERB Decision No. 360, pp. 5-6; *Building Material & Construction Teamsters' Union v. Farrell, supra,* 41 Cal.3d 651, 664; see also *Klamath-Trinity Joint Unified School District* (1988) PERB Decision No. 717.)

We next turn to whether the City provided Local 39 with adequate notice and meaningful opportunity to bargain *before* reaching the firm decision to transfer Supervising Dispatcher duties to the Dispatcher III classification. Although this inquiry concerns whether the record supports Local 39's allegation of unilateral change, in the circumstances of this case, it also bears directly on the analytically distinct, but factually related, issue of whether the City has proved *its* affirmative defense of waiver by inaction.

Whether the City Afforded Notice and Meaningful Opportunity to Bargain

An employer violates its duty to bargain in good faith when it fails to afford the employees' representative reasonable advance notice and an opportunity to bargain *before* reaching a firm decision to establish or change a policy within the scope of representation, or *before* implementing a new or changed policy not within the scope of representation but having a foreseeable effect on matters within the scope of representation. (*Modesto City, supra,* 136 Cal.App.3d 881, 900; *Trustees of the California State University* (2012) PERB Decision No. 2287-H, pp. 10-11.) In *Santa Clara, supra,* PERB Decision No. 2321-M, we recently revisited the rationale for requiring advance notice both for proposals affecting matters within scope and for non-negotiable decisions whose effects are within scope. There, we explained

that, because of the destabilizing effects of unilateral action, in either case, an employer's failure to provide effective notice is a *per se* violation of the duty to bargain. (*Id.* at pp. 22-29.)

Whether it concerns a negotiable decision or the negotiable effects of a non-negotiable decision, notice must be provided to a person designated to receive such notice or who has authority to act on behalf of the organization. (*Fresno County Office of Education* (2004) PERB Decision No. 1674 (*Fresno*).) Moreover, the notice must be communicated in a manner that clearly informs the recipient of the proposed change to matters within scope or of the non-negotiable decision whose effects are within scope. (*Fairfield-Suisun, supra*, PERB Decision No. 2262, p. 13; *Lost Hills Union Elementary School District* (2004) PERB Decision No. 1652 (*Lost Hills*).) A publication addressed to the general public or a passing comment to a low-level official of the employee organization is not effective notice. (*Victor Valley, supra,* PERB Decision No. 565; *State of California (Department of Personnel Administration)* (1998) PERB Decision No. 1296-S; *Fairfield-Suisun, supra*, at p. 13.) Correspondence or other direct communications with bargaining unit members is, absent more, insufficient to impute actual or constructive knowledge of a proposed change to the bargaining representative. (*State of California (Department of Veterans Affairs)* (2010) PERB Decision No. 2110-S (*Veterans Affairs)*, pp. 5-6; *Fall River Joint Unified School District* (1998) PERB Decision No. 1259; *Regents of the University of California (Davis)* (2010) PERB Decision No. 2101-H, p. 18; *Fresno, supra,* at p. 19.)

The amount of notice that is "reasonable" will necessarily depend on the circumstances of each case. (*County of Riverside* (2010) PERB Decision No, 2097-M; *Metropolitan Teletronics Corp.* (1986) 279 NLRB 957 [to be effective, notice must be "in a meaningful manner at a meaningful time"].) At minimum, notice must be given sufficiently in advance of the employer's firm decision to alter matters within scope, or before implementation of a non-

negotiable decision with negotiable effects, to allow the exclusive representative the opportunity to decide whether to request information, demand bargaining, consult its members, acquiesce to the change, or take other action. (*Victor Valley, supra*, PERB Decision No. 565, p. 5; see also *Compton Community College District* (1989) PERB Decision No. 720, p. 13. Thus, implementation two days after giving notice is insufficient time to allow the representative to consider its options and decide a course of action. (*Trustees of the California State University* (2009) PERB Decision No. 1876-H, p. 11.) Employers and employee organizations alike would do well to err on the side of caution by giving notice of proposed changes at the earliest opportunity to allow sufficient time for negotiations, and by responding promptly and without equivocation to such notice, rather than delay until some arbitrarily determined date, on the belief that only a particular amount of time, and no more or less, is all that the law requires. (*County of Sacramento* (2013) PERB Decision No. 2315-M; *Stockton Police Officers' Assn. v. City of Stockton* (1988) 206 Cal.App.3d 62, 66; *Metropolitan Water District of Southern California* (2009) PERB Decision No. 2055-M; *State of California (Board of Equalization)* (1997) PERB Decision No. 1235-S.)[15]

Here, the ALJ concluded, and the City does not dispute, that no formal notice – written or otherwise – was provided to an official of Local 39 with authority to request bargaining or, indeed, to any officer, employee or agent of Local 39. The April 28, 2011 electronic message from Chief Braziel, which informed *employees* of the impending layoffs, was never sent to

[15] An employer is of course entitled to fully develop a proposal affecting negotiable subjects before presenting it to the employees' representative but, as we discuss below, it must nonetheless be presented as a *proposal*, and not as a *final decision* from which no meaningful alternatives will be considered. (*Veterans Affairs, supra,* PERB Decision No. 2110-S; *Ciba-Geigy Pharmaceuticals Div.* (1982) 264 NLRB 1013, 1017-1018 (*Ciba-Geigy Pharms.*); see also *Owens-Corning Fiberglas Corp.* (1987) 282 NLRB 609, 614.)

Local 39 by Braziel or by anyone else acting on behalf of the City.[16] Nor was any evidence presented that, in the weeks *after* Braziel sent his April 28 message to employees, either he, or any other person acting on behalf of the City, followed up by electronic message, letter, telephone, or any other means of communication, to ensure that Local 39 had, in fact, received notice of the City's decision to lay off the Supervising Dispatchers and transfer their work to employees in another classification in another bargaining unit.

The ALJ found, and we agree, that Local 39's representatives Adams and Mooney received the Chief's email message from one of the Supervising Dispatchers "in May," and that Adams met once or twice with the Supervising Dispatchers "in May" over the announced layoffs and the employees' bumping rights. While the ALJ focused on this testimony as providing "actual" or "constructive" notice, and effectively "starting the clock" for Local 39 to request bargaining, we see the matter differently.

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[16] Although stated in a footnote to the proposed decision, the ALJ credited Braziel's assertion in his April 28 message that he had originally intended to notify the unions before the employees, but that, because the media had learned of the proposed cuts, he wanted employees to have information about the proposed cuts as quickly as possible. However, Braziel did not appear as a witness at the hearing and our regulations expressly state that, while admissible, hearsay evidence by itself is insufficient to support a finding. (PERB Reg. 32176.) Notwithstanding Braziel's professed intent of "working with the unions and the City to ensure [that] we follow all applicable labor agreements and civil service rules," it does not follow, intuitively or logically, that, after failing to give advance notice to the employees' representatives, *as required by law*, the only alternative left was to give *no* notice whatsoever. (MMBA, §§ 3504.5, subd. (a) ["Except in cases of emergency as provided in this section, the governing body of a public agency, and boards and commissions designated by law or by the governing body of a public agency, shall give reasonable written notice to each recognized employee organization affected of any ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the governing body or the designated boards and commissions and shall give the recognized employee organization the opportunity to meet with the governing body or the boards and commissions."]; 3505 [defining the "meet and confer" requirement under MMBA to include "adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent"].)

The evidence regarding what Local 39's agents knew, and when they knew it, consists entirely of testimony by Local 39's witnesses, some of whom were admittedly uncertain about the precise dates and other details. While we may disregard self-serving professions of ignorance about matters that are largely or even exclusively within the knowledge of a witness, we see no reason to do so here. The City did not contradict the testimony of these witnesses nor impeach their credibility and thus, whatever reservations may exist about selective memory, their uncontradicted, unimpeached testimony is "certainly sufficient to carry the burden of proof in an unfair practice case." (*Mt. Diablo Unified School District* (1984) PERB Decision No. 373c, p. 4.)[17]

Moreover, even assuming that Local 39 received Braziel's April 28 "Budget Cuts Update" message at or about the same time as the employees to whom it was sent, we cannot say that it would sufficiently put Local 39 on notice *of the negotiable aspects* of the City's plans to reorganize the Police Department and to lay off the Supervising Dispatchers. Although the Chief's message states that the seven Supervising Dispatchers whose positions were to be eliminated "will have the option of bumping down into their previously held positions," it includes no information about what duties are, or will be, routinely assigned to the Dispatcher III classification. Other than the City's plans to reorganize and to lay off some employees, neither of which are themselves negotiable decisions, Braziel's message makes no mention of transferring the Supervising Dispatcher duties to another bargaining unit, nor of any other negotiable subjects resulting from the reorganization. It thus fails to meet the standard for providing adequate notice to the employees' representative because it does not

[17] Additionally, the City could have easily avoided the problem of proving what Local 39 knew and when it knew it by simply providing formal notice to Local 39 of the reorganization and transfer of duties affecting the Supervising Dispatchers consistent with its statutory obligations. (MMBA, §§ 3504.5, subd. (a), and 3505.)

clearly inform the recipient of the proposed change to matters within scope. (*Lost Hills, supra,* PERB Decision No. 1652.) While we thus agree that no formal notice – written or otherwise – was ever provided to Local 39, we disagree with the ALJ that Local 39 had "actual" or "constructive" notice of the City's plans to transfer bargaining unit work sufficiently in advance of implementation to request or participate in meaningful bargaining.

In addition to concerns about what Local 39 knew, or reasonably could be expected to glean from the Chief's email message to employees, there exists a more fundamental problem with *when* Local 39 became aware of the planned reorganization and, arguably, of the transfer of duties out of its unit, and what other, critical events *had, by this time, already occurred.* Where the representative's "actual" or "constructive" knowledge of a "proposed" policy change is the result of the employer's *implementation* of that change, by definition, there has been inadequate notice. (*Santa Clara, supra,* PERB Decision No. 2321-M, pp. 28-29.) The same is true where the representative obtains "notice" of a "proposed" change by virtue of employer conduct indicating that it has no intention of entering into negotiations with an open mind. (*Lost Hills, supra,* PERB Decision No. 1652; *San Francisco Community College District* (1979) PERB Decision No. 105 (*San Francisco*); *Arcohe, supra,* PERB Decision No. 360; *Ciba-Geigy Pharms., supra,* 264 NRLB 1013, 1017; *Mercy Hospital of Buffalo, supra,* 311 NLRB 869, 873; *S & I Transportation, supra,* 311 NLRB 1388, 1390.) In such cases, the employer's "notice" is nothing more than its announcement of a *fait accompli.*

Characteristic of many *fait accompli* cases is the employer's use of direct communications with employees to announce or implement a new or changed policy affecting negotiable subjects, *without* providing notice to the exclusive representative. The practical effect of the employer's conduct is to *preclude* meaningful bargaining, by announcing the change to employees, *to the exclusion of* their representative. (*Clovis, supra,* PERB Decision

No. 1504; *Veterans Affairs, supra*, PERB Decision No. 2110-S, pp. 5-6; see also *S & I Transportation, supra,* 311 NLRB 1388, 1389; *Ciba-Geigy Pharms., supra,* 264 NRLB 1013, 1017; *Roll & Hold Warehouse & Distrib. Corp.* (1997) 325 NLRB 41, aff'd (7th Cir. 1998) 162 F.3d 513, 519-520.)

In *Clovis, supra,* PERB Decision No. 1504, the respondent school district planned to join with other school districts in a "Joint Powers Authority," which would the serve as the legal employer of school district employees and thereby allow the school districts making up the Joint Powers Authority to avoid paying employer contributions to the federal Social Security program and the California Public Employment Retirement System (PERS). The exclusive representative of the respondent's employees included both a state-wide organization and its local chapter. Over objections from the state-wide organization, but with the consent and participation of officers of the local chapter, the respondent convened several meetings with employees to convince them of the benefits of "opting-out" of the Social Security and PERS systems. The respondent then conducted an election for unit employees to determine, by a majority vote, whether to continue participating in Social Security and PERS. The overwhelming majority of unit employees voted to remain in PERS, while a slight majority elected to opt out of Social Security. Despite the result, the respondent did not implement any changes to its own, or the employees' Social Security contributions, pending resolution of a PERB charge filed by the state-wide organization.

The ALJ concluded that, by holding an election to modify employee retirement and other benefits options, the respondent unlawfully by-passed the representative by dealing directly with employees, and unilaterally changed matters within the scope of representation. The Board agreed that the election and the respondent's stated intent to implement the results of the election demonstrated that a firm decision had been taken to change employee retirement benefits,

without providing the exclusive representative notice and opportunity to bargain the changes. Like the ALJ, the Board expressly rejected the respondent's defense that, notwithstanding the election results, it had taken no action to implement the proposed changes in retirement benefits and had therefore never consummated the complained-of policy change. (*Id.* at pp. 19-23.) *Clovis* thus stands for the proposition that, even if an employer does not implement a change in policy until later, or perhaps not at all, its direct communications with employees *soliciting the change* demonstrates that the employer has *already* reached a firm decision, for the purpose of demonstrating that a unilateral change has occurred. Moreover, once the employer has carried out its *fait accompli*, its subsequent dealings with the union do not "cure" the violation, or "restart the clock" for determining whether the union has acted diligently in requesting bargaining. (*Ibid.*; see also *Escondido, supra,* PERB Decision No. 2311-M, pp. 10-11, and cases cited therein.)

Private sector cases involving similar facts have reached the same result. In *S & I Transportation, supra,* 311 NLRB 1388, the employer sent a memorandum to its employees, informing them that, "[d]ue to the cost in the administrative expense of a weekly payroll," the company "will be processing its payroll bi-monthly." (*Id.* at p. 1389.) No notice was provided to the union, which, after learning of the memorandum from employees, requested bargaining and threatened to file an unfair practice charge. The employer met with the union and agreed to delay implementation, but otherwise adopted the change in policy, exactly as set forth in its previous memorandum to employees. Because no notice was sent to the union and because of the definite language used in the employer's memorandum to employees about the change in policy, the National Labor Relations Board (NLRB) concluded that the employer had no intention of considering alternatives, or of doing anything other than implementing the change, as announced to the employees. The employer's willingness to delay implementation and meet

with the union *after* it had already announced its decision to employees was, in the NLRB's view, no defense, since any "bargaining," *after* the employer had already made up its mind, would not "cure" the violation. (*Ibid.*; *Mercy Hospital of Buffalo, supra,* 311 NLRB 869, 873-874.)

The facts of the present case fall squarely within the holdings of *Clovis, supra,* PERB Decision No. 1504, *S & I Transportation, supra,* 311 NLRB 1388, and similar cases. According to McDaniel, at some point *in or about April* 2011 and *continuing through May and June*, Captain Dowden began meeting with the Supervising Dispatchers to identify and redistribute their duties in anticipation of the departmental reorganization and layoffs. McDaniel testified that the first such meeting occurred *before* the employees received the April 28 electronic message from Braziel and Braverman testified that, .even before the April 28 "notice" to employees, layoffs were the subject of rumors within the department. However, by the time of Dowden's second meeting with the Supervising Dispatchers, they had received Braziel's April 28 message and knew of the impending layoffs. At either this meeting or the previous one, Dowden had asked the employees to identify the essential tasks of their positions, which she then listed on index cards that were presented to the Supervising Dispatchers and other employees at the second meeting. Dowden next asked for volunteers to serve as the primary or backup person responsible for ensuring that each essential function continued to get done after the pending reorganization and staffing cuts had taken effect. Neither Dowden, nor any other witness, contradicted McDaniel on this point, and the City produced no other evidence to impeach McDaniel's credibility or her testimony that the meetings with Dowden to reassign employee duties began *in or about April* and continued *through May and June.*

Based on McDaniel's undisputed testimony, we thus infer that Dowden's second meeting, at which she solicited employee input for redistributing their duties, occurred *in early*

or mid-May, i.e., shortly *after* the employees had learned of the budget cuts and pending layoffs through the Chief's April 28 message. Thus, a *firm decision* regarding the *fully-negotiable* matter of transferring work out of Local 39's bargaining unit was *reached and implemented* in or about *late April* or, at the latest, *in early to mid-May 2011*, when Dowden began meeting with the employees and redistributing their job duties. When read together with the testimony of Adams, that she and fellow business agent Mooney did not learn of the April 28 email from Braziel until *sometime in May* 2011, we further infer that the process of meeting with the employees and thus *implementing* the reorganization and transfer of duties more likely than not began *before* or *at about the same time as* Local 39's representatives received the Chief's April 28 email message from one of the affected employees.

By the time Adams and Mooney learned of the reorganization and began meeting with the Supervising Dispatchers "in May," Dowden had already been meeting with the same employees about redistributing their job duties, beginning in April and continuing through May and June. Although we cannot assign precise dates to Dowden's meetings with the employees and Local 39's receipt of Braziel's email message on the available evidence, we find that the City's firm decision to transfer bargaining unit work and its implementation of that decision occurred *too close in time* to Local 39's receipt of the "Budget Cuts Update" message to afford Local 39 sufficient time to meet with employees or to formulate counterarguments or proposals *before implementation.* (*Defiance Hospital, supra,* 330 NLRB 492, citing *NLRB v. Centra, supra,* 954 F.2d 366.)

While we thus agree with the ALJ's finding that Local 39 learned of the proposed reorganization and layoffs, and possibly even of the negotiable decision to transfer Supervising Dispatcher duties "in May," we cannot agree with her conclusion that this knowledge started the clock to run on Local 39's time to request bargaining because, by that time, the City had

already reached a firm decision on the subject and had begun, or was about to begin, implementing the decision by soliciting input from the affected employees. Although insufficient notice is an element of the prima facie case, and therefore part of the charging party's burden for proving a unilateral change allegation, where the facts demonstrate, or (as here) the employer admits, that no formal notice was provided to the representative, the burden is *the employer's* to prove its affirmative defense of waiver, and *not the union's* to prove *lack of notice* as part of its prima facie case. (*Victor Valley, supra,* PERB Decision No. 565, p. 5-6; *Santa Clara, supra,* PERB Decision No. 2321-M [overruling *Sylvan, supra,* PERB Decision No. 919 and similar cases holding that a union waives its right to bargain over negotiable effects when it receives "actual" or "constructive" notice of a decision that has already been implemented and fails to request bargaining]; see also *Mercy Hospital of Buffalo, supra,* 311 NLRB 869, 873 ["[i]n the absence of clear notice of the intended change, there is no basis on which to find that the Union waived its right to bargain"].)

Local 39 has therefore established each of the elements necessary for stating a prima facie case of unilateral change. It has shown that, without notice or meaningful opportunity to bargain, the City implemented a change in policy affecting negotiable matters which, in turn, had a generalized effect or continuing impact on terms and conditions of employment. (*Fairfield-Suisun, supra,* PERB Decision No. 2262; *Santa Clara, supra*, PERB Decision No. 2321-M, p. 21.) We now turn to whether the City can establish its affirmative defense that, through unreasonable delay or inaction, Local 39 waived its right to bargain over the transfer of bargaining unit work out of its unit and/or the effects of that decision.

<u>The City's Affirmative Defense of Waiver by Unreasonable Delay or Inaction</u>

PERB has long held that an exclusive representative may waive its right to bargain over a matter within the scope of representation. (*San Mateo County Community College District*

(1979) PERB Decision No. 94 (*San Mateo*).) However, an asserted waiver of the right to bargain must demonstrate clear and unmistakable language (*Amador, supra,* PERB Decision No. 74) or conduct that foregoes a reasonable opportunity to bargain over a decision not already firmly made by the employer (*San Mateo*). A waiver might be shown by inaction on the part of the exclusive representative (*Los Angeles Community College District* (1982) PERB Decision No. 252), but the evidence must demonstrate an intentional relinquishment of the union's right to bargain. (*San Francisco, supra,* PERB Decision No. 105.) However, a waiver of the right to bargain is not lightly inferred. (*Oakland Unified School District* (1982) PERB Decision No. 236.) As with other statutory rights, a waiver of the right to bargain over a particular subject or over particular effects of a non-negotiable decision must be clear and unmistakable and the evidence must indicate an intentional relinquishment of the representative's right to bargain. (*Amador, supra,* PERB Decision No. 74; *California State Employees' Assn. v. Public Employment Relations Bd.* (1996) 51 Cal.App.4th 923, 937-938.) As we recently emphasized in *Santa Clara, supra*, PERB Decision No. 2321-M, to prevail on an affirmative defense of waiver, the 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. 22; *Arcohe, supra*, PERB Decision No. 360; *Ciba-Geigy Pharms., supra,* 264NLRB 1013, 1017.)

It also follows from the discussion of "notice" above that, where notice is asserted to have been "actual" or "constructive" because of a failure to provide formal notice, *the employer* must demonstrate not only that the representative had positive knowledge of the proposed change, but that such knowledge was acquired sufficiently in advance of implementation, and

under circumstances that would "at least afford a reasonable opportunity for counter arguments or proposals." (*Santa Clara, supra*, PERB Decision No. 2321-M; *Fairfield-Suisun, supra*, PERB Decision No. 2262, p. 6.) Sufficient time to make counterarguments or proposals further assumes sufficient time for the representative, if it so chooses, to consult with employees about the proposed change and to formulate a plan of action. (*State of California (Department of Veterans Affairs)* (2010) PERB Decision No. 2110-S; *Defiance Hospital, supra,* 330 NLRB 492, citing *NLRB v. Centra, supra,* 954 F.2d 366; cf. *State of California (Department of Corrections & Rehabilitation, Department of Personnel Administration)* (2010) PERB Decision No. 2115-S.) Similarly, if the notice leaves insufficient time for meaningful negotiations *before* implementation, or other circumstances indicate that the employer has no intention of changing its mind, then the "notice" is nothing more than "notice" of a *fait accompli* and the question of waiver never arises. (*Ciba-Geigy Pharms., supra,* 264 NRLB 1013, 1017; *Lost Hills, supra,* PERB Decision No. 1652; *San Francisco, supra,* PERB Decision No. 105; *Arcohe, supra*, PERB Decision No. 360.)

Here, the available evidence is insufficient to demonstrate that the City has met its burden of showing that Local 39 had knowledge of the proposed transfer of work from the Supervising Dispatchers to the Dispatcher III classification *sufficiently in advance of* a firm decision or its implementation to allow a reasonable opportunity to make counterarguments or proposals. While we agree with the ALJ's conclusion that Local 39 learned of the proposed reorganization and layoffs, and possibly even of the negotiable decision to transfer Supervising Dispatcher duties "in May," we cannot agree with her conclusion that this knowledge started the clock to run on Local 39's time to request bargaining because, by that time, the City had already reached a firm decision on the subject and had begun, or was about to begin, implementing the decision by soliciting input from the affected employees. Because the City

had already begun implementing its decision at or about the time Local 39 learned of it, there can be no serious discussion here of waiver. As the above cases emphasize, a union's obligation to demand bargaining over a decision or its effects never arises in the face of an employer's unilateral action or announcement of a *fait accompli* because such conduct renders bargaining futile. (*Santa Clara, supra,* PERB Decision No. 2321-M.)[18]

Because our case law makes clear that a waiver may only occur when the representative has failed or unreasonably delayed in its request for bargaining over a matter that has not

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[18] It is well settled that soliciting employees, whether "collectively or individually," to indicate their acceptance or approval of modified working conditions, when the matter is the subject of ongoing negotiations with their bargaining representative is a *per se* violation of the duty to bargain. (*Medo Photo Supply Corporation v. NLRB* (1944) 321 U.S. 678, 683-684; see also *Clovis, supra,* PERB Decision No. 1504; *Cascade Employers Association, Inc.* (1960) 126 NLRB 1014, 1028.) Thus, an employer may not communicate its bargaining proposals to employees before first submitting them to the exclusive representative, seek to bargain directly with employees, or invite them to abandon their representative to achieve better terms directly from the employer. (*Trustees of the California State University* (2006) PERB Decision No. 1871-H; *Alhambra City and High School Districts* (1986) PERB Decision No. 560, pp. 15-18; and, *Muroc, supra,* PERB Decision No. 80, pp. 21-22.) Moreover, even when a union, either through affirmative assent or inaction, waives its right to bargain over a particular subject, and thereby consents to the employer's *unilateral* action on that particular subject, it does not thereby authorize the employer to deal directly with employees on that subject, absent an express agreement or other circumstances clearly and unmistakably indicating that the representative *additionally* consents to abdicate its representative function. (*Allied Signal Corp.* (1992) 307 NLRB 752, 754; *Retlaw Broadcasting Corp.* (1997) 324 NLRB 138, 144.)

An allegation of unlawfully bypassing the representative and dealing directly with employees is obviously implicated by the facts of this case. Under its statutory mandate to adjudicate disputes and enforce the statutes within its jurisdiction, PERB undoubtedly has discretion to consider such unalleged violations. (PERB Regs. 32320 and 32325; *Santa Clara Unified School District* (1979) PERB Decision No. 104; *Belridge School District* (1980) PERB Decision No. 157 (*Belridge*); *ABC Unified School District* (1991) PERB Decision No. 831b; *Santee Elementary School District* (2006) PERB Decision No. 1822.) However, because finding an additional violation of the City's duty to bargain by direct dealing would not affect the practical remedy of an order to restore the prior status quo, to bargain in good faith and to make Local 39 and the affected employees whole, in this instance we choose not to reach the issue of whether the City separately violated its duty to bargain by dealing directly with the Supervising Dispatchers over the negotiable decision to transfer bargaining unit work.

already been firmly decided or implemented (*San Mateo, supra,* PERB Decision No. 94), we reject the City's defense of waiver.

The ALJ's Conclusion That the City Acted in Good Faith

Finally, we consider the ALJ's analysis of the parties' subjective intent and her apparent determination that the City acted in good faith throughout this dispute. Because unilateral change allegations are analyzed as *per se* violations of the duty to bargain, for which no evidence or finding regarding the respondent's subjective bad faith is required (*Pajaro Valley, supra,* PERB Decision No. 51), we cannot agree with the ALJ's conclusion that, "[u]nder the totality of circumstances presented, . . . [¶] . . . Local 39 has failed to meet its burden of proof that the City unlawfully refused to bargain in good faith over the decision to reassign Supervising Dispatchers job duties to Dispatcher IIIs after the layoff of Supervising Dispatchers, and/or the effects of that decision." As explained above, an employer's willingness to delay implementation, to meet with the representative, or even to rescind a unilaterally-adopted policy, *after* it has already reached a firm decision or implemented the policy, does not mitigate its unlawful conduct in this context, because the unilateral action is a per se violation for which no evidence of the employer's subjective intent is necessary. (*Santa Clara, supra,* PERB Decision No. 2321-M, p. 22; see also *NLRB v. Katz* (1962) 369 U.S. 736; and *San Francisco, supra,* PERB Decision No. 105.)

Here, the City's willingness to meet promptly with Local 39 on June 29, 2011, and to engage in "positive" and "upbeat" discussions over "preliminary" matters, *after* the City had already reached a firm decision to transfer Supervising Dispatcher duties out of the bargaining unit, and *after* Captain Dowden had already met with the employees to identify and redistribute their job duties, does nothing to cure or mitigate the unilateral change, nor to demonstrate the

City's good faith, even assuming an inquiry into the parties' subjective motive is relevant and appropriate to the facts and pleadings of this case.

An evaluation of what constitutes "reasonable notice" or "unreasonable delay" for an affirmative defense of waiver will typically require a "totality of circumstances" analysis, which may take into account evidence of the parties' good faith or otherwise. However, as explained above, a "totality of circumstances" analysis is inapposite here because the City's unilateral action, a per se violation, precludes any defense of waiver by inaction. (*San Francisco, supra*, PERB Decision No. 105.)[19]

We reverse the proposed decision and issue the following remedial order.

REMEDY

As is customary in cases involving unilateral changes, we order the City to cease and desist in its failure and refusal to bargain, and, upon the request of the employees' representative to restore the prior status quo, to make the affected employees and the representative whole, and to bargain, upon request, in good faith over proposals to transfer work from one bargaining unit to another and other matters within scope. (*Santa Clara, supra*, PERB Decision No. 2321-M, pp. 21-22.) Additionally, because the unfair practice committed in this case stems, in large part, from the employer's electronic communication to the bargaining unit and not to the employees' representative, in fashioning a remedial order appropriate to the

[19] We similarly reject the implication in the proposed decision that Local 39 acted in bad faith by making a single request for bargaining and then meeting only once before filing the present charge, or that demanding bargaining, Local 39 was precluded from filing the present charge. As the Board recently explained in *Santa Clara, supra*, PERB Decision No. 2321-M, when confronted with unilateral action by the employer, the union has a choice: it may request bargaining or it may file an unfair practice charge. (*Id.* at p. 31.) Here, Local 39 did both and, under the circumstances, we find nothing improper in that choice to pursue *both* options.

circumstances of this case, we take this opportunity to update PERB's traditional posting requirement to better conform to the realities of the 21st-century workplace.

Like the other statutes we administer, the MMBA grants the Board broad powers to determine the appropriate remedy for unfair practices within our jurisdiction. (MMBA, § 3509, subd. (b).) PERB Regulation 32320, subdivision (a)(2) recognizes the Board's authority to "take such . . . action as it considers proper" when reviewing and deciding upon an unfair practice case which has been appealed to the Board. PERB Regulation 32325 further provides that the Board "shall have the power to issue a decision and order in an unfair practice case directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of the applicable statute."

The Board's authority to inform employees of their rights, and its discretion to determine the circumstances and methods for accomplishing this task, are both well-settled. (*Placerville Union School District* (1978) PERB Decision No. 69.) Since the earliest days of this agency, PERB remedial orders have required offending parties to post notice of their unlawful conduct to ensure that all employees affected by the Board's decision and order are notified of their rights. (*Antelope Valley Community College District* (1979) PERB Decision No. 97 (*Antelope Valley*).) From time to time PERB has likewise modified or updated the traditional posting requirement to meet the demands of different circumstances. (*Antelope Valley, supra*, PERB Decision No. 97; *Belridge, supra,* PERB Decision No. 157; *United Teachers Los Angeles* (1990) PERB Decision No. 803; *Santa Monica Community College District* (1979) PERB Decision No. 103.)

We believe that physically posting notice of the Board's remedial orders in the workplace remains an essential tool for remedying unfair practices and furthering the policies of the statues we administer. (*Belridge, supra,* PERB Decision No. 157.) However, to ensure the continued

viability of this tool, we hold today that where the offending party in unfair practice proceedings, whether it be an employer or employee organization, regularly communicates with public employees by email, intranet, websites, or other electronic means, it shall be required to use those same media to post notice of the Board's decision and remedial order. Any posting of electronic means shall be *in addition to* the Board's traditional physical posting requirement.

This addition to our posting requirement follows the NLRB, which has recognized that the "increasing prevalence of electronic communications at and away from the workplace" has meant that electronic dissemination of notice to employees is hardly an "extraordinary" or burdensome remedy when the respondent already routinely disseminates all manner of work-related information to employees by the same means. In *J & R Flooring, Inc. d/b/a Picini Flooring* (2010) 356 NLRB No. 9, the NLRB modified its standard posting language to expressly require respondents to distribute remedial notices in unfair labor practice proceedings electronically "when that is a customary means of communicating with employees." With one caveat, which stems from the peculiar circumstances of the present case, we emphasize that our holding today does not broaden the scope of the Board's standard notice posting remedy and that the electronic notice requirement is intended to reach the same employees as would be exposed to paper notices posted by traditional means. (*Id.* at pp. 18-19.) Based on the record before us, we anticipate that, at minimum, the electronic posting requirement will entail sending a scanned or similarly reproduced version of the attached Notice to Employees to the undisclosed list of recipients of the April 28, 2011 "budget cuts update" electronic message from Chief of Police Rick Braziel. However, we leave to the parties and to the Office of the General Counsel to determine whether the City customarily uses other forms of electronic media to communicate with employees and thus,

whether additional electronic media are appropriate for effecting the remedy ordered in this case.

Additionally, because of the peculiar circumstances of this case, we find it necessary to depart from the Board's practice of limiting the remedial order, including the posting requirement, to affected employees in the bargaining unit where the dispute arose. (*City of San Diego, supra,* PERB Decision No. 2103-M.) Like the present case, *City of San Diego* involved an employer's use of electronic media to communicate directly with employees, but not with their representative, to effect changes in negotiable subjects. Although the communications at issue – a press release and website posting on the city attorney's homepage – invited all employees to waive certain contractually-guaranteed rights, only the charging party, a union representing just one of several bargaining units, challenged the city attorney's communications. The Board adopted the ALJ's proposed decision, which concluded that the employer had unlawfully bypassed the charging party, but agreed with the employer that ordering it to remove the unlawful solicitations from its website was overly broad, and that, instead, the appropriate remedy was for the employer to include language on the website clarifying that the city attorney's invitation for employees to surrender their contractually guaranteed rights did not apply to employees represented by the charging party. The case thus stands for the proposition that the charging party only has standing to represent employees in its own bargaining unit, and that the Board will not order a remedy to advise employees of their rights in bargaining units where unlawful conduct was not challenged.

Despite some similarities, we regard *City of San Diego* as distinguishable. There, the employer's unlawful conduct was directed equally at all units, and thus could have been challenged through multiple charges, each brought by the exclusive representative of its respective bargaining unit. In the present case, however, the City's unlawful conduct was

directed at the employees and the exclusive representative of one unit, but, because of the multi-jurisdictional regression ladders, the employer's conduct necessarily reverberated beyond the jurisdictional boundary between the General Supervisory and Police Department bargaining units. Pursuant to the regression ladders, the Supervising Dispatchers bumped downward into Dispatcher III positions in the Police Department bargaining unit, with a resulting chain reaction of additional bumping through the Dispatcher III, II and I classifications, which are also in the Police Department bargaining unit. Although it involves employees in separate bargaining units, the present case is more analogous to *State of California (Department of Mental Health)* (1990) PERB Decision No. 840-S and similar cases in which the Board has extended the posting requirement beyond the immediately affected employees, because the nature of the employer's unlawful conduct affected contractual or other rights shared by *other* employees.

Although we find nothing unlawful in the multi-unit regression ladders that provided for the Supervising Dispatchers to bump downward to Dispatcher III positions, nor in the City's adherence to those ladders once it made the decision to eliminate the Supervising Dispatcher positions and lay off those employees, neither can we ignore the fact that this decision went hand-in-hand with the unilateral decision to transfer Supervising Dispatcher duties to another unit, or that, because of the City's multi-unit regression ladders, it necessarily involved displacement and other consequences for other employees in the Dispatcher III, II and I series. We do not believe the "make whole" provisions of the remedy should extend beyond the Supervising Dispatchers to other employees, given that the decision to layoff was not itself unlawful. However, to effectuate the policies of the MMBA, it is important that *all* employees affected by the unlawful transfer of work, including those who may have suffered job loss, reduced titles and compensation, or other consequences, as a result of the City's unilateral action, receive some explanation of the Board's decision and notice of its remedy. (*Los Angeles Unified*

School District (2001) PERB Decision No. 1469; *Santa Monica Community College District* (1979) PERB Decision No. 103.) Doubts as to the appropriate remedy in unfair practice proceedings are resolved against the party whose unlawful conduct made such confusion possible. (*State of California (Department of Transportation)* (1983) PERB Decision No. 304-S.) The posting requirement in this case shall therefore include those physical locations and electronic means customarily used by the City to communicate with employees in the Dispatcher I, II and III series in the Police Department bargaining unit.

Disputes involving the locations or scope of the posting, which additional form(s) of electronic means shall be used to post notice, or any other issues relating to the remedy shall be resolved in compliance proceedings.

ORDER

Based on the foregoing findings of fact and conclusions of law and the entire record in this case and pursuant to the Meyers-Milias-Brown Act (MMBA), Government Code section 3509, the Public Employment Relations Board (PERB or Board) REVERSES the administrative law judge's (ALJ) proposed decision and finds that the City of Sacramento (City) violated section 3506.5, subdivision (c), of the Government Code by failing and refusing to meet and negotiate in good faith with Stationary Engineers Local 39, International Union of Operating Engineers, AFL-CIO (Local 39), which is the exclusive representative of employees in the City's General Supervisory bargaining unit, over the City's decision to transfer duties from the Supervising Dispatcher classification in the General Supervisory bargaining unit to the Dispatcher III classification in the Police Department bargaining unit represented by another employee organization. The above conduct also violated subdivisions (b) and (c) of section 3506.5 of the MMBA, by denying Local 39 rights guaranteed to it by the MMBA, and by interfering with the rights of employees to join, form and participate in the activities of

employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.

The City, its governing board and its representatives, shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and confer in good faith with Local 39, the exclusive representative of employees in the General Supervisory bargaining unit, by unilaterally transferring duties from the Supervising Dispatcher classification in Local 39's unit to the Dispatcher III classification in the Police Department bargaining unit.

2. Denying Local 39 rights guaranteed by the MMBA to represent employees.

3. Interfering with the rights of employees in the City's General Supervisory bargaining unit 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.

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

1. At the request of Local 39, restore the prior status quo by reinstating to the position of Supervising Dispatcher all persons employed by the City in that classification as of June 30, 2011, including but not limited to Katie Braverman, Debbie Kriske, LaTonya McDaniel, Jenny McHenry, Patty McGeary, Melanie Plummer, and Paul Troxel; make Local 39 whole for all lost dues for the period of time the affected employees were demoted, as a result of the unilateral transfer of Supervising Dispatcher duties out of the General Supervisory bargaining unit; and, bargain in good faith with Local 39 over any proposed decision(s) to transfer the duties of the Supervising Dispatcher classification to another

classification and/or another bargaining unit, as well as any negotiable effects of such decision(s).

2. Make whole for any loss in compensation and benefits suffered as a result of the City's unlawful transfer of duties from the General Supervisory bargaining unit to the Police Department bargaining unit all persons employed as of June 30, 2011, by the City as Supervising Dispatchers, including but not limited to Katie Braverman, Debbie Kriske, LaTonya McDaniel, Jenny McHenry, Patty McGeary, Melanie Plummer, and Paul Troxel. Such payment shall include interest at a rate of 7 percent per annum.

With regard to the above provisions requiring the City to make Local 39 and the affected employees whole for lost dues, wages, benefits or other monetary compensation, this Order shall be stayed for 60 days during which, solely at Local 39's option, 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.

3. Within ten (10) workdays of service of a final decision in this matter, post at all work locations where notices to employees in the City are customarily posted, copies of the Notice attached hereto as an Appendix, signed by an authorized agent of the City. Such posting shall be maintained for at least thirty (30) consecutive workdays. 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 in the General Supervisory bargaining unit and with employees in the Dispatcher I, II and III series in the Police Department bargaining unit. Pursuant to *Santa Monica Community College District* (1979) PERB Decision No. 103 and other applicable authority, the City shall identify and include in

its electronic posting any and all affected employees who are no longer employed by the City as of the date of posting, or use personal delivery or some alternative means of notification reasonably devised to ensure that any and all affected employees who are no longer employed by the City are advised of their rights and remedies under this Decision. The City, its governing board and its representatives shall take reasonable steps to ensure that the posted Notice is not reduced in size, defaced, altered or covered by any material.

4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of PERB, or the General Counsel's designee. The City shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on Local 39.

Chair Martinez and Member Huguenin joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. SA-CE-738-M, *Stationary Engineers Local 39, Inte5national Union of Operating Engineers, AFL-CIO v. City of Sacramento*, in which all parties had the right to participate, it has been found that the City of Sacramento (City) violated the Meyers-Milias Brown Act (MMBA), Government Code section 3506.5, subdivision (c), by failing and refusing to meet and negotiate in good faith with Stationary Engineers Local 39, International Union of Operating Engineers, AFL-CIO (Local 39), which is the exclusive representative of employees in the City's General Supervisory bargaining unit, over the City's decision to transfer duties from the Supervising Dispatcher classification in the General Supervisory bargaining unit to the Dispatcher III classification in the Police Department bargaining unit separately represented by another employee organization. The Public Employment Relations Board (PERB) finds the above conduct also violated subdivisions (b) and (c) of section 3506.5 of the MMBA, by denying Local 39 rights guaranteed to it by the MMBA, and by interfering with the rights of employees to join, form and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.

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

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and confer in good faith with the exclusive representative of employees in the General Supervisory bargaining unit by unilaterally transferring duties from that unit to another classification in the Police Department bargaining unit.

2. Denying Local 39 rights guaranteed by the MMBA to represent employees.

3. Interfering with the rights of employees in the City's General Supervisory bargaining unit 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.

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

1. At the request of Local 39, restore the prior status quo by reinstating to the position of Supervising Dispatcher all persons employed by the City in that classification as of June 30, 2011, including but not limited to Katie Braverman, Debbie Kriske, LaTonya McDaniel, Jenny McHenry, Patty McGeary, Melanie Plummer, and Paul Troxel; make Local 39 whole for all lost dues for the period of time the affected employees were demoted, as a result of the unilateral transfer of Supervising Dispatcher duties out of the General Supervisory bargaining unit; and, bargain in good faith with Local 39 over any proposed

decision(s) to transfer the duties of the Supervising Dispatcher classification to another classification and/or another bargaining unit, as well as any negotiable effects of such decision(s).

2. Make whole for any loss in compensation and benefits suffered as a result of the City's unlawful transfer of duties from the General Supervisory bargaining unit to the Police Department bargaining unit all persons employed as of June 30, 2011, by the City as Supervising Dispatchers, including but not limited to Katie Braverman, Debbie Kriske, LaTonya McDaniel, Jenny McHenry, Patty McGeary, Melanie Plummer, and Paul Troxel. Such payment shall include interest at a rate of 7 percent per annum.

With regard to the above provisions requiring the City to make Local 39 and the affected employees whole for lost dues, wages, benefits or other monetary compensation, this Order shall be stayed for 60 days during which, solely at Local 39's option, 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.

Dated: _____ CITY OF SACRAMENTO

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.