STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SANTA CLARA COUNTY CORRECTIONAL PEACE OFFICERS ASSOCIATION, Charging Party, v. COUNTY OF SANTA CLARA, Respondent.	Case No. SF-CE-1150-M PERB Decision No. 2431-M June 10, 2015

Appearance: Mastagni, Holstedt by Jeffrey R. A. Edwards, Attorney, for Santa Clara County Correctional Peace Officers Association.

Before Martinez, Chair; Huguenin and Banks Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Santa Clara County Correctional Peace Officers Association (Association) from the Office of the General Counsel's dismissal of its unfair practice charge. The charge, as amended, alleged that the County of Santa Clara (County) violated the Meyers-Milias-Brown Act (MMBA)[1] and PERB regulations[2] by unilaterally altering the status quo terms and conditions of employment, as set forth in Section 20 (Tuition Reimbursement) of the parties' expired 2011-2013 Memorandum of Understanding (MOU) and/or as established by past practice, without bargaining to impasse or agreement.

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

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

The Office of the General Counsel dismissed the amended charge because it considered its allegations to be inconsistent with the "clear and unambiguous" provisions of the parties' expired collective bargaining agreement. As explained below, we reverse the dismissal and remand for issuance of a complaint.

PROCEDURAL HISTORY

The Association filed its charge on December 10, 2013. The charge alleged that the County had unilaterally changed or repudiated its policy and practice, as contained in Section 20 of the expired MOU, regarding reimbursement of tuition costs incurred by bargaining unit employees for attending training and development events.

On January 13, 2014, the County advised the Association of its intent to resolve this charge by reimbursing Julio Alvarez (Alvarez) for classes he attended on August 26, 2013, and October 16 through 18, 2013. After receiving no response from the Association, on January 16, 2014, the County informed the Office of the General Counsel of its willingness to reimburse Alvarez in return for withdrawal of the charge. The County's correspondence with the Office of the General Counsel was not signed under oath.

On March 12, 2014, the Office of the General Counsel issued a warning letter advising the Association that the charge, as written, failed to state a prima facie case that a unilateral change had occurred. The warning letter included no discussion of PERB's jurisdiction over this dispute.

After being granted an extension of time, the Association filed an amended charge on April 24, 2014. The amended charge alleged that the County unilaterally changed the status quo terms and conditions of employment contained in Section 20 of the expired MOU *and* that it had unilaterally changed "established practice" regarding tuition reimbursements, as contained in the

County's Employee Development Reimbursement Form. Aside from a request for attorneys' fees at the appropriate lodestar rate, the Association has requested a standard Board-ordered remedy in a unilateral change case, including a cease-and-desist order, posting of notice to employees of the County's unlawful conduct, and a make whole order for all affected bargaining unit employees, including but not limited to Alvarez, plus interest for any reimbursement requests that were denied as a result of the alleged unilateral change(s).

On May 12, 2014, the County filed a position statement which included as exhibits copies of the reimbursement form, in which Alvarez requested reimbursement for the Outlaw Motorcycle Gang Class Update and the 2013 San Mateo Gang Symposium. As discussed in more detail below, the County's position statement was not signed under oath and it did not include proof of service on the Association.

On May 21, 2014, the County provided the Office of the General Counsel with a corrected position statement which included a declaration under penalty of perjury that its contents were true, and a completed proof of service indicating that a sworn version of the position statement had been mailed to the Association on May 12, 2014.

Also on May 21, 2014, the Office of the General Counsel dismissed the amended charge.

On June 10, 2014, the Association filed the present appeal.[3] The Association concurrently filed a request for PERB to take administrative notice of the reimbursement form, which was attached to both the County's unsworn and sworn position statements.

The County filed no opposition to the appeal.

[3] Although the Association's filing is captioned "Statement of Exceptions to Proposed Decision," the filing complies with the requirements of PERB Regulation 32635 governing appeals from dismissal without a hearing. We regard the filing as an appeal from dismissal.

FACTUAL ALLEGATIONS IN THE CHARGE

On review of a dismissal without hearing, we assume the truth of the charging party's factual allegations. (*San Juan Unified School District* (1977) EERB[4] Decision No. 12, p. 5; *Golden Plains Unified School District* (2002) PERB Decision No. 1489, p. 6.) Where the charging party offers conflicting versions of the facts, the Board accepts that version most favorable to the charging party's case and disregards others. (*California School Employees Association & its Chapter 244 (Gutierrez)* (2004) PERB Decision No. 1606, pp. 3-4.) We may also consider information provided by the respondent, when such information is submitted under oath, complements without contradicting the facts alleged in the charge, and is not disputed by the charging party. (PERB Reg. 32620, subd. (c); *Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M; *Lake Tahoe Unified School District* (1993) PERB Decision No. 994; *Riverside Unified School District* (1986) PERB Decision No. 562a.)

The Association represents the County's Correctional Employees Unit (CEU), which includes the following job classifications: Correctional Officer, Sheriff's Correctional Deputy, Correctional Sergeant, Sheriff's Correctional Sergeant, and Sheriff's Correctional Lieutenant. In *County of Santa Clara* (2014) PERB Decision No. HO-U-1151-M, a separate case involving the same parties and same bargaining unit, an administrative law judge (ALJ) determined that Sheriff's Correctional Officers and Sheriff's Correctional Sergeants are "peace officers" within

[4] Before January 1978, PERB was known as the Educational Employment Relations Board or EERB.

the meaning of Penal Code section 830.1,[5] while the remaining titles are considered "custodial officers" under a different provision of the Penal Code.[6]

The County's position statement does not challenge PERB jurisdiction in this matter and neither the amended charge nor the Association's appeal mentions or discusses MMBA section 3511 or PERB jurisdiction to order a remedy affecting "persons" who are peace officers.

The Association and the County were parties to an MOU in effect from September 19, 2011 through September 1, 2013. Section 20 of the expired MOU includes a tuition reimbursement fund for unit employees, consisting of $15,000 per year; unused portions of the fund "rollover into the next fiscal year," and "will accumulate for the term of the [MOU] and will revert to the [C]ounty thereafter." Section 20 further provides that unit employees are eligible for reimbursement if, among other things, the application for reimbursement was filed "prior to the commencement of the course," and "[t]here are sufficient funds available in the program."

The amended charge also alleges that the County has "routinely" granted tuition reimbursement requests to unit employees who have not submitted an application before commencement of the course. Included with the County's corrected position statement is a copy

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[5] After no exceptions were filed, the ALJ's decision in *County of Santa Clara, supra,* PERB Decision No. HO-U-1151-M became final on November 4, 2014. Pursuant to PERB Regulation 32300, the decision is not a precedential decision of the Board itself, but its factual findings and legal conclusions are binding on the parties. PERB may take administrative notice of matters included in its own files, including materials from other cases. (*Antelope Valley Community College District* (1979) PERB Decision No. 97; *Palo Verde Unified School District* (1988) PERB Decision No. 689.)

[6] The County's attempt to confer "peace officer" status on Correctional Officers, because of a shortage of personnel in the County jails with full gun-bearing rights, has also been the subject of extensive litigation in the courts. (See *County of Santa Clara v. Deputy Sheriffs' Association of Santa Clara County* (1992) 3 Cal.4th 873; *People ex rel. Deputy Sheriffs' Association of Santa Clara County, Inc. v. County of Santa Clara* (1996) 49 Cal.App.4th 1471.)

of its reimbursement form, which requires the requesting employee to sign, under penalty of perjury, a statement acknowledging, among other things, that "this form and all required documents ... must be received by Employee Development *no later than two months after the last day of the event*" for which reimbursement has been requested. (Emphasis added.) The form requires the requesting employee to authorize a payroll deduction to allow the County to recoup payment from the employee if any one of several conditions is not met, including if the employee fails to submit proof of successful completion of the course "within 2 months after the end date of the event." The right-hand side of the form has an "Office Use Only" column which includes several options to indicate why a request has been denied, including "Claim submitted beyond 2 month deadline," "Claim submitted after fiscal year end," "Individual Maximum has been reached," and "Fund has been exhausted." The form also provides a space marked "Other," followed by several blank lines to include a written explanation.

The amended charge further alleges that the MOU language has remained the same for more than a decade before the present controversy arose and that the County has never previously refused to reimburse unit employees' tuition expenses during the gaps between the expiration of one MOU and ratification of its successor. By way of example, the Association specifically alleges, beginning about May 2011, the parties had been "out of contract" for approximately one year, during which time the County maintained the terms and conditions of employment, including reimbursement of unit employees' tuition for work-related events or classes, until a successor agreement was reached.

The County maintains various local rules governing employer-employee and labor relations. In language that is similar or identical to that found in the MMBA, Section A25-393 of the local rules sets forth the County's duty to meet and confer in good faith with the

representatives of recognized employee organizations concerning wages, hours and other terms and conditions of employment. Section A25-397 expressly acknowledges the County's obligation to provide reasonable advance notice to recognized employee organizations of any proposed ordinance, rule, regulation or proposal directly relating to matters within the scope of representation.

On August 19, 2013, County Labor Relations Representative Mitchell Buellesbach (Buellesbach) met with Mark Salvo (Salvo), the chief spokesperson for the Association bargaining team, to discuss extending the parties' MOU, which was set to expire in approximately two weeks. Salvo explained that, in the Association's view, no extension was necessary because the terms and conditions of employment contained in the MOU would remain in effect until the parties agreed otherwise or exhausted impasse resolution procedures. Salvo also advised Buellesbach that the Association had never previously entered into a contract extension to cover the post-expiration period of negotiations. The meeting ended with Buellesbach stating that he understood the Association's position, and that the parties could revisit the issue at a later date, if necessary.

Alvarez is a Correctional Peace Officer employed by the County since 1989 and is the Vice President of the Association. Since 2002, Alvarez has served as a training officer as part of his duties with the County. In that capacity, he has attended a variety of classes on gangs and other criminal organizations active in the County correctional system. The Association alleges that these classes assist Alvarez in identifying gang members and in recognizing and preventing conflicts between gangs, knowledge which Alvarez then uses when training other correctional officers. The Association alleges that Alvarez has attended, on average, 80 to 100 hours of such classes per year during the eight years preceding the present charge, and that the County has

routinely reimbursed Alvarez and other officers in the CEU for tuition and other costs associated with attending such classes.

On August 26, 2013, Alvarez attended the Outlaw Motorcycle Gang Intelligence Update, an 8-hour class covering, inter alia, methods for identifying gang members. The class cost $45.00, which Alvarez paid out-of-pocket.

On October 11, 2013, Alvarez requested reimbursement with the County's Employee Services Agency for the cost of attending the Outlaw Motorcycle Gang Intelligence Update. When Alvarez submitted the form, a receptionist in the Employee Services Agency informed him that, pursuant to a recent directive from the County's Labor Relations Office, the County would not process his request or any other request by Association-represented employees for tuition reimbursement until negotiations for a successor agreement had concluded. A copy of Alvarez's completed reimbursement form was included with the County's corrected position statement. The "Office Use Only" section of the form indicates that it was reviewed by a County employee on October 24, 2013. However, the copy of the form provided by the County does not indicate why the request was denied or even that it was denied.

Upon learning that his request would be denied, on October 11, 2013, Alvarez advised the Association by email message that his request for tuition reimbursement had been denied, and that the receptionist had informed him that the County would not process requests for tuition reimbursement until a new MOU took effect. The same day, Salvo forwarded Alvarez's message to Buellesbach and requested that the latter clarify the County's position. Buellesbach responded that because the Association had declined to extend the MOU, it had expired and, consequently, "there is no authority for tuition reimbursements." Further communications

between Slavo and Buellesbach followed on October 14 and 25, and November 8, 2013, without resolution.

Notwithstanding his October 11, 2013 conversation with the County's receptionist, on October 16-18, 2013 Alvarez attended the San Mateo Gang Symposium, a three-day conference on identifying gangs in the San Francisco Bay area. Attendance at the symposium cost $250.00, which Alvarez paid out of pocket. On October 22, 2013, Alvarez submitted a tuition reimbursement application to the County's Employee Services agency, which, like his previous request, was denied. According to the Association, both requests were denied with the justification that because the contract was not extended, the County was not obligated to continue the tuition reimbursement program contained in Section 20 of the MOU.

The Association alleges, inter alia, that the County unilaterally departed from the status quo terms and conditions contained in Section 20 of the expired MOU and established practice, as memorialized in the County's reimbursement form.

THE WARNING AND DISMISSAL LETTERS

Mootness

In a footnote, the dismissal letter concluded that the Association's unilateral change allegation was not moot, notwithstanding the County's assertion that it has fully reimbursed Alvarez for the two events identified in the charge and supporting materials. The dismissal letter offers two reasons in support of this conclusion. First, the Office of the General Counsel declined to consider any factual allegations included in the County's "position statement," because it was not signed under oath and because it included no proof of service. Although the County did submit an "amended" position statement which attempted to correct these two

deficiencies, the Office of the General Counsel did not consider the amended position statement because it was filed on May 21, 2014, the same day the charge was dismissed.

In the alternative, the Office of the General Counsel determined that, even if the County had fully reimbursed Alvarez, the issues raised by the Association's charge are not moot. Citing *County of Sacramento* (2008) PERB Decision No. 1943-M, the Office of the General Counsel noted that reversal or rescission of a unilateral change does not excuse or cure the alleged violation or otherwise render it moot where the respondent maintains that it has the right to repeat the complained-of conduct.

Failure to State a Prima Facie Case

Based on the material included the Association's charge, the Office of the General Counsel understood one allegation to be that the County had violated the status quo terms and conditions contained in Section 20 of the expired MOU, which, by its terms, requires reimbursement of tuition costs to bargaining unit employees if certain criteria are met. According to the dismissal letter, the Office of the General Counsel understood the amended charge to include an *additional* allegation that the County had violated an established practice not contained within the express terms of the expired MOU. Specifically, the dismissal letter explained that, notwithstanding the language of Section 20 requiring reimbursement requests to be submitted *in advance* of the event at which expenses are incurred, the Association alleged in the amended charge that its members have routinely been reimbursed for tuition expenses, so long as their requests were made within two months *after* the last day of the event, as memorialized in the County's reimbursement form.

The Office of the General Counsel cited PERB and National Labor Relations Board precedent holding that, "[a]s a general rule," an employer must maintain the status quo terms

and conditions following the expiration of an agreement, even when the terms purport to apply only for the "duration" of the agreement. In particular, the Office of the General Counsel noted that the "duration" language found in many agreements is "too general and vague" to waive the union's right to bargain over mandatory subjects and that, in the absence of more explicit language, the employer must refrain from unilateral action following expiration of an agreement until negotiations have resulted in impasse or agreement.

However, the Office of the General Counsel also noted that, "where the agreement expressly provides that a contractual obligation will terminate upon expiration, the NLRB will find a waiver." In the present circumstances, the Office of the General Counsel recited language from Section 20 of the expired MOU, which states that the County will maintain the tuition reimbursement program "for the term of" the MOU. According to the Office of the General Counsel, while this language by itself would not constitute a waiver, Section 20 includes additional language stating that "unused portions of the [reimbursement] fund will accumulate for the term of [the MOU] *and will revert to the [C]ounty thereafter*." (Emphasis added.) The Office of the General Counsel also noted that Section 20 makes payment of a reimbursement request contingent upon the availability of funds. According to the Office of the General Counsel, these provisions, taken together, were sufficient to constitute a waiver, such that the County was authorized to disregard the tuition reimbursement program once the parties let the MOU expire.

Additionally, the Office of the General Counsel noted that each of the instances in which Alvarez submitted requests for reimbursement, as alleged in the charge, occurred *after* the expenses had already been incurred, while the language of Section 20 requires that requests be submitted in advance. The Office of the General Counsel reasoned that, even if the terms

and conditions of the expired MOU remained in effect, they would not assist Alvarez in the present circumstances, because, under Section 20, he had no right to reimbursement after the fact. Moreover, the Office of the General Counsel noted that Alvarez had submitted each of the reimbursement requests at issue after the MOU had expired at which point, according to the Office of the General Counsel's interpretation of Section 20, any unused tuition reimbursement funds were to revert to the County. In either event, Alvarez had no right under Section 20 or its expired terms to reimbursement of the expenses incurred and thus, the allegation that the County had unilaterally altered the status quo, as contained in the expired MOU, must be dismissed.

The Office of the General Counsel also rejected the Association's separate allegation that the County had unilaterally departed from an established practice by noting that a past practice is only relevant to a unilateral change allegation if the parties' written agreement is silent or ambiguous on the subject. According to the Office of the General Counsel, where a written agreement is "clear and unambiguous," its terms govern (*County of Riverside* (2013) PERB Decision No. 2307-M), regardless of whether the parties have previously sought to enforce their contractual rights. (*Marysville Joint Unified School District* (1983) PERB Decision No. 314 (*Marysville*).) According to the Office of the General Counsel, the past practices alleged by the Association are "directly contrary to the clear and unambiguous language of the [expired] MOU," including its requirement that reimbursement requests be submitted *before* incurring educational expenses and its condition that expenses are reimbursable, *only* if funds are available. Because the County "was not prohibited from enforcing its contractual right to deny reimbursement requests that were not submitted in

accordance with the clear and unambiguous terms of the MOU," the Office of the General Counsel concluded that the charge also failed to state a prima facie case that the County had unilaterally altered an established practice.

THE APPEAL

On appeal, the Association argues that the Office of the General Counsel misunderstood the reversion provision of the MOU which, according to the Association, "only applies to funds that rolled over from a prior fiscal year," but "not [to] the annual deposit into the account" used to reimburse such requests. Thus, the reversion provision "operates essentially as a cap on the rolled over funds to prevent the fund from growing indefinitely," but "does not extinguish the fund when [the] MOU expires."

The appeal also argues that the County unilaterally altered *two* separate procedures – one contractual and one established by County policy and practice – which, according to the Association, govern *two different* kinds of reimbursement requests. According to the Association, the fact that the reimbursement procedure set forth in the County's reimbursement form differs from the procedure set forth in the MOU does not mean that the former is eclipsed by the latter. Rather, the two procedures were intended to cover different kinds of reimbursement requests and the Office of the General Counsel therefore erred in determining that one procedure was not an established practice, simply because it varied from the other procedure set forth in the MOU.

DISCUSSION[7]

A. Jurisdiction

The present charge was filed by an employee organization representing a unit comprised at least in part of "peace officers" within the meaning of Penal Code section 830.1. MMBA section 3511[8] expressly excludes persons who are "peace officers" from PERB's jurisdiction. To avoid acting in excess of its authority, PERB has an obligation to determine whether it has jurisdiction to consider a matter, regardless of whether the parties themselves have raised the issue. (*Los Angeles Community College District* (1994) PERB Decision No. 1060, p. 8; *City of Redondo Beach* (2014) PERB Order No. Ad-409-M, p. 3; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 391-392.)

PERB has previously asserted jurisdiction in unfair practice cases involving similarly-situated parties, *i.e.*, charges brought by employee organizations representing a unit comprised at least in part of peace officers. (*County of Calaveras* (2012) PERB Decision No. 2252-M; *County of Yolo* (2013) PERB Decision No. 2316-M.) In both *Calaveras* and *Yolo*, the underlying disputes involved whether the employer had violated its local rules and/or the MMBA when processing petitions to sever or modify bargaining units including peace officers

[7] We find it unnecessary to address the Office of the General Counsel's determination that this dispute is not moot, as that issue was not raised by the Association's appeal and the County has filed no opposition to the appeal.

[8] MMBA section 3511 provides: "The changes made to Sections 3501, 3507.1, and 3509 of the Government Code by legislation enacted during the 1999-2000 Regular Session of the Legislature shall not apply to persons who are peace officers as defined in Section 830.1 of the Penal Code."

and/or to decertify or recognize employee organizations seeking to represent a unit including peace officers.[9]

Since the MMBA came under PERB's jurisdiction in 2001, PERB has never questioned its authority to entertain an unfair practice charge brought by the exclusive representative of a "mixed" bargaining unit of peace officers and non-peace officers. (*County of Calaveras*; *County of Yolo*.) MMBA section 3511 precludes jurisdiction only with respect to charges brought by peace officers, not employee organizations. As important, mixed bargaining units include public employees who are not peace officers. No plausible interpretation of the MMBA would support the conclusion that the exclusive representative of such employees would be precluded from bringing an unfair practice charge on their own or their bargaining unit's behalf. Because, however, no Board decision has ever addressed this issue, we take this opportunity to address it here. By issuance of this decision, we make explicit PERB's authority to hear charges, such as the present one, that are brought by employee organizations, including employee organizations representing or seeking to represent units including persons who are peace officers.

[9] *County of Santa Clara* (2013) PERB Decision No. 2321-M also involved a dispute over Correction Officers by the same parties as the present case. In *County of Santa Clara*, the Association appealed from partial dismissal of an unfair practice charge alleging that the County had unilaterally changed evaluation procedures, hours, and staffing levels affecting Correction Officers who, pursuant to a legislative amendment, were eligible to become Correction Deputies, a position considered a "peace officer" within the meaning of the Penal Code, effective January 2011. (*Id.* at pp. 5-6.) However, in that case, the new peace officer classification was not established until March 2011. Because the charge was brought by an employee organization, and because it was undisputed that the employees in question were not "peace officers" when the unfair practices allegedly occurred, there was no issue of the Board's jurisdiction in that dispute. (*Los Angeles Community College District* (1994) PERB Decision No. 1060, pp. 3, 8.)

Although MMBA section 3511 excludes PERB from hearing charges filed by "persons" who are peace officers, it does not prohibit the agency from hearing charges brought by employee organizations. The fact that an employee organization represents or seeks to represent *some* peace officers does not alter the analysis or result. This interpretation is supported by the language of the statute and by the familiar canons of construction, including the maxim that statutory terms are not interpreted in isolation, but rather are to be read with reference to the entire scheme of law of which they are a part so that the whole may be harmonized and retain effectiveness. (*Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, 530; see also *Los Angeles Superior Court* (2010) PERB Decision No. 2112-I, adopting dismissal letter at p. 2 [citing similar maxims for contract interpretation].) Of particular significance is the distinction appearing elsewhere in the statute between "person" and "entity," which indicates that the term "person" refers only to a *natural* person and not to *corporate* or *associational* personhood, such as an employee organization. (See MMBA, § 3509.5, subd. (c).) If the Legislature had intended to prohibit PERB from investigating and remedying an unfair practice charge brought by an employee organization, it would have stated that PERB has no authority over "persons who are peace officers" *nor over entities* who represent or seek to represent peace officers. We believe the policies and purposes of the MMBA would not be served by expanding limitations on PERB's authority beyond those which the statutory language expressly requires. (*City of Redondo Beach, supra*, PERB Order No. Ad-409-M, pp. 3-5.)

Moreover, the fact that the Legislature has since chosen not to limit PERB's jurisdiction over MMBA factfinding requests, a right that may only be asserted by employee organizations and not by "persons" who are peace officers (*City of Redondo Beach*), lends

further support to our conclusion that the Legislature did not intend for MMBA section 3511 to strip PERB of all jurisdiction simply because some persons who are peace officers may benefit from a Board-ordered remedy in a case brought by an employee organization.

B. The Association's Request for Administrative Notice

The Association has requested administrative notice of the County's reimbursement form which, according to the Association, provides probative information regarding the parties' practice for reimbursing employees in that it acknowledges that employees may be reimbursed for attending training and development events for up to two months *after* the event. Although copies of the form were included as exhibits to the County's position statement, because the County's position statement was not signed under penalty of perjury and did not include proof of service, as required by PERB regulations, the Office of the General Counsel determined that it could not consider the factual allegations included in the position statement or its attachments. The Office of the General Counsel also determined that this information, even if considered, would not alter its conclusion that the Association had failed to state a prima facie case because the language in the form varies from the language in the expired MOU and therefore could not serve as an "established practice" to support a unilateral change allegation.

We find it unnecessary to rule on the Association's request for administrative notice and/or to determine whether "good cause" exists to consider evidence submitted for the first time on appeal.[10] We agree with the Office of the General Counsel's refusal to consider factual

[10] PERB Regulation 32635, subdivision (b), and decisional law preclude Board consideration of new evidence or new charge allegations presented for the first time on appeal unless the proponent establishes "good cause." (*Service Employees International Union, Local 1021 (Estival)* (2009) PERB Decision No. 1998-M, p. 2; *California School Employees Association & its Chapter 198 (Bruce)* (2006) PERB Decision No. 1858, p. 2.)

allegations in an unsworn position statement submitted by the County without proof of service. (PERB Regs. 32140, subd. (a), 32620, subd. (c).) While defective service may be excused if all parties to the case have had actual notice of the issues and would not be unfairly surprised or unduly prejudiced (*Fontana Unified School District* (2003) PERB Order No. Ad-324, p. 7; *Santa Monica-Malibu Unified School District* (1987) PERB Order No. Ad-163, p. 2), PERB has never adopted a similarly lenient standard for excusing unsworn position statements. (*National Education Association-Jurupa (Norman)* (2014) PERB Decision No. 2371, p. 7.) However, because the County's *corrected* position statement, which was signed under penalty of perjury and which included proof of service, was filed the same day as the dismissal, we conclude that the County's position statement and its attachments are within the scope of the Board's review.

C. Dismissal for Failure to State a Prima Facie Case

The appeal presents allegations that the County imposed unilateral changes in terms and conditions of employment constituting "per se" refusals to meet and confer in good faith. To prove a unilateral change, the charging party must establish that: (1) the employer 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. (*County of Santa Clara, supra*, PERB Decision No. 2321-M, p. 13.)

Here, the Association has alleged that, upon expiration of the parties' MOU on September 1, 2013, the County ceased reimbursing bargaining unit employees for tuition without notice or opportunity for bargaining. Because employer policies concerning reimbursement for job-related tuition or training expenses affect the statutorily-enumerated

subject of wages, such policies are negotiable. (MMBA, § 3504; *Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375, pp. 29-30.) The present dispute therefore involves matters within the scope of representation.

Additionally, the County's refusal to reimburse Alvarez occurred while the parties were negotiating for a successor MOU and before exhaustion of any impasse resolution procedures. The Association has sufficiently alleged that the alleged change in policy occurred without notice and/or opportunity for bargaining. (*County of Santa Clara, supra*, PERB Decision No. 2321-M, p. 18; *San Mateo County Community College District* (1979) PERB Decision No. 94, p. 12, citing *NLRB v. Katz* (1962) 369 U.S. 736.)

Likewise, according to materials included with the amended charge, the County has asserted that it is legally authorized to refuse to reimburse employees because, according to the County's Labor Relations Representative, without an extension of the MOU "there is no authority for tuition reimbursements." Under PERB precedent, even if an employer's action affects only one employee, it nonetheless has a generalized effect or continuing impact on the unit members' terms and conditions of employment if based on the employer's assertion of a contractual or other legal right to act unilaterally. (*County of Riverside* (2003) PERB Decision No. 1577-M, p. 6; *Hacienda La Puente Unified School District* (1997) PERB Decision No. 1186, p.4.)

Thus, the sole issue is whether the County's refusal to reimburse Alvarez constituted a change in policy, including an established practice. Although the Office of the General Counsel determined that no change to an established practice occurred because there could be no "established" practice contrary to the clear and unambiguous terms of the parties' MOU, we

conclude that the charge sufficiently alleges the existence of an established practice regarding employee reimbursements and that a change in that practice occurred when the County refused to reimburse Alvarez's requests.

In our view, the Office of the General Counsel misconstrued the language of Section 20(a) in finding that Section 20 (Tuition Reimbursement) had expired. Subdivision (a), "Fund," establishes a tuition reimbursement fund into which $15,000 is placed per year for the bargaining unit. Unused funds from one year will roll over into the next year and unused portions of the tuition reimbursement fund will revert to the County at the end of the contract term. The Office of the General Counsel focused on the reversion term, not on the $15,000 per year term. The MOU does not contemplate that the bargaining unit would not have available to it for tuition reimbursement $15,000 per year. The only legitimate *funding* basis on which a request for reimbursement could be been denied would be if the $15,000 had already been expended. But that was not the basis for the County's decision here. Alvarez's request was denied because the MOU had expired. Because the terms of the expired contract continue until agreement or impasse is reached, the request for reimbursement should have been processed in the same manner as if the contract were still in effect. (*Pajaro Valley Unified School District* (1978) PERB Decision No. 51, pp. 5-7, citing *NLRB v. Katz, supra,* 369 U.S. 736.)

We disagree with the Office of the General Counsel's determination that the Association waived its right to have Section 20 survive upon expiration of the contract when it agreed to the reversion language for two reasons. An affirmative defense not raised by the respondent at the charge processing stage cannot provide the basis for dismissal, even if the pertinent facts are undisputed. (*Metropolitan Water District of Southern California* (2009) PERB Decision No. 2055-M, p. 4, fn. 4; *Long Beach Community College District* (2003) PERB Decision

No. 1568, p. 15.) While PERB's regulations require a Board agent investigating a charge to "[a]ssist the charging party to state in proper form the information required" (PERB Reg. 32620, subd. (b)(1)), they include no similar requirement that affirmative defenses not raised by the respondent be considered. Because the County failed to raise the defense of consent or waiver by agreement while the charge was before the Office of the General Counsel, it cannot serve as the basis for dismissal.

Additionally, we do not interpret the reversion language of Section 20 to mean that no funds were available for tuition reimbursement at the end of the contract term. As stated above, under the terms of subdivision (a), there is $15,000 available in the tuition reimbursement fund *each* year. In sum, unused monies may revert to the County at the end of the contract term, but that does not mean that no monies exist in the fund *on a year to year basis* from which to pay bargaining unit members. The MOU contemplates that every fiscal year there will be $15,000 to draw from.

Having determined that Section 20 did not expire, the next question is whether the MOU is clear and unambiguous on whether a request for reimbursement must be made before course commencement, such that the MOU trumps the separate past practice alleged by the Association. In our view, the MOU is not clear and unambiguous on this issue. Although a Board agent must accept the plain language of a contract or local rule where it is clear and unambiguous (*Glendora Unified School District* (1991) PERB Decision No. 876; *Butte Community College District* (1985) PERB Decision No. 555; see also *Marysville, supra,* PERB Decision No. 314, p. 9), where, as here, "there is a legitimate dispute over the meaning of [a] contract, the parties must be afforded the opportunity to offer evidence in support of their respective contentions" before the

matter is dismissed. (*Saddleback Community College District* (1984) PERB Decision No. 433, pp. 4, 2-3; *Fullerton Joint Union School District* (2004) PERB Decision No. 1633, pp. 5-6.)

Section 20 covering "Tuition Reimbursement" is divided into five sections. Subdivision (a) concerning "Fund" is discussed above. Subdivision (b) concerns "Eligibility." Subdivision (b)(3) states *as one of the eligibility criteria* the following: "The application was filed with the appointing authority or his/her designee prior to the commencement of the course." "[A]pplication" is not defined. Given that this is a section on eligibility, not tuition reimbursement, one possible interpretation is that the term refers to a process for obtaining pre-approval from the appointing authority *for attending the course.*[11]

Subdivision (d) concerns "Reimbursement." It requires only the following: "employees shall receive full immediate reimbursement for tuition and other required costs (including textbooks) upon presentation of a receipt showing such payment has been made."[12]

Subdivision (c) concerning "Disapproval" is the only section that refers to "an application for tuition reimbursement."

One possible interpretation of Section 20 is that the word "application" in subdivision (b) on eligibility refers to an application for tuition reimbursement. The Office of the General Counsel interpreted Section 20 in this way. Having concluded there was a conflict

[11] This interpretation is supported by reference to the County's reimbursement form, which states: "If this course is being taken during your regular work hours, your manager must have prior knowledge and sign at least 10 days in advance of the event."

[12] Subdivision (e) concerns "Deduction Authorization," which topically follows logically from Subdivision (d) on "Reimbursement." An employee who has received reimbursement may be required to return the reimbursed tuition in whole or in part by way of a payroll deduction under set circumstances, i.e., unsuccessful participation in course, leaving County employment.

between the "clear and unambiguous" MOU provision and the past practice regarding the issue of pre-approval of a tuition reimbursement request, the Office of the General Counsel concluded that the MOU trumps the past practice under *Marysville, supra,* PERB Decision No. 2321-M.

However, whether the MOU requires that the tuition reimbursement request be submitted before course attendance is at least ambiguous, given that subdivision (d), which contains the tuition reimbursement requirements, contains no such requirement. This ambiguity means two things. First, *Marysville* cannot be applied here because the contract provision is not clear and unambiguous. Second, it is possible to construe the past practice as resolving any ambiguity about whether pre-approval of a tuition reimbursement request is required under the County's policy. This interpretation is supported by language on the form, whereby the employee making the request acknowledges that the form and supporting documents must be received by Employee Development no later than two months after the last day of the event for which reimbursement is being requested.

We conclude that the Association has adequately alleged a past practice that the County accepted tuition reimbursement requests submitted within two months of completion of the course and that, upon expiration of MOU, the County failed to maintain the status quo terms and conditions of employment, including the past practice described above.

We reverse the dismissal and remand this matter for issuance of complaint.

ORDER

It is hereby ORDERED that the dismissal of the unfair practice charge, as amended, in Case No. SF-CE-1150-M is REVERSED and the matter REMANDED to the Office of the General Counsel for issuance of a complaint that the County of Santa Clara unilaterally altered

an established practice and/or the terms set forth in the parties' expired Memorandum of Understanding by refusing to reimburse bargaining unit employees for tuition or related expenses incurred in work-related educational or training events.

Chair Martinez and Member Huguenin joined in this Decision.