STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

UNFAIR PRACTICE CHARGE

DO NOT WRITE IN THIS SPACE: **Case No:** **Date Filed:**

INSTRUCTIONS: File the original and one copy of this charge form in the appropriate PERB regional office (see PERB Regulation 32075), with proof of service attached to each copy. Proper filing includes concurrent service and proof of service of the charge as required by PERB Regulation 32615(c). All forms are available from the regional offices or PERB's website at www.perb.ca.gov. If more space is needed for any item on this form, attach additional sheets and number items.

IS THIS AN AMENDED CHARGE? **YES** ☐ **If so, Case No.** **NO** ☒

1. CHARGING PARTY: **EMPLOYEE** ☐ **EMPLOYEE ORGANIZATION** ☒ **EMPLOYER** ☐ **PUBLIC**[1] ☐

a. Full name: University Council - American Federation of Teachers

b. Mailing address: Leonard Carder, LLP, 1999 Harrison Street, Suite 2700, Oakland, CA 94612

c. Telephone number: (510) 272-0169

d. Name and title of person filing charge: Afroz Baig, Attorney **E-mail Address:** abaig@leonardcarder.com

Telephone number: (510) 272-0169 **Fax No.:** (510) 272-0174

e. Bargaining unit(s) involved: Unit 18 (non-Senate faculty)

2. CHARGE FILED AGAINST: (mark one only) **EMPLOYEE ORGANIZATION** ☐ **EMPLOYER** ☒

a. Full name: Regents of the University of California

b. Mailing address: University of California, Office of the General Counsel 1111 Franklin St., 8th Floor, Oakland, CA 94607

c. Telephone number: (510) 987-0933

d. Name and title of agent to contact: Allison Woodall, Deputy General Counsel **E-mail Address:** allison.woodall@ucop.edu

Telephone number: (510) 987-0933 **Fax No.:** (510) 987-9757

3. NAME OF EMPLOYER (Complete this section only if the charge is filed against an employee organization.)

a. Full name:

b. Mailing address:

4. APPOINTING POWER: (Complete this section only if the employer is the State of California. See Gov. Code, § 18524.)

a. Full name:

b. Mailing address:

c. Agent:

[1] An affected member of the public may only file a charge relating to an alleged public notice violation, pursuant to Government Code section 3523, 3547, 3547.5, or 3595, or Public Utilities Code section 99569.

SEE REVERSE SIDE

5. GRIEVANCE PROCEDURE

Are the parties covered by an agreement containing a grievance procedure which ends in binding arbitration?

Yes ☐ No ☒

6. STATEMENT OF CHARGE

a. The charging party hereby alleges that the above-named respondent is under the jurisdiction of: (check one)

- ☐ Educational Employment Relations Act (EERA) (Gov. Code, § 3540 et seq.)
- ☐ Ralph C. Dills Act (Gov. Code, § 3512 et seq.)
- ☒ Higher Education Employer-Employee Relations Act (HEERA) (Gov. Code, § 3560 et seq.)
- ☐ Meyers-Milias-Brown Act (MMBA) (Gov. Code, § 3500 et seq.)
- ☐ Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act (TEERA) (Pub. Utilities Code, § 99560 et seq.)
- ☐ Trial Court Employment Protection and Governance Act (Trial Court Act) (Article 3; Gov. Code, § 71630 – 71639.5)
- ☐ Trial Court Interpreter Employment and Labor Relations Act (Court Interpreter Act) (Gov. Code, § 71800 et seq.)

b. The specific Government or Public Utilities Code section(s), or PERB regulation section(s) alleged to have been violated is/are:
Gov. Code Section 3571(a), (b) and (c); PECC, Gov. Code §3555, et seq.; PEDD, Gov. Code § 3550, et seq.

c. For MMBA, Trial Court Act and Court Interpreter Act cases, if applicable, the specific local rule(s) alleged to have been violated is/are (***a copy of the applicable local rule(s) MUST be attached to the charge***)**:**

d. Provide a clear and concise statement of the conduct alleged to constitute an unfair practice including, where known, the time and place of each instance of respondent's conduct, and the name and capacity of each person involved. This must be a statement of the facts that support your claim and *not conclusions of law*. A statement of the remedy sought must also be provided. (*Use and attach additional sheets of paper if necessary.*)

See attachment.

DECLARATION

I declare under penalty of perjury that I have read the above charge and that the statements herein are true and complete to the best of my knowledge and belief and that this declaration was executed on 10/08/2020 (Date)

at Petaluma, CA (City and State)

Afroz Baig (Type or Print Name) (Signature)

Title, if any: Attorney

Mailing address: Leonard Carder, LLP, 1999 Harrison Street, Suite 2700, Oakland, CA 94612

Telephone Number: (510) 272-0169 E-Mail Address: abaig@leonardcarder.com

PROOF OF SERVICE

I declare that I am a resident of or employed in the County of Alameda,

State of California. I am over the age of 18 years. The name and address of my

Residence or business is LEONARD CARDER, LLP; 1999 Harrison Street, Suite 2700, Oakland, CA

94612.

On 10/08/2020 (*Date*), I served the Unfair Practice Charge (*Description of document(s)*)

_____ (*Description of document(s) continued*) in Case No. _____ (PERB Case No.).

on the parties listed below by (check the applicable method(s)):

| placing a true copy thereof enclosed in a sealed envelope for collection and delivery by the United States Postal Service or private delivery service following ordinary business practices with postage or other costs prepaid;

| personal delivery;

| facsimile transmission in accordance with the requirements of PERB Regulations 32090 and 32135(d).

|X electronic service (e-mail) - I served a copy of the above-listed document(s) by transmitting via electronic mail (e-mail) to the electronic service address(es) listed below on the date indicated. (*May be used only if the party being served has filed and served a notice consenting to electronic service or has electronically filed a document with the Board. See PERB Regulation 32140(b).*)

(*Include here the name, address, e-mail address and/or fax number of the Respondent and/or any other parties served.*)

Allison Woodall
Office of the General Counsel
University of California
1111 Franklin Street, 8th Floor
Oakland, CA 94607
via email: UCPERB@ucop.edu

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on 10/08/2020 (*Date*), at Oakland (*City*) CA (*State*).

Carol Edgerton

(*Type or print name*) (*Signature*)

I. INTRODUCTION

Charging Party University Council-American Federation of Teachers ("UC-AFT" or "the Union") brings this charge against Respondent, Regents of the University of California ("UC" or "the University"). This charge arises from UC Irvine's unilateral repudiation of the negotiated status quo created by the expired New Employee Orientations Side Letter ("NEO Side Letter") between the parties, governing new employee orientations. The Side Letter states that Union representatives shall be permitted to meet with employees for thirty-minutes following the University's portion of the orientation, to share information about the Union and/or the bargaining unit. The Side Letter contains a number of other requirements for the University, including notifying the Union of scheduled new employee orientations for the fall, winter, and spring quarters. UC Irvine has failed to abide by the terms set forth in the NEO Side Letter. This violation is especially egregious given that other UC campuses have made a seamless transition to providing NEOs remotely.

A complaint should issue because there is no clearer case of unilateral change than an employer repudiating agreed-upon terms embodied in an agreement between the parties. The University's unilateral conduct plainly violates HEERA section 3571(a), (b), and (c). The University's unlawful conduct will continue to cause injury, as the same issues will present themselves for new employee orientations in future quarters. Further, the University's conduct also violates two other PERB administered statutes, the Public Employee Communication Chapter ("PECC"), Gov. Code §3555, *et seq*., and the Prohibition on Public Employers Deterring or Discouraging Union Membership ("PEDD"), Gov. Code § 3550, *et seq*.

II. FACTUAL BACKGROUND

UC-AFT represents 6,500 employees at the University of California campuses. The represented workers affected by the University's unlawful material change are those in the Unit 18 (non-Senate Faculty), and employed at the University of California, Irvine.

A. Side Letter Between UC and UC-AFT

The MOU between the University and UC-AFT for NSFs was in effect from February 27, 2016, to January 31, 2020. The NEO Side Letter was effective "no later than March 1, 2018," and remained in effect until January 31, 2020, "the expiration date of the current IX contract." (*See* Exh. 1, New Employee Orientation Side Letter, ¶ 10.) The parties have been in negotiations for a successor agreement since April 17, 2019, but have not finalized a new contract. Further, the Side Letter explicitly states that, "this Side Letter constitutes the parties full agreement regarding adherence to the mandate in Assembly Bill 119. Any changes or further agreements shall be discussed during successor bargaining." (*Id*. at ¶ 11.)

Although an authoritative true and correct copy of the Side Letter is appended as Exh. 1, key provisions are excerpted below for ease of reference:

Notice

> By August 15 of each calendar year covered by this Side Letter, or at least ten (10) days prior to the Fall orientation, whichever is earlier, the University shall

notify the Union of the scheduled campus-designated IX new employee orientation for the fall, winter, and spring quarters for quarter campuses or fall and spring semesters for semester campuses for the upcoming academic year. (Exh. 1, New Employee Orientation Side Letter, ¶ 2.)

Attendance

The parties agree that providing the Union access to these three campus-designated in-person IX new employee orientations for quarter campuses and two campus-designated in-person IX new employee orientations for semester campuses shall fulfill the University's obligations regardless of the number of IX employees that attend. There shall be no additional orientations scheduled for fiscal-year appointees or Summer Session appointees. (Exh. 1, New Employee Orientation Side Letter, ¶ 3(c).)

Appointment Letter Notification

The initial appointment letter shall include an electronic link to the IX voluntary new employee orientation schedule for the academic year appointees. The University shall discuss with the Union the language describing the posting online of the new employee orientation schedule. (Exh. 1, New Employee Orientation Side Letter, ¶ 4.)

New IX Employee Orientations

The Union representatives shall be permitted to meet with IX employees for thirty (30) minutes following the University's portion of the orientation for the purpose of sharing information about the Union and/or the bargaining unit. The content of the University's presentation and any materials will be determined solely by the University. The content of the Union's presentation and any materials will be determined solely by the Union. (Exh. 1, New Employee Orientation Side Letter, ¶ 5.)

Agenda

The Union's presentation time shall be included on the agenda for the new IX employee orientations. (Exh. 1, New Employee Orientation Side Letter, ¶ 6.)

Sign-in Sheet

The University shall provide copies of the sign-in sheet from the new IX employee orientations no later than 10 business days following the orientation. (Exh. 1, New Employee Orientation Side Letter, ¶ 7.)

University and Union Portions of Presentation

During the University portion of the presentation, the Union's presenter and staff will not be present. Management will not discourage Union membership or

attendance at the Union portion of the presentation. **During the Union portion of the orientation, management employees and/or orientation presenters shall not be present.** (Exh. 1, New Employee Orientation Side Letter, ¶ 8 [emphasis added].)

B. UC Irvine's Failure to Comply with Side Letter

On March 10, 2020, the Union contacted Tanisha Willoughby, Academic Employee and Labor Relations Manager at UC Irvine, to discuss COVID-19 and the impact that moving to remote work would have on operations. (Exh. 2, March 2020 Email Correspondence between St. Clair and Willoughby.) In response, Ms. Willoughby stated that March 26, 2020, was the earliest date she was available to meet and discuss these issues. (*Ibid*.) The Union accepted the March 26, 2020, meeting date, but reiterated its request to talk over the phone prior to that date. (*Ibid*.)

On March 26, 2020, Ms. Willoughby hosted a Zoom meeting to discuss several pending matters with UC-AFT. During this meeting, UC-AFT asked what the University's plan was to post the New Employee Orientations ("NEO" or "NEOs"). Ms. Willoughby informed UC-AFT representatives on the call that Eva Maida, an employee within the Academic Personnel department who coordinates the NEO, was on maternity leave. In response, the Union informed Ms. Willoughby that nearly all other UC campuses had made a seamless transition to providing NEOs remotely. Further, the Union representatives requested that Ms. Willoughby inform them about who would be filling in for Ms. Maida during her maternity leave. Ms. Willoughby committed to doing so during the meeting.

As of April 8, 2020, UC-AFT had not received a response from Ms. Willoughby regarding the NEOs. Honora St. Clair, UC-AFT Field Representative, sent an email to Ms. Willoughby and Marianne Liu Beckett, UC Irvine's Assistant Vice Chancellor of Academic Personnel, stating:

> I wanted to check on the new employee orientation. I understand Eva is on leave but it's important for us to move forward with a plan to get this on the books ASAP.
>
> In the meantime, please provide the union with a list of all new hires for Spring 2020 that includes professional and personal contact information in accordance with AB 119.

(Exh. 3, April 8, 2020, Email Correspondence between St. Clair and Willoughby.) In response, Ms. Willoughby took the shocking position that "orientations were only held for the union," and advised UC-AFT to reach out directly to new employees to schedule an orientation once she produced the list of new hires. (*Ibid*.)

C. UC-AFT's Grievance Alleging Violation of the NEO Side Letter

On April 23, 2020, UC-AFT filed a grievance alleging violations of the NEO Side Letter. (Exh. 4, St. Clair Email dated April 23, 2020; Exh. 5, UC-AFT Grievance dated April 23, 2020.) The grievance alleged that paragraphs 2, 4, 5, and 6 of the NEO Side Letter were violated. (Exh.

5, UC-AFT Grievance dated April 23, 2020.) In this grievance the Union requested several remedies, including:

- By August 15, 2020, the University notify UC-AFT of the scheduled new employee orientations for the fall, winter, and spring quarters for the upcoming academic year;
- The University include an electronic link to the voluntary new employee orientation schedules in the initial appointment letter;
- The University discuss with UC-AFT the language describing the posting online of the new employee orientation schedule;
- The University prepare the notice and the agenda; and
- UC discuss with UC-AFT requested the language in the notice and the agenda prior to posting.

(*Ibid*.) A Step-1 review meeting was held between UC and UC-AFT on May 4, 2020. During this meeting, Ms. Willoughby stated that the University already had an orientation and onboarding process in place for each NSF when they are hired, and did not see NEOs are a good use of the University of the NSF's time. UC-AFT representatives responded, and stated that it was not aware that the University was holding NEOs individually, but that it had a right to attend. Ms. Willoughby answered by stating that if the Union had the time to come for half an hour to every onboarding or orientation for NSFs that the University was conducting when new employees complete paperwork that it was okay with her. The Union stated that it was happy to take Ms. Willoughby up on this offer, and was willing to invest time into making sure that there was a consistent orientation process across the system. By the conclusion of the Step-1 meeting, Ms. Willoughby committed to providing the names of the new hires, and to sending out a notice of an NEO for new hires as soon as possible.

On May 12, 2020, UC issued its Step-1 Decision. (Exh. 6, UCI Step-1 Decision.) In the Decision, UC Irvine stated that it does not have scheduled campus-designated new employee orientations.

> The University does not have scheduled campus-designated new employee orientation, and therefore, does not have new hire orientation dates to provide to the Union. However, per the agreement, the University does provide the names of the new hires and assists in scheduling and coordinating the Union's orientation. The University is, as it has always been and as demonstrated in the email communications, here to schedule and provide a room or zoom meeting information for the Union's new employee orientation. **The University has fulfilled the contractual obligation with regard to the new employee orientations**.

(*Id*. at p. 2 [emphasis added].) Based on this position, UC denied the grievance and determined that it was not in violation of the Side Letter.

On May 19, 2020, the Union appealed the grievance to Step-2. (Exh. 7, St. Clair Email Dated May 19, 2020). In the same email appealing the grievance to Step-2, the Union asked that the University schedule a NEO for May 28, 2020, at 2 PM, and provided the Zoom information. (*Ibid*.) The Union also affirmed its desire to take Ms. Willoughby up on her offer to attend additional onboarding/orientation meetings. (*Ibid*. ["Again, I want to reiterate that the Union is happy to take you up on your offer to invite us to any additional onboarding/orientation meetings that take place when a new employee is hired. We would be happy to attend and meet with any lecturer individually after they complete their paperwork—much like we do with new hired in the LX unit"].) Despite the Union's willingness to take Ms. Willoughby up on her offer, nothing came of this, and Ms. Willoughby tried to distance herself from this offer. In response to the May 19, 2020, email, Ms. Willoughby committed to sending out the NEO invitation. (Exh. 8, Willoughby Email dated May 20, 2020.)

On June 3, 2020, UC issued its Step-2 Decision. (Exh. 9, UCI Step-2 Decision.) In the Step-2 Decision, UC claimed that it "hosted" a union orientation, via Zoom on May 28, 2020. (*Ibid*. ["Most recently, the University hosted a union orientation via Zoom on May 28, 2020 at 2 pm"].) The University concluded that it had fulfilled its contractual and legal obligation with regard to NEOs, and in good faith, would "continue to work with AFT to hold quarterly union orientation, even after the side letter expired in January 2020." (*Ibid*.) UC denied the grievance and the requested remedy. (*Ibid*.)

On June 17, 2020, UC-AFT appealed the grievance to Step-3. (Exh. 10, UC-AFT Step-3 Appeal.) The Step-3 appeal pointed out UC's obligations to comply with AB 119.

> Ms. Willoughby's claims that the orientations were only held for the Union and that the Union should reach out to new hires directly to schedule an orientation is in violation of the Side Letter and AB 119. Statements by Ms. Willoughby in grievance meetings and Step responses that the University has no obligation to hold an orientation and that these orientations were only held for the union are factually incorrect and in violation of the side letter.

(*Ibid*.) Further, the Step-3 appeal stated that "[b]y statute, employee orientation has been made a mandatory term and condition of employment subject to bargaining and the agreement expressly states that it is the parties' full agreement and that any changes are to be discussed during successor bargaining. By implication, the side letter was incorporated as part of the master MOU." (*Ibid*.)

On July 13, 2020, UC issued its Step-3 Decision. (Exh. 11, UC Step-3 Decision.) The response stated, "the Department has been consistent in adhering to the provisions of the New Employee Orientation Side letter…" (*Ibid*.) Additionally, it stated that scheduling NEO "when there are not simultaneous orientations for non-represented employees requires a collaborative approach – one that the Department has demonstrated a willingness to engage." (*Ibid*.) The grievance and the requested remedy were denied.

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D. NEO held on May 28, 2020

In its Step-2 Appeal, UC-AFT asked UC to schedule a NEO for May 28, 2020, at 2 PM. (Exh. 7, St. Clair Email dated May 19, 2020). In the same email, UC-AFT provided Ms. Willoughby with a link for the Zoom meeting. (*Ibid.*) On May 20, 2020, Ms. Willoughby distributed the Zoom link regarding the May 28, 2020, NEO to new hires. (Exh. 12, Willoughby Email dated May 20, 2020, Non-Senate Instructional Unit NEO.) The Zoom information distributed by Ms. Willoughby on May 20, 2020, was the same link that UC-AFT provided to her in its Step-2 Appeal email. Additionally, Ms. Willoughby did not discuss the language used in her email with the Union prior to distributing it, and the language used in her email differed from what had been used in the past. (Exh. 14, Non-Senate Instructional Unit NEO February 2020.)

On the evening of May 27, 2020, the day before the NEO was scheduled to take place, Honora St. Clair, UC-AFT Field Representative, received a notification email from Zoom stating that Ms. Willoughby was waiting in the Zoom call for it to begin. (Exh. 13, Zoom Email to St. Clair dated May 27, 2020 ["Please click this URL to start your Zoom meeting: IX New Employee Orientation…as your participant Tanisha Willoughby (tanisha.willoughby@uci.edu) is waiting"].)

The NEO was held on May 28, 2020, at 2 PM by UC-AFT representatives Andrew Tonkovich and Honora St. Clair. During the NEO, at 2 PM, Ms. Willoughby then called into the Zoom meeting using the phone. The phone number she called in with was not listed under her name. UC-AFT representatives Andrew Tonkovich and Honora St. Clair repeatedly asked the attendee calling in from that phone number to introduce himself or herself. After repeated requests, Ms. Willoughby finally introduced herself, and stated that she was calling in "to see if everything was okay." She was informed by the UC-AFT representatives that everything was okay, and was asked if she had called in to provide her thirty-minute presentation for new employees. Ms. Willoughby stated "no" and hung up.

III. DISCUSSION

A. The University's Repudiation of the Status Quo Created by the Expired NEO Side Letter Violated HEERA Section 3571(a), (b), and (c)

The University violated Gov. Code Section 3571(c) by failing to abide by the terms of the NEO Side Letter and implementing a unilateral change. The violation of Gov. Code Section 3571(c) also results in a derivative violation of Gov. Code Section 3571(a) and (b) because new employees are being denied the right to join and participate in the activities of UC-AFT, as well as to enjoy UC-AFT's representation, and the Union has been denied its right to bargain with an employer. A unilateral change of a policy or practice within the scope of representation is a per se violation of the duty to meet and confer in good faith. (*California State Employees' Assn. v. Public Employee Relations Bd.* (1996) 51 Cal.App.4th 923, 934-35 ["*CSEA*"] ["An employer's unilateral change in terms and conditions of employment within the scope of representation is, absent a valid defense, a per se refusal to negotiate and a violation of HEERA"].) In order to establish a *prima facie* case, the union must show:

> (1) the employer breached or altered the parties' written agreement, or own established past practice; (2) such action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) the change is not merely an isolated breach of the contract, but amounts to a change of policy, i.e., the change has a generalized effect or continuing impact on bargaining unit members' terms and conditions of employment; and (4) the change in policy concerns a matter within the scope of representation.

(*Ibid*. [citing *Grant Joint Union High School Dist.* (1982) PERB Dec. No. 196]; see also *Regents of the University of California (Davis)* (2010) PERB Dec. No. 2101-H, p. 23.)

1. *UC's Repudiation is Blatantly Apparent Under a Plain Reading of NEO Side Letter*

The first *prima facie* element under *CSEA* is whether UC "breached or altered the parties' written agreement, or own established past practice," which UC-AFT clearly satisfies. (See *CSEA*, *supra*, 51 Cal.App.4th at 934-35.) The terms of expired NEO Side Letter establish the status quo between the parties for as long as they remain out-of-contract. (*Regents of the University of California* (2004) PERB Dec. No. 1689-H, Proposed Dec. pp. 24-27); (Exh. 10, UC-AFT Step-3 Appeal, p.2.)[1] The employer cannot make changes to terms and conditions without completing negotiations on a new agreement. (*Ibid*.)

Repudiating provisions of the parties' expired Side Letter or collective bargaining agreement is an especially clear unlawful unilateral change. (*Stanislaus Consolidated Fire Protection District* (2012) PERB Dec. No. 2231-M, p. 15 ["There is no better illustration of the District's act of repudiation than its taking an electronic version of scissors and cutting the disputed provision right out of the very document intended to memorialize the parties' agreement"]; see also *Grant Joint High School Dist.*, *supra*, PERB Dec. No. 196, p. 8 [observing a unilateral change to established policy is unlawful whether the policy is embodied in the terms of the parties' MOU or collective bargaining agreement, or evidenced in the parties' past practice].) While PERB does not enforce the terms of negotiated agreements, it may interpret contract language as necessary to decide the alleged unfair practices by applying traditional rules of contract interpretation. (*City of Davis* (2016) PERB Dec. No. 2494-M, p. 18 [citing *County of Sonoma* (2011) PERB Dec. No. 2173-M, p. 16].)

Here, the Unit 18 MOU expired on January 31, 2020, and the parties remain in negotiations over a successor agreement. Further, the NEO Side Letter stated that it would remain in effect until January 31, 2020, and that "any changes or further agreements shall be discussed during successor bargaining." (*See* Exh. 1, New Employee Orientation Side Letter, ¶¶ 10-11.) The NEO Side Letter, therefore, establishes the status quo for purposes of this unfair

[1] "The university has an undeniable obligation to provide a new employee orientation with union access per the side letter, which remains in effect during status quo period. By statute, employee orientation has been made a mandatory term and condition of employment subject to bargaining and the agreement expressly states that it is the parties' full agreement and that any changes are to be discussed during successor bargaining. By implication, the side letter was incorporated as part of the master MOU."

practice charge. Further, the language of the NEO Side Letter is explicit, and does not require interpretation beyond its expressing meaning for PERB to find that UC-AFT has met its *prima facie* burden. Based on a plain reading of the Side Letter, it is clear that UC has repudiated the status quo created by the expired NEO Side Letter.

The Side Letter binds the University to a negotiated procedure for ensuring the Union has access to its NEOs, as required under the PECC:

- By August 15 of each calendar year the University shall notify the Union of scheduled new employee orientations for the fall, winter, and spring quarters;

- The initial appointment letter shall include an electronic link to the voluntary new employee orientation schedule for the academic year appointees;

- The Union representatives shall be permitted to meet with employees for thirty-minutes following the University's portion of the orientation for the purpose of sharing information about the Union and/or the bargaining unit;

- The Union's presentation time shall be included on the agenda for the new employee orientations; and

- Management will not discourage Union membership or attendance at the Union portion of the presentation. During the Union portion of the orientation, management employees and/or orientation presenters shall not be present.

(*See* Exh. 1, NEO Side Letter, ¶¶ 2, 4, 5, 6, 8.) There can be no dispute here that the University has not been providing access to its NEOs through this process since April 2020.

UC has expressly repudiated the status quo created by the expired Side Letter, indeed, staking out a position that lacks any justification in the language of the NEO Side Letter. However, by April 8, 2020, UC made the novel contention that the new employee orientations "were only held for the union," while actively concealing the truth that UC had transitioned its onboarding process to a new online format without first providing notice and an opportunity to bargain to the Union. (Exh. 3, April 8, 2020, Email Correspondence between St. Clair and Willoughby.) Ms. Willoughby's April 8, 2020, email only hinted at the full extent of its repudiation as she advised the Union to reach out directly to newly hired employees to schedule an orientation. (*Id*.) During the May 4, 2020, Step-1 review meeting, UC finally revealed that it already had unilaterally developed an orientation and onboarding process for newly hired NSFs, without meeting and conferring with the Union over its access to that process, and that it did not see the former NEO process as a good use of its time. Since March 2020, UC-AFT has had the opportunity to participate in only one Unit 18 NEO. This was the May 28, 2020, NEO that the Union organized. Despite this, UC's newest position is that scheduling of NEOs "when there are not simultaneous orientations for non-represented employees required a collaborative approach – one that the Department has demonstrated a willingness to engage." (Exh. 11, UC Step-3 Decision.) It is important to note, UC's narrow understanding of NEOs that UC-AFT has the right to have "mandatory access" to does not comport for Gov. Code § 3555.5(b)(3) or the NEO

Side Letter. Given this, UC's repudiation of the status quo established by the NEO Side Letter is explicit.

2. *UC Repudiated the Status Quo Created by the Expired Side Letter as a Fait Accompli Providing No Notice and An Opportunity to Bargain to UC-AFT*

The second *prima facie* element under *CSEA* is whether UC provided UC-AFT with notice and an opportunity to bargain prior to repudiating the status quo embodied in the NEO Side Letter. (See *CSEA*, *supra*, 51 Cal.App.4th at 934-35; also *City of Sacramento* (2013) PERB Dec. No. 2351-M, p. 28.) It is beyond question that UC failed and refused to do so. An employer does not cure its failure to bargain a fait accompli in its attempts to bargain post-unilateral change. (*Porta-King Buildings Systems* (1993) 310 NLRB 539, 539-540, enfd. (8th Cir. 1994) 14 F.3d 1258, 1264.

Here, UC-AFT reached out to Ms. Willoughby in early March 2020, and requested to discuss the impact of COVID-19 on operations. Ms. Willoughby did not make herself available to meet with the Union until March 26, 2020. At that meeting when UC-AFT asked Ms. Willoughby about the University's plant to host the NEO, she represented that the individual who handled them was on maternity leave, and committed to letting UC-AFT know who would be filling that role. On April 8, 2020, the University took the position that NEOs were only held for the Union, and that the Union could reach out to new hires directly to schedule them. (Exh. 3, April 8, 2020, Email Correspondence between St. Clair and Willoughby.) It was not until the Step-1 review meeting on May 4, 2020, that Ms. Willoughby stated that UC implemented a separate orientation and onboarding process for each NSF when they were hired, which the Union was unaware of. (See *Regents of the University of California (Berkeley)* (2018) PERB Dec. No. 2610-H, pp. 44-48 [No dispute that by the time the union learned about employer's decision, the decision was already underway].)

UC's announcement of its repudiation came as a *fait accompli*, after UC had reached a firm position, thereby precluding prior notice to UC-AFT. In *Porta-King Building Systems*, the NLRB held:

> An offer to bargain over layoffs *after* they have occurred is no substitute for such prior notice. Once the layoffs have taken place and unit jobs lost, the union's position has been seriously undermined and it cannot engage in the meaningful bargaining that could have occurred if the Respondent had offered to bargain at the time the Act required it to do so. …Therefore, we find that the Respondent's offer to bargain about the layoffs after they occurred is insufficient to undo the effects of [the violation] of the Act…

(*Porta-King Buildings Systems*, *supra*, 310 NLRB at 539-540 [internal quotations and citations omitted].) In the instant matter, the harm occurred when UC repudiated the status quo created by the NEO Side Letter. Ongoing discussion between the parties regarding the successor agreement, or COVID-19 effect bargaining, are not sufficient to remedy the harm caused by UC's unilateral conduct.

3. *The Imposed Changes Have a Generalized Effect and Ongoing Impact*

The third *CSEA* element requires showing that UC's conduct is not "merely an isolated breach of contract, but . . . has a generalized effect or continuing impact on bargaining unit members' terms and conditions of employment." (See *CSEA*, *supra*, 51 Cal.App.4th at 934-35; also *City of Davis*, *supra*, PERB Dec. No. 2494-M, pp. 19-20 ["…the Board and courts have established in numerous cases that an alleged unlawful change must be more than an isolated breach of contract or practice, but instead must constitute a change of policy that had a generalized effect or continuing impact upon terms and conditions of employment of bargaining unit members"].) PERB's inquiry is focused on the effect of the change, not necessarily on the length of time the change is in effect or the number of employees affected by the change. (*San Jacinto Unified School District* (1994) PERB Dec. No. 1078, p. 20 ["It is the 'effect' of an employer's unilateral action, not necessarily its period of duration, that determines whether it constitutes a change of policy"]; *Jamestown Elementary School District* (1990) PERB Dec. No. 795, p. 6 ["While, in some cases, the number of employees affected might be indicative of whether there has been a policy change, that is not always true. The proper focus must be on identifying the relevant established policies and determining if, under the circumstances presented, the disputed action is in the nature of a policy change"].) Further, the Board has found a "continuing impact" where the breaching party asserts that the change was authorized by the collective bargaining agreement. (*Fremont Unified School District* (1997) PERB Dec. No. 1240, pp. 5-6.)

Here, there can be no doubt that UC's repudiation of the status quo created by the parties' expired Side Letter has a generalized effect and ongoing impact on employees in the Unit 18 bargaining unit. Given the COVID-19 pandemic, UC is conducting many of its functions remotely and online. This includes the hiring, onboarding, and orientation of new hires. At most other campuses, the transition to providing NEOs remotely has taken place by the time UC-AFT met with Ms. Willoughby on March 26, 2020. However, at UC Irvine, this is not the case. UC Irvine justified not holding NEOs by stating that the Union could schedule them on its own with new hires, and by stating that the Union-organized May 28, 2020, orientation fulfilled its contractual and legal obligation with regard to NEOs. (Exh. 3, April 8, 2020, Email Correspondence between St. Clair and Willoughby; Exh. 9, UCI Step-2 Decision.) This broadly undermines the Union's right under the PECC to access the *University's* NEOs.

Further, at every step of the grievance process, UC stated its belief that it is in compliance with its contractual and legal obligations with regard to new employee orientations.)

- In the Step-1 Decision the University states that it does not have scheduled campus designated new employee orientations, and therefore cannot provide new hire orientation dates to the Union. Further, the Step-1 Decision held, "[t]he University has fulfilled the contractual obligation with regard to the new employee orientations." (Exh. 6, UCI Step-1 Decision.)

- In the Step-2 Decision, UC stated: "Most recently, the University hosted a union orientation via Zoom on May 28, 2020 at 2 pm. Moreover, since the inception of the new employee orientation [*sic*] side letter, the University has worked collaborative (*sic*) and continues to be willing to work with the union regarding the orientation schedule, notice,

and online posting…the University has fulfilled its contractual and legal obligation with regard to the new employee orientation." (Exh. 9, UCI Step-2 Decision.)

- In the Step-3 Decision UC concluded: "The record and supporting documentation demonstrate that the Department has been consistent in adhering to the provisions of the New Employee Orientation Side Letter by providing the union with available dates and times for scheduling IX orientations…" (Exh. 11, UC Step-3 Decision.)

UC is, as a result, forthright in asserting that it views its conduct to be lawful under the status quo, which conclusively establishes a generalized and continuing impact in this case. (*San Jacinto Unified School District, supra*, PERB Dec. No. 1078, pp. 20-21 ["During the two-month period…it clearly had a generalized effect or continuing impact upon bargaining members' terms and conditions of employment…the Board has determined that a unilateral change, to be found unlawful, need not affect every member of the unit"].)

UC's interpretation of the NEO Side Letter amounts to a continuing change in policy that will harm new hires in the Unit 18 bargaining unit, as hiring and onboarding will continue to be conducted remotely due to COVID-19. (See *Grant Joint Union High School District*, *supra*, PERB Dec. No. 196.) UC's interpretation of what constitutes an "employee orientation" diverges from the statutory definition of the term. (*See* Gov. Code § 3555.5(b)(3).) Additionally, the onboarding process UC has instituted amounts to a mandatory orientation, thereby implicating UC-AFT's access rights under the PECC. (See *County of Orange In-Home Supportive Services Public Authority* (2019) Case No. LA-CE-1286-M, p. 19 ["I have no doubt that the nuanced distinction the Public Authority is trying to make regarding the new script not being a part of the orientation itself and not actually constituting training would be lost on a reasonable Provider attending an orientation. The new Provider is compelled to attend an orientation event administered by the Public Authority in order to complete enrollment…and become employed."].)[2] UC's refusal to abide by the express terms of the NEO Side Letter is divorced from the language of the Agreement itself, and represents a repudiation of the negotiated post-expiration status quo between the parties. (Compare *Regents of the University of California* (2014) PERB Dec. No. 2398-H, p. 31 [employer imposed its own interpretation of side letter intended to distinguish criteria for designating instructors as lecturers or adjunct professors, which amounted to a repudiation of that side letter]; *Regents of the University of California* (1991) PERB Dec. No. 907-H, pp. 23-24 [unilateral creation of a hiring ratio not based on agreed upon criteria constituted an unlawful alteration of the terms of agreement].)

4. NEOs are Within the Scope of Representation

The fourth and final *CSEA* element asks whether the unilateral change falls within the scope of representation. (See *CSEA*, *supra*, 51 Cal.App.4th at 934-35.) Under HEERA, the "scope of representation" includes wages, hours of employment, and other terms and conditions of employment. (Gov. Code 3562(q).) PERB cases have held that mandatory employee training programs fall within the scope of representation. (See *County of Orange In-Home Supportive*

[2] The ALJ Decision is appended as Exh. 15 to this filing. Exceptions are currently pending in this matter before the PERB Board.

Services Public Authority, *supra*, Case No. LA-CE-1286-M; *Trustees of the California State University* (2003) PERB Dec. No. 1507-H, p. 21 ["PERB has found trainings negotiable because it may relate to employee job performance, evaluations, and wages"].) Further, an employee organization's right to access is well established pursuant to HEERA. (Gov. Code § 3568 [giving employer organizations the right of access at reasonable times to areas in which employees work, etc.].) The PECC additionally establishes that access to NEO is a subject matter within the scope of bargaining. (*See* Gov. Code § 3555, *et seq*.) The law mandates, upon request of the employer or the exclusive representative, that the parties "shall negotiate regarding the structure, time, and manner of the access of the exclusive representative to a new employee orientation." (Gov. Code § 3557(a).)

Even if NEOs are viewed as a permissive subject of bargaining, the parties in the instant matter have already committed to bargaining this subject. The Side Letter explicitly states, "[a]ny changes or further agreements shall be discussed during successor bargaining." (*See* Exh. 1, New Employee Orientation Side Letter, ¶ 11.) As a result of that agreement, irrespective of whether NEO access is a mandatory or permissive subject, UC is bound by the status quo created by the Side Letter until bargaining on a successor agreement concludes. (See *Anaheim Union High School District* (2016) PERB Dec. No. 2504, pp. 8, 38 [parties must negotiate in good faith even over non-mandatory subjects if they have agreed to do so] [citing *State of California (Department of Personnel Administration)* (2009) PERB Dec. No. 2081-S; also *Travis Unified School District* (1992) PERB Dec. No. 917].)

B. UC-AFT Has Never Waived Its Right to Bargain Over NEO Access

UC-AFT has never waived its right to bargain over NEO access. PERB has held that union conduct in negotiations does not constitute a waiver unless it is demonstrated that the parties fully discussed or consciously explored a subject, and that the union intentionally yielded its interest in the matter. (*Fresno County In-Home Supportive Services Public Authority* (2015) PERB Dec No. 2418-M, p. 41.) Further, PERB has held that a union does not need to request to bargain with the employer after a unilateral change has already been implemented, or if a firm decision has already been made by the employer. (*City of Sacramento* (2013) PERB Dec. No. 2351-M ["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"].)

Here, UC-AFT has never waived its right to bargain over NEO access. The parties' NEO Side Letter clearly states that any changes or further agreements "shall" be discussed during successor bargaining. (*See* Exh. 1, New Employee Orientation Side Letter, ¶ 11.) After the transition to remote and online work, other UC campuses seamlessly transitioned to providing UC-AFT access to its NEOs remotely. This irrefutably demonstrates that UC is capable of providing access to remote NEOs. UC Irvine did not even explore this with UC-AFT. Instead, it actively concealed that it was carrying out remote on-boardings, thereby unilaterally repudiating the post-expiration status quo of the parties' NEO Side Letter, while denying the Union even the opportunity to demand to bargain. UC-AFT has never waived its right to bargain over NEOs.

C. UC's Conduct Violates PECC

UC has not only failed to comply with the status quo established by the expired NEO Side Letter, but it has also independently violated the PECC by that same conduct. The PECC applies to public employers, including those that are subject to HEERA. (Gov. Code § 3555.5(a).) It defines "new employee orientation' as "the onboarding process of a newly hired public employee, whether in person, online, or through other means or mediums, in which employees are advised of their employment status, rights, benefits, duties and responsibilities, or any other employment-related matters." (Gov. Code § 3555.5(b)(3).) Under the law, public sector employers must provide exclusive representatives with employee contact information, and must allow them access to new employee orientations. (*See* Gov. Code §§ 3556, 3558). Here, UC's conduct not only amounts to a repudiation of the Side Letter, but also results in violations of the PECC because the University failed to inform the Union about its onboarding/orientation meetings, resulting in a clear violation of Gov. Code § 3556, which requires that "[t]he exclusive representative shall not receive less than 10 days' notice in advance of an orientation."

The PECC also mandates, upon request of the employer or the exclusive representative, that the parties "shall negotiate regarding the structure, time, and manner of the access of the exclusive representative to a new employee orientation." (Gov. Code § 3557(a).) "The failure to reach agreement on the structure, time, and manner of the access shall be subject to compulsory interest arbitration pursuant to this section." (*Ibid*.) The parties did negotiate these terms, and memorialized them in the NEO Side Letter. UC's repudiation of the status quo created by the expired Side Letter, as a result, also violates Gov. Code § 3557. UC deviated from the NEO Side Letter and instituted an orientation and onboarding process with each NSF that the Union was not informed about or given an opportunity to participate in. When UC-AFT learned about UC Irvine's repudiation and practice of holding other onboarding or orientation meetings with NSFs, it asked to be invited to these additional onboarding/orientation meetings. (Exh. 7, St. Clair Email Dated May 19, 2020). UC's unilateral conduct denied the Union access to UC's onboarding, denied the Union its right to bargain over the "structure, time, and manner" of that access, and worse still repudiated the statutorily mandated agreement the parties reached as to NEO access – all of which are violations of the PECC.

D. UC's Behavior Deterred and Discouraged Union Membership in Violation of the PEDD

"A public employer shall not deter or discourage public employees or applicants to be public employees from becoming or remaining members of an employee organization, or from authorizing representation by an employee organization, or from authorizing dues or fee deductions to an employee organization." (Gov. Code § 3550.) After UC failed to schedule any NEOs, UC-AFT scheduled a presentation for new employees that was held on May 28, 2020. Ms. Willoughby disseminated the Zoom link for the Union organized orientation to new hires via email. (Exh. 12, Willoughby Email dated May 20, 2020, Non-Senate Instructional Unit NEO.) Ms. Willoughby then tried to access the Union led employee orientation on two separate occasions – once on the evening before the orientation was held, and the second time by calling into the orientation itself. (Exh. 13, Zoom Email to St. Clair dated May 27, 2020 ["Please click this URL to start your Zoom meeting: IX New Employee Orientation…as your participant Tanisha Willoughby… is waiting"].)

The NEO Side Letter makes clear that the University cannot attend the Union portion of the orientation. ." (*See* Exh. 1, New Employee Orientation Side Letter, ¶ 8 ["During the Union portion of the orientation, management employees and/or orientation presenters shall not be present"].) Not only did Ms. Willoughby access the Union orientation presentation in violation of the Side Letter, the conduct she exhibited had the probable consequence of deterring or discouraging union membership. The NLRB has generally found that an employer has engaged in unlawful surveillance when the employer photographs or videotapes employees, or has openly engaged in recordkeeping of employees participating in union activities. (*City of San Bernardino* (2018) PERB Dec. No. 2556-M, p. 20 [citing *Lake Tahoe Unified School District* (1999) PERB Dec. No. 1361].)

Here, Ms. Willoughby called into the Zoom meeting from a number that was listed under a different name, and did not identify her as management. Thereafter, when the Union representatives asked her to introduce herself, it took repeated requests before she did so. Further, when asked if she was there to do her thirty-minute presentation, she stated "no" and hung up the phone. Such conduct clearly amounts to unlawful surveillance because Ms. Willoughby expressly denied that she was there for the only good-faith (albeit still mistaken, as the Side Letter specifies the University cannot attend the Union's presentation) purpose that could explain her presence: to make a presentation on behalf of the University. It is furthermore unclear whether Ms. Willoughby would have identified herself at all if she had not been repeatedly pressed to do so by the Union representatives, deepening the impression that she was engaged in surveillance. Additionally, as the NLRB has noted, such conduct gives the ominous and chilling appearance to new employees that the employer was potentially engaged in recordkeeping as to who was attending the Union presentation. As a result, Ms. Willoughby's conduct has the natural and probable consequence of deterring of discouraging new employees from participating in the Union's orientation presentation, and from ultimately joining the Union.

IV. REQUESTED REMEDY

The University committed an unfair practice by refusing to abide by the express terms of the NEO Side Letter. UC Irvine's violation is especially egregious given that other UC campuses have been able to negotiate a seamless transition to providing UC-AFT access to their NEOs remotely. Given this, UC-AFT asks that PERB issue a complaint against the University for its unlawful conduct. The Union further asks that PERB order the University to remedy, and cease and desist from, all of its unlawful conduct. The remedy must include measures necessary to restore the status quo and make whole all affected employees, in addition to other remedies PERB deems appropriate.

EXHIBIT 1

NEW EMPLOYEE ORIENTATIONS

SIDE LETTER

Non-Senate Instructional (IX) Bargaining Unit

1. The parties to this Side Letter are the University of California (hereinafter referred to as "University"), with the exception of University of California San Francisco (UCSF is subject to a separate side letter) and the American Federation of Teachers (hereinafter referred to as the "Union"). ↳ University Council-

2. By August 15 of each calendar year covered by this Side Letter, or at least ten (10) days prior to the Fall orientation, whichever is earlier, the University shall notify the Union of the scheduled campus-designated IX new employee orientation for the fall, winter, and spring quarters for quarter campuses or fall and spring semesters for semester campuses for the upcoming academic year.

3. **Non-Mandatory IX Orientations:**

   a. The parties agree that attendance at the new IX employee orientations is not required nor does it constitute assigned work of any type; therefore, attendance is voluntary and the University shall make that clear in all notifications.

   b. Should the University schedule the IX orientation prior to or following another campus orientation/meeting, the IX orientation may be held in an adjacent or near-by room.

   c. The parties agree that providing the Union access to these three campus-designated in-person IX new employee orientations for quarter campuses and two campus-designated in-person IX new employee orientations for semester campuses shall fulfill the University's obligations regardless of the number of IX employees that attend. There shall be no additional orientations scheduled for fiscal-year appointees or Summer Session appointees.

4. **Appointment Letter Notification:** The initial appointment letter shall include an electronic link to the IX voluntary new employee orientation schedule for the academic year appointees. The University shall discuss with the Union the language describing the posting online of the new employee orientation schedule.

5. **New IX Employee Orientations:** The Union representatives shall be permitted to meet with IX employees for thirty (30) minutes following the University's portion of the orientation for the purpose of sharing information about the Union and/or the bargaining unit. The content of the University's presentation and any materials will be determined solely by the University. The content of the Union's presentation and any materials will be determined solely by the Union.

6. The Union's presentation time shall be included on the agenda for the new IX employee orientations.

7. The University shall provide copies of the sign-in sheet from the new IX employee orientations no later than 10 business days following the orientation.

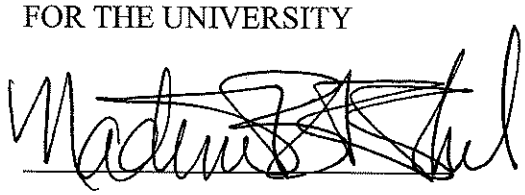
8. During the University portion of the presentation, the Union's presenter and staff will not be present. Management will not discourage Union membership or attendance at the Union portion of the presentation. During the Union portion of the orientation, management employees and/or orientation presenters shall not be present.

9. By March 1, 2018, the University shall notify the Union of the date of the first new IX employee orientation, which will be scheduled during the month of April 2018. The parties agree that the University shall not be obligated to re-issue any initial appointment letters that have already been issued on or before March 1, 2018. However, initial appointment letters for spring quarter 2018 that are issued after March 1, 2018, shall include the electronic link consistent with paragraph 4.

10. The terms of the Side Letter will be effective no later than March 1, 2018 and shall remain in effect until January 31, 2020, the expiration date of the current IX contract.

11. This Side Letter constitutes the parties full agreement regarding adherence to the mandate in Assembly Bill 119. Any changes or further agreements shall be discussed during successor bargaining.

FOR THE UNIVERSITY

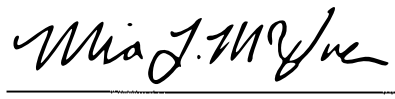


Nadine Baron Fishel

6 December 17

Date

FOR THE UNION



Mia McIver

7 December 2017

Date

EXHIBIT 2

Honora StClair <hstclair@ucaft.org>

Checking in

Honora St. Clair <hstclair@ucaft.org> Thu, Mar 12, 2020 at 11:35 AM
To: Tanisha Willoughby <tanisha.willoughby@uci.edu>
Cc: andrewtonkovich@ucaft.org, Loren Eason <nous_athanatos@yahoo.com>

Let's schedule the 26th. I do hope we can still have a call or more before then to make the meeting as productive as possible.
I am more than willing to discuss potential settlements informally at any time as well.
Take care,
Honora

Sent from my iPhone

On Mar 11, 2020, at 8:15 PM, Tanisha Willoughby <tanisha.willoughby@uci.edu> wrote:

> Honora how's the 26th for you? That is the best day for me to schedule for us to meet. Please let me know a time and I'll schedule and send out the zoom information.
>
> Sent from my iPhone
>
> > On Mar 10, 2020, at 2:49 PM, Honora StClair <hstclair@ucaft.org> wrote:
> >
> > Good afternoon Tanisha,
> > I hope this finds you well. I was hoping we could schedule a call soon to check in. [redacted]
> > In addition to our active grievances (which I am interested in discussing how to address remotely), I would like to know what the university's plans are (even if only in the idea phase so far) regarding COVID 19.
> >
> > Best,
> > Honora
> >
> > Honora St. Clair
> >
> > UC-AFT Field Representative
> > Local 2226 UCI & Local 1966 UCR
> >
> > [redacted]
> > HStClair@ucaft.org
> > ucaft.org
> >
> > *It is now easier than ever to become a member of UC-AFT. If you know someone who is not yet a member please invite them to join using our online form today. Just click on the link and follow the simple steps into membership! **Join UC-AFT: * Become a member of UC-AFT using our *easy online membership form* <https://leadernet.aft.org/webform/uc-aft-member-enrollment>

EXHIBIT 3

Honora StClair <hstclair@ucaft.org>

New Employee Orientation

Tanisha Willoughby <tanisha.willoughby@uci.edu> Wed, Apr 8, 2020 at 3:23 PM
To: Honora StClair <hstclair@ucaft.org>, Marianne Liu Beckett <mbeckett@uci.edu>
Cc: Andrew Tonkovich <atonkovi@uci.edu>, Loren Eason <nous_athanatos@yahoo.com>, UC-AFT Local 2226 <local2226representation@ucaft.org>

Hello Honora,

I will get you the list of the new hires as soon as possible. The orientations were only held for the union, so once you have the list please feel free to reach out to them directly to schedule an orientation.

Thank you,

Tanisha Willoughby, J.D.

Academic Employee and Labor Relations Manager

From: Honora StClair <hstclair@ucaft.org>
Date: Wednesday, April 8, 2020 at 5:19 PM
To: Tanisha Willoughby <tanisha.willoughby@uci.edu>, Marianne Liu Beckett <mbeckett@uci.edu>
Cc: Andrew Tonkovich <atonkovi@uci.edu>, Loren Eason <nous_athanatos@yahoo.com>, UC-AFT Local 2226 <local2226representation@ucaft.org>
Subject: New Employee Orientation

Dear Tanisha and Marianne,

I wanted to check on the new employee orientation. I understand Eva is on leave but it's important for us to move forward with a plan to get this on the books ASAP.

In the meantime, please provide the union with a list of all new hires for Spring 2020 that includes professional and personal contact information in accordance with AB 119.

Thank you,

Honora

Honora St. Clair

UC-AFT Field Representative

Local 2226 UCI & Local 1966 UCR

[redacted]

HStClair@ucaft.org

ucaft.org

*It is now easier than ever to become a member of UC-AFT. If you know someone who is not yet a member please invite them to join using our online form today. Just click on the link and follow the simple steps into membership! **Join UC-AFT: * Become a member of UC-AFT using our *easy online membership form* <https://leadernet.aft.org/webform/uc-aft-member-enrollment>

EXHIBIT 4

Honora StClair <hstclair@ucaft.org>

New Employee Orientation

Honora StClair <hstclair@ucaft.org> Thu, Apr 23, 2020 at 4:06 PM
To: Tanisha Willoughby <tanisha.willoughby@uci.edu>
Cc: Marianne Liu Beckett <mbeckett@uci.edu>, Andrew Tonkovich <atonkovi@uci.edu>, Loren Eason <nous_athanatos@yahoo.com>, UC-AFT Local 2226 <local2226representation@ucaft.org>
Bcc: [redacted]

Dear Tanisha,
Your claim that the orientations were only held for the Union and that the Union should reach out to new hires directly to schedule an orientation is troubling, not in compliance with the Side Letter in the collectively bargained MOU, or AB 119.

I understand your office has gone through a number of staffing changes in the last 1-2 years. The union has been extremely flexible. It is becoming exceedingly apparent that AP has taken advantage of that flexibility.

Your office should take immediate action to schedule an orientation for new IX employees for Spring 2020. We are happy to work with you to create an online orientation, as nearly every other campus in the system has already done.

Furthermore, by August 15th, 2020, the University shall notify the Union of the scheduled campus-designated IX new employee orientation for the fall, winter, and spring quarters for the upcoming academic year 2020-2021.
The initial appointment letters shall include an electronic link to the IX voluntary new employee orientation schedules for the academic year appointees. The University shall discuss with the union the language describing the posting online of the new employee orientation schedule. The University shall prepare the notice and agenda for each orientation. The University shall discuss with the union the language in the notice and agenda prior to posting.

In compliance with AB 119, the union expects to be provided with the name, job title, department, work location, work, home, personal cellular telephone number, personal email address, and home address of any new employee within 30 days of hire or by the first pay period of the month following hire (Gov. Code §3558); unless the employee has explicitly requested that this information remain private.

Please see attached grievance.
Also attached is a copy of the Side Letter regarding this matter.
Here is a link http://www.caperb.com/2017/07/24/ab-119-what-are-the-requirements-part-i/ to the CA PERB Blog, which includes an FAQ on AB 119 so you can better understand your obligations under the law.

Thank you,
Honora

Honora St. Clair

UC-AFT Field Representative
Local 2226 UCI & Local 1966 UCR

[redacted]
HStClair@ucaft.org
ucaft.org

*It is now easier than ever to become a member of UC-AFT. If you know someone who is not yet a member please invite them to join using our online form today. Just click on the link and follow the simple steps into membership! **Join UC-AFT: * Become a member of UC-AFT using our *easy online membership form*
<https://leadernet.aft.org/webform/uc-aft-member-enrollment>

On Wed, Apr 8, 2020 at 3:23 PM Tanisha Willoughby <tanisha.willoughby@uci.edu> wrote:
[Quoted text hidden]

2 attachments

NEO_SideLetter_Unit18_2017.12.6.pdf
159K

UCAFT Grievance New Employee Orientations 4.23.2020.pdf
151K

EXHIBIT 5

UNIVERSITY OF CALIFORNIA
FORMAL CONTRACT GRIEVANCE
NON-SENATE INSTRUCITONAL UNIT

Allegations of a violation of the Memorandum of Understanding (MOU) in effect between the University and the University Council-AFT must be filed on this form. See the MOU, Article XXXIII Grievance Procedure, for details regarding the filing of grievances.

GRIEVANT'S NAME, Last, First, Middle Union Grievance	GRIEVANT'S CLASSIFICATION TITLE/WORKING TITLE Unit 18
GRIEVANT'S DEPARTMENT/PROGRAM/LOCATION UCI	GRIEVANT'S WORK TELEPHONE
ADDRESS TO WHICH REQUIRED CORRESPONDENCE IS TO BE SENT TO GRIEVANT: 7735 Thornlake Avenue Whittier Ca 90606	
Article(s) and Section(s) of MOU alleged to have been violated: Including, but not limited to: New Employee Orientations Side Letter 2. and 4. and 5. and 6.	
Action being grieved and manner in which action violated the above cited provisions and adversely affected the grievant. Please attach any relevant materials. By August 15th of each calendar year covered by this Side Letter, or at least ten (10) days prior to the Fall Orientation, whichever is earlier, the University shall notify the Union of the scheduled campus-designated IX new employee orientation for the fall, winter, and spring quarters for the upcoming academic year. Appointment Letter Notification: The initial appointment letter shall include an electronic link to the IX voluntary new employee orientation schedules for the academic year appointees. The University shall discuss with the union the language describing the posting online of the new employee orientation schedule. The Union's presentation time shall be included on the agenda for the new IX employee orientations.	

Date of Occurrence or date grievant had knowledge of alleged violation April 8, 2020.

REMEDY REQUESTED

By August 15th, 2020, the University shall notify the Union of the scheduled campus-designated IX new employee orientation for the fall, winter, and spring quarters for the upcoming academic year. The initial appointment letter shall include an electronic link to the IX voluntary new employee orientation schedules for the academic year appointees. The University shall discuss with the union the language describing the posting online of the new employee orientation schedule. The University shall prepare the notice and agenda. . The University shall discuss with the union the language in the notice and agenda prior to posting.

IF THE GRIEVANT IS REPRESENTED IN THIS GRIEVANCE, THE FOLLOWING INFORMATION REGARDING THE REPRESENTATIVE MUST BE PROVIDED

REPRESENTATIVE'S NAME Honora St. Clair	UC-AFT REPRESENTATIVE YES___X___ NO_____	REPRESENTATIVE'S TELEPHONE NO. [redacted]
REPRESENTATIVE'S ADDRESS (City, State, Zip) [redacted]		UC-AFT GRIEVANCE YES X NO_____
GRIEVANT'S SIGNATURE / DATE	REPRESENTATIVE'S SIGNATURE / DATE Honora M. St Clair **April 23, 2020**	
STEP 1-DATE OF MEETING	NAME OF SUPERVISOR	REPRESENTATIVE PRESENT YES_____ NO_____

DATE OF RESPONSE (DUE WITHIN 10 DAYS OF FORMAL DISCUSSION)	DISPOSITION
STEP 2 (COMPLETED FORM MUST BE FILED WITHIN 45 DAYS OF OCCURRENCE) DATE FORM RECEIVED DEADLINE FOR RECEIPT	
DATE OF REVIEW (TO BE HELD WITHIN 10 DAYS OF RECEIPT OF FORM)	DISPOSITION
DATE OF RESPONSE (DUE WITHIN 15 DAYS OF REVIEW)	DISPOSITION
STEP 3 DATE OF REQUEST FOR REVIEW (DUE WITHIN 15 DAYS OF RESPONSE TO STEP 2	MEETING REQUESTED YES_____ NO_____
DATE OF MEETING, IF ANY (TO BE HELD WITHIN 15 DAYS OF REQUEST FOR REVIEW)	REPRESENTATIVE PRESENT YES_____ NO_____
DATE OF UNIVERSITY'S WRITTEN DECISION	NAME OF DESIGNATED UNIVERSITY OFFICIAL
DISPOSITION	

U N I V E R S I T Y U S E O N L Y

LOCATION	CAMPUS GRIEVANCE #	YEAR	% APPOINTMENT	APPOINMENT END DATE	WERE ANY TIME LIMITS WAIVED? EXPLAIN YES_____ NO_____
DATE RECEIVED BY GRIEVANCE OFFICER		DELIVERY METHOD			OLR GRIEVANCE NUMBER
DATE OF MAILING TO UC-AFT, IF APPLICABLE		DATE UC-AFT RESPONSE DUE		DATE OF UC-AFT RESPONSE RECEIVED	CAMPUS CONTACT

COPIES TO GO TO: CAMPUS RELATIONS, GRIEVANT, UC-AFT, GRIEVANT'S DEPARTMENT, OFFICE OF LABOR RELATIONS

EXHIBIT 6

UCI University of California, Irvine

Office of the Provost and Executive Vice Chancellor
510 Aldrich Hall
Irvine, CA 92697 -1000
www.provost.uci.edu

May 12, 2020

Honora StClair
UC-AFT Local 2226 Field Representative
[redacted]

Re: Step I Decision, AFT-UCI NEO Grievance

Procedural History

The American Federation of Teachers ("AFT" or "the Union") filed the above-captioned matter (the "grievance") received by UCI on or around April 23, 2020. The grievance alleged violations of New Employee Orientations Side Letter sections 2 and 4 and 5 and 6 of the UC/AFT Collective Bargaining Agreement covering the Non-Academic Senate Lecturers Unit (the "contract"). The grievance is filed on behalf of the Union, with no specific individuals or grievants identified.

The University acknowledged the grievance on April 24, 2020 via an email to the AFT. A Step 1 review was held between the Union and University representatives on Monday, May 4, 2020 at 10:00am.

Union Position

In its April 23, 2020 written grievance, the Union stated the following:

"By August 15th of each calendar year covered by this Side Letter, or at least ten (10) days prior to the Fall Orientation, whichever is earlier, the University shall notify the Union of the scheduled campus-designated IX new employee orientation for the fall, winter, and spring quarters for the upcoming academic year. Appointment Letter Notification: The initial appointment letter shall include an electronic link to the IX voluntary new employee orientation schedules for the academic year appointees. The University shall discuss with the union the language describing the posting online of the new employee orientation schedule. The Union's presentation time shall be included on the agenda for the new IX employee orientations."

The Union requested the following remedy: "By August 15th, 2020, the University shall notify the Union of the scheduled campus-designated IX new employee orientation for the fall, winter, and spring quarters for the upcoming academic year. The initial appointment letter shall include an electronic link to the IX voluntary new employee orientation schedules for the academic year appointees. The University shall discuss with the union the language describing the posting online of the new employee orientation schedule. The University shall prepare the notice and agenda. . The University shall discuss with the union the language in the notice and agenda prior to posting."

UCI Position

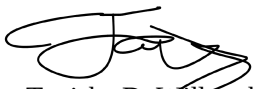
The University provided the Union with the names of new hires on April 9, 2020 as it done for previous quarters. Previously, on September 12, 2019, the University sent the Union the names of the new hires for the fall quarter and provided dates for the Union to hold its orientation. The Union did not respond to the request and an orientation was not held since the University does not hold quarterly orientations. On January 24, 2020, the University reached out the Union to see if it wanted to hold its new hire orientation for the winter quarter since it did not elect to do so or respond to the request from the fall quarter. The Union held it winter quarter orientation on February 19, 2020.

The University does not have scheduled campus-designated new employee orientation, and therefore, does not have new hire orientation dates to provide to the Union. However, per the agreement, the University does provide the names of the new hires and assists in scheduling and coordinating the Union's orientation. The University is, as it has always been and as demonstrated in the email communications, here to schedule and provide a room or zoom meeting information for the Union's new employee orientation. The University has fulfilled the contractual obligation with regard to the new employee orientations.

Decision

Based on the above analysis, I have concluded that the grievance is denied. The University is not in violation of the Side Letter of the contract.

Sincerely,



Tanisha D. Willoughby
Academic Employee and Labor Relations Manager

Cc: Marianne Beckett, Academic Personnel

EXHIBIT 7

Honora StClair <hstclair@ucaft.org>

NEO Step I response

Honora StClair <hstclair@ucaft.org> Tue, May 19, 2020 at 4:28 PM
To: Tanisha Willoughby <tanisha.willoughby@uci.edu>
Cc: UC-AFT Local 2226 <local2226representation@ucaft.org>, Marianne Liu Beckett <mbeckett@uci.edu>

Dear Tanisha,
The union is appealing this grievance to step 2.

Please schedule a NEO for May 28th, at 2pm.

As stipulated in the NEO side-letter, we will be ready to meet with IX employees for 30 minutes following the University's portion of the orientation. The University has always allowed us to be present for the University's portion of the orientation, and we expect that to continue. Please let me know if the notice and invitation you will be sending to IX employees will be any different than previous announcements. As always, please CC me on the announcement.

I set up a zoom meeting for this occasion. The details are pasted below.

Again, I want to reiterate that the Union is happy to take you up on your offer to invite us to any additional onboarding/orientation meetings that take place when a new employee is hired. We would be happy to attend and meet with any lecturer individually after they complete their paperwork-- much like we do with new hires in the LX unit.

Thank you,
Honora

Honora St. Clair is inviting you to a scheduled Zoom meeting.

Topic: IX New Employee Orientation
Time: May 28, 2020 02:00 PM Pacific Time (US and Canada)

Join Zoom Meeting
https://zoom.us[redacted]

Meeting ID: [redacted]
Password: [redacted]
One tap mobile
[redacted]US (San Jose)
[redacted]US (Tacoma)

Dial by your location
[redacted]US (San Jose)
US (Tacoma)
US (Houston)
US (New York)
US (Germantown)
US (Chicago)
Meeting ID: [redacted]
Password: [redacted]
Find your local number: https://zoom.us[redacted]

Honora St. Clair

UC-AFT Field Representative
Local 2226 UCI & Local 1966 UCR

[redacted]
HStClair@ucaft.org
ucaft.org

*It is now easier than ever to become a member of UC-AFT. If you know someone who is not yet a member please invite them to join using our online form today. Just click on the link and follow the simple steps into membership! **Join UC-AFT: * Become a member of UC-AFT using our *easy online membership form* <https://leadernet.aft.org/webform/uc-aft-member-enrollment>

[Quoted text hidden]

EXHIBIT 8

Honora StClair <hstclair@ucaft.org>

NEO Step I response

Tanisha Willoughby <tanisha.willoughby@uci.edu> Wed, May 20, 2020 at 10:32 AM
To: Honora StClair <hstclair@ucaft.org>
Cc: UC-AFT Local 2226 <local2226representation@ucaft.org>, Marianne Liu Beckett <mbeckett@uci.edu>

I acknowledge your step 2 appeal and will send out the NEO invitation.

Tanisha Willoughby, J.D.

Academic Employee and Labor Relations Manager

[Quoted text hidden]

EXHIBIT 9

University of California, Irvine

Office of the Provost and Executive Vice Chancellor
510 Aldrich Hall
Irvine, CA 92697 -1000
www.provost.uci.edu

June 3, 2020

Honora StClair
UC-AFT Local 2226 Field Representative
[redacted]

Re: Step II Decision, AFT-UCI NEO Grievance

Procedural History

The American Federation of Teachers ("AFT" or "the Union") filed the above-captioned matter (the "grievance") received by UCI on or around April 23, 2020. The grievance alleged violations of New Employee Orientations Side Letter sections 2 and 4 and 5 and 6 of the UC/AFT Collective Bargaining Agreement covering the Non-Academic Senate Lecturers Unit (the "contract"). The grievance is filed on behalf of the Union, with no specific individuals or grievants identified.

The University acknowledged the grievance on April 24, 2020 via an email to the AFT. A Step 1 review was held between the Union and University representatives on Monday, May 4, 2020 at 10:00am. The Step 1 response denying the grievance was sent to AFT on May 12, 2020. On May 19, 2020, the Union appealed to Step 2 via email.

Union Position

In its April 23, 2020 written grievance, the Union stated the following and reiterated in its May 19, 2020 appeal as issues that remain unresolved and its requested remedy:

> *"By August 15th of each calendar year covered by this Side Letter, or at least ten (10) days prior to the Fall Orientation, whichever is earlier, the University shall notify the Union of the scheduled campus-designated IX new employee orientation for the fall, winter, and spring quarters for the upcoming academic year.*
> *Appointment Letter Notification: The initial appointment letter shall include an electronic link to the IX voluntary new employee orientation schedules for the academic year appointees. The University shall discuss with the union the language describing the posting online of the new employee orientation schedule.*
> *The Union's presentation time shall be included on the agenda for the new IX employee orientations."*
>
> *The Union requested the following remedy: "By August 15th, 2020, the University shall notify the Union of the scheduled campus-designated IX new employee orientation for the fall, winter, and spring quarters for the upcoming academic year. The initial appointment letter shall include an electronic link to the IX voluntary new employee orientation schedules for the academic year appointees. The University shall discuss with the union the language describing the posting online of the new employee orientation schedule. The University shall prepare the notice and agenda. . The University shall discuss with the union the language in the notice and agenda prior to posting."*

UCI Position

As detailed in the University's Step 1 response, the University has complied with its contractual and legal obligations by consistently providing the Union with the names of new hires and dates for the Union to hold its orientation

each quarter. In Fall 2019, the Union failed to respond to the University's offer to hold its union orientation. The University provided the Union an opportunity to hold its winter quarter orientation on February 19, 2020. Most recently, the University hosted a union orientation via Zoom on May 28, 2020 at 2 pm. Moreover, since the inception of the new employee orietnaton side letter, the University has worked collaborative and continues to be willing to work with the union regarding the orientation schedule, notice, and online posting.

As demonstrated by the above summary, the University has fulfilled its contractual and legal obligation with regard to the new employee orientations. In good faith, the University provided and will continue to work with AFT to hold quarterly union orientation, even after the side letter expired in January 2020. Furthermore, the University is committed to implement the provisions on union orientation when the parties reach an agreement on successor negotiation in the future.

Decision

Based on the above analysis, the grievance and the remedy requested are denied in their totality.

Sincerely,

Marianne Liu Beckett
Assistant Vice Chancellor, Academic Personnel

Cc: Tanisha Willoughby, Academic Personnel

EXHIBIT 10

University Council-American Federation of Teachers
Representing Lecturers and Librarians of the University of California

June 17, 2020

Peter Chester
Director, Labor Relations
University of California, Office of the President
300 Lakeside Dr., 10th Floor
Oakland, Ca 94612

RE: UC-AFT Grievance, UC Irvine, Unit 18 NEO Grievance

SENT BY ELECTRONIC TRANSMISSION ONLY

Dear Mr. Chester:

This letter and the attached materials constitute UC-AFT's appeal to Step 3 of the above referenced grievance pursuant to the New Employee Orientations Side Letter of the Unit 18 MOU.

The original formal grievance, Case number never provided by UC Irvine but referred to in all communications as the "NEO Grievance", was filed on April 23rd, 2020. A Step One meeting took place on May 4th, 2020. A Step One Response was received on May 12th, 2020. The NEO Grievance was appealed to Step 2 on May 19, 2020. A Step 2 Decision was received on June 3, 2020.

The grievance in this case involves the University's refusal to comply with the New Employee Orientations Side Letter of the Unit 18 MOU. Honora St. Clair, UC-AFT field representative, contacted Tanisha Willoughby on March 10, 2020, to request that a call be scheduled to check in on pending matters and discuss how to continue operations under the COVID environment. The soonest available date provided to UC-AFT by Tanisha Willoughby was March 26th, 2020.

During the informal meeting scheduled for March 26th over zoom, Honora St. Clair asked Ms. Willoughby about UC Irvine's plans to hold a New Employee Orientation (NEO) remotely. Ms. Willoughby informed UC-AFT representatives who were present that the individual in Academic Personnel, Eva Maida, who coordinates the NEO for her office is on maternity leave. Ms. Willoughby was informed that nearly every other campus has made a seamless transition to providing the NEO remotely, and requested an update on who would be filling in for Ms. Maida during her leave. Ms. Willoughby committed to doing so.

After not receiving a response from Ms. Willoughby regarding the NEO, Honora St. Clair followed up via email on April 8, 2020. This email stated that UC-AFT understands that

Ms. Maida is on leave and restated the importance of the University moving forward with a plan to offer the orientation to new employees in Spring.

Ms. Willoughby responded on April 8, 2020 by stating, “The orientations were only held for the union, so once you have the list please feel free to reach out to them directly to schedule an orientation.”

AB 119 mandates a new employee orientation by the employer and negotiation with labor unions over the time, place and manner. These mandated negotiations resulted in our NEO Side Letter within the Unit 18 MOU.

The University has an obligation to hold New Employee Orientations under AB 119. The Side Letter as negotiated ensures that UC-AFT represented employees will be provided a New Employee Orientation by the University and further provides for access to our members at the time of the University’s orientation.

Ms. Willoughby’s claim that the orientations were only held for the Union and that the Union should reach out to new hires directly to schedule an orientation is in violation of the Side Letter and AB 119. Statements by Ms. Willoughby in grievance meetings and Step responses that the University has no obligation to hold an orientation and that these orientations were only held for the union are factually incorrect and in violation of the side letter.

The side letter references “the University’s portion of the presentation” no less than three times. The university has an undeniable obligation to provide a new employee orientation with union access per the side letter, which remains in effect during status quo period. By statute, employee orientation has been made a mandatory term and condition of employment subject to bargaining and the agreement expressly states that it is the parties' full agreement and that any changes are to be discussed during successor bargaining. By implication, the side letter was incorporated as part of the master MOU.

The remedy requested is that UC Irvine fully comply with AB 119 and the New Employee Orientations Side Letter in the Unit 18 MOU.

> By August 15th, 2020, the University shall notify the Union of the scheduled campus-designated IX new employee orientation for the fall, winter, and spring quarters for the upcoming academic year.
>
> The initial appointment letter shall include an electronic link to the IX voluntary new employee orientation schedules for the academic year appointees.
>
> The University shall discuss with the union the language describing the posting online of the new employee orientation schedule.

> The University shall prepare the notice and agenda. The University shall discuss with the union the language in the notice and agenda prior to posting. …"

Please direct all communication to UC-AFT Executive Director, Bill Quirk, at bquirk@ucaft.org.

Sincerely,

Honora St.Clair
Field Representative
UC-AFT Local 2199

EXHIBIT 11

UNIVERSITY OF CALIFORNIA

BERKELEY • DAVIS • IRVINE • LOS ANGELES • MERCED - RIVERSIDE • SAN DIEGO • SAN FRANCISCO

SANTA BARBARA • SANTA CRUZ

OFFICE OF THE VICE PRESIDENT
HUMAN RESOURCES

OFFICE OF THE PRESIDENT
300 Lakeside Drive, 10th floor
Oakland, CA 94612-3550

July 13, 2020

Honora St. Clair
UC-AFT – Local 2226 Field Representative
Email: hstclair@ucaft.org

Re: **Response to UC-AFT Appeal to Step III: UC Irvine, (IX) New Employee Orientation Grievance Systemwide No.: IR-IX2118-20**

Dear Ms. St. Clair:

The Office of the President, Labor Relations, has reviewed the above-referenced grievance arising out of the UC Irvine Campus. The grievance, received on April 23, 2020 alleges that the University violated the UC-AFT Lecturers Agreement; specifically, the *New Employee Orientations* Side Letter, sections 2, 4, 5 and 6.

The grievance provides:

> *By August 15th of each calendar year covered by this Side Letter, or at least ten (10) days prior to the Fall Orientation, whichever is earlier, the University shall notify the Union of the scheduled campus-designated IX new employee orientation for the fall, winter, and spring quarters for the upcoming academic year.*
>
> *Appointment Letter Notification: The initial appointment letter shall include an electronic link to the IX voluntary new employee orientation schedules for the academic year appointees. The University shall discuss with the union the language describing the posting online of the new employee orientation schedule.*
>
> *The Union's presentation time shall be included on the agenda for the new IX employee orientations.*

As a remedy:

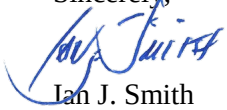
> *By August 15th, 2020, the University shall notify the Union of the scheduled campus-designated IX new employee orientation for the fall, winter, and spring quarters for the upcoming academic year. The initial appointment letter shall include an electronic link to the IX voluntary new employee orientation schedules for the academic year appointees. The University shall discuss with the union the language describing the posting online of the new employee orientation schedule. The University shall prepare the notice and agenda. . The University shall discuss with the union the language in the notice and agenda prior to posting.*

Analysis and Decision

The record and supporting documentation demonstrate that the Department has been consistent in adhering to the provisions of the New Employee Orientation Side Letter by providing the union with available dates and times for scheduling IX orientations in addition to providing the union with lists of new IX employees as required by the contract. Scheduling of said orientations when there are not simultaneous orientations for non-represented employees requires a collaborative approach – one that the Department has demonstrated a willingness to engage. Based on the aforementioned I find no violation of the contract.

Based on the foregoing and in full agreement with the University's step 1 and step 2 responses of the Grievance Procedure referred-to herein, the grievance and requested remedy are respectfully denied.

Sincerely,



Ian J. Smith
Manager – Labor Relations

c: Executive Director Chester, UCOP
Associate Director Fishel, UCOP
Assistant Vice Chancellor Beckett UCI
Manager Kleiman, UCI
File

EXHIBIT 12

Honora StClair <hstclair@ucaft.org>

UCI Non-Senate Instructional Unit (IX) New Employee Orientation

2 messages

Tanisha Willoughby <tanisha.willoughby@uci.edu> Wed, May 20, 2020 at 10:40 AM
To: [redacted]
Cc: Honora StClair <hstclair@ucaft.org>, UC-AFT Local 2226 <local2226representation@ucaft.org>

UCI Office of Academic Personnel

UCI Non-Senate Instructional Unit (IX) New Employee Orientation

You are invited to a new employee orientation designed to inform new instructors about University Council - American Federation of Teachers (UC-AFT), the union which represents you. Further information about UC-AFT may be found at https://ucaft.org/.

New Employee Orientation for Spring 2020

Date: Thursday, May 28, 2020

Time: 2:00 pm

Place: Zoom Meeting
https://zoom.us/[redacted]

Meeting ID: [redacted]
Password: [redacted]

New employees are encouraged to attend the above orientation.

Sincerely,

Tanisha D. Willoughby, J.D.

Academic Employee and Labor Relations Manager

University of California, Irvine

Email: Tanisha.willoughby@uci.edu

Telephone: 949.824.5103

EXHIBIT 13

Honora StClair <hstclair@ucaft.org>

Your meeting attendees are waiting!

Zoom <no-reply@zoom.us>
To: hstclair@ucaft.org

Wed, May 27, 2020 at 5:57 PM

Hi there,
Please click this URL to start your Zoom meeting: IX New Employee Orientation, https://zoom.us/[redacted] as your participant Tanisha Willoughby (tanisha.willoughby@uci.edu) is waiting.

EXHIBIT 14

Subject: RE: UCI Non-Senate Instructional Unit (IX) New Employee Orientation
Date: Wed, 12 Feb 2020 15:56:52 +0000
From: Academic Personnel <acadpers@uci.edu>
To: Academic Personnel <acadpers@uci.edu>

Hello,

This is just a reminder to sign up for the New Employee Orientation held by University Council - American Federation of Teachers (UC-AFT), the union which represents you.

Please click the link below to RSVP.

Thank you,

Office of Academic Personnel

From: Academic Personnel
Sent: Wednesday, February 5, 2020 8:41 AM
To: Academic Personnel <acadpers@uci.edu>
Subject: UCI Non-Senate Instructional Unit (IX) New Employee Orientation

UCI Office of Academic Personnel

UCI Non-Senate Instructional Unit (IX) New Employee Orientation

You are invited to a new employee orientation designed to familiarize new employees with relevant information about working at the University and inform new instructors about University Council - American Federation of Teachers (UC-AFT), the union which represents you. Further information about UC-AFT may be found athttps://ucaft.org/.

New Employee Orientation for Winter 2020

Date: Wednesday, February 19, 2020

Time: 12:00 p.m. - 1:00 p.m. ***University Council-American Federation of Teachers Presentation***

Place: Humanities Gateway (HG) 1030

New employees are encouraged to attend the above orientation. If you wish to join this event, please go tohttps://forms.gle/eZ7B959XZU1vgG986 to indicate that you will be attending this meeting.

Sincerely,

Eva Maida
Senior Academic Personnel Analyst
Voice: 949.824.9446 Email: emaida@uci.edu

EXHIBIT 15

44 PERC ¶ 70, 44 Pub. Employee Rep. for California ¶ 70, 2019 WL 5558421

California PERB Administrative Law Judge

United Domestic Workers of America, Local 3930, American Federation of State, County & Municipal Employees, AFL-CIO, Charging Party, v. County of Orange in-Home Supportive Services Public Authority, Respondent

No. LA-CE-1286-M

RACHO

September 30, 2019

Related Index Numbers

15.2 Hospital and Health Care Service Employees
15.32 Administrative Service Employees, County
72.18 Interference/Coercion/Restraint, Other Interference
72.33 Discrimination Related to Union Membership or Concerted Activity, Forms of Discrimination
72.151 Interference/Coercion/Restraint, Interrogation, Of Employees
72.131 Interference/Coercion/Restraint, Benefits or Reprisals, Threats of Reprisal
72.611 Unilateral Change in Term or Condition of Employment, What Constitutes Change
74.31 Types of Orders, Cease and Desist
74.321 Types of Orders, Restoration of Status Quo Ante, Specific Affirmative Action

Appearances:

Hannah Weinstein, Attorney, for United Domestic Workers of America, Local 3930, American Federation of State, County, & Municipal Employees, AFL-CIO, Rothner, Segall & Greenstone
Gabriel Bowne, Senior Deputy County Counsel, for County of Orange In-Home Supportive Services Public Authority

Judge / Administrative Officer

RACHO

Ruling

In a proposed decision, PERB's ALJ decided that a county in-home health care services employer violated several MMBA provisions by unilaterally altering the introduction script in new provider orientations. The introductory script derogated the union's authority, implied that collective bargaining was futile, and reasonably discouraged or deterred employees from union membership, the ALJ concluded. The ALJ directed the employer to rescind the introduction script and to pay the union a sum representing the amount of new membership dues that were lost as a result of the improper script.

County agency must rescind changes to employee orientation script

Meaning

The ALJ observed that MMBA Section 3550 prohibits a public agency from deterring or discouraging a public employee from becoming or remaining a member of an employee organization. While an employer lacks a duty to maintain strict neutrality towards unions, the ALJ noted, the employer's expression of its views towards unions may not include a promise of a benefit or a threat of reprisal or force.

Case Summary

The county authority manages in-home support services (IHSS), a statewide program overseeing individuals who provide in-home assistance with daily living for elderly individuals and persons living with disabilities. It conducts several new employee orientation sessions every month. Union representatives are permitted to give a presentation at those sessions. In June 2017, the

county authority and the union agreed to the language of an introductory script that would be read by all staff at new provider orientations. However, the employer altered the script after some county supervisors had contact with a purportedly anti-union group, the Freedom Foundation. The union brought an unfair practice charge against the employer. In a proposed decision, PERB's ALJ decided that the employer violated several MMBA provisions by unilaterally altering the introduction script in new provider orientations, the content of which deterred or discouraged union membership, without providing the union with notice and an opportunity to bargain over those changes. The ALJ found that the changes to the introduction script were negotiable because they were part of mandatory employee training. Upon considering the context and impact of the revised script given during a mandatory orientation event, the ALJ determined that the script implied that new employees would gain nothing by listening to the union's presentation. The script derogated the union's authority, implied that collective bargaining was futile, and reasonably discouraged or deterred employees from union membership, the ALJ concluded. The ALJ issued a cease and desist order. The ALJ also directed the employer to rescind the introduction script and to pay the union a sum representing the amount of new membership dues that were lost as a result of the improper script.

Full Text

Proposed Decision

Before Valerie Pike Racho, Administrative Law Judge.

Introduction

An exclusive representative alleges in this case that a public agency employer unilaterally changed the content of a negotiated script used in new employee orientations, without providing notice and the opportunity to bargain, and that the content of the new script had the effect of deterring or discouraging employees from electing to become union members. The public agency employer denies that it violated the law and avers that the changes in question were intended to promote neutrality.

Procedural History

On March 5, 2018, United Domestic Workers of America, Local 3930, American Federation of State, County, & Municipal Employees, AFL-CIO (UDW or Union) filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) against the County of Orange (County) In-Home Supportive Services Public Authority (Public Authority) [1] alleging violations of the Meyers-Milias-Brown Act (MMBA) and Government Code section 3550. [2]

On or about April 23, 2018, the County responded to the charge allegations by filing a position statement.

On June 19, 2018, the Office of the General Counsel issued a complaint on behalf of PERB alleging that the County unilaterally changed a matter within the scope of representation without notice and opportunity to bargain having been provided to UDW in violation of MMBA sections 3505, 3506.5, and interfered with UDW's and employees' rights under the MMBA and Government Code section 3550.

On June 28, 2018, the County filed its answer to the complaint, admitting certain factual allegations, denying all material violations of law and asserting various affirmative defenses.

On August 16, 2018, the parties participated in an informal settlement conference with a Board agent but the dispute was not resolved.

On November 9, 2018, UDW filed a request to amend the complaint to add an allegation that the County violated MMBA section 3506.5, subdivision (d), by dealing with a non-exclusive employee organization known as “the Freedom Foundation.”

UDW also requested that judicial notice be taken of certain electronic and other records of the Freedom Foundation and of action taken by the County Board of Supervisors.

A formal hearing took place on November 15 and 16, 2018. The County orally opposed UDW's request to amend the complaint and the request for judicial notice regarding records of the Freedom Foundation. UDW's request to amend the complaint was denied as being prejudicial due to the lack of sufficient notice in advance of the hearing for the County to present evidence on whether the Freedom Foundation could be considered an employee organization. The request for judicial notice was granted only as to the County Board of Supervisor's records and denied as to the electronic and other records of a private organization (the Freedom Foundation). (See Evid. Code, § 452.)

The parties' reply briefs were filed with PERB by March 1, 2019. At that time the record was closed and the matter was submitted for decision.

Findings of Fact

Jurisdiction

The County admits that its subdivision, the Public Authority, is a public agency within the meaning of MMBA section 3501, subdivision (c), and the employer of record for collective bargaining purposes pursuant to Welfare and Institutions Code (WIC) section 12301.6, subdivision (c)(1), [3] of County homecare providers ("Providers"). UDW is an exclusive representative within the meaning of PERB Regulation 32016, subdivision (b), and represents a bargaining unit of Providers. The parties are therefore within PERB's jurisdiction.

Background and the Parties' Collective Bargaining Agreement

1. *Services Performed by Providers and the Role of the Public Authority*

"In-Home Supportive Services" (IHSS) is a statewide program established by statute (WIC, § 12301 et seq.) and managed locally by counties with program oversight provided by the California Health and Human Services Agency-Department of Social Services (DSS). Providers are individuals who provide in-home assistance with required tasks for daily living to elderly persons and persons of all ages with disabilities ("Recipients"). Approximately 83 percent of Providers are familial relations of the Recipients for which they provide services. There are more Recipients in need of services than there are Providers who are available and willing to work.

The Public Authority manages the IHSS program for Providers working within the County and is the employer of record for collective bargaining purposes. (See WIC, § 12301.6, subds. (a); (c)(1).) The Public Authority processes the enrollment of new Providers and provides them with training, including how to execute their time records in order to receive accurate payment by the state. The Public Authority also recruits Providers and maintains a registry of them to match with Recipients who need services. Effective April 1, 2015, WIC section 12301.24, subdivision (e)(1), required new Providers to attend an in-person orientation presented by the Public Authority. Subdivision (e)(4) of that same section provides in relevant part that representatives of a recognized employee organization within a county "shall be permitted to make a presentation of up to 30 minutes at the orientation."

2. *The Collective Bargaining Agreement*

The Public Authority and UDW negotiated a memorandum of understanding (MOU) that was effective through June 30, 2016. [4] The parties' agreement specifically addresses issues regarding new Provider orientation and training. For example, Article 5, "Labor-Management Relations Committee," subdivision (b), provides in relevant part:

The Public Authority and the Union shall establish a Labor-Management Relations Committee. The purpose of the Committee shall be to consider and, when agreed upon, take action on matters affecting the relations between the parties and recommended measures to improve client care and the IHSS program.

Article 7, "Orientation and Training," states in relevant part:

The Labor-Management Relations Committee will develop an orientation meeting for new IHSS Providers, which shall be optional, and will also develop an informational packet for all bargaining unit members . . . to explain various items important to the work of the IHSS provider. These items would include, but are not limited to hours/assessments, services, rights, rules, time card instructions, contact numbers and complaint/action forms. The Public Authority will also allow the Union to include in the packet of information Union contact information including Union website address.

3. *History of the Public Authority Introducing UDW at Orientations*

As many as 18 new Provider orientations are held per month because prospective Providers are coming into the IHSS program at different times and the presentation must be made in several languages. During orientation, new Providers must complete and submit certain enrollment forms and undertake Live Scan fingerprinting for a background check before being cleared to begin working. The process takes a few hours. UDW is allotted 30 minutes during the session to explain to new Providers the role of an exclusive representative and the benefits of Union membership. UDW also passes out and collects membership cards during its presentation. Because there are many orientations conducted in a month in several different languages, rotating UDW and Public Authority staff members participate in individual sessions according to their language proficiencies and personal schedules.

Before June 2017, there was no uniform manner in which Public Authority staff introduced UDW's portion of the presentation. UDW Organizer Maria Avila testified that before June 2017, some Public Authority representatives introduced UDW by saying to Providers, "Now you are going to hear the Union's presentation. Please give them your undivided attention." Avila also recalled one Public Authority representative named "Juanita" being a bit negative in the way she introduced UDW's portion of the event. UDW Regional Coordinator Donta Harrison, who supervises the Organizers who conduct UDW's orientation presentations, also testified that the way in which Public Authority representatives introduced UDW speakers during this period of time varied widely from encouraging, to neutral, to negative. Harrison personally attended a sampling of orientations around this time. Harrison also learned from members of his staff that some Public Authority representatives were telling Providers how to get out of UDW membership. This prompted Harrison to discuss with Public Authority Executive Director Luz Loreto his concern that Public Authority staff may be providing incorrect information to Providers. Harrison asked that Providers be directed to contact UDW with questions regarding Union membership. Harrison and Loreto agreed to discuss these matters within the Labor-Management Relations Committee (LMRC). [5]

At LMRC meetings in the spring of 2017, Public Authority representatives told UDW that Providers had made complaints regarding the length of UDW's presentation during orientation and there being too many Union representatives who were loud and aggressive. [6] Loreto requested that UDW cover the topic of dues deduction more thoroughly in its presentation because she believed that Providers were not being accurately informed about the financial aspect of Union membership. Loreto testified that between 2014 and 2017, there were "a lot" of Providers who contacted the Public Authority in-person and by telephone with concerns and questions about dues deductions from their paychecks. Loreto admitted that she personally handled such phone calls only once or twice per quarter, and that she knew of one office technician who handled up to 20 calls per month. But Loreto also admitted that she did not keep records of either the total number of calls or the amount of time that her staff may have spent on similar phone calls or in-person contacts from Providers. Loreto opined that one reason Providers may choose to leave employment is because they have problems with the Union and/or do not like paying dues, but she admitted that the Public Authority does not ask Providers who are quitting why they are leaving the job and it has no data regarding any Providers who may have left employment because of a reluctance to pay Union dues or fees.

Loreto had other concerns regarding UDW's presentation that it appears from the record were not shared with UDW. For example, Loreto testified that she personally did not like that UDW's presentation "bad mouth[ed] the [Public Authority], our staff, the County, the social workers, [and] the [Board of Supervisors]." Loreto also testified that she had personally observed UDW staff passing out membership cards and urgently telling attendees to "sign this, sign this" before UDW had even begun its presentation. Loreto testified that, in her opinion, since UDW and Public Authority staff both handle aspects of the orientation, Providers may think that they represent the same entity, which could compound employees' confusion. There is no evidence that Loreto raised any of these issues in LMRC meetings or privately with Harrison.

Sometime around the spring of 2017, some Public Authority staff persons began reading aloud during orientations portions of a 2014 letter that had been issued by DSS to all county IHSS program managers. The letter was regarding some then-recent statutory changes to IHSS programs. One portion of the letter stated, "Prospective provider participation in the employee organization presentation is entirely voluntary. Prospective providers are not mandated to take part in the employee organization's presentation."[7] UDW complained in LMRC meetings that if the Public Authority was going to recite part of the letter, then the entire letter should be read aloud. As the letter was detailed and four pages long, the Public Authority did not think that was a good option. These issues led to the parties discussing developing a uniform script for the Public Authority to use when introducing UDW at orientations.

In or around June 2017, the parties agreed through the LMRC to the language of an introductory script ("negotiated script") that would be read by all Public Authority staff when introducing UDW at new Provider orientations. Loreto testified to having concerns about the negotiated script language, but she never shared them with UDW. Loreto thought that the negotiated script made it seem as if the Public Authority was "just going along with the Union" and therefore was not sufficiently neutral. When asked why, given such reservations, the Public Authority agreed to the language, Loreto responded that the meeting had been "long" and she felt that they had to "come up with something" and that it was "a work in progress." The negotiated script was in effect for several months. While the negotiated script was in use, UDW signed up 75 to 90 percent of new Providers as members at orientation sessions.

The County Determines to Change the Introduction Script After Contacts by the Freedom Foundation

1. *The Freedom Foundation's Attempts to Collect Revocation Cards*

Sometime in 2017, UDW staff reported to Harrison that people identifying themselves as representatives of the Freedom Foundation were approaching people in the parking lot of a Public Authority facility and asking whether they were Providers/members of UDW. The Freedom Foundation representatives urged people identifying themselves as Providers to sign a card that they offered to mail on the Provider's behalf to resign the Provider from Union membership. Harrison then visited the same Public Authority facility and was approached by Freedom Foundation representatives who mistook him for a Provider. They made anti-union comments and urged him to sign a revocation card. UDW later received by regular mail and e-mail some revocation cards sponsored by the Freedom Foundation attempting to revoke the membership of Providers.

2. *The Freedom Foundation's Contacts with Members of the Board of Supervisors*

The three persons who served in the capacity of chief of staff for County Board of Supervisors members Michelle Steel, Shawn Nelson, and Andrew Do testified about contacts their respective offices had with Sam Han, a representative of the Freedom Foundation, in 2017. In June 2017, Supervisor Nelson's office sent the MOU between UDW and the Public Authority to Han at Han's request. In or around November 2017, Han met personally with both Supervisor Steel and Supervisor Nelson and provided them with the Freedom Foundation's anti-union literature. On November 16, 2017, Han e-mailed the chief of staff for Supervisor Steel complaining about interactions between canvassers for the Freedom Foundation and representatives of UDW outside of Public Authority facilities. Han requested that the Freedom Foundation be allowed to make its own presentation to new Providers in orientations.

Han transmitted a letter dated December 14, 2017, to Supervisors Steel, Nelson, and Do complaining that Providers were not being adequately advised of their rights under the United States Supreme Court's decision in Harris v. Quinn (2014) 134 S.Ct. 2618, and suggesting the text of "notification language" to be read at new Provider orientations. The chief of staff for Supervisor Steel forwarded the letter to the County Counsel's office.

3. *In January 2018, UDW Learns that the Introduction Script has been Changed*

Sometime in January 2018, Harrison received a text message from a representative of another union representing employees in the County about an announcement on the Freedom Foundation's website touting victory over changes to the Provider orientation script. Harrison then visited the Freedom Foundation's website and observed a press release stating that the Board of Supervisors had granted the request of the Freedom Foundation to formally consider whether to provide Providers with written and oral notice of their First Amendment rights in relation to their Union.

Harrison next discovered that the Board of Supervisors had met in closed session on January 9, 2018, regarding "anticipated litigation" over the Freedom Foundation's request to access County property to communicate with Providers. No action was reported out of the closed session. This led Harrison to assume that the Freedom Foundation had been posturing.

On January 18, 2018, however, Harrison received a letter from Loreto stating that due to a "directive" issued by the Board of Supervisors, and in consultation with County Counsel, a modified introduction script would be immediately implemented during new Provider orientations effective the next day. The new script was as follows:

The United Domestic Workers/AFSCME Local 3930 (UDW) is the union that represents IHSS Providers in Orange County and will now be giving a 30-minute presentation. Under the law, IHSS providers are not required to join a union, pay any fees to the union, or attend the union's presentation. If you decide to leave during the union's presentation, please return in 30 minutes to complete the remainder of the provider enrollment.

IHSS providers are not employed by the State of California or the County of Orange. Your rate of pay and benefits are set by the contract between the County of Orange and UDW and will remain the same regardless of whether or not you decide to become a UDW member.

If you do decide to join the UDW and sign a membership form, the State Controller's Office, on behalf of the UDW, will deduct union dues from your pay. You may dis-enroll from the union and cancel the deduction of dues from your pay in accordance with the terms and conditions set forth on the UDW membership form. You may also re-enroll for UDW membership at any time.

Again, your participation in the UDW presentation is entirely voluntary. You are not required to attend the presentation. If you decide not to participate in the union's presentation, you must be back in 30 minutes for the remainder of the provider enrollment.

Loreto asserted during the hearing that she had used the word "directive" above in error referring to action by the Board of Supervisors, because she later learned that the Board of Supervisors had not taken any official action over the matter. She clarified that she learned from County Counsel Annie Loo that the Board of Supervisors was "looking at the script." Loreto testified that County Counsel (presumably Loo) told her that the script needed to be changed. Loreto stated that she liked that idea because she did not believe that the negotiated script was sufficiently neutral and she wanted to make sure that Providers were "properly informed of what they could do[.]" Loreto wrote the new script. She did not consult with County Counsel over its content. She was informed by County Counsel that the changes did not require negotiation with UDW before they were implemented. The new script was implemented on January 19, 2018, and remains in effect.

4. *Changes in Union Membership Rates After the New Script was Implemented*

As noted previously, when the negotiated was in use, an average of 75 to 90 percent of orientation attendees signed up as members of UDW. The first time the new script was read during an orientation, the new member sign-up rate dropped to 24 percent. During the first six months that it was in use, the average sign-up rate was between 20 and 30 percent. The UDW organizing team debriefed after the orientation meetings and gradually began to adjust the manner of its presentation by adding more Organizers to each event and engaging in more one-on-one communications between employees and Organizers rather than giving a primarily lecture-style presentation. By the time of the hearing, the average sign-up rate had rebounded to between 50 and 70 percent.

Issues

1. Did the Public Authority unilaterally change a matter within the scope of representation by implementing a new introduction script in new Provider orientations without giving UDW notice and the opportunity to bargain over the proposed change?

2. Did the Public Authority's new introduction script deter or discourage Union membership in violation of Government Code section 3550?

Conclusions of Law

1. *Unilateral Changes*

Public agencies and recognized employee organizations each have a duty to meet and confer in good faith over matters within the scope of representation, as defined in MMBA section 3504. (MMBA, § 3505.) Unilateral changes to negotiable subjects are "per se" violations of the duty to bargain and violate MMBA Section 3506.5, subdivision (c). (City of Livermore (2014) PERB Decision No. 2396-M, p. 20.) To establish a prima facie case for an unlawful unilateral change, the charging party must show by a preponderance of the evidence that: (1) the employer took action to change existing policy; (2) the policy change concerned 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 change has a generalized effect or continuing impact on terms and conditions of employment. (*County of Santa Clara* (2013) PERB Decision No. 2321-M, p. 13.)

A. *The Prima Facie Elements of a Change in Policy; without Notice and Opportunity to Bargain; and with a Generalized Effect on the Bargaining Unit*

Of the prima facie elements discussed above, the only one in real dispute is whether the Public Authority's decision to implement a new introductory script concerns a matter within the scope of representation. The Public Authority does not deny that it made changes to the way it introduces UDW at new Provider orientations and that the previous introduction script had been developed through discussions and ultimate agreement with UDW in LMRC meetings, as contemplated under the parties' MOU at Article 7. This shows a change in established policy. Loreto admitted that UDW was not notified beforehand that the Public Authority was contemplating making changes to the negotiated script and this fact was acknowledged in the Public Authority's answer. Instead, UDW was told on January 18, 2018, that a new script would be implemented the following day on January 19, 2018. Accordingly, UDW lacked adequate notice and the opportunity to request to bargain over the matter. The new script was in fact implemented and remains in use, showing a generalized effect on the bargaining unit. Thus, the first, third, and fourth elements of the test for a unilateral change are demonstrated.

B. *The Prima Facie Element of a Matter Within the Scope of Representation*

a. The Current Standards for Determining Negotiability

The Public Authority argues that under the tests for negotiability in Claremont Police Officers Association v. City of Claremont (2006) 39 Cal.4th 623 (City of Claremont)[8] and International Association of Fire Fighters, Local 188 v. PERB (2011) 51 Cal.4th 259 (*Richmond Firefighters*), the change at issue here is not within the scope of representation because there was no showing of an adverse impact on Providers' working conditions and at most it had "an indirect and attenuated impact on the employment relationship." (Quoting *Richmond* Firefighters at pp. 272-273.)

The Public Authority also disputes UDW's assertion that the matter was negotiable because it was part of employee training. The thrust of the Public Authority's argument on this point is that in cases where the Board has concluded that a training proposal is within scope, for example, *Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375 (*Healdsburg*),[9] it is because the training proposal itself related to other enumerated subjects of bargaining, and not because the Board has generally determined that all training is negotiable. The Public Authority also argues that although the new introduction script is read aloud during the orientation, it is not actually a part of the orientation, and it is also not training, as it has nothing to do with Providers job functions but merely "explains to providers their legal rights relative to the UDW."[10] None of these arguments hold weight.

As an initial point, I disagree with the Public Authority's analysis of these facts under City of Claremont and *Richmond Firefighters*. The Board held recently in County of Orange (2018) PERB Decision No. 2594-M, that it is not necessary in every instance where the negotiability of a decision is at issue in a case arising under the MMBA to apply the three-part test set forth in City of Claremont.[11] Instead, the Board noted that the Court in *Richmond Firefighters*, which was decided a year after City of Claremont, observed that there are three types of managerial decisions, "each with its own implications for the scope of representation":

(1) decisions that have only an indirect and attenuated impact on the employment relationship and thus are not mandatory subjects of bargaining, such as advertising, product design, and financing; (2) decisions directly defining the employment relationship, such as wages, workplace rules, and the order and succession of layoffs and recalls, which are *always* mandatory subjects of bargaining (emphasis added); and (3) decisions that directly affect employment, such as eliminating jobs, but nonetheless may not be mandatory subjects of bargaining because they involve a change in the scope and direction of the enterprise or, in other words, the employer's retained freedom to manage its affairs unrelated to employment.

(*County of Orange*, *supra*, PERB Decision No. 2594-M, p. 18, quoting *Richmond* Firefighters, supra, 51 Cal.4th at pp. 272-273; internal quotation marks omitted.)

The Board then concluded that the Court, by explaining that management decisions "directly defining the employment relationship" are *always* mandatory subjects of bargaining, meant to curtail the application of the type of balancing test found in City of Claremont and federal authorities.[12] The Board noted that when considering decisions that directly define the employment relationship:

It is not necessary to ask whether such a decision has a "significant and adverse effect" on wages, hours, or other terms and conditions of employment, nor is it necessary to balance that effect against the employer's need for unencumbered decisionmaking. This is consistent with our own case law. (See *Huntington Beach Union High School District* (2003) PERB Decision No. 1525, pp. 8-9 [when the Legislature expressly places a subject within the scope of representation, it is neither "necessary or proper to . . . balance []the potential benefits of negotiating a particular item against the employer's management prerogatives"].)

(*County of Orange*, *supra*, PERB Decision No. 2594-M, p. 19, bracketed text and edited quote in original.) The Board also observed that a literal application of the test from City of Claremont "would conflict with decades of settled labor law" because it has the potential to exclude unilateral wage *increases* as not having an adverse effect on employees, yet wages and benefits are fully negotiable subjects. (*County of Orange* at p. 19.)

Given the Board's analysis in *County of Orange*, the Public Authority's arguments that the changes to the introduction script are outside scope because they had no significant or adverse impact on employment conditions are inapposite. And, as discussed below, the Public Authority's conclusion that the change at issue falls within the first category of non-negotiable decisions under *Richmond Firefighters* because of an alleged "indirect and attenuated" impact on the employment relationship is also incorrect, as it mischaracterizes the nature of the Public Authority's communication to employees.

b. It is Well-Established that Training Components are Negotiable

PERB has consistently found that mandatory training programs are negotiable. In *Healdsburg*, *supra*, PERB Decision No. 375, the Board noted that training is not an enumerated subject of bargaining under the EERA, but nonetheless concluded that its close relationship to terms and conditions of employment makes the substance of employee training a natural fit for negotiations. [13] The Board observed:

Although not specifically enumerated, in-service training is logically and reasonably related to several enumerated subjects. Training that is necessary to insure employees' safety is negotiable since it relates to safety, an enumerated subject. Also, since training may have an impact on job performance of employees, it is related both to evaluation and grievance procedures and, therefore, potentially to wages as well. Training is of great concern to employees, since it may affect promotional opportunities and job safety. It is also of great significance to management, since training helps maintain a high level of employee performance, thereby affecting the quality of services which are delivered to the public. It is, therefore, an appropriate subject for the negotiation process.

(*Id*. at p. 83.)

The County argues in its reply brief regarding the Board's analysis quoted above that:

[T]he Board found those sections within the scope of representation not because training is, per se, a negotiable subject, but rather because the contract sections at issue *related* to other enumerated subjects of bargaining, such as job safety, grievance procedures, employee evaluations, promotional opportunities, and wages and hours of employees.

(Emphasis in original.) Such a narrow view of *Healdsburg* is unwarranted. The Board's only substantive description of the training proposal at issue was that it was an in-service training for employees "designed to maintain a high standard of performance and to increase the skills of employees in the bargaining unit." (*Healdsburg*, *supra*, PERB Decision No. 375, pp. 82-83.) This bare description does not demonstrate that the in-service training in that case was specifically related to safety, grievances, or the like, as contended by the County. Rather, it appears that the Board was discussing the topic of employee training generally, through the lens of the *Anaheim* test, to reach the conclusion that it is a negotiable subject. This is also consistent with the Board's decades-later citation to *Healdsburg*, in State of California (Department of Corrections and Rehabilitation, Ventura Youth Correctional Facility) (2010) PERB Decision No. 2131-S, p. 5, to support its conclusion that "[i]t is undisputed that training is a matter within the scope of representation." Given the Board's conclusions on this subject, under the *Richmond Firefighters* analysis, decisions involving employee training programs necessarily would fall under the second category of decisions "directly defining the employment relationship," which are always mandatory subjects of bargaining.

I have no doubt that the nuanced distinctions the Public Authority is trying to make regarding the new script not being a part of the orientation itself and not actually constituting training would be lost on a reasonable Provider attending an orientation. The new Provider is compelled to attend an orientation event administered by the Public Authority in order to complete enrollment in the IHSS program and become employed. From the perspective of a new employee in this situation, any information presented by the Public Authority in an official manner during the orientation could only be reasonably construed as a part of the orientation itself. A Public Authority representative reading a prepared script to the entire group certainly fits that criterion.

Moreover, the new introduction script goes beyond simply explaining that UDW is the union representing Providers and will be making its own separate presentation. It refers specifically to pay and benefits being determined by a contract between UDW and the Public Authority, which will remain the same regardless of Union membership status, and to procedures for joining and terminating Union membership. Loreto admitted that she wanted to "properly inform" Providers about their Union rights and obligations, and the Public Authority's brief noted that its desire in enacting the new script was to "explain" to Providers their legal rights relative to the Union. In other words, the Public Authority was attempting to train Providers over Union matters during its mandatory training session regarding employment procedures. Thus, the changes to the introduction script were negotiable because they were a part of mandatory employee training.

C. *The Public Authority's Affirmative Defenses*

UDW has proven all of the prima facie elements of a unilateral change in policy by the Public Authority. Absent a valid defense, such conduct was in violation of MMBA section 3506.5, subdivision (c). (County of San Bernardino (Office of the Public Defender) (2015) PERB Decision No. 2423-M, p. 54; Regents of the University of California (1983) PERB Decision No. 356-H, p. 18.) The Public Authority's answer raised affirmative defenses that the implementation of the decision was a fundamental managerial concern, placing it outside the scope of representation, and that its need for unencumbered decision-making outweighed the benefit derived from bargaining. Arguably, these assertions are more in the nature of denials, asserting the absence of one or more elements of the prima facie case, rather than true affirmative defenses. [14] (See, e.g., Witkin, Cal. Crim. Law 4th Defenses, § 2 (2012).) However, even accepting them at face value, in light of the analysis above, they fail. Although Loreto testified at length about the rationale for the policy, the Public Authority did not assert in its answer that the changes to the introduction script were justified by business or operational necessity. Affirmative defenses not raised in an answer are considered waived and therefore need not be considered by the administrative law judge. (*Sonoma County Office of Education* (1997) PERB Decision No. 1225, adopting proposed dec., p. 10 (*Sonoma*).)

Even if the Public Authority had timely raised a business necessity justification in its answer—which it did not—the defense would not have prevailed in this circumstance. PERB has recognized that under exceptionally limited conditions, an employer may be excused from negotiating before taking unilateral action on the basis of a true emergency that justifies the claim of business necessity. (*County of San Bernardino (Office of the Public Defender)*, *supra*, PERB Decision 2423-M, p. 54.) The employer must show an actual financial or other emergency that leaves no alternative to the action taken and allows no time for meaningful negotiations before taking action. (*Calexico Unified School District* (1983) PERB Decision No. 357, adopting proposed dec., p. 20.) The necessity must also be the unavoidable result of a sudden change in circumstance beyond the employer's control. (*Lucia Mar Unified School District* (2001) PERB Decision No. 1440, adopting proposed dec., p. 46.)

The Public Authority did not allege or prove the existence of any emergency under the above standards that would relieve it of its obligation to complete bargaining with UDW before taking action over a matter within the scope of representation. The record demonstrates that after a sustained effort by the Freedom Foundation to influence a change in the information given to Providers during orientations, the Board of Supervisors decided to "look" at the script, and thereafter County Counsel directed Loreto to change it to be more "neutral." [15] The Freedom Foundation's aims and concerns did not provide an emergency situation to which the Public Authority was obligated to immediately respond before fulfilling its duty to negotiate with UDW.

Loreto provided speculative testimony about the amount of time her staff may have spent handling questions from supposedly confused Providers regarding Union matters, but admitted that she did not keep records of her subordinates' time in this manner, admitted to personally handling such inquiries from employees only once or twice per quarter, and no Providers testified about their experiences. [16] This limited evidence also does not demonstrate a business necessity defense. Loreto had some concerns about the negotiated script and UDW's presentation but there is no evidence that she shared these concerns with UDW. The parties had addressed similar concerns in the past through bilateral discussions and agreement in the LMRC, which is also the method specifically outlined for the development of orientation content under the terms of MOU Article 7. The Public Authority did not provide any evidence of a sudden change in circumstances beyond its control that required it to implement new orientation content before appropriately bargaining with UDW over the proposed changes. In short, the Public Authority

has not shown any legitimate reason why it needed to act before satisfying the duty to negotiate with UDW. Its unilateral action therefore violated the duty to bargain in good faith, which in turn interfered with both employee and employee organization rights under the MMBA.

2. *The Public Authority Deterred or Discouraged Union Membership*

The PERB complaint alleges at paragraph 8 that the conduct by the Public Authority alleged as a unilateral change in policy in violation of the MMBA also "interfered with employee rights" under Government Code section 3550 (Section 3550). At the time of the conduct at issue in this matter, Section 3550 stated, "A public employer shall not deter or discourage public employees from becoming or remaining members of an employee organization." [17] PERB has jurisdiction over violations of this chapter, with all of the powers and duties conferred on it in Government Code section 3541.3. [18] (Gov. Code, § 3551.) This is a relatively new law that is applicable to most public employers operating in the state, including the Public Authority. (Gov. Code, § 3552, subd. (c).) As of the date of this writing, the Board has not yet had the opportunity to issue a decision interpreting Section 3550. For this reason, the parties were asked to brief the issue of the appropriate legal standard to apply to alleged violations of this chapter.

A. *Position of the Charging Party*

UDW urges that the Legislative history of Section 3550 demonstrates that a standard of "strict neutrality" by the employer is required during communications with employees while they are contemplating whether they will join a union. UDW cites a report from the Senate Committee on Public Employment and Retirement stating that Senate Bill (SB) 285, which after being signed into law by Governor Jerry Brown became Section 3550, was "essentially seek[ing] to ensure that public employees shall remain neutral when their employees are deciding whether to join a union." (Cal. B. Analysis, S. Comm on Pub. Emp't & Ret., 2017-2018 Reg. Sess., S.B. 285, April 24, 2017.) The report went on to note that the author of SB 285 believed that current law did not protect employees against "undue influence from employers hostile to unionization" when employees were contemplating union membership. (Ibid.) UDW also points out that the phrase "deter or discourage" is unique to Section 3550, as it does not appear in the MMBA, implying that the Legislature meant to enforce a more stringent standard rather than merely codifying the existing prohibition on employer interference with union activities under MMBA sections 3506 and 3506.5, subdivision (a). [19]

B. *Position of the Respondent*

The Public Authority urges that existing interference standards as applied to violations of the MMBA were intended to pertain to alleged violations of Section 3550. Also citing the Legislative history of SB 285, the Public Authority notes that the report, after referencing the language in MMBA section 3506 prohibiting employer interference with and retaliation for employee protected activities, stated that the new law was "consistent with existing California policy and seeks to build off of current law." [20] (Cal. B. Analysis, Assemb. Comm. On Pub. Emps., Ret. & Soc. Sec., 2017-2018 Reg. Sess., S.B. 285, June 21, 2017.) Thus, the Public Authority urges PERB to use common tests for determining whether employer speech violates rights of employees under the MMBA, and find such speech lawful as long as it does not contain "threats of reprisal or force or promise of benefit." (Citing County of Riverside (2010) PERB Decision No. 2119-M, p. 17.)

C. *Rules of Statutory Construction*

In construing a statute, PERB begins with the fundamental rule that the intent of the Legislature should be ascertained in order to effectuate the law's purpose. (Dyna-Med Inc. v. Fair Employment & Housing Com. (1987) 43 Cal.3d 1379, 1386.) Where the language of a statute is clear and unambiguous, the construction intended by the Legislature is obvious from the language used. (*Grossmont-Cuyamaca Community College District* (2008) PERB Decision No. 1958, p. 18 (*Grossmont-Cuyamaca*), citing *North Orange County Regional Occupational Program* (1990) PERB Decision No. 857.) Words are afforded their ordinary and

usual meaning, and, if possible, each word is given meaning to avoid a construction that makes any word "surplusage." (Santa Clara Valley Water District (2013) PERB Decision No. 2349-M, p. 16.) Only where the plain meaning of the statute is unclear should PERB turn to other sources to discern legislative intent, including legislative committee and bill reports and other records. (*Id*. at pp. 16-17, citing Mejia v. Reed (2003) 31 Cal.4th 657, 663.)

Every statute should be interpreted "with reference to the whole system of which it is a part so that all may be harmonized and given effect." (*Grossmont-Cuyamaca*, *supra*, PERB Decision No. 1958, p. 19, quoting *Joint Powers Board of Directors, Tulare County Organization for Vocational Education, Regional Occupational Center and Program* (1978) PERB Decision No. 57, other citation omitted.) Where there is more than one reasonable interpretation of law, one which will harmonize rather than conflict with other provisions should be adopted. (People v. Kuhn (1963) 216 Cal.App.2d 695, 698.)

The plain meaning of the words the Legislature chose to use in Section 3550 are not difficult to discern and they are certainly not ambiguous. Breaking them down, it was unlawful in January 2018 for (1) a public agency (2) to deter or discourage (3) a public employee (4) from becoming or remaining a member of (5) an employee organization. The focus of the parties' analyses has been, unsurprisingly, on the "deter or discourage" language, which was a novel addition to California's collective bargaining laws. [21] Under common and ordinary usage "deter" means "to turn aside, discourage, or prevent from acting" or "to inhibit." (Merriam-Webster, https://www.merriam-webster.com/dictionary/deter (last visited Sep. 17, 2019).) And "discourage" means "to deprive of courage or confidence"; "to hinder by disfavoring"; or "to dissuade or attempt to dissuade from doing something." (Merriam-Webster, https://www.merriam-webster.com/dictionary/discourage (last visited Sep. 17, 2019).) These words do not require any special context to understand. They are clear on their face. Thus, there is no cause to rely on the legislative history for guidance as to their intended meaning.

Notably, the statute does not define or require "neutrality" or "strict neutrality" by an employer. "A recognized rule of statutory construction is that the expression of certain things in a statute necessarily involves exclusion of other things not expressed." (Antelope Valley Health Care District (2006) PERB Decision No. 1816-M, pp. 9-10, quoting *Los Angeles Unified School District* (1990) PERB Decision No. 852, p. 5.) If the Legislature intended to impose a strict neutrality standard on public employers, then it stands to reason that Section 3550 would have included such language. Since it does not, it is not appropriate to read into the statute something that it does not say. [22]

Moreover, such an interpretation is potentially at odds with another California collective bargaining statute—the Higher Education Employer-Employee Relations Act (HEERA) (Gov. Code, § 3560 et seq.). Employers and employees that are subject to the terms of HEERA (see Gov. Code, § 3562, subds. (e), (g)) are also subject to the terms of Section 3550. (Gov. Code, § 3552, subds. (b) and (c).) HEERA section 3571.3 provides:

The expression of any views, arguments, or opinions, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute, or be evidence of, an unfair labor practice under any provision of this chapter, *unless such expression contains a threat of reprisal, force, or promise of benefit*; provided, however, that the employer shall not express a preference for one employee organization over another employee organization.

(Emphasis added.) [23] Employer speech could not be curtailed to the degree required under a standard of strict neutrality and still comport with the requirements of HEERA section 3571.3. Thus, an interpretation of Section 3550 as mandating a public employer to remain strictly neutral when communicating with employees contemplating union membership should be avoided in order to harmonize Section 3550 with the entire body of laws that govern the rights and obligations of employers, employee organizations, and employees in California's public sector. (*Grossmont-Cuyamaca*, *supra*, PERB Decision No. 1958, p. 19; People v. Kuhn, supra, 216 Cal.App.2d, p. 698.)

Since the meaning of "deter or discourage" is clear and unambiguous, the employer speech in this case will be examined to determine whether it reasonably deterred or discouraged new Providers from joining the Union. In making that determination, it

is logical to turn for guidance to PERB's existing standards for evaluating employer speech in the context of interference claims arising under the MMBA and other statutes within PERB's jurisdiction.

D. *Standards for Evaluating Employer Communications to Employees*

The test for whether a respondent has interfered with the rights of employees under the MMBA does not require that an unlawful motive is established; only that at least slight harm to employee rights results from the conduct. The standard has been described as follows:

All [a charging party] must prove to establish an interference violation of section 3506 is: (1) That employees were engaged in protected activity; (2) that the employer engaged in conduct which tends to interfere with, restrain or coerce employees in the exercise of those activities, and (3) that employer's conduct was not justified by legitimate business reasons.

(City of San Diego (2005) PERB Decision No. 1738-M, p. 5, citing Public Employees Association of Tulare County, Inc. v. Board of Supervisors of Tulare County (1985) 167 Cal.App.3d 797, 807.)

Under *Carlsbad Unified School District* (1979) PERB Decision No. 89, if harm to protected rights is slight and the employer offers justification based on operational necessity, the competing interests are balanced to determine whether the harm to employee rights outweighs the asserted business justification. (*Id*. at p. 10; Omnitrans (2009) PERB Decision No. 2030-M, pp. 22-24.) The employer's motive, intent, or purpose is not part of a prima facie case of interference and issues regarding the employer's subjective state of mind are only considered in an interference case where the employer has asserted as an affirmative defense that it acted in good faith for a bona fide business purpose, i.e., for determining whether the employer acted for the asserted reason. (*Community Learning Center Schools, Inc*. (2017) PERB Order No. Ad-448, p. 9.)

PERB uses objective criteria when evaluating whether an employer's statements are unlawfully coercive or threatening. (*County of Riverside*, *supra*, PERB Decision No. 2119-M, p. 17.) Thus, it must be demonstrated that an employer's communications would tend to coerce or interfere with a reasonable employee in the exercise of protected rights. The fact that an employee may subjectively interpret an employer's statement as coercive does not necessarily render those statements unlawful. (Regents of the University of California (1983) PERB Decision No. 366-H, adopting proposed dec., p. 15, fn. 9; BMC Manufacturing Corp. (1955) 113 NLRB 823.) Generally, public employers subject to the MMBA may express or disseminate their views, arguments, or opinions, which "shall not constitute, *or be evidence of, an unfair labor practice* . . . unless such expression contains a threat of reprisal, force, or promise of benefit" or "express[es] a preference for one employee organization over another employee organization." (*City of Oakland* (2014) PERB Decision No. 2387-M, pp. 25-26, emphasis in original; citations omitted.)

In the collective bargaining context, the "touchstone" for determining the propriety of direct employer communications with employees is whether they bypass the exclusive representative or undermine its authority to represent unit members. (*Muroc Unified School District* (1978) PERB Decision No. 80, pp. 19-20 (*Muroc*).) In the context of election interference, an employer's captive audience speech expressing anti-union views has been a factor to consider, among a totality of circumstances, to find unlawful coercion. (*Office of Kern County Superintendent of Schools* (1985) PERB Decision No. 533, pp. 48-49 (*Kern Schools Super.*), citing *Clovis Unified School District* (1984) PERB Decision No. 389 (*Clovis*).)

The Board considers the accuracy of the content of the employer's speech in determining whether the communication constitutes an unfair labor practice. Lawful expressions of free speech by an employer have been found where the communication at issue accurately described an event and contained no obvious threats of reprisal or promises of benefit, even where it was critical of the union's bargaining position and/or tactics. (*Saddleback Valley Unified School District* (2013) PERB Decision No. 2333, adopting proposed dec., pp. 28-29; see also, *Oak Park Unified School District* (1998) PERB Decision No. 1286, adopting dismissal ltr., pp. 2-4; *Rio Hondo Community College District* (1980) PERB Decision No. 128, pp. 20-21.) Likewise, in State of California (Department of Transportation) (1996) PERB Decision No. 1176-S, the Board found a written communication from the employer to employees describing how employees could resign from union membership (and directing employees

with questions to the union), was permissible because it was accurate, noting that "while employers may not solicit employees to withdraw from union membership, they may . . . bring to employees attention their right to resign from the union and revoke dues-check off authorizations *so long as the communication is free of* threat and *coercion* or promise of benefit." (Id., adopting warning ltr., p. 3; citing *Ace Hardware Corp*. (1984) 271 NLRB [1174 [24] ; emphasis added.)

However, employer statements that disparage protected activity or the collective bargaining process itself, by suggesting that unionization will result in loss of pay or benefits, or that use of the representative's grievance procedure is futile, have been found to reasonably tend to discourage participation in protected activity and thereby interfere with the rights of employees and/or employee organizations. (*City of Oakland*, *supra*, PERB Decision 2387-M, pp. 26-27, citations omitted; *County of Riverside*, *supra*, PERB Decision No. 2119-M, pp. 19-20 [manager's statement to union officials that he would be dead before the employer granted recognition to group of employees interfered with union's rights under the MMBA].) PERB has also held that the "safe harbor for employer speech does not apply to . . . advocacy on matters of employee choice, such as urging employees to participate or refrain from participation in protected conduct[.]" (*Hartnell Community College District* (2015) PERB Decision No. 2452, p. 25 (*Hartnell*), citing *County of Riverside*, *supra*, PERB Decision No. 2119-M, pp. 16-23 and NLRB v. Gissel Packing Co. (1969) 395 U.S. 575, 619-620.)

The Board places considerable weight on the context of the employer's statements in deciding whether it was coercive. (California State University (1989) PERB Decision No. 777-H, adopting proposed dec., pp. 8-9 (*CSU*).) Part of examining context involves considering "the speech in light of its actual or probable impact on the person receiving the communication." (*Colusa Unified School District* (1983) PERB Decision No. 296, adopting proposed dec., p. 34 (*Colusa*); *John Swett Unified School District* (1981) PERB Decision No. 188, pp. 6-7 [when considered in total, employer's statements to union officer went beyond problem-solving; the primary effect was to intimidate and coerce employee because of his organizational activity].) The impact that a communication may have on an employee who may be more susceptible to intimidation or receptive to the coercive import of the employer's message is especially taken into account. (*CSU* at p. 3.)

The Board recently highlighted the context of the speech as being critical when considering the potential for interference with employee rights. For example, *Hartnell*, *supra*, PERB Decision No. 2452, provides that in analyzing these cases:

The Board will look to the surrounding circumstances in which employer speech occurs, *including the employer ' s power to control terms and conditions of employment and the economic dependence of employees on the employer*, to determine whether, when viewed in context, employer speech conveys a threat of reprisal or force, a promise of benefit or a preference for one employee organization over another.

(*Id*. at p. 25; emphasis added; citations omitted.) The Board noted that the above test still requires a balancing of employee rights against the employer's asserted justification of operational necessity. (Ibid.)

As a starting point in applying the above precedent to these facts, I note that this is not a proverbial "slam dunk" type of fact pattern to find an interference violation. All of the speech at issue here appears to be facially accurate and it is not overtly anti-union. As discussed above, accurate employer speech will not be found in violation of the law unless it can also be found coercive or threatening. I find the speech to be accurate despite UDW's argument in its brief that, because WIC section 12301.24, subdivision (e)(1), does not say that a union's presentation is optional and the remainder of the orientation is clearly mandatory, then the statute must contemplate that a union's presentation is also mandatory for new IHSS program employees to attend. If the entire orientation is mandatory, then the Public Authority's statements to employees that they need not attend UDW's portion of the event would be inaccurate. The above provision of the WIC is indeed silent regarding employees' option to listen to or forego a union's presentation, but I disagree that that silence means employees are therefore compelled to attend a union event.

Under MMBA section 3502, an employee has the right to "form, join, or participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations [,]" but they also have a concomitant right to "*refuse to join or participate* in the activities of employee organizations." (Emphasis added.) MMBA

sections 3506 and 3506.5, subdivision (a), make it unlawful for a public agency "to interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502." Thus, if the Public Authority was compelled by WIC section 12301.24, subdivision (e)(1), to force employees to participate in an employee organization activity, that it turn may cause it to violate the MMBA. Such a statutory interpretation must be avoided. (*Grossmont-Cuyamaca*, *supra*, PERB Decision No. 1958, p. 19; People v. Kuhn, supra, 216 Cal.App.2d at p. 698.) Thus, the Public Authority's statements that attendance during UDW's presentation was optional for employees are accurate. UDW did not take issue with the accuracy of any of the other statements in the new script and, as noted previously, I also do not find any reason to do so. An objective reading of the script also finds no threats of force or promises of benefits.

But, as discussed above at length, the accurate and non-threatening content of the speech are not the only factors to consider. The content of the script must be viewed in light of the larger context of the whole event where it was delivered to conclude whether or not it had the potential to be coercive. To that end, new Providers are told *five times* by the Public Authority—both at the beginning and end of the message—that they do not have to listen to UDW. Sandwiched between hearing that they do not have to stay and listen to the Union, employees are told (1) that a contract between the Public Authority and UDW determines their salary and benefits, but becoming a member of UDW has no bearing on either; and (2) if they sign up as members they can change their minds about that, but, only according to the terms of the membership form and dues will continue to be deducted; however, if they change their minds *again* they can rejoin the Union anytime without restriction. Employees with a long day of orientation ahead of them would reasonably conclude from the employer's speech that they do not have to be present for the next 30 minutes, and since the employer emphasized that fact by saying it *multiple times*, perhaps they are being encouraged to go ahead and leave; even if they stay and then decide to join the Union, nothing substantive about employment terms will change for them (perhaps collective bargaining is futile); and, finally, joining the Union and getting out of it may be complicated. Again, nothing is false about the Public Authority's statements, but together they very much leave the impression that UDW will not convey any vital information to employees; an employee may be left to wonder, then—what would be the point in staying to listen to the union? And since the Public Authority's representatives delivered this message to employees in-person, with the opportunity to observe who stayed in the room and who left, employees may have felt additional pressure to leave the room before the Union's presentation. An employee in this situation may have reasonably feared repercussions or employer displeasure if they stayed to listen to the Union's talk after the Public Authority had repeatedly emphasized that they did not have to do so.

The most important piece of context is that the speech occurs during a *mandatory* orientation event. Thus, the Public Authority has a captive audience for its message about UDW. Captive audience speeches are an important factor to review when evaluating the potential for coercion in questions surrounding employee choice. (*Kern Schools Super.*, *supra*, PERB Decision No. 533, pp. 48-49, citing *Clovis*, *supra*, PERB Decision No. 389.) In this case, employees are asked to choose whether or not to join the Union immediately after the Public Authority's script is recited. New Providers are in an especially vulnerable position at that moment, having not yet completed the orientation process and therefore become eligible to receive pay for their care-giving work. It is reasonable to assume that a prospective employee in that situation may avoid doing something that it seems like the employer may be discouraging. Given all of these circumstances, the subtly coercive message by the Public Authority to employees that nothing is to be gained by listening to the Union's presentation could reasonably interfere with an employee's decision regarding union membership. The safe harbor for employer free speech does not apply to matters involving employee free choice. (*Hartnell*, *supra*, PERB Decision No. 2452, p. 25.)

And in addition to viewing the speech in light of a reasonableness standard, it is appropriate to consider employer speech in light of the *actual impact* it had on the persons receiving the communication. (*Colusa*, *supra*, PERB Decision No. 296, adopting proposed dec., p. 34.) It seems that the communication actually did interfere with employee choice in this case, as shown by the precipitous decline in membership sign-ups on the very day the new script was implemented. There are no other facts in the record, save the new script, that could plausibly explain such a rapid overnight decline.

Ironically, in defense of this allegation, the Public Authority's reply brief references Government Code section 3553,[25] which was not yet in effect at the time of the conduct alleged to be in violation of the law in this case. Government Code section 3553 provides:

(a) This section shall apply only when an employee organization has been recognized or certified by the governing body of the public employer or the Public Employment Relations Board as the exclusive representative of employees in a bargaining unit.

(b) If a public employer chooses to disseminate mass communications to public employees or applicants to be public employees concerning public employees' rights to join or support an employee organization, or to refrain from joining or supporting an employee organization, *it shall meet and confer with the exclusive representative concerning the content of the mass communication*.

(c) If the public employer and the exclusive representative *do not come to agreement on the content of a public employer ' s mass communication covered by this section, and if the public employer still chooses to disseminate the mass communication, the public employer shall distribute to the public employees, in addition to, and at the same time as, its own mass communication, a communication of reasonable length provided to the public employer by the exclusive representative*. The exclusive representative shall provide the public employer with adequate copies of its own mass communication prior to distribution.

(d) This section shall not apply to a public employer's distribution of a communication concerning public employee rights that has been adopted for purposes of this section by the Public Employment Relations Board or the Department of Human Resources.

(e) For purposes of this section, a "mass communication," means a written document, *or script for an oral or recorded presentation or message, that is intended for delivery to multiple public employees*.

(Emphasis added.)

Quoting subdivision (b) above, the Public Authority argues in its reply brief:

if lawmakers truly intended for section 3550 to prohibit employers from providing factual information to employees about their rights to join or not join the union, *why would those same lawmakers create Government Code § 3553[]?*

[¶...¶]

Under UDW's definition of "deter or discourage," it would be unlawful for an employer to "choose to disseminate mass communications to public employees or applicants to be public employees concerning public employees' rights to join or support an employee organization, or to refrain from joining or supporting an employee organization," yet lawmakers expressly contemplated being able to do just that.

(Emphasis in original.)

The Public Authority is correct. Lawmakers clearly envisioned an employer being able to issue a mass communication to employees regarding union membership, like the script in this case. (See, Gov. Code, § 3553, subd. (e).) However, the Public Authority conveniently ignores that *before doing so*, the Legislature orders an employer to *bargain over the content* of such communication with a union. Only in the event that agreement is unable to be reached *over the content* are there certain other procedures that must be followed *before* a *unilateral* message to employees over such topics may be lawfully distributed to employees by the employer. (Gov. Code, § 3553, subd. (c).) If section 3553 had been in effect during the relevant time period, then the Public Authority's unilateral distribution of a mass communication, without first bargaining with UDW over the content, surely would have violated it, just as there was a violation here of MMBA section 3506.5, subdivision (c). The adoption by

the Legislature of section 3553 also undercuts the Public Authority's argument that this subject should be considered outside the scope of representation.

Circling back to the discussion over the Public Authority's bargaining violation under MMBA section 3506.5, subdivision (c), is germane to the discussion of interference with protected rights under Section 3550. As discussed above, in *Muroc*, the Board found that the touchstone for determining the propriety of direct employer communications with employees is whether they bypass the exclusive representative or undermine its authority to represent unit members. (*Muroc*, *supra*, PERB Decision No. 80 at pp. 19-20; see also, City of Arcadia (2019) PERB Decision No. 2648-M, pp. 37-38 [derogating the authority of the exclusive representative amounts to a violation of MMBA section 3506.5, subd. (c)].) A fundamental inquiry in a bypassing case is whether the employer has chosen to deal with the union through the employees, rather than with the employees through the union. (NLRB v. Pratt & Whitney Air Craft Div. (2d Cir. 1986) 789 F.2d 121, 134.) Loreto admittedly wanted to control the information that Providers were getting regarding employee organization matters because she disapproved of the way UDW was presenting that information to them. In this way, the Public Authority also chose to deal with the Union through the employees rather than with the employees through the Union. For all of these reasons, the subtext of the Public's Authority's message —i.e., that UDW's presentation will have no bearing on employment conditions, and is therefore fine to skip—derogated the Union's authority, implied that collective bargaining is futile, and reasonably discouraged or deterred employees from union membership.

UDW has shown a prima facie case of interference with employee rights under Section 3550 as alleged in the PERB complaint. As previously discussed, the Public Authority's answer in this case did not raise as an affirmative defense a business justification for changing the script, and affirmative defenses not raised in an answer are considered waived. (*Sonoma*, *supra*, PERB Decision No. 1225, p. 10.) Therefore, there is no need to balance competing interests to determine whether the harm to employee rights outweighs the asserted business justification. Accordingly, the Public Authority's changes to the introduction script for new Provider orientation reasonably deterred or discouraged union membership in violation of Section 3550.

Remedy

It has been found that the Public Authority violated MMBA sections 3503, 3505, 3505.3, 3506, and 3506.5, subdivisions (a), (b), and (c), and Government Code section 3550, and therefore committed unfair practices under MMBA section 3509, subdivision (b), and PERB Regulation 32603, subdivisions (a), (b), (c), and (g). MMBA section 3509, subdivision (b), and Government Code section 3541.3, subdivision (i), authorize PERB to order the appropriate remedy necessary to effectuate the purposes of these chapters. (See Omnitrans (2010) PERB Decision No. 2143-M, p. 8.) This includes the authority to order an offending party to cease and desist from conduct that violates statutes under PERB's jurisdiction, as well as to take affirmative actions designed to effectuate the law's purposes. (City of Torrance (2008) PERB Decision No. 1971-M, pp. 28-29). It is therefore appropriate to order the Public Authority to cease and desist from unlawfully interfering with protected employee and employee organization rights under the MMBA and Government Code section 3550.

In cases of unlawful unilateral action, PERB generally orders employers to rescind the policy change and restore the status quo as it existed before the violation. (*Lucia Mar Unified School District* (2001) PERB Decision No. 1440, adopting proposed decision, p. 56.) That is appropriate here. Accordingly, the Public Authority is ordered to stop using the introductory script it introduced on January 19, 2018, and return to using the negotiated script that was in effect before January 19, 2018, during all new Provider orientations.

In addition, UDW requests a traditional make-whole remedy in a unilateral change case, consisting here of lost dues from reduced membership after the unlawful implementation of the new script. The Public Authority argues that because there is no documentary evidence to support UDW's membership statistics, and employees could have been motivated by any number of reasons to join or not join the union, lost dues are not appropriate damages. PERB has traditionally ordered dues remittance to the union where an employer's unilateral change caused a union to lose membership dues or fees. (County of Butte (2016) PERB

Decision No. 2492-M, pp. 6-8; Regents of the University of California (2014) PERB Decision No. 2398-H, pp. 36-37; City of Sacramento (2013) PERB Decision No. 2351-M, p. 49; see also, Hospitality Care Center (1994) 314 NLRB 893, 895-896.)

As discussed earlier in the proposed decision, the record does not provide any facts other than the unlawful unilateral implementation of the new script to plausibly explain the marked, overnight decline in new member sign-ups at orientations. The testimony offered by UDW regarding its membership statistics was not challenged by the Public Authority and it was credible. This is sufficient for a finding of fact, with or without supporting documentary evidence. (See, e.g., *City of Davis* (2018) PERB Decision No. 2582-M, p. 25.) It is thus concluded that the Public Authority's action was the proximate cause of the harm caused to UDW, and therefore dues remittance is an appropriate make-whole remedy. Because the pre-change rates of membership were expressed as a range of percentages, i.e., between 75 and 90 percent on average, the precise amount of damages are difficult to quantify. However, uncertainty as to the *amount* of damages must be resolved against the party whose wrongful conduct caused the loss. (*United Teachers Los Angeles (Raines, et al.)* (2016) PERB Decision No. 2475, p. 91, citing *City of Pasadena* (2014) PERB Order No. Ad-406-M, pp. 26-27.)

Taken together, Harrison's and Avila's unrefuted testimony confirmed an approximately 50 percent drop in new member sign-ups, on average, for at least six months following the implementation of the new script. After that, the number of Providers signing up as union members at orientations steadily improved to nearly pre-change levels (on average, between 50 and 70 percent) after UDW modified its own presentation. It is therefore appropriate to limit the make-whole remedy in this case to the six month period from January 19, 2018, to July 19, 2018. Financial losses should be augmented with interest at the rate of 7 percent per annum. (*Journey Charter School* (2009) PERB Decision No. 1945a, p. 2.)

It is also appropriate to order the Public Authority to post a notice incorporating the terms of this order at all locations where notices to unit employees are usually posted. Posting of such a notice, signed by an authorized representative of the Public Authority, provides employees with notice that the Public Authority acted in an unlawful manner, must cease and desist from its illegal action, and will comply with the order. 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 Public Authority to communicate with employees in the IHSS bargaining unit. (*City of Sacramento*, *supra*, PERB Decision No. 2351-M, pp. 43-45.) It effectuates the purposes of PERB-enforced statutes to inform employees of the resolution of this controversy. (*Omnitrans*, *supra*, PERB Decision No. 2143-M, proposed dec., p. 19.)

Proposed Order

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, it has been found that the County of Orange In-Home Supportive Services Public Authority (Public Authority) violated the Meyers-Milias-Brown Act (MMBA or Act) (Government Code, § 3500 et seq.) and Government Code section 3550. The Public Authority violated MMBA sections 3503, 3505, 3505.3, 3506, and 3506.5, subdivisions (a), (b), and (c), and Government Code section 3550, and therefore committed unfair practices under MMBA section 3509, subdivision (b), and Public Employment Relations Board (PERB or Board) Regulation 32603, subdivisions (a), (b), (c), and (g) by unilaterally changing a script in new employee orientations, the content of which deterred or discouraged union membership, and without providing notice and an opportunity to request bargaining to United Domestic Workers of America, Local 3930, American Federation of State, County & Municipal Employees, AFL-CIO (UDW).

Pursuant to MMBA section 3509, subdivision (b), and Government Code section 3541.3, subdivision (i), it is hereby ORDERED that the Public Authority, its governing body, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to bargain in good faith with UDW.

2. Deterring or discouraging employees from becoming members of UDW.

3. Interfering with employees' exercise of protected rights.

4. Denying UDW the right to represent its members.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE PURPOSES OF THE MMBA AND GOVERNMENT CODE SECTION 3550:

1. Rescind the introduction script for new employee orientations that was implemented on January 19, 2018, and restore the introduction script for new employee orientations that was in use before January 19, 2018.

2. Using the period of time before January 19, 2018, as a benchmark, remit to UDW a sum equivalent to the amount of new membership dues, with interest at the rate of 7 percent per annum, which were lost by UDW between January 19, 2018, and July 19, 2018, due to the Public Authority's unlawful acts.

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

Right to Appeal

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

Public Employment Relations Board

Attention: Appeals Assistant

1031 18th Street

Sacramento, CA 95811-4124

(916) 322-8231

FAX: (916) 327-9425

E-FILE: PERBe-file.Appeals@perb.ca.gov

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

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile

transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135, subdivision (d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 and 32130.)

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

Footnotes

1 The County and the Public Authority are referred to interchangeably as the Respondent in this matter.

2 The MMBA is codified at Government Code section 3500 et seq. Unless otherwise specified, all statutory references herein are to the Government Code. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

3 As will be discussed below, the WIC defines the parameters of the state program covering the employees at issue here.

4 At the time of the hearing, the parties had not yet executed a successor agreement and therefore were still bound by the terms of the expired agreement.

5 The LMRC is composed of several representatives of both parties, including Harrison and Loreto.

6 No Providers testified at the hearing.

7 According to Loreto, some Providers, upon receiving their paychecks with dues deductions, had threatened to not turn in their time sheets. Such action would put Recipients' services at risk. It was apparently for this reason that portions of the DSS letter started to be recited by Public Authority staff at orientations.

8 Under City of Claremont, the first inquiry in the scope analysis is whether the matter has a significant and adverse effect on the wages, hours, or working conditions for represented employees. If not, then there is no duty to meet and confer. If so, then the next inquiry is whether the significant and adverse effect arises from the implementation of a fundamental managerial or policy decision. If no fundamental managerial or policy decision is implicated, then the employer is required to meet and confer over the change. Finally, if both of these two questions are answered affirmatively, then the parties' respective interests are balanced against each other and the matter is within the scope of representation only if the "'employer's need for unencumbered decision-making in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question.'" (City of Claremont, supra, 39 Cal.4th at p. 638, quoting Building Material & Construction Teamsters' Union v. Farrell (1986) 41 Cal.3d 651, 660.)

9 That case was decided under the Educational Employment Relations Act (EERA) (Gov. Code, § 3540 et seq.) PERB has found it appropriate to rely on cases interpreting EERA and other California labor relations statutes with parallel provisions, as well as those interpreting the National Labor Relations Act (NLRA) (29 U.S.C. § 151 et seq.), when interpreting the MMBA. (See, Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 616-617.)

10 The Public Authority argues that because WIC section 12301.24, subdivision (a), lists six components of a mandatory new Provider orientation and section 12301.24, subdivision (e), separately provides that employee organizations may present information at the orientation, it shows that the Union's portion of the event is not actually a part of the orientation itself.

11 In reaching that conclusion, the Board disavowed any interpretation of City of Alhambra (2010) PERB Decision No. 2139-M suggesting that the test in City of Claremont should always be applied to determine whether a matter is within the scope of representation under the MMBA. (*County of Orange*, *supra*, PERB Decision No. 2594-M, p. 20.)

12 See, e.g., First National Maintenance Corporation v. NLRB (1981) 452 U.S. 666, 679; Building Material & Construction Teamsters' Union v. Farrell, supra, 41 Cal.3d 651, 660.

13 The consolidated cases in that matter were on remand from the California Supreme Court with an instruction for further consideration by the Board in light of the Court's decision in San Mateo City School District et al. v. PERB (1983) 33 Cal.3d 850. (*Healdsburg*, *supra*, PERB Decision No. 375, p. 2.) The Board noted that the Court cited with approval the Board's test for determining the negotiability of subjects not specifically enumerated within EERA section 3543.2 that was established in *Anaheim Union High School District* (1981) PERB Decision No. 177. (*Healdsburg*, pp. 5-6.) Under the *Anaheim* test, a non-enumerated subject will fall within the scope of representation if: (1) it is logically and reasonably related to wages, hours, or an enumerated term and condition of employment; (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict; and (3) the employer's obligation to negotiate would not significantly abridge its freedom to exercise managerial prerogatives. (*Healdsburg*, p. 6.)

14 Unlike a denial, which controverts the allegations in the complaint and does not affect the charging party's burden under PERB Regulation 32178, an affirmative defense alleges the existence of *additional facts* that, if proven, would reduce or bar liability, even if the complaint's allegations were found to be true. (Regents of the University of California (2018) PERB Decision No. 2601-H, p. 18; see also FPI Development, Inc. v. Nakashima (1991) 231 Cal.App.3d 367, 381; 383-384; 5 Witkin, Cal. Proc. (5th ed 2008), Pleading § 1081.) Thus, while often pleaded as "affirmative defenses," a respondent's assertions that the charging party has failed to state a prima facie case or a cognizable claim operate as denials, as they do no more than respond to the essential allegations of the complaint, and therefore do not affect the charging party's burden. (PERB Regulation 32178; see also Quantification Settlement Agreement Cases (2011) 201 Cal.App.4th 758, 812-813.)

15 The Public Authority denies that it was influenced by the actions of the Freedom Foundation or that this entity dictated the terms of the new script, and, to be clear, I do not make any such findings. However, the timing of these events strongly suggests that the contacts made by the Freedom Foundation with the Board of Supervisors at least triggered the review of the script by County officials, who in turn permitted the Public Authority to unilaterally modify it. There are no other facts in the record showing that the script would have been modified in January 2018 even in the absence of the Freedom Foundation's contacts with the County.

16 The out-of-court statements of Providers are hearsay, and, without an applicable exception to the hearsay rule, are insufficient to establish a factual finding. (PERB Reg. 32176; *Palo Verde Unified School District* (2013) PERB Decision No. 2337, p. 19.)

17 This version of the statute was in effect from January 1, 2018, until June 26, 2018. (Added by Stats. 2017, Ch. 567 (SB 285), § 1, eff. Jan. 1, 2018.) As of June 27, 2018, the statute was amended as follows: "A public employer shall not deter or discourage public employees or applicants to be public employees from becoming or remaining members of an employee organization, or from authorizing representation by an employee organization, or from authorizing dues or fee deductions to an employee organization. This is declaratory of existing law." (Amended by Stats. 2018, Ch. 53 (SB 866), § 11, eff. Jun. 27, 2018.)

18 Government Code section 3541.3, subdivisions (h) and (i), respectively, provide in relevant part that the Board or its delegates have the power and duty to hold hearings relating to any matter within its jurisdiction and to "take any action and make any determinations in respect of these charges or alleged violations as the board deems necessary to effectuate the policies of this chapter."

19 MMBA section 3506 states: "Public agencies and employee organizations shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502." MMBA section 3506.5, subdivision (a), states that a public agency shall not: "Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter."

20 In its briefs, the Public Authority repeatedly emphasizes that because the Legislature uses the phrase "[t]his is declaratory of existing law[,]" it demonstrates that existing standards applicable to violations of the MMBA must apply to allegations involving Section 3550; whereas UDW, citing applicable legislative history, argues that the new phrase refers to extending the statute's protections to applicants for employment. I find no need to reach a conclusion one way or the other, because that phrase was added to the statute effective June 27, 2018, which is beyond the timeframe at issue in this case.

21 The phrase does appear, however, in section 8(a)(3) of the National Labor Relations Act. (29 U.S.C., § 151 et seq.)

22 Similarly, Section 3550 also does not prohibit an employer from making statements that are the functional opposite of deter and discourage—i.e., statements that could *induce or encourage* union membership. While words of union encouragement are arguably already prohibited under MMBA section 3506.5, subdivision (d) (prohibiting an employer from contributing "financial or other support to any employee organization"), if employer neutrality had been the aim of the Legislature for Section 3550, one would expect to see such a prohibition spelled out in the new law.

23 While the MMBA does not contain the same language, the Board has adopted the same standard applicable to the MMBA through its decisional law. (See, e.g., *County of Riverside*, *supra*, PERB Decision No. 2119-M, p. 17.)

24 The decision incorrectly cites the case as 271 NLRB 178.

25 Amended by Stats. 2018, Ch. 53 (SB 866), § 11, eff. Jun. 27, 2018.