



**STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD**

WEST COVINA FIREFIGHTERS'
ASSOCIATION, INTERNATIONAL
ASSOCIATION OF FIREFIGHTERS, LOCAL
3226,

Charging Party,

v.

CITY OF WEST COVINA,

Respondent.

UNFAIR PRACTICE
CASE NO. LA-CE-1145-M

PROPOSED DECISION
(January 18, 2019)

Appearances: Adams Ferrone & Ferrone, by John R. Kristofferson, Attorney, for West Covina Firefighters Association, International Association of Firefighters Local 3266; Jones & Mayer, by Jamal Boyd-Weatherby, Attorney, for City of West Covina.

Before Eric J. Cu, Administrative Law Judge.

INTRODUCTION

In this case, an exclusive representative accuses a public agency employer of numerous acts of interference with protected rights, retaliation for union activities, and violations of the duty to meet and confer in good faith. The employer denies any violation.

PROCEDURAL HISTORY

On December 1, 2016, the West Covina Firefighters Association, International Association of Firefighters Local 3226 (Association) filed an unfair practice charge accusing the City of West Covina (City) of several violations of the Meyers-Milias Brown Act (MMBA) and Public Employment Relations Board (PERB or Board) Regulations.¹

¹ The MMBA is codified at Government Code section 3500 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

On June 20, 2017, the PERB Office of the General Counsel issued a complaint alleging multiple instances of retaliation, interference with protected rights, and unilateral changes to matters within the scope of representation. On July 10, 2017, the City filed an answer to the complaint denying the substantive allegations and asserting multiple affirmative defenses. The statute of limitations was not asserted as a defense.

An informal conference was held on August 8, 2017, but the matter was not resolved. A formal hearing was then held over four days between May 21 and September 13, 2018.

The parties filed simultaneous closing briefs on November 21, 2018. At that point, the record was considered closed and the matter was submitted for decision.

FINDINGS OF FACT

The Parties

The City is a “public agency” within the meaning of MMBA section 3501, subdivision (c), and PERB Regulation 32016, subdivision (a). The Association is an “exclusive representative” within the meaning of PERB Regulation 32016, subdivision (b). The Association’s bargaining unit includes the position of Firefighter, Firefighter/Paramedic, Engineer, and Captain. Probationary employees are also included in the bargaining unit, as are positions funded through temporary grant money.

The Parties’ Labor Dispute

The Association and the City have been involved in a labor dispute since 2015. For at least part of that time, the parties were in negotiations for a successor to their Memorandum of Understanding (MOU), which expired in 2014. For a three-month period starting in summer 2016,² Association unit members engaged in peaceful picketing in public areas near City Hall

² Unless otherwise specified, all dates hereafter refer to events in 2016.

on the days of City Council meetings. Unit members also sat together during the Council meetings. The demonstrators wore union-affiliated clothing and some carried union signs during the demonstrations. Around 20 to 25 Association unit members, including some rookies, participated. Association President Matt Jackson occasionally spoke during the open forum portion of the meetings.³ There was no evidence of any disruptions or confrontations.

Resignations from Extra-Duty Assignments

Unit members may volunteer for extra duties and assignments at the Fire Department. For example, a unit member coordinates the Fire Explorers, which is a mentoring program that allows local teens to attend meetings and other functions with firefighters.

In June, unit members resigned from between 36 and 40 extra-duty assignments all around the same time. Only a few specific examples were identified for the record. Engineer Peter Aguilar resigned from coordinating the Fire Explorers program. Captain Brent Meier resigned from coordinating the Public Education program, which involves ordering education supplies (stickers, safety books, and plastic novelty helmets) and speaking at schools about fire safety. Captain Jason Robles resigned from some unspecified assignments.

An unidentified unit member resigned from the California Incident Command Certification System (CICCS) coordinator position, which assists unit members interested in participating in strike team assignments. Strike team assignments are part of the Fire Department's Master Mutual Aid agreement with other fire departments throughout the State. Under this agreement, firefighters at the Fire Department may assist other fire departments in responding to large-scale disasters. The City may be reimbursed for time its own firefighters spend on strike teams, but participants must maintain certain CICCS training and certification

³ Jackson is also a Captain in the Fire Department.

requirements to qualify for reimbursements. The CICCIS Coordinator is responsible for ensuring that all interested firefighters have the necessary certifications.

Fire Department Chief Larry Whithorn accepted some unit members' resignations, but ordered others to continue their extra-duty assignments if he felt they were necessary for the Fire Department to function. Around 13 unit members, including Meier, filed grievances over Whithorn's order to continue these assignments.

The Tuition Reimbursement Program

Section 17 of the expired MOU contains a Tuition Reimbursement program. That section states:

- A. Unit employees's maximum tuition reimbursement (including books) shall be six hundred and eighty dollars (\$686) per fiscal year.
- B. The specific details of the Tuition Reimbursement Program is [sic] set forth in Administrative Policy approved on August 13, 1992, and amended thereafter.

The City's Administrative Policy (AP) for Tuition Reimbursement applies to all bargaining units who have negotiated for such a benefit. The AP defines the purpose and requirements of the program. The AP states that its purpose is to enhance employee development by providing access to training and continuing education opportunities in order to improve employee performance. It further states that "[e]mployee development includes, but is not limited to courses taken at trade schools, technical schools, and/or degreed college programs."

Section I(2) of the AP states, [o]nly courses, specialized training, or degree programs 'job related' to full-time positions will be considered for tuition reimbursement." Reimbursement requests for courses unrelated to one's job may be denied. Human Resources (HR) administers the Tuition Reimbursement program for all departments. The HR Director

may and/or the relevant department head may approve or deny requests. For most departments, tuition reimbursements are funded through money budgeted to HR.

Under Section I(3), courses offered by “major universities” are only eligible for reimbursement if they are accredited by the U.S. Department of Education. HR Director Edward Macias testified that, ever since he was first hired as a HR Management Analyst in 2014, the City only grants reimbursement requests at most departments if the course is both job related and offers credits toward a degree through an accredited institution.⁴

The Tuition Reimbursement program at the Fire Department differs from other departments in two important ways. First, since at least 2008, the Fire Department approved reimbursement requests for “Red Helmet” courses, which is a private company offering classes approved by the State Fire Marshall. It is undisputed that Red Helmet is not accredited by the U.S. Department of Education and does not have classes that provide credits towards achieving a degree. The second significant difference is that tuition reimbursement costs for Fire Department employees are split between HR’s tuition reimbursement budget and the Fire Department’s training budget.

In or around the fall of 2015, HR and Fire Department management discussed reconciling the Fire Department’s handling of tuition reimbursement requests with other City departments. Ultimately, then-HR Director Tom Bokosky⁵ communicated to Whithorn that tuition reimbursement requests from Fire Department employees would only be approved if the course was job related, earned credits towards a degree or certificate, and was offered by an accredited institution.

⁴ Macias also testified that the City interpreted the policy in this way even before he was employed by the City, but there was no non-hearsay evidence corroborating his testimony.

⁵ Bokosky did not testify.

In November 2015, Whitmore held an Officers Training Conference (OTC) meeting. All three Assistant Chiefs and most Captains attended. Captains Jackson and Todd Smith both attended. At the time, Jackson was Association President and Smith was Association Vice President. During the meeting, management announced that, effective July 1, Red Helmet classes would no longer be eligible for tuition reimbursements because those classes did not provide any college credits.

On January 6, HR issued a memo to all department heads, including Whithorn, stating in relevant part that the “City will no longer reimburse expenses for training courses that are not provided by academic institutions with USDE recognized accreditation.” Macias assisted Bokosky in drafting the memo. On May 16, Assistant Chief Brian McDermott issued a memo to Fire Department employees largely reiterating the content of the HR memo. Starting on July 1, the City stopped reimbursing Association unit members for Red Helmet courses through the Tuition Reimbursement program. Since then, unit members, including Firefighter/Paramedic Michael Hambrel, were denied reimbursement requests for Red Helmet classes.

Whithorn’s July 7, 2016 Conversation with Greg La Fleur

On or around July 7, Firefighter/Paramedic Greg La Fleur was participating in Association demonstrations outside the City Council chambers. Association President Jackson also participated. At the time, La Fleur had been out on a medical leave of absence for some time because of an off-duty leg injury. Whithorn, who is required to attend all City Council meetings, observed La Fleur among the Association demonstrators in the Community Room, just outside of the City Council chamber. Whithorn had recently been informed by HR that La Fleur had nearly depleted all of his leave time and he explained the situation to La Fleur

that evening. Whithorn testified that he saw Jackson that evening too, but that Jackson was not in the room at the time. Jackson disputes this and said he was standing next to La Fleur at the time Whithorn approached. La Fleur did not testify.

Whithorn testified that he expressed concern that La Fleur was out demonstrating while on injury leave. He told La Fleur that his leave time would run out soon, at which point the City would not be obligated to hold La Fleur's position for him. Whithorn also testified that he told La Fleur "it doesn't look good that you're running out of [leave] time. You should be healing, but you're showing up here." Whithorn further testified that La Fleur appeared to be relieved that Whithorn had notified him.

According to Jackson, Whithorn told La Fleur that "the City Council could view it poorly that [La Fleur] was participating in that [picketing] event while off on injury." At one point, Jackson testified that he overheard Whithorn's conversation with La Fleur. However, in response to questions from Association's counsel, Jackson testified that it was La Fleur who told him what Whithorn had said. Jackson did not testify about La Fleur's reaction to the conversation.

Sometime later, La Fleur provided the City with clearance from his own physician that he was medically able to return to work. However, HR had informed Whithorn that it wanted La Fleur to undergo a fitness-for-duty examination by a City selected physician before returning to full active duty as a Firefighter/Paramedic.⁶ In the interim, Whithorn assigned La Fleur to a "special detail," that is sometimes used for employees who have exhausted all

⁶ Macias testified that he heard an HR Technician express concern after reviewing the medical information La Fleur had provided to the City. According to Macias, the Technician sought guidance about how La Fleur could be returned to active duty. However, Macias temporarily left the City at the time it was decided that La Fleur should see a specialist. The HR Technician was not identified and did not testify.

their leave, but do not qualify for another assignment. Whithorn was not involved with the decision to require La Fleur to see the specialist, the selection of the City's doctor, or the scheduling of the examination. Whithorn testified that he favored the special detail assignment so that La Fleur could resume receiving his full pay and benefits.

The Meeting Between Whithorn and La Fleur at Fire Station #2

La Fleur returned to work at Fire Station #2 for his special detail assignment sometime in August. Captain Paul Krueger was on duty when La Fleur returned. Krueger testified that La Fleur asked about the process for seeing the City's specialist and Krueger was unable to answer.

In general, before an injured employee may return to work, they must provide documentation from a medical professional stating that they are able to return to duty on a modified or unrestricted basis. Because each injury and recovery is unique, HR assesses whether additional information is needed before the employee can return to full duty. Factors considered include the severity of the injury, the length of the absence, the employee's health condition, the expected duties upon return, and any questions or concerns about the employee's medical documents.

Occasionally, the HR Director may request a fitness-for-duty examination by a City-approved doctor before an injured employee returns to full active duty. The HR Director is responsible for deciding whether such an examination is needed, but the employee's department head has some input into the process. HR is responsible for selecting the physician and scheduling the examination. HR Director Macias explained that these types of examinations are rarely needed and that the City does not have any fixed policy regarding when they are needed or how they are scheduled.

Whithorn visited Fire Station #2 on the day La Fleur returned to work on his special detail assignment. According to Krueger, La Fleur asked Whithorn about returning to regular duty. Krueger testified that La Fleur said something to the effect of “I’d really love to get back to work. I’ve been off for a long time. I’ll do anything I need to get back.” According to Krueger, Whithorn responded that the process would take some time. La Fleur continued to ask about expediting the process, at which point Whithorn responded “well, maybe I’ll get to that when I’m done with all of these grievances.” Krueger testified that he then saw Whithorn throw down a sheet of paper and walk away. Whithorn did not testify about this conversation.

The Incident with Edgar Vela

On July 25, Whithorn visited Fire Station #5 after lunch and parked his Fire Department vehicle on the apparatus floor. Whithorn and Captain William Mansour spoke during the visit and they continued their conversation as Whithorn walked back to his vehicle. Firefighter/Paramedic Edgar Vela was assigned that station and had been wiping and polishing Whithorn’s vehicle as Whithorn and Mansour approached. At the time, Vela was a rookie who had been hired with funds from a temporary grant. Vela testified that wiping down the Chief’s vehicle was a sign of respect from rookies. The three of them then spoke briefly on the apparatus floor. The content of this conversation is in dispute.

Whithorn and Mansour both testified that they were discussing matters unrelated to work before seeing Vela. According to Mansour, Whithorn’s demeanor was not out of the ordinary during the conversation and he did not appear to be upset. Both Whithorn and Mansour testified that Whithorn told Vela that it was unnecessary to polish the vehicle. Vela remained on the apparatus floor as Mansour and Whithorn continued their conversation.

Whithorn testified that he eventually turned to Vela and said “I want to ask you a question. You don’t have to answer if you don’t want to, but when you’re sitting in the front row and center at a City Council meeting, are you there because you feel the City has done you wrong or do you feel pressured to be there?” Both Whithorn and Mansour testified that Vela’s response was something to the effect of “a little bit of both.” Whithorn also asked Vela if he paid Association dues. When Vela said that he did, Whithorn told him that he (Whithorn) was not allowed to be part of the Association for the first six months of his rookie year. Whithorn testified that he was surprised that Vela answered his questions. Mansour testified that all three of them were smiling at the time and Mansour said to Whithorn of Vela, “he’s a good guy. He’s a good rookie.” Whithorn replied by saying “I know he is. That’s why I hired him.” Whithorn described the whole encounter as a pleasant conversation.

According to Vela, Whithorn appeared to be upset as he and Mansour approached. Whithorn asked Vela if he was paying Association dues, to which Vela responded affirmatively. Whithorn then asked why Vela decided to participate in the picketing events at City Hall, and if Vela was unhappy at the City. Vela testified that he felt intimidated and concerned by Whithorn’s questions and tried to respond “neutrally.” According to Vela, Whithorn also said that he did not pay Association dues as a rookie and that it was “unfair” or “unjust” that the Association makes rookies pay dues and participate in demonstrations. According to Vela, Whithorn said that when grant-funded employees, like Vela, show up at the City Hall demonstrations, it was more difficult to retain those employees because the City Council members recognized their faces.

Vela felt uncomfortable by this encounter and spoke to Firefighter/Paramedic Matt Briskie and Krueger. Both Briskie and Krueger testified that Vela spoke to them about the

conversation with Whithorn. Their account of what Vela said was consistent with what Vela testified to at the hearing. Vela later spoke to Mansour who assured Vela that he had not done anything wrong.

The August 2016 Statements by Assistant Chief McDermott

Sometime in August, Captain Scott Gilmore saw McDermott sitting at a table at Fire Station #3. Gilmore testified that McDermott “looked upset,” which prompted Gilmore to ask if something was bothering him. According to Gilmore, McDermott responded by stating something along the lines of “I don’t know what the Union is up to, the Association is up to, but it’s going to go bad for you[.]” McDermott did not testify and no other witness testified about this exchange.

The August 18, 2016 Memo

On August 18, Whithorn issued a memo to Fire Department employees entitled “FIRE DEPARTMENT UPDATE.” In the memo, Whithorn referenced some employees’ decision to resign or withdraw from performing extra duties and assignments for the Fire Department. Whithorn expressed that some of the duties were essential to day-to-day operations, the safety of department employees, and the Fire Department’s ability to carry out its mission. He stated that the impact of the resignations was not known, but that they “may require the suspension of voluntary programs such as the Fire Explorers; limiting our participation of [sic] strike team assignments due to no CICCIS Coordinator; a greater reliance on Fire Captains to request and follow up with station repairs and the needs to the crew; as well as potential delays of repairs and/or replacement of non-essential items.”

During the hearing, Whithorn explained his view that the Fire Explorer coordinator was a significant position because the teenagers serviced by the program needed a consistent

reliable presence for the program to work. Although firefighters, including Vela, continued to volunteer for the program, Whithorn said that having an official coordinator demonstrated a greater level of commitment, which he believed to be necessary for that program.

Whithorn also explained that participating on strike team assignments is more difficult without a CICCS coordinator because no one else at the Fire Department is responsible for ensuring that participants have the certifications to qualify the City for reimbursement.

Regarding fire station repairs, Whithorn explained that administrative duties are typically assigned to Assistant Chiefs and Captains. When a significant number of unit members resigned from their extra-duty assignments, Whithorn assigned more tasks from those assignments to Assistant Chiefs, which left more administrative work to Captains. Captains were accordingly used more frequently as the point of contact to communicate and coordinate any repairs or remodeling with the City departments responsible for monitoring the construction and code compliance.

The August 2016 Meier Grievance Meeting

After Meier resigned from coordinating the Public Education program, Whithorn ordered him to continue those duties. Meier grieved that order, taking the position that the coordinator duties were *voluntary*, and that he could resign at any time. Management's position was that the duties were *ancillary*, and that Meier could be directed to continue them as a mandatory part of his job. In August, Meier and Whithorn attended a grievance meeting, as did Jackson for the Association. Assistant Chief Bart Brewer and Bokosky also attended, for the City.

Meier described the meeting as "a little more aggressive" than he expected, particularly when describing Whithorn's behavior and tone of voice. During the meeting, Meier asserted

that coordinating the Public Education program was not specifically listed in his job description. Whithorn responded by listing other common activities that were not in any job description, such as exercising, eating, napping, and washing personal vehicles. Regarding washing vehicles, Whithorn testified that he said something to the effect of “where does it say [in our job descriptions] we get to wash our vehicles?” According to Meier, Whithorn also said “what if you weren’t able to wash your cars anymore?” At the hearing, Whithorn denied making this last statement.

The August 24, 2016 Drought Memo

In January, City Manager Chris Freeland began discussing water conservation efforts with department heads.⁷ Department heads were encouraged to reduce overall water usage in their departments. Around the same time, the City began displaying materials detailing the City’s water reduction and encouraging City residents to do the same. Freeland also spoke with Whithorn directly about conservation at the Fire Department. The two discussed the policy of allowing Fire Department employees to wash their personal vehicles at fire stations. According to Whithorn, Freeland said he did not like the “optics” of firefighters washing their vehicles while the City was encouraging residents to conserve water. Neither Freeland nor Whithorn raised the issue with the Association at this time.

Whithorn did not immediately make any changes to the vehicle washing policy. He testified that he knew that the change would be unpopular and would adversely affect morale. He testified that he hoped that drought conditions might improve, making any change unnecessary. But by May, the Governor issued Executive Order (EO) B-37-16, which called

⁷ Freeland did not testify.

for developing long-term water reduction strategies. EO B-37-16 also directed that previous EOs concerning water conservation, including EO B-29-15, remain in effect.⁸

On August 24, Whithorn issued a memo to Fire Department employees stating, in part “until further notice, Fire Department personnel will no longer utilize city water to wash their personal vehicles, such as, but not limited to; cars, trucks, motorcycles, recreational vehicles, trailers, boats, etc.” Whithorn referenced EO B-29-15, and the City’s efforts to prioritize water conservation, as part of the justification for the change. The Association received no advance notice of the change.

The Evaluation Drafting Procedure

Captains conduct performance evaluations for Firefighters, Firefighter/Paramedics, and Engineers, even though all of these positions are in the same bargaining unit. Captains are notified when the employees they supervise are due for an evaluation. The Captain completes an initial draft of the evaluation on a standard City evaluation form. The Captain scores employees according to a numeric scale of one to five. According to the form, one is the highest possible score, and is reserved for employees whose “[p]erformance consistently exceeds all requirements.” A score of two is for employees whose “[p]erformance exceeds requirements.” A score of three is for employees whose “[p]erformance meets all requirements.” Scores of four and five are for employees who fail to meet at least some performance expectations. Captains also give an overall performance score using the same scale.

⁸ EO B-29-15 called for a mandatory 25 percent statewide reduction in water usage.

The evaluation form also includes space for narrative commentary for each performance category as well as for the employee's overall performance. Finally, the Captain drafts goals for the employee to achieve before the next evaluation.

Captains send draft evaluations to an Assistant Chief for review. If approved, the Assistant Chief signs the evaluation and sends it to the Chief for approval. Fully approved evaluations are then returned to the Captain to issue to the employee. If either the Assistant Chief or the Chief declines to approve the evaluation, it is "kicked back," or returned to the Captain for revisions.

The Peter Aguilar Evaluation

In August, Robles drafted an evaluation for Aguilar, who was on probation at the time. Robles gave Aguilar an overall score of two.⁹ In one of the comments sections, Robles described Aguilar as "Dedicated," capitalizing the term because it was one of the three core values of the Fire Department, the other two being "Integrity" and "Pride."

McDermott kicked back the Aguilar evaluation to Robles. According to Robles, McDermott said "how [is Aguilar] dedicated if [he's] dropping some of these assignments," likely referring to Aguilar's decision to resign from coordinating the Fire Explorers program. Robles testified that McDermott instructed him to "change it or reword it." Robles disagreed that resigning from the coordinator position required eliminating the "Dedicated" comment and felt strongly that Aguilar deserved both the overall score of two and the "Dedicated" description. He made some unspecified changes and resubmitted the draft to McDermott.

Eventually, Whithorn spoke to Robles about the Aguilar evaluation as well. Whithorn suggested that Robles add more narrative for his comments, such as providing examples of

⁹ Robles also gave Aguilar an overall score of two in his prior evaluation.

times that Aguilar displayed his dedication. Whithorn also wanted Robles to set goals for Aguilar that went beyond an Engineer's expected job duties.¹⁰ Whithorn did not direct Robles to change any score on the evaluation or to remove commentary.

Ultimately, Robles both McDermott and Whithorn approved a version of the Aguilar evaluation that contained both the "Dedicated" comment as well as the overall score of two. There was no detailed evidence about the difference between Robles's original draft evaluation and the final version. However, the commentary in the final evaluation does include positive examples of Aguilar's work performance and also includes multiple goals.

The SMART Goals Memo

On or around September 14, McDermott e-mailed all Captains about evaluations. McDermott wrote that some draft evaluations had been kicked back to Captains because the goals sections needed more detail or the performance scores required justification. Attached to the memo was a "SMART Goals" rubric, for stating and defining employees' goals.¹¹

Captain Eric Gonzalez testified that before the SMART Goals rubric was introduced, Captains had more flexibility in drafting goals. However, Jackson, who has been drafting evaluations for longer than Gonzalez, testified that the elements in the SMART Goals rubric were not new. Whithorn concurred, testifying that the rubric was implemented merely for "tidying up" how goals were drafted in evaluations. Jackson did believe that management had changed some aspect of drafting evaluations, but he was vague about the nature of the change. Jackson testified that "it wasn't adding more detail. It was changing the verbiage of the

¹⁰ Whithorn expressed particular concern with Robles's stated goal of having Aguilar polish one quarter of the fire truck because waxing the truck is a duty assigned to all probationary Engineers.

¹¹ "SMART" is an acronym, which stands for: Specific, Measurable, Achievable, Relevant, and Time-bound.

detail.” Regarding evaluation scores and commentary, Robles testified that Captains have always been required to justify positive evaluation scores with written commentary.

Captain Gonzalez’s Evaluation of Engineer Flannigan

In around September, Gonzalez created a draft performance evaluation for an Engineer he supervised, named Flannigan.¹² Gonzalez submitted a draft of the evaluation to McDermott for his review. Gonzalez testified that McDermott kicked back the draft and directed him to add more detail to the “goals” section. Gonzalez re-wrote that section and re-submitted the draft to McDermott. McDermott kicked back the evaluation once more, again citing concern over the goals section. Gonzalez revised the evaluation once again and McDermott approved it.

Later, Gonzalez asked McDermott why the draft evaluation required multiple revisions. According to Gonzalez, McDermott responded by saying “if we wanted to be treated like professionals, then, you know, we should have no problem dealing with these changes. That, you know, we’re big boys and we should be able to handle it.”

ISSUES

1. Did the City unilaterally change a policy within the scope of representation by:
(a) its May 16 memo regarding the Tuition Reimbursement program?; (b) delaying Firefighter/Paramedic La Fleur’s return to full active duty?; (c) adopting a policy prohibiting washing personal vehicles at Fire Stations; or (d) changing evaluation drafting procedures?
2. Did the City retaliate against unit members for protected activities by:
(a) delaying La Fleur’s return to full active duty; or (b) requiring that Captain Robles remove the “Dedicated” comment from Engineer Aguilar’s evaluation?

¹² Flannigan’s first name was not provided.

3. Did the City interfere with protected rights by: (a) Chief Whithorn's statements to La Fleur on July 7; (b) Whithorn's questioning Firefighter/Paramedic Vela on July 25; (c) Assistant Chief McDermott's August statements to Captain Gilmore; (d) Whithorn's August 7 statements to Captain Meier during a grievance meeting; (e) Whithorn's August 18 memo; or (f) McDermott's August comments about evaluations?

4. Should the Association's unalleged unilateral change violation be addressed? If so, was there a violation?

CONCLUSIONS OF LAW

1. The Unilateral Change Allegations

The PERB complaint alleges multiple unilateral changes to negotiable policies. An employer's unilateral policy changes violates the duty to bargain in good faith where: (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 the opportunity to bargain over the change; and (4) the change has a generalized effect or continuing impact on terms and conditions of employment. (*City of Davis* (2016) PERB Decision No. 2494-M, p. 18, citing *Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262, p. 9; see also *Grant Joint Union High School District* (1982) PERB Decision No. 196 (*Grant JUHSD*), p. 10 and *Walnut Valley Unified School District* (1981) PERB Decision No. 160, p. 5.)¹³

¹³ When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, p. 616; *Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M, p. 13, fn. 4.)

(a) Tuition Reimbursement (§§ 3-8)¹⁴

The PERB complaint alleges that the City unilaterally changed how it administers the Tuition Reimbursement program for the Association’s unit. The City does not dispute that changes were made, but contends that this claim is untimely because the Association knew of the changes outside the statute of limitations period. Specifically, the City asserts that Fire Department management announced the change to all Captains during a November 2015 OTC meeting, which was attended by Association officers Jackson and Smith. The City accordingly argues that Association representatives had actual knowledge of the changes more than six months from December 1, 2016, the date the unfair practice charge was filed in this case. (See *City of Livermore* (2014) PERB Decision No. 2396-M, p. 11, citing *Coachella Valley Mosquito & Vector Control Dist. v. PERB* (2005) 35 Cal.4th 1072 [holding MMBA claims have a six month statute of limitations period].)

During the investigation phase of PERB’s unfair practice charge process, the charging party has the burden of proving that its claims are timely. Claims based on conduct occurring more than six months before the charge was filed are subject to dismissal. (PERB Regulation 32620, subd. (b)(5).) After the investigation concludes, and if a complaint issues, the Board has found that the statute of limitations is “an affirmative defense, which the respondent has the burden to plead and prove.” (*Los Angeles Unified School District* (2014) PERB Decision No. 2359 (*LAUSD*), p. 3.) Under PERB Regulation 32644, subdivision (b)(6), the respondent is required to state all affirmative defenses in its answer. Affirmative defenses that are not raised in a properly filed answer are waived. (*LAUSD*, p. 3; *Regents of the University of California* (2018) PERB Decision No. 2601-H, pp. 13-14; *Claremont Unified School District*

¹⁴ Due to the large number of allegations in the PERB complaint, this proposed decision will list the paragraphs of the complaint at issue in each of the sections below.

(2014) PERB Decision No. 2357, p. 17; *City of Torrance* (2008) PERB Decision No. 1971-M, pp. 27-28.) In other words, it is not appropriate for PERB to consider affirmative defenses raised for the first time in the respondent's closing brief. (*City of Burbank* (2008) PERB Decision No. 1988-M, pp. 19-20, citing *Sonoma County Office of Education* (1997) PERB Decision No. 1225.)

The City in this case did not assert the statute of limitations as an affirmative defense in its answer to the PERB complaint. The City also did not seek to amend its answer at any time to assert that the Association's claim is untimely. Therefore, because the City did not raise this affirmative defense properly, the merits of this defense will not be considered.¹⁵

Turning next to the elements of PERB's unilateral change analysis, there is no significant dispute over the second, third, and fourth elements of the test. The Board has consistently found that "because employer policies concerning reimbursement for job-related tuition or training expenses affect the statutorily enumerated subject of wages, such policies are negotiable." (*County of Santa Clara* (2015) PERB Decision No. 2431-M, pp. 18-19, citing MMBA, § 3504 and *Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375 (*Healdsburg*), pp. 29-30.) And, notwithstanding the City's assertion that the Association knew about the change since November 2015, there is no dispute that the City failed to notify the Association until *after* it made the firm decision to change how it administered the Tuition Reimbursement program. (See *State of California (Board of Equalization)* (1997) PERB Decision No. 1235-S, adopting warning ltr., p. 2, citing *Victor Valley Union High School District* (1986) PERB

¹⁵ The City also appears to assert that PERB lacks jurisdiction to address this claim at all because it is untimely. The Board has previously considered and rejected such a position. (*LAUSD*, p. 27 ["It is long settled that the statute of limitations is not a jurisdictional bar to an untimely unfair practice charge."].)

Decision No. 565; see also *Fresno County Office of Education* (2004) PERB Decision No. 1674, pp. 19-20.) Finally, it is undisputed that the enacted changes remain in effect, meaning that there is a continuing impact on the Association's bargaining unit.

Regarding whether a policy change occurred here, an established policy may be embodied in the parties' contract. Where contractual language is silent or ambiguous, the policy may be discerned through external evidence. (*City of Davis, supra*, PERB Decision No. 2494-M, pp. 18-19, citing *County of Riverside* (2013) PERB Decision No. 2307-M, p. 20 and *Rio Hondo Community College District* (1982) PERB Decision No. 279, p. 17.) In this case, since at least 2008, Association unit members regularly requested and received tuition reimbursements for classes offered by Red Helmet. Starting on July 1, 2016, the City no longer approved reimbursement requests for Red Helmet classes, because that company was not accredited by the U.S. Department of Education and its courses did not offer credits that could be applied towards a degree. The City maintains that these requirements have always been part of the Tuition Reimbursement AP, but that the City previously declined to enforce those terms for Association unit members. Because the parties' expired MOU authorizes the City to apply the terms of the AP, the City contends that it was entitled to apply both the accreditation and the credits requirements to unit members.

In *Marysville Joint Unified School District* (1983) PERB Decision No. 314 (*Marysville JUSD*), the Board discussed management's ability to conform the terms of employment to the parties' contract. There, the parties' contract language entitled teachers to "one duty-free lunch break of no less than 30 minutes each day." (*Id.* at p. 2.) In the past, employees received a 50 to 55 minute lunch period but, amidst layoffs for other positions, the employer reduced the break to just 30 minutes. (*Id.* at pp. 4-5.) The Board found that there was no contractual

guarantee to a longer break and that the employer's conduct was consistent with the its authority under the agreement. (*Id.* at pp. 9-10.) The Board expressly rejected the argument that the practice of offering a longer lunch period precluded any return to the 30-minute break specified in the contract. The Board held “[t]he mere fact that an employer has not chosen to enforce its contractual rights in the past does not mean that, ipso facto, it is forever precluded from doing so.” (*Id.* at p. 10, citation omitted.)

Revisiting this issue again in *County of Riverside, supra*, PERB Decision No. 2307-M, the Board found that *Marysville JUSD* “stands for the principle that if a contract provision is unambiguous and there is no subsequent mutual agreement to alter it, the employer is entitled to enforce the terms of the contract despite its prior failure to do so.” (*Id.* at pp. 24-25.) The Board in that case held that the parties’ contract did not unambiguously authorize the employer to deviate from existing practices concerning shift differentials and premium pay to employees using release time. The employer’s changes in those areas were therefore subject to negotiations. (*Ibid.*)

In this case, the City does not identify any section in the expired MOU or the Tuition Reimbursement AP that unambiguously allows the City to impose the accreditation and degree credits requirements to all reimbursement requests. Section I(3) contains the only reference to accreditation requirements for reimbursement requests.¹⁶ That section states only that “major universities” must be accredited for their courses to be approved for reimbursement. It says nothing about accreditation requirements of other institutions such as “trade schools” and “technical schools,” which are also referenced as eligible institutions in the AP. The AP also makes the distinction between “degree programs,” such as those offered by a university, and

¹⁶ Section I(4) authorizes the City to inspect the credentials of any university, but does not set forth any accreditation requirements for any type of institution.

other “specialized training,” both of which are eligible for reimbursement. Under these circumstances, I find that the City did not have the unambiguous contractual right to impose the accreditation and credits requirements to *all* Association unit members’ reimbursement requests. The decision to depart from existing practice and implement those requirements was therefore an unlawful unilateral policy change in violation of the duty to negotiate in good faith under MMBA section 3505. The unilateral change constitutes an unfair labor practice under MMBA section 3505.6, subdivision (c), and PERB Regulation 32603, subdivision (c). The same conduct also interferes with the Association’s right to represent its bargaining unit under MMBA section 3503, and represented employees’ right to representation, under MMBA section 3506. Such interference is unlawful under MMBA section 3506.5, subdivisions (a) and (b), and PERB Regulation 32603, subdivisions (a) and (b). (See *County of Sacramento* (2009) PERB Decision No. 2045-M, p. 4.)

(b) Fitness-for-Duty Examinations (§§ 16-20)

The PERB complaint alleges that the City unilaterally changed its policy concerning fitness-for-duty examinations. According to the PERB complaint, the City had a policy of scheduling these examinations on the same day that the employee returned from leave. The PERB complaint goes on to allege that the City changed this policy on July 28, by delaying La Fleur’s return to work from leave. These allegations are not supported by the record. There was no evidence that the City or the Fire Department had any regular schedule concerning the necessity or the timing of fitness-for-duty examinations. To the contrary, HR Director Macias testified that decisions about examinations are made on a case-by-case basis, if they are needed at all. Even Association witness Captain Krueger testified that there was no fixed policy concerning fitness-for-duty examinations.

There was also no evidence that the City changed or adopted a new policy by the way it handled La Fleur's fitness for duty examination. Whithorn testified that HR informed him that La Fleur would need a fitness for duty examination. Whithorn was not involved in selecting the City physician or scheduling the examination. This is consistent with how Macias described the usual process when fitness-for-duty examinations are needed. There was no showing that La Fleur's examination took longer than others. In fact, the record does not specify when La Fleur's examination occurred at all. In summary, the Association has not met its burden of proving that the City deviated from existing policy.

Even if it were true that the City departed from an existing policy regarding fitness-for-duty examinations, the Association has not proven that the City's conduct amounted to more than an isolated incident. Not every policy deviation amounts to an actionable unilateral change. Rather, the conduct must have a generalized effect or continuing impact on the terms and conditions. (*City of Davis, supra*, PERB Decision No. 2494-M, pp. 19-20, citing *San Joaquin County Employees Assn. v. City of Stockton* (1984) 161 Cal.App.3d 813; *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802 (*City of Vernon*); *County of Riverside, supra*, PERB Decision No. 2307-M; p. 18, *City of Riverside* (2009) PERB Decision No. 2027-M, p. 9; and *Grant JUHSD, supra*, PERB Decision No. 196; see e.g., *Lake Elsinore School District* (1988) PERB Decision No. 666, p. 18, adopting proposed dec., pp. 21-22, *State of California (Department of Corrections and Rehabilitation, Ventura Youth Correctional Facility)* (2010) PERB Decision No. 2131-S, pp. 5-7, and *City of Commerce* (2008) PERB Decision No. 1937-M, adopting warning ltr., p. 2.) On the other hand, even a single employer action may impact employees on a continuing basis where the employer asserts that it was

within its authority to act under existing policy. (*County of Riverside* (2003) PERB Decision No. 1577-M, p. 6.)

In this case, the Association presented no evidence that the City treated any other employees in the same way it treated La Fleur or that anyone at the City expressed that it was authorized under existing policy to act in that manner. To the contrary, Krueger testified that multiple unit members before and after the incidents with La Fleur were able to return to work from injury without requiring any fitness for duty examination. Therefore, the Association has not proven that the City's handling of La Fleur's situation was more than an isolated incident affecting only him. For all of these reasons, this allegation is dismissed.

(c) Vehicle Washing (§§ 35-40)

The PERB complaint alleges that, on August 24, the City unilaterally terminated its policy of allowing Association unit members to wash their personal vehicles at Fire Stations, using City resources. None of the elements of the Association's prima facie case for this claim are in dispute. The parties agree that Fire Department management issued a memo dated August 24, stating, in part "until further notice, Fire Department personnel will no longer utilize city water to wash their personal vehicles, such as, but not limited to; cars, trucks, motorcycles, recreational vehicles, trailers, boats, etc." Before that, management consistently permitted Association unit members to wash their vehicles at Fire Stations. It is also clear that a policy allowing employees to wash cars on an employer's premises with the employer's facilities is a matter within the scope of representation. (*City of Vernon, supra*, 107 Cal.App.3d, pp. 815-821.) There is no dispute here that the policy prohibiting car washing took effect for all unit members on August 24 and has continued ever since. Finally, there is

no dispute that the City did not notify the Association before deciding to issue the memo leaving no opportunity to request negotiations.

The City contends that the new policy was necessary because of the ongoing drought in the State. The Board has recognized that under “exceptionally limited circumstances,” an employer may be excused from bargaining over an otherwise negotiable policy change due a “true emergency.” (*County of San Bernardino (Office of the Public Defender)* (2015) PERB Decision No. 2423-M (*County of San Bernardino*), p. 54, citing *Cloverdale Unified School District* (1991) PERB Decision No. 911.) To demonstrate this “operational necessity” or “business necessity” defense, the employer must establish an “actual financial or other emergency that leaves no alternative to the action taken and allows no time for meaningful negotiations before taking action.” (*County of San Bernardino*, p. 54, citing *Calexico Unified School District* (1983) PERB Decision No. 357, adopting proposed dec., p. 20.) The “necessity,” moreover, must be the unavoidable result of a sudden change in circumstances beyond the employer’s control. (*County of San Bernardino*, p. 54, citing *Lucia Mar Unified School District* (2001) PERB Decision No. 1440, adopting proposed dec., p. 46.)

Here, the City did not prove that the State drought left the City with no alternative to unilateral action. Taking at face value the City’s claim that it needed to reduce its water usage, there are no facts showing that eliminating car washing at Fire Stations was the only way the City could have achieved its reduction targets. When Whithorn spoke with City Manager Freeland about eliminating the car washing policy, neither person said anything about how the change was necessary to reach any particular water-saving goal. Rather, Whithorn testified that Freeland was concerned about the unfavorable “optics” of firefighters washing their vehicles while the City was encouraging residents to conserve water.

In addition, the record shows that any concern over the drought was not so sudden that immediate unilateral action was needed. Whithorn's conversation with Freeland occurred sometime around January. EO B-37-16, which Whithorn said motivated him to eliminate the car washing policy, was issued by the Governor on May 9. Whithorn did not eliminate the policy until several months later, on August 24. The City offers no explanation for why there was an insufficient amount of time to notify the Association about possible changes to the car washing policy and provide the opportunity for negotiations.

The City also contends that any bargaining obligation it had about changing the car washing policy was excused because EO B-37-16 required the change. In *State of California (Department of Personnel Administration)* (2008) PERB Decision No. 1978-S, the Board acknowledged that the Legislature itself may change the terms and conditions of employment for represented employees through legislation. (*Id.* at p. 10; see also *Santa Clara County Superior Court* (2014) PERB Decision No. 2394-C, p. 21.) In another case, the Board differentiated between "immutable" standards fixed by external law, and instances where the law provides employers merely with discretion to make changes to working conditions. It found that "when external law establishes immutable provisions in an area otherwise within the scope of representation, matters are negotiable only to the extent of the employer's discretion, that is, to the extent that the external law does not 'set an inflexible standard or insure immutable provisions.'" (*Berkeley Unified School District* (2012) PERB Decision No. 2268 (*Berkeley USD*), p. 9, quoting *San Mateo City School Dist. v. PERB* (1983) 33 Cal.3d 850 (*San Mateo City SD*), pp. 864-865.) For negotiations over matters also covered by external law, the parties may negotiate about incorporating those matters into a collectively-bargained

agreement. (*Berkeley USD, supra*, p. 9.) But, the parties may not bargain terms which replace, set aside, or nullify inflexible provisions of the external law. (*San Mateo City SD*, p. 864.)

Here, nothing in EO B-37-16 sets an inflexible standard or contains immutable provisions regarding washing personal vehicles at Fire Stations. While the EO does encourage water conservation and references general conservation targets in other EOs, EO B-37-16 does not include any specific method for reducing water usage. Thus, I reject the City's claim that the EO excuses the City's obligation to bargain before eliminating its vehicle washing policy.

In summary, the Association established all the elements of its prima facie case for a unilateral change to the policy of allowing unit member to wash their personal vehicles at Fire Stations with City resources. The City did not establish that it had a valid reason for its unilateral action. Therefore, the change violates the duty to negotiate in good faith under MMBA section 3505, which is an unfair labor practice under MMBA section 3505.6, subdivision (c), and PERB Regulation 32603, subdivision (c). The same conduct also interferes with the Association's right to represent its bargaining unit under MMBA section 3503, and represented employees' right to representation, under MMBA section 3506. Such interference is unlawful under MMBA section 3506.5, subdivisions (a) and (b), and PERB Regulation 32603, subdivisions (a) and (b). (See *County of Sacramento, supra*, PERB Decision No. 2045-M, p. 4.)

(d) Evaluations

The PERB complaint alleges two different changes to how Captains draft evaluations for their subordinates. The first alleged change is specific to Robles's handling of Aguilar's evaluation. The second alleged change involves management scrutinizing draft evaluations

more heavily and by adopting new performance goal standards. Each of these allegations will be addressed separately below.

(i) Directive to Remove the “Dedicated” Comment (§§ 42-50)

The Association contends that Fire Department management instructed Robles to remove the comment Aguilar was a “Dedicated” employee his draft performance evaluation. This assertion was not proven by the record. Robles testified that McDermott directed him to change or reword the evaluation, which Robles interpreted to mean that the comment could remain in the evaluation if Robles added additional narrative support. Whithorn, similarly testified that he spoke to Robles about the evaluation and requested that Robles include examples of Aguilar’s dedication. Because Robles felt strongly about using that term to describe Aguilar, he reworded the evaluation and it was approved by both McDermott and Whithorn. Under these facts, the Association failed to prove that the City’s actions amounted to a change in policy. For this reason, the Association has not met its burden of proving that a unilateral policy change occurred here. This claim is accordingly dismissed.

(ii) Greater Scrutiny for Evaluations (§§ 51-56)

The PERB complaint alleges that:

51. Before September 14, 2016, Respondent’s policy concerning evaluations was that evaluations were not “more closely” “scrutinize[d],” and did not require “that positive comments be justified, and did not specify that “‘dedicated employee’ doesn’t mean coming to work and doing your job” and did not specify that “Going above and beyond is a good evaluation.”^[17]

52. On or about September 14, 2016, Respondent, acting through its agent McDermott, changed this policy by

¹⁷ The PERB complaint appears to be quoting from the City’s position statement submitted during the PERB Office of the General Counsel’s investigation of the Association’s unfair practice charge.

“scrutinizing evaluation [sic] more closely, [] requiring that positive comments be justified,” specifying that “‘dedicated employee’ doesn’t mean coming to work and doing your job,” specifying that “Going above and beyond is a good evaluation,” and by sending an electronic mail message to Captains stating “recent evaluations have been returned with a need for better stated goals or further explanation” and “[f]ormal training is being planned for all captains on evaluation writing,” and attaching “a chart on SMART Goals.”

After reviewing these paragraphs from the complaint, it is difficult to understand what changes to the evaluation system are alleged here. The Association provided little insight during the hearing about the nature of the changes it claims are at issue. It also did not address these claims in its closing brief. Therefore, the following discussion reflects my best attempt to address the claims as alleged in the complaint.

There was no evidence that the City changed any evaluation drafting procedures, as quoted in the complaint. Regarding the need to justify positive comments, Robles, testifying for Association, said that written justifications have always been required for favorable assessments in an evaluation. And, as just stated above, the Association did not prove that the City either required any Captain to remove the term “dedicated” from any evaluation or otherwise changed how that term is used in evaluations.

There was similarly no showing that the City changed what qualifies as a “good evaluation.” The Association presented no evidence that the City ever communicated with the Association about how “[g]oing above and beyond,” impacts an employee’s evaluation. Even if those communications took place, there was no evidence that this represents a new policy. To the contrary, the City’s standard evaluation form specifies that employees whose “[p]erformance consistently exceeds all requirements,” are eligible for a score of one, the highest evaluation score. Employees whose “[p]erformance exceeds requirements,” are

eligible for a score of two. A score of three is for employees whose “[p]erformance meets all requirements.” Using this system, Robles gave Aguilar a score of two in all performance categories, stating in some that Aguilar “continues to go above and beyond” Robles’s expectations.¹⁸ Robles confirmed in his testimony that this is a “good” score. These facts suggest that surpassing expectations has always been the basis for the higher evaluation scores.

The record does show that McDermott e-mailed Captains on September 14, and attached the SMART Goals rubric, as alleged in paragraph 52 of the PERB complaint. However, the Association did not prove that using this rubric was a policy change. Both Jackson, on behalf of the Association, and Whithorn, on behalf of the City, testified that the details listed in the SMART Goals rubric were not new. Although Gonzalez testified that, before the rubric was presented, the Captains had more leeway in drafting goal statements, I credit the testimony of Jackson and Whithorn over his. Both of them had more experience than Gonzalez with doing evaluations and Gonzalez was vague about how using the rubric represented a change. Therefore, the Association has not proven that using the SMART Goals rubric was a unilateral change.

McDermott’s September 14, e-mail also references planning a training for Captains about evaluations. Under certain circumstances, mandatory training requirements have been found to be within the scope of representation. (*Healdsburg, supra*, PERB Decision No. 375, pp. 29-31.) But the Association did not show either that the City actually implemented any new training for evaluation procedures or made the firm decision to require such training. Jackson testified that no trainings ever occurred. The mere statement in McDermott’s e-mail that trainings were being planned is insufficient to establish that a policy change occurred.

¹⁸ There was no evidence that management directed Robles to include this comment in Aguilar’s evaluation.

(See *State of California (Department of General Services)* (1993) PERB Decision No. 976-S, adopting warning ltr., p. 2 [holding that the mere threat to make a unilateral change was insufficient to show that a policy change occurred].)

Finally, the PERB complaint alleges that management scrutinized draft evaluations more closely after September 14. McDermott's e-mail states, and witnesses confirmed, that some draft evaluations were kicked back to Captains for revisions around August and September. And Gonzalez testified about a conversation he had with McDermott about evaluations, in which McDermott said "if we wanted to be treated like professionals, then, you know, we should have no problem dealing with these changes. That, you know, we're big boys and we should be able to handle it." The City put forward no evidence disputing that McDermott made this statement. Nevertheless, I find insufficient evidence that a unilateral change occurred here. It remains unclear whether evaluations were kicked back for revisions because of some kind of policy change or because the draft evaluations had declined in quality during this time. By the same token, it is unclear whether McDermott's alleged statement that the Association should have no problem dealing with any "changes" was referring to any actionable policy change or merely a return to existing quality expectations. And, while multiple Association witnesses testified as to their belief that some kind of change occurred, there is no clear understanding of how evaluations were handled differently. Gonzalez had one evaluation kicked back to him because McDermott felt that the goals statement needed to be "more in depth." However, Jackson testified that more detail was not the issue. He said that the change was to "the verbiage of the detail." Neither Gonzalez nor Jackson elaborated further. Even if these diverging accounts could be reconciled, it is once again unclear whether management's instructions represented a new policy direction or whether there were simply

more draft evaluations that did not meet existing standards. Since the Association did not address these claims in its closing brief, I have no greater insight into what specific change it contends has occurred here. Therefore, I conclude that the Association has not met its burden of proving that a unilateral change occurred here. These claims are accordingly dismissed.

2. Retaliation for Protected Activities

The PERB complaint also alleges that the City retaliated against two of its unit members because of activities protected under the MMBA. To demonstrate that an employer discriminated or retaliated against an employee in violation of MMBA Section 3506 and PERB Regulation 32603, subdivision (a), the charging party must show that: (1) the employee exercised rights under the MMBA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action *because of* the exercise of those rights. (*County of Riverside* (2009) PERB Decision No. 2090-M, p. 25, citing *Novato Unified School District* (1982) PERB Decision No. 210, pp. 6-8, other citations omitted.) If the charging party establishes all of these elements, then the burden of proof shifts to the respondent to establish that it would have taken the same actions even if the employee had not engaged in protected activity. (*County of Riverside*, pp. 38-39.)

(a) Retaliatory Delays in La Fleur's Fitness for Duty Examination (¶¶ 9, 17-25)

The PERB complaint alleges that the City threatened to delay La Fleur's fitness for duty examination and actually delayed the examination because La Fleur participated in Association demonstrations at City Hall. It is undisputed that La Fleur engaged in peaceful off-duty picketing and attended City Hall meetings, along with other Association unit members. Non-disruptive, informational picketing qualifies as protected activity. (*City of*

San Jose (2010) PERB Decision No. 2141-M, pp. 10-11; see also *San Marcos Unified School District* (2003) PERB Decision No. 1508, pp. 22-27.) There is also no dispute that Whithorn, as the head of the Fire Department, knew of La Fleur's picketing activity.

However, the Association has not demonstrated that the City took adverse action against La Fleur by delaying his fitness for duty examination. As the City points out, there is insufficient evidence in the record establishing when La Fleur was required to take a fitness for duty examination or whether it took an unusual amount of time. Thus, the Association's claim that the City unlawfully delayed his fitness for duty examination because of his protected activity is dismissed for lack of proof.

The PERB complaint further alleges that the City took a retaliatory adverse action against La Fleur by *threatening* to delay his fitness for duty examination. Although the Association does not address this claim in its closing brief, I note that MMBA section 3506.5, subdivision (a), makes it unlawful for an employer to "impose or *threaten to impose* reprisals on employees," because of their protected activities. (Emphasis supplied.) Thus, an employer's threat qualifies as an adverse action under PERB's retaliation analysis even if that threat was never carried out, so long as there is unequivocal notice of a firm decision to take the action. (*Trustees of the California State University* (2009) PERB Decision No. 2038-H, pp. 11-12, citing *County of Merced* (2008) PERB Decision No. 1975-M and *Regents of the University of California* (2004) PERB Decision No. 1585-H.)

Here, Association witness Krueger testified that he overheard Whithorn and La Fleur discussing La Fleur's examination, and Whithorn said "well, maybe I'll get to that when I'm done with all of these grievances." I find that this falls short of unequivocal notice that management intended to delay La Fleur's examination. Prefacing the comment with the word

maybe, suggests that Whithorn had not made a final decision for any particular course of action. In addition, because neither Whithorn nor La Fleur testified about the conversation, the comment attributed to Whithorn lacks context.¹⁹ For example, without evidence about which grievances were being referenced, it is unclear from the record whether addressing those grievances before scheduling La Fleur’s examination would result in a delay. Therefore, I conclude that the Association has not met its burden of proving that La Fleur suffered an adverse action, as alleged in the PERB complaint. This claim is dismissed.²⁰

(b) Retaliatory Demands to Change Aguilar’s Evaluation (¶¶ 41-50)

The PERB complaint also alleges that the City retaliated against Aguilar when McDermott requested Robles to remove the term “Dedicated” from Aguilar’s evaluation. As stated above, the Association did not prove that anyone from the City requested or required that this term be removed from the evaluation. Rather, Whithorn and McDermott asked Robles to re-word the evaluation, which he did, and it was approved with the “Dedicated” comment still in it. Thus, the Association has failed to prove that the City retaliated against Aguilar by the way it handled his evaluation. This retaliation claim is therefore dismissed.

3. Interference with Protected Rights

The PERB complaint includes multiple claims that the City interfered with protected rights. MMBA Section 3502 states in relevant part: “public employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.” Public agencies,

¹⁹ As previously noted, La Fleur did not testify at all.

²⁰ The Association made no alternative arguments about whether the statements Whithorn allegedly made to La Fleur as violate La Fleur’s rights under the MMBA. In that absence of any such effort by the parties to litigate such alternative theories, I decline to do so sua sponte. (See *City of Inglewood* (2015) PERB Decision No. 2424-M, pp. 11-13.)

such as the City, may not unreasonably interfere with those rights. (MMBA, §§ 3506, 3506.5, subd. (a); PERB Regulation 32603 subd. (a).) If the employer’s conduct interferes with protected rights, the burden shifts to the employer to establish a legitimate justification for its actions. (*County of San Bernardino, supra*, PERB Decision No. 2423-M, pp. 36-37, citing *Public Employees Assn. of Tulare County, Inc. v. Board of Supervisors of Tulare County* (1985) 167 Cal.App.3d 797, p. 807; *Stanislaus Consolidated Fire Protection District* (2012) PERB Decision No. 2231-M, pp. 22-23; *Carlsbad Unified School District* (1979) PERB Decision No. 89, pp. 10-11.) When the harm to protected rights is “slight,” the employer may assert “operational necessity” as a defense and the Board will then balance the employer’s asserted interests against the harm to employees’ rights. (*Id.*) If, on the other hand, the harm is “inherently destructive of employee rights, the employer’s conduct will be excused only on proof that it was occasioned by circumstances beyond the employer’s control and that no alternative course of action was available.” (*Id.*; see also *Los Angeles Community College District* (2014) PERB Decision No. 2404 (*LACCD*), pp. 5-6.)

(a) Statements to La Fleur on July 7, 2016 (¶¶ 9-12)

The PERB Complaint alleges that Whithorn’s statements to La Fleur on July 7, interfered with protected rights. Employers and employees alike have the protected right to express their views on the terms and conditions of employees’ employment. (*City of Oakland* (2014) PERB Decision No. 2387-M, pp. 23-24, citing MMBA, § 3500.) In general, management’s effort to “express or disseminate their views, arguments or opinions” does not constitute an unfair labor practice unless that expression contains a threat of reprisal, force, or a promise of benefit, or demonstrates a preference for one employee organization over another. (*Id.*, citing *Rio Hondo Community College District* (1980) PERB Decision No. 128 (*Rio Hondo*

CCD), pp. 18-20.) Unprotected threats and promises may be conveyed either explicitly or implicitly based on the circumstances. (See *Los Angeles Unified School District* (1988) PERB Decision No. 659 (*Los Angeles USD*), p. 7.) The Board assesses an employer's statements in light of their overall context to determine whether those statements have some tendency to coerce or interfere with employees' exercise of protected rights. (*Los Angeles Unified School District* (2005) PERB Decision No. 1791, adopting warning ltr., pp. 4-5, citing *Rio Hondo CCD*.) One important contextual detail is that employer speech is "always, at least implicitly, backed up by the employer's power to control the terms and conditions of employment, a power not made available to employees or their representatives. Consequently, the surrounding circumstances in which an employer's statements are examined for any coercive effect must take into account employees' economic dependence on the employer for their livelihoods." (*City of Oakland*, p. 25, fn. 5, citing *Coachella Valley Mosquito & Vector Control District* (2009) PERB Decision No. 2031-M (*Coachella Valley MVCD*), pp. 20-21 and *John Swett Unified School District* (1981) PERB Decision No. 188, pp. 5-8.)

In *Los Angeles USD*, *supra*, PERB Decision No. 659, the Board assessed a principal's statements to instructional aides that she preferred that they come to her before "involving the union or others from the outside." (*Id.* at pp. 9-10.) The Board found that there was nothing inherently unlawful about requesting that employees bring concerns to her attention, but that the context of the comments made them unlawfully coercive. Specifically, the Board found that the principal appeared to be angry, expressed disapproval towards the aides' actions, and conveyed that she considered one aide to be a "troublemaker" for involving the union. The Board also considered the fact that there was widespread concern among aides that they would be replaced by another, unrepresented, job classification. (*Id.* at pp. 11-12.) The Board found

that the principal's comments constituted implied threats of adverse action if the aides continued to seek union assistance. (*Id.* at p. 13.)

In *Regents of the University of California* (1998) PERB Decision No. 1263-H, a manager commented that it would “not be a good idea” for lab employees to raise their concerns about a sick leave policy with others in the lab and “people could lose their jobs” if they did. (*Id.*, adopting proposed dec., at pp. 8-9.) The employer did not deny that the manager made those statements, but asserted that the comment was referring to the possibility of losing grant funding for the labs. (*Id.*, adopting proposed dec., p. 10.) PERB rejected that assertion and found that these statements to be an implied threat of dismissal. (*Id.*, adopting proposed dec., pp. 45-46.)²¹

In *Regents of the University of California* (1997) PERB Decision No. 1188-H, the employer made inaccurate statements to unrepresented employees about whether a pre-planned salary increase would apply to them if they later voted to unionize. The employer misrepresented that if they elected an exclusive representative, then their entitlement to the increase would depend on the outcome of bargaining. (*Id.* at p. 25.) The Board held that because the salary plan took effect before the employer had any bargaining obligation to any union for those employees, the employer remained in control over whether it would apply the increase to the employees considering unionizing. (*Id.* at p. 26.) The Board therefore found the employer's statements to be a threat of reprisal if employees elected to be represented. (*Id.*; see also *Office of Kern County Superintendent of Schools* (1985) PERB Decision No. 533, adopting proposed dec., pp. 52-53.)

²¹ PERB also found that the manager's statements were justified under the circumstances of that case, in part, due to the “reckless and inflammatory” comments the employees had made about the sick leave policy. (*Id.*, adopting proposed dec., pp. 46-47.)

In *Bellevue Union Elementary School District* (2003) PERB Decision No. 1561 (*Bellevue UESD*), PERB found no unlawful interference in a manager's critical comments about a teachers' union "work-to-contract" campaign. Those comments were tempered by the manager's recognition that the teachers were providing professional services as required by their contract. (*Id.*, adopting proposed dec., at pp. 38-39.) PERB found that the manager was not expected to remain neutral about the job action and was entitled to express his own critical views so long as he did not make any threats or promises. (*Id.*, citing *Regents of the University of California* (1983) PERB Decision No. 366-H, p. 11; *Rio Hondo CCD*, *supra*, PERB Decision No. 128, pp. 18-20.)

In *Saddleback Valley Unified School District* (2013) PERB Decision No. 2333 (*Saddleback Valley USD*), PERB found no unlawful interference where a school board member stated during a board meeting that the union's negotiating strategy was a "disservice" to its members because the length of negotiations reduced the period of time over which the employer could spread a lawfully imposed salary reduction. (*Id.*, adopting proposed dec., pp. 29-30.) PERB declined to find that the statement amounted to a threat, and instead held that it was a permissible expression of opinion about the outcome of negotiations. (*Ibid.*)

Here, Whithorn and Jackson gave differing accounts of what Whithorn said to La Fleur on July 7.²² In this instance, I credit Whithorn's testimony over Jackson's. Jackson's

²² At the outset, the City appears to contend that Whithorn's testimony on this issue should be stricken from the record because it was only offered in rebuttal to Jackson's hearsay account of the conversation, suggesting that it would not have questioned Whithorn about his conversation with La Fleur at all, had Jackson not already testified about it. This argument is unpersuasive. Jackson's hearsay recollection of the conversation is admissible evidence under PERB Regulation 32176; see also *Palo Verde Unified School District* (2013) PERB Decision No. 2337 (*Palo Verde USD*), pp. 19-20.) Moreover, testimony about this incident is clearly germane to this case, as the incident is referenced in multiple paragraphs of the PERB complaint. As such, it was within my purview as the hearing officer in this case to allow both

explanation for how he heard about the conversation was internally inconsistent. Initially, he testified that La Fleur told him what Whithorn had said. Later, Jackson testified that he was nearby and could hear the conversation for himself. Neither he nor any other Association witnesses explained these divergent statements. For these reasons, I find Jackson's testimony on this issue lacks credibility.²³ In contrast, Whithorn gave clear and consistent testimony about this incident. Therefore, Whithorn's testimony is credited here.

Whithorn said that he told La Fleur that his leave reserve was nearly depleted and that the City was not required to hold his position open after his leave was used up. Whithorn also said that "it doesn't look good that you're running out of [leave] time. You should be healing, but you're showing up here." I find it relevant that this conversation happened during the Association's demonstrations protesting the status of ongoing contract negotiations. The conversation was also shortly after multiple unit members resigned en masse from what they viewed as voluntary job duties. Although, as in *Bellevue UESD, supra*, PERB Decision No. 1561, Whithorn was entitled to express his opinion about the Association's demonstrations, I find his comments amount to more than merely stating his views on this dispute. Rather, by stating that the City would not be required to hold onto La Fleur's position and that La Fleur's picketing activity did not look good, Whithorn suggested that the City may take negative action in response to La Fleur's continued participation in Association activity.

Jackson and Whithorn to testify about this event, in order to create a full and complete record from which a proposed decision may be rendered. (See PERB Regulation 32170, subds. (a), (d), (f), (h), and (i).)

²³ When the Association's counsel started to question Jackson about what La Fleur told him said about what Whithorn had said, counsel for the City objected on "double hearsay" grounds. At that point, the Association could have clarified through testimony from Jackson or La Fleur, the extent to which Jackson himself heard Whithorn's comments to La Fleur. Its failure to do so leaves ambiguity in Jackson's testimony, which weighs against Jackson's credibility as a witness on this issue.

Furthermore, La Fleur's dwindling leave status made him uniquely dependent on Whithorn for job security, which further exacerbates the coercive nature of Whithorn's statements. (See *Los Angeles USD, supra*, PERB Decision No. 659.) It is true, as the City points out, that Whithorn addressed the situation by giving La Fleur a special detail assignment, allowing him to return to the City's payroll. However, this fact also underscores the level of authority Whithorn had over La Fleur's return. Stated otherwise, because Whithorn always had the ability to offer La Fleur an assignment, his comments to La Fleur suggest that Whithorn might be disinclined to assist La Fleur if he continued his Association activities. I find these comments to be coercive under the circumstances, and caused "slight" harm to La Fleur's protected rights.

Turning next to Whithorn's justification for his comments, he testified that he spoke to La Fleur out of genuine concern over La Fleur's leave status. I find this explanation unpersuasive. Once again, Whithorn had the ability to resolve the issue by offering La Fleur a special detail assignment. He did not mention this or other possible resolutions to La Fleur's situation during their conversation. Accordingly, I find that Whithorn's July 7 statements to La Fleur interfered with his protected rights under MMBA section 3502, which is unlawful under MMBA sections 3506 and 3506.5, subdivision (a), and PERB Regulation 32603, subdivision (a). This conduct also derivatively interfered with the Association's right to represent La Fleur under MMBA section 3503, which is unlawful under MMBA, section 3506.5, subdivision (b), and PERB Regulation 32603, subdivision (b).

(b) Questioning Vela (¶¶ 13-15)

The PERB complaint alleges that Whithorn interfered with protected rights during a conversation with then-probationary Firefighter/Paramedic Vela, on July 25.²⁴ PERB recognizes that employers may have legitimate reasons for inquiring with their employees about union and other protected activities. (*State of California (Department of Corrections)* (1995) PERB Decision No. 1104-S (*Department of Corrections*), adopting proposed dec., pp. 16-17.) However, such questioning must be undertaken carefully, due to the likelihood that it could chill protected activities. (*William S. Hart Union High School District* (2018) PERB Decision No. 2595 (*Hart UHSD*), pp. 6-7,²⁵ citing *County of Merced* (2014) PERB Decision No. 2361-M, pp. 7-8, 10; *Cook Paint & Varnish Co.* (1981) 258 NLRB 1230, p. 1232.) The questioning must be conducted in a manner that is free from hostility to the union or other coercive influences. (*Department of Corrections*, adopting proposed dec., pp. 16-17.)

PERB has identified some safeguards for reducing the possibility of interference during interrogations about protected activities. Those include informing the employee of the purpose of the questioning, assuring him or her that participation is voluntary and that no reprisal will take place, and taking care not to exceed the necessities of the legitimate area of inquiry. (*Id.*, citing *Johnnie's Poultry Co.* (1964) 146 NLRB 170; see also *Hart UHSD*, p. 7; *City of Commerce* (2018) PERB Decision No. 2602-M, pp. 6-7.) The questioning must also otherwise

²⁴ The PERB complaint further alleges that Mansour, another City agent, also unlawfully questioned Vela. However, Mansour is employed in a position that is part of the Association's bargaining unit. There was no evidence that he was acting as an agent of the City. There is also no evidence that Mansour ever questioned Vela on or around July 25. Therefore, any interference allegations alleging Mansour's misconduct are dismissed.

²⁵ At the time this proposed decision issued, *Hart UHSD*, was the subject of a petition for extraordinary relief pursuant to Government Code section 3542. (See *William S. Hart Union High School District v. PERB* (B294310, app. pending).)

occur in a context that is free from hostility or coercion. (*Ibid.*) The Board examines the totality of the circumstances to determine whether the questioning has a tendency to be threatening or coercive. (*Clovis Unified School District* (1984) PERB Decision No. 389 (*Clovis USD*), p. 15.) The Board's analysis does not focus on the specific words used during the inquiry, but whether the employer, through its questioning, conveys disapproval toward the union or is otherwise coercive. (*Id.*, citing *PPG Industries, Inc.* (1986) 251 NLRB 1146.)

Here, Whithorn, Mansour, and Vela testified about the July 25 conversation. Both Whithorn and Mansour said that they were engaged in a casual conversation unrelated to the Fire Department, and only asked Vela about his Association activities after seeing him lingering on the apparatus floor. They both described the conversation with Vela as similarly casual. Whithorn testified that he asked Vela if he participated in the Association's City Hall demonstrations because he felt that the "City had done [him] wrong" or if he felt pressured to attend. He also asked Vela if he was a dues-paying member of the Association, explaining that he (Whithorn) was not required to pay dues for his first six months as a rookie. Whithorn also told Vela that he was not required to answer those questions. Both Whithorn and Mansour testified that the conversation remained jovial and ended when Mansour said of Vela, "he's a good guy," or "he's a good rookie." Whithorn responded by saying "I know he is, that's why I hired him."

Vela, on the other hand, testified that Whithorn appeared to be upset as he walked onto the apparatus floor with Mansour. The two approached Vela and Whithorn asked him whether he paid Association dues. After Vela said "yes," Whithorn said that it was "unfair" or "unjust" that the Association was involving rookies in Association activities. Vela then testified that Whithorn asked whether he was unhappy with what he had with the City and said that

participating in the Association's demonstrations made it hard for him to keep rookies like Vela employed, because they were hired with grant funds. Vela testified that he felt intimidated by the conversation.

I credit Vela's account over that of Whithorn and Mansour in the places where they differ. In particular, I find that Whithorn and Mansour's effort to characterize the whole exchange as casual and friendly lacks credibility.²⁶ If the conversation progressed as they had said, then there would not have been a need for Mansour's "good guy" comment, which seemed intended to alleviate tension. Moreover, if it was true that Whithorn and Mansour were having a friendly conversation unrelated to the Association or its unit members before speaking to Vela, then Whithorn's sudden transition into questioning Vela about Association activity was not only unprompted and unexpected, but also unusual to the point of being implausible. Another factor that militates against their version of the event was Whithorn's testimony that he was surprised that Vela answered his questions at all. Whithorn offered no explanation for why he made these inquiries if he expected no response from Vela. Furthermore, I find that this testimony belies the City's characterization of the conversation as lighthearted and casual. It instead suggests that Whithorn was aware that his questions would make Vela uncomfortable.

Considering these factors, I find it more likely that, as Vela had testified, Whithorn appeared to be agitated when he and Mansour approached and that the conversation with Vela was tense and uncomfortable. In this context, I conclude that Whithorn's inquiry caused at least slight harm to Vela's rights as an employee. Vela did not deny that Whithorn told him

²⁶ It is also worth noting that Whithorn's testimony about this incident conflicted with Mansour's. Mansour insisted that Whithorn did not ask Vela about Association dues, but Whithorn admitted that he did.

that he did not need to answer his questions about the Association, but Whithorn never informed Vela that no reprisal would result from either his responses or his choice not to respond. (See *Clovis USD, supra*, PERB Decision No. 389, p. 16; citing *Ethyl Corp. (1977)* 231 NLRB 431 [holding that an employer’s assurance of a right to remain silent does not automatically amount to an assurance against reprisal since silence may be construed as support for the union].) Whithorn’s statement that it was difficult for him to retain grant-funded employees if they continued participating in Association demonstrations can reasonably be interpreted as a threat that further participation would affect their continued employment. The statement that it was “unfair” or “unjust” that the Association involved rookies in Association activities also conveys disapproval towards Association activities, which further contributed to a coercive atmosphere during the questioning. Whithorn did not specifically deny making either statement.²⁷

Whithorn testified that he questioned Vela because he “wanted to make sure “that [rookies like Vela] were comfortable and knew what they were getting involved in[,]” explaining that the Association did not allow him to participate in job actions when he was a rookie. There is no evidence that Whithorn ever informed Vela that this was the purpose of his inquiry. Even if he had, I do not consider this to be a legitimate purpose for questioning Vela about his status in the Association or the reasoning behind participating in Association activities. (See *Hart UHSD, supra*, PERB Decision No. 2595, p. 9 [holding an employer had

²⁷ Whithorn did deny telling Vela that the Association “shouldn’t be making him do stuff.” He also denied discussing Vela’s status as a probationary employee at the time because, according to Whithorn, Vela “knows he’s on probation.” I find that this testimony does not constitute a denial of the more problematic statements Vela attributed to Whithorn because Whithorn did not deny characterizing the Association’s activities as “unfair” or “unjust” and did not deny discussing the effect that the demonstrations might have on grant-funded employees, like Vela.

no legitimate interest in questioning employees about the adequacy of their union representation]; see also *Hartnell Community College District* (2015) PERB Decision No. 2452, p. 56, citations omitted [holding employers have no role in influencing matters of employee choice or the administration of internal union affairs].)

Therefore, Whithorn's questioning and other statements to Vela on July 25 interfered with Vela's rights under MMBA section 3502, which is unlawful under MMBA sections 3506 and 3506.5, subdivision (a), and PERB Regulation 32603, subdivision (a). This conduct also derivatively interferes with the Association's right to represent Vela under MMBA section 3503, which is unlawful under MMBA, section 3506.5, subdivision (b), and PERB Regulation 32603, subdivision (b).

(c) McDermott's Statements About Association Activity (¶¶ 26-28)

The PERB complaint also alleges that McDermott interfered with protected rights when he said words to the effect of "I don't know what the Union is up to, the Association is up to, but it's going to go bad for you" to Captain Gilmore. At hearing, Gilmore testified that McDermott did in fact make statements like that to him at Fire Station #3 in August. The City offered no contrary evidence, but it asserts that Gilmore's testimony was entirely hearsay which cannot form the foundation of the Association's interference claim. I disagree. Under PERB Regulation 32176, hearsay evidence is admissible in PERB proceedings, "but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." PERB has interpreted this regulation to mean that hearsay evidence is admissible but cannot form the sole basis for a factual finding absent an exception to the hearsay rule. (*Palo Verde USD, supra*, PERB Decision No. 2337, pp. 19-20; *County of Riverside, supra*, PERB Decision No. 2090-M, p. 12, fn. 9.) In *Bellflower Unified School District* (2014) PERB

Decision No. 2385 (*Bellflower USD*), the Board recognized and applied the “party admission” hearsay exception, codified at Evidence Code section 1220, and stating:

Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity.

The Board found that the rationale behind this exception is that the party to the admission is present at the hearing and has the ability to explain or contradict the hearsay statement. (*Id.* at p. 10, citing 1 Witkin, California Evid. (5th Ed. 2012) Hearsay, § 91(2), p. 915.) In this case, it is undisputed that Assistant Chiefs, like McDermott, are part of Whithorn’s cadre of managers at the Fire Department. Therefore, I consider him to be authorized to speak as a representative of the Fire Department. Statements attributed to McDermott accordingly qualify as a party admission exception to the hearsay rule. (See Evid. Code § 1220; *Bellflower USD, supra*, PERB Decision No. 2385, p. 10.) The City heard all of Gilmore’s testimony before starting its own case in chief. The City declined the opportunity to call McDermott as a witness to rebut the statements attributed to him by Gilmore. And the City did not otherwise introduce evidence that would tend to contradict Gilmore’s testimony or demonstrate that his account is untrustworthy.

In *Gissel Packaging Company* (1969) 395 U.S. 575 (*Gissel Packaging*), an employer may lawfully make predictions about the consequences of protected activity if “carefully phrased on the basis of objective fact to convey an employer’s belief as to demonstrably probable consequences beyond its control.” (*Id.* at p. 618.) In contrast, the employer may not make a “threat of retaliation based on misrepresentation and coercion.” (*Ibid.*) In that case, the court held that an employer’s speeches, pamphlets, and other writings indicating that it

would close or move its operations if the employees unionized was not a lawful prediction of economic consequences, but was instead a threat designed to coerce employees against organizing. (*Id.* at p. 619-620.)

In *Coachella Valley MVCD*, *supra*, PERB Decision No. 2031-M, the employer stated to employees that they were free to join the union but that the costs associated with unionization would result in layoffs. As in *Gissel Packaging*, the Board in that case concluded that the employer's statements were not a lawful prediction because it did not describe any of the other causes for the layoffs, such as its budget deficit and increased operating expenses. Rather, the Board found that the employer's depiction that unionization was the sole reason for layoffs was unlawfully coercive. (*Coachella Valley MVCD*, at pp. 21-23.)

In *Colusa Unified School District* (1983) PERB Decision No. 296 (*Colusa USD*), a superintendent made critical comments during negotiations about a union's decision to grieve a dispute over holiday pay. The manager's comments included his assessment that pursuing the grievance was "a step backward," which adversely affected the union's relationship with management. He also said that the grievance left less money for negotiated benefits because funding for both came from the same source, concluding that, "win or lose, [the union] loses." (*Id.*, adopting proposed dec., pp. 35-37.) In evaluating the context of those remarks, the Board considered the personal stress the superintendent was under at the time, the number of times he repeated the comments (once), and the fact that he was speaking during negotiations to a seasoned union representative. The Board also concluded that the comments were basically true, "that the District had limited funds and any expenditure of money for litigation would bring a corresponding reduction in money for other purposes, including negotiated benefits." (*Id.*, adopting proposed dec., at p. 36.) The Board held that the remarks, under those

circumstances, were not overly coercive and did not interfere with protected rights. (*Id.*, adopting proposed dec., at p. 37.)

In this case, I do not conclude that McDermott's statement was simply a prediction of the probable consequences of the Association's conduct. Rather, as in *Gissel Packaging* and *Coachella Valley MVCD*, the statement impliedly threatens that retribution would follow continued Association activity. The City points out that statements attributed to McDermott contain no direct threat of reprisal or force and are vague about which Association activities he was referring to. It accordingly argues that no interference violation can be found. I find this argument unpersuasive. As stated above, both explicit and implicit threats may have a coercive effect on protected activities. And under certain circumstances, even a vague statement may imply that there will be negative consequences for engaging in protected activities. (See *Norton Concrete Company* (1980) 249 NLRB 1270, pp. 1272-1274; *Murcel Manufacturing Corporation* (1977) 231 NLRB 623, p. 640.)

I find that McDermott's statements to be objectively coercive. Once again, context is key. McDermott spoke to Gilmore in August, in the midst of the parties' protracted contract negotiations and the Association's public demonstrations. This conversation occurred less than a month after the Fire Department unilaterally made unfavorable changes to the Tuition Reimbursement program. It was also around the time department management was implementing its policy prohibiting vehicle washing. It is undisputed that both changes limited benefits many unit members enjoyed. Against this backdrop, a reasonable person would fear that continued Association advocacy and activity would result in additional restrictions or other negative job consequences from management. I find this situation different from *Saddleback USD, supra*, PERB Decision No. 2333, where the employer expressed a negative

opinion of a union's negotiating strategy as part of a larger explanation for its own conduct in negotiations. Here, McDermott's comment suggested that the Association's conduct would have negative consequences from management. McDermott's comments also came around the same time Whithorn made similar statements to La Fleur and Vela about participating in picketing activities.

The City offers no justification for this statement, but maintains that no violation should be found here because McDermott was vague about which Association activities he took issue with. While I agree with the City that his comment was not specific, I find that the undefined nature of his comment, in these circumstances, only magnifies its coercive effect. Without knowing which particular Association conduct he McDermott found objectionable, a reasonable person would be left to wonder if *all* Association activities would have unfavorable repercussions. (See *LACCD, supra*, PERB Decision No. 2404, pp. 6-8 [holding an overbroad, vague restriction on protected activities interfered with protected rights].) Accordingly, I find that McDermott's statement to Gilmore interfered with his protected rights under MMBA section 3502, which is unlawful under MMBA section 3506.5, subdivisions (a) and (b). The statement also interferes with the Association's rights to represent its unit members, under MMBA section 3503, which is unlawful under MMBA, section 3506.5, subdivision (b), and PERB Regulation 32603, subdivision (b).

(d) Meier Grievance Comments (¶¶ 29-31)

The PERB complaint also alleges that the City interfered with protected rights by Whithorn's statements during an August meeting over Captain Meier's grievance. Meier filed grievance at issue because he had resigned from coordinating the Public Education program and Whithorn had ordered him to continue those duties. During the meeting, Meier took the

position that he could resign from the position because the coordinator duties were not in his job description. According to Meier, Whithorn replied by providing other examples of things commonly done in the Fire Department that were not in unit members' job descriptions, such as exercising, eating, resting, and washing personal vehicles. According to Meier, Whithorn then said words to the effect of "what if you weren't able to wash your vehicles anymore?" Whithorn acknowledged discussing the vehicle washing policy, but denied using those words.

I credit Meier's testimony in this area over Whithorn's. Meier seemed earnest and credible while testifying, and he dutifully explained what he remembered and what he did not. He was also careful not to mischaracterize Whithorn's statements or demeanor, even if doing so would have bolstered the Association's case. Furthermore, Meier's testimony was corroborated by Jackson, who was also at the meeting as an Association representative.

I am disinclined to believe Whithorn's explanation that his reference to the vehicle washing policy was merely an illustration about conduct common in Fire Stations. By the time of the grievance meeting, Whithorn had already discussed eliminating the vehicle washing policy with Freeland. In addition, EO B-37-16 had already issued as well, which Whithorn testified was the major impetus for his decision to eventually eliminate the vehicle washing policy. Thus, I find it unlikely that he would use this policy as an example just to make a point about conduct allowed in the Fire Department since he already knew by then that the policy might change.

Having determined that Whithorn did say "what if you weren't able to wash your vehicles anymore?", I find that a reasonable person under the circumstances would find this statement to be a threat of reprisal. The obvious implication from Whithorn's statement is that, if management were to sustain Meier's grievance on the grounds that the Public Education

coordinator duties were not in his job description, then management would use that same rationale to eliminate favorable benefits. It is once again important to view Whithorn's comment in its proper context, where management had recently made adverse changes to the Tuition Reimbursement program. Because there were around 12 other grievances that were similar to Meier's, Whithorn's comment reasonably impacted how the Association handled those other grievances as well. I accordingly find that this threat caused at least slight harm to both Meier's protected rights under MMBA section 3502 and to the Association's rights under MMBA section 3503. Because the City denied that Whithorn made this statement, it offers no business justification for it. Nor do I find one in my own review of Whithorn's testimony. Therefore, I find this statement interfered with protected rights, which is unlawful under MMBA sections 3506 and 3506.5, subdivisions (a) and (b), as well as PERB Regulation 32603, subdivisions (a) and (b).

(e) August 18, 2016 Memo (¶¶ 32-34)

The PERB complaint also alleges that the City interfered with protected rights through statements made in Whithorn's August 18 memo to department employees about Association unit members' decisions to resign from extra-duty assignments they had previously volunteered for. In particular the complaint alleges that Whithorn stated that the impact of the resignations was still unknown, "but may require the suspension of voluntary programs such as the Fire Explorers; limiting our participation in strike team assignments due to no CICCS Coordinator; a greater reliance on Fire Captains to request and follow up with station repairs

and the needs of their crew; as well as potential delays of repairs and/or non-essential items.”

It is undisputed that Whithorn sent this memo to unit members.²⁸

Here, I do not conclude that the quoted language from the August 18 memo was unlawfully coercive. As in *Bellevue UESD, supra*, PERB Decision No. 1561, the MMBA does not require Whithorn to react indifferently to the Association’s concerted push to have unit members resign from extra assignments. Moreover, as in *Colusa USD, supra*, PERB Decision No. 296, the quoted portions of Whithorn’s memo largely refer to the predictable consequences of unit members’ resignations. For example, the evidence shows that the CICC coordinator position is required to track participating firefighters’ certifications to ensure that the City gets reimbursed for time spent on strike team assignments. It follows, as Whithorn testified, that it would be more difficult to participate in those assignments if the coordinator position remained vacant. Likewise, with the Fire Explorers program, the record shows that the coordinator position required a significant time commitment. Whithorn credibly testified about his view that volunteers on an informal, ad hoc, basis would not be sufficient to run the program because the teenagers served by the program need consistent, reliable mentors.²⁹ The Association presented no evidence refuting the conclusion that that resigning from these positions adversely affect the Fire Department’s ability to conduct those programs.

²⁸ The memo contains other statements from Whithorn, but neither party addresses whether any other statements interfered with protected rights. In the absence of any effort by the parties to litigate whether these other statements constitute unfair labor practices, I decline to do so sua sponte. (See *City of Inglewood, supra*, PERB Decision No. 2424-M, pp. 11-13.)

²⁹ The Association points out that Robles did later volunteer to assume the Fire Explorers coordinator position but that management, at least initially, refused his offer. I find this fact to be ancillary to the question of whether Whithorn’s August 18 memo interfered with protected rights. At the time Whithorn sent the memo, Robles had not stepped forward for the assignment. Therefore, Robles’s later decision does not factor into whether the memo was coercive at the time it was issued.

Regarding Whithorn's reference to relying on Captains more, he explained at the hearing that more responsibilities fell to Assistant Chiefs and Captains after unit members resigned from their extra-duty assignments. This included using Captains more frequently as a point of contact for contractors and other City departments regarding station repairs. The Association provided no evidence suggesting that this characterization is inaccurate and offers no evidence or argument that this statement had any probable coercive effect.³⁰

In sum, the quoted sections in the August 18 memo appear to accurately state Whithorn's beliefs about the impact of the mass resignations. I find no threat of reprisal or force and no promise of benefit in this language. I also find no other basis from which to conclude that the quoted language had a coercive effect on unit members at the time. Therefore, this allegation is dismissed.

(f) McDermott's Evaluation Comments (¶¶ 57-59)

The PERB complaint also alleges that the City interfered with protected rights when McDermott told Captain Gonzalez that the Association wanted to be "paid like professionals," thus, they should be held to a higher standard and stricter goals, because they "claim to be worth so much." These allegations were not supported by the record. There was no evidence that McDermott, or anyone else from the City, commented about the Association's desire for pay or about having higher standards or stricter goals. The Association did not discuss this allegation in its closing brief. Thus, these allegations are dismissed for lack of proof.

The record does show that McDermott did comment to Gonzalez about the Association's desire to be treated like professionals having an impact on the way that evaluations were administered. However, the Association has not addressed whether it

³⁰ There was also no evidence that those responsibilities were outside Captains' expected job duties.

contends that these other comments also violate the MMBA. In the absence of any effort by the parties to litigate this issue, I decline to do so as well. (See *City of Inglewood, supra*, PERB Decision No. 2424-M, pp. 11-13.)

4. The Association's Unalleged Violation

The Association broadly argues in its closing brief that the City enacted a unilateral policy change by designating extra-duty assignments as mandatory, instead of voluntary. This claim is not alleged in the PERB complaint. PERB may consider theories of liability not set forth in the complaint under the “unalleged violation” doctrine. That doctrine requires:

- (1) adequate notice and opportunity to defend has been provided to the respondent;
- (2) the acts are intimately related to the subject matter of the complaint and are part of the same course of conduct;
- (3) the unalleged violation has been fully litigated; and
- (4) the parties have had the opportunity to examine and be cross-examined on the issue.

(*City of Roseville* (2016) PERB Decision No. 2505-M, p. 25, citations omitted; *Fresno County Superior Court* (2008) PERB Decision No. 1942-C, pp. 14-15, 17.) The claim must also have occurred within the limitations period applicable for matters alleged in the complaint. (*Ibid.*)

These criteria have not been met here. In particular, I find that the matter was not fully litigated during the course of this hearing. The record shows that unit members resigned from between 36 and 40 extra-duty assignments and that management accepted some resignations and ordered unit members to continue performing others. The large majority of these assignments were not identified or addressed in any substance during the hearing. No evidence was presented about whether any extra-duty assignments were identified as mandatory or voluntary at the time unit members agreed to take those assignments. Moreover, no detailed evidence was presented about the job duties for the positions in the Association's bargaining unit, leaving it unclear whether the extra-duty assignments include any new job duties. Under

these circumstances, the record is inadequate to address whether management’s decision to consider some extra-duty assignments mandatory was an actionable unilateral policy change. I similarly find that the City did not have a sufficient opportunity to defend itself against this claim or to examine and present evidence on this issue. For these reasons, it is not appropriate to address the Association’s unalleged violation.

REMEDY

MMBA Section 3509, subdivision (b), authorizes PERB to order “the appropriate remedy necessary to effectuate the purposes of this chapter.” (*Omnitrans* (2010) PERB Decision No. 2143-M, p. 8.) This includes an order to cease and desist from engaging in any unlawful conduct and post notice of the violation. (*Id.* at p. 9.) The Board may also issue “make whole” relief to remedy the unfair practices where appropriate. (*Omnitrans* (2009) PERB Decision No. 2030-M, pp. 29-30, citing MMBA § 3509, subd., (b); Gov. Code, § 3541.3, subds. (c) and (i); *County of San Joaquin (Health Care Services)* (2003) PERB Decision No. 1524-M; *San Diego Adult Educators v. PERB* (1990) 223 Cal.App.3d 1124, p. 1137.)

In unilateral change cases, PERB may order the respondent to restore the status quo ante and rescind any unilaterally adopted policy changes. In *California State Employees Assn. v. PERB* (1996) 51 Cal.App.4th 923, p. 946, the court found:

Restoration of the status quo is the normal remedy for a unilateral change in working conditions or terms of employment without permitting bargaining members’ exclusive representative an opportunity to meet and confer over the decision and its effects. This is usually accomplished by requiring the employer to rescind the unilateral change and to make the employees “whole” from losses suffered as a result of the unlawful change.

(Citations omitted; see also *County of Sacramento, supra*, PERB Decision No. 2045-M, pp. 3-4, citing *County of Sacramento* (2008) PERB Decision No. 1943-M.) In this case, the City unlawfully changed two policies for Association unit members. First, the City changed the types of courses available for reimbursement under the Tuition Reimbursement program. Second, it began prohibiting unit members from washing private vehicles using City facilities and resources. The City is accordingly ordered to rescind both of these unilaterally adopted policies. The City is furthermore ordered to make whole those employees, if any, who suffered financial losses as a direct result of the unilaterally implemented policies. Financial compensation shall be augmented with interest at a rate of 7 percent per annum. (*County of Riverside, supra*, PERB Decision No. 2090-M, p. 43.)

Where an employer's statements interfere with protected rights, appropriate remedies may include an order to cease and desist from interfering with protected rights. (*LACCD, supra*, PERB Decision No. 2404, p. 14; *County of Merced, supra*, PERB Decision No. 2361-M, p. 13.) In this case, it has been found that the City interfered with protected rights by Whithorn's July 7 statements to La Fleur, Whithorn's July 25 questions and comments to Vela, McDermott's August comments to Gilmore, and Whithorn's comments to Meier during an August grievance meeting. The City is ordered to cease and desist from this conduct.

Finally, it is appropriate to direct the City to post a notice of this order, signed by an authorized City representative. These remedies effectuate the purposes of the MMBA because employees are informed that the City has acted unlawfully, is required to cease and desist from such conduct, and will comply with the order. (*City of Selma* (2014) PERB Decision No. 2380-M, adopting proposed dec., pp. 14-15.) The notice posting shall include both a physical posting of paper notices at all places where members of the Association's bargaining

unit are customarily placed, as well as a posting by “electronic message, intranet, internet site, and other electronic means customarily used by the [City] to communicate with its employees in the bargaining unit.” (*Centinela Valley Union High School District* (2014) PERB Decision No. 2378, pp. 11-12, citing *City of Sacramento* (2013) PERB Decision No. 2351-M.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the City of West Covina (City) violated the Meyers-Milias Brown Act (MMBA), Government Code sections 3502, 3503, 3505, and 3506. This conduct is unlawful under MMBA section 3506.5, subdivisions (a), (b), and (c), as well as California Code of Regulations, title 8, Section 32603, subdivisions (a), (b), and (c). The City committed these violations by: (1) unilaterally changing how it administered the Tuition Reimbursement program; (2) unilaterally eliminating its personal vehicle washing policy; (3) Chief Whithorn’s threatening statements to Firefighter/Paramedic La Fleur on July 7, 2016; (4) Whithorn’s coercive questioning of Firefighter/Paramedic Vela on July 25, 2016, about West Covina Firefighters Association, International Association of Firefighter Local 3226 (Association) activity; (5) Assistant Chief McDermott’s threatening statements to Captain Gilmore in August 2016; and (6) Whithorn’s threatening statements to Captain Meier during an August 2016 grievance meeting. All other claims are dismissed.

Pursuant to MMBA section 3509, it hereby is ORDERED that the City, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Unilaterally implementing policies that are within the scope of representation.

2. Interfering with employees' rights to be represented by the Association, including but not limited to, threatening employees for engaging in protected activities and questioning employees about their Association activities in a coercive manner.

3. Interfering with the Association's right to represent its bargaining unit members.

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

1. Rescind the changes to the Tuition Reimbursement program for the Association's bargaining unit outlined in the May 16, 2016 memo.

2. Rescind the August 24, 2016 policy prohibiting Association unit members from washing their personal vehicles at City fire stations.

3. Compensate Association unit members for any financial losses incurred as a direct result of the unilateral policy changes in Section (B)(1) and (B)(2) of this order. Compensable financial losses should be augmented by interest at a rate of 7 percent per annum.

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

5. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on the Association.

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, subs. (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).)



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

After a hearing in Unfair Practice Case No. LA-CE-1145-M, , in which all parties had the right to participate, it has been found that the City of West Covina (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq., by (1) unilaterally changing how it administered the Tuition Reimbursement program; (2) unilaterally eliminating its personal vehicle washing policy; (3) Chief Larry Whithorn’s threatening statements to Firefighter/Paramedic Greg La Fleur on July 7, 2016; (4) Whithorn’s coercive questioning of Firefighter/Paramedic Edgar Vela on July 25, 2016, about West Covina Firefighters Association, International Association of Firefighter Local 3226 (Association) activity; (5) Assistant Chief Brian McDermott’s threatening statements to Captain Scott Gilmore in August 2016; and (6) Whithorn’s threatening statements to Captain Brent Meier during an August 2016 grievance meeting. All other claims were dismissed.

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

A. CEASE AND DESIST FROM:

1. Unilaterally implementing policies that are within the scope of representation.
2. Interfering with employees’ rights to be represented by the Association, including but not limited to, threatening employees for engaging in protected activities and questioning employees about their Association activities in a coercive manner.
3. Interfering with the Association’s right to represent its bargaining unit members.

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

1. Rescind the changes to the Tuition Reimbursement program for the Association’s bargaining unit outlined in the May 16, 2016 memo.
2. Rescind the August 24, 2016 policy prohibiting Association unit members from washing their personal vehicles at City fire stations.
3. Compensate Association unit members for any financial losses incurred as a direct result of the unilateral policy changes in Section (B)(1) and (B)(2) of this order. Compensable financial losses should be augmented by interest at a rate of 7 percent per annum.

Dated: _____

CITY OF WEST COVINA

By: _____
Authorized Agent

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