



STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

COSTA MESA FIREFIGHTER'S
ASSOCIATION, LOCAL 1465,

Charging Party,

v.

CITY OF COSTA MESA,

Respondent.

UNFAIR PRACTICE
CASE NO. LA-CE-1558-M

PROPOSED DECISION
(July 28, 2023)

Appearances: Adams, Ferrone & Ferrone, by Michael McGill, Attorney, for Costa Mesa Firefighter's Association, Local 1465; Liebert Cassidy Whitmore, by Alex Wong, and Peter J. Brown, Attorneys, for City of Costa Mesa.

Before Jessica Kim, Administrative Law Judge

INTRODUCTION

In this case, the Costa Mesa Firefighters Association, Local 1465 (Association or Charging Party) alleges that the City of Costa Mesa (City or Respondent) violated the Meyers-Milias-Brown Act (MMBA).¹ The Association alleges that the City: (1) unilaterally changed a policy regarding the Association's use of an Association leave bank; (2) unilaterally changed the return to work test for bargaining unit members returning from extended leave; and (3) unilaterally changed overtime opportunities for bargaining unit members returning from extended leave.

The City denies any violation of the MMBA and Public Employment Relations

¹ The MMBA is codified at Government Code section 3500 et seq. Public Employment Relations Board (PERB) Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Board (PERB) Regulations.

PROCEDURAL HISTORY

On January 4, 2022, the Association filed an unfair practice charge against the City. On July 8, the Association filed a First Amended charge. The City filed Position Statements in response to both charges.

On August 25, 2022, PERB issued a complaint in this matter, alleging:

- (1) The Association had “full control, administration, and discretion over the use of a bank of vacation hours, established by article 19 of the parties’ memorandum of understanding (MOU).” The City unilaterally changed this policy in the Fall of 2021 by twice denying Association President Scott Purcell’s request to utilize the Article 19 vacation bank for Association leave. The City’s conduct also amounted to unlawful domination in violation of Government Code section 3506.5(d). The City’s conduct also derivatively or independently violated employees’ rights to be represented by the Association, and derivatively or independently violated the Association’s right to represent its members.
- (2) The parties’ MOU at Article 32 set forth the City’s policy for bargaining unit members returning from extended leave. The City unilaterally changed this policy in 2021 by requiring two bargaining unit members returning from work to perform an engineer task book in order to return to full duty. The City’s conduct also derivatively violated employees’ rights to be represented by the Association, and derivatively violated the Association’s right to represent its members.
- (3) The City unilaterally changed overtime opportunities for bargaining unit members returning from extended leave by requiring them to complete the engineer task book before they could work overtime. This conduct derivatively violated employees’ rights to be represented by the Association, and derivatively violated the Association’s right to represent its members.

On September 14, 2022, the City filed an answer to the complaint, denying any violation of the MMBA, or PERB Regulations, and asserting numerous affirmative defenses. The City did not allege statute of limitations as one of its affirmative defenses.

A formal hearing was conducted over 2 days on March 8, and 9, 2023, via videoconference. The case was submitted for proposed decision on May 26, 2023, upon receipt of all post-hearing briefs.

FINDINGS OF FACT

The Parties

The Association is an exclusive representative within the meaning of PERB Regulation 32016(b) of an appropriate unit of employees.

Scott Purcell (Purcell) was the Association's President between 2018 through 2021. Purcell is also a public employee within the meaning of MMBA section 3501, subdivision (d), and is employed with the City as a fire engineer.

The City is a public agency within the meaning of Government Code section 3501(c) and PERB Regulation 32016(a).

Utilization of Article 19 Vacation Bank While on an Exchange

The City and the Association's Memorandum of Understanding, Articles 19 and 25

The Association and the City are parties to a Memorandum of Understanding (MOU), originally effective from 2017 through 2021. The parties later agreed to a sideletter agreement that extended the MOU until June 30, 2024.² The MOU at Article 19 includes the following provisions for a vacation bank for the use of Association representatives for Association-related activities:

“Article 19 – Association Vacation Bank

19.1 **CMFA HOURS BANK** - The City agrees to maintain a vacation bank to be administered by the CMFA

² The sideletter modified some article of the 2017-2021 MOU, but none of the modifications were relevant to the present controversy.

Board of Directors. The bank will be comprised of hours voluntarily donated by Association members. The City will notify CMFA when this bank reaches a positive balance in excess of \$30,000.00 or a negative balance of \$5,000.00 so donations can be appropriately adjusted.”

The MOU at Article 25 includes the following provisions regarding vacations:

“Article 25 – Leaves of Absence

. . .

“25.2 **VACATIONS** - The purpose of annual vacation leave is to enable each eligible employee annually to return to his/her work mentally refreshed. Any leave of absence without pay shall not accrue vacation leave for each full pay period of such absence.”

. . .

“d. Vacation Leave - Vacation will be used in accordance with current accepted Fire Department procedures. . . .”

2015 Telestaff Committee Minutes Regarding Taking a Vacation While on an Exchange

City firefighters and fire engineers work 24-hour shifts. These employees regularly exchange shifts with each other. An “exchange,” or “trade,” occurs when an employee trades a 24-hour shift that they were originally scheduled for, in exchange for a 24-hour shift that another employee was originally scheduled for.

Telestaff is the name of the City’s electronic scheduling system for Fire Department employees.

In late 2014 and early 2015 the City’s Fire Department had a Telestaff Committee that met periodically. Fred Seguin, who at the time was Deputy Fire Chief, was chairperson of the committee. The committee also included Steven Cathey, Eric McVey, Jamie Serrato and Association Board member Mike Hurd.

On or around January 29, 2015 the Telestaff Committee met. After this meeting, Seguin sent out an e-mail message to fire operations staff. Attached to the e-mail message was a document titled “Telestaff Meeting Minutes.” The Telestaff Meeting Minutes included seven numbered sections. Number 3 stated the following.

“3. Taking Vacation on an exchange.

The practice of taking a vacation on an exchange (28 day cycle) was decided upon last year to not be approved due to [Fair Labor Standards Act (FLSA)³] compensation issues and will remain in effect. However, the [Battalion Chiefs] do have the latitude to approve requests for time off when on an exchange on a case by case basis.”

Since 2015, the City Fire Department’s practice is to limit employees on an exchange from taking regular vacation leave, specifically regular vacation leave described by Article 25 of the parties’ MOU. A key disputed issue of this case—discussed *post*—is whether the City also limited employees on an exchange from taking Association leave, as described by Article 19 of the parties’ MOU.

Fire Department Practices Regarding Vacation Leave and Association Leave

When an Association representative requests to utilize the Article 19 vacation bank for Association leave, the Association representative notifies their captain, who in turn notifies the Battalion Chief.

In at least one respect, the Fire Department treats Article 25 vacation usage and Article 25 Association leave differently. If an employee requests a shift of Article 25 vacation with sufficient advance notice, and if there are no volunteers to take that shift, the City will “force a fill” i.e. require another employee to take the shift. In contrast, the

³ The FLSA is codified at 29 U.S.C. § 201.

City does not “force a fill” when an Association representative requests to utilize the Article 19 vacation bank for Association leave. Instead, it is the Association representative’s responsibility to check to make sure that there is an employee signed up on the “pick list” before the Association representative requests to utilize Article 19 Association leave. The pick list is a list of employees who are willing to work on a particular day.

President Purcell’s Requests to Take Association Leave While on an Exchange

Purcell has held various positions with the Association, including as a director on the Association’s Board from around 2010 to 2014, Secretary from around 2014 through 2018, and President from 2018 through 2021. As President, Purcell’s role included meeting with City Council members and other City officials, attending conferences, and representing bargaining unit members in grievances and unfair practice charges. Purcell frequently utilized the Article 19 vacation bank for these purposes. Association representatives, including Purcell, only utilize the Article 19 vacation bank for Association-related duties, not for personal use.

Purcell utilized the Article 19 Association vacation bank while on an exchange on June 6, 2014, April 15, 2015, May 7, 2019, May 15, 2019, March 11, 2020, April 2, 2021, and April 7, 2021.

Prior to November 2021, the City had not denied a request by Purcell to utilize the Article 19 vacation bank while on an exchange. In addition, besides Purcell, several other Association representatives had utilized the Article 19 vacation bank while on an exchange, including Rob Gagne and Mike Hurd. Rob Gagne, who used to serve as Association President, utilized the Article 19 vacation bank at least once

while he was on an exchange. Gagne also was never denied a request to utilize the Article 19 vacation bank while on an exchange. Association Vice President Mike Hurd utilized the Article 19 vacation bank approximately 4 times while on an exchange. Hurd has also never been denied a request to utilize the Article 19 vacation bank.

In November 2021, Purcell requested to utilize the Article 19 vacation bank for Association leave. Purcell was planning to use Association time to meet with a Council member. Purcell was on an exchange that day. Battalion Chief Coates denied Purcell's request to utilize the Article 19 vacation bank. Coates stated the reason for denying the request was that Purcell was on an exchange.

In December 2021, Purcell again requested to utilize the Article 19 vacation bank for Association leave. Purcell was planning to use Association time to attend a grievance in the morning and meet with a Council member in the afternoon. Purcell was on an exchange that day. Battalion Chief Coates again denied Purcell's request. Coates stated the reason for denying the request was that Purcell was on an exchange. After denying this request, Coates provided Purcell with the option of leaving his station for the duration of the grievance meeting without utilizing the Article 19 vacation bank. Purcell accepted this option and attended the grievance meeting.

Return to Work

The City and the Association's Memorandum of Understanding, Article 32 Return to Work Policy

The parties' MOU has the following provision regarding return to work:

“ARTICLE 32 - RETURN TO WORK POLICY

“32.1 PHYSICIAN RELEASE - The City has implemented through an Administrative Regulation a “Return to

Work Policy” for employees who are released by their physician(s) to return to work for full duty in the manner set forth in Appendix B.

“32.2 RETURN TO WORK TESTING - Upon return to work for duty on the first shift for any leave of absence of 10 shifts or more (except Vacation) the employee will have a manipulative abilities test administered at the training tower by the Training Officer and/or his/her designee with the employee tested in the following areas:

- 1) Pull and extend 1 ¾” crosslay (200’) pre-connected line
- 2) Able to crawl following one section (50’) of 1 ¾” hose
- 3) Perform both tip and butt positions of a 24’ extension ladder (includes raising and lowering the fly)
- 4) Don Breathing Apparatus in accordance with current standards (under 2 minutes)
- 5) Carry two spare S.C.B.A. bottles in full turnouts and wearing a S.C.B.A. to the 2nd floor landing.

“32.3 Any member not passing any of the above will placed on remedial training by the training officer until such time they can pass the requirements of 32.2.”

The return to work manipulative abilities testing set forth in Article 32.2 takes an employee approximately eight to ten minutes to complete.

Background: Firefighters Return to Work

The Association represents the classifications of firefighter, fire engineer, and captain. A firefighter classification may be promoted to a fire engineer. Fire engineer duties include driving Fire Department vehicles, also called apparatuses. A Fire Department apparatus typically weighs between 40,000 and 80,000 pounds. Driving the apparatus is a perishable skill i.e. a skill that requires consistent to practice to maintain.

For a firefighter to promote to fire engineer, the firefighter must complete the Fire Engineer Promotional Task Book (Task Book). The Task Book requires an

employee to successfully complete various tasks with verification by a training officer. The Task Book requirements include, but are not limited to, a written test, a map test, performance of a DMV pre-trip inspection, quint operations, light air tasks, and truck operations.

To complete the Task Book and earn a promotion to fire engineer, it typically takes a firefighter around five months. Although it is possible to complete the Task Book quicker, a firefighter may not be able to perform the tasks in the Task Book back-to-back due to scheduling.

Employees returning from extended leave are required to complete the Return to Work manipulative abilities test set forth in MOU Article 32.2. On approximately 10-12 occasions prior to the Fall of 2021, employees coming back from extended leave completed the test set forth in article 32.2 and were not required to perform additional testing.

However, on one occasion in 2017, a fire engineer that returned to work was required to perform additional testing. On that occasion, a fire engineer had taken an extended leave of ten to eleven months. Upon his return, the City had safety concerns about his return to his job as a fire engineer. Accordingly, the City required the employee to complete the Task Book before returning to full duty. Division Chief of Operations Jason Pyle testified that Rob Gagne, who was the President of the Association in 2017, was aware that the returning fire engineer was required to complete the Task Book and did not express objections. Gagne, who also testified, did not recall the 2017 occurrence, and therefore did not confirm or refute Chief Pyle's testimony.

Fall 2021, Return to Work of Two Fire Engineers

In Fall 2021, two fire engineers returning from work were required to complete the Task Book before they were permitted to return to full duty. The fire engineers were assigned to be the 5th person on an apparatus while they completed the Task Book. Generally, the Department assigns four employees to work on an engine or a truck company, but a fifth employee may be assigned to shadow while completing the Task Book.

Both fire engineers completed the Task Book in under two months, though the City gave neither Purcell nor the Association advance notice before requiring the engineers do so.

The returning fire engineers were not permitted to sign up to work overtime until they finished the Task Book. Traditionally, the City Fire Department provides overtime opportunities based on previous hours of overtime worked. If multiple employees sign up for an overtime opportunity, the employee with the least number of overtime hours previously worked will be selected for the overtime opportunity. If two employees have worked the same number of overtime hours, the tie is broken by seniority.

ISSUES

1. Did the City violate its duty to bargain in good faith by unilaterally changing its policy to prohibit Association representatives on an exchange from utilizing the Article 19 vacation bank for Association leave? By the same alleged conduct, did the City engage in unlawful domination?
2. Did the City violate its duty to bargain in good faith by unilaterally changing its policy to require fire engineers returning from extended leave to complete the

Task Book?

3. Did the City violate its duty to bargain in good faith by unilaterally requiring fire engineers returning from an extended leave to complete the Task Book before they could sign up for overtime opportunities?

CONCLUSIONS OF LAW

1. Unilateral Change Allegation – Utilization of Article 19 Vacation Bank While on an Exchange

To state a prima facie case of an unlawful unilateral change, a charging party must show: (1) the employer changed or deviated from the status quo; (2) the change or deviation concerned a matter within the scope of representation; (3) the change or deviation had a generalized effect or continuing impact on represented employees' terms or conditions of employment; and (4) the employer reached its decision without first providing adequate advance notice of the proposed change to the union and bargaining in good faith over the decision, at the union's request, until the parties reached an agreement or a lawful impasse. (*Bellflower Unified School District (2021)* PERB Decision No. 2796, p. 9, citing *County of Merced (2020)* PERB Decision No. 2740-M, pp. 8-9.)

- a. Change to Status Quo

There are three primary means of establishing that an employer changed or deviated from the status quo: (1) a deviation from a written agreement or written policy; (2) a change in established past practice; or (3) a newly created policy or application or enforcement of existing policy in a new way. (*County of Merced, supra*, PERB Decision No. 2740-M, p. 9.)

- i. Written Policy

Here, under the parties' Memorandum of Understanding at Article 19, Association representatives may utilize a vacation bank to take Association leave. The Association alleges that Article 19 creates a written policy providing the Association "full control, administration, and discretion over the use" of this vacation bank. The Association alleges that the City changed this policy by denying President Purcell's use of Association leave while on an exchange on two occasions in November and December 2021.

PERB lacks jurisdiction to resolve pure contract disputes. However, PERB may interpret agreements as necessary to decide an unfair practice case. (See *Regents of the University of California (Davis)* (2010) PERB Decision No. 2101-H, pp. 18-19.) This includes addressing whether a respondent has unilaterally changed a policy that is embodied in the terms of a collectively bargained agreement. (*Antelope Valley Community College District* (2018) PERB Decision No. 2618, p. 15.) With respect to such policies, an employer may not unilaterally impose a contractual interpretation that reverses a previous understanding. (*Ibid.*)

PERB employs traditional rules for interpreting contracts. (*City of Riverside* (2009) PERB Decision No. 2027-M, p. 10, citing *National City Police Officers' Assn. v. City of National City* (2001) 87 Cal.App.4th 1274, 1279.) The aim is to effectuate the parties' mutual intent at the time of the agreement, to the extent that their intentions are lawful. (*County of Sonoma* (2012) PERB Decision No. 2242-M, pp. 15-16, citing Civ. Code, § 1636; see also *City of Riverside*, p. 10.) If the written terms are "clear and unambiguous, it is unnecessary to go beyond the plain language of the contract itself to ascertain its meaning." (*County of Sonoma*, pp. 15-16; *Marysville Joint Unified*

School District (1983) PERB Decision No. 314, p. 9.)

PERB must also interpret the “whole of a contract” together, such that every part is given effect and, when practical, each provision of the contract assists with understanding the other provisions. (*County of Sonoma, supra*, PERB Decision No. 2242-M, p. 16, citing Civ. Code, § 1641.) Conversely, the Board “must avoid an interpretation that leaves a provision without effect.” (*Id.* at p. 16; see also *Antelope Valley Community College District, supra*, PERB Decision No. 2618, pp. 19-20.)

PERB may consider extrinsic evidence, including bargaining history, prior agreements, or past applications of the agreement, in areas where the contract is silent or ambiguous. (*County of Sonoma, supra*, PERB Decision No. 2242-M, p. 16, citing *Joint Unified School District, supra*, PERB Decision No. 314.) However, reliance on such evidence is neither necessary nor warranted where the written terms are already clear and unambiguous. (*Trustees of the California State University* (1996) PERB Decision No. 1174-H, p. 6.)

Applying these principles in this case, Article 19 creates a vacation bank for Association-related leave to be “administered” by the Association. The word “administered” indicates that the Association has control over certain aspects of the vacation bank. The parties both agree that the Association controlled which Association members could request to utilize the Article 19 vacation bank, and for what purpose.

However, while the Association certainly had control over certain aspects of the vacation bank, the plain language of Article 19 does not indicate that the Association had full control or discretion over *every* aspect of the vacation bank.

In fact, Article 19 specifically contemplates that the City will control some aspects of the vacation bank. Article 19 states “the City agrees to maintain” the vacation bank administered by the Association. And that “[t]he City will notify [the Association] when this bank reaches a positive balance in excess of \$30,000 or a negative balance of \$5,000.00 so donations can be appropriately adjusted.”

Therefore, from the plain language of the MOU itself, the Association does not have full control over every aspect of the vacation bank—at the least, the City has control over maintaining the vacation bank and calculating the vacation bank’s balance.

Accordingly, the Association’s allegation that Article 19 provided the Association with “full control, administration, and discretion over the use of a bank of vacation hours” is rejected. Further, Article 19 does not explicitly permit Association members to utilize the vacation bank while on an exchange. Accordingly, I do not find that the Association demonstrated that the County had a written policy of permitting Association representatives to utilize the Article 19 vacation bank while on an exchange.

ii. Past Practice

The next step is examining whether the Association established past practice. Parties may be bound to their past practices where the practice is “regular and consistent” or “historic and accepted.” (*County of Merced, supra*, PERB Decision No. 2740-M, p. 13, 11 n. 9; *Hacienda La Puente Unified School District (1997)* PERB Decision No. 1186 adopting proposed dec., p. 13.)

The Association submitted evidence to show that the City had a past practice of permitting Association representatives to utilize the Article 19 vacation bank while on an

exchange. Before 2021, Purcell utilized the Article 19 vacation bank for Association leave while on an exchange around 7 times. Moreover, before 2021, the City had never denied Purcell's utilization of the Article 19 vacation bank while on an exchange. In addition, former President Rob Gagne and Vice President Mike Hurd both utilized the Article 19 vacation bank while on an exchange. The City never denied Gagne or Hurd's request to utilize the Article 19 vacation bank while on an exchange.

The Association sufficiently proved that there was a regular and consistent past practice of permitting Association representative to utilize the Article 19 vacation bank while on an exchange. (*County of Merced, supra*, PERB Decision No. 2740-M, p. 13, 11 n. 9.)

The City counters that its past practice is to prohibit Association representatives from utilizing the Article 19 vacation bank time while on an exchange. The City asserts that this past practice is embodied in the Telestaff Meeting Minutes from January 29, 2015. These Telestaff Meeting Minutes state, in relevant part, that "The practice of taking a vacation on an exchange (28 day cycle) was decided upon last year to not be approved due to FLSA compensation issues and will remain in effect."⁴ The City asserts that since on or before January 29, 2015, it has not permitted Fire Department employees to take vacation while on an exchange. The City also asserts

⁴ At least one witness testified that the reason the City adopted a rule barring taking a vacation on an exchange is that taking such leave raises FLSA concerns. However, the City does not argue that an Association representative's occasional use of Association leave during an exchange is prohibited by the FLSA. Nor has the City identified a section of the FLSA that prohibits such leave usage. Accordingly, any defense regarding the FLSA has been waived. (See, e.g., *Regents of University of California* (2023) PERB Decision No. 2852-H, p. 12, n. 8 [defense not raised in Answer is waived].)

that this practice applies to both vacation under Article 25 of the MOU, and Association leave under Article 19. The City notes that Article 19 refers to the Association leave bank as a “vacation bank,” which supports the City’s argument that Article 19 Association leave usage is subject to the same Fire Department operating procedures as Article 25 vacation usage.

The City has not established that there was a past practice of prohibiting Association representatives from utilizing the Article 19 vacation bank while on an exchange. The Telestaff Meeting Minutes from January 29, 2015, limit taking a “vacation” while on an exchange. However, the Telestaff Meeting Minutes do not mention Association leave, release time, or the Article 19 vacation bank. Therefore, the Telestaff Meeting Minutes are at best ambiguous about whether the limitations on vacation time under Article 25 also apply to the utilization of Article 19 Association leave. In addition, the MOU does not explicitly state that all rules that apply to Article 25 vacations also apply to Article 19 Association leave. Further, by the City’s own admission, not every Fire Department practice that applies to Article 25 vacation leave applies to Article 19 Association leave—the City admits that unlike regular vacation time, the Department will not force a fill based on a request to utilize the Article 19 vacation bank. The City failed to set forth evidence that prior to 2021 it limited Association representatives from utilizing the Article 19 vacation bank while on an exchange.

Based on the foregoing, the Association has established that the City’s past practice prior to November 2021 was to allow Association representatives to utilize the Article 19 vacation bank while on an exchange. The Association also established that

the City changed this policy in the Fall of 2021 by prohibiting Association representatives from utilizing the Article 19 vacation bank while on an exchange.

b. Scope of Representation, Generalized Effect or Continuing Impact, and Notice and Opportunity to Bargain

Respondent does not dispute the other elements of a unilateral change allegation. Therefore, these elements will only be touched upon briefly.

The City's policy of prohibiting Association representatives from utilizing the Article 19 vacation bank while on an exchange was within the scope of representation. (*County of Orange* (2018) PERB Decision No. 2611-M, p. 11 ["It is well-established that union release time falls within the scope of representation because of its relationship to employer-employee relations and its direct impact upon employees' wages and hours of employment."] Further the change had a generalized effect and continuing impact because the City asserts that it has the right to deny Association leave to Association representatives who are on an exchange. (*Sacramento City Unified School District* (2020) PERB Decision No. 2749, p. 8 [A generalized effect or continuing impact is shown if a change either alters a term or condition of employment or involves an employer assertion of a non-existent right that could be relevant to future disputes].) Finally, the City did not provide the Association notice and an opportunity to bargain to impasse or agreement before the Fall of 2021 when the City changed its policy regarding the usage of Association leave while on an exchange. (*Bellflower Unified School District, supra*, PERB Decision No. 2796, p. 9.)

Based on the foregoing, the City violated MMBA section 3506.5, subdivision (c), and derivatively violated subdivisions (a), and (b), when it unilaterally prohibited Association members from utilizing Article 19 Association leave while on an exchange

without first affording the Association notice or an opportunity to meet and confer over the change.

2. Domination Allegation – Utilization of Article 19 Vacation Bank While on an Exchange

Based on the same conduct above—the City prohibiting President Purcell from utilizing the Article 19 vacation bank while on an exchange—the complaint advances a legal theory that the City violated MMBA section 3506.5, subdivision (d), or in other words, the City engaged in unlawful domination.

An employer may engage in unlawful domination when it fails to remain strictly neutral when two different employee organizations are in competition with each other. (*City of San Diego* (2020) PERB Decision No. 2747, p. 43.) In some instances, an employer may also engage in unlawful domination when it puts its thumb on the scale in favor of or against a particular union leader. (*Id.* at pp. 43-44.) Here, the Association has not shown that the City put their thumb on the scale of a particular union leader or supported one union over a different union. Accordingly, the Association’s allegation that the City violated MMBA section 3506.5, subdivision (d) is hereby DISMISSED.

3. Unilateral Change Allegation – Return to Work Requirements for Fire Engineers

a. Change in Policy

The parties’ MOU at Article 32 sets forth the requirements for an employee to return to full duty after an extended leave of absence. Article 32.1 refers to a Physician’s release and other requirements for return to work set forth in the MOU Appendix B. Article 32.2 outlines a five-step manipulative abilities test that an employee must successfully perform before returning to work.

The Association alleges that an employee may return to work from an extended leave as long as the requirements in Article 32 are completed and that Article 32 prohibits the City from introducing an additional test outside the article that an employee must complete before they return to work. The Association alleges that in 2021, the City deviated from this written policy by requiring two fire engineers to complete an additional test, not set forth in Article 32, before returning to full duty. Specifically, the Association alleges that the City made an unlawful unilateral change by requiring fire engineers returning from work after an extended absence to complete the Task Book before returning to full duty.

The City interprets Article 32 differently, asserting that though it sets forth return to work testing for a bargaining unit member returning to work after an extended leave of absence, Article 32 does not specify the assignment of that returning bargaining unit member. Therefore, the City reserves the management right to assign these employees upon their return to work and claims specifically that it may assign returning fire engineers to be the 5th person on an apparatus until they complete the Task Book. Further, the City argues that before 2021, the Association and the City management had previously agreed that a fire engineer returning to work in 2017 had to complete the Task Book before returning to full duty.

First, I will address the City's argument regarding the return to work of the one fire engineer in 2017. Because it's undisputed, I accept Chief Pyle's testimony that in 2017, the then-President of the Association, Gagne, was aware that a fire engineer was required to complete the Task Book before returning to work and that Gagne did not object to this requirement. That said, the City does not allege that in 2017 the

Association and the City agreed to a new written policy regarding return to work. Therefore, this 2017 occurrence did not override the parties' written MOU at Article 32. At best, Gagne's awareness of the 2017 occurrence could lead to a statute of limitations defense.⁵ However, statute of limitations—an affirmative defense—was not raised by Respondent in its Answer, and therefore, any such defense has been waived. (*Regents of University of California, supra*, PERB Decision No. 2852, p. 12, n. 8)

Second, I must address the City and the Association's disputed interpretation of Article 32. Reviewing each section of Article 32, the language supports the Association's interpretation that the return to work requirements listed in Article 32.1 and Article 32.2 are the only requirements for an employee to return to work after an extended leave. (*County of Sonoma, supra*, PERB Decision No. 2242-M, p. 16 [PERB must interpret the whole of the contract together such that every part is given effect].) Article 32 encompasses the negotiated requirements for an employee's return to work after an extended leave. Further, Article 32.2 sets forth the manipulative test for an "employee" to perform before they return to work. The word "employee" is inclusive of both the firefighter and the fire engineer classifications.

Moreover, the City's argument that it was allowed to assign the returning fire engineers at the City's discretion until the fire engineers completed the Task Book is not well founded. The plain meaning of "return to work," a phrase referred to multiple

⁵ PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1077.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177, p. 4.)

times in Article 32, is that an employee will be returned to work to their regular duties. In this case, the City required the returning fire engineers to complete the Task Book before resuming the regular duties of a fire engineer. Article 32 did not permit the City to add this requirement without bargaining.

Accordingly, the Association established that the City had a written policy that a fire engineer may return to work from extended leave if they complete the requirements set forth in the MOU at Article 32. The Association also established that the City changed that policy in 2021 by requiring fire engineers to perform the Task Book before returning to full duty.

b. Scope of Representation, Generalized Effect or Continuing Impact, and Notice and Opportunity to Bargain

Respondent does not dispute the other elements of a prima facie case of unilateral change including scope of representation, generalized effect or continuing impact, or notice and opportunity to bargain. Therefore, these elements will only be touched upon briefly.

Return to work policies are within the scope of representation. (See e.g., MMBA, § 3504 [The scope of representation under the MMBA includes “all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment,” but not including “consideration of the merits, necessity, or organization of any service or activity provided by law or executive order”]; See also *County of Monterey* (2018) PERB Decision No. 2579-M, p. 11.) Further, the City’s conduct had a generalized effect and continuing impact because the City asserts the right to require fire engineers to complete the Task Book before returning to full duty. (*Sacramento City*

Unified School District, supra, PERB Decision No. 2749, p. 8.) Finally, the City did not provide the Association notice and an opportunity to bargain to impasse or agreement before the City required the two fire engineers to complete the Task Book.

Based on the foregoing, the City violated MMBA section 3506.5, subdivision (c), and derivatively violated subdivisions (a), and (b), when it unilaterally required fire engineers returning from work from extended leave to complete the Task Book without first affording the Association notice or an opportunity to meet and confer over the change.

4. Unilateral Change Allegation—Fire Engineers Returning From Work Not Permitted to Sign Up for Overtime Opportunities Until Completion of the Task Book

It is undisputed that the City did not permit the two fire engineers returning from work in 2021 to sign up for overtime opportunities until they completed the Task Book.

The Association alleges the diminished overtime opportunities as a separate unilateral change from the requirement that fire engineers complete the Task Book. However, these allegations are linked—the alleged lack of overtime opportunities for the two employees returning to work are a direct consequence of the City imposing the new Task Book requirement. It does not make sense to consider these as two separate unilateral change allegations. Accordingly, the theory alleging the diminished overtime opportunities as its own separate unilateral change is hereby DISMISSED. However, as explained further below, diminished overtime opportunities are taken into consideration as part of the remedy for this case.

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 conduct that violates the MMBA. (*Id.* at p. 9.) This remedy is warranted to address the City's unilateral change violations.

PERB's remedial authority also includes the power to order an offending party to take affirmative actions to effectuate the purposes of the MMBA. (*City of Redding* (2011) PERB Decision No. 2190-M, adopting proposed decision, pp. 18-19.)

Restoration of the status quo is the typical remedy for a unilateral change violation.

Normally, this requires the employer to rescind the unilateral change and to make the employees whole from losses suffered as a result of the unlawful change. (*California State Employees Assn. v. Public Employment Relations Bd.* (1996) 51 Cal.App.4th 923, 946.) A "properly designed remedial order seeks a restoration of the situation as nearly as possible to that which would have obtained but for the unfair labor practice." (*Modesto City Schools* (1983) PERB Decision No. 291, pp. 67-68).

Here, the City is ordered to rescind its policy of prohibiting Association representatives from utilizing the Article 19 vacation bank for Association leave while on an exchange. (*Desert Sands Unified School District* (2010) PERB Decision No. 2092, p. 31.) The City must also rescind its policy of requiring fire engineers to complete the Task Book prior to returning to full duty after an extended leave. (*Ibid.*)

I also order the City to make whole any employee who was adversely impacted by these unilateral changes. Any impacted employee must be reimbursed for the difference between what they actually earned and what they would have earned but for the City's unlawful conduct. (*Regents of the University of California* (1997) PERB Decision No. 1188-H, p. 33.)

Here, there does not appear to be any financial impact to President Purcell. Although the City twice denied Purcell's utilization of Association leave, the Association did not establish that Purcell experienced an impact to his salary or other monetary benefits because of these denials.

However, the two engineers who were required to complete the Task Book in 2021 must be reimbursed for any lost overtime opportunities. The City asserts that these two fire engineers did not miss overtime opportunities because the City's overtime procedures give preference to employees that have worked fewer overtime hours. The City asserts that once these two engineers returned to full duty after completing the Task Book, they were first in line for overtime opportunities. The Association counters that even taking into consideration the City's priority system, the fire engineers could have missed out on overtime opportunities. For instance, overtime opportunities fluctuate, and if the overtime opportunities were concentrated during the weeks or months the fire engineers were performing the Task Book, they may have lost overtime opportunities even if they had priority for overtime opportunities upon their return.

I reject the City's argument that given the City's overtime priority system, the fire engineers returning to work in 2021 do not need to be reimbursed for lost overtime opportunities. (See, e.g., *The Accelerated Schools* (2023) PERB Decision No. 2855, p. 17 [while remedial orders must rely to a degree on estimates, that is preferable to allowing uncertainty caused by unlawful conduct to leave an unfair practice without any effective remedy].) During compliance, the PERB Board agent should determine if the two fire engineers returning from extended leave in 2021 lost overtime opportunities during the weeks or months while they were completing the Task Book. Factors that

may be relevant to this determination include whether overtime opportunities were concentrated during the time period each fire engineer was completing the Task Book, and if the fire engineer, upon completion of the Task Book and return to full duty, requested and was assigned overtime opportunities. If the fire engineers lost overtime opportunities the City must reimburse them for the lost opportunities plus interest at the rate of 7 percent annum. (*City of Sacramento* (2013) PERB Decision No. 2351-M, pp. 49-50.)

Finally, I order the City to post physical and electronic notices of the violations, the resolution, and City's willingness to remedy the situation and comply with the law. Such a remedy effectuates the purposes of the MMBA. (See *County of Orange, supra*, PERB Decision No. 2611-M, p. 22, adopting proposed dec. at p. 86.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that City of Costa Mesa (City) violated MMBA sections 3505, and 3506.5, subdivision (c), and PERB Regulation 32603, subdivision (c) by refusing or failing to meet and confer in good faith with the Costa Mesa Firefighter's Association, Local 1465 before unilaterally implementing: (1) a policy prohibiting Association representatives from utilizing the Article 19 vacation bank for Association leave while on an exchange; and (2) a policy requiring fire engineers returning to work from an extended leave to complete the Fire Engineer Promotional Task Book before returning to full duty. The City also derivatively interfered with bargaining unit employees' rights to be represented by the Association, and the Association's right to represents its bargaining unit employees in violation of MMBA sections 3505, and

3506.5, subdivisions (a) and (b), and PERB Regulation 32603, subdivisions (a) and (b).

All other allegations are DISMISSED.

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

A. CEASE AND DESIST FROM:

1. Failing or refusing to meet and confer in good faith with the Association.
2. Interfering with the rights of bargaining unit employees to be represented by the Association.
3. Denying the Association the right to represent bargaining unit employees.

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

1. Rescind the policy prohibiting Association representatives from utilizing the Article 19 vacation bank for Association leave while on an exchange.
2. Rescind the policy requiring fire engineers returning to work from an extended leave to complete the Fire Engineer Promotional Task Book before returning to full duty.
3. Upon request of the Association, provide reimbursement for lost overtime opportunities to the two fire engineers who were required to complete the Fire Engineer Promotional Task Book before returning to full duty. The reimbursement shall include interest at the rate of 7 percent annum.
4. Within 10 workdays after this decision is no longer subject to appeal, post at all City work locations where notices to employees 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 the City will comply with the terms of this Order. Such posting shall remain in place for a period of 30 consecutive workdays. The City shall take reasonable steps to ensure that the Notice is not altered, defaced, or covered with any other material. In addition to physically posting this Notice, the City shall post it by electronic message, intranet, internet site, and other electronic means the City uses to communicate with employees. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.

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 OF APPEAL

A party may appeal this proposed decision by filing with the Board itself a statement of exceptions within 20 days after the proposed decision is served. (PERB Reg. 32300.) If a timely statement of exceptions is not filed, the proposed decision will become final. (PERB Reg. 32305, subd. (a).)

The statement of exceptions must be a single, integrated document that may be in the form of a brief and may contain tables of contents and authorities, but may not exceed 14,000 words, excluding tables of contents and authorities. Requests to exceed the 14,000-word limit must establish good cause for exceeding the limit and be filed with the Board itself and served on all parties no later than five days before the statement of exceptions is due. PERB Regulation 32300, subdivision (a), is specific

as to what the statement of exceptions must contain. Non-compliance with the requirements of PERB Regulation 32300 will result in the Board not considering such filing, absent good cause. (PERB Reg. 32300, subd. (d).)

The text of PERB's regulations may be found at PERB's website:

www.perb.ca.gov/laws-and-regulations/.

A. Electronic Filing Requirements

Unless otherwise specified, electronic filings are mandatory when filing appeal documents with PERB. (PERB Reg. 32110, subd. (a).) Appeal documents may be electronically filed by registering with and uploading documents to the "ePERB Portal" that is found on PERB's website: <https://eperb-portal.ecourt.com/public-portal/>. To the extent possible, all documents that are electronically filed must be in a PDF format and text searchable. (PERB Reg. 32110, subd. (d).) A filing party must adhere to electronic service requirements described below.

B. Filing Requirements for Unrepresented Individuals

Individuals not represented by an attorney or union representative, are encouraged to electronically file their documents as specified above; however, such individuals may also submit their documents to PERB for filing via in-person delivery, US Mail, or other delivery service. (PERB Reg. 32110, subds. (a) and (b).) All paper documents are considered "filed" when the originals, including proof of service (see below), are actually received by PERB's Headquarters during a regular PERB business day. (PERB Reg. 32135, subd. (a).) Documents may be double-sided, but must not be stapled or otherwise bound. (PERB Reg. 32135, subd. (b).)

The Board's mailing address and contact information is as follows:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street, Suite 200
Sacramento, CA 95811-4124
Telephone: (916) 322-8231

C. Service and Proof of Service

Concurrent service of documents on the other party and proof of service are required. (PERB Regs. 32300, subd. (a), 32140, subd. (c), and 32093.) A proof of service form is located on PERB's website: www.perb.ca.gov/about/forms/. Electronic service of documents through ePERB or e-mail is authorized only when the party being served has agreed to accept electronic service in this matter. (See PERB Regs. 32140, subd. (b), and 32093.)

D. Extension of Time

An extension of time to file a statement of exceptions can be requested only in some cases. (PERB Reg. 32305, subds. (b) and (c).) A request for an extension of time in which to file a statement of exceptions with the Board itself must be in writing and filed with the Board at least three calendar days before the expiration of the time required to file the statement of exceptions. The request must indicate good cause and, if known, the position of each of the other parties regarding the request. The request shall be accompanied by proof of service of the request upon each party. (PERB Reg. 32132.)



**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-1558-M, *Costa Mesa Firefighter's Association, Local 1465 v. City of Costa Mesa*, in which all parties had the right to participate, it has been found that the City of Costa Mesa (City) violated Meyers-Milias-Brown Act (MMBA) sections 3505, and 3506.5, subdivision (c), and PERB Regulation 32603, subdivision (c) by refusing or failing to meet and confer in good faith with the Costa Mesa Firefighter's Association, Local 1465 before unilaterally implementing: (1) a policy prohibiting Association representatives from utilizing the Article 19 vacation bank for Association leave while on an exchange; and (2) a policy requiring fire engineers returning to work from an extended leave to complete the Fire Engineer Promotional Task Book before returning to full duty. The City also derivatively interfered with bargaining unit employees' rights to be represented by the Association, and the Association's right to represents its bargaining unit employees in violation of MMBA sections 3505, and 3506.5, subdivisions (a) and (b), and PERB Regulation 32603, subdivisions (a) and (b).

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

A. CEASE AND DESIST FROM:

1. Failing or refusing to meet and confer in good faith with the Association.
2. Interfering with the rights of bargaining unit employees to be represented by the Association.
3. Denying the Association the right to represent bargaining unit employees.

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

1. Rescind the policy prohibiting Association representatives from utilizing the Article 19 vacation bank for Association leave while on an exchange.
2. Rescind the policy requiring fire engineers returning to work from an extended leave to complete the Fire Engineer Promotional Task Book before returning to full duty.
3. Upon request of the Association, provide reimbursement for lost overtime opportunities to the two fire engineers who were required to complete the Fire Engineer Promotional Task Book before returning to full duty. The reimbursement shall include interest at the rate of 7 percent annum.

Dated: _____

City of Costa Mesa

By: _____
Authorized Agent

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

PROOF OF SERVICE

I declare that I am a resident of or employed in the County of Los Angeles, California. I am over the age of 18 years and not a party to the within entitled cause. The name and address of my residence or business is Public Employment Relations Board, Los Angeles Regional Office, 425 W. Broadway, Suite 400, Glendale, CA, 91204-1269.

On July 28, 2023, I served the Cover Letter and Proposed Decision regarding Case No. LA-CE-1558-M on the parties listed below by

I am personally and readily familiar with the business practice of the Public Employment Relations Board for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Los Angeles, California.

Personal delivery.

Electronic service (e-mail).

Peter J. Brown, Attorney
Liebert Cassidy Whitmore
6033 West Century Blvd., 5th Floor
Los Angeles, CA 90045
Email: pbrown@lcwlegal.com

Alex Wong, Attorney
Liebert Cassidy Whitmore
6033 West Century Blvd., Suite 500
Los Angeles, CA 90045
Email: AWong@lcwlegal.com

Michael A. McGill, Attorney
Ferrone & Ferrone Law Group
4333 Park Terrace Drive #200
Westlake Village, CA 91361
Email: mmcgrill@ferronelawgroup.com

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on July 28, 2023, at Glendale, California.

J. Carter

(Type or print name)



(Signature)