*** * * JUDICIAL APPEAL PENDING * * ***

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES COUNCIL 57, LOCAL 2428, Charging Party, v. EAST BAY REGIONAL PARK DISTRICT, Respondent.	Case No. SF-CE-1993-M PERB Decision No. 2969-M June 25, 2025

Appearances: Beeson, Tayer & Bodine by Andrew H. Baker, Attorney, for American Federation of State, County & Municipal Employees Council 57, Local 2428; Lynne Bourgault, General Counsel, and Allison M. Dibley, Assistant General Counsel, for East Bay Regional Park District.

Before Krantz, Paulson, and Krausse, Members.

DECISION

PAULSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by Respondent East Bay Regional Park District to a proposed decision of an administrative law judge (ALJ). The complaint alleged that the District violated the Meyers-Milias-Brown Act (MMBA) when it: (1) unilaterally changed its telework policy without bargaining in good faith to impasse or agreement with Charging Party American Federation of State, County and Municipal Employees Council 57, Local 2428 (AFSCME); (2) engaged in unlawful direct dealing by bypassing AFSCME and requiring unit employees to complete new telework agreements or else work fully in-person; (3) interfered with protected rights by muting the microphone of AFSCME's lead negotiator during the public comment portion of a District Board of Directors meeting; and (4) derivatively interfered with protected rights by the direct dealing and unilateral change violations.[1] After a formal hearing, the ALJ found in favor of AFSCME on all four counts.

In its exceptions, the District contests some of the ALJ's factual findings and all legal conclusions. The District also excepts to the proposed make-whole remedy.[2] Having independently reviewed the entire record in this matter, we find the proposed decision well-reasoned and in accordance with applicable law. We therefore affirm the proposed decision, as supplemented by the discussion below.

FACTUAL AND PROCEDURAL BACKGROUND

The District is a "public agency" within the meaning of section 3501(c) and PERB Regulation 32016(a).[3] During the relevant time period, Sabrina Landreth was the General Manager (as of March 2021); Debra Auker was the Assistant General Manager and Chief Financial Officer; Jim O'Connor was the Assistant General

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[1] The MMBA is codified at Government Code section 3500 et seq. Undesignated statutory references are to the Government Code.

[2] The District requests oral argument. We typically deny such requests when the record before us is adequate, the parties availed themselves of the opportunity to brief all pertinent issues, and the briefs are sufficiently clear as to make oral argument unnecessary. (*City and County of San Francisco* (2020) PERB Decision No. 2691-M, p. 3, fn. 4 (*CCSF*).) Applying this standard here, we deny the District's request for oral argument.

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

Manager of Operations; Janelle Rodrigues was the Chief of Workforce Development (as of December 2021); and Burke Dunphy was the District's chief negotiator.

AFSCME is a "recognized employee organization" within the meaning of section 3501(b) and an "exclusive representative" within the meaning of PERB Regulation 32016(b). Rod Palmquist was AFSCME's chief negotiator.

<u>Telecommute Letter of Agreement</u>

The District and AFSCME negotiated two memoranda of understanding (MOUs) during the relevant period: one with a term of April 1, 2017, through March 31, 2021, and one with a term of April 1, 2021, through March 31, 2024.[4] Both MOUs are silent on the subject of telecommuting. Prior to the start of the COVID-19 pandemic in 2020, the District did not have a telecommuting policy and all employees were expected to report to their assigned worksites in person.

The parties engaged in successor negotiations for the 2021-2024 MOU from April to September 2021, and in the interim, they extended the prior MOU multiple times. At the time of negotiations, AFSCME represented approximately 520 employees in the District, 200 of whom had been working 100 percent remotely since the start of the pandemic in March 2020. On July 15, 2021, the parties executed a "package tentative agreement" that included a Letter of Agreement regarding the return to in-person/indoor work (Return-to-Work LOA), and a Letter of Agreement

[4] Only the 2017-2021 MOU is in evidence. The parties stipulated that revisions made as part of the 2021-2024 MOU do not affect the issues in this case.

regarding telecommuting (Telecommute LOA). AFSCME members ratified the package agreement on July 28, 2021.[5]

The Return-to-Work LOA outlined procedural steps for a return to work, i.e., unit employees would have a certain amount of time to submit requests for telecommute agreements, the District would respond to those requests by a certain date, and employees without approved telecommute agreements would return to work full-time in-person starting on a certain date.

The Telecommute LOA provided the terms and conditions for telecommute requests, agreements, and approval eligibility. It did not contain any restrictions or requirements regarding the number of in-office workdays versus remote workdays, and allowed managers and supervisors to approve telecommute requests with approval from "Division management." It also stated the Telecommute LOA was a "pilot telecommute program," and included the following language:

> "The agreement shall be a pilot and will expire on August 30, 2022; however, this Letter of Agreement will be automatically extended beyond its expiration, unless either the Park District or the Union gives at least ninety (90) days' notice to sunset this agreement. In the event either the Park District or the Union gives notice to sunset this Letter of Agreement, the Parties will satisfy their statutory obligations to meet and confer."

Furthermore, the Telecommute LOA provided that "a supervisor or a manager may deny, end, or modify a Telecommute Agreement for any business reason that is not

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[5] The 2017-2021 MOU—and by extension the 2021-2024 MOU—does not contain any language that would arguably terminate, modify, or extinguish the Telecommute LOA.

arbitrary or capricious" except as otherwise provided by the LOA, and provided that AFSCME could grieve denials, rescissions, or terminations of telecommute agreements under the grievance procedure set out in the MOU, up to and including arbitration.

At hearing, the parties did not present any bargaining notes or bargaining proposals that led to the adoption of the Telecommute LOA. When Landreth joined the District in March 2021, negotiations for what became the original Telecommute LOA were already in progress. She did not personally attend any of the negotiations at issue but held regular check-ins and briefings with the District's negotiations team and provided direction to them. During negotiations for the Telecommute LOA, she gave "clear direction" to the District negotiating team, staff, managers, and District Board of Directors that the policy was to be a time-limited pilot arrangement. The parties did not discuss the meaning of the language "the Parties will satisfy their statutory obligations to meet and confer" or what the status quo would be if the Telecommute LOA was terminated.

Once the Telecommute LOA was in place, Landreth solicited feedback about the program from staff, management, AFSCME representatives, and other public entities. Landreth relayed some of the issues with the program to AFSCME representatives: there was too much flexibility for each division and supervisor to come up with the maximum number of telecommuting days, which led to inconsistencies, and there was no single overlap day between employees, which other public entities had indicated was helpful.

Termination of the Telecommute LOA and Subsequent Negotiations

On May 25, 2022—97 days before the August 30 expiration date—the District gave notice to AFSCME via e-mail that it intended to sunset the Telecommute LOA "effective August 30, 2022."[6] The District stated that it "hope[d] to implement a new telecommute program" and invited AFSCME to "meet and confer with the Park District to discuss such a new telecommute program," and to provide availability during "the weeks of June 6 and June 13, 2022." Palmquist responded later that same day and stated AFSCME "will definitely want to meet and confer" but that his schedule was "tight" due to other negotiations, that he would need to confer with AFSCME's team, and that he thought the parties "will need much more than just two weeks." He suggested the parties schedule dates in July and August as well.

The parties provided limited testimony about what occurred during the July through August bargaining sessions. In general, each party accuses the other of not meaningfully engaging in negotiations.

The parties' first bargaining session was on July 6. At hearing, witnesses for both AFSCME and the District expressed surprise that the other party did not present a proposal during the July 6 meeting. Palmquist did not attend the July 6 meeting, but he testified that AFSCME assumed the District would provide the first proposal because of the way the sunset notice was written. According to Rodrigues, the District assumed AFSCME would make the first proposal because it was "an important issue"

[6] All dates hereafter are in 2022 unless otherwise noted.

to them. In any case, at the close of the July 6 meeting, the parties agreed the District would provide the first proposal.

On July 13, the District e-mailed AFSCME a draft telecommuting policy and agreement form, and requested comments or revisions by July 24, or “it will be assumed that the Union has no proposed changes/comment, and the Park District will proceed with implementing the proposed policy and form.” Compared to the Telecommute LOA, the draft policy changed some of the eligibility requirements; required new employees to work exclusively in-person for their first month of employment; generally required all employees to work in-person a minimum of three days per week, including every Wednesday; prohibited employees from working remotely outside of California; required telecommuting employees to attend meetings while on camera; and specified that employees who request time off during in-office days may be required to forgo their next regularly scheduled telecommuting days and work in-person instead. It also allowed assistant general managers to terminate individual telecommuting agreements “based on Park District needs or as required in any operable MOU for any reason as long as such reason is not arbitrary or capricious.” The draft also included the following language:

> “The Telecommute Program is entirely discretionary and may be revised, suspended, or rescinded by the General Manager of the Park District at any time upon providing a one-month notification to all Park District employees.”

Lastly, the draft provided that the telecommuting program “is not subject to the grievance procedures in any Memorandum of Understanding nor subject to any other review or appeal procedure.”

On July 15, Palmquist responded to the District's e-mail and reiterated AFSCME's demand to meet and confer. He stated AFSCME would provide a written proposal to the District, but did not agree with the proposed deadline of July 24. He instructed the District to "cease and desist" from implementing its proposed telecommuting policy until it had met its obligation to meet and confer. He also indicated he had other negotiations scheduled for some of the dates the District had offered to meet and confer, but offered a later start time for a July 26 meeting, and confirmed availability for August 3, August 24, and August 31.

The parties did not meet on July 26 due to Palmquist's scheduling conflicts. They met for the second time on August 3, and AFSCME provided its counterproposal on the telecommute policy on that date. AFSCME's proposal essentially rejected all the District's changes to the prior Telecommute LOA, except that AFSCME agreed to the prohibition on employees working remotely outside of California, while also adding language allowing for telecommuting from out-of-state with prior authorization from the employee's direct supervisor. AFSCME also proposed in-person work a minimum of one day a week rather than three days a week, without a specific "overlap" day. In addition, AFSCME inserted language subjecting the telecommute program to the grievance procedure and providing that employees' direct supervisors would have the authority to approve or deny telecommute agreements "for any business reason that is not arbitrary or capricious," rather than requiring approval by the employees' supervisor, manager, and assistant general manager.

The parties met for the third time on August 9. The District provided its counterproposal on the telecommute policy via e-mail that day and followed up with a modified version on August 10 that included the “table edits” the parties discussed on August 9 at the bargaining table. The District accepted some minor changes but generally reverted to its prior proposal. On the language regarding rescission or termination of individual telecommute agreements, the District changed the sentence to: “An Assistant General Manager may terminate or rescind a Telecommuting Agreement at any time upon providing at least seven (7) calendar days written notice for any reason as long as such reason is not arbitrary or capricious.” The District also added new language specifying that if an employee’s telecommute day falls on a holiday, the employee may not switch their telecommute day without prior approval from an assistant general manager, and language requiring employees who accept acting assignments, promotions, or transfers into another division to reapply for telecommute agreements. Furthermore, the District maintained the non-grievability language and the provision allowing the general manager to revise, suspend, or rescind the entire program at their discretion.

On August 11, at 4:08 p.m., Dunphy e-mailed AFSCME to follow up on a discussion from the parties’ August 9 meet and confer session. Dunphy stated that the District’s obligations under the Telecommute LOA were “separate and apart from the meet and confer process over a new telecommute policy,” and the District had met its obligations to sunset the Telecommute LOA because it had provided the requisite notice and an opportunity for AFSCME to identify any impacts from ending the LOA, and AFSCME had not done so.

Also on August 11, Landreth sent an e-mail to all District employees regarding telecommute policies. The e-mail explained that the District had already implemented a new telecommute policy for “managers, confidentials, and unrepresented employees” (the Management Policy) and requested that any employee in those categories who wished to telecommute after August 30 submit an agreement for review and approval. Landreth then summarized the negotiations with AFSCME, enclosed a chart listing the major differences in the parties’ proposals, attached the proposals exchanged to date, and included a list of “frequently asked questions.” The e-mail ended with the following paragraph:

> “Though we remain confident in our proposal and hopeful that we will reach agreement, the next meeting that AFSCME has agreed to is not until August 24, 2022, which edges up to the expiration of the Pilot Policy and Program on August 30, 2022. The management team remains available to continue discussions with the Union on a new policy should there be a request to meet earlier. **The Park District remains consistent in wanting to continue offering remote work for all eligible Park District staff in light of its benefits to employees, the environment, and to work/life balance.** While a policy is needed to continue to allow AFSCME to telework, the Park District thinks employees should not be penalized in this interim period, so on a temporary basis until discussions on a successor policy are completed, the Park District will offer **an optional benefit to AFSCME employees to continue to telework after August 30, 2022 under the terms of the unrepresented telework policy**. Should any employee decide to take advantage of this optional benefit, they should discuss it with their Supervisor/Manager and be prepared to complete a form. Employees who do not want this optional benefit should discuss in person expectations with their Supervisor/Manager.”

(Bolding in original.)

Later the same day at 5:55 p.m., Auker e-mailed employees in the Finance and Management Services Division, asking them to review Landreth’s message carefully, and "know that we are trying to create a temporary bridge between the current telework policy that will sunset at the end of the month and a new policy that is currently under review." She indicated that if employees "chose to take advantage of this opportunity we will process these requests as quickly as we can."

On August 15, an e-mail was sent on behalf of O'Connor to all represented Operations employees. The e-mail stated O'Connor was following up on Landreth's August 11 e-mail, and directed "[t]hose represented staff that wish to take advantage of this optional temporary benefit" to complete an attached form by August 24. The form attached to the e-mail was titled "Telecommute Agreement Form (Unrepresented, Confidentials, and Managers ONLY)."

The Management Policy and accompanying form closely resembled the District's proposals to AFSCME. The eligibility criteria were generally the same, new employees were not eligible to telecommute for the first month of employment, employees were prohibited from working remotely outside of California, employees who requested time off on in-office days could be required to forgo their regularly scheduled telecommuting days, and assistant general managers could "approve, deny, or modify Telework Agreements for any reason as long as such reason is not arbitrary or capricious." The Management Policy also required employees to work in-person a minimum of three days a week, including Wednesdays, and to attend meetings while on camera. Finally, the Management Policy stated that the telecommute program was not subject to any review or appeal procedure, and included the same language stating the program was "entirely discretionary" and could be revised, suspended, or rescinded by the General Manager upon one month's notice.

On August 22, Palmquist responded to the District's August 11 e-mails. He stated AFSCME strongly disagreed that the District had "the right to unilaterally change AFSCME-represented employees' status quo working conditions," maintained that Landreth's August 11 e-mail constituted an unfair labor practice, and informed the District that AFSCME would continue to meet and confer about the telecommute policy under protest. (Original formatting removed.) He offered a number of dates for future meet and confer sessions.

The parties met for a fourth time on August 24, and AFSCME provided another counterproposal. AFSCME maintained most of its prior positions, but agreed to most of the District's eligibility criteria, which it had previously rejected, and proposed in-person work a minimum of two days a week rather than one day a week, without a specific "overlap" day. Dunphy responded on behalf of the District via e-mail on August 26. She stated the parties "remain significantly apart on a number of major issues," and accordingly, the District was making its "last, best, and final offer" (LBFO). The most significant change the District made in its August 26 LBFO was to provide that denials or rescissions of telecommute agreements could be appealed to the General Manager or designee; however, the decision of the General Manager or designee would be final and not appealable under the grievance procedure, and approvals or modifications to telecommute agreements were not appealable. The District otherwise maintained its prior positions, including in-person work a minimum of three days per week, including Wednesdays, and the General Manager's discretion to revise, suspend, or rescind the program upon one month's notice to employees.

On August 29, Palmquist responded to the District via e-mail. He stated that the District's LBFO was not "legitimate" or made in good faith because the District had unilaterally implemented the Management Policy and abruptly delivered an LBFO when the parties had more bargaining sessions scheduled. He also stated AFSCME saw no reason to continue meeting and conferring with the District regarding the telecommute policy unless the District agreed to (1) rescind the Management Policy that was implemented via Landreth's August 11 e-mail as applied to AFSCME-represented employees, and restore the telecommute agreements made by AFSCME-represented employees under the original Telecommute LOA; and (2) commit to bargaining in good faith moving forward, including by maintaining the status quo established by the Telecommute LOA until negotiations were completed in good faith, including any mediation or mandatory fact-finding.

Dunphy responded via e-mail on August 30, and stated the District disagreed: "[t]he status quo ante is a return to in-person work, not maintaining agreements under an LOA that will end effective tomorrow." She stated the District would not agree to AFSCME's demands, and ended with:

> "We understand from your email that AFSCME is unilaterally cancelling all further meetings on this matter, including the meeting scheduled for tomorrow and will not be providing any further counterproposals. Given that, it appears that the parties are at a stalemate and that further engagement on this matter will not result in an agreed-upon telecommute policy. Accordingly, the Park District hereby

> submits this formal declaration of impasse in this meet and confer process."

Palmquist responded on August 31, stating AFSCME disagreed with the District's characterizations and maintaining that the District had not perfected a bona fide impasse.

After August 31, the parties participated in settlement discussions but did not exchange any other proposals or otherwise reopen negotiations regarding the telecommute policy. It is undisputed that at least some AFSCME-represented employees continued to telecommute after August 30 under the Management Policy, pursuant to Landreth's August 11 e-mail.

As for the District's reasons for terminating the Telecommute LOA, the District offered only hearsay evidence at hearing, but we need not address the admissibility of that evidence as it has no potential impact on the outcome, as we discuss *post*, p. 17, fn. 8.

<u>August 9 District Board of Directors Meeting</u>

The District held a Board of Directors meeting on August 9, and provided in-person access to the public as well as virtual access via the web platform Zoom. Palmquist attended the meeting virtually, along with approximately 50 to 75 AFSCME members, about 40 of whom gave public comment. The District's video recording of the meeting was played during the PERB formal hearing. The video shows Palmquist beginning to read remarks prepared for public comment, a transcript of which is in the record. As he is speaking, the video shows five different Zoom "boxes" which are focused on Palmquist, Landreth, President Colin Coffey, District Board General

Counsel Lynne Bourgault, and another District Board Director. All the District representatives are seen wearing face masks.

The video shows Palmquist saying the District's decision to sunset the Telecommute LOA was a "power trip by the assistant general managers," that the assistant general manager team has a "toxicity problem," that Landreth "is not empowered to rein in rogue" assistant general managers, and that "Jim O'Connor and Debra Auker are the epicenter of these problems." At this point, the video shows both Landreth and Bourgault looking at a point off-screen—possibly at each other and/or at Coffey—while Palmquist continues, saying Auker and O'Connor "acted arbitrarily in mostly denying telecommute agreements" and "are where the bulk of AFSCME's grievances are." At the same time, Landreth appears to speak, and Bourgault shakes her head, leans forward, and begins to speak, but her audio cannot be made out over Palmquist's. Landreth looks to another direction off-screen and appears to say something. Coffey looks off-screen, and Palmquist's audio abruptly stops but he continues to speak. Coffey, Landreth, and Bourgault then appear to be speaking to each other, but there is no audio. An unidentified voice chimes in: "I think someone muted him." After a moment, Bourgault leans forward again and says: "There is a concern that they're making personal attacks against staff. It's up to you, President Coffey." Coffey says, "Rod, I'm just getting some objections from staff that you're getting focused on individuals instead of the topic," and says he will allow Palmquist to continue "but I just wanted you to know that it doesn't necessarily advance the dialogue to do that." Palmquist is then unmuted and continues speaking, but at hearing he testified that he was initially unaware he had been muted, and did not know where to resume his remarks.

While the clerk of the board did not testify at hearing, Landreth's unrebutted testimony was that only the clerk had the ability to mute a participant on Zoom. Landreth did not give direction to mute Palmquist, nor did she hear Bourgault or any District Board Director give a direction to mute Palmquist. At the point when Palmquist mentioned O'Connor, Landreth told Bourgault it was an "unnecessary personal attack" or words to that effect, but Landreth did not remember what Bourgault said to her in response. Based on Landreth's testimony, and the fact that, in the video, Bourgault seemed unsurprised Palmquist had been muted and used the same words Landreth did when addressing Coffey (referencing a "personal attack"), the ALJ found, and we agree, that the District was responsible for muting Palmquist during the Board of Directors meeting. We find this to be the case whether or not Landreth gave or heard an explicit instruction to the clerk to do so.

On November 8, counsel for AFSCME sent the District a letter demanding it cease and desist from censoring public comment as it did by muting Palmquist, and from requiring pre-registration to comment on closed session items in violation of the Ralph M. Brown Act (Brown Act).[7] On December 6, the Board of Directors adopted a resolution authorizing Coffey to send a letter to AFSCME "communicating the Board's unconditional commitment to cease, desist, and not repeat the past actions as alleged" in AFSCME's November 8 letter. Also on December 6, Coffey sent a letter to

[7] The Brown Act is codified at section 54950 et seq.

AFSCME's counsel in which the District committed to cease and desist from the offending conduct. No evidence was proffered regarding whether the letter or its contents was shared with AFSCME-represented District employees.

DISCUSSION

When resolving exceptions to a proposed decision, the Board applies a de novo standard of review. (*County of Santa Clara* (2019) PERB Decision No. 2629-M, p. 6.) However, to the extent that a proposed decision has adequately addressed issues raised by certain exceptions, the Board need not further analyze those exceptions. (*Ibid*.) The Board also need not address alleged errors that would not affect the outcome. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 5.)

In Part I below, we explain that telecommute policies fall within the scope of representation, meaning they constitute a mandatory subject of bargaining. Parts II, III, and IV then analyze the direct dealing, unilateral change, and independent interference allegations, while Part V discusses the appropriate remedy.[8]

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[8] As the ALJ noted, muting Palmquist's microphone is the only independent interference claim alleged in the complaint. The complaint's other interference claims are purely derivative of the unilateral change and direct dealing allegations. While the District attempted to raise a business necessity defense to the derivative interference claims, there is no such defense to a derivative claim. A derivative interference claim never warrants separate analysis, as its outcome is always the same as the claim from which it derives. (*County of Santa Clara* (2021) PERB Order No. Ad-485-M, p. 9.) Here, the derivative interference claims succeed because they derive from unilateral change and direct dealing claims that AFSCME established. While a business necessity defense is available to a unilateral change claim, the ALJ correctly noted that the District did not raise such a defense and in any event could not have established its elements: "(1) an actual financial or other emergency that (2) leaves no real alternative to the action taken and (3) allows no time for meaningful negotiations before taking action." (*Imperial Irrigation District* (2023) PERB Decision No. 2861-M, p. 56.) The District also waived, for a second time, any business necessity defense to

I. Scope of Representation

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, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." (§ 3504.) Although work-from-home policies are not an enumerated category under the MMBA, we have already found such policies within the scope of representation in cases falling under the Educational Employment Relations Act, section 3540 et seq. (See *Oxnard Union High School District* (2022) PERB Decision No. 2803, pp. 43-44; *West Valley-Mission Community College District* (2024) PERB Decision No. 2917, pp. 15-16 (*West Valley*).) Here, the District concedes that telecommuting policies are a mandatory subject of bargaining. Because this case is our first occasion to address work-from-home policies in the context of the MMBA, however, we briefly explain why they are negotiable.

PERB's test for determining the scope of bargaining under the MMBA derives from *International Assn. of Fire Fighters, Local 188, AFL-CIO v. Public Employment Relations Bd.* (2011) 51 Cal.4th 259, 272-273 (*Richmond Firefighters*). In that case, the Supreme Court observed that there are three categories of managerial decisions, each with its own implications for the scope of representation: (1) "decisions that 'have only an indirect and attenuated impact on the employment relationship' and thus are

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the unilateral change allegation by not arguing any such defense in its exceptions.

not mandatory subjects of bargaining," such as advertising, product design, and financing; (2) "decisions directly defining the employment relationship, such as wages, workplace rules, and the order of succession of layoffs and recalls," which are "*always* mandatory subjects of bargaining" (emphasis added); and (3) "decisions that directly affect employment, such as eliminating jobs, but nonetheless may not be mandatory subjects of bargaining because they involve 'a change in the scope and direction of the enterprise' or, in other words, the employer's 'retained freedom to manage its affairs unrelated to employment.'" (*County of Orange* (2018) PERB Decision No. 2594-M, p. 18, quoting *Richmond Firefighters*, *supra*, 51 Cal.4th at pp. 272-273.) Applying *Richmond Firefighters* to the facts herein, we conclude that the telecommute policy would fall under the second category of decisions because it directly defines the employment relationship. Work-from-home policies concern hours of work and are thus subject to decisional bargaining.

Having concluded that telecommute policies are mandatory subjects of bargaining under the MMBA, we turn next to the specific complaint allegations.

II. Direct Dealing

There are two alternate means of establishing a direct dealing or bypassing violation. (*County of Santa Clara*, *supra*, PERB Order No. Ad-485-M, p. 14 & fn. 9.) First, an employer violates the duty to bargain in good faith if it directly approaches employees to effect a change in terms or conditions of employment within the scope of representation. (*Walnut Valley Unified School District* (1981) PERB Decision No. 160, p. 4.) Thus, a charging party may demonstrate unlawful bypassing by showing that the employer dealt directly with its employees (1) to create a new policy of general application, or (2) to obtain a waiver or modification of existing policies applicable to those employees. (*Id*. at p. 6.) However, once a policy has been established by lawful means, an employer has the right to take necessary actions, including consulting with employees, to implement the policy. (*Ibid*.)

Second, an employer may not communicate directly with employees to undermine or derogate a union's exclusive authority to represent unit members. (*Muroc Unified School District* (1978) PERB Decision No. 80, pp. 19-20.) If the employer communication at issue relates to collective bargaining, an employer may accurately describe the parties' negotiations, but must refrain from misleading employees, making new proposals it has not made at the bargaining table, seeking to bargain directly with employees, inviting them to abandon their representative to achieve better terms directly from the employer, or engaging in a campaign to disparage the union's negotiators so as to drive a wedge between employees and their union. (*Trustees of the California State University* (2006) PERB Decision No. 1871-H, adopting dismissal letter at p. 3.) Consequently, an employer "must refrain from a campaign of communications to sway the views of the employees while maintaining an inflexible position at the negotiating table. Such conduct bypasses and undermines the exclusive representative by negotiating with the union through the employees instead of with the employees through the union." (*Ibid*.; *Muroc Unified School District*, *supra*, PERB Decision No. 80, p. 21.)

The ALJ concluded that the District engaged in the first category of direct dealing through Landreth's August 11 e-mail to all employees. There, Landreth "offer[ed] an optional benefit to AFSCME employees to continue to telework after

August 30, 2022 under the terms of the [Management Policy],” without which they would lose the ability to telework after August 30. (Original formatting removed.) Like the ALJ, we are hard-pressed to view this communication as anything other than a direct overture to unit employees to obtain a waiver or modification of the Telecommute LOA and supplant it with the Management Policy. This evidence notwithstanding, the District argues that it did not implement a new policy with respect to AFSCME-represented employees because they were not “forced” to choose between working in-person or remotely, as the latter was an “optional benefit.” Whether the Management Policy is labeled compulsory or optional, the District cannot overcome the fact that it was a new and different policy and by directly offering AFSCME-represented employees coverage under a new and different policy, the District bypassed AFSCME to directly solicit its members. We similarly reject the District’s argument that it could not have bypassed AFSCME because its conduct was not coercive, as coercion is not necessary to a finding of direct dealing. (See *Trustees of the California State University*, *supra*, PERB Decision No. 1871-H, adopting dismissal letter at p. 3.)[9]

The District next argues that, because the MOU does not cover telecommuting and the LOA expressly stated that telecommuting is “a privilege, not a right,” the default was for employees to return to work 100 percent in person when the

[9] This is unlike interference allegations involving employer speech, where PERB looks to the surrounding circumstances to determine if an employee or union representative would objectively tend to feel that the communication coerces, restrains, or otherwise interferes with protected rights. (*City of San Diego* (2020) PERB Decision No. 2747-M, p. 37.)

Telecommute LOA expired. The District's reasoning is incorrect. Even if the District's argument about the effect of the Telecommute LOA's expiration on the status quo was correct (discussed *post*, pp. 23-27), the District could not offer a new and different policy directly to employees while bypassing AFSCME.

For the foregoing reasons, we affirm the direct dealing violation.

III. Unilateral Change

A unilateral change to a matter within the scope of representation is a per se violation of the respondent's duty to bargain in good faith. (*Stockton Unified School District* (1980) PERB Decision No. 143, p. 22.) Because a unilateral change has an inherently destabilizing and detrimental effect upon the parties' bargaining relationship, it is unlawful irrespective of intent. (*City of Montebello* (2016) PERB Decision No. 2491-M, p. 10; *County of Riverside* (2014) PERB Decision No. 2360-M, p. 18.)

To establish a prima facie case that a respondent employer made an unlawful unilateral change, a charging party union that exclusively represents a bargaining unit must prove: (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 (*Bellflower*).)

The ALJ found, and we affirmed above, that the Telecommute LOA was within the scope of representation. The ALJ also correctly found that terminating the Telecommute LOA had a generalized effect or continuing impact on AFSCME-represented employees' terms and conditions of employment. Since the District does not challenge these conclusions, we focus our discussion on the first and fourth elements of the unilateral change test.

A. <u>The District Changed the Status Quo</u>

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 an established past practice; or (3) a newly created policy or application or enforcement of existing policy in a new way. (*Bellflower*, *supra*, PERB Decision No. 2796, p. 10.) Similar to its stance regarding the direct dealing allegations, the District contends terminating the Telecommute LOA did not change the status quo because the status quo was 100 percent in-person work, rather than the terms and conditions set by the Telecommute LOA. The District is mistaken.

As a starting point, a side letter, like a collective bargaining agreement (CBA), is a binding contract. (*Palomar Community College District* (2011) PERB Decision No. 2213, p. 9 (*Palomar*).) Therefore, just as a CBA sets the applicable status quo even after its expiration date, a side letter does the same. Indeed, this principle dates to precedent as old as PERB itself, as the Board has repeatedly held that "the duty to bargain in good faith over negotiable matters is continuous and binds both labor and management not only through the life of the agreement but also during negotiations after the term of the agreement has expired up to the point of impasse." (*Stanislaus*

Consolidated Fire Protection District (2012) PERB Decision No. 2231-M, p. 13; *Standard Teachers Association, CTA/NEA* (2005) PERB Decision No. 1775, adopting proposed decision at p. 14 ["a party is precluded from making unilateral changes in the status quo both during the term of a negotiated agreement and after that agreement expires, until such time as the parties negotiate a successor agreement or they negotiate through completion of the statutory impasse procedure"]; *San Mateo County Community College District* (1979) PERB Decision No. 94, p. 17 [rejecting employer's argument to follow jurisdictions that have allowed employers to make a unilateral change after a contract has expired]; see also *San Joaquin County Employees Assn. v. City of Stockton* (1984) 161 Cal.App.3d 813, 818-819 ["status quo is measured by reference to the expired agreement itself"].)

The District's obligations with respect to the Telecommute LOA were therefore the same as with a CBA that is effective for a definite term. After the Telecommute LOA expired on August 30, the District was required to maintain the terms of the agreement until the parties completed good faith negotiations. (*CCSF*, *supra*, PERB Decision No. 2691-M, p. 35, fn. 22 [employer must maintain status quo until good faith negotiations completed]; *City and County of San Francisco* (2017) PERB Decision No. 2540-M, adopting proposed decision at p. 30.) Put a different way, irrespective of the Telecommute LOA's stated expiration date, the District's obligation to maintain the status quo pending negotiations did not automatically expire on August 30.

Even so, the District argues that PERB regards expiration dates in side letters differently than it does expiration dates in CBAs or memoranda of understanding, citing *Palomar*, *supra*, PERB Decision No. 2213. *Palomar* is the Board's leading case regarding side letters. There, the employer issued a letter of reprimand to an employee pursuant to a 2005 side letter that contained no express reference to its duration. (*Id.* at pp. 9-10.) The union alleged that the side letter expired in 2006 when the parties last modified their CBA, and that the side letter was not in effect when the employer issued the reprimand. (*Id.* at pp. 2, 5.) The Board explained:

> “[A] side letter is an agreement between an employer and union that typically: (1) modifies, clarifies or interprets an existing provision in an MOU; or (2) addresses issues of interest to the parties that are not otherwise covered by the MOU. At its most basic, a side letter is a contract between the parties. As such, the duration of such an agreement is dictated by the provisions of the side letter itself (either express or implied) or by the subsequent conduct of the parties. [Internal citation.] Consequently, absent a provision in an MOU, an agreement between the parties or other evidence demonstrating the parties intended it to expire, a side letter does not automatically expire upon the ratification of a subsequently negotiated MOU.”

(*Id.* at p. 9.) Applying this framework, the Board affirmed the dismissal of the complaint, finding nothing in the 2005 side letter or the parties’ CBA operated to terminate the side letter. (*Id.* at p. 10.) By the District’s reading, *Palomar* requires us to “strictly enforce” the expiration date in the Telecommute LOA and find that the Telecommute LOA “ceased to exist” after August 30. We do not interpret the decision in such a brittle manner. Instead, we find *Palomar* to stand for the straightforward proposition that side letters are binding contracts that do not automatically expire at the expiration of an MOU or CBA, unless specifically stated in an MOU, CBA, or the side letter itself. *Palomar* does not dictate that parties’ obligations are automatically extinguished upon expiration of a side letter.

To be sure, bargaining parties are permitted to agree—in either a side letter or any other collectively bargained agreement—that certain employment terms will revert or change in a specified manner immediately at expiration, even while bargaining proceeds. But any such agreement must be clear and unmistakable. (See *California State Employees' Assn. v. Public Employment Relations Bd.* (1996) 51 Cal.App.4th 923, 937-939 [where contract provision afforded annual merit increases "for the duration of this agreement," annual merit increases continued to define the post-expiration status quo pending negotiations, as "a collective bargaining agreement is not an ordinary contract"]; accord *State of California (Department of Personnel Administration)* (1998) PERB Decision No. 1296-S, pp. 2-3 & adopting proposed decision at pp. 19-30.) The sunset language in the Telecommute LOA does not qualify because it does not specify what (if any) replacement terms would take effect upon sunset. Indeed, much to the contrary, the sunset provision closed by stating: "In the event either the Park District or the Union gives notice to sunset this Letter of Agreement, the Parties will satisfy their statutory obligations to meet and confer." The parties thus contemplated what would happen after the sunset date. They did not state that bargaining would occur with new terms in place. We must presume they knew the default set forth by extensive precedent: that the status quo would remain in place for the period of bargaining, absent an explicit agreement delineating that alternate terms would be in place during negotiations.

For these reasons, by operation of the duty to maintain the status quo during bargaining, the terms of the Telecommute LOA remained the status quo after the sunset date, only so long as the parties' bargaining was not yet complete. But even if that were not the case, there would still be no question that the District implemented a new policy, and/or applied or enforced existing policy in a new way, by forcing exclusively-represented employees to choose between giving up working from home altogether and instead working fully in-person, or abiding by new, unilaterally imposed terms that had never before existed, and which greatly limited the extent to which they could work from home.

Thus, we conclude that the District deviated from the status quo.

B. The District Failed to Afford AFSCME Adequate Notice and to Bargain in Good Faith to Agreement or Impasse

The third element of the unilateral change test requires that the employer afford the employees' union reasonable advance notice of the proposed change and bargain in good faith over the decision, at the union's request, to agreement or lawful impasse. (*County of Merced* (2020) PERB Decision No. 2740-M, pp. 8-9; *City of San Diego* (2015) PERB Decision No. 2464-M, p. 51, affd. *sub nom. Boling v. Public Employment Relations Board* (2018) 5 Cal.5th 898.) Although the amount of time varies depending on the circumstances of each case, "an employer must give notice sufficiently in advance of reaching a firm decision to allow the representative an opportunity to consult its members and decide whether to request information, demand bargaining, acquiesce to the change, or take other action." (*Regents of the University of California* (2023) PERB Decision No. 2852-H, p. 17, quoting *Regents of the University of California (Berkeley)* (2018) PERB Decision No. 2610-H, p. 45; *Victor Valley Union High School District* (1986) PERB Decision No. 565, p. 5.)

A bona fide impasse exists if parties' differences are so substantial and prolonged that further meeting and conferring is futile, despite good faith negotiations that were free from unfair labor practices. (*CCSF*, *supra*, PERB Decision No. 2691-M, p. 39; *County of Merced*, *supra*, PERB Decision No. 2740-M, p. 15.) A party evinces bad faith when it rushes to impasse, or if its impasse declaration is "premature, unfounded, or insincere" (*City of San Ramon*, *supra*, PERB Decision No. 2571-M, p. 10, quoting *Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M, p. 53), as such action "demonstrate[s] an intent to subvert the negotiating process." (*County of Riverside*, *supra*, PERB Decision No. 2360-M, p. 12; *City of San Gabriel* (2020) PERB Decision No. 2751-M, pp. 23-24.) An employer may impose new terms after impasse only if it bargained in good faith throughout negotiations, from "inception through exhaustion of statutory or other applicable impasse resolution procedures." (*City of San Ramon*, *supra*, p. 6, quoting *City of San Jose* (2013) PERB Decision No. 2341-M. p. 40; *City of Glendale* (2020) PERB Decision No. 2694-M, p. 60.) In determining the existence of impasse on a given date, PERB focuses on numerous factors, including: the number and length of negotiation sessions; the extent to which the parties have exchanged information and thoroughly discussed proposals and counterproposals in good faith; and the nature of the unresolved issues and the parties' discussions of such issues to date. (*CCSF*, *supra*, p. 40; *City of San Ramon*, *supra*, pp. 10-12; *County of Riverside*, *supra*, pp. 13-14.) Both parties must believe they are at the "end of their rope," which is typically negated if one party displays continuing movement, or if the other party references a deadline for completion of negotiations and acts in accordance with that deadline. (*County of Merced*, *supra*, PERB Decision No. 2740-M, pp. 16-17.)

As the ALJ impliedly found, the District did not provide advance notice of its decision to impose new terms on employees, as it notified AFSCME at 4:08 p.m. on August 11, the same day it e-mailed employees to notify them of the new terms. While the District initially gave over three months' notice that it intended to sunset the Telecommute LOA and invited AFSCME to bargain with it over a new telecommute program, that did not constitute advance notice of the new terms to be imposed on August 31. Landreth's August 11 e-mail to staff, sent while negotiations with AFSCME were pending, reflected an abrupt about-face from the District's willingness to bargain and communicated the District's firm decision to impose specific, new, restrictive telecommute terms on an upcoming date, irrespective of whether the parties had completed negotiations by that date. (*State of California (California Correctional Health Care Services)* (2022) PERB Decision No. 2823-S, p. 13.) Thus, the District did not afford AFSCME reasonable advance notice before imposing new terms on employees. (*West Contra Costa Unified School District* (2023) PERB Decision No. 2881, pp. 16-17 [when union learns of changes on same day as affected employees, or after decision has been made, that is a fait accompli and does not constitute any advance notice, much less reasonable advance notice].)

In addition to providing notice to AFSCME, the District was also required to bargain in good faith until the parties either reached an agreement or a bona fide impasse and afforded time for AFSCME to avail itself of the impasse resolution procedures set forth in MMBA section 3504.5. The District argues that it negotiated in good faith with AFSCME and lawfully declared impasse, but the record bears out a different conclusion, beginning with the District's imposition of an unlawful time limit on negotiations. By taking the position that the status quo set by the Telecommute LOA would no longer be honored if the parties did not reach an agreement by August 30, the District effectively threatened that if AFSCME did not agree to its proposals, it would impose an even less favorable status quo and force AFSCME to "bargain from a hole." (*County of Santa Clara* (2013) PERB Decision No. 2321-M, p. 24.) The District set a deadline for completion of negotiations and ultimately acted upon that deadline, thereby rushing its bargaining obligations and prematurely declaring impasse. (*County of Merced*, *supra*, PERB Decision No. 2740-M, p. 16; *City of San Gabriel*, *supra*, PERB Decision No. 2751-M, pp. 23-28; *City of Selma* (2014) PERB Decision No. 2380-M, pp. 13-15.) This was further confirmed by Landreth's August 11 e-mail to all staff. Far from "evinc[ing] a genuine desire to reach an agreement," this e-mail bypassing AFSCME—which Landreth sent following the third bargaining session on August 9 and ahead of another planned session on August 24—shows that no bona fide impasse was possible. (*City of San Gabriel*, *supra*, pp. 23-28.)

Moreover, the District only provided a written declaration of impasse on August 30. This was unlawful, first, because it post-dated by 19 days the District's announcement of new terms to employees. Also, because only a written declaration of impasse can trigger a union's right to avail itself of impasse resolution procedures under MMBA section 3505.4 (*County of Merced*, *supra*, PERB Decision No. 2740-M, p. 17, fn. 12), there was no opportunity for the parties to exhaust those procedures between the District's declaration of impasse on August 30 and the new terms taking effect the next day.

Further compounding the District's problems, the fact of the District's unfair labor practice during negotiations, viz., direct dealing with AFSCME-represented employees while it was in bargaining with AFSCME over a new telecommute policy, also precludes a finding of good faith bargaining and bona fide impasse. (*City of Glendale*, *supra*, PERB Decision No. 2694-M, p. 60.) This bypassing violation overshadows other nominal indicators of the District's willingness to bargain with AFSCME, including the four bargaining sessions before the District declared impasse, because an employer's conduct must be free of unfair labor practices as a precondition to declaring impasse. (*CCSF*, *supra*, PERB Decision No. 2691-M, p. 39; *City of San Jose*, *supra*, PERB Decision No. 2341-M, p. 40.)

In sum, we conclude that AFSCME stated a prima facie case of a unilateral change. The District did not reassert its waiver defense on exceptions, and in any event, we would reject it for the same reason the ALJ did, i.e., finding that the District was obligated to bargain in good faith over changes to the telecommuting policy obviates the need to address the District's argument that AFSCME waived its right to bargain. (*Regents of the University of California*, *supra*, PERB Decision No. 2852-H, p. 18, fn. 10.) We therefore affirm the unilateral change violation.

IV. <u>Interference</u>

To establish a prima facie interference case, a charging party must show that an employer's conduct tends to or does result in some harm to protected union and/or employee rights. (*City of San Diego*, *supra*, PERB Decision No. 2747-M, p. 36.) A charging party need not establish that the employer acted because of an unlawful motive. (*Claremont Unified School District* (2019) PERB Decision No. 2654, p. 20.)

If a charging party establishes a prima facie case, the burden shifts to the employer. (*City of San Diego*, *supra*, PERB Decision No. 2747-M, p. 36.) The degree of harm dictates the employer's burden. (*Ibid*.) If the harm is "inherently destructive" of protected rights, the employer must show that the interference results from circumstances beyond its control and that no alternative course of action was available. (*Ibid*.) For conduct that is not inherently destructive, the respondent may attempt to justify its actions based on operational necessity. (*Ibid*.) In such cases, PERB balances the asserted business need against the tendency to harm protected rights; if the tendency to harm outweighs the necessity, PERB finds a violation. (*Ibid*.) Within the category of actions or rules that are not inherently destructive, the stronger the tendency to harm, the greater is the respondent's burden to show its business need was important and that it narrowly tailored its actions or rules to attain that purpose while limiting harm to protected rights as much as possible. (*Id*. at pp. 36-37, fn. 19.) In cases involving employer speech, the accuracy of the communication is relevant to whether the employer can establish an affirmative defense. (*Id*. at p. 37.)

We have little difficulty finding that the District's conduct interfered with AFSCME's protected rights. Shortly after Palmquist began criticizing various District managers and officials at the August 9 District Board meeting, his microphone was muted apparently with the approval of Bourgault, Landreth, and/or Coffey. As noted above, we affirm the ALJ's finding that the District authorized the muting. Bourgault interrupted Palmquist to express concern about "personal attacks against staff," followed by Coffey who observed that Palmquist was "getting focused on individuals instead of the topic." Coffey then stated that he would allow Palmquist to resume speaking, explaining: “I just wanted you to know that it doesn’t necessarily advance the dialogue to do that.” This policing would reasonably tend to discourage protected activity, and the resulting chilling effect tended to cause at least slight harm to protected rights. (*Alameda Health System* (2023) PERB Decision No. 2856-M, p. 30.)

The District does not dispute that AFSCME had a protected right to advocate for its members and criticize management at the August 9 District Board of Directors meeting, nor does it contend that Palmquist’s speech lost its protection because it was maliciously false. (*Carpinteria Unified School District* (2021) PERB Decision No. 2797, p. 14.) Rather, the District argues that it did not interfere with AFSCME’s protected rights because it muted Palmquist’s microphone for only thirty seconds, and in any case, audio and video transmission issues during remote meetings are “not uncommon” in our present time. Neither of these defenses establish operational necessity.

Next, the District argues that even if it did interfere with AFSCME’s protected rights, it negated any harm when the District Board adopted a resolution at the December 6 public meeting whereby the District Board made an “unconditional commitment to cease, desist, and not repeat the past actions as alleged.” We are not convinced. An employer’s “honestly given retraction can erase the effects of a prior coercive statement if the employer retraction was made in a manner that ‘completely nullified the coercive effects of the earlier statement.’” (*Jurupa Unified School District* (2015) PERB Decision No. 2458, p. 12, quoting *Jurupa Unified School District* (2013) PERB Decision No. 2309, p. 9 [internal quotation marks omitted].) To be effective, the retraction must be: (1) timely; (2) unambiguous; (3) specific in nature to the coercive conduct; (4) free from other illegal conduct; (5) adequately publicized to the employees involved; (6) not followed by other illegal conduct; and (7) accompanied by assurances that the employer will not interfere with employees' protected rights in the future. (*Alliance Environmental Science and Technology High School et al.* (2020) PERB Decision No. 2717, pp. 25-26.) The District Board's resolution did not serve as an effective retraction because it was not timely and was not adequately publicized to the employees involved. While the Board of Directors passed the resolution at a public meeting, the District did not offer any evidence that it gave notice of the resolution to the AFSCME members who attended the August 9 meeting at which Palmquist spoke.

For the foregoing reasons, we find that the District interfered with AFSCME's protected rights when it muted Palmquist's statement at the August 9 Board of Directors meeting.

V. Remedy

The MMBA grants PERB broad remedial powers, including the authority to issue cease-and-desist orders and to require such affirmative action as PERB deems necessary to effectuate the MMBA's policies and purposes. (§ 3509(a) & (b).) PERB remedies must serve the dual purposes of compensating for the harm a violation causes and deterring further violations. (*County of San Joaquin v. Public Employment Relations Bd.* (2022) 82 Cal.App.5th 1053, 1068.) 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.) PERB's standard remedy for an employer's unlawful unilateral change is a cease-and-desist order, a notice posting, restoration of the status quo ante, appropriate make-whole relief including back pay and benefits with interest, and an order to bargain with the union upon request. (*Pittsburg Unified School District* (2022) PERB Decision No. 2833, p. 14; *City of Pasadena* (2014) PERB Order No. Ad-406-M, pp. 12-15; *Regents of the University of California (Berkeley)*, *supra*, PERB Decision No. 2610-H, pp. 94-96.) This remedy also applies to a bypassing violation. (*Antelope Valley Community College District* (2018) PERB Decision No. 2618, pp. 23-25; *Omnitrans* (2010) PERB Decision No. 2143-M, pp. 8-9.)

We find these remedies appropriate here. Thus, we will order the District to rescind the Management Policy as applied to AFSCME-represented employees, return to the status quo as set out in the July 2021 Telecommute LOA, cease and desist from failing to meet and confer in good faith with AFSCME over the telecommute policy, notify and, on request, complete good faith negotiations with AFSCME before changing telecommute policies, cease and desist from interfering with employees' right to be represented by AFSCME and with AFSCME's right to represent employees, and post a notice of its violations.

As for make-whole relief, to serve the dual purposes of a remedial order noted above, PERB must expunge the consequences of an unfair practice and restore "the economic status quo that would have obtained but for the respondent's wrongful act." (*County of Santa Clara* (2024) PERB Decision No. 2900-M, pp. 27-28, 31-32 [judicial appeal pending]; *County of Kern & Kern County Hospital Authority* (2019) PERB Decision No. 2659-M, pp. 26-27; *City of Pasadena*, *supra*, PERB Order No. Ad-406-M, p. 13.) The District takes exception to the proposed make-whole order reimbursing AFSCME-represented employees for commute expenses and childcare costs, arguing that the Telecommute LOA specifically stated, "telecommuting is not a substitute for dependent care." For this reason, the District argues that this case is factually distinguishable from *West Valley*, *supra*, PERB Decision No. 2917. We disagree.

In *West Valley*, *supra*, PERB Decision No. 2917, the Board concluded that the employer had unilaterally changed academic counselors' remote work policies by requiring them to work 100 percent in person as the COVID-19 pandemic waned. (*Id.* at pp. 1-2.) Part of the remedial order included a make-whole order for "economic losses [ ] as a result of the [employer's] unilateral change." (*Id.* at p. 21, citing *County of Santa Clara*, *supra*, PERB Decision No. 2900-M, pp. 27-28, 31-33 [PERB remedial standards cover most direct or foreseeable harms resulting in material part from a violation].) The order allowed the union to present evidence in compliance proceedings regarding commute expenses and childcare expenses the counselors incurred when they were required to shift from a hybrid work schedule to a 100 percent in-person schedule. (*Id.* at p. 21.)

These principles allow reimbursement for certain increased dependent care costs, depending on proof. The compliance officer will certainly need to take into account the principle that "telecommuting is not a substitute for dependent care"; however, variables impacted by increased office work, such as commute time or work-hour modifications, or a precipitous change in schedule, may impact dependent care costs. Make-whole relief in the context of *West Valley* and the present case is for harms that resulted in material part from the employers' violations. (*County of Santa Clara*, *supra*, PERB Decision No. 2900-M, pp. 28, 31.) The purpose of such relief is to "'recreate the conditions and relationships that would have been had there been no unfair labor practice,' even when doing so necessarily entails some degree of uncertainty as to the precise relationships." (*City of Pasadena*, *supra*, PERB Order No. Ad-406-M, p. 13, quoting *Franks v. Bowman Transp. Co., Inc.* (1976) 424 U.S. 747, 769.) Here, it is possible for affected employees to prove in compliance that they incurred greater childcare expenses as the result of having to commute to the office more regularly, and on little notice. We therefore order reimbursement of economic harms, potentially including commute expenses and/or increased childcare expenses, subject to proof.

ORDER

Based on the foregoing and the entire record in the case, the Public Employment Relations Board (PERB) finds that the East Bay Regional Park District (District) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3506.5(a), (b), (c), and (e), by unilaterally changing its telework policy without bargaining in good faith to impasse or agreement with Charging Party American Federation of State, County and Municipal Employees Council 57, Local 2428 (AFSCME); bypassing AFSCME and dealing directly with unit employees; and interfering with protected rights by muting the microphone of AFSCME's lead negotiator during the public comment portion of a District Board of Directors meeting. The District's unilateral change and bypassing violations also derivatively interfered with protected union and employee rights.

Pursuant to MMBA section 3509(b), we hereby ORDER that the District, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and confer in good faith with AFSCME over the District's telecommute policy.

2. Bypassing AFSCME and dealing directly with unit employees regarding changes to the telecommute policy.

3. Interfering with the right of bargaining unit employees to be represented by the employee organization of their choosing.

4. Denying AFSCME its right to represent bargaining unit employees.

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

1. At AFSCME's request, rescind the telecommute policy changes implemented in August 2022 for AFSCME-represented employees, and return to the status quo as set out in the July 2021 Letter of Agreement Regarding Telecommuting.

2. Before changing telecommute policies for AFSCME-represented employees, notify and, on request, complete good faith negotiations with AFSCME.

3. Make unit members whole for any harms incurred in material part because of the District's unilateral imposition of telecommute policy changes implemented in August 2022 for AFSCME-represented employees, with interest accrued to the date of payment at an annual rate of seven percent, compounded daily.

4. Within 10 workdays after this decision is no longer subject to appeal, post at all work locations where notices to AFSCME-represented employees are posted, copies of the Notice attached hereto as an Appendix. An authorized agent of the District must sign the Notice, indicating that the District will comply with the terms of this Order. The District shall maintain the posting for a period of 30

consecutive workdays. The District shall take reasonable steps to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material. In addition to physically posting this Notice, the District shall communicate it by electronic message, intranet, internet site, and other electronic means the District uses to communicate with employees in the bargaining unit AFSCME represents.[10]

5. Notify OGC of the actions the District has taken to follow this Order by providing written reports as directed by OGC and concurrently serving such reports on AFSCME.

Members Krantz and Krausse joined in this Decision.

[10] Either party may ask PERB's Office of the General Counsel (OGC) to alter or extend the posting period, require further notice methods, or otherwise supplement or adjust this Order to ensure adequate notice. Upon receipt of such a request, OGC shall solicit input from all parties and, if warranted, provide amended instructions to ensure adequate notice.

APPENDIX

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

After a hearing in Unfair Practice Case No. SF-CE-1993-M, *American Federation of State, County & Municipal Employees Council 57, Local 2428 v. East Bay Regional Park District*, in which all parties had the right to participate, the Public Employment Relations Board found that the East Bay Regional Park District (District) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq., when it: (1) failed to bargain in good faith to impasse or agreement with American Federation of State, County and Municipal Employees Council 57, Local 2428 (AFSCME); (2) bypassed AFSCME and dealt directly with unit employees; and (3) interfered with protected rights by muting the microphone of AFSCME's lead negotiator during the public comment portion of a District Board of Directors meeting. The District's unilateral change and bypassing violations also derivatively interfered with protected union and employee rights.

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

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and confer in good faith with AFSCME over the District's telecommute policy.

2. Bypassing AFSCME and dealing directly with unit employees regarding changes to the telecommute policy.

3. Interfering with the right of bargaining unit employees to be represented by the employee organization of their choosing.

4. Denying AFSCME its right to represent bargaining unit employees.

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

1. At AFSCME's request, rescind the telecommute policy changes implemented in August 2022 for AFSCME-represented employees, and return to the status quo as set out in the July 2021 Letter of Agreement Regarding Telecommuting.

2. Before changing telecommute policies for AFSCME-represented employees, notify and, on request, complete good faith negotiations with AFSCME.

3. Make unit members whole for any harms incurred in material part because of the District's unilateral imposition of telecommute policy changes implemented in August 2022 for AFSCME-represented employees, with interest accrued to the date of payment at an annual rate of seven percent, compounded daily.

Dated: ______________________ East Bay Regional Park District

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.