

Tim Henry

From: James Patrick Bonnie <jbonnie@lcwlegal.com>
Sent: Wednesday, November 13, 2024 10:41 PM
To: Tim Henry
Cc: Che I. Johnson
Subject: PERB Decision - District's use of limited-term firefighters
Attachments: PERB Proposed Decision.pdf

Importance: High

Good Evening Chief Henry,

I have great news. We finally received the Administrative Law Judge's (ALJ) decision regarding the District's use of Limited-Term Firefighters, and the ALJ ruled in favor of the District. The ALJ found that NCPFA failed to bring an unfair labor practice charge in a timely manner and failed to prove that the District had violated the MMBA.

First, the ALJ found that the case should be dismissed as untimely because the District proved that the NCPFA failed to bring an Unfair Labor Practice charge within the six-month statute of limitations. The ALJ found that NCPFA knew as early as July 16, 2021, that the District was using limited-term firefighters (LTF) when full-time firefighters (FTF) were absent. The ALJ cited the NCPFA's cease and desist letter regarding LTF sent in July 2021 by Mastagni to the District and NCPFA President Tim England's approval of the sending of the letter to support his decision.

Second, the ALJ found that even if the District had failed to prove an affirmative defense, NCPFA failed to establish a prima face case of unlawful unilateral change. The ALJ found that the NCPFA failed to prove that "[b]efore August 16, 2022, [the District] used [LTFs] as additional staffing, but not to fill bargaining unit member [i.e., FTF] seats or vacancies." To find that the NCPFA failed to establish a prima facia case, the ALJ determined the credibility of each party's evidence and found that the District's evidence was more credible than NCPFA's evidence. Some of the key credibility determinations the ALJ made are:

- The ALJ found that our evidence of the district use of limited-term firefighters prior to the union's formation was relevant to determining the "established practice."
- The ALJ did not consider Lance Morton's declaration, Robert Gonzalez's declaration, and testimony regarding his declaration [District's alleged use of LT's in 2022], finding the testimony unsupported hearsay.
- The ALJ found that the testimony of Tim England ("LFG were always used as additional help and he could not recall when 2 or more LFTF were on a single apparatus"), Jensen and Aaron Plechner's' testimony about the District use of LTF was "either inaccurate or overstated." The ALJ found that

"It may be true that Jensen and Pleschner personally never had overtime shifts reassigned to LTFs before September 2022, but I find Henry and Kutka's testimony was more specific; more pertinent to unit and non-unit member assignments, in general; factually accurate; and consistent with District policies. I therefore credit their testimony over that of NCPFA's witnesses and find that the District had long assigned and reassigned FTFs and LTFs interchangeably, including for overtime.

As a result, the ALJ found the NCPFA failed to establish a prima facie case of unlawful unilateral change and did not address our other arguments, including the MOU stating that the District could subcontract to LTF.

NCPFA will have 20 days to file a statement of exception to the Board regarding the proposed decision, approximately December 3, 2024. If they file a statement of exception, our reply would be due approximately December 24, 2024. If they file a statement of exception, the Board reviews the proposed decision under a de novo standard of review, meaning that the Board reviews the entire record and is free to make different factual findings and reach different legal conclusions than those in the proposed decision. (City of San Ramon (2018) PERB Decision No. 2571-M, p. 5.) However, very helpful to the District is that the Board cases have shown that the Board acknowledge that “a hearing officer who has observed the testimony of witnesses under oath is better positioned than the Board itself to make credibility determinations based on observational factors, such as the demeanor, manner, or attitude of witness[es].” (State of California (Department of Social Services) (2019) PERB Decision No. 2624-S, p. 11.) I have attached the Board’s decision for your review.

Thank you and your officers, especially Battalion Chief Kutka, for your hard work on this case. Kutka and your testimony were invaluable to our success. Please let me know if you have any questions. I have enjoyed the privilege of representing the District in this matter.

Sincerely,

James

James Patrick Bonnie | Associate

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PERB
California Public Employment
Relations Board

Los Angeles Regional Office
425 W. Broadway, Suite 400
Glendale, CA, 91204-1269
Telephone: (818) 551-2822



November 13, 2024

Re: *North Central Professional Fire Fighters Local 5260 v. North Central Fire Protection District*
Unfair Practice Case No. SA-CE-1217-M

Dear Parties:

Attached is the Public Employment Relations Board (PERB or Board) agent's Proposed Decision in the above-entitled matter.

Any party to the proceeding may file with the Board itself a statement of exceptions to the Proposed Decision. The statement of exceptions should be electronically filed using the "ePERB portal" accessible from PERB's website (<https://eperb-portal.ecourt.com/public-portal/>). (PERB Reg. 32110, subd. (a).)¹ Individuals not represented by an attorney or union representative, are encouraged to electronically file their documents using the ePERB portal; however, such individuals may submit their documents to PERB for filing via in-person delivery, US Mail, or other delivery service. (PERB Reg. 32110, subds. (a) and (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

Pursuant to PERB Regulation 32300, the statement of exceptions must be filed with the Board itself within 20 days of service of this proposed decision. A document submitted through ePERB after 11:59 p.m. on a business day, or at any time on a non-business day, will be deemed "filed" the next regular PERB business day. (PERB Reg. 32110, subd. (f).) A document submitted via non-electronic means will be 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); see also PERB Reg. 32130.)

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, including footnotes, but excluding the tables of contents and authorities.

¹ PERB's regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

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. The statement of exceptions shall: (1) clearly and concisely state why the proposed decision is in error, (2) cite to the relevant exhibit or transcript page in the case record to support factual arguments, and (3) cite to relevant legal authority to support legal arguments. Exceptions shall cite only to evidence in the record of the case and of which administrative notice may properly be taken. (PERB Reg. 32300, subd. (c).) 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).)

Within 20 days following the date of service of a statement of exceptions, any party may file with the Board a response to the statement of exceptions. The response shall be filed with the Board itself in the same manner set forth in this letter for the statement of exceptions (see paragraphs two and three of this letter). The response may contain a statement of any cross-exceptions the responding party wishes to take to the proposed decision. The response shall comply in form with the requirements of PERB Regulation 32300 set forth above, except that a party both responding to exceptions and filing cross-exceptions shall be permitted to submit up to 28,000 words total, including footnotes, without requesting permission. A response (with or without an inclusive statement of cross-exceptions) to such exceptions may be filed within 20 days. Such response shall comply in form with the provisions of PERB Regulation 32310.

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See PERB Regs. 32300, subd. (a) and 32093; see also PERB Reg. 32140 for the required contents.) Proof of service forms are available for download 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.)

Any party desiring to argue orally before the Board itself regarding the exceptions to the proposed decision shall file with the statement of exceptions or the response thereto a written request stating the reasons for the request. Upon such request or its own motion the Board itself may direct oral argument. (PERB Reg. 32315.) All requests for oral argument shall be filed as a separate document.

An extension of time to file a statement of exceptions can be requested only in some cases. (PERB Reg. 32305, subs. (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.)

Unless a party files a timely statement of exceptions to the proposed decision, the decision shall become final. (PERB Reg. 32305.)

Sincerely,

A handwritten signature in black ink, appearing to be "Eric J. Cu", written in a cursive style.

Eric J. Cu
Interim Chief Administrative Law Judge

EJC



**STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD**

NORTH CENTRAL PROFESSIONAL FIRE
FIGHTERS, IAFF LOCAL 5260,

Charging Party,

v.

NORTH CENTRAL FIRE PROTECTION
DISTRICT,

Respondent.

UNFAIR PRACTICE
CASE NO. SA-CE-1217-M

PROPOSED DECISION
(November 13, 2024)

Appearances: Mastagni Holstedt by Garrett Porter, Attorney, for North Central Professional Fire Fighters, IAFF Local 5260; Liebert Cassidy Whitmore by Che Johnson and James Bonnie, Attorneys, for North Central Fire Protection District.

Before Erik M. Cuadros, Administrative Law Judge.

INTRODUCTION

In this case, the North Central Professional Fire Fighters, IAFF Local 5260 (NCPFA) alleges the North Central Fire Protection District (District) unilaterally and unlawfully reassigned bargaining unit work without meeting and conferring, thus violating the Meyers-Milias-Brown Act (MMBA).¹ The District denies any wrongdoing. As explained below, I find that NCPFA failed to prove the District violated the MMBA.

PROCEDURAL HISTORY

On September 28, 2022, NCPFA filed an unfair practice charge against the District with the Public Employment Relations Board (PERB or Board).

¹ The MMBA is codified at Government Code section 3500 et seq. All statutory references are to the Government Code unless otherwise stated. PERB Regulations, *post*, are codified at California Code of Regulations, title 8, section 31001 et seq.

On August 17, 2023, PERB's Office of the General Counsel issued a complaint alleging the District changed a past practice by assigning the bargaining unit work of full-time firefighters (FTFs) to non-unit limited-term firefighters (LTFs) without notice or an opportunity to meet and confer over the change in policy or its effects. By this same conduct, the complaint also alleged the District interfered with the rights of bargaining unit employees and denied NCPFA its right to represent bargaining unit members.²

On September 6, 2023, the District filed an answer to the complaint, denying the substantive allegations and asserting numerous affirmative defenses.

On October 12, 2023, the parties participated in an informal settlement conference but did not resolve the matter.

On February 29, March 5, and April 26, 2024, the parties participated in a virtual formal hearing, during which each had the opportunity to examine and cross-examine witnesses and to present evidence in support of their respective positions. Without objection, official notice was taken of the contents of PERB's case file in this case, and the case was submitted for proposed decision on August 2, 2024, upon receipt of all post-hearing briefs.

FINDINGS OF FACT

I. Parties and Jurisdiction

The District is a public agency within the meaning of MMBA section 3501, subdivision (c) and PERB Regulation 3016, subdivision (a). From 2007 – 2019, it

² The complaint also alleged the District unilaterally eliminated LTFs' medical clearance requirements. NCPFA orally withdrew and the Administrative Law Judge (ALJ) so dismissed this allegation with prejudice at the start of the formal hearing in this case on February 29, 2024.

contracted with the City of Fresno Fire Department, the latter providing personnel to staff the former's fire stations and equipment. On July 1, 2019, the District reclaimed responsibility for all firefighting services, including the provision of personnel, for the rural areas within its jurisdiction. On July 1, 2022, it further reclaimed responsibility for the metropolitan areas within its jurisdiction.

NCPFA is an exclusive representative within the meaning of PERB Regulation 32016, subdivision (b). It was recognized in March 2020 and represents the District's fire captains, engineers, and FTFs.

The District also employs LTFs, but NCPFA does not represent them. Under the District's Administrative Manual, Policy 101.008, LTFs may be hired for a defined period or during the completion of an examination or hiring process to fill a permanently allocated position, whereupon the LTF may become an FTF.

II. Relevant Scheduling History

Chief Timothy Henry was hired in July 2018 and tasked with reopening the District. He first hired a command team, including a deputy chief and three battalion chiefs (BC), in or about November 2018. Fire captains were hired in May 2019. Engineers, FTFs, and LTFs were hired in June 2019 and underwent fire academy training before the District opened on July 1 that year.

The District initially reopened four stations, running three 24-hour shifts: A, B, and C. Each had at least one engine or other apparatus, and most commonly, the District assigned 3-0 staffing for each shift: one captain, one engineer, and one firefighter. The record shows engines may occasionally have 4-0 staffing, augmenting the 3-0 staff with one additional firefighter.

The District uses a computer program, CrewSense, to track staffing assignments. It shows the station and shift that personnel are assigned to on a day-to-day basis. Since the District's reopening, BC Jonathan Kutka has been responsible for day-to-day staffing, overtime, and making decisions to hold staff over to the next shift if needed. When CrewSense shows an open firefighter position in the shift schedule, due to an absence or other reason, he sends notice of or "flies" an overtime opportunity via the CrewSense app. Firefighters may accept the overtime opportunity; if none do, Kutka will "force hire" a firefighter to cover the shift.

The District allows a practice of shift trading, where employees may exchange work shifts with an off-duty employee of like rank to work in the former's place, subject to approval by the Fire Chief or designee. Firefighters trade shift assignments by submitting a request for approval by the BC, but management cannot initiate a trade.

The parties' memorandum of understanding (MOU), Article 7, *post*, reflects this practice, explaining that employees are permitted to trade work shifts with "like rank" "in a manner consistent with the FLSA^[3] and District Policy."

The District's Constant Staffing Policy (Administrative Manual, Policy 101.002) clarifies that LTFs, specifically, "may use shift trades with like rank when necessary." About LTF staffing guidelines in general, the District may "cover vacant position[s] on fire apparatus" with LTFs, including, "but not limited to, increasing apparatus staffing, emergency recall, events or special needs to maintain daily staffing levels[.]" whereas interns may only be used to "upstaff" apparatus (e.g., move from 3-0 to 4-0 staffing).

³ This presumably refers to the Fair Labor Standards Act of 1938, codified at United States Code section 201 et seq.

The record shows that, since reopening in 2019, the District has used FTFs and LTFs interchangeably for staffing purposes. On June 17, the District issued its first Special Notice announcing to all employees initial station and shift assignments until revoked. At Station 57, which used 3-0 staffing, three LTFs were assigned as the only firefighter on a 3-0 engine for all three shifts. On at least four other occasions between August and October 2019, the District assigned a single LTF, including LTF Joshua Vasquez, as the only firefighter on an engine crew at Station 57; one of these staffing assignments—on August 26—resulted from a shift trade with another firefighter.⁴

In 2020, the District continued to assign LTFs interchangeably with FTFs, assigning the former as the only firefighter on a 3-0 apparatus. On February 22, the District issued a Special Notice to all employees announcing both that LTFs were allowed to shift trade with FTFs because they shared “the same responsibilities,” and LTFs and FTFs were equally eligible for overtime assignments. On February 27, Henry sent a memo to the District Board of Directors describing the District’s intended use of LTFs, in relevant part writing that they would “fill some of the vacancies and cover some of what would be otherwise overtime shifts.”⁵ On April 28 – May 28, the District assigned two LTFs as the only firefighters assigned to Station 56 for their respective shifts. On July 7 – August 7, the District assigned or transferred two LTFs as the only firefighters assigned to Station 56 for their respective shifts. Other daily

⁴ At least two occasions involved an engine with 3-0 staffing; the two remaining included an additional Firefighter Intern. Based on the June 17 Special Notice, the firefighter who traded shifts on August 26 and did not work that day was also an LTF.

⁵ The memo uses the term “Firefighter Trainee,” but the record shows this term was used interchangeably with LTF.

assignments on April 17, 21, and 30; June 19; and August 4 reflect this same practice. On at least twelve occasions, the District assigned a single LTF as the only firefighter on an engine or patrol crew; three of these staffing assignments—on April 21 and 30, and on August 4—resulted from a shift trade with an FTF originally assigned the shift and many involved engines with 3-0 staffing.⁶

In 2021, the District began hiring and training new firefighters to prepare for the July 2022 opening of two new stations for the metropolitan areas within its jurisdiction, including LTFs Travis Jensen and Aaron Pleschner, *post*, hired in May and July 2021, respectively, as well as LTFs Jason Lum, Richard Medellin, and Wade Kandarian. On July 23, the District issued a Special Notice announcing assignments and transfers, reflecting these additional staff.

The additional hires did not change the District's practice of staffing FTFs and LTFs interchangeably, continuing to allow various apparatus assignments with LTFs as the only firefighter(s) assigned. The District's September and October 2021 Special Notices show that it assigned LTF Brad Goodwin as the only firefighter on Engine 55, B Shift for those months, working alongside current NCPFA President Kyle Harp as the engineer. Other daily assignments on August 7; September 2, 3, and 26; and November 20, reflect this same practice. On August 7, two LTFs, including Jensen, were assigned to Engine 55. On September 2, the District assigned LTF Lum to Engine 56; ultimately, he traded a portion of his shift with LTF Kandarian before

⁶ On August 1, as reflected in its July 7 – August 7 Special Notice of Transfers, *ante*, the District also assigned one LTF as the only firefighter on Engine 56, also an engine with 3-0 staffing.

returning to finish it, though each worked as the only firefighter assigned during their respective on-duty time. On September 3, the District assigned LTF Lum as the only firefighter on Engine 56 and, though it assigned an FTF and LTF Pleschner on Engine 58, the FTF traded a portion of his shift with LTF Kandarian, resulting in two LTFs as the only firefighters on the latter engine for a nine-hour period. On September 26, the District assigned an FTF and LTF Pleschner on Engine 58, but the FTF traded his 24-hour shift with LTF Kandarian, resulting in the two LTFs as the only firefighters on that engine. On November 20, Pleschner, now an FTF, traded his shift with LTF Goodwin, making the latter the only firefighter assigned to Engine 55.

III. Relevant Bargaining History, Contract Provisions, and Policies

NCPFA witnesses said that employees began discussing a union in July 2019, when the District reopened, ultimately leading to the NCPFA's formation and, later, its recognition in March 2020. Timothy England was hired as a captain and served as NCPFA's President until Summer 2022. Robert Gonzalez was hired as a captain and first served as Vice President until becoming President in 2022.⁷ Harp was hired as an engineer and became President in January 2024. Though he was previously involved in the union, he was away on leave for different periods, including in 2021.

Gonzalez and Harp testified that they knew beginning in July 2019 or shortly thereafter about the District's practice of assigning FTFs and LTFs interchangeably for staffing purposes, including that the District would assign LTFs as the only firefighter(s) on an apparatus. Gonzalez testified that LTFs were used to perform "the

⁷ Gonzalez has since promoted to Battalion Chief, serving in an acting role beginning in March 2023, and becoming a permanent BC in July 2023.

same job” as FTFs prior to August 16, 2022, and admitted he recalled LTFs serving as the only firefighter on 3-0 engines when the union first formed in 2019. Harp testified that the NCPFA formed, in part, in response to this practice, citing, for example, LTF Vasquez’s assignment to Engine 57 in 2019, saying, “[T]his was before we were formed as a union. So, we couldn’t fight this. We had to accept it[,]” and that the employees thus formed “a bargaining unit where we can negotiate these things[.]”

Shortly after NCPFA’s recognition in March 2020, the parties began bargaining a first contract. NCPFA tried to address the District’s use of LTFs in various contexts during bargaining.

The issue was first raised during negotiations in 2020. The District explained then that it had long used FTFs and LTFs interchangeably and was not interested in contractually limiting how LTFs were assigned because, in its view, such limitations would impede its ability to provide services.

On July 16, 2021, NCPFA’s attorney sent a cease-and-desist letter to the District’s attorney. NCPFA asserted the District had recently changed a past practice without meeting and conferring. It objected to the District’s staffing LTFs on 3-0 engines, writing the District had previously used them to “help at special events” but was now scheduling LTFs to “ride the engines and perform duties that would normally be done by union members[,] . . . eliminat[ing] the need . . . to hire more union positions or offer overtime to union members.” NCPFA demanded the District stop transferring union work to non-union employees and bargain over any future changes.

The record is not clear whether the District responded to NCPFA’s July 16 letter specifically, but the parties continued to discuss the issue in bargaining. Several times,

NCPFA proposed minimum staffing requirements for union members. On December 6, 2021, it also proposed other MOU language that would have modified the District's use of LTFs, establishing, for example, extensive procedures for overtime hiring of FTFs. The District rejected both proposals, continuing to explain that as it reestablished itself and expanded services in rural and, subsequently, metropolitan areas within its jurisdiction, it wanted to use all of the staff available to it and that such growth would not be possible, in its view, without the use of LTFs. Ultimately, NCPFA dropped both proposals, and in July – September 2022, the parties signed a 2022-2024 MOU, effective July 2022.

IV. The Alleged Unilateral Change

On or about September 2, 2022, Gonzalez contacted Chief Henry to ask that the District not cancel an overtime assignment that week.⁸

On September 6, 2022, the District cancelled at least one callback shift earlier accepted by Jenson as an overtime opportunity. Jenson was by then an FTF, and he testified that he was assigned to Engine 59, C Shift, though it is not clear whether this was his regular assignment at the time or the engine for which he had accepted the overtime. NCPFA asserts the District reassigned an LTF to cover the vacancy. Jensen

⁸ NCPFA alleges the District on this date cancelled overtime previously accepted by an FTF and reassigned the vacancy to an LTF, but Gonzalez admitted he did not have specific, firsthand knowledge of the alleged reassignment. He could only testify that he had discussions with Henry about the overtime assignment—he could not recall specifics about their discussion; the names of the FTF or LTF allegedly involved; the station involved; or who reported it. He vaguely testified only that it was brought to his attention by membership. For reasons described below, I find neither Gonzalez's testimony nor his declaration about this alleged reassignment sufficient to support a finding of fact. (See pp. 10-11 & fn. 10, *post.*)

testified that staffing for the shift(s) in question was 4-0, and he believed the District reassigned Tyler Vanderlinden in his place. However, Jensen admitted he was not “fully sure and positive who replaced me,” that he was taking “a guess” it was Vanderlinden and could not “fully recall.”

The September 6 CrewSense schedule shows Vanderlinden was assigned to Engine 55 that day, not Engine 59. Engine 55 had 4-0 staffing with one captain; one engineer; and Aaron Prothro and Vanderlinden, the two firefighters. There is no evidence about Prothro’s status on that date, whether he was an FTF or LTF. Alternatively, Engine 59, also with 4-0 staffing, shows firefighters Kandarian and Nathaniel Olvera assigned, but again, the record does not establish either’s status as an FTF or LTF on that date.⁹

NCPFA attempts to further assert that also on September 6, the District reassigned two other LTFs consistent with the alleged unilateral change. First, that Captain Jonathan Hall, a union member, reported to Gonzalez that the District reassigned an LTF from Station 55 to fill a vacancy to which an FTF had previously been assigned. Second, that the District assigned an LTF to Station 56, A Shift—a shift previously staffed by an FTF.

Gonzalez attested to both these allegations in a sworn declaration submitted in support of this case’s underlying charge. But testifying about his declaration and these two alleged events, Gonzalez repeatedly admitted he had no personal knowledge or

⁹ Olvera was hired as an LTF in 2020; Kandarian in 2021, in the same class as Jensen and Pleschner. Given Olvera and Kandarian’s length of District service, it seems unlikely they were LTFs on September 6, 2022. But given the lack of evidence about their status in 2022, I decline to consider this in any legal analysis, *post*.

could not remember having any personal knowledge about the events in question; that the events were reported to him but he could not identify the individuals who reported them, how they reported them, or the stations or members involved in or affected by the allegations; and surmised he may have gleaned some of the information from the union's executive board. He did not remember if or how he verified that LTFs were being used to fill the alleged overtime opportunities.

No other evidence of these two allegations was presented during the hearing (e.g., testimony from those who were involved), leaving Gonzalez's testimony standing alone. Based on his admitted lack of personal knowledge and the underlying hearsay issues impacting his ability to accurately perceive, as well as his capacity to recollect or communicate about these events, I find Gonzalez's testimony unreliable and thus insufficient to support factual findings about them.¹⁰

The complaint lastly alleges that on September 9, the District assigned an LTF to a vacancy on another engine, cancelling overtime previously accepted by another FTF. No admissible evidence about this allegation was presented at hearing, and thus, a factual finding cannot be reached as to its occurrence or nonoccurrence.¹¹

¹⁰ "[C]redibility may be determined on the basis of both observational factors, viz., demeanor, manner and attitude, and non-observational factors including those specified in Evidence Code section 780." (*Palo Verde Unified School District (2013) PERB Decision No. 2337, p. 28.*)

¹¹ At hearing, NCPFA moved to admit both the underlying charge and a sworn declaration by Lance Morton supporting it into the evidentiary record, asserting their admissibility as administrative hearsay supporting Gonzalez's testimony. (Gov. Code § 11513, subd. (d).) When moving for their admission, Gonzalez had not yet testified about the factual allegations NCPFA sought to support. It being then unclear how the documents would supplement and explain the witness's testimony, the ALJ denied their admission. Predominantly relying on his own declaration, Gonzalez later testified

ISSUE

Did the District fail to meet and confer in good faith by unilaterally assigning LTFs to fill staffing assignments created by FTF vacancies?

CONCLUSIONS OF LAW

I. The District's Untimeliness Claim

The District contends this case should be dismissed as untimely. Unfair practice charge claims before PERB have a six-month statute of limitations period. (*Coachella*

about several assignments in August and September 2022, but the motion was not revisited. Even so, neither document can be viewed as corroborative administrative hearsay.

They were not submitted for the purpose of supporting or clarifying Gonzalez's testimony, but to establish the truth about the events on September 9. Gonzalez could only testify about the earlier reassignments, albeit dubiously. Morton's declaration, though, only addressed the events alleged on September 9—events about which Gonzalez had no firsthand knowledge and did not testify. In the context in which both documents were introduced at hearing, they clearly were submitted for the same purpose. Because neither supports other non-hearsay evidence about the events of September 9, they were not admissible as administrative hearsay.

Yet PERB may take official notice of matters within its own files and records, as the ALJ did in this case, including of both the charge and Morton's declaration. (*Bellflower Unified School District* (2017) PERB Decision No. 2544, p. 6, fn. 4; see also, *Santa Clara County Superior Court* (2014) PERB Decision No. 2394-C, pp. 16 and fn. 14 [describing standards for taking "administrative notice," alternatively "official notice"].) In so doing, PERB can take notice of the existence, content, and authenticity of public records, but not the truth of factual matters asserted in such documents. (*County of Merced* (2020) PERB Decision No. 2740-M, pp. 7-8, fn. 5.) Having reviewed both documents and finding the hearsay facts and conclusions described therein uncorroborated by any evidence, including Gonzalez's hearsay testimony, I give both documents the weight which they merit and decline to make findings of fact about September 9 based on them alone. (See PERB Reg. 32176 [uncorroborated hearsay cannot support finding of fact unless corroborated by non-hearsay evidence].)

Valley Mosquito & Vector Control Dist. v. PERB (2005) 35 Cal.4th 1072, 1077; see also *Los Angeles Unified School District* (2014) PERB Decision No. 2359, pp. 3, 30; *City of Berkeley* (2012) PERB Decision No. 2281-M, p. 5; *Gavilan Joint Community College District* (1996) PERB Decision No. 1177, p. 4 [at formal hearing, respondent bears burden of pleading as affirmative defense and proving charge is untimely, the limitations period beginning once charging party knows, or should know, of the conduct underlying the charge].)

For unilateral change claims, the limitations period “begins to run on the date that the charging party as actual or constructive notice of the respondent’s clear intent to implement a unilateral change in policy, provided that nothing subsequent to that date evinces a wavering of that intent.” (*City of Livermore* (2014) PERB Decision No. 2396-M, p. 6.) In such case, only a lack of “clear and unequivocal” notice of the alleged misconduct (*Trustees of the California State University (San Marcos)* (2020) PERB Decision No. 2738-H, p. 12) or ambiguity about the employer’s intent regarding a policy or position will delay the start of the limitations period (see *Kern County Hospital Authority* (2022) PERB Decision No. 2847-M, p. 8-9 [employer’s processing of group grievance signals ambiguity or wavering of intent]; *Omnitrans* (2009) PERB Decision No. 2001-M, p. 7 [employer indicating it was amenable to making changes based on union’s feedback evinces wavering of intent]).

Here, NCPFA filed its charge on September 28, 2022, meaning the limitations period extends back to March 28, 2022. Yet at least as early as July 16, 2021, NCPFA knew the District was filling staffing vacancies with LTFs when FTFs were absent. On that date, NCPFA’s attorney sent a cease-and-desist letter, arguing the District

previously assigned LTFs only to “help at special events” but was beginning to schedule them for work it alleged “would normally be done by union members[,] . . . eliminat[ing] the need . . . to hire more union positions or offer overtime to union members.” It therefore accused the District of unilaterally reassigning bargaining unit work without bargaining over the decision or its effects—the very claim at issue here.

The District has thus shown that NCPFA knew the former was engaging in the same conduct underlying its present charge for over fourteen months before filing it. Then-President England and then-Vice President Gonzalez also received the letter, and England testified that he was aware of and approved the letter issuance “at the behest of” NCPFA. There is no evidence of any ambiguity or wavering of intent: the District told NCPFA during first-contract negotiations that it would continue to schedule FTFs and LTFs interchangeably, maintaining that position after receiving the cease-and-desist letter and throughout negotiations; and it carried through with those statements in its actual assignments. The District having carried its burden to prove the charge was not timely filed, this claim is dismissed.

II. The Alleged Unilateral Change

Even assuming the District had not proven its affirmative defense, I find NCPFA failed to establish a prima facie case for an unlawful unilateral change.

The MMBA requires public employers to meet and confer in good faith with recognized employee organizations on matters within the “scope of representation.” (MMBA, §§ 3504, 3505, 3506.5, subd. (c).) An employer’s unilateral change to a matter within the scope of representation without affording its employees’ representative reasonable advance notice and a meaningful opportunity to bargain

constitutes a per se violation of its duty to bargain. (*County of Santa Clara* (2019) PERB Decision No. 2680-M, p. 7; *Stockton Unified School District* (1980) PERB Decision No. 143, p. 22.)

To establish a prima facie case for an unlawful unilateral change, a charging party 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.)

As an initial matter, there can be no dispute over elements (2) and (3). Bargaining unit work is within the scope of representation. Assigning that work to non-unit employees has a generalized effect or continuing impact on terms and conditions of employment because it impacts bargaining unit employees' overtime opportunities and because the District contended it had the right to so assign both FTFs and LTFs pursuant to the parties' MOU. (*County of Orange* (2018) PERB Decision No. 2611-M, p. 11; *City of Davis* (2016) PERB Decision No. 2494-M, p. 32.)

Regarding the first element, there are three primary means of establishing that an employer changed or deviated from the status quo: (1) a deviation from a written agreement; (2) a change in established past practice; or (3) a newly created policy or application or enforcement of an existing policy in a new way. (*Oakland Unified School*

District (2023) PERB Decision No. 2875, p. 12; *County of Santa Clara* (2022) PERB Decision No. 2820-M, p. 5.) NCPFA argues only the second theory, asserting as the complaint does, that “[b]efore August 16, 2022, [the District] used [LTFs] as additional staffing, but not to fill bargaining unit member [i.e., FTF] seats or vacancies.” Thus, it claims, while LTFs were used solely to upstaff engines for responding to emergencies or special events, the District previously assigned overtime shifts to NCPFA members exclusively (viz., if staffing fell below 3-0 because a firefighter was absent, the vacancy would be filled by another FTF, not LTF). The District, however, asserts that it had long used LTFs interchangeably with FTFs, including for filling overtime opportunities, and therefore, it did not deviate from any status quo.

To establish the status quo via binding, unwritten past practice, the practice must be “unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties,’ or which is ‘regular and consistent’ or ‘historic and accepted.’” (*City of Santa Maria* (2020) PERB Decision No. 2736-M, p. 18; *Region 2 Court Interpreter Employment Relations Committee & California Superior Courts of Region 2* (2020) PERB Decision No. 2701-I, pp. 55-57.) The parties’ conflicting accounts thus require a credibility determination.¹²

England emphatically testified that LTFs were “always” used as additional help in 2021, viz., upstaffing a crew from 3-0 to 4-0. He could not recall any time when two or more LTFs were on a single apparatus. Jensen and Pleschner testified about their

¹² See Evidence Code section 780; *Palo Verde Unified School District, supra*, PERB Decision No. 2337, pp. 27-28.

personal assignments as LTFs in May – August 2021—critically, though, not about any overtime experiences prior to August 2022. Jensen asserted that during his time as an LTF, he could not recall a time when he worked as the only firefighter on a 3-0 crew—an FTF always was present—or a time that he ever worked with another LTF. Pleschner testified that he worked a total of four shifts over eight days as an LTF, stating that each was a 4-0 shift and there was always one FTF and himself, the LTF. But the record shows their testimony to be either inaccurate or overstated.

In 2021, alone, there were multiple cases in which a single LTF was assigned to an engine without an FTF present, including Goodwin on Engine 55, who worked alongside Harp; and Lum and Kandarian on Engine 56. Thus, LTFs were not used solely for upstaffing purposes. On August 7, Jensen and another LTF were assigned a single shift—together, they, two LTFs, were the only firefighters on the one engine; no FTF was present. On September 3 and 26, then-LTF Pleschner worked two 4-0 shifts in which he and another LTF were the only firefighters on the engine; no FTF was present. And on November 20, now-FTF Pleschner traded shifts with another LTF, making the LTF the only firefighter assigned to the engine that day.

Henry and Kutka testified more specifically about firefighter assignments, including overtime. Both viewed the positions as interchangeable. Kutka cited assignments stretching to when the District first reopened, including on June 17, 2019, when the District announced the assignment of three LTFs as the only firefighter on Engine 57 for three open overtime assignments on the A, B, and C 3-0 shifts. On four occasions in August – October 2019, the District assigned a single LTF as the only firefighter on Engine 57, at least two of which had 3-0 staffing. In February 2020, the

District issued a Special Notice to all employees announcing that LTFs were equally eligible for overtime assignments in CrewSense because both shared “the same responsibilities.” That month, Henry sent a memorandum to the Board of Directors describing the District’s intended use of LTFs, in relevant part that they would “fill some of the vacancies and cover some of the what would be otherwise overtime shifts.” On thirteen occasions in April – August 2020, the District assigned a single LTF as the only firefighter on an engine or patrol crew, many of which had 3-0 staffing.

Henry also testified more specifically about his conversation with Gonzalez on September 2, 2022. They discussed the District’s recent hiring of a new LTF class and its plans to assign them to fill staffing vacancies or overtime opportunities. Gonzalez asked that the District delay such assignments until such time as those overtime opportunities that FTFs had already bid on or accepted were completed. At hearing, however, Gonzalez admitted that in his experience going at least as far back as in 2021, any firefighter—an FTF or LTF—could accept an overtime assignment.

It may be true that Jensen and Pleschner personally never had overtime shifts reassigned to LTFs before September 2022, but I find Henry and Kutka’s testimony was more specific; more pertinent to unit and non-unit member assignments, in general; factually accurate; and consistent with District policies. I therefore credit their testimony over that of NCPFA’s witnesses and find that the District had long assigned and reassigned FTFs and LTFs interchangeably, including for overtime.

NCPFA argues that examples of LTFs serving as the only firefighter on a 3-0 engine before NCPFA was recognized as the exclusive representative in March 2020 are irrelevant and should not be considered. Yet both parties are entitled to present

evidence of past practices to determine the status quo or to establish an affirmative defense. And an employer's historical past practices before a union's formation may be relevant to determine what the "established practice" is and therefore the status quo. (*California State Employees' Assn. v. Public Employment Relations Bd.* (1996) 51 Cal.App.4th 923, 943-944, citing *Davis Unified School District, et al.* (1980) PERB Decision No. 116, pp. 20-21 [PERB "necessarily look[ed] to pre-EERA employment conditions to determine the status quo" since public employees' right to collective bargaining had existed for only one year at the time] and *Pajaro Valley Unified School District* (1978) PERB Decision No. 51, pp. 1, fn. 1 & 7-10 [examining employer's bargaining obligations with exclusive representative recognized six months prior, Board looked beyond parties' bargaining history to determine actual past practices].) Therefore, evidence of the District's assignments of LTFs to overtime shifts and its communications with union leaders about those assignments before March 2020 are relevant and appropriate for consideration.

Even assuming such evidence is not so appropriate, the weight of evidence arising thereafter—e.g., from April 2020 to November 2021, including NCPFA's cease-and-desist letter of July 2021 (pp. 5-8, *ante*)—shows the District assigned FTFs and LTFs interchangeably, contrary to NCPFA's witnesses' general testimony that LTFs were used solely as additional staffing and undercutting their credibility. NCPFA did not otherwise present specific evidence that the District previously assigned overtime shifts to union members exclusively. By this, coupled with the District's witnesses' credible testimony that it had previously assigned overtime shifts to LTFs, NCPFA failed to establish the status quo as alleged, viz., "[b]efore August 16, 2022, [the

District] used [LTFs] as additional staffing, but not to fill bargaining unit member [i.e., FTF] seats or vacancies.”

Thus, it also cannot show a change in or deviation from any status quo based solely on the District’s cancellation of Jenson’s overtime shift on September 6, 2022,¹³ either, and setting aside its failure to timely file the charge within the statute of limitations, would therefore also have failed to establish its prima facie case for an unlawful unilateral change of past practice.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. SA-CE-1217-M are hereby DISMISSED.

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

¹³ The remaining changes or deviations alleged in the complaint were not established. Even if NCPFA had established the status quo was as alleged, Jensen himself was unsure of and could not identify the firefighter that the District ultimately assigned to this shift. There being no other corroborative evidence showing whether the individual who replaced him was a FTF or LTF, NCPFA would also have failed in this regard to show that the District changed or deviated from the alleged status quo.

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.)

PROOF OF SERVICE

I declare that I am a resident of or employed in the County of Sacramento, 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, Sacramento Regional Office, 1031 18th Street, Sacramento, CA, 95811-4124.

On November 13, 2024, I served the Cover Letter and Proposed Decision regarding Case No. SA-CE-1217-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 Sacramento, California.

Personal delivery.

Electronic service (e-mail).

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on November 13, 2024, at Sacramento, California.

Maryna Maltseva

(Type or print name)

/s/ Maryna Maltseva

(Signature)