STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNION OF AMERICAN PHYSICIANS & DENTISTS, Charging Party, v. STATE OF CALIFORNIA (CALIFORNIA CORRECTIONAL HEALTH CARE SERVICES), Respondent.	Case No. SA-CE-2168-S PERB Decision No. 2823-S June 29, 2022

Appearances: Weinberg, Roger & Rosenfeld by Anne I. Yen, Attorney, for Union of American Physicians & Dentists; California Department of Human Resources by Nicole D. Lobre, Labor Relations Counsel, for State of California (California Correctional Health Care Services).

Before Banks, Chair; Shiners and Krantz, Members.

DECISION[1]

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by Respondent State of California (California Correctional Health Care Services) (CCHCS) to the attached proposed decision of an administrative law judge (ALJ). The complaint in this matter, as amended, alleged that

[1] PERB Regulation 32320, subdivision (d) authorizes the Board to designate a decision, or any part thereof, as non-precedential. (PERB Regulations are codified at Cal. Code Regs., tit. 8, § 31001 et seq.) Applying the criteria the regulation enumerates, we designate as non-precedential Parts II-V of the Discussion, the remedial order, the appendix, and the attached proposed decision. The Introduction, Factual and Procedural Background, and Part I of the Discussion are precedential.

CCHCS violated the Ralph C. Dills Act (Dills Act)[2] by: (1) implementing an Integrated Substance Use Disorder Treatment (ISUDT) program and a Medication Assisted Treatment (MAT) program without bargaining in good faith with Charging Party Union of American Physicians & Dentists (UAPD) over the decision and/or the effects thereof; and (2) failing to bargain in good faith before requiring all UAPD-represented primary care providers (PCPs) to obtain "X-Waivers" from the federal Drug Enforcement Administration (DEA) and fully provide ISUDT/MAT services.

After an evidentiary hearing, the parties submitted post-hearing briefs and the ALJ issued a proposed decision. The ALJ concluded that while CCHCS had no duty to bargain over its decision to offer the ISUDT and MAT programs, the Dills Act required CCHCS to bargain over the decision's negotiable effects on PCPs' terms and conditions of employment. The ALJ further concluded that CCHCS failed to comply with this duty. The ALJ directed CCHCS, among other things, to cease requiring PCPs to obtain X-Waivers and fully provide MAT, rescind any discipline issued for violating these mandates, and make PCPs whole.

CCHCS filed five exceptions to the proposed decision. Broadly categorized, the first four exceptions ask us to reverse the ALJ's conclusions on liability, as well as certain factual findings the ALJ reached. The fifth exception argues in the alternative that, if CCHCS violated the Dills Act, we should modify the ALJ's proposed remedy. UAPD filed no exceptions and asks us to affirm the ALJ's proposed decision.

[2] The Dills Act is codified at Government Code section 3512 et seq. All statutory references are to the Government Code.

We have reviewed the proposed decision, the record, and the parties' arguments. For the reasons we explain, we affirm the ALJ's overall conclusion that CCHCS violated the Dills Act, but we partially grant certain exceptions and therefore adjust the ALJ's factual findings, legal conclusions, and remedial order. Other than those instances in which we partially grant an exception, we affirm the ALJ's determinations.

FACTUAL AND PROCEDURAL BACKGROUND[3]

CCHCS provides medical, dental, and mental health services to inmates at institutions within the California Department of Corrections and Rehabilitation (CDCR). Since 2005, a court-appointed receiver has overseen health care services for CDCR inmates pursuant to a federal action currently styled as *Plata et al. v. Newsom et al.*, N.D. Cal. No. C01-1351-JST (*Plata*). In September 2018, the receiver directed CCHCS to implement a MAT program for inmates with Substance Use Disorder (SUD). CCHCS developed a plan to do so as part of an overall ISUDT program. The 2019-2020 State budget allocated $71.3 million to the ISUDT program, and the 2020-2021 budget allocated $161.9 million to the program.

UAPD exclusively represents State Bargaining Unit 16, which includes physicians who serve as PCPs for inmate patients within CDCR. The PCPs' classification specification and job duty statement require PCPs to provide primary care. This includes diagnosing patients and prescribing them medication and other treatment. These job descriptions have never specified that PCPs must obtain an

[3] The proposed decision includes a more complete statement of facts. This section sets forth an abbreviated version, providing context for our legal analysis.

X-Waiver. They also have never specified SUD or other medical conditions that PCPs must treat.[4]

On July 5, 2019, CCHCS notified UAPD of its plan to implement an ISUDT program and offered to meet with UAPD if requested. ISUDT includes MAT, which, in turn, includes medication, therapy, and community support. The primary SUD medication for inmates in the ISUDT and MAT programs is Suboxone, often prescribed for inmates with opioid use disorder. At this time, PCPs lacking X-Waivers from the DEA could not prescribe Suboxone beyond three-day "bridge" orders.[5]

UAPD requested to bargain, and the parties began ISUDT/MAT negotiations on October 3, 2019. At the parties' first bargaining session, UAPD proposed, among other items, that PCPs trained in treating ISUDT/MAT patients should receive a pay differential. CCHCS responded two months later, stating that the parties should bargain any economic proposals in negotiations for a successor Memorandum of Understanding (MOU). However, during the parties' subsequent MOU negotiations, CCHCS reversed course and stated that ISUDT/MAT bargaining was the appropriate forum for discussing proposed compensation adjustments related to those programs.

During the first year of the parties' ISUDT/MAT negotiations, CCHCS took a consistent, two-part position in its proposals: (1) Unit 16 employees must attend all

[4] PCPs must hold a license to practice medicine in California. In 2006, prior to the facts relevant to this case, CCHCS also began requiring newly hired PCPs to hold a certification in internal medicine or family medicine. CCHCS permitted incumbent PCPs who lacked such certification to remain non-certified, but they would then not benefit from a pay raise associated with certification.

[5] A bridge order allows a physician to provide continuity of care and prevent withdrawal symptoms before the patient sees a physician who holds an X-Waiver.

assigned SUD training and generally must continue MAT prescriptions for patients already on MAT;[6] and (2) at least for the time being, no Unit 16 employee had to obtain an X-Waiver or initiate MAT for patients with SUD, unless and until the employee feels competent to do so. CCHCS further proposed that the parties should reopen negotiations if CCHCS sought to require employees to obtain an X-Waiver and/or initiate MAT for patients with SUD. As part of its position, CCHCS claimed that it had no duty to bargain over mandatory trainings, but stated it did have a duty to bargain over any requirement that PCPs obtain X-Waivers to prescribe SUD medication.

UAPD did not agree with CCHCS's overall proposal and filed this unfair practice charge alleging that CCHCS was violating its duty to bargain. UAPD did, however, agree to CCHCS's proposal regarding mandatory SUD training.

PERB's Office of the General Counsel issued a complaint against CCHCS in June 2020. On October 20, 2020, three months before the formal hearing on the complaint commenced, CCHCS wrote UAPD as follows:

> "This is to provide a status of the [ISUDT] Program and the negotiations associated with the program that have been taking place since October 2019.
>
> "As you are aware, [CDCR] and [CCHCS] launched the ISUDT Program as part of their legal obligation to provide constitutionally mandated health care to the inmate/patient population. The CDCR and CCHCS developed the program in response to the severity of overdoses and increase[d] deaths in the institutions tied to opioid abuse. The program was implemented in January 2020 targeting patients who

[6] As the ALJ noted, the record is unclear as to whether continuing existing prescriptions is the same as ordering three-day bridge prescriptions.

enter prison already on [MAT], patients already in prison categorized as high risk and patients who are anticipating release from prison and will be transitioning to their communities.

“Early in the spring, factors began to impact the ISUDT program. COVID-19 played a large role in the evolution. Cognitive Behavioral Interventions (CBI) [were] placed on hold until alternative plans could be identified and implemented, and the expedited release of inmate/patients impacted the initial ISUDT focus group. However, during COVID-19, there was an unforeseen increase in the number of inmate/patients needing to participate in the program.

“Specifically, the main factors driving the higher volume of patients include:

- “Not limiting patient access to Addiction Medicine providers. Rather any patient at higher risk for morbidity and mortality related to Opioid Use Disorder/Alcohol Use Disorder is being referred to the ISUDT program and for MAT evaluations; and

- “Majority of patients assessed, are accepting MAT. Rather than the projected 50% acceptance rate, ISUDT program acceptance rate is approximately 90%.

“Because of these changes, CCHCS will be expanding the training to all [PCPs] to allow for PCPs to manage stable patients on their panels. CCHCS previously informed UAPD that, as we rolled this program out there would be an increase, however, there is an urgent need to operationalize this statewide to ensure proper care is provided to the program participants. The training will continue to be Didactic courses and mentoring by the Addiction Medicine Central Team and the institution Champions. This will allow all staff to provide services to ISUDT patients on a statewide basis.

“In addition, CCHCS now needs full PCP participation in the management of ISUDT patients on their panels including

> the prescribing of MAT. As discussed several times at the table, CCHCS could not close the negotiations without the ability to come back to UAPD should the need arise to require the PCPs to obtain an X-Waiver. Based on the rapid growth of the program there will be an expectation for all [physicians and surgeons] to obtain their X-Waiver by June 30, 2021, in order to maintain their privileging and credentialing. As this negotiation table is still open, it is the intent of CCHCS to address this change in position at our next scheduled meeting date."[7]

The parties held their next bargaining session on October 28, 2020. At that session, consistent with the October 20 letter, CCHCS proposed that PCPs must obtain X-Waivers and begin fully providing MAT by June 30, 2021.

UAPD made a counterproposal when the parties held their next bargaining session on December 2, 2020. Among other items, UAPD proposed that the X-Waiver and associated new duties would be mandatory only for employees hired on or after July 1, 2021. In response, CCHCS stated it was a "management decision" that all PCPs must obtain X-Waivers and participate in MAT, and CCHCS would not negotiate over that decision. Although the parties met three more times, the record does not indicate that CCHCS changed its position on bargaining over X-Waivers and participation in MAT.

---

[7] In the proposed decision, the ALJ labeled this letter the "October 20 directive" and concluded that it unilaterally directed PCPs to obtain X-Waivers and begin fully providing MAT. The letter certainly changed CCHCS's bargaining position. Standing alone, however, it was not necessarily a "directive." On the one hand, the letter notified UAPD of an "expectation" that employees would need to obtain X-Waivers in the following eight months. But CCHCS apparently did not send the letter to employees and, overall, the letter largely indicates that CCHCS remained willing to bargain over this issue. We therefore refer to CCHCS's letter as simply the "October 20 letter."

Meanwhile, the ALJ held six non-consecutive days of hearing beginning on January 25, 2021. The parties presented their final witnesses and exhibits on the last hearing day, June 21, 2021, which was shortly before the deadline for PCPs to obtain X-Waivers and begin fully providing MAT.

CCHCS notified employees that the deadline to obtain X-Waivers was June 30, 2021, and thereafter CCHCS continued to insist on that deadline. This is clear based on testimony from CCHCS Deputy Director for Medical Services Renee Kanan, CCHCS negotiator Jan Sale, and Unit 16 PCP Steven Sabo. We also take administrative notice of the receiver's June 2021 report to the federal district court in *Plata* and related cases, wherein he stated that CDCR "has required all Medical Services providers" to obtain X-Waivers from the DEA. (https://cchcs.ca.gov/wp-content/uploads/sites/60/TR/T47_20210601_TriAnnualReport.pdf, p. 5 [as of June 23, 2022].) Thus, while the October 20 letter was not in and of itself a directive to employees, CCHCS did ultimately require PCPs to obtain X-Waivers and begin fully providing MAT by on or about July 1, 2021.[8]

DISCUSSION

Although the Board reviews exceptions to a proposed decision de novo, to the extent that a proposed decision adequately addresses issues raised by certain exceptions, the Board need not further analyze those exceptions. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 5.) The Board also need not address alleged

[8] Federal rules regarding X-Waivers changed while the parties litigated the case. Effective April 2021, PCPs no longer needed X-Waivers to prescribe Suboxone for up to 30 patients. CCHCS, however, required PCPs "to be X-Waived" to prescribe Suboxone to at least 100 patients by no later than June 30, 2021.

errors that would not impact the outcome. (*Ibid*.) To the extent an ALJ assesses credibility based upon observing a witness in the act of testifying, we defer to such assessments unless the record warrants overturning them. (*Los Angeles Unified School District* (2014) PERB Decision No. 2390, p. 12.)

Here, the ALJ found that CCHCS had no duty to bargain over its decision to institute the ISUDT and MAT programs, but was required to bargain over the potential effects thereof, including whether PCPs: (1) must complete X-Waiver training and obtain an X-Waiver; (2) must fully provide MAT; and (3) would receive a salary increase in exchange for obtaining an X-Waiver and providing MAT. In finding that management had to bargain over these topics, the ALJ first determined that CCHCS implemented materially new qualifications and job duties that were not reasonably comprehended within PCPs' existing duties. The ALJ then held that CCHCS was not privileged to implement changes before completing effects negotiations because CCHCS failed to satisfy the first element of the three-part test set forth in *Compton Community College District* (1989) PERB Decision No. 720, pp. 14-15 (*Compton*). As a remedy, the ALJ principally ordered CCHCS to rescind its directive requiring PCPs to obtain an X-Waiver and provide MAT, make employees whole, and resume bargaining upon request.

Because UAPD filed no exceptions, it has now acceded to the ALJ's conclusion that CCHCS had no duty to bargain over its decision to offer ISUDT and MAT services, and instead had to bargain only over that decision's effects on employment terms and conditions. Moreover, CCHCS has declined to argue that its MOU with

UAPD permitted it to materially change job duties or qualifications. We express no opinion on these waived arguments.[9]

Accepting the conclusions to which neither party excepted, our remaining task is to determine whether the Dills Act required CCHCS to bargain about the new programs' effects on employment terms and conditions, and, if so, whether CCHCS complied with that duty. In Parts I-V below, we address the issues that CCHCS has raised in its five sets of exceptions. Where applicable, we note the differences between our analysis and the proposed decision, as well as between our remedial order and the ALJ's proposed order.

I. Exception Alleging that CCHCS's New Requirements Did Not Materially Change PCPs' Terms or Conditions of Employment

A charging party can establish that new job duties materially deviated from the status quo by showing that new duties or assignments are not "reasonably comprehended" within employees' prior duties or assignments. (*Cerritos Community College District* (2022) PERB Decision No. 2819, pp. 30-31 (*Cerritos*) [judicial appeal pending].) "Reasonably comprehended" is an objective standard that refers to what a reasonable employee would comprehend based on all relevant circumstances, including, but not limited to, past practice, training, and job descriptions. (*County of Santa Clara* (2022) PERB Decision No. 2820-M, p. 6, citing *Rio Hondo Community College District* (1982) PERB Decision No. 279, pp. 17-18 [while catchall language in job description does not overcome evidence of contrary past practice, PERB interprets

[9] Pursuant to PERB Regulation 32300, subdivision (e), the Board considers issues not raised in exceptions only where there is good cause to do so.

job descriptions in the context of employees' overall role].) For instance, the Board has found new duties were not reasonably comprehended within an existing assignment when they required employees to obtain additional credentialing. (*County of Santa Clara*, *supra*, PERB Decision No. 2820-M, p. 6, citing *Mt. San Antonio Community College District* (1983) PERB Decision No. 297, p. 11 (*Mt. San Antonio*).)

An employer also must bargain if it materially alters employees' workload. (*County of Santa Clara*, *supra*, PERB Decision No. 2820-M, pp. 5-6 & fn. 4; *Cerritos*, *supra*, PERB Decision No. 2819, p. 30; *County of Kern* (2018) PERB Decision No. 2615-M, p. 10 & adopting proposed decision at p. 11.) Because this is a separate inquiry from whether new duties were reasonably comprehended within existing duties, a charging party need only show that the workload change was material. (*County of Santa Clara*, *supra*, PERB Decision No. 2820-M, p. 6, fn. 4.) Thus, a change in workload may be found even when the nature of duties assigned does not materially change—for instance, if an employer assigns fewer employees to perform a steady amount of work. (See, e.g., *Fullerton Union High School District* (1978) PERB Decision No. 53, pp. 7-8.) The converse can also be true: an employer can impose materially new duties without increasing overall workload, as alleged in *County of Santa Clara*, *supra*, PERB Decision No. 2820-M. However, these two types of material changes often occur in concert with one another, as UAPD alleges in this case, and establishing one can aid in proving the other. For instance, if new duties increase employee workload, that tends to show that the new duties may not have been reasonably comprehended within existing duties.

This case also requires us to consider a third alternative means of showing a material change on a bargainable subject: An employer must bargain before materially

changing a job qualification unless the change merely complies with an externally imposed change in law. (*County of Sacramento* (2020) PERB Decision No. 2745-M, p. 17.) While a newly-required qualification is subject to bargaining if it is material and not required by an external change in law, it also may constitute evidence that the employer has materially changed duties. In other words, if an employer requires a new qualification while altering duties, the new qualification tends to show that the new duties were not reasonably comprehended within existing duties. (*County of Santa Clara*, *supra*, PERB Decision No. 2820-M, p. 6; *Mt. San Antonio*, *supra*, PERB Decision No. 297, p. 11.)

To apply these standards, we compare new duties, qualifications, or workload with the status quo, and we determine if a reasonable employee would find the changes to be material. (*County of Santa Clara*, *supra*, PERB Decision No. 2820-M, p. 8.) In arguing that it did not make material changes, CCHCS claims the ALJ made five factual errors and applied incorrect legal reasoning. We consider each argument in turn. Although we adjust the ALJ's findings to hew them more precisely to the record, and we alter the ALJ's analysis to better match precedent, we ultimately conclude that CCHCS made material changes to PCPs' terms and conditions of employment.

A. Factual Findings as to CCHCS's New Requirements for PCPs

1. First factual finding

CCHCS asks us to overturn the ALJ's finding that new job duties and qualifications took effect on July 1, 2021. CCHCS first points out that, before this date, PCPs could participate in the MAT and ISUDT programs on a partial basis. CCHCS then notes that the evidentiary record closed on June 21, 2021, claiming that the

record therefore did not include evidence showing what happened on or after July 1, 2021. CCHCS returns to a similar vein of argument in a later exception, claiming that the ALJ's findings contain "a factual impossibility" in that the record closed nine days before the implementation date and therefore cannot show that CCHCS did, in fact, implement new job qualifications and duties. On the record before us, this argument is legally and factually untenable.

A change in policy occurs on the date the employer makes a firm decision, even if the decision does not take effect immediately or never takes effect. (*City of Milpitas* (2015) PERB Decision No. 2443-M, p. 15.) Here, there is more than sufficient evidence that, well before the record closed, CCHCS had firmly decided that PCPs would take on the new duties and obtain new qualifications by July 1, 2021.

While the October 20 letter did not necessarily constitute a "directive" to employees, CCHCS's position crystalized on December 2, 2020, when CCHCS stated it was a non-negotiable management decision that all PCPs must obtain X-Waivers and begin fully providing MAT. CCHCS further indicated that its next step was to notify employees of the new requirements. At the PERB hearing, CCHCS admitted that it in fact required PCPs to submit their X-Waiver applications before June 2021 given that the application process generally takes between four and six weeks. Testimony from Kanan, Sale, and Sabo further proves that CCHCS maintained its announced deadline for PCPs to become X-Waived and begin providing MAT. Sale, for instance, testified that while CCHCS/CDCR originally anticipated most PCPs would voluntarily obtain X-Waivers, not enough PCPs were applying. For that reason, he continued, "we then had to put out that we were going to require it by a certain date. We just couldn't wait any longer for these doctors to get on board." Finally, the receiver's June 2021 report

similarly leaves no doubt as to what occurred, as he wrote that CDCR "has required all Medical Services providers to obtain a [DEA] X-Waiver." Thus, while CCHCS notes that it allowed partial participation in MAT before July 1, 2021, this does not counter the overwhelming evidence that well in advance of June 30, 2021, CCHCS established that date as a firm deadline for its changes.

2. Second factual finding

CCHCS next excepts to the ALJ's finding that "'the prescribing of MAT' is the same thing as requiring PCPs to prescribe Suboxone." CCHCS notes, for instance, that requiring a PCP to obtain an X-Waiver does not automatically require the PCP to prescribe SUD medication to any given patient.

CCHCS fails to acknowledge the context of the ALJ's finding. The ALJ found that: (1) CCHCS chose to use Suboxone as the primary medication component of MAT; and (2) "MAT also includes the use of cognitive behavior therapy (CBT) or cognitive behavior intervention (CBI)." Based on these findings, the ALJ reasoned that prescribing Suboxone was not reasonably comprehended within PCPs' existing job duties because, unlike other medications, PCPs must provide CBI and teach patients coping skills when prescribing Suboxone. CCHCS argues the ALJ was incorrect because PCPs may prescribe Suboxone based on their professional judgment, but they need not do so. We affirm the ALJ's inference that a PCP cannot fully participate in MAT without prescribing Suboxone on at least some occasions. CCHCS provided no evidence that fully providing MAT would be a de minimis part of PCPs' duties. Rather, the record supports the inference that CCHCS materially changed PCPs' duties.

3. Third factual finding

CCHCS contends the ALJ erred in finding that: (1) prescribing SUD medication differs from prescribing other medication in that it requires physicians to teach coping skills and provide CBI, including motivational interviewing; and (2) UAPD-represented PCPs do not have the time to conduct lengthy motivational interviews with each patient. The parties largely agree that the standard of care for treating SUD involves medication, CBI, and other supports, and they also agree that ISUDT and MAT programs involve far more than medication. However, the parties dispute the extent of the burden on PCPs.

While CCHCS and CDCR expect counselors to focus on CBI and CBT, the record nonetheless shows that PCPs were reasonable in understanding that CCHCS also expected them to provide ISUDT and MAT patients with materially new services beyond prescribing medication. Indeed, CCHCS's Care Guide for SUD provides that behavioral modification is the "cornerstone" for treatment, and PCPs are expected to "[u]se motivational interviewing to encourage initial and ongoing participation." Furthermore, inmate patients were often not receiving CBI or CBT from counselors, and group therapy sessions were often not available. Most importantly, existing PCP schedules generally provided 15-minute sessions, but physicians would frequently need to spend far more time than that to allow for motivational interviewing and other tasks associated with prescribing SUD medication.[10]

[10] Unit 16 PCP Thomas Bzoskie testified that a physician who prescribes SUD medication must take the time to understand the psychology behind their patients' addiction, a task that is unlike the primary care he provided in the past. Unit 16 PCP Alphonso Swaby similarly explained the difference in prescribing SUD medication, noting that he had to follow a time-consuming whole person, "360 degree" approach.

In sum, even if CCHCS did not impose on PCPs an absolute requirement of providing CBI and teaching coping skills to every patient with SUD, the ALJ made no error that would alter the outcome of this case. PCPs reasonably understood the new expectations as materially increasing their duties and workload, including new duties that were not reasonably comprehended within their previous duties.

4. Fourth factual finding

CCHCS excepts to the ALJ's finding that CCHCS considered modifying PCPs' job duty statement to include addiction medicine as a desirable qualification for new hires, and that it is therefore reasonable to infer CCHCS was aware that the existing job duty statement did not cover such work. While there was evidence regarding a proposed or actual revised duty statement, the record does not include such a revision and we therefore decline to speculate about its contents. Furthermore, it is unclear to which PCP positions the proposed or actual new duty statement might apply. Because this unclear and unpersuasive evidence does not support the ALJ's finding, we grant CCHCS's exception on this point.

5. Fifth factual finding

CCHCS excepts to the following passage in the proposed decision: "The weight of the evidence demonstrates that addiction medicine is a special area of practice, not within the expertise of a general practice PCP." CCHCS contends this finding "incorrectly infers that CCHCS is requiring PCPs to act as Addiction Specialists." Rather, CCHCS argues, the MAT-related duties it requires of PCPs "fall squarely within the expertise of a general practice PCP" and are "consistent with the community standard of care." CCHCS points to evidence that physicians in office-based settings can prescribe SUD medication, as well as evidence that other primary health care

delivery systems are increasing access to MAT.

UAPD, for its part, called six PCPs to testify. Each stated that providing MAT falls outside the prior scope of their practice. For instance, Christine Kuo testified that PCPs have no addiction medicine residency training and therefore have a "big gap" to cross, especially without the help of mental health care providers, to successfully treat addiction.[11]

We do not see these competing claims as mutually exclusive. It is entirely plausible that: (1) addiction medicine is a recognized specialty area; (2) primary care physicians outside of CCHCS nonetheless may find themselves responsible for treating SUD (especially when there is a dearth of other options); and (3) PCPs at CCHCS had largely not done so before the events at issue here. There is no cause for us to delve further into the extent to which, in modern American medical practice, addiction medicine may fall partially within primary care and/or partially outside of it. Further analysis would not substantially aid our inquiry, which involves applying precedent to determine whether *reasonable PCPs at CCHCS* would view their employer's new requirements as materially changing *their* qualifications, duties, and/or workload.

In answering this question, the CCHCS job descriptions for PCPs have limited utility given that they do not attempt to detail which medical conditions PCPs must treat on their own versus which conditions PCPs may refer to specialists in whole or in

[11] Although it is possible to obtain medical board certification in addiction medicine, CCHCS does not require PCPs to have any such certification. For this reason, testimony regarding addiction medicine residency training and medical board certification bears little weight.

part. Past practice thus becomes even more relevant. (*County of Santa Clara*, *supra*, PERB Decision No. 2820-M, p. 6 [catchall language in a job description does not outweigh contrary past practice].)

Turning to the relevant past practice, CCHCS did not require PCPs to obtain X-Waivers until July 1, 2021. If the new X-Waiver requirement stood alone, there may have been no bargaining obligation depending on the extent to which the new qualification materially altered PCPs' existing qualification requirements. But the X-Waiver requirement did not stand alone. Rather, it was integrally related to a significant new set of responsibilities that PCPs had not previously performed. In the past, mental health professionals had primarily overseen treatment for SUD and patients' other mental health needs; CCHCS significantly changed duties and increased workload by requiring PCPs to take on primary responsibility for SUD, a complex, immediately life-threatening mental health condition. Accordingly, while we do not affirm the proposed decision to the extent it arguably found that addiction medicine falls outside of primary care in American medical practice, this adjustment leaves intact the well-supported fact that CCHCS implemented material changes to UAPD-represented PCPs' terms and conditions of employment.

B. Legal Conclusions as to CCHCS's New Requirements for PCPs

In arguing that it merely assigned PCPs duties that were reasonably comprehended within their prior duties, CCHCS primarily relies on the last of its above-discussed factual contentions. Specifically, CCHCS argues that providing MAT is "within the scope and expertise of a general practice PCP, and not reserved for addiction specialists," and that having PCPs do so "is the preferred approach within the medical community." (Original underscore.) As discussed above, however,

arguments about current American medical practice bear substantially less weight than arguments about past practice at CCHCS.

Beyond its argument about the allegedly broad nature of primary care, CCHCS selectively cites past PERB decisions to argue for a broad scope of what constitutes existing job duties. But even were we to accept those select decisions as the sum of our precedent, we would still affirm the ALJ. For instance, CCHCS repeatedly cites *Davis Joint Unified School District* (1984) PERB Decision No. 393 (*Davis*), a decision that does not establish a broad management right to change job duties. (See *Cerritos*, *supra*, PERB Decision No. 2819, p. 31 [*Davis* cannot be broadly construed].) *Davis* does not help CCHCS, as it explicitly notes that management must bargain if it assigns tasks that are not reasonably understood to be among existing duties, and, even more importantly for this case, it cautions that increases in "the quantity of work" must be bargained. (*Davis*, *supra*, PERB Decision No. 393, p. 26 & fn. 11, original underscore.) Here, as discussed above, CCHCS assigned new duties that materially increased PCPs' workload.

Other decisions upon which CCHCS relies are similarly unavailing given that the instant case involves an increase in workload. For instance, in *Mt. San Antonio*, *supra*, PERB Decision No. 297, the Board distinguished between assigning librarians and counselors to teach classes integrally related to their specialties versus having them learn to teach new classes that were further afield from what they had previously taught. (*Id*. at pp. 10-11.) There was no allegation that such changes materially altered the total amount of work the school district expected employees to perform. (*Ibid*.)

Because the record here shows a workload increase, the ALJ ultimately reached a correct conclusion irrespective of whether assigning PCPs to treat SUD is

akin to forcing librarians and counselors to learn to teach new classes further afield from what they had previously taught. However, as an alternate basis for our holding, we find that CCHCS's new requirements, in both their premise and design, were, in fact, sufficiently similar to a school employer assigning courses far enough outside employees' prior scope of work that they must obtain new skills and certifications. The new requirements significantly shifted SUD treatment away from specialists and toward PCPs. While PCPs outside the prison system may have experience treating SUDs, UAPD-represented PCPs reasonably viewed these duties as new.

Accordingly, absent a contractual waiver of the right to bargain, CCHCS had two primary choices for imposing the new requirements. First, it could bargain in good faith to impasse or agreement, which CCHCS admits it did not do. Second, it could comply with the requirements of *Compton*, *supra*, PERB Decision No. 720, pp. 14-15. We turn now to CCHCS's exceptions alleging that it complied with *Compton*.

II. Exceptions Alleging the ALJ Erred in Finding that CCHCS Unlawfully Implemented Effects of the ISUDT and MAT Programs Prior to Reaching Impasse or Agreement

An employer normally may not implement a decision while effects bargaining continues and instead must wait until the parties have reached agreement or impasse over the negotiable effects of the decision. (*County of Santa Clara* (2021) PERB Decision No. 2799-M, p. 25.) There is an exception, however, if the employer establishes each of the following three elements: (1) the employer based the implementation date on an immutable deadline or an important managerial interest, such that a delay in implementation beyond the date chosen would effectively undermine the employer's right to make the decision; (2) the employer gave sufficient

advance notice of the decision and implementation date to allow for meaningful negotiations prior to implementation; and (3) the employer negotiated in good faith prior to and after implementation. (*Id*. at pp. 25-26; *Compton*, *supra*, PERB Decision No. 720, pp. 14-15.)

The three *Compton* elements reflect, in part, that one critical purpose of effects bargaining is to allow the parties to discuss alternative means of achieving the employer's goals. (*County of Santa Clara*, *supra*, PERB Decision No. 2799-M, p. 27; *Anaheim Union High School District* (2016) PERB Decision No. 2504, pp. 10-11, 15 & adopting proposed decision at p. 41; *City of Sacramento* (2013) PERB Decision No. 2351-M, p. 22.) Indeed, that is the most important reason for the general rule prohibiting an employer from implementing a decision while negotiations continue, since once an employer implements, shifting to other alternatives becomes more difficult. And where the first *Compton* element is satisfied, it remains paramount for the employer to honor the bargaining process by fully discussing potential compromises before and after the implementation date.

CCHCS does not contend it reached impasse or agreement in its negotiations with UAPD. Instead, CCHCS claims that *Compton*, *supra*, PERB Decision No. 720, forms the "centerpiece" of its position and that it established each *Compton* element. We consider each element in turn.

A. First *Compton* Element

The record amply supports the ALJ's finding that there was no immutable deadline by which CCHCS had to require PCPs to obtain X-Waivers and begin fully providing MAT. Unique circumstances in this case raise a question as to whether there was nonetheless an "important managerial interest, such that a delay in implementation beyond the date chosen would effectively undermine the employer's right to make the decision." (*Compton*, *supra*, PERB Decision No. 720, pp. 14-15.)

First, federal courts have found "serious constitutional violations in California's prison system." (*Brown v. Plata* (2011) 563 U.S. 493, 499; see also *id*. at pp. 499-510 [summarizing, as of 2011, proceedings in *Plata* and one of the other long-running cases pertaining to allegedly unconstitutional conditions in California prisons].) The federal district court in *Plata* directed the State to meet its constitutional obligations by providing inmates with SUD care that matches the standard available in the community. CCHCS designed the ISUDT and MAT programs to meet this standard. Although there was no deadline imposed on CCHCS, and it enjoys discretion as to the nature and extent of the programs, the *Plata* court mandate establishes, at least, that CCHCS had an important managerial interest. Moreover, at the outset of the COVID-19 pandemic, it became impractical for CCHCS to provide CBI as would normally be appropriate. Furthermore, approximately 90 percent of eligible patients began accepting MAT, which far exceeded expectations. While these factors added to the urgency, even in an emergency an employer must bargain in good faith as time allows. (*Oxnard Union High School District* (2022) PERB Decision No. 2803, p. 45.)

Ultimately, there is no cause for us to determine whether delaying implementation beyond the date CCHCS chose would have undermined the State's

right to decide how to implement the court's order, because, as discussed *post*, CCHCS cannot establish that it bargained in good faith and therefore has no valid *Compton* defense.[12]

B. Second and Third *Compton* Elements

The remaining *Compton* elements focus on the employer's conduct. An employer claiming urgency must provide early notice to the extent reasonably possible and then must bargain in good faith. As discussed *ante*, doing so honors the process to the fullest extent possible, which may allow compromise alternatives to emerge either before or after the implementation date.

CCHCS first provided UAPD with notice and an opportunity to bargain beginning in July 2019. While the more important notice date was October 20, 2020—when CCHCS notified UAPD that it sought to make the new job duties and qualifications mandatory—the initial July 2019 notice did get the ball rolling. It allowed information exchange, as well as multiple sessions at which CCHCS informed UAPD that it might later propose making the changes mandatory, though CCHCS promised the parties could engage in renewed bargaining were that to occur.

After CCHCS sent UAPD the October 20 letter, the parties held just one session in which CCHCS was willing to bargain over its revised position that new job

[12] While CCHCS points to the *Plata* litigation as a source of urgency under *Compton*, it has not argued that any of its new requirements were externally imposed. Nor does the record support such an argument. CCHCS had a variety of options for staffing the ISUDT and MAT programs, including using addiction specialists or having only a subset of PCPs fully provide MAT. Such alternatives may have been less preferable, and CCHCS may have been right to eschew them. But the existence of such possibilities prevents CCHCS from claiming its decisions were non-discretionary ones mandated by an outside entity.

duties and qualifications should be mandatory for all PCPs. That session, on October 28, 2020, was the parties' eighth overall, and CCHCS used the session to present its first proposal fleshing out its revised position.

The next time the parties met, for their ninth overall session on December 2, 2020, UAPD presented its first proposal countering management's October 28 proposal. UAPD proposed steps that could, at least in part, satisfy management's stated concern, including mandatory new job duties and qualifications for new hires combined with a monetary incentive for existing PCPs to volunteer for the new duties and qualifications.

At that point, if CCHCS found nothing to work with in UAPD's proposal and could not envision any other possibility beyond its own proposal, it could have lawfully engaged in hard bargaining, while making sure to avoid a take-it-or-leave-it attitude or otherwise bargain in bad faith. (See *City of San Ramon*, *supra*, PERB Decision No. 2571-M, p. 8 [noting the difference between lawful hard bargaining and bad faith bargaining].) Instead, CCHCS made it impossible to search for compromise alternatives and otherwise negotiate in good faith, declaring it was a "management decision" that all PCPs obtain X-Waivers and participate in MAT, and that CCHCS would not negotiate over that decision. This outright refusal to bargain was a per se failure to bargain in good faith. (*County of Sacramento*, *supra*, PERB Decision No. 2745-M, pp. 24-25 [wrongly claiming a certification requirement is a management decision, or is not bargainable, constitutes a per se bargaining violation]; accord *Regents of the University of California* (2021) PERB Decision No. 2783-H, pp. 30-31;

Region 2 Court Interpreter Employment Relations Committee and California Superior Courts of Region 2 (2020) PERB Decision No. 2701-I, p. 37.)[13]

Even had CCHCS not committed a per se violation, its conduct also constituted bad faith under the totality of the circumstances. This is so because CCHCS incorrectly labeled a proposal as non-bargainable, failed to clarify whether the various proposals and topics at issue were bargainable, and failed to treat negotiations seriously and in good faith. (*County of Sacramento*, *supra*, PERB Decision No. 2745-M, pp. 24-25; see also *Cerritos*, *supra*, PERB Decision No. 2819, p. 23, fn. 9 & pp. 37-38; *City of Palo Alto* (2017) PERB Decision No. 2388a-M, p. 33; *City of Selma* (2014) PERB Decision No. 2380-M, p. 16.)

Declaring that it would not bargain over the new mandatory job duties and job qualifications was, in part, a surprising break from the past, wherein CCHCS had acknowledged a duty to bargain over those topics while reserving only mandatory training as a topic over which it refused to bargain. But it also was not the first time CCHCS acted unlawfully vis-à-vis ISUDT/MAT negotiations. Indeed, CCHCS had previously engaged in a bait-and-switch over UAPD's rational attempts to negotiate a

[13] When it stated its refusal to bargain in December 2020, CCHCS told UAPD it only had to bargain the "effects" of its allegedly non-bargainable decision to require PCPs to obtain X-Waivers and fully provide MAT. That conflicted with CCHCS's repeated prior admissions that it had to bargain over the negotiable effects of its decision to offer the ISUDT and MAT programs, including any proposal it might make to require PCPs to obtain an X-Waiver and fully provide MAT. CCHCS admitted this repeatedly, including in its October 20 letter. There, CCHCS noted it had always maintained that, to close a deal, it would need to have the right to reopen negotiations if it found the need to make participation mandatory. CCHCS was correct in prior admissions, as the extensive precedent discussed above requires an employer to bargain before materially changing job duties, workload, and/or qualifications.

pay differential that would incentivize and/or reward PCPs for taking on the new duties and qualifications. Specifically, as noted *ante*, CCHCS first told UAPD that the parties should bargain any economic proposals in negotiations for a successor MOU, yet once those negotiations commenced, CCHCS reversed course and stated that ISUDT/MAT bargaining was the appropriate forum for discussing proposed compensation adjustments related to those programs. CCHCS thus mirrored the unlawful conduct in *County of Sacramento*, *supra*, PERB Decision No. 2745-M, where the employer told the union that it needed to propose wage increases for a new certification requirement during negotiations specific to the certification rather than during MOU negotiations, and when the union did so the employer did not consider the proposal. (*Id*. at pp. 24-25.)[14]

To defend its conduct, CCHCS blames UAPD for delaying the parties' effects negotiations. The record partially supports this allegation while also raising questions about CCHCS's lack of urgency. Indeed, for such an important matter, CCHCS likely should have proposed to bargain day-after-day, on a continuous or almost-continuous basis, to impasse or agreement. However, even if UAPD bears more responsibility than CCHCS for the parties holding only 10 ISUDT/MAT bargaining sessions between

[14] As in *County of Sacramento*, *supra*, PERB Decision No. 2745-M, we need not consider whether a party bargains in bad faith if it insists on negotiating an issue in only one of two sets of negotiations but avoids bad faith conduct in its preferred bargaining forum. Such conduct is less problematic than that at issue here and in *County of Sacramento*, but depending on the circumstances, it could amount to insistence on piecemeal negotiations (*City of San Jose* (2013) PERB Decision No. 2341-M, pp. 19-20, 24-32 & 36-39) or refusing to bargain over ground rules for negotiations (*City of Arcadia* (2019) PERB Decision No. 2648-M, pp. 35-36; *County of Orange* (2018) PERB Decision No. 2594-M, pp. 8-16).

July 2019 and December 2020, such delay by a charging party is at most one relevant factor under a totality-of-conduct analysis. (*Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M, p. 52.) It does not completely excuse bad faith conduct by a respondent, much less permit an outright refusal to bargain. Here, it would not permit CCHCS's bad faith in bargaining compensation, nor the per se violation that CCHCS committed when it declared mandatory new job duties and qualifications to be non-bargainable.

For the foregoing reasons, CCHCS did not satisfy the third *Compton* element. Accordingly, CCHCS was not privileged to implement new mandatory job qualifications and duties before reaching impasse or agreement.[15]

III. Exception Alleging the ALJ Erred in Finding that CCHCS Unlawfully Directed PCPs to Obtain X-Waivers and Begin Fully Providing MAT by July 1, 2021

CCHCS makes three arguments as to why the ALJ allegedly erred in finding that it violated the Dills Act in requiring PCPs to obtain X-Waivers and begin fully providing MAT by July 1, 2021. We have already rejected two of these arguments: (1) that CCHCS had no duty to bargain because it only assigned PCPs new duties that already fell within their existing job responsibilities; and (2) that the record cannot show CCHCS unlawfully implemented changes, since the record closed nine days before the deadline for all PCPs to obtain X-Waivers and begin fully providing MAT.

For its third argument, CCHCS claims that it satisfied its duty to bargain by providing UAPD with approximately eight months' advance notice of its decision and

[15] When CCHCS curtailed good faith negotiations on December 2, 2020, this also meant that CCHCS violated the second *Compton* element in that there was insufficient time for meaningful bargaining.

then bargaining on four or five occasions thereafter. This argument ignores critical facts and fundamental labor law principles. As explained above, the Dills Act permitted CCHCS one or more avenues to impose its decision absent an agreement. As one option, CCHCS could have bargained in good faith to impasse, but it does not claim to have done so. While the parties could potentially have reached impasse by early 2021, CCHCS cut short negotiations in bad faith before any good faith impasse could be reached, when it suddenly declared the key subjects to be non-bargainable on December 2, 2020. Relatedly, and equally importantly, CCHCS never declared impasse. Among other problems with this approach, CCHCS deprived UAPD of its Dills Act right to have PERB appoint a mediator to assist with an impasse. (See § 3517 [parties "should include adequate time for the resolution of impasses"]; § 3518 [PERB shall appoint a mediator at the request of either party, or the parties may jointly select a mediator]; §§ 3519, subd. (e) & 3519.5, subd. (d) [each party must participate in good faith in mediation].)[16]

Alternatively, CCHCS could have implemented its decision without reaching impasse had it satisfied the *Compton* test. But CCHCS deviated egregiously from this standard via its unilateral, shifting directives as to where CCHCS would permit UAPD to raise the compensation issue, as well as by ultimately denying that it had any duty to bargain over the other key issues.

[16] Because CCHCS never declared impasse, it cannot, and does not, argue that it imposed new employment terms after impasse. Accordingly, there is no cause to address such issues. However, we note that an employer's right to impose terms after impasse depends on the employer having bargained in good faith throughout negotiations. (*County of Merced* (2020) PERB Decision No. 2740-M, pp. 21-22.)

IV. Exception Alleging the ALJ Erred in Finding that CCHCS Unlawfully Refused to Bargain Over UAPD's Proposal to Exempt from the New Mandates All PCPs Hired Prior to July 1, 2021

In this exception, CCHCS again asserts that it complied with its bargaining duty. While the argument fails largely for the same factual and legal reasons discussed above, we supplement our analysis given that CCHCS frames its argument differently in this exception. Rather than claiming that it satisfied its duty to bargain by providing UAPD with approximately eight months' advance notice of its decision and then bargaining on four or five occasions thereafter, in this exception CCHCS argues that it bargained "for almost two years" and provided "repeated explanations as to why it could not make participation in the ISUDT/MAT program voluntary" and "UAPD repeatedly passed duplicative proposals simply requesting to be exempt from the program."

For the first year of bargaining, CCHCS repeatedly made proposals that did not require PCPs to obtain X-Waivers and fully provide MAT unless they felt ready to do so. CCHCS stated that if this voluntary approach proved insufficient, the parties would later bargain any proposal to make such conditions mandatory. UAPD nonetheless continued to propose that participation in the ISUDT/MAT program be voluntary for all PCPs. On October 28, 2020, CCHCS made its first proposal that the changes become mandatory. When the parties next met, UAPD made a proposal that it had never made before, which would for the first time subject a fraction of PCPs (those hired after July 1, 2021) to the mandate. While this could have been an opening offer in a negotiation toward a compromise satisfying the concerns CCHCS expressed when it shifted its position, CCHCS shut down that possibility by responding that the matter

was not subject to negotiation. Either way, CCHCS had a duty to bargain in good faith, either to reach a good faith impasse or to avail itself of *Compton*. It had no right to unilaterally declare that the topic at hand was not bargainable.

In sum, CCHCS came under court order to provide constitutionally adequate care to inmates with SUD. Based on this mandate, CCHCS undertook bargaining over substantial new responsibilities it sought to place on PCPs. Despite the Legislature's decision to allocate hundreds of millions of dollars to this purpose, CCHCS did not propose to incentivize or reward PCPs for taking on such responsibilities. Instead, it repeatedly and illegally directed UAPD to raise such issues elsewhere. A year after the parties began bargaining, CCHCS gave notice that its new bargaining position was to make the new responsibilities mandatory rather than voluntary. However, when UAPD made its first counterproposal to that new position—proposing that the new responsibilities be mandatory for new hires and voluntary for others—CCHCS suddenly reversed course and denied its duty to bargain. It then implemented its changes without bargaining in good faith to impasse or agreement.

V. Remedy Issues

The Legislature has vested PERB with broad powers to remedy Dills Act violations and to take any action the Board deems necessary to effectuate the Act's purposes. (§ 3514.5, subd. (c); *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 198; *Mt. San Antonio Community College Dist. v. Public Employment Relations Bd.* (1989) 210 Cal.App.3d 178, 189-190; *City of San Diego* (2015) PERB Decision No. 2464-M, p. 42*,* affirmed *sub nom. Boling v. Public Employment Relations Bd.* (2018) 5 Cal.5th 898, 920.) In every case, the Board strives to exercise this discretion

prudently. Attentiveness to detail and circumstance has never been more important than in this case, with its backdrop of federal constitutional rights and oversight.

CCHCS's sole, narrow exception to the ALJ's proposed remedial order asks us to excise from the bargaining order the phrase stating that CCHCS must bargain "upon request by UAPD." According to CCHCS, the ALJ's phrasing implies that only UAPD, but not CCHCS, may request to bargain over future effects of the ISUDT/MAT program. Although we strongly doubt the ALJ intended the phrase "upon request by UAPD" to limit CCHCS's statutory right to request to meet and confer, in an abundance of caution given the importance of this case, we partially grant the exception and reword the bargaining order in a manner that leaves no room for such an interpretation. Indeed, following PERB precedent in effects bargaining cases, our order runs from the date any impacted employee began to experience harm until the earliest of: (1) the date the parties reach a fully-ratified, effective agreement as part of complying with their bargaining obligations; (2) the date the parties have reached a bona fide, good faith final impasse (including good faith participation in any post-impasse procedures that may be required or agreed upon); or (3) failure by UAPD to request negotiations or to bargain in good faith. (*County of Ventura* (2021) PERB Decision No. 2758-M, pp. 53 & 56.)

There is no other exception to the ALJ's proposed order before us, other than indirectly through CCHCS's challenges to liability. However, given that we have adjusted certain liability findings, and based on the unique nature of the case, we exercise our discretion to review and adjust the proposed order that CCHCS:

> "[r]escind the October 20, 2020 directive making it mandatory for PCPs to obtain an X-[W]aiver and provide

> MAT, including prescribing Suboxone to inmate patients, rescind any portion of a disciplinary action issued to a PCP for the violation of such mandates and remove such portion of the disciplinary action placed in the personnel file of the PCP, and make PCPs whole for any compensation lost resulting from these mandates, to be augmented by interest at a rate of 7 percent per year."

We first explain why we decline to order CCHCS to cease requiring PCPs to obtain X-Waivers and fully provide MAT. We then provide further guidance to the compliance officer in implementing the ALJ's make-whole remedy.

A. Recission

As noted above, neither the receiver nor the federal court specified a deadline by which CDCR and CCHCS must provide constitutionally adequate care for patients with SUD. Therefore, in directing that CCHCS bargain to impasse or agreement before it can resume requiring PCPs to obtain X-Waivers and fully provide MAT, the ALJ's proposed order technically did not infringe on any outside mandate. Nonetheless, we do not order recission because of the severe impact such an order would likely have on inmate patient health. Furthermore, we are confident that the compliance officer will thoughtfully implement our make-whole order, thereby creating conditions that are fair enough for bargaining to proceed, viz., conditions not overly tilted toward either side.

B. Make-Whole Compensation

A "finding by the Board that an unfair labor practice was committed is presumptive proof that at least some backpay is owed." (*Bellflower Unified School District* (2019) PERB Order No. Ad-475, p. 10.) Notwithstanding this presumption, in compliance proceedings the charging party bears the burden of proving damages caused by the respondent's unfair practice(s). (*Regents of the University of California*

(2021) PERB Decision No. 2755-H, p. 56.) The charging party, however, need not prove damages with precision. (*Bellflower Unified School District* (2022) PERB Decision No. 2544a, p. 26 [judicial appeal pending].) Rather, make-whole relief usually involves predictions and estimates, and thus approximating damages can meet the charging party's burden. (*City of Pasadena* (2014) PERB Order No. Ad-406-M, p. 14 (*Pasadena*).) We resolve uncertainties as to the amount owed against the wrongdoer. (*Id*. at p. 27.) Provided that an estimate has a rational basis and is not so excessive as to be punitive, it appropriately serves both compensatory and deterrent functions. (*Id*. at p. 13.)

When an employer fails to bargain to impasse or agreement before imposing mandatory additional duties, increased workload, or extra hours, without additional pay, PERB has ordered back pay and/or compensatory time off, irrespective of whether the employees' regular compensation is hourly or on a salary basis. (*Pasadena*, *supra*, PERB Order No. Ad-406-M, pp. 12-15 & adopting proposed compliance order at pp. 6-15; *Mark Twain Union Elementary School District* (2003) PERB Decision No. 1548, pp. 6-9 (*Mark Twain*); *Corning Union High School District* (1984) PERB Decision No. 399, p. 16-17 (*Corning*); see also *City of Culver City* (2020) PERB Decision No. 2731-M, pp. 26-27 & adopting proposed decision at pp. 55-56.)

The relevant line of cases begins with *Corning*, *supra*, PERB Decision No. 399. There, a school district converted teachers' preparation period to a mandatory teaching period, which increased the amount of evening and weekend time they spent preparing lesson plans. (*Id*. at pp. 4-6.) To remedy this violation, the Board ordered that the parties should bargain an appropriate means of providing compensatory time

off, and, if the parties were not able to reach an agreement, the school district must provide back pay. (*Id*. at pp. 10, 16-17.)

The Board took the same approach in *Mark Twain*, *supra*, PERB Decision No. 1548, where a school district lengthened teachers' work hours. (*Id*. at pp. 2-3.) Once again, the Board directed the parties to bargain over compensatory time off that "comports to the extra hours that each affected teacher actually worked," while ordering back pay at least for former employees, and for all employees if the parties cannot reach an agreement. (*Id*. at p. 9.)

More recently, in *Pasadena*, *supra*, PERB Order No. Ad-406-M, a city unilaterally implemented a new stand-by rotation for emergencies, which the compliance officer found imposed "mandatory additional duties for which [employees] were not paid." (*Id*. at pp. 7, 15 & adopting proposed compliance order at p. 6.) Acknowledging that it was impossible to determine what additional compensation (if any) the parties might have agreed upon had the city engaged in bargaining, the compliance officer and the Board nonetheless remedied the violation by approximating compensation based on comparator practices. (*Id*. at pp. 8-9, 23-27 & adopting proposed compliance order at pp. 11-14.)

Here, the ALJ's proposed order required CCHCS to "make PCPs whole for any compensation lost resulting from" having to obtain X-Waivers and begin fully providing MAT. This phrasing is akin to the underlying order in *Pasadena*, *supra*, PERB Order No. Ad-406-M, which directed the city to compensate employees "for financial losses, if any, that occurred as a direct result of the [c]ity's unilateral action." (*Id*. at pp. 3-4 & adopting proposed compliance order at p. 1.)

It is particularly appropriate to order make-whole relief until the parties complete good faith negotiations given that: (1) we do not order recission; (2) the Legislature allocated hundreds of millions of dollars specifically for the ISUDT program; and (3) when UAPD sought to obtain a fraction of those funds for PCPs who are integral to the ISUDT program, CCHCS responded via the unlawful bargaining conduct described above. With these circumstances in mind, we provide guidance to the compliance officer, and adjust the ALJ's make-whole order, as follows.

We order the parties to negotiate over appropriate retroactive compensation for the fact that CCHCS unilaterally assigned PCPs substantial new duties, thereby materially increasing their workload, without compensation and without either completing negotiations or satisfying precedent regarding early implementation. If the parties are unable to reach an agreement, the General Counsel or designee shall develop a record and establish the appropriate type and amount of compensation, which may include back pay, compensatory time off, or any combination thereof. The make-whole remedy shall be consistent with the record, precedent, and this decision. At present, we do not have before us adequate evidence to estimate the amount of extra time that PCPs spend on their new duties. Determining that amount is a matter for the parties to negotiate, or, absent agreement, it is a matter for compliance proceedings. However, we know that UAPD proposed a five percent salary differential. UAPD may or may not have intended that proposal as merely an opening offer, but it establishes a logical cap on any back pay or compensatory time off award, since it is likely the highest number that the parties would have agreed upon. Accordingly, the General Counsel or designee shall not award PCPs back pay or compensatory time off that, on an annualized basis (before adding interest), exceeds five percent of PCPs' annual pay.

ORDER

Respondent State of California (California Correctional Health Care Services) (CCHCS) violated Dills Act sections 3516.5, 3517, and 3519, subdivision (c), and derivatively violated section 3519, subdivisions (a) and (b) by: (1) failing and refusing to meet and confer in good faith with Union of American Physicians & Dentists (UAPD) over the negotiable effects of CCHCS's decision to offer Integrated Substance Use Disorder Treatment (ISUDT) and Medication Assisted Treatment (MAT) programs; and (2) implementing new mandatory job qualifications and new mandatory job duties that were not reasonably comprehended within the duties that CCHCS had previously assigned to UAPD-represented Primary Care Physicians (PCPs), without first negotiating in good faith with UAPD.

The following Order shall remain in place until the earliest of: (1) the date the parties have ceased meeting and conferring because they have reached agreement as part of complying with this Order; (2) the date the parties have reached a bona fide, good faith final impasse (including good faith participation in any impasse resolution procedures that may be required or agreed upon as part of complying with this Order); or (3) failure by UAPD to request negotiations or to bargain in good faith as part of complying with this Order.

Pursuant to Dills Act section 3514.5, the Board hereby ORDERS that CCHCS, its agents, and its representatives shall:

A. CEASE AND DESIST FROM failing and refusing to meet and confer in good faith with UAPD over the negotiable effects of implementing the ISUDT and MAT programs.

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

1. Meet and confer in good faith with UAPD over the negotiable effects of implementing the ISUDT and MAT programs, including, but not limited to, workload, new job qualifications, and new duties that were not reasonably comprehended within PCPs' previous duties, as well as compensation adjustments corresponding to such changes.

2. Make PCPs whole for additional time spent due to changes in workload, qualifications, and job duties that CCHCS implemented as part of the ISUDT and MAT programs, beginning when PCPs began incurring material additional time and lasting until the earliest of the three circumstances noted *ante* at pages 36-37. The parties shall meet and confer on implementing this remedy. If the parties cannot reach agreement within 120 days after this decision is no longer subject to appeal (or any later deadline that the General Counsel or designee may direct), then the General Counsel or designee shall develop a compliance record and craft an appropriate remedy consistent with this decision. Any compensation awarded shall be augmented by interest at an annual rate of seven percent.

3. Rescind any discipline or other adverse action issued for not obtaining an X-Waiver or failing to provide full MAT services.

4. Within 10 workdays after this decision is no longer subject to appeal, post at all work locations where notices to employees represented by UAPD customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of CCHCS, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30

consecutive workdays. CCHCS shall take reasonable steps to ensure that the Notice is not altered, defaced, or covered with any other material. In addition to physically posting this Notice, CCHCS shall post it by electronic message, intranet, internet site, and other electronic means CCHCS customarily uses to communicate with its UAPD-represented employees.[17]

5. Provide written notification of the actions CCHCS has taken to comply with this Order to the General Counsel of PERB, or the General Counsel's designee. CCHCS shall provide reports, in writing, as directed by the General Counsel or designee, and CCHCS shall concurrently serve all such reports on UAPD.

Chair Banks and Member Shiners joined in this Decision.

[17] In light of the ongoing COVID-19 pandemic, CCHCS shall notify PERB's Office of the General Counsel in writing if, due to an extraordinary circumstance such as an emergency declaration or shelter-in-place order, a majority of employees at one or more work locations are not physically reporting to their work location as of the time the physical posting would otherwise commence. If CCHCS so notifies the General Counsel's Office, or if any party requests in writing that the General Counsel alter or extend the posting period, require additional notice methods, or otherwise adjust the manner in which employees receive notice, the General Counsel's Office shall investigate and solicit input from all parties. It shall provide amended instructions to the extent appropriate to ensure adequate publication of the Notice, such as directing CCHCS to commence posting within 10 workdays after a majority of employees have resumed physically reporting on a regular basis; directing CCHCS to mail the Notice to all employees who are not regularly reporting to any work location due to the extraordinary circumstance, including those who are on a short term or indefinite furlough, are on layoff subject to recall, or are working from home; or directing CCHCS to mail the Notice to those employees with whom it does not customarily communicate through electronic means.

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. SA-CE-2168-S, *Union of American Physicians & Dentists v. State of California (California Correctional Health Care Services)*, in which all parties had the right to participate, the Public Employment Relations Board (PERB) found that the State of California (California Correctional Health Care Services) (CCHCS) violated the Ralph C. Dills Act, Government Code section 3512 et seq. by: (1) failing and refusing to meet and confer in good faith with Union of American Physicians & Dentists (UAPD) over the negotiable effects of our decision to offer Integrated Substance Use Disorder Treatment (ISUDT) and Medication Assisted Treatment (MAT) programs; and (2) implementing new mandatory job qualifications and new mandatory job duties that were not reasonably comprehended within the duties that we had previously assigned to Primary Care Physicians (PCPs), without first negotiating in good faith with UAPD.

As a result of this conduct, PERB has ordered us to post this Notice and to comply with the prohibitions and mandates set forth below until the earliest of: (1) the date the parties have ceased meeting and conferring because they have reached agreement as part of complying with PERB's Order; (2) the date the parties have reached a bona fide, good faith final impasse (including good faith participation in any impasse resolution procedures that may be required or agreed upon as part of complying with PERB's Order); or (3) failure by UAPD to request negotiations or to bargain in good faith as part of complying with PERB's Order.

Pursuant to PERB's Order, we will:

A. CEASE AND DESIST FROM failing and refusing to meet and confer in good faith with UAPD over the negotiable effects of implementing the ISUDT and MAT programs.

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

1. Meet and confer in good faith with UAPD over the negotiable effects of implementing the ISUDT and MAT programs, including, but not limited to, workload, new job qualifications, and new duties that were not reasonably comprehended within PCPs' previous duties, as well as compensation adjustments corresponding to such changes.

2. Make PCPs whole as directed by PERB.

3. Rescind any discipline or other adverse action issued for not obtaining an X-Waiver or failing to provide full MAT services.

Dated: _____

STATE OF CALIFORNIA (CALIFORNIA CORRECTIONAL HEALTH CARE SERVICES)

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.