IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

SALINAS VALLEY MEMORIAL HOSPITAL DISTRICT,

Petitioner,

v.

PUBLIC EMPLOYMENT RELATIONS BOARD,

Respondent,

INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 20 (ENGINEERS AND SCIENTISTS OF CALIFORNIA),

Real Party in Interest.

Petition for Writ of Extraordinary Relief from the Decision of the Public Employment Relations Board, PERB Decision No. 2689-M, (PERB Case No. SF-CE-1620-M)

RESPONDENT'S BRIEF

J. FELIX DE LA TORRE, General Counsel, Bar No. 204282
WENDI L. ROSS, Deputy General Counsel, Bar No. 141030
DANIEL M. TRUMP, Senior Regional Attorney, Bar No. 276392
JESSICA S. KIM, Senior Regional Attorney, Bar No. 257766
PUBLIC EMPLOYMENT RELATIONS BOARD
1031 18th Street
Sacramento, California 95811-4124
Telephone: (916) 322-3198
Facsimile: (916) 327-6377
E-mail: PERBLitigation@perb.ca.gov

Attorneys for Respondent Public Employment Relations Board

IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
California Rules of Court, rule 8.208

Court of Appeal Case Number: H047857

Case Name: *Salinas Valley Memorial Hospital District v. Public Employment Relations Board; International Federation of Professional and Technical Engineers, Local 20, (Engineers and Scientists of California)*

Each party other than the [Public Employment Relations Board] must comply with the requirements of rule 8.208 concerning serving and filing a Certificate of Interested Entities or Persons. (Cal. Rules of Court, rule 8.728(d)(1).)

Dated: September 28, 2020

J. FELIX DE LA TORRE, General Counsel
WENDI L. ROSS, Deputy General Counsel

By 
DANIEL TRUMP, Senior Regional Attorney

Attorneys for Respondent
PUBLIC EMPLOYMENT RELATIONS BOARD

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INTRODUCTION

The Meyers-Milias-Brown Act (MMBA or Act; Gov. Code, § 3500 et seq.)[1] gives public employees the right to form, join, and participate in the activities of employee organizations of their own choosing. (§ 3502.) The Act further guarantees employees of local public agencies the right to select their representative by majority authorization within an appropriate bargaining unit. (§ 3507.1) The Act also permits public agencies to promulgate rules to regulate the recognition and unit determination process. (§ 3507.) But these rules may not be formulated or applied to undermine employee rights. (§ 3507, subd. (d); § 3509, subd. (g).) And a public agency may not unreasonably withhold recognition from an employee organization. (§ 3507, subd. (c).) Here, the Public Employment Relations Board (PERB or Board) found that the Salinas Valley Memorial Hospital District (Hospital) has, for now six years, unreasonably—and unlawfully—refused to recognize a bargaining unit of laboratory employees represented by Engineers and Scientists of California, IFPTE Local 20 (ESC). Substantial evidence supports the Board's findings.

In 2014, laboratory employees of the Hospital attempted to join a union. ESC obtained authorizations from a majority of employees in the unit, and met with the Hospital's managers to demand recognition under the MMBA. The parties negotiated over the composition of the bargaining unit, and the union's

[1] Further statutory references are to the Government Code.

proof of majority support was verified by a state mediator. But the Hospital refused to recognize and negotiate with ESC.

Since then, ESC has filed with the Board three unfair practice charges on behalf of those laboratory employees. The third charge is the matter before this Court. Each time, PERB has found the Hospital in violation of its duties under the Act and ordered it to take corrective measures. The Hospital has engaged in a now-six-year game of keep-away with its own employees and their rights. During this time, the Hospital has repeatedly introduced obstacles to its employees' attempt to be represented by ESC. For instance, the Hospital first complained that the proposed unit failed to include histology technicians, prevailed on the union to include them, and then years later found that the inclusion of those same employees weighed against approving the unit. Similarly, the Hospital faulted the unit for being "nonconforming" to traditional healthcare units. But it failed to acknowledge why the proposed unit is nonconforming: because the Hospital itself previously established nonconforming units that excluded many laboratory employees. The Hospital's reliance on these and other disingenuous grounds for rejecting ESC's proposed unit is contrary to its duty to apply its local rules in a neutral and evenhanded fashion. This conduct is not a "reasonable" application of the Hospital's local rules, and for this reason it is contrary to the Act.

The Hospital would have this Court and PERB ignore these facts and read the Hospital's decision not to recognize ESC

in a vacuum. But even the customary deference afforded to public agencies in making unit determinations for their employees does not require PERB to ignore clear bad faith conduct by those agencies in such determinations. To preserve the ability of the Hospital's employees to meaningfully exercise their rights under the Act, the Court should affirm the Board's decision and deny the Hospital's petition.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Hospital's Previous Unfair Practices

As noted, the matter before this Court is the third case in a six-year-long dispute. The first two cases also resulted in rulings against the Hospital that were not appealed to the PERB Board itself. Because those decisions were not appealed, they are binding on the parties and beyond the scope of the Hospital's Petition. (§ 3509.5; Cal. Code Regs., tit. 8, § 32305, subd. (a).)[2] However, those decisions provide necessary context for the current case, which is why the Board itself took notice of the records in the prior two charges when deciding the third case. (AR:II:1066.)[3] For these reasons, this summary includes

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[2] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. Further citations to these regulations are presented in the format, PERB Regulation [section number].

[3] Citations to the administrative record have the format (AR:[Volume Number]:[Sequential Page Number].) Volumes I-IV contain the record of the case under review, *Salinas III*. Volumes V-VI contain the record of *Salinas I*. Volumes VII-VIII contain the record of *Salinas II*.

the first two decisions, encompassing the history of the dispute up to the facts of the instant matter.[4]

A. *Salinas I*

On February 12, 2015, ESC filed an unfair practice charge, Case No. SF-CE-1287-M, against the Hospital. (AR:V:2068-2116.) In accordance with PERB Regulations, an evidentiary hearing was held before a PERB administrative law judge (AR:VI:2459-2589), and the parties submitted post-hearing briefs (AR:V:2271-2320). The ALJ issued a proposed decision on November 5, 2015. (AR:V:2322-2351.) Because neither party appealed the ALJ's decision to the Board itself, it became final and binding on the parties on December 2, 2015. (*Salinas Valley Memorial Hospital District* (2015) PERB Decision No. HO-U-1191-M (*Salinas I*); AR:V:2353-2380; see PERB Regulation 32300.)

1. *Salinas I*'s Factual Findings

In 2014, a clinical laboratory scientist (CLS) working at the Hospital sent an e-mail to ESC requesting information about collective bargaining. (AR:V:2356.) ESC organizer Dominic Chan arranged a meeting to gauge the CLSs' interest in unionization. (AR:V:2355-2356) Chan and ESC determined that there was sufficient interest, so they circulated a petition

[4] Because these prior decisions are binding on the parties and they are not subject to direct or collateral attack in this case, citations are generally to the decisions themselves, not the underlying administrative record of those cases, except where the record provides additional context.

among the employees. (AR:V:2356.) On September 16, 2014, Chan sent a letter formally requesting that the Hospital recognize ESC as the CLSs' exclusive representative. (*Ibid.*) Two days later, ESC sent a follow-up letter adding medical laboratory technicians (MLTs) its request for recognition. (*Ibid.*)

The Hospital's Director of Human Resources, Michelle Childs, responded to Chan. (AR:V:2356.) Initially, Childs requested that ESC agree to submit the issue to a secret ballot election. (*Ibid.*) Chan disagreed and suggested that the parties arrange to have a mediator from the State Mediation and Conciliation Service (SMCS) verify proof of ESC's majority status by the "card check" process provided for in MMBA section 3507.1, subdivision (c). (AR:V:2356-2357.)

After some back-and-forth, Chan and Childs agreed that a mediator would conduct a card check. (AR:V:2357.) During these discussions, Childs for the first time raised an unspecified concern about the composition of the proposed bargaining unit. (*Ibid.*) Childs believed she had preserved the Hospital's "right to object to the composition of the bargaining unit," but wanted to "mov[e] the process forward." (*Ibid.*)

On October 23, 2014, Childs sent a memorandum addressed to all MLTs, histology technicians (histotechs), and lead histology technicians (lead histotechs) to inform them that ESC had demanded recognition as their exclusive representative. (AR:V:2357.) Histotechs and lead histotechs had not been included in ESC's petition, and Chan believed that their absence from the petition was Childs' previously

unspecified concern about the composition of the unit. (*Ibid.*) Chan responded by letter to protest the inclusion of the histotechs and lead histotechs. (*Ibid.*)

Four days later Chan and Childs participated in a conference call with SMCS mediator Kenneth Glenn to discuss the logistics of the card check. (AR:V:2357-2358.) The parties did not discuss any substantive matters related to unit composition, but the Hospital did agree to provide a list of all employees in the classifications covered by ESC's petition. (*Ibid.*)

Childs sent the list by e-mail. (AR:V:2358.) The list included histotechs and lead histotechs in addition to the CLSs and MLTs that ESC had sought to represent. (AR:VI:2618-2619.) Childs' e-mail also contained a reservation of the Hospital's right to continue to protest the "appropriateness" of the unit. (AR:V:2358.)

Because Childs had not otherwise specified the Hospital's concerns about the unit's appropriateness, Chan continued to believe that the dispute concerned the histotechs and lead histotechs. (AR:V:2358.) To avoid further delay, Chan and ESC acceded to including the histotechs and lead histotechs. (*Ibid.*)

On November 11, 2014, Glenn conducted the card check to verify the employee authorization cards against the list of employees agreed to by the parties. (AR:V:2358.) The final list included all full-time, part-time, and per diem CLSs, lead CLSs, MLTs, histotechs, and lead histotechs. (AR:V:2358; AR:VI:2618-2619.) Before beginning the card check, Glenn presented the

parties with a document entitled "Card/Petition Cross-Check Election Agreement." (*Ibid.*) The document describes the logistics of the count. (AR:VI:2596.) One clause of the agreement states, "in the event the Union establishes a majority in the Cross-Check, the employer agrees to recognize the Employee Organization as the exclusive representative for the unit defined below." (AR:V:2358-2359; AR:VI:2596.) Childs expressed concern over her authority to sign such a document, because the Hospital still wished to preserve its ability to challenge the unit's composition in an unspecified way. (AR:V:2358-2359.)

Glenn stated that he could not conduct the card check unless both parties signed the agreement. (AR:V:2359.) He also advised that the parties could address unit composition issues after the card check was conducted. (*Ibid.*) Childs did not attempt to amend the language of the agreement, and she and Chan signed it. (AR:V:2358-2359.)

Glenn tallied the employees' authorization cards, and determined that ESC had obtained support from a majority of the 31 employees in the proposed unit. (AR:V:2359; AR:VI:2598.)

Sometime after the card check, Chan obtained a copy of the Hospital's Ordinance Regarding Employee Election of Labor Organizations. (AR:V:2359; AR:VI:2647-2650.) The Ordinance contains a list of 17 "Regulations" pertaining to the recognition of employee organizations at the Hospital. (AR:V:2359-2360;

AR:VI:2647-2650.) Most relevant is Regulation 2, which at that time stated:

> Appropriate Unit. The board of Directors will decide the extent of the appropriate unit. The hospital has historically recognized three employee organizations who represent approximately 80% of the employees in the hospital. Any additional units must take into account a) the appropriateness of the unit in relation to the organizational structure of the hospital, the possibility of proliferation of units, and the history of labor relations in the hospital. In the event of a dispute in the appropriateness of the bargaining unit, the matter, upon request of any party, will be referred to the State Mediation-Conciliation Division of the State Industrial Relations Department for recommendation to the Board of Directors for the Board's final decision.

(AR:V:2360; AR:VI:2647.)

Chan sent an e-mail to Childs proposing to resolve any outstanding disputes over the unit's composition either through mediation or formal bargaining. (AR:V:2360.) Childs did not respond, and Chan sent a second e-mail proposing bargaining dates. (AR:V:2361.) Childs responded that she still had concerns about the composition of the unit but did not state what these were. (*Ibid.*)

On December 19, 2014, Childs sent Chan an e-mail finally expressing the nature of the Hospital's objection:

> We have carefully considered your request to bargain in the unit of Lab employees which you have chosen to organize. We have concluded that this unit is inappropriate in a public sector hospital. The creation of small units such as the one you seek (limited to Clinical Lab Scientists and Medical Lab Technicians) would allow for an impermissible proliferation of bargaining units, contrary to established public policy and existing PERB law.

(AR:V:2361.) Childs suggested that the parties jointly contact PERB to resolve the matter. (*Ibid.*)

Chan responded that there were no outstanding unit composition issues, given the Hospital's participation in the card check, and again proposed bargaining dates. (AR:V:2361.)

Meanwhile, between Childs's e-mail and Chan's response, Childs contacted Chan regarding a disciplinary matter involving a CLS. (AR:V:2362.) Chan represented the employee in the disciplinary matter. (*Ibid.*)

2. *Salinas I*'s Legal Conclusions

The ALJ considered three issues: First, did the Hospital unreasonably withhold recognition from ESC in violation of sections 3507, subdivision (c), and 3507.1, subdivision (c)? (AR:V:2362.) Second, did the Hospital breach its duty to meet and confer in good faith in violation of section 3505? (*Ibid.*) Third, did the Hospital waive its right to contest the appropriateness of the bargaining unit? (*Ibid.*)

Analyzing the issues, the ALJ concluded that: 1) the Hospital's failure to recognize ESC was unreasonable (AR:V:2369-2370); 2) the Hospital had acted in bad faith when it raised unit appropriateness concerns but failed to take any steps to resolve them (AR:V:2371-2372); and 3) the issue of whether the card check agreement waived the Hospital's right to contest the appropriateness of the unit was not ripe for decision (AR:V:2372-2373). As a remedy for the violations found, the ALJ ordered the Hospital to apply Regulation 2 to determine the appropriateness of the unit. (AR:V:2374-2375.)

B. *Salinas II*

On May 25, 2016, ESC filed another unfair practice charge, Case No. SF-CE-1391-M, concerning the Hospital's conduct following *Salinas I*. (AR:VII:2661-2742.) The case was heard by the same ALJ who issued *Salinas I*. (AR:V:2354; AR:VII:2974.) After a hearing and post-hearing briefs, the ALJ issued a proposed decision on November 30, 2017. (AR:VII:2974-3030.) Once again, neither ESC nor the Hospital appealed the proposed decision, and it became final on December 27, 2017. (*Salinas Valley Memorial Hospital District* (2017) PERB Decision No. HO-U-1574-M (*Salinas II*); AR:VII:2971-3031; see PERB Regulation 32300.)

1. *Salinas II*'s Factual Findings

After the decision in *Salinas I*, Childs contacted Chan to inform him that the proposed unit's appropriateness would be discussed at a special meeting of the Hospital's Board of Directors (Hospital Board). (AR:VII:2977.) The Hospital Board

met on December 14, 2015 to hear ESC's presentation on the issue. (*Ibid.*)

At the meeting, ESC was represented by attorney Danielle Lucido, Chan, representative and organizer Nick Steinmeier, and CLS Frank Yu. (AR:VII:2977.) After ESC's presentations, the Hospital Board went into closed session to consider the matter, but took no other action at that time. (*Ibid.*)

Three days later the Hospital Board issued a statement concluding that the proposed unit was inappropriate. (AR:VII:2977-2978.) The statement included the following rationale:

> First, organizational structure: ESC petitioned to represent a small group of employees in a department which employs other individuals already represented by an established union. The Board's position is that splitting a single department into groups of employees represented by separate unions and those unaffiliated with any union would increase the probability of conflict or work disruption.
>
> Second, proliferation of units: The Board's position is that the addition of a new bargaining unit of such a small size would result in a proliferation of units. The Board's decision in no way prevents (i) currently unaffiliated employees from seeking to join one of the established unions or (ii) one of the established unions from seeking to represent a currently unaffiliated group of employees. The Board simply does not endorse furthering the "micro-unit" concept.

> Third, history of labor relations: The history of labor relations at the Hospital, for decades, has involved three bargaining units. The Board values the input, contributions, and support of the three established unions. The board further believes that the best way to foster harmonious labor relations and make reasonable use of the Hospital's limited administrative resources is to maintain the long-standing balance of three established bargaining units.

(AR:VII:2978; AR:VIII:3497.)

Childs was present during the Hospital Board's closed session but "was not at liberty to divulge the contents of the conversation that took place." (AR:VII:2978.)

On January 7, 2016, Lucido contacted SMCS Chief Loretta van der Pol, and in accordance with Regulation 2 of the Hospital's Ordinance, requested that SMCS make a "recommendation" about the appropriateness of the unit. (AR:VII:2979-2980.) Van der Pol responded that SMCS did not make "recommendations" about unit disputes, but could provide mediation services on that question if the parties jointly agreed. (AR:VII:2980.) The Hospital refused to participate in a mediation. (*Ibid.*)

2. *Salinas II*'s Legal Conclusions

The ALJ noted that the order in *Salinas I* had instructed the Hospital to apply Regulation 2 to determine whether the proposed unit was appropriate, while the present case concerned whether that application was unreasonable. (AR:VII:2981.)

As in the first decision, the ALJ asserted that it was not for PERB to determine the appropriateness of a bargaining unit in the first instance, where an employer has its own local rules. (AR:VII:2982-2983.) Instead, PERB reviews the employer's application of its own rules to determine whether the employer's decision was "reasonable." (*Ibid.*)

However, the ALJ noted that even this deferential standard presumes that the employer has made written findings that can be reviewed by PERB. (AR:VII:2994-2995.) The Hospital's one-page statement did not include what evidence it considered, the standard it was applying, or any reference to PERB or National Labor Relations Board (NLRB) decisions that might have guided the Hospital Board's decision. (AR:VII:2998.) In addition, Childs' refusal to testify about what she may have advised the Hospital Board in closed session also prevented PERB from reviewing the Hospital's rationale. (AR:VII:2998-2999.) These deficiencies in the Hospital's process "withheld from PERB the very tools it needs" to determine whether the Hospital had applied its rules reasonably. (AR:VII:3000.) The ALJ also noted the "egregious" delay this conduct had caused. (AR:VII:2997.) Thus, the ALJ concluded, the Hospital's failure to "identify the standard it is applying, assemble and identify the relevant facts, then apply those facts to the proper standard" violated the MMBA. (AR:VII:3020.)

Nonetheless, the ALJ ordered the Hospital to take the matter under consideration again and make written findings regarding its determination. (AR:VII:3026-3027.) The ALJ also

provided extensive guidance to aid the Hospital in interpreting Regulation 2. (AR:VII:3000-3020.) The ALJ instructed that under PERB caselaw, an employer must accept a small residual unit, except where it has a "detrimental impact" on the employer's operational efficiency, because failing to do so disenfranchises employees. (AR:VII:3014.) Further, the Hospital must consider the "community of interest" among employees. (AR:VII:3019-3020.) The ALJ noted that these factors must be reconciled with the fact that the Hospital's existing bargaining units do not conform to the presumptively appropriate units traditionally found in acute care facilities. (*Ibid*.)

II. *Salinas III*

In its third opportunity, the Hospital again denied ESC recognition, claiming that the proposed unit was inappropriate. The parties again litigated the matter through PERB's administrative hearing process, culminating in the Board decision under review here, *Salinas Valley Memorial Hospital District* (2020) PERB Decision No. 2689-M (*Salinas III*). This time the Board ordered the Hospital to recognize and bargain with ESC.

A. The Hospital's Third Opportunity to Apply Regulation 2

After *Salinas II* became final, Childs initially invited ESC to present evidence regarding the appropriateness of its unit at a Hospital Board meeting on February 12, 2018. (AR:IV:1462.) Several ESC representatives and supporters testified at the

meeting. (AR:IV:1490-1522.) ESC also submitted a letter urging the Hospital Board to recognize it. (AR:IV:1454-1473.) However, the Hospital Board did not consider the matter until May 24, 2018, six months after *Salinas II* became final. (AR:IV:1525.) Sometime before that meeting, the Hospital created a "staff report" on the question of unit appropriateness. (AR:III:1294-1296; AR:IV:1475-1488.) Childs took the lead on preparing the staff report. (AR:III:1343-1344.) When asked about the report, Hospital Board President Chris Orman testified that he and the other Hospital Board members received it in advance of the May 24, 2018 meeting. (AR:III:1294-1296.) Orman had reviewed the report, along with the submissions from ESC, in preparation for the meeting. (*Ibid.*)

The May 24, 2018 meeting involved little back and forth between the parties. (AR:IV:1534-1536.) Two employees, along with Steinmeier, urged the Hospital Board to vote to recognize the union. (AR:IV:1535.) Most Hospital Board members declined to discuss the matter, and Orman called the vote. (*Ibid.*) Initially, a bare majority of the Hospital Board voted in favor of recognizing ESC, but one member asked to change his vote. (*Ibid.*) A new vote was taken, and this time the Hospital denied recognition. (AR:IV:1535-1536.)

B. The Hospital's June 27, 2018 Determination

Over a month later, on June 27, 2018, the Hospital Board issued a new determination purporting to explain its reasoning for denying recognition. (AR:IV:1541-1561.) This determination was drafted by Childs and legal counsel. (AR:III:1302, 1356.)

Orman testified that this document was issued with the input and ratification of the Hospital Board as a whole, and that it represented their position. (AR:III:1296-1297.) Childs circulated the draft amongst the Hospital's Directors to get "feedback." (AR:III:1536-1537.) Attached to the determination was the aforementioned staff report also prepared by Childs. (AR:IV:1548-1561.)

The Hospital's determination considered four factors: (1) the Hospital's organizational structure; (2) the possibility of unit proliferation; (3) the Hospital's history of labor relations; and (4) the community of interest and disparity of interest, as reflected by departmental structure, supervision, frequency of contact and workspace, skills and training, job functions and duties, and terms and conditions of employment. (AR:IV:1542-1547.) The first three factors are drawn from the text of Regulation 2. (AR:IV:1565.) The fourth is a factor the ALJ directed the Hospital to consider in *Salinas II*. (AR:VII:3019-3020.)

1. Organizational Structure of the Hospital

First, the Hospital's determination examined the proposed unit compared to the overall structure of the Hospital and the Laboratory Department (Lab). (AR:IV:1542-1543.) The Hospital noted that the proposed unit did not seek to include all employees in the Lab, all unrepresented employees in the Lab, or all unrepresented professional or technical employees in the Hospital. (AR:IV:1542.) The Hospital found that these facts "weighed heavily" in its determination that the unit was

inappropriate. (*Ibid.*) The analysis also asserted that some Lab employee work functions were shared with employees represented by a different union, the National Union of Healthcare Workers (NUHW), and that this overlap could lead to "work jurisdiction disputes and other work conflicts." (AR:IV:1542-1543.)

The Hospital's analysis of organizational structure did not acknowledge that the Hospital's existing bargaining units fail to adhere to the same criteria. Nor did the Hospital's report contain specific evidence of work conflicts between employee groups.

Although the Hospital's determination concluded that ESC's petition failed to include all unrepresented employees of the Lab, the attached staff report listed only four such employees: the Laboratory Director, two supervisors, and one employee classified as a "laboratory aide." (AR:IV:1548-1549.) The Hospital's determination also did not acknowledge that the Hospital—despite previously insisting on including some additional employees in the unit—had never previously suggested that the laboratory aide position should be included in the proposed unit. (AR:III:1363.) Nor did the Hospital describe in its determination or the attached staff report what the duties of the laboratory aide are, and why given those duties the laboratory aide classification would be appropriately included in a bargaining unit with CLSs, MLTs, and histotechs. And the Hospital did not acknowledge that the other three employees are

supervisors or managers, who would not be included in a rank-and-file unit.

2. The Possibility of Unit Proliferation

The Hospital next considered "the possibility of a proliferation of units." (AR:IV:1543-1544.) The Hospital applied a "rebuttable presumption against the undue proliferation of units," which ESC was required to overcome. (AR:IV:1543.) According to the Hospital, there are "102 non-leadership job classifications that are unrepresented, and those job classifications are contained within 42 separate departments of the Hospital." (*Ibid.*) The Hospital concluded that this meant that "[a]n undue proliferation of units would be practically unavoidable if the Hospital decided to recognize a small, non-conforming unit within a single department of the Hospital." (*Ibid.*)

The determination did not contain any evidence that granting ESC's petition would lead to rampant proliferation. For instance, the determination and attached staff report did not describe the remaining unrepresented positions, many of which appear to perform mostly business-related functions rather than patient care. (AR:I:651.)

The Hospital Board took special note of this statement attributed to "Congress" in the staff report:

> Hospitals and other types of health care institutions are particularly vulnerable to a multiplicity of bargaining units due to the diversified nature of the medical services provided to patients. If each

> professional interest and job classification is permitted to form a separate bargaining unit, numerous administrative and labor relations problems become involved in the delivery of health care.

(AR:IV:1544; AR:IV:1555-1556.)[5]

The Hospital's determination did not acknowledge that ESC's proposed unit is broader than just a single profession or job classification, and in fact includes approximately 30 employees across six classifications. (AR:IV:1548.) Nor did the Hospital note that its existing engineering unit, which includes 29 employees, is slightly smaller than ESC's proposed unit. (AR:IV:1396.)

3. History of Labor Relations

The Hospital's determination turned next to the history of labor relations. (AR:IV:1544.) The Hospital noted that the employees covered by ESC's petition had not previously been represented for purposes of collective bargaining. (*Ibid.*) It also noted that while a portion of Lab employees are represented by NUHW, NUHW's unit "exceeds the boundaries of the lab." (*Ibid.*) Both findings weighed against ESC. (*Ibid.*)

The Hospital did not acknowledge that public employees in California have a statutory right to be represented by their

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[5] The statement appears to be drawn from a quote by Senator Robert Taft Jr., as reproduced in *Levine Hosp. of Hayward, Inc.* (1975) 219 NLRB 327, 328.

chosen representative. (§ 3502.) The Hospital also did not note that it allowed ESC, through Chan, to represent a CLS in a disciplinary hearing in early 2015. (AR:V:2113.)

4. Community of Interest

Finally, the Hospital's determination turned to a discussion it referred to as "The Community And Disparity of Interest – Comparing Those Included & Excluded From The Petitioned Unit." (AR:IV:1544.) The Hospital began by stating that "the PERB Decision [in *Salinas II*] had instructed that 'appropriate units in acute care facilities must still share a community of interest within the bargaining unit, yet must also have a disparity of interest with those employees outside of the unit.'" (*Ibid.*) The Hospital failed to note the context of this statement by the ALJ, which followed a detailed discussion of the history of the NLRB's approach to unit determinations in acute care facilities between 1974 and 1989:

> Based on the above analysis, it is clear that appropriate units in acute care facilities must still share a community of interest within the bargaining unit, yet must also have a disparity of interest with those employees outside of the unit. <u>If the Hospital's Regulation 2 can be said to have incorporated the federal standard</u> for determining appropriate units, then the disparity of interest standard must be applied when Regulation 2 is invoked.

(AR:VII:3009, emphasis added.)

Nor did the Hospital's analysis note that the ALJ admonished that the disparity of interest standard is "incompatible" with the NLRB's regulation setting forth presumptively appropriate bargaining units in acute care hospitals, known as the Health Care Rule. (AR:VII:3019; see 29 C.F.R. § 103.30 [identifying seven presumptively appropriate units in acute care hospitals].) The Hospital also ignored the ALJ's caution that PERB "'has generally construed its regulations governing representation matters narrowly and declined to look to private-sector authority for guidance when PERB's regulations expressly address the policy concerns underlying the practice and procedure of private-sector labor boards, such as the NLRB or Agricultural Labor Relations Board.'" (AR:VII:3018.) And the Hospital failed to note the ALJ's admonition that, unlike the NLRB, PERB has found that "unless the employer can establish that certification of the residual unit will have a detrimental impact on its operational efficiency, PERB will not disenfranchise the employees by refusing certification of their unit." (AR:VII:3014.)

The Hospital described the standard it would apply as follows: "The issue . . . is whether the employees in the Petitioned Unit share a community of interest that is sufficiently distinct from the interests of the employees excluded from the Petitioned Unit to warrant a finding that the Petitioned Unit constitutes a separate appropriate unit." (AR:IV:1544.) The Hospital Board concluded ESC's proposed unit was not sufficiently distinct. (*Ibid.*)

The Hospital acknowledged that there was "commonality" between the employees in the proposed unit. (AR:IV:1544.) But it found "that commonality is not sufficiently distinct, or distinct at all, from those 41 employees who are excluded from the Petitioned Unit but are also in the Lab." (AR:IV:1545.) The only fact in support of this conclusion is "they are all working in the Lab." (AR:IV:1544-1545.)

Next, the Hospital considered the workspaces and "frequency of contact" of the employees in the proposed unit. (AR:IV:1545-1546.) The Hospital found that histotechs work in a separate part of the hospital building from the other members of the unit, and weighed this factor against ESC. (AR:IV:1545.) But the Hospital failed to note that it was Childs, its own Human Resources Director, who insisted on including histotechs in the proposed unit, over Chan's initial objections. (AR:V:2357-2358.) The Hospital also noted that employees excluded from the proposed unit share workspace with those in the proposed unit. (AR:IV:1545.) But the Hospital did not acknowledge that its own decision to place some Lab employees in a different bargaining unit caused this supposed deficiency as well.

The Hospital then considered the training requirements for the employees in the proposed unit. (AR:IV:1546.) The Hospital found significant that histotechs are unlicensed and "may be trained at the Hospital," unlike CLSs and certified MLTs. (AR:IV:1546.) The Hospital again failed to acknowledge its own role in creating this supposed disparity within the unit.

Next, the Hospital considered the job functions and interchange of duties of employees in the proposed unit. (AR:IV:1546.) Here, too, the Hospital found that the differences between CLSs and MLTs on the one hand, and histotechs on the other hand, weighed against finding a community of interest, without acknowledging its own insistence on including histotechs in the unit. (AR:IV:1546.) The Hospital also concluded that there were significant duties shared between those employees in the proposed unit and other Lab employees excluded from the unit. (AR:IV:1546, 1558.) The Hospital did not state which of these duties it found important to its analysis, but the staff report identified such "significant" tasks as "answer[ing] the phone" and "verify[ing] specimens and patient identifiers to ensure that the correct specimen is being tested." (AR:IV:1553.) The staff report also noted that CLSs can and do cover duties for both MLTs and histotechs. (AR:IV:1553-1554.) Although this fact would indicate a substantial amount of interchange in job functions within the proposed unit as distinct from the functions performed by employees outside the unit, it did not factor into the Hospital's analysis. (AR:IV:1546.)

Finally, the Hospital considered the "terms and conditions of employment" of the employees in the proposed unit. (AR:IV:1547.) The Hospital concluded that the employees in the proposed unit "receive similar compensation and the same health, dental and vision benefits" as "the unrepresented employees outside of it." (AR:IV:1547.) The only elaboration of this point in either the Hospital's analysis or the staff report

was that "[a]ll employees in the Lab, all NUHW employees, and all unrepresented technical and professional employees receive the same health, dental, and vision coverage." (AR:IV:1554.) As for compensation, the staff report noted that CLSs earn approximately 50 percent more than even histotechs and MLTs, so it is unclear how "similar" these figures are. (*Ibid.*) Neither report described the compensation of the laboratory aide position, even though this is the only unrepresented rank-and-file Lab position not included in the proposed unit. Neither report described the compensation of Lab employees represented by NUHW. Despite this lack of evidence, the Hospital weighed this factor "heavily" against ESC. (AR:IV:1547.)

Based on these factors and findings, the Hospital determined again that the proposed unit was not appropriate. (AR:IV:1547.) Instead of offering ESC an opportunity to address any of the supposed deficiencies in the proposed unit that would have alleviated the Hospital's concerns, such as simply including the laboratory aide in the unit, the Hospital again denied ESC's petition for recognition entirely. (*Ibid.*)

C. ESC's Third Unfair Practice Charge

On October 25, 2018, ESC filed its third unfair practice charge, Case No. SF-CE-1620-M, against the Hospital. (AR:I:11-257.) This charge alleged that the Hospital's June 27, 2018 determination was another "unreasonable" withholding of recognition in violation of sections 3507, subdivision (c) , and 3507.1. (AR:I:12, 27-28.) The case proceeded to an

administrative hearing before a PERB ALJ[6] in February 2019. (AR:III:1137-1376.)

The ALJ issued a proposed decision on June 14, 2019. (AR:I:647-680.) The Hospital was again found to have violated employee rights by unreasonably withholding recognition from ESC. (AR:I:676.) But this time, rather than giving the Hospital a fourth opportunity to make a reasonable unit determination, the ALJ concluded that the appropriate remedy was for the Hospital to rescind its decision and begin negotiating with ESC as the exclusive representative of the employees in the proposed unit. (AR:I:677.)

The Hospital appealed the matter to the Board itself by filing "exceptions" to the ALJ's proposed decision. (AR:II:697-742, 779.)

The Board issued *Salinas III* on January 13, 2020. (AR:II:1065-1124.) A Board majority affirmed the ALJ's findings that the Hospital had violated the MMBA by denying recognition to ESC, and that the proper remedy was to order the Hospital to recognize the union and begin bargaining with it. (AR:II:1066.) However, the Board departed from the ALJ's analysis, by explicitly assessing the June 27, 2018 unit determination in the context of the Hospital's past unlawful conduct toward ESC. (*Ibid.*)

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[6] Though not relevant to any issue in the case, the Hospital is correct that the third case was assigned to a different ALJ from the first two. (See Petitioner's Opening Brief [POB] 26.)

The Board first reviewed the history of the parties' dispute through *Salinas I* and *II*. (AR:II:1069-1075.) The Board then reviewed the Hospital's June 27, 2018 unit determination. (AR:II:1076-1078.) The Board specifically noted that the Hospital's determination failed to refer in any way to the parties' 2014 card check agreement or ESC's actual representational work on behalf of the bargaining unit. (AR:II:1078.)

The Board observed that unlike some other statutes under PERB's jurisdiction, the MMBA permits local agencies to establish reasonable rules for managing their own labor relations. (AR:II:1084, citing § 3507, subd. (a) .) But the Board explained that while this "dual role" allows for local tailoring and diversity of rules, it also creates a risk that an employer will misuse that authority for improper ends. (*Ibid.*)

The Board reaffirmed that in a typical MMBA unit determination, where reasonable minds could differ, the Board does not substitute its own judgment for that of the local agency. (AR:II:1085, citing *United Clerical Employees v. County of Contra Costa* (1977) 76 Cal.App.3d 119, 125.) In practice, this deferential standard means that the Board will uphold a local agency's unit determination as reasonable unless there is proof to the contrary. (*Ibid.*) PERB typically applies a substantial evidence test to a local agency's unit determinations, and scrutinizes the agency's conduct for an abuse of discretion. (*Ibid.*, citing *Covina–Azusa Fire Fighters Union v. City of Azusa* (1978) 81 Cal.App.3d 48, 61 (*City of Azusa*).)

But this case was not typical, the Board found. The Board observed that the Hospital had been on the wrong side of two related unfair practice proceedings over the same issue. (AR:II:1085-1086.) The Board noted that none of the cases applying the deferential standard of review of employers' unit determinations had grappled with the problem of a "recidivist" employer. (*Ibid.*, fn. 18.) Put another way, the uncontested findings that the Hospital acted unreasonably in the two prior cases were sufficient to rebut the presumption that the Hospital's findings in the third case were reasonable. (*Ibid.*)

Without the presumption of reasonableness, the Board found that the Hospital's June 27, 2018 unit determination could not withstand scrutiny. (AR:II:1097.) Rather, the Hospital "aggrandized selected facts" about every unit determination criterion and excluded others to arrive at a self-serving decision. (*Ibid.*)

For instance, the Hospital's discussion of its organizational structure had concluded that the proposed unit was "nonconforming" and that "work jurisdiction disputes" could arise if the Lab employees were allowed to form a union. (AR:II:1093; AR:IV:1542-1543.) But the Board found that the proposed unit was composed of employees the Hospital had excluded from its existing nonconforming bargaining units, and this fact meant the Hospital could not reject ESC's proposed unit simply because it was nonconforming. (AR:II:1093.) Further, insofar as "work jurisdiction disputes" can arise in workplaces with multiple bargaining units, that possibility

already existed between the Hospital's employees represented by NUHW and those represented by California Nurses Association. (AR:II:1093-1094.) Despite this, the Hospital offered no evidence or even identified a reasonably probable example of such a dispute. (*Ibid.*) The Board thus concluded that the Hospital had no evidence to support this part of its determination, which the Hospital had weighed "heavily" against ESC. (AR:II:1094; AR:IV:1543.)

The Board, in agreement with the ALJ, found the Hospital's conclusions about the risks of unit proliferation to be similarly unreasonable. (AR:II:1094.) The ALJ had concluded that the risks of proliferation were "theoretically possible, but highly unlikely." (AR:I:668.) The Hospital's current structure of three bargaining units dates back decades, indicating little interest in organizing the remaining unrepresented employees. (AR:II:1094.) The Hospital's purported concerns about unit proliferation also fail to account for the kinds of employees who remain unrepresented. (AR:I:668.) Aside from those included in ESC's petition, most unrepresented employees are "leadership" or otherwise perform business-related functions. (AR:I:668; AR:IV:1389-1392.) Further, the Hospital's concern with the purportedly small size of ESC's proposed unit should not have been considered disqualifying, because it contains approximately the same number of employees as the Hospital's existing engineering unit. (AR:II:1094.)

The Board observed that the Hospital's consideration of the history of labor relations was also unreasonable.

(AR:II:1095.) Specifically, the Hospital erroneously interpreted this factor to favor its existing structure of three bargaining units represented by three separate unions. (*Ibid.*) In this regard, the Hospital erred by relying on caselaw concerning severance petitions (where a union petitions to represent a sub-set of an existing, currently represented bargaining unit). (*Ibid.*) But, the Board noted, ESC was not petitioning to dilute or fragment an existing unit. (*Ibid.*) Rather, it was seeking to represent employees who have historically been denied representation because of the Hospital's own fragmentation of the Lab between NUHW and unrepresented employees. (*Ibid.*) Where a decision to deny certification is tantamount to deciding the employees must remain unrepresented indefinitely, the employer must meaningfully grapple with this impact. (*Ibid.*) That the Hospital's determination failed to do so was also unreasonable. (*Ibid.*)

The Board found the Hospital's analysis of community interest similarly flawed because it gave too much weight to the mere fact that employees within the proposed bargaining unit work with others outside the unit. (AR:II:1096.) The Hospital failed to explain how physical proximity to employees outside of the bargaining unit would overcome the substantial mutual interest within the bargaining unit. (*Ibid.*) Second, the Hospital's attempt to use the histotechs to undermine the community of interest within the bargaining unit was impermissible, because it was the Hospital that originally

sought to add them to the proposed unit. (AR:IV:1475-1476, fn. 32.)

These specific flaws in the Hospital's determination were not the only reasons why the Board found the determination unreasonable. The Board emphasized that the Hospital's determination never grappled with the 2014 card check agreement. (AR:II:1098-1100.) The Hospital's promise to recognize ESC as the exclusive representative of the proposed unit was never fulfilled. (AR:II:1099.) As the Board put it, "One should expect that a prior agreement to recognize ESC as the exclusive representative of the putative bargaining unit would at least factor into a determination of that unit's appropriateness for collective bargaining purposes, even if only to explain the agreement's relative weight in the overall analysis." (*Ibid.*)

This omission, along with others described above weighed heavily in PERB's decision to set aside the Hospital's third unit determination.

Consequently, the Board found that the Hospital had unreasonably withheld recognition from ESC, and ordered it to grant ESC's petition and meet and confer with ESC over terms and conditions of employment upon demand. (AR:II:1102-1103.)

STANDARD OF REVIEW

PERB has exclusive initial jurisdiction to adjudicate unfair practice charges under the MMBA and other public sector labor relations statutes. (§§ 3509, subd. (a), 3541.3, subd. (i).) Due to PERB's administrative expertise and the importance of

statewide uniformity in public sector labor relations, the Board's decisions are entitled to significant deference. (*Coachella Valley Mosquito & Vector Control Dist. v. Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1085-1086; *Tri-Fanucchi Farms v. Agricultural Labor Relations Bd.* (2017) 3 Cal.5th 1161, 1168 [decisions of the expert labor board come to the courts with a "'presumption of validity'"].)

When reviewing the Board's construction of the statutes within its jurisdiction, courts must decide the statute's true meaning, but they defer to the Board's interpretation unless it is clearly erroneous. (*Boling v. Public Employment Relations Bd.* (2018) 5 Cal.5th 898, 917 (*Boling*).) As the California Supreme Court affirmed, "PERB is one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." (*Id.* at pp. 911-912, internal quotation marks omitted.) The deference afforded to the Board is higher when statutory language is open-ended and the interpretive question is "heavily freighted with policy choices which the agency is empowered to make," or "entwined with issues of fact, policy, and discretion." (*Id.* at p. 911.)

As for the Board's factual findings, they are conclusive "if supported by substantial evidence on the record considered as a whole." (§ 3509.5, subd. (b).) Under this standard, the court may not reweigh the record evidence. (*Boling*, *supra*, 5 Cal.5th 898, 912.) Nor may it consider whether contrary

findings are as reasonable as, or more reasonable than, the Board's. (*Ibid.*) Rather, if the Board chooses between two conflicting but reasonable views—including inferences to be drawn from otherwise undisputed facts—the court may not substitute its judgment for PERB's. (*Id.* at p. 913.)

Finally, PERB's remedial authority is subject to review for abuse of discretion. (*Mt. San Antonio Community College Dist. v. Public Employment Relations Bd.* (1989) 210 Cal.App.3d 178, 189-190 (*Mt. San Antonio*); *Jasmine Vineyards, Inc. v. Agricultural Labor Relations Bd.* (1980) 113 Cal.App.3d 968, 982 [holding that the Agricultural Labor Relations Board "in its presumed expertise must be given relatively free reign in determining which remedy will best effectuate the policies of the act"][7].) Under the abuse of discretion standard, the remedies ordered by an expert labor board "will not be disturbed by the courts unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the act." (*Butte View Farms v. Agricultural Labor Relations Bd.* (1979) 95 Cal.App.3d 961, 967 (*Butte View Farms*).)

The petitioner for a writ of extraordinary relief bears the high burden of establishing error. (*Butte View Farms*, *supra*, 95 Cal.App.3d 961, 966, fn. 1.) If the petitioner fails to meet this

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[7] The courts apply similar standards of review to decisions of PERB and the Agricultural Labor Relations Board. (*San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 856.)

burden, the court of appeal may summarily deny the petition. (*Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd.* (1979) 24 Cal.3d 335, 351.)

ARGUMENT

I. PERB appropriately reviewed the reasonableness of the Hospital's unit determination.

The Hospital argues that it had an "unequivocal statutory right" to determine whether ESC's proposed unit is appropriate, and accuses PERB exceeding its legal authority by attempting to "seize control of the unit determination process." (POB 28.) Although the MMBA allows a public agency to adopt its own unit determination rules, the Hospital's role in the unit determination process is not exclusive. PERB is still empowered to review that determination. (§ 3509, subd. (b).) Specifically, PERB has the authority to review an agency's application of rules and regulations to ensure they do not undercut or frustrate the MMBA's policies. (AR:II:1083.) By reviewing the Hospital's determination for reasonableness, PERB acted well within its statutory authority.

A. The MMBA authorizes PERB to review whether an employer reasonably applied a local rule concerning unit appropriateness.

Since its enactment in 1968, the MMBA has reserved to local governments the power to establish and enforce rules governing labor relations with their employees. (*International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191, 197 (*City of Gridley*).) Section 3507 permits local

agencies to "adopt *reasonable* rules and regulations after consultation in good faith" with employee unions. (§ 3507, subd. (a), emphasis added.) These rules may include, among other things, procedures for recognition of employee organizations. (*Ibid.*) To be "reasonable," the employer's rules must be consistent with the policies and purposes of the MMBA. (*City of Gridley*, *supra*, 34 Cal.3d 191, 202.) The MMBA's standards "may not be undercut by contradictory rules or procedures that would frustrate its purposes." (*County of Los Angeles v. Los Angeles County Employee Relations Com*. (2013) 56 Cal.4th 905, 925 (*County of Los Angeles*).)

Before PERB's jurisdiction was extended to include the MMBA, employee organizations challenged an employer's adoption or application of local rules in superior court. (See, e.g., *City of Gridley*, *supra*, 34 Cal.3d 191, 194.)

In 2001, PERB assumed responsibility to interpret and enforce the MMBA. (Stats. 2000, ch. 901, § 8.) In 2003, the Legislature added section 3507, subdivision (d) to the MMBA, which expressly permits employees and employee organizations to challenge a local rule as an unfair practice. (Stats. 2003, ch. 215, §3.) A party objecting to a local rule may file an unfair practice charge with PERB asserting that the rule is either unreasonable on its face, or in its application. (*County of Riverside* (2010) PERB Decision No. 2119-M, p. 13; *County of Monterey* (2004) PERB Decision No. 1663-M, adopting proposed decision at pp. 28-29; § 3509, subd. (b) .) The party challenging a local agency's unit determination decision bears the burden of

demonstrating that the decision was not reasonable. (*County of Riverside*, *supra*, PERB Decision No. 2119-M, p. 13; *Organization of Deputy Sheriffs v. County of San Mateo* (1975) 48 Cal.App.3d 331, 338.) In the typical unit determination dispute, where reasonable minds could differ, the Board does not substitute its judgment for that of the local agency. (*United Clerical Employees v. County of Contra Costa*, *supra*, 76 Cal.App.3d 119, 125.) Until this case, neither PERB nor the courts have had occasion to consider whether a different standard applies when an employer has engaged in bad faith in making its unit determination.

B. It was not clearly erroneous for PERB to withhold deference to the Hospital's unit determination.

1. PERB defers to an employer's reasonable unit determination.

The Hospital failed to recognize that its role in the unit determination process is paired with attendant responsibilities. When a public agency makes a unit determination decision based on its own local rules, it takes on a dual role. (Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts* (1972) 23 Hastings L.J. 719, 741-742 (hereafter Grodin).) On the one hand, the public agency has a significant stake in the outcome of its determination and is a party to its own decision. (*Ibid.*) On the other hand, the employer must act as a quasi-judicial decision-maker to apply its local rules to the facts before it. (*Ibid.*) The exercise of quasi-

judicial power requires an impartial decision maker. (See, e.g., *People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 635; *B.C. Cotton, Inc. v. Voss* (1995) 33 Cal.App.4th 929, 954.) Further, the employer's process for determining whether to grant a unit determination must place the parties on a level playing field. (See, e.g., *City & County of San Francisco* (2017) PERB Decision No. 2540-M, p. 15 (*San Francisco*) ["a necessary function of the collective bargaining statute . . . is to ensure fairness through the adoption of neutral rules of engagement, ones which are non-normative in outcome terms and grounded in a presumption that the parties engage each other on a relatively level playing field"], mod. on other grounds by *City & County of San Francisco* (2019) PERB Decision No. 2540a-M.)

The benefit of the employer's dual role under the MMBA, as the Board acknowledged, is that it allows for "local tailoring and diversity of local rules." (AR:II:1084.) But the risk is that an employer will be swayed by its own interests during the decision-making process. (Grodin, *supra*, 23 Hastings L.J. 719, 741-742.)

In this case, even without looking to the Hospital's two prior unfair practices, there is evidence the Hospital abdicated its responsibility as a decision-maker. As discussed in greater detail in sections II.A. and II.B., below, the Hospital gave little weight to its employees' right to choose their exclusive representative. Again, the ability of employees to choose and participate in employee organizations is one of the key purposes

of the MMBA. (§ 3502.) The Hospital elevated its own interests and ignored employee rights.

The Hospital has not even acknowledged its duty as a quasi-judicial decision maker to balance its interests with the protected rights of its employees. Instead, the Hospital cites portions of legislative history in which certain sponsors of the 2003 amendments to the MMBA stated that the statute is of "little hardship" to employers because by simply adopting "their own reasonable rules, public agencies can avoid application of any PERB rule with which they disagree." (POB 30.)

But the courts and PERB have not adopted an interpretation of section 3507 that gives employers free rein to ignore other provisions of the MMBA. Instead, the courts and PERB have consistently held that the MMBA's standards may not be undercut by contradictory rules or procedures that would frustrate its purposes. (*County of Los Angeles*, (*supra*), 56 Cal.4th 905, 925; *San Francisco*, *supra*, PERB Decision No. 2540-M, p. 11.) Unit determinations in particular "must be reasonable and in conformity with all pertinent sections of [the MMBA]." (*Santa Clara County Dist. Attorney Investigators Assn. v. County of Santa Clara* (1975) 51 Cal.App.3d 255, 265 (*County of Santa Clara*).)

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2. The Hospital's violations of the MMBA in its first two opportunities to process ESC's petition are relevant evidence to the reasonableness of its third determination.

The Board's findings from *Salinas I* and *II* are beyond dispute: twice the Hospital acted unreasonably by rejecting ESC's proposed unit, offering at best perfunctory reasons for its decisions. In *Salinas I*, the Hospital was found to have ignored entirely its responsibility to make a unit determination under Regulation 2. (AR:V:2369.) Then in *Salinas II*, given a second chance, the Hospital did such a cursory job that it effectively prevented the ALJ from being able to review whether the Hospital's decision was reasonable. (AR:VII:3000.) The Hospital's conduct on both occasions violated the MMBA by unreasonably withholding recognition from ESC. And worse, the cumulative effect of these actions was a three-year delay from when the employees had petitioned to form a union. (AR:VII:2997.) Three *more* years have now passed.

Indeed, the Hospital acknowledges that these past unfair practices are intertwined with the instant case, noting that the two prior unfair practices "were prior skirmishes in the exact same battle being fought here." (POB 35.)[8]

[8] Strangely, the Hospital seems to take pride in its prior conduct, claiming that all it has done is to "take a principled and legally supportable position, and to stick with that position through three administrative hearings." (POB 35.) The only consistent principle running through the Hospital's conduct is its steadfast opposition to recognizing ESC.

The Board's expertise and its role as the finder of fact necessarily give the Board wide discretion to determine what evidence is relevant when it decides an unfair practice charge. (See *Boling*, *supra*, 5 Cal.5th 898, 912.) Likewise, the relevant MMBA requirements—that the local agency's rules and unit determinations be "reasonable"—are open-ended, which further supports deference to the Board's interpretation. (*Id.* at p. 911.) In the absence of contrary authority, PERB was appropriately sensitive to the risk that the Hospital was using its role to serve its own interests.

3. In light of the Hospital's past conduct, the Board appropriately determined the Hospital's determination was not due customary deference.

PERB owes deference to an MMBA-employer's unit determination if it results from a reasonable application of the employer's local rules. Here, the local rules required the Hospital to act as the decision-maker (cf. *People ex rel. Lockyer v. Sun Pacific Farming Co.*, *supra*, 77 Cal.App.4th 619, 635), in a process that permits the parties to engage on a relatively level playing field (*San Francisco*, *supra*, PERB Decision No. 2540-M, p. 15). When an employer appropriately assumes its responsibility as an impartial quasi-judicial decision-maker, PERB defers to the employer's unit determination. As the Hospital notes, PERB has consistently upheld this deferential posture toward employers who are acting in accordance with their local rules. (POB 31-32, citing *County of Orange* (2016)

PERB Decision No. 2478-M and *County of Riverside* (2011) PERB Decision No. 2163-M.)

But in this case, PERB was confronted with a novel fact pattern: the Hospital had already twice failed to process ESC's recognition petition with the requisite neutrality and objectivity. None of PERB's existing cases, including *County of Orange* and *County of Riverside*, dealt with analogous facts. The employer in *County of Riverside* had not yet made a unit determination. (*County of Riverside*, *supra*, PERB Decision No. 2163-M, adopting proposed decision at p. 10.) In *County of Orange* the only issue before PERB was whether the denial of a petition violated MMBA section 3507.3, pertaining to professional employees' right to be represented separately from other employees. (*County of Orange*, *supra*, PERB Decision No. 2478-M at p. 10.) Neither case involved multiple findings of unlawful conduct.[9] In this third "skirmish," (POB 35) the Board observed that the Hospital appeared to have engaged in a "repeated and methodical" pattern of misapplying its own rules to deny ESC recognition. (AR:II:1083.) The Hospital was not permitted to exalt its own interests in the unit determination process and ignore the protected rights of its employees. It was not clearly erroneous for the Board to find that this conduct was

[9] The Hospital's argument concerning *County of Orange* and *County of Riverside* conflates the standard applied by PERB and the remedy for the Hospital's violation. (POB 31-33.) Therefore these decisions are also discussed in section III, below, pertaining to PERB's remedy.

unreasonable within the meaning of section 3507. (AR:II:1089; see *Boling*, *supra*, 5 Cal.5th 898, 911-912.) This determination is supported by the conclusive evidence of the employer's prior unfair conduct and should not be disturbed on review. (§ 3509.5, subd. (b); *Boling*, *supra*, 5 Cal.5th 898, 912.)

C. The Board's consideration of the Hospital's past unfair practices was consistent with *San Francisco.*

The Hospital asserts that PERB "departed from its long-standing objective test by including intent in its analysis." (POB 33.) In support of this assertion, the Hospital cites only one precedent, *San Francisco*, *supra*, PERB Decision No. 2540-M. (POB 33-36.) The Hospital asserts that in *San Francisco*, the Board found that intent was irrelevant when it reviews a local rule for reasonableness. (POB 33.) However, the Hospital selectively quotes *San Francisco*. The Board's discussion of intent in *San Francisco* is not applicable here.

In *San Francisco*, the Board considered the reasonableness of a local rule adopted by the City of San Francisco through a voter initiative, Proposition G. (*San Francisco*, *supra*, PERB Decision No. 2540-M, pp. 3-4.) A PERB ALJ issued a proposed decision finding that certain provisions of the City's local rule were unreasonable on their face, and included findings that the initiative was intended to be "anti-labor." (*Id*. at p. 8.) In its decision on the City's exceptions, the Board held:

> Because intent is irrelevant here, we do not rely, as the ALJ did, on the

> conclusion that Proposition G was intended to be "anti-labor," based on the comments of the County Supervisor who sponsored the initiative. Moreover, as the City correctly points out, voter intent cannot be determined based on those comments, which were not communicated to voters.

(*Id*. at pp. 23-24, fn. 14.)

The Hospital relies on this excerpt from *San Francisco* to argue that PERB cannot consider intent in any local rule case. (POB 33-36.) But this holding in *San Francisco* does not stand for this broad proposition. At most, it stands for the proposition that intent is irrelevant in facial challenges. This case involves a challenge to the application of a local rule, not a facial challenge.

The difference between a facial challenge and an as-applied challenge directly impacts what evidence is relevant to the claim. A facial challenge is based only on the text of a rule. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.) An as-applied challenge, "contemplates analysis of the facts of a particular case or cases to determine the circumstances in which the statute or ordinance has been applied and to consider whether in those particular circumstances the application deprived the individual to whom it was applied of a protected right." (*Ibid.*) Accordingly, as the Board stated in its decision, "[i]n considering whether an employer has unreasonably applied a local rule, evidence of an employer's conduct and motivation is clearly relevant to the analysis." (AR:II:1092.)

The Hospital has not identified any precedent that bars PERB from considering an employer's intent when it reviews the employer's application of a local rule. And, as the Board noted in its decision, none exists. (AR:II:1091, fn. 25.) Indeed, the court in *City of Azusa*, specifically held that a local employer's unit determination may be overturned where the employer "has not met and consulted in good faith regarding the unit." (81 Cal.App.3d 48, 63.) Therefore, the Board's decision to consider the Hospital's prior unfair practices in this case was not contrary to precedent.

II. Substantial evidence supports the Board's finding that the Hospital unreasonably applied its local rules.

After rejecting the presumption that the Hospital's June 27, 2018 unit determination was reasonable, the Board turned to the contents of that determination. Indeed, even without considering the Hospital's prior unfair practices, the Hospital's unit determination is an unreasonable exercise of the Hospital's responsibility as decision-maker under section 3507 for two broad reasons. First, the Hospital gave little weight to its employees' right to choose their exclusive representative. Again, the ability of employees to choose and participate in employee organizations is one of the key purposes of the MMBA. (§ 3502.) Second, the Hospital either misrepresented facts about, or misapplied the standards for each of the four unit determination factors it considered. Even standing alone, the Hospital's June 27, 2018 unit determination is unreasonable.

A. The Hospital's failure to consider employee rights distorted every part of its unit appropriateness determination.

The Hospital's failure to adequately consider employee rights impacted every part of its unit determination. How this failure specifically affected the application of certain elements of the unit determination, is discussed below in section II.B. But this failure looms more broadly over the Hospital's entire unit determination process.

The essence of the dispute in this case stems from the fact that the Hospital has over the last several decades, acting under its authority to make unit determinations under section 3507, established large heterogenous units that are "nonconforming," or not strictly appropriate by its own estimation. (See AR:IV:1543.) Despite their size, these units still excluded a significant number of employees. These excluded "residual" employees have a right to "form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." (§ 3502.) If unrepresented residual employees exercise this right by petitioning to form a union, they will need to squeeze into a mold that was cast by the employer's previous unit determinations.

This is by no means an uncommon problem. PERB itself has longstanding caselaw directing how petitions for nonconforming residual units should be addressed. Logically, there are only three options: 1) reconfigure existing units to be

conforming and to allow maximum exercise of employee rights to bargain, which upsets and unsettles longstanding bargaining relationships; 2) grant the residual petition as long as this does not significantly impair the employer's operations; or 3) deny the petition and effectively disenfranchise residual employees. In general, PERB caselaw favors the second option. (*Pleasanton Joint School District/Amador Valley Joint Union High School District* (1981) PERB Decision No. 169, p. 4 (*Pleasanton*).) The Hospital took the third, disfavored path.

Put simply, as the Board explained, "if dismissing the petition effectively denies employees the right to representation, the employer's rejection based on the inappropriateness of the unit is generally warranted only where there is 'convincing evidence in support of the . . . claim that efficiency of its operations would be impaired.'" (AR:II:1097, citing *Pleasanton*, *supra*, PERB Decision No. 169, p. 4.) This standard best preserves employee rights, while guarding against potentially disruptive "proliferation" of units. (*Ibid.*)[10]

[10] To be clear, the Board's caselaw generally favors establishing large appropriate units over smaller ones. (See *Fairfield-Suisun Unified School District* (2017) PERB Order No. Ad-452, pp. 4-5.) But the circumstances here (where residual employees seeking representation would otherwise remain unrepresented) implicate a longstanding exception to that rule articulated consistently over decades of caselaw. (See *Pleasanton*, *supra*, PERB Decision No. 169, p. 4.) In fact, since 1979, the *only* decisions where PERB approved a separate small unit of employees in a single classification are factual circumstances where denial would leave the employees

But the Hospital did not consider the employees' interests in being represented by a union in making its determination. In some parts of the determination, this led the Hospital to ignore evidence. Elsewhere, this failure caused the Hospital to misapply established standards for evaluating unit determination factors. These deficiencies in the Hospital's determination are discussed below, in section II.B. But the Board emphasized an additional point: the Hospital's failure to give any weight to its employees' interests is consistent with the Hospital's past violations of employee rights and is patently unreasonable. (AR:II:1089.)

This is so *because* the employer's dual role in unit determinations under the Act requires a balanced approach. (AR:II:1089, citing Grodin, *supra*, 23 Hastings L.J. 719, 741-742.) A local process that places a "thumb on the scale" for the employer's interests is not reasonable. (*San Francisco*, *supra*, PERB Decision 2540-M, p. 16.) The Board properly concluded that the Hospital's failure to grapple with the effects of its decision on employee rights was unreasonable.

B. Substantial evidence supports the Board's findings that the Hospital misstated or misapplied all applicable factors to conclude that the proposed unit is not "appropriate."

Even on its own terms, the Hospital's June 27, 2018 unit determination is unreasonable. The determination distorts

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unrepresented. (*Oakland Unified School District* (2001) PERB Decision No. 1464, hearing officer's decision at p. 19.)

certain facts and misapplies established standards, as detailed below. Contrary to the Hospital's assertion, the factual conclusions in its determination are not "uncontroverted" or "undisputed." (POB 37-38.)

1. Organizational Structure of the Hospital

The Hospital found that its existing organizational structure weighed "heavily" against approving the proposed unit. (AR:IV:1543.) The Hospital Board's reasoning was that that the proposed unit did not seek to include 1) all employees in the Lab, 2) all unrepresented employees in the Lab, or 3) all unrepresented professional or technical employees. (AR:IV:1542.)

This reasoning was flawed. The Hospital failed to recognize that the large mixed unit represented by NUHW—from which the petitioning employees have been excluded—also fails to include all Lab employees or all professional and technical employees. If these facts weigh heavily against ESC's petition, they weigh just as heavily against the status quo.

The Hospital also asserted that some important functions of the Lab are purportedly shared between employees in the proposed unit and those represented by NUHW. (AR:IV:1542-1543.) This, the Hospital claimed, creates the potential for "work jurisdiction disputes and other work conflicts" undermining the function of the Lab. (*Ibid.*)

Once again, the Hospital's conclusion does not follow. ESC was not petitioning to divide an existing unit. When ESC filed its petition, the line was already drawn down the middle of

the Lab. Today the line represents union versus nonunion Lab employees. The only difference had the Hospital granted ESC's petition would be that employees on both sides of the line would have a union.

Furthermore, even though this division in the Lab between employees represented by NUHW and petitioning employees already exists, no evidence was presented to show that it has caused "work jurisdiction disputes and other work conflicts." The Hospital's analysis of the organizational structure factor therefore lacked any evidence for its central claim. (*City of Azusa*, *supra*, 81 Cal.App.3d 48, 61.)

The Hospital implied that this factor would have weighed in favor of ESC's petition if it had included "all unrepresented employees in the Lab," but did not identify what the purported exclusions are. (AR:IV:1542.) In fact, the record shows that three of the unrepresented employees are supervisors or managers who would not be included in a rank-and-file unit anyway. (AR:IV:1548-1549.) Therefore the only purportedly missing employee is the laboratory aide position.[11] But if that absence represented such a problem for the Hospital, it could have easily suggested that ESC add the laboratory aide to the unit, just as it had done for the histotechs initially. That the Hospital instead used this fact to, again, deny the petitioning

[11] There was testimony that a second person was hired into the laboratory aide position after the Hospital's determination. (AR:III:1225.) Regardless, there was only a single laboratory aide at the time the Hospital rendered its determination. (AR:IV:1549.)

employees representation entirely was unreasonable. (See *City of Azusa*, *supra*, 81 Cal.App.3d 48, 61.)

2. Unit Proliferation

The Hospital determined that there is a "general, rebuttable presumption against the undue proliferation of units," citing "guidance" from *Salinas II*. (AR:IV:1543.) But *Salinas II* noted some federal authority for the proposition that "'four or fewer units, if otherwise suitable on 'community of interest' grounds, would not have been thought undue.'" (AR:VII:3013, quoting *NLRB v. Res-Care, Inc.* (7th Cir. 1983) 705 F.2d 1461, 1470-1471.) And the actual "guidance" was that it would be generally reasonable for the Hospital to rely on PERB's unit appropriateness caselaw. (AR:VII:3013.) Yet the Hospital did not cite or identify any such cases in its determination on unit proliferation.

As described in Argument section II.A., above, and as *Salinas II* explained (AR:VII:3014), PERB caselaw addresses the problem of unit proliferation in exactly these circumstances. A recognition petition by a group of unrepresented residual employees should be granted unless convincing evidence establishes that the efficiency of the employer's operations would be disrupted. (*Pleasanton*, *supra*, PERB Decision No. 169, p. 4.) Here, the Hospital itself created the conditions it claims will impair its operations: it has divided the Lab between NUHW-represented employees and other rank-and-file nonunion employees. Again, if the Hospital is correct such division creates the conditions for employees to have "work

jurisdiction disputes," there should be evidence of that fact. But none was cited. Therefore, as the Board held, the Hospital did not establish that its operations would be impaired by granting the petition. (AR:II:1097, citing *Pleasanton*, *supra*, PERB Decision No. 169, p. 4.)

The Hospital's bad-faith approach is also evident in its discussion of "non-conforming" units. These refer to bargaining units that are not one of the seven presumptively appropriate units identified by the NLRB's Health Care Rule. (AR:IV:1543; 29 C.F.R. § 103.30.) The proposed unit is indeed nonconforming in this sense. But so are the Hospital's other units. The Hospital did acknowledge this, but excused those units because they are "very large." (AR:IV:1543.) But in doing so, the Hospital neglected to mention that the engineering unit is approximately the same size as ESC's proposed unit. (AR:IV:1396.)

Finally, the Hospital claimed that undue proliferation was a concern because "there are 102 non-leadership job classifications that are unrepresented, and those job classifications are contained within 42 separate departments of the Hospital." (AR:IV:1543.) A review of these remaining unrepresented classifications shows, however, that they are divided into categories representing leadership, clerical employees, professional employees, technical employees, and a miscellaneous group. (AR:IV:1389-1394, AR:I:651.) Many are business-related technical and professional employees, or clericals. (AR:I:651.) Insisting on the broadest possible unit

leaves a substantial number of the Hospital's employees effectively unable to exercise their rights under sections 3502 and 3507.1 in perpetuity. (See AR:IV:1396.) As the Board explained, "[t]he MMBA does not give the Hospital the right to determine which employees get the benefit of the statute or which must remain unrepresented, and it certainly does not empower it to determine the number and identity of the employee organizations that represent its employees." (AR:II:1090.)

Indeed, as the Board noted, the residual employees have remained unrepresented despite the current configuration having been in place for decades. (AR:III:1317.) NUHW organizer Grant Hill testified that NUHW had little interest in organizing a small group of employees. (AR:III:1323.)

The Hospital considered none of these facts, despite weighing the unit-proliferation factor "heavily" against ESC. (AR:IV:1543.) Based on these omissions, substantial evidence supports the PERB's finding that the Hospital applied the unit-proliferation factor unreasonably. (AR:II:1094.)

3. History of Labor Relations

The Hospital determined that the history of labor relations weighed against granting ESC's petition. The only support for this conclusion was: 1) the employees in the proposed unit had not been unionized before; and 2) the Hospital had never bargained with a portion of the Lab "exclusively," by which the Hospital meant excluding non-Lab employees. (AR:IV:1544.) The word "exclusively" is doing all the work in

the Hospital's analysis, but its relevance is unclear. The Hospital currently has a labor and employee relations system that treats half of the Lab as represented by NUHW and the other half as unrepresented. (*Ibid.*) The fact that the NUHW unit contains classifications in other departments does not change the fact that the other half of the Lab is already treated distinctly.

Further, it is not true that the Hospital does not have any history of dealing with a representative of just Lab employees. The Board noted that there were two significant pieces of evidence that established some history favoring the establishment of the proposed unit. (AR:II:1098.) The first is the card-check agreement which stated that the Hospital would recognize ESC as the exclusive representative of ESC's proposed unit. (AR:IV:1098-1099.)[12] The Hospital's decision to utterly disregard this agreement's existence, failing even to explain its weight in the overall unit determination analysis, was unreasonable. (*Ibid.*) Second, the Hospital has dealt with ESC as the representative of a clinical laboratory scientist on at least one occasion. (AR:II:1099; AR:V:2114.)

[12] No party challenged the ALJ's conclusion in *Salinas I* that the Hospital had not waived its right to further contest the appropriateness of the unit, and so the Board did not disturb this conclusion. But the Board noted that the lack of a waiver did not render the agreement irrelevant to a unit appropriateness determination. (AR:II:1098.)

Therefore, the Board correctly concluded that the Hospital had ignored significant relevant evidence in its analysis of the history of labor relations.

4. Community of Interest

The "community of interest" factor in unit determinations is well established. (*County of Santa Clara*, *supra*, 51 Cal.App.3d 255, 260.) This inquiry involves identifying and weighing the similarities and differences between employees in the unit on the one hand, and those excluded on the other. (See *id.* at p. 265.) But both courts and PERB have held that a petitioner need not identify the *most* appropriate unit for a unit to be appropriate for recognition. (See *Alameda County Assistant Public Defenders Assn. v. County of Alameda* (1973) 33 Cal.App.3d 825, 830; *City of Glendale* (2007) PERB Order No. Ad-361-M, pp. 4-5.) All that is required is that the unit be "appropriate." (See § 3507.1, subd. (c).)

The Hospital claimed that it was applying the following test to determine whether employees in the proposed unit have a community of interest, and that this test was directed by the ALJ in *Salinas II*: "appropriate units in acute care facilities must still share a community of interest within the bargaining unit, yet must also have a disparity of interest with those employees outside of the unit." (AR:IV:1544.) Again, the Hospital quoted selectively from *Salinas II*.

In *Salinas II* the Hospital argued that it was following the federal community of interest standard. (AR:VII:3000.) In response to the Hospital's claim, the ALJ provided a detailed

history of the federal standard to guide the Hospital in its third opportunity to determine whether the unit was appropriate. (AR:VII:3000-3020.) But *Salinas II* also instructed that a test based on "disparity of interests" was incompatible with the NLRB's Health Care Rule, which the Hospital also relied on at various points in its determination. (AR:VII:3019.)

Here again the Hospital's failure to adequately consider employee rights distorted its analysis. Where employees have been historically excluded from a unit with which they share some community of interest, a strict disparity of interests test effectively disenfranchises them. (*Pleasanton*, *supra*, PERB Decision No. 169, p. 7.) Furthermore, *Salinas II* instructed that PERB had not followed a strict "disparity of interests" test in the past, because that analysis ultimately becomes a "most appropriate" unit test. (AR:VII:3014-3015.)

So while the Hospital was correct to apply a "community of interest" test, it selectively quoted from *Salinas II* to suggest that it was required to find the *most* appropriate unit, when it was not.

Under the Hospital's reasoning, even if the petitioning employees had enough in common to make them a cohesive unit for collective bargaining, any similarities to employees now represented by NUHW were disqualifying. (AR:IV:1544.) But any such similarities were not overwhelming enough for the Hospital to have, in the past, modified NUHW's unit to add the unrepresented lab classifications. And indeed the similarities between classifications in the proposed unit and employees

outside the unit cited by the Hospital appear to concern aspects of the employees' work that is incidental to their main job duties. For example, the Hospital's staff report considered the allegedly shared duties of "answer[ing] the phone" and "verify[ing] specimens and patient identifiers to ensure that the correct specimen is being tested." (AR:IV:1553.) These duties are not contained in the Hospital's description of the key duties of CLSs, MLTs, or histotechs. (AR:IV:1550-1551.) The Hospital's report did not similarly describe the duties of the NUHW-represented lab employees, such as pathology clerks and laboratory technician assistants, so it is impossible to know how closely related the functions of these two groups truly are.

The Hospital's bad faith is shown most clearly in its treatment of histotechs. The Hospital cites the histotechs repeatedly as being too distinct from CLSs and MLTs to be included in a unit with them. (AR:1545-1546.) On the factors of "frequency of contact," "training requirements," and "interchange of job functions," the Hospital found that histotechs were distinct enough from CLSs and MLTs to weigh against finding that the proposed unit had a community of interest. (AR:IV:1545-1546.) But it was the Hospital who sought to include the histotechs in the unit, over ESC's initial objections. (AR:V:2357-2358.) This gamesmanship led PERB to conclude that the Hospital had acted unreasonably. (AR:II:1096.)

The Hospital's determination also relied on the "fact" that all Lab employees have "similar" compensation, but this fact

was entirely unsupported in the Hospital's findings. (AR:IV:1547, 1554.) Neither the determination nor the staff report describes the compensation for Lab employees outside the proposed unit. (*Ibid.*) Yet this was another factor the Hospital weighed "heavily" against the petition. (AR:IV:1547.) This was also unreasonable. (*City of Azusa*, *supra*, 81 Cal.App.3d 48, 61.)

In sum, substantial evidence supports the Board's conclusion that the Hospital unreasonably applied the community of interest factors. (*Boling*, *supra*, 5 Cal.5th 898, 912.)

III. The Board's order that the Hospital recognize and bargain with ESC is well within its broad remedial authority.

It was well within PERB's remedial authority to order the Hospital to grant ESC's recognition petition.

PERB's remedial powers are broad. The MMBA provides PERB with initial exclusive jurisdiction to determine whether an unfair practice charge "is justified and, if so, the appropriate remedy necessary to effectuate the purposes of the [MMBA]." (§ 3509, subd. (b).) The courts have noted that "the relation of remedy to policy is peculiarly a matter for administrative competence." (*Mt. San Antonio*, *supra*, 210 Cal.App.3d 178, 189, quoting *Phelps Dodge Corp. v. NLRB* (1941) 313 U.S. 177, 194.) Accordingly, PERB's discretionary remedial authority is subject only to limited judicial review. (*Id.* at p. 190, citing *Jasmine Vineyards, Inc. v. Agricultural Labor Relations Bd.*, *supra*, 113 Cal.App.3d 968, 982.) The Board's remedies "will not be

disturbed by the courts unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the act." (*Butte View Farms*, *supra*, 95 Cal.App.3d 961, 967.)

The Hospital argues that even if it unlawfully denied ESC recognition, PERB did not have the authority to order the Hospital to recognize ESC. (POB 31-32.) Instead, the Hospital suggests that the proper remedy would be to permit the Hospital yet another chance to arrive at a reasonable unit determination. (*Ibid*.) In support of this argument, the Hospital cites to *County of Orange*, *supra*, PERB Decision No. 2478-M and *County of Riverside* (2011) PERB Decision No. 2163-M. Neither case forecloses the remedy the Board ordered here.

In both *County of Orange* and *County of Riverside*, PERB determined that an employer unlawfully applied its local rules to reject representation petitions. In *County of Orange*, the employer unreasonably rejected a severance petition by a union seeking to represent several professional classifications, contrary to MMBA section 3507.3. (*County of Orange*, *supra*, PERB Decision No. 2478-M, pp. 1-2.) The Board issued a limited remedy requiring the employer to rescind the denial of the severance petition and determine whether the proposed unit was appropriate. (*Id.* at p. 13.) Although the Board did not order the employer to grant the union's severance petition, the Board alluded to the possibility that in a different "procedural context" it may be appropriate for PERB to determine the contours of a unit. (*Id.* at p. 13.) Furthermore, the Board held

that it would allow the employer to decide whether the petitioned-for unit was appropriate, "so long as the decision was consistent with the MMBA." (*Ibid.*)

In *County of Riverside*, *supra*, PERB Decision No. 2163-M, the Board considered whether an employer violated its local rules when it denied a unit modification petition. (*Id.* at p. 1.) The Board found that the employer unreasonably denied the petition on the basis that the union had failed to provide proof of support, despite the fact that its local rule had no such requirement. (*Id.* at pp. 2, 4-5.) As a remedy, the Board required the employer to rescind its denial of the petition, but it did not require the employer to grant the petition. (*Id.* at p. 6.) The appropriateness of the unit had not been litigated, and so certifying the unit was "premature." (*Id.*, adopting proposed decision at p. 10.)

As also noted in Argument section I.B.3, above, *County of Orange* and *County of Riverside* are distinguishable from this case. The employer in *County of Riverside* had not yet made a unit determination. (*County of Riverside*, *supra*, PERB Decision No. 2163-M, adopting proposed decision at p. 10.) The employer in *County of Orange* had made a unit determination once, but the only issue before PERB was whether that denial violated MMBA section 3507.3, pertaining to professional employees' right to be represented separately from other employees. (*County of Orange*, *supra*, PERB Decision No. 2478-M at p. 10.) Thus, it was appropriate in *County of Orange* and *County of Riverside* for the Board to grant the employer a further

opportunity to determine whether the proposed unit was appropriate.

But, this case has distinct features that required the Board to act more decisively. (AR:II:1102.) Here, "the Hospital's repeated failure to apply its own rule reasonably [has] result[ed] in an exhaustive history of litigating similar issues." (AR:II:1101, internal quotation marks omitted.) By the time this case was before the Board, the Hospital had delayed for five years ESC's right to represent the petitioning employees, and those employees' right to be represented. The continuing denial of recognition raised the risk of irreparable injury to ESC. (See *City of Fremont* (2013) PERB Order No. IR-57-M, p. 26, citing *Small v. Avanti Health Systems, LLC* (9th Cir. 2011) 661 F.3d 1180, 1185, 1191.) There is no reason to believe that on the fourth try, the Hospital would reasonably apply its local rules. Indeed, the Hospital has not attempted to explain how it would do so or acknowledged that it failed on its first three attempts.

Thus, the Board properly determined that given the circumstances of the case, a "conclusive resolution," i.e., an order requiring the Hospital to recognize ESC, was necessary to effectuate the purposes of the MMBA. (AR:II:1102.) The Board's order was not an abuse of its broad discretion to determine the appropriate remedy for an unfair practice. (*Mt. San Antonio*, *supra*, 210 Cal.App.3d 178, 189-190; see also *Local Joint Executive Bd. of Las Vegas v. NLRB* (9th Cir. 2011) 657 F.3d 865, 873-874 [even where deference is owed, an agency's repeated recalcitrance makes remand inappropriate].)

CONCLUSION

The Hospital seeks to have the Board's decision annulled and set aside and be replaced by a different decision dismissing ESC's allegations. (POB 53.) The result for its employees' rights would be disastrous. The Hospital has configured its units in a way that, according to its arguments, allows it to effectively disenfranchise a significant portion of its workforce. The Board emphasized that "[t]he MMBA does not give the Hospital the right to determine which employees get the benefit of the statute or which must remain unrepresented, and it certainly does not empower it to determine the number and identity of the employee organizations that represent its employees." (AR:II:1090.) The Court should affirm this principle by denying the Hospital's petition.

Dated: September 28, 2020

Respectfully submitted,

J. FELIX DE LA TORRE, General Counsel
WENDI L. ROSS, Deputy General Counsel

By 

DANIEL TRUMP, Senior Regional Attorney
JESSICA KIM, Senior Regional Attorney

Attorneys for Respondent
PUBLIC EMPLOYMENT RELATIONS BOARD

COUNSEL'S CERTIFICATE OF COMPLIANCE WITH CALIFORNIA RULES OF COURT 8.204(c)(1)

Counsel of Record hereby certifies that pursuant to rule 8.204(c)(1) of the California Rules of Court, the enclosed brief of Respondent Public Employment Relations Board is produced using 13-point Roman-type font and contains, including footnotes, 13,594 words, which is less than the maximum—14,000 words—permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: September 28, 2020

J. FELIX DE LA TORRE
Declarant
PUBLIC EMPLOYMENT RELATIONS BOARD

PROOF OF SERVICE
C.C.P. 1013a

COURT NAME: In the Court of Appeal for the State of California, Sixth Appellate District

CASE NUMBER: H047857

PERB DEC. NO.: 2689-M

CASE NAME: *Salinas Valley Memorial Hospital District v. Public Employment Relations Board; International Federation of Professional and Technical Engineers, Local 20, (Engineers and Scientists of California)*

I declare that I am a resident of or employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within entitled cause. I am an employee of the Public Employment Relations Board, 1031 18th Street, Sacramento, California 95811.

On September 28, 2020, I served an electronic copy of **Respondent's Brief** on the Sixth District Court of Appeal pursuant to California Rules of Court, rule 8.44(b), satisfying service on the Supreme Court of California.

On September 28, 2020, I served the **Respondent's Brief** regarding the above-referenced case on the parties listed below:

Attorneys for Petitioner
Ramanpreet K. Dheri
Robert G. Hulteng
Littler Mendelson, PC
333 Bust St., 34th Floor
San Francisco, CA 94104

Attorney for Real Party in Interest
Danielle A. Lucido
IFPTE, Local 20
810 Clay Street
Oakland, CA 94607

[X] **(BY TRUEFILING)** I electronically served the document(s) via TRUEFILING on the recipients designated above pursuant to California Rule of Court, Rule 8.70.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct and that this declaration was executed on September 28, 2020, at Sacramento, California.

S. Taylor
(Type or print name)


(Signature)