Case No. H047857

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

SALINAS VALLEY MEMORIAL HOSPITAL DISTRICT
Petitioner,

v.

PUBLIC EMPLOYEE RELATIONS BOARD
OF THE STATE OF CALIFORNIA
Respondent.

ENGINEERS AND SCIENTISTS OF CALIFORNIA,
IFPTE, LOCAL 20, AFL-CIO & CLC
Real Party In Interest

Appeal from PERB Decision No. 2689M
Unfair Practice Case No. SF-CE-1620-M

REAL PARTY IN INTEREST'S BRIEF

Danielle A. Lucido (California Bar No. 237258)
ENGINEERS & SCIENTISTS OF CALIFORNIA
LOCAL 20, IFPTE, AFL-CIO & CLC
810 Clay Street
Oakland, California 94607
(510) 238-8320
(510) 238-8324 (fax)

Attorney for Real Party In Interest
ESC, Local 20, IFPTE

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL Sixth APPELLATE DISTRICT, DIVISION	COURT OF APPEAL CASE NUMBER: H047857
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 237258 NAME: Danielle A. Lucido, General Counsel FIRM NAME: Engineers & Scientists of California, Local 20, IFPTE, AFL-CIO & CLC STREET ADDRESS: 810 Clay Street CITY: Oakland STATE: CA ZIP CODE: 94607 TELEPHONE NO.: (510) 238-8320 FAX NO.: (510) 238-8324 E-MAIL ADDRESS: dlucido@ifpte20.org ATTORNEY FOR (*name*): Engineers & Scientists of California, Local 20, IFPTE, AFL-CIO&CLC	SUPERIOR COURT CASE NUMBER:
APPELLANT/ PETITIONER: Salinas Valley Memorial Hospital District RESPONDENT/ REAL PARTY IN INTEREST: Engineers and Scientists of California, IFPTE, Local 20, AFL-CIO & CLC	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(*Check one*): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Engineers&Scientists of California IFPTE L20 AFL-CIO&CL

2. a. [X] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (*Explain*):
(1)	
(2)	
(3)	
(4)	
(5)	

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: 9/28/20

Danielle Lucido
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF APPELLANT OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
APP-008 [Rev. January 1, 2017]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cal. Rules of Court, rules 8.208, 8.488
www.courts.ca.gov

Table of Contents

TABLE OF AUTHORITIES

Page(s)

CASES

PERB ADMINISTRATIVE DECISIONS

Statutes

Regulations

I. INTRODUCTION

In November of 2014, a two-thirds majority of the workers in a bargaining unit of Laboratory employees elected International Federation of Professional & Technical Engineers, Local 20 (Engineers & Scientists of California) (hereafter "ESC" or "Union") as their exclusive representative for collective bargaining. The workers, employed by Salinas Valley Memorial Hospital District (hereafter "SVMH" or "Hospital") exercised their right to unionize pursuant to a card check election agreement negotiated by the parties and administered by the State Mediation and Conciliation Service (hereafter "SMCS"). Leading up to that agreement, the Employer successfully negotiated changes to the scope of the petitioned-for unit and signed the card check agreement as a form of contingent recognition—i.e. it promised to recognize the union upon a showing of majority support. Once the Union demonstrated majority support, however, the Employer embarked on a multi-year path of obstructionism, unreasonably withholding recognition and unreasonably applying its own local rule as it relates to unit determinations. After each of three distinct evidentiary hearings before the Public Employment Relations Board (hereafter "PERB" or "Board"), administrative law judges have found the Hospital's application of its local rule violated the Meyers-Milias-Brown Act (hereafter "MMBA" or "Act"), Gov. Code §§ 3507, 3509.

SVMH has steadfastly refused to accept its employees' choice at every step, for six long years, despite PERB's repeated remands to the Hospital, instructing it to apply its self-administered local rules reasonably, in a manner consistent with due process. Despite multiple opportunities, the Hospital has proven itself unwilling and/or unable to do so. The foreseeable—indeed, intended—effect has been to thwart employees' right to organize and obtain representation of their choosing for almost six years, while SVMH has committed multiple unfair practices in violation of the MMBA over this period of time.

In 2020, the PERB Board concurred with the Administrative Law Judge that the Employer acted unreasonably and that its refusal to recognize ESC must be remedied, ordering SVMH to cease and desist its unlawful conduct and to meet and confer with the workers' chosen representative, ESC. The Hospital asks the Court to invalidate the PERB Board's 2020 Decision and to find that PERB should not only excuse this Employer's unfair practices but bar any consideration of evidence of any employer's bad faith in unreasonably its own local rules. In other words, the Hospital asks this Court to create new law that would encourage intentional bad faith conduct by employers dead set on thwarting the very purpose of the MMBA which is to encourage collective bargaining between local agencies and the chosen representatives of their employees.

While this dispute has called on PERB to reach well-considered legal conclusions and painstaking factual findings, the reason the parties are before the Court of Appeal is much more straightforward. The Hospital has no regard whatsoever for PERB's authority to administer and enforce the unit determination provisions of the MMBA, Government Code §§ 3507 and 3509. Refusing altogether to accept PERB's statutorily explicit jurisdiction to review bargaining unit determinations made by local agencies for reasonableness, SVMH seeks a buyer in this Court for propositions that it has failed to sell to two different PERB Administrative Law Judges and the Board itself. The Hospital contends that it has no obligation to uphold its own agreement with the Union, or otherwise recognize the petitioned-for unit and that its repeated bad faith conduct should not be considered in any way. Indeed, this Employer contends that its unreasonable refusal to recognize the union by disputing the scope of the unit should be unreviewable under California labor law. None of these propositions withstand scrutiny.

A central purpose of the MMBA is to provide "a uniform basis for recognizing the right of public employees to join organizations of their own choice and be represented by those organizations in their employment relationships with public agencies." (Gov. Code § 3500.) Section 3507 of the MMBA permits public agencies to adopt "*reasonable* rules and regulations . . . for the administration of employer-employee relations"

including rules governing "recognition of employee organizations." (Gov. Code §§ 3507(a), 3507(a)(3); see also *Internat. Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191, 199 ["*City of Gridley*"] [discussing similar language in prior version of statute].) The power to adopt and apply local rules is not absolute. PERB routinely reviews local rules to determine whether they are facially "reasonable" and on that basis, facially valid. (See, e.g., *City & County of San Francisco* (2017) PERB Dec. No. 2540-M (invalidating local rule as facially unreasonable). PERB also reviews local agencies' applications of their own local rules to determine whether or not the agency acted "reasonably." (*County of Riverside* (2010) PERB Dec. No. 2119-M, p. 13 [citing *City of Glendale* (2007) PERB Order No. Ad-361-M; *Alameda County Assistant Public Defenders Association v. County of Alameda*, (1973) 33 Cal.App.3d 825, 830].) A public agency's rule, or application of its rule, must not "frustrate the declared purposes of the MMBA." (*City of Gridley*, *supra*, 34 Cal.3d at 202 [citing *Huntington Beach Police Officers' Association v. City of Huntington Beach* (1976) 58 Cal.App.3d 492, 501-502; *International Federation of Professional & Technical Engineers, Local 21 v. City & County of San Francisco* (2000) 79 Cal.App.4th 1300, 1305-6].)

SVMH is a public hospital governed under the MMBA. It employs nearly 2,000 employees, most of whom are represented by one of three unions in three bargaining units. At the time of PERB's most recent

decision, the National Union of Healthcare Workers ("NUHW") represented 810 of SVMH's employees in a unit of varied titles, the California Nurses Association ("CNA") represented 683 employees in a nursing unit, and the International Union of Operating Engineers, Stationary Engineers, Local 39 ("IOUE") represented a much smaller unit of 29 employees in engineering titles. The structure of these three existing units is relatively unique as the scope of the existing units was determined long ago and/or by agreement with those unions. The scope of NUHW's unit is the product of agreement with the Employer and leaves a residual group of 32 non-supervisory employees in the SVMH Laboratory without representation. This case concerns the right of those unrepresented, non-supervisory Laboratory employees to organize and bargain with the Hospital through a representative of their own choosing. ESC, Real-Party-in-Interest, respectfully requests that this Court affirm PERB's 2020 Decision and dismiss the Employer's writ petition as its latest attempt to thwart these workers' rights.

A. The Hospital and the Union Negotiated Over the Scope of the Unit and Reached a Card-Check Agreement in 2014; The Hospital Then Refused to Recognize the Successful Union, Prompting Multiple Rounds of Litigation

On September 16, 2014, ESC submitted a request that SVMH recognize it as the exclusive representative of the disputed unit.[1] ESC's

[1] The factual history is set forth more fully in Section II below.

request indicated that it had authorization cards reflecting majority support among the unit. The Hospital refused. On November 11, 2014, SMCS mediation resulted in the parties entering into a card-check agreement, which authorized the SMCS mediator to conduct a card-check election. The same day, the SMCS mediator conducted the card-check election and certified ESC as exclusive representative.

SVMH did not contest this result at that time. The Hospital instead delayed for more than a month until explicitly refusing to recognize ESC as bargaining agent on December 19, 2014. The Hospital declared that the bargaining unit as defined in the agreement to which it is a party was not an appropriate unit and engaged in a "technical refusal to bargain" in order to force the parties into litigation before PERB.

This led the Union to file the first unfair practice charge in this dispute, Case No. SF-CE-1287-M. ALJ Alicia Clement issued a decision in 2015 ("ALJ Decision 1") ordering the Hospital to either recognize the Union and bargain, or else to address what legitimate concerns it had regarding the appropriateness of the unit through the process in its Employee Relations Ordinance ("ERO"), which would require that it issue a formal reasoned decision.[2] The Hospital did not do this, instead deeming

[2] The Hospital's ERO contains its local rules on representation, with rule 2 addressing unit determinations. (PERB 2187-2192.)

the bargaining unit "inappropriate" without providing an adequate explanation.

The Union thus filed the second unfair practice charge in this dispute, Case No. SF-CE-1391-M. ALJ Clement presided, again, and in 2017 issued a second decision finding SVMH (1) acted in bad faith and (2) did not apply its ERO in a reasonable manner (hereafter "ALJ Decision 2"). She then ordered the Employer to apply its ERO reasonably and base any resulting unit determination on discernable factors and written findings that PERB could review. The Hospital did not do this either. Its board members voted 3-2 to again deem the unit "inappropriate," albeit only after one Hospital board member changed his vote after the fact. A month later, the Hospital's counsel drafted a post-hoc report purporting to explain the decision that was made behind closed doors and without public discussion. The Hospital's post-hoc rationalizations simply ignored the SMCS-mediated card-check agreement.

The Union then filed a third unfair practice charge in this dispute, Case No. SF-CE-1620-M, alleging that the Hospital's third proceeding was, yet again, unreasonable, as was the Hospital's continued refusal to recognize and bargain with ESC. ALJ Donn Ginoza considered the evidence and arguments of both parties and took notice of the Hospital's now extensive history of violating the MMBA. His Proposed Decision (hereafter "ALJ Decision 3") ordered the Hospital to (1) cease and desist

from unreasonably withholding recognition and (2) meet and confer with ESC upon request. This remedy is well within PERB's broad remedial authority and in line with many cases where PERB has ordered recognition and bargaining under the MMBA and other similar statutes it administers. (*See* Gov. Code §§ 3541.3, 3509(b).) It should outrage but not surprise by this point that the Hospital once again refused to follow the clear directive of a PERB Administrative Law Judge.

Continuing to refuse to bargain, the Hospital filed exceptions with the full PERB Board. PERB conducted a thorough analysis of the history of the dispute and the Hospital's conduct, weighing whether its unit determination was reasonable under the circumstances. In PERB Decision Number. 2689-M, PERB ultimately agreed with the ALJ that the Hospital failed to meet the reasonableness standard and affirmed his remedial order. PERB's decision turned on a complete review of the record, including the fact that the Hospital at no point accounted for its binding SMCS-mediated card-check agreement. It acted as though it never existed. The Hospital's determination was instead entirely self-serving.

B. The PERB Board's 2020 Decision is Not Only in Line with the Language and Purpose of the MMBA; Its Analysis and Remedy Follow Precedent Established by the Courts of Appeal and PERB Itself

The Hospital contends that PERB's 2020 Decision marks some kind of departure from precedent, but a review of the appellate decisions as well

as PERB's own precedential decisions shows the opposite is true. PERB's 2020 Decision is rooted in established precedent. Before the Legislature conferred jurisdiction on PERB to enforce the MMBA, the Courts of Appeal recognized that an employer's unreasonable withholding of recognition could be and should be remedied with an order to meet and confer. (See, e.g., *County of Alameda*, *supra*, 33 Cal.App.3d 825; *Reinhold v. City of Santa Monica* (1976) 63 Cal.App.3d 433 ["*City of Santa Monica*"].) Similarly, once PERB took up the role of reviewing local rules and their application for reasonableness, it too has remedied an employer's unreasonable conduct with orders to cease and desist from violating the MMBA and to recognize the union at issue. (See, e.g., *Butte County* (2016) PERB Decision No. 2492-M; *Oak Valley Hospital* (2018) PERB Decision No. 2583-M.)

SVMH fails to acknowledge that this precedent even exists. Instead, SVMH would have this Court look to distinguishable cases where PERB decided instead to remedy unfair practices by remanding the matter to the agency for further consideration or processing. SVMH has been afforded three opportunities to act in a reasonable manner and had demonstrated, over six years and three evidentiary hearings that it is unwilling to do so because it does not want to add a fourth bargaining unit to the Hospital's existing three. PERB is under no obligation to issue yet another remand or

condemn the workers' decision to purgatory; it is authorized to put a stop to the Employer's unlawful conduct.

C. The Correct Standard of Review Is Appropriately Deferential To PERB's Expertise

The Hospital's writ petition seeks to further delay or cut off its obligation to recognize ESC. Central to this effort, the Hospital attempts a sleight of hand. The Hospital insists that PERB wrongly "substituted its own judgment for that of the hospital" and thereby "exceeded its authority in this case." (SVMH Opening Brief at p. 52.) It complains that "the MMBA does not empower PERB to make unit determinations." (*Ibid*.) The Hospital can only hope this Court fails to notice MMBA sections 3507 and 3509, which expressly empower PERB to ***review*** local agency unit determinations. This is not to mention that the parties first ended up before PERB thanks to the Hospital's own initiative—its so-called "technical refusal to bargain" giving rise to ALJ Decision 1.

Unambiguous statutory language and California Supreme Court precedent establish the standards of review in this case, from which the Hospital hides. As to questions of law, PERB's construction "will not be set aside unless clearly erroneous." (*Boling v. Public Employee Relations Bd.* (2018) 5 Cal.5th 898, 911-912 ["*Boling I*"], cert den. (2019) __ U.S. __ [139 S. Ct. 1337, 203 L.Ed.2d 600].) "The findings of the board with respect to questions of fact, including ultimate facts, if supported by

substantial evidence on the record considered as a whole, shall be conclusive." (Gov. Code § 3509.5 (b); also *Boling I*, *supra*, 5 Cal.5th at 904.) A reviewing court meanwhile will not strike a remedy ordered by PERB unless it finds an abuse of discretion. (*Boling v. Public Employee Relations Bd.* (2019) 33 Cal.App.5th 376, 388 ["*Boling II*"].) Neither of the *Boling* decisions nor MMBA Section 3509.5 garners a single mention in SVMH's's Opening Brief.

The questions before this Court are (1) whether PERB's reasonableness analysis finding the Hospital to have violated the MMBA was clearly erroneous under law; (2) whether PERB's factual findings were not supported by substantial evidence; and (3) whether its resulting remedial order constituted an abuse of discretion. The language of the MMBA and case law from the California Supreme Court compel a conclusion that the PERB Board's 2020 Decision is owed deference. In contrast, the Hospital's self-administered decisions to deny recognition and dispute the unit at issue have been found unreasonable and are owed no deference by this Court.

For the reasons that follow, and as PERB itself will argue in its Brief, the Hospital's appeal fails under the correct standards of review.

II. FACTUAL AND PROCEDURAL HISTORY

Prior to SVMH's filing of the present Petition for Writ of Extraordinary Relief ("Petition"), three PERB Administrative Law Judges

("ALJ") Decisions and the PERB Board itself successively found SVMH applied its own unit-determination rule unreasonably, repeatedly violating the MMBA by unlawfully denying recognition to the Union. The Hospital's repeated failure to apply its rule reasonably spanned a period of six years.

A. The Unit at Issue Is Typical of Many Units That ESC Represents

ESC represents a variety of bargaining units in both public and private settings and is known among Clinical Laboratory Scientists ("CLSs") and Medical Laboratory Technicians ("MLTs") as a union uniquely situated to represent them, deeply familiar with their professional interests and career path. ESC represents units of CLSs and MLTs at a variety of private and public sector hospitals in California including Hazel Hawkins Memorial Hospital, Washington Hospital and Valley Medical Center in San Jose. (PERB 1490.) The Union typically works with the Employer to define the precise contours of the unit, i.e. whether other laboratory employees are included or not.

B. The Hospital Itself Created The List of Classifications That Were Included In The Parties' Card Check Agreement

ESC worked with SVMH to define the scope of the unit and at the Employer's request, they agreed on a unit of 31. The unit at issue includes the CLSs, MLTs and Histology Technicians (also known as "Histotechs").

(PERB 0052-0054, 0654.) Michelle Childs, Chief Human Resources Officer for the Employer, agreed to a binding card check election for this group of lab employees on November 11, 2014. (PERB 0044.) The Hospital compiled the list of employees to be included in the card check election and transmitted it to an SMCS mediator and the Union. (PERB 0052-0054.)

Although the Union did not initially seek to represent Histology Technicians, the Hospital added their classification to the voter list, and the Union accepted the change. (PERB 0052-0054, 1492.) As in most workplaces, the precise number of employees in each classification has varied over time but at the time of the card check election, there were twenty-two Clinical Laboratory Scientists, three Lead Clinical Laboratory Scientists, two Certified Medical Laboratory Technicians, one non-certified Medical Laboratory Technician and one Lead Histology Technician. Together, these 31 positions constituted all unrepresented employee positions in the Laboratory.[3] All other non-supervisory employees in the

[3] SVMH attempts to mislead - or confuse - the Court by contending that ESC petitioned to represent 31 of 71 Lab employees and implying, repeatedly, that if only ESC had sought to represent "all unrepresented employees in the Lab" such a unit might have been deemed appropriate. In fact, ESC *did* petition to represent all unrepresented employees in the lab. At the time there were 42 such employees; 38 of those 42 were represented by NUHW. The remaining unrepresented employees were in managerial/supervisory positions not automatically included in the same unit as those they supervise. While the Hospital asked the Union to add the histology technicians to the unit, and ESC agreed, the Employer never

Lab were represented by a different employee organization—the NUHW—including pathology clerks, laboratory technician assistants (also called phlebotomists), and receptionists. (PERB 0652.) These NUHW lab employees are part of a much larger unit distributed across 173 job classifications which includes clerical, service, professional and technical employees. (PERB 0649, 1840, 1888-1912.) For this reason, the unit is can be characterized as a "residual unit," designed to afford all unrepresented Laboratory employees the ability to engage in collective bargaining.

C. ESC and SVMH Executed a Card Check Election Agreement That Expresses Their Mutual Agreement Regarding The Scope of The Unit

On November 11, 2014, the parties signed a Card/Petition Cross-Check Election Agreement. (PERB 1928.) In paragraph 3 of the Card/Petition Cross-Check Election Agreement, the parties agreed that "in the event the Union establishes a majority in the Cross-Check, the Employer agrees to recognize the Employee Organization as the exclusive bargaining representative for the unit defined" therein. (PERB 1927.) The Agreement also states that the parties agree that any result will be "final and binding…(including questions as to eligibility)." (PERB 1927.) State Mediator Kenneth Glenn conducted the mutually requested and agreed

---

asked the Union to include managerial/supervisory employees or anyone else.

upon card check election on November 11, 2014. (PERB 0654, 1930.) On November 11, 2014, ESC was declared to have majority support in the agreed upon unit. Indeed, ESC won the votes of two thirds of the agreed-upon unit.[4] (PERB 0654, 1930.)

D. SVMH Unlawfully Refused to Recognize ESC, Prompting ESC to File an Unfair Practice Charge; PERB's ALJ Issued a 2015 Decision ("ALJ Decision 1") Finding SVMH Violated the MMBA

Despite the SMCS declaring ESC to have majority support, the Hospital refused to bargain with or recognize the Union. On February 12, 2015, ESC filed an unfair practice charge. PERB's Office of the General Counsel issued a Complaint on April 23, 2015 alleging the Hospital violated MMBA section 3507.1 when it refused to recognize the Union, and Government Code sections 3505 and 3506.5 when it refused to meet and confer with the Union over terms and conditions of employment for employees in the petitioned-for bargaining unit (also referred to as the "ESC lab unit"). (PERB 2234-2238.)

[4] SVMH's Opening Brief erroneously states the Union won with "a bare majority" of "16 cards." (SVMH Opening Brief, p. 14). SVMH's cites the Card/Petition Cross-Check Results for this proposition. (*Ibid*, citing PERB 2598.) That document does not state the number of "yes" cards. Rather, it says "the majority designation would be 16." (PERB 2598.) SVMH made the same erroneous claim in its Post Hearing Brief to ALJ Alicia Clement in 2017, later admitting to her, after being prompted by the Union, that "16" should be replaced with "20." (PERB 2964-2968.)

PERB Administrative Law Judge ("ALJ") Alicia Clement convened a formal evidentiary hearing on August 4, 2015. (PERB 2459-2592.) The ALJ's Proposed Decision issued on November 5, 2015, and became final on December 2, 2015 without objection from the Employer. The ALJ, addressed the following issues: 1) whether the Hospital unreasonably withheld recognition of the Union in violation of MMBA section 3507(c) and 3507.1(c); 2) whether the Hospital breached its duty to meet and confer in good faith in violation of MMBA section 3505; and 3) whether the Hospital waived its right to contest the appropriateness of the bargaining unit. (PERB 3409.)

On the first question, ALJ Clement held the Hospital unreasonably failed to recognize ESC. (PERB 3424.) ALJ Clement found that the Union did all that it could to comply with the Hospital's unit determination rule detailed in its ERO and that the Hospital failed to adhere to its own ERO by not rendering a decision on the appropriateness of the bargaining unit, as required.

On the second question, ALJ Clement found that the Hospital's refusal to meet and confer with the Union violated Government Code section 3505. In her decision, she notes that while the Hospital made an effort to preserve its ability to contest the appropriateness of the proposed bargaining unit, it never acted to preserve that ability and as of the date of the hearing, a year later, had taken no steps to challenge the composition of

the bargaining unit or propose an alternative scope. According to ALJ Clement, the Hospital's protracted lack of action to perfect the composition of the unit demonstrated bad faith. (PERB 3425-3426.)

On the third issue, whether the Hospital waived its right to perfect the composition of the bargaining unit, ALJ Clement found the issue was not ripe for consideration. (PERB 2344.) She ordered the Hospital to request a determination from its Board of Directors and to comply with Rule 2 of its ERO if it wished to test the appropriateness of the bargaining unit. (PERB 3429.)

E. The Hospital Board of Directors Found The Unit to Be Inappropriate And Told The Lab Employees They Could Instead Join an Existing Union

The Hospital did not express any interest in working with the union or invoking the ERO to "perfect the unit." Instead, it sought to defeat the stated interests of all affected employees in the lab by petitioning its Board of Directors on November 25, 2015 for a determination that the entire unit should be considered "inappropriate." To this end, the Hospital invoked the first part of Rule 2 of its ERO. (PERB 3445.) The Board invited the Union to make an extremely brief presentation regarding the proposed unit. (PERB 1610-1612.) During this December 14, 2015 presentation, representatives from the Union explained that the Union was a professional employee union that represented similar units of CLS and other laboratory

employees, and that the workers in the proposed unit shared a strong community of interest. (PERB 1610-1612.)

Three days later, on December 17, 2015, the Board determined that the list of classifications it had compiled and sent to the SMCS prior to the card check a year earlier did not comprise an appropriate unit. (PERB 3495.) The Board of Directors issued a brief "Statement" with a short description of how it had applied the three factors set forth in its ERO rule 2: (1) "the organizational structure of the hospital": other employees in the laboratory are represented by a separate union (NUHW) which would cause conflict and disruption; (2) "the possibility of proliferation of units": the Hospital does not believe in the "micro-unit" concept "which would result in a proliferation of units";[5] and (3) "the history of labor relations in the Hospital": the Hospital wants to maintain the long-standing balance of three "established bargaining units." (PERB 3495.)

The Board of Directors' Statement indicated that "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." (PERB 3495.) There was no public discussion of unit

[5] Despite not believing in micro-units, the Hospital already has one: the International Union of Operating Engineers, Stationary Engineers Local 39 unit contains 29 employees. (PERB 1396, 1704.)

appropriateness prior to the December 17, 2015 determination and the Hospital refused to reveal how it came to its decision, which was made in closed session. (PERB 1666-1667.)

F. ESC Filed a Second Unfair Practice Charge And The Same PERB ALJ Issued a 2017 Decision ("ALJ Decision 2") Finding The Hospital Had Once Again Acted Unreasonably And in Violation of The MMBA

The Union filed an additional unfair practice charge against the Hospital following the Hospital Board's December 2015 Determination, claiming the Hospital's application of its ERO Rule 2 was unreasonable. (PERB 2661-2742.) PERB's General Counsel issued another complaint in case SF-CE-1391-M. (PERB 2851-2854.) ALJ Clement held an evidentiary hearing on November 17, 2016. (PERB 1576-1702.)

PERB's ALJ issued a Proposed Decision on November 30, 2017, which became final on December 27, 2017, once again without objection form the Employer. ALJ Clement found, among other things, that the Hospital unreasonably failed to apply its local rules when it determined the Laboratory unit to be inappropriate. (PERB 3020.) In reaching this conclusion, she began by noting that employers may adopt their own rules regarding unit determination, but are subject to a reasonableness standard under the MMBA. (PERB 2982-2983.)

ALJ Clement found that the Hospital's deliberate and knowing withholding of any evidence related to reasoned decision-making denied

PERB the ability to evaluate the quality of the Hospital's decision-making process. (PERB 3000.) ALJ Clement found that the Hospital's December 17, 2015 memorandum purporting to explain the decision "contains conclusions but no rationale." (PERB 2998.) ALJ Clement further found that "an employer's failure to provide a basis for its findings promotes disputes and delays," and that here, the Hospital's continued refusal to bargain "is an egregious delay and deprivation to the parties' rights." (PERB 2997.)

She ordered the Hospital to try again, affording it a *third* opportunity to reasonably apply its local rule and be transparent.

G. The Union's February 2018 Presentation to The Hospital Board Regarding The Lab Unit

On or around December 22, 2017, Union Representative Nick Steinmeier sent a letter to Michelle Childs asking that ESC be included in the Hospital's upcoming investigation into unit appropriateness. (PERB 1167.) Childs informed the Union that a meeting would be held on February 12, 2018 and the Union could have "up to one hour" for its presentation. (PERB 1932.) The Union presented written evidence and condensed its presentation of witnesses to fit within the hour it was given.

During the February 12, 2018 Special Board of Directors meeting, Executive Director Karen Sawislak, Union Representative Nick Steinmeier and Lucido each presented. (PERB 1490-1522.) Lucido presented two

witnesses, albeit briefly: one Clinical Lab Scientist, Frank Yu, and one Medical Laboratory Technician, Cyd Sallabedra, to testify about their community of interest within the Laboratory.[6] (PERB 1495-1513.) Lucido also discussed the Union's analysis of the three factors included in the Hospital's rule on unit determinations, ERO Rule 2. (PERB 1491-1494.) Steinmeier and Sawislak informed the Board that ESC represents many CLS-MLT units throughout Northern California, including at public sector hospitals Hazel Hawkins, Valley Medical and Washington Hospital. (PERB 1490.) Sawislak explained that this was a "very typical unit among healthcare professionals." (PERB 1491.)

In her February 6, 2018 letter to the Hospital Board, Lucido provided the Employer with legal authority that indicated that the Hospital's stated desire to keep the number of bargaining units in the hospital to those three that were already established would deprive Laboratory employees of their statutory right to be represented by a union of their choosing. (PERB 1471-1473.) The Board proceeded to do exactly that.

[6] Because the Hospital said that it would base its decision on the lab unit's "disparity of interest" with other employees, in addition to their community of interest with employees included in the unit, the Union presented evidence on the disparity of interest factor. The Union did not and does not agree that ALJ Clement required the Hospital to utilize this factor or that current MMBA or NLRA law calls for it.

H. The Board Vote Took Place Without Public Discussion

The Hospital Board scheduled its vote on unit appropriateness for their May 24, 2018 meeting and discussed the matter only in closed session. (PERB 1294-1296, 1303.) After its closed session ended, the Board went straight into the unit appropriateness vote, with a motion from Board member Margaret D'Arrigo-Martin to "vote on the appropriateness of the petition or unit for purposes of collective bargaining." (PERB 1534.) There were no deliberations in open session. (PERB 1534-1536.) As Board Chairman Orman put it, "[w]e didn't do a lot of discussing." (PERB 1303.)

Immediately prior to the vote, the Hospital's in-house counsel stated, "I want it to be clear. So a vote of yes would be you're determining that it *is* an appropriate unit. A vote of no would be saying that it's not appropriate." (PERB 1535.) Then, in a 3-2 vote, the Board determined that the unit *was* indeed appropriate with Board members Alfred Diaz-Infante, Carissa Purnell and Carmen Gil voting "yes" and Board members Margaret D'Arrigo-Martin and Chris Orman voting "no." After Board Chair Orman voted "no", however, Diaz-Infante said that he "misunderstood" and requested to change his vote from "yes" to "no." (PERB 1535.) The Board called for a re-vote and determined—for the third time—that the unit was "inappropriate." More than a month later, on June 27, 2018, the Hospital

issued a post-hoc rationalization of its vote, titled as a "Statement From the Chairman of the Board of Directors."[7] (PERB 1541-1547.)

I. The Hospital Issued a Post-Hoc Statement Over a Month Later in a Failed Attempt to Rationalize its Unreasonable Decisions To Find the Unit "Inappropriate" and Withhold Recognition

The Statement claims that the Board considered the following when making its unit appropriateness determination: 1) organizational structure 2) possibility of proliferation of units 3) history of labor relations and 4) community of interest within the bargaining unit and a disparity of interest with the employees outside of the unit. (PERB 1542.) These were the same factors considered in its December 17, 2015 Statement from the Board of Directors with the addition of the community of interest/disparity of interest factor. (PERB 3495.)

On the first factor, the Statement contends that because the proposed unit does not include "all employees in the Lab, all unrepresented employees in the Lab," or all professional or technical employees in the Hospital, its organizational structure "weighs against finding the unit appropriate." (PERB 1542.)[8]

---

[7] Chairman of the Board Chris Orman admitted at the hearing in this matter that he did not write the Statement despite its title. (PERB 1302-1303.) It was written primarily by counsel for the Hospital with input from Childs. (PERB 1199.)

[8] The Hospital's Statement is particularly curious because, of course, ESC *did* petition to represent a unit of "*all unrepresented employees in the Lab*"

On the second factor, the Hospital Statement said the lab unit is a "non-conforming, small unit, that would split up a single, small department between NUHW, Local 20, and unaffiliated employees" and "lead to proliferation of units in the Hospital" which would lead to "numerous administrative and labor relations problems."[9] (PERB 1543-1544.)

On the third factor, the Statement cited the fact that the proposed unit had not previously been organized and the Hospital had not historically bargained for employees in the lab other than with NUHW. (PERB 1544.) Based on this lack of history, it found the history of labor relations weighed against finding the lab unit to be appropriate. (PERB 1544.)

On the fourth factor, the Board concluded that because the CLSs, MLTs and Histotechs share a community of interest with the other *NUHW-represented lab employees*, they somehow lacked "a community of interest that is sufficiently distinct from the interests of employees excluded" from the petitioned-for unit.[10] (PERB 1544-1547)

---

other than managerial/supervisory employees that the Hospital never expressed any interest in adding to the unit. See fn 3 above.

[9] The Hospital does not mention that it was the Hospital itself, working with NUHW, that created a non-conforming unit that left dozens of non-supervisory employees in the Lab without representation. That decision is what created the need for a residual unit in the Lab.

[10] Of course, ESC did not "exclude" NUHW members; it has only ever sought to represent the residual unit of unrepresented employees, a standard practice wherever there are "non-conforming" units.

This was the third time the Hospital found the petitioned-for unit "inappropriate" and the second time it issued a statement either implying or outright stating the Lab employees who voted to join ESC should instead vote to join NUHW—an option the workers have neither sought nor been given. Once again, the Hospital's hypothetical was a non-starter: NUHW has disclaimed any interest in representing the employees in the residual Laboratory unit. (PERB 0674).

J. ESC Filed a Third Unfair Practice Charge and in a 2019 Decision ("ALJ Decision 3") PERB Found SVMH Violated the MMBA By Failing, Again, to Apply its Own Local Rule in a Reasonable Manner

Following this post-hoc Statement, the Union filed an unfair practice charge alleging the Hospital's 2018 unit determination reflected another unreasonable application of its ERO Rule 2 and that the Hospital continued to unreasonably withhold recognition. (PERB 0011-0257.) PERB's General Counsel issued a Complaint in case SF-CE-1620-M and granted the Union's request to expedite the case on November 9, 2018. (PERB 0436-0439.) Administrative Law Judge Donn Ginoza convened an evidentiary hearing on February 20 and 25, 2019. (PERB 1136-1376.)

In the Proposed Decision dated June 14, 2019, ALJ Ginoza found the hospital applied all three factors in its Regulation 2 unreasonably. (PERB 0647-0680.) According to Judge Ginoza, SVMH applied the first factor, "appropriateness of the unit in relation to the Hospital's

organizational structure," unreasonably because they used a mechanistic approach that insisted on a unit comprised of all of the remaining unrepresented employees or all remaining unrepresented professional or technical employees in the Hospital. (PERB 0666-0667.) Judge Ginoza points to the fact that the current configuration of unions already "achieves the largest possible bargaining units by including six presumptive NLRB groups into the existing three, covering 85 percent of all employees." (PERB 0667.)

In applying the second factor, potential for unit proliferation, ALJ Ginoza found that SVMH's concerns were nothing more than speculation. (PERB 0668.) Judge Ginoza explains that where an employer rejects a petition based on operational efficiency and that rejection denies employees the right to representation, PERB case law dictates that the employer's rejection is only warranted where there is "convincing evidence" of the claim. (PERB 0671.) He recounted that that the SVMH's speculation that it might lose some degree of efficiency was not backed up by any examples and found that in the absence of any actual evidence, adding a fourth unit of Laboratory employees would "not impose an unreasonable burden on the efficiency of operations." (PERB 0672.)

ALJ Ginoza found that the Hospital unreasonably applied the third factor of ERO Rule 2, history of labor relations, because it is of little use when employees "have lacked representation for many years and now seek

to obtain that right." (PERB 0671.) Indeed, as applied by the Employer, this factor could only weigh against *any* new bargaining unit. Lastly, ALJ Ginoza considered and rejected the Hospital's determination that the Lab unit lacks a sufficient community of interest because it ran counter to the weight of the evidence which demonstrated that in fact, employees work in close proximity under the same supervision and share common functions, i.e. they *do* share a community of interest.

Accordingly, ALJ Ginoza ordered SVMH to cease and desist from unreasonably withholding recognition, and to meet and confer with ESC. (PERB 1066.) SVMH appealed the Decision to PERB.

K. The PERB Board Affirms the ALJ's Findings and Proposed Remedy in PERB's Decision No. 2689-M ("Decision 4")

On January 13, 2020, PERB issued Decision number 2689-M, (hereafter "Decision 4") in which it agreed with ALJ Decision 3 and found SVMH violated the MMBA when it unreasonably applied its rule on unit determinations to deny recognition to ESC. (PERB 1066.) PERB also upheld the remedy issued in ALJ Decision 3, ordering the Hospital to recognize and bargain with ESC. (PERB 1066.) PERB's comprehensive analysis of the facts and law at issue are discussed in further detail below in Section IV.

The core fact findings supporting PERB's conclusion that the Hospital's unit determination was unreasonable deserve emphasizing. PERB took note:

> In reaching its determination that the unit was inappropriate, the Hospital notably made no reference to the parties' card-check agreement in which it agreed to recognize ESC as the exclusive representative upon proof of majority support of the employees in the unit. The Hospital also did not consider the fact that it permitted ESC to represent at least one of those employees in a disciplinary matter, and that it had responded to at least some of ESC's requests for information before categorically refusing to recognize and bargain. Instead, the Hospital determined, yet again, that it would not recognize ESC or the previously agreed-to unit.

(Decision 4, p. 14 [PERB 1078.) These fact findings directly translated into PERB's remedial order in this case directing the Hospital to recognize ESC and commence bargaining: "The Board cannot ignore, and the ALJ was right to consider, the Hospital's repeated failure to apply its own rule reasonably, resulting in an 'exhaustive history of litigating' similar issues." (*Id.* p. 37 [PERB 1101].) Given this context, yet another remand to the Hospital would have been inadequate to restore employee representational rights. PERB's finding that the Hospital simply "***refused*** to reasonably apply its own rules ***in order to*** deny a group of employees representation and an opportunity to bargain" therefore necessitated that PERB "order a conclusive resolution." (*Id.* at p. 38 [emphasis added] [PERB 1102].)

On February 10, 2020, the Hospital filed a Petition for Writ of Extraordinary Relief with this Court asking the Court to annul and set aside

PERB Decision 2689-M and command that "a new and different decision be issued, dismissing the unfair practice charge and complaint." (Petition, p. 13.)

III. STANDARD OF REVIEW

"[T]he relationship of a reviewing court to an agency such as PERB . . . is generally one of deference." (*Regents of the University of California v. Public Employee Relations Bd.* (1986) 41 Cal.3d 601, 617 ["*Housestaff*"].)

PERB's factual findings are owed deference by the Courts of Appeal: "The findings of the board with respect to questions of fact, including ultimate facts, if supported by substantial evidence on the record considered as a whole, shall be conclusive." (§ 3509.5 (b).) Where "there is a plausible basis for the Board's factual decisions," the Courts of Appeal "are not concerned that contrary findings may seem . . . equally reasonable or even more so . . . . [A] reviewing court may not substitute its judgment for that of the Board." (*Housestaff, supra*, 41 Cal.3d at 617.) As to questions of law, PERB's construction "will not be set aside unless clearly erroneous." (*Boling v. Public Employee Relations Bd.* (2018) 5 Cal. 5th 898, 911-912 ["*Boling I*"], cert den. (2019) __ U.S. __ [139 S. Ct. 1337, 203 L.Ed.2d 600].) This same deference is owed to PERB's construction of its statutes in light of other laws. (*Cumero v. Public Employment Relations Board* (1989) 49 Cal.3d 575, 583; *Banning Teachers Association v. Public Employment Relations Board* (1988) 44 Cal.3d 799, 804;

Inglewood Teachers Association v. Public Employment Relations Board (1991) 227 Cal.App.3d 767, 776.)

Finally, a reviewing court will not strike a remedy ordered by PERB unless it finds an abuse of discretion. (*Boling II*, *supra*, 33 Cal.App.5th at 388 ["*Boling II*"].) When reviewing a remedial order, a court should generally permit it to "stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the Act." (*Ibid.* [citing *Carian v. Agricultural Labor Relations Bd.* (1984) 36 Cal.3d 654, 674].)

IV. ARGUMENT

The Hospital argues in its Opening Brief that the facts are largely undisputed and, therefore, PERB's conclusions with respect to the Hospital's unit determination are not entitled to any deference at all. This same argument was made and rejected by the California Supreme Court in *Boling I*, *supra*, 5 Cal.5th 898. In that unfair practice case, the Court of Appeals decided that "PERB's determinations were subject to independent review because the facts were undisputed." (*Id*. at 912.) The Supreme Court disagreed with the Court of Appeals explaining that "when the matter falls within PERB's area of expertise" deference applies to its legal conclusions even when resting on undisputed facts. (*Id*. at 913.)

The standards of review settled by the California *Supreme Court in Boling I* direct the outcome of this appeal and bind this Court to defer to

PERB's fact findings and legal conclusions. To the extent the facts are disputed, it bears emphasizing that PERB's fact findings—including findings of "ultimate facts" —are "conclusive" and owed deference so long as they are supported by substantial evidence in the record. (*Id.* at 904 [citing Gov. Code § 3509.5.) As indicated by the Supreme Court in *Boling I*, this Court must defer to PERB's conclusions of law under the clearly erroneous standard. (See *ibid*.) Its remedial order meanwhile must be upheld absent a determination that PERB abused its discretion. (*Boling II*, *supra*, 33 Cal.App.5th at 388.)

Each of these standards has been more than satisfied in this case, which are discussed below in turn. The justifications for deference in this case are especially strong, in fact—far more than in the typical unfair practice case that proceeds in a single arc from the ALJ level, to PERB, to the Court of Appeal. This dispute has appeared and reappeared before PERB itself and two different ALJs through four rounds of painstaking review over six years. It has been extensively litigated and analyzed at every level within the agency, as a result. The subject matter falls within PERB's legislatively delegated area of expertise: application of the MMBA to a union recognition procedure. Indeed, through its protracted procedural history, PERB has developed an even greater expertise in the dispute itself that could not be reproduced in the Court of Appeal through this proceeding alone. This dispute's unusual procedural history should therefore

comfortably dispel any doubt that could remain that this Court should defer to PERB's decision.

A. PERB's Findings of Fact Regarding The Four Unit Appropriateness Factors Are Supported by Substantial Evidence And Are Entitled to Deference

In Decision 4, PERB conducted a granular analysis of the facts underlying each of the Hospital's four unit determination factors: "the organizational structure of the Hospital; (2) the possibility of proliferation of units; (3) the history of labor relations in the Hospital; and (4) the community of interest and disparity of interest."[11] (2020 Decision. pp. 28-29 [PERB 1092-1093].) These fact findings clearly rest on substantial evidence.[12]

First, with respect to the Hospital's organizational structure, PERB looked at large and non-conforming existing units at the Hospital and found

[11] PERB exercised its authority to consider all of the evidence presented by the parties leading up to the instant case, "including taking administrative notice of [its] own records." (PERB 1081.)

[12] All of the fact findings underlying these unit determination factors inform PERB's legal conclusions in this case, which as noted throughout are entitled to deference unless clearly erroneous. *Boling I, supra*, 5 Cal.5th at 904. In particular, the question of whether the employees share a community of interest is a mixed question of fact and law, starting with an intensive examination of the facts before reaching a legal conclusion. Whether under the substantial evidence or clearly erroneous standards, PERB's examination of the Hospital's community of interest analysis at this phase is owed this Court's deference under *Boling I*. PERB's assessment that the Hospital acted unreasonably satisfies both standards of review given PERB's finding that its unit determination lacked a rational basis in fact, as discussed herein.

this meant both that the "Hospital's collective bargaining program [wa]s sufficiently agile and robust to tolerate a lot of nonconformity"[13] and that the Hospital's reliance on potential work jurisdiction disputes was misplaced. (Decision 4 pp. 29-30 [PERB 1093].) According to PERB, any potential for work jurisdiction disputes was already present given that some employees in the Laboratory are represented by NUHW while some are unrepresented. (*Id.*, pp. 30-31 [PERB 1093-1094].)

Next, with respect to proliferation of bargaining units, PERB determined that the existing "three units date back many decades, indicating little outside interest in organizing the residual unrepresented employees." (*Id*., p. 30 [PERB 1094].) In addition, PERB found the size of the ESC Laboratory unit was the same as one of the existing long-standing Hospital bargaining units, the International Union of Operating Engineer's unit which is made up of only 29 employees. (*Ibid*.) PERB rejected the Hospital's conclusion that a residual Laboratory unit would somehow negatively impact operations. As PERB explained, "the Hospital's evidence was purely speculative and insufficient to demonstrate concrete operational harm" as required by PERB case law. (*Id.*, p. 33 [PERB 1097] [citing

[13] The National Labor Relations Board has a Health Care Rule that establishes seven presumptive categories for union representation. (29 C.F.R. § 103.30 (2005).) Bargaining units that do not follow the contours of these presumptive categories are said to be non-conforming units.

Pleasanton Joint School District/Amador Valley Joint Union High School District (1981) PERB Dec. No. 169, p. 4].)

PERB went on to find it unreasonable for the Employer to rely on the fact that workers in the petitioned for unit have not been represented in the past as if that would justify them remaining unrepresented, as this would mean that it would always weigh against a new unit. (PERB 1095.) PERB concluded that the Hospital's unreasonable application of this factor was "tantamount to deciding the employees must remain unrepresented in practical perpetuity," something the Hospital failed to grapple with at all, which was in and of itself, unreasonable, given its foreseeable adverse impact on employee choice. (*Id.,* pp. 31-32 [PERB 1095-1096].)

Finally, PERB correctly considered the record evidence that the Hospital's "determination was motivated by its desire to maintain its current structure of three units and three unions." (*Id.,* p. 26 [PERB 1090].) As explained above, though public employers covered by the MMBA may adopt "reasonable rules and regulations" "for the administration of employer-employee relations" including rules on "recognition of employee organizations," those rules must not "frustrate the declared purposes of the MMBA." (Gov. Code § 3507(b); *City of Gridley, supra*, 34 Cal.3d at 202 [citations omitted].) One of the stated purposes of the MMBA is to provide "a uniform basis for recognizing the right of public employees to join organizations of their own choice and be represented by those organizations

in their employment relationships with public agencies." (Gov. Code § 3500.) PERB found the Hospital "ignored and frustrated" this purpose when it applied its unit determination rule for a third time. (*Id.*, p. 24 [PERB 1088].)

In light of these conclusions, PERB found the "Hospital applied its unit determination criteria in a manner that cannot withstand rational scrutiny and thus constituted an abuse of discretion." (*Id.*, p. 33 [PERB 1097].) Because of this lack of rational basis in fact, PERB found the Hospital's third determination that the unit was somehow "inappropriate" was unreasonable and therefore unlawful. (*Ibid* [PERB 1097].)

PERB's finding that the Hospital's unit determination lacked rational basis in fact and was therefore unreasonable should be treated by this Court as "conclusive" as it is "supported by substantial evidence." (Gov. Code § 3509.5 (b).) PERB's 40 page majority Decision makes clear that its conclusions in this regard are based on its "granular" review of the facts and evidence presented over a period of six years, in three unfair practice cases and four rounds of review. (PERB 1087, 1100, 1102.) Few if any other disputes receive such thorough litigation of the facts at the agency level. If this does not amount to substantial evidence, it is unclear what would.

B. Government Code Section 3507 Clearly Requires That A Public Agency's Application of Rules Regarding Recognition Must Be Reasonable

California Government Code Section 3507 grants public agencies the option to adopt "reasonable rules and regulations . . . for the administration of employer-employee relations" including rules on "recognition of employee organizations." (Gov. Code §§ 3507, 3507(b); *City of Gridley, supra*, 34 Cal.3d at 199.) Given the plain language of section 3507, when evaluating a unit determination made pursuant to a local rule, PERB must consider whether the public agency's determination is reasonable. (*Riverside, supra*, PERB Dec. No. 2119-M.) There is no dispute in the case law about this statutory limit on public agency authority:

> "[t]he scope of local government rulemaking power under Government Code section 3507 is limited by the policies and purposes of the MMBA… '[T]he power reserved to local agencies to adopt rules and regulations was intended to permit supplementary local regulations which are 'consistent with, and effectuate the declared purposes of, the statute as a whole.'"

(*City of Gridley, supra*, 34 Cal.3d 191, 202 [quoting *Huntington Beach Police Officers' Assn. v. City of Huntington Beach* (1976) 58 Cal.App.3d 492, 502].) As the Supreme Court of California explained, when interpreting § 3507, "it is clear the Legislature did not intend to grant local agencies the power to adopt substantive rules that would interfere with employee choice." (*City of Gridley, supra*, 34 Cal.3d 191.) Moreover, "the guiding principles of the

statute insofar as recognition of the organizations goes is employee choice." (*Id*. at 201.)

Not only does section 3507(a) require that employer rules be reasonable in light of the MMBA, Section 3507(c) goes further and explicitly imposes a duty on public agencies not to "unreasonably withhold recognition of employee organizations." (Gov. Code § 3507(c); *Antelope Valley Health Care District* (2006) PERB Decision No. 1816-M, pp. 11-13 [finding that the District unreasonably withheld recognition under 3507(c) when the Union had majority support].) The Legislature passed AB 498 in 1970 for one reason: to add this new duty to the existing prohibition on unreasonable rules. (Stats.1970, c. 64, p. 79, § 1.) This statutory requirement that recognition not be unreasonably withheld together with the requirement that employer rules be facially "reasonable" and "reasonable" in their application establishes clear limits on public agencies' establishment of rules and their application of those rules.

Section 3507(d) goes even further and expressly empowers employee organizations to "challenge a rule or regulation of a public agency as a violation of th[at] chapter." (Gov. Code § 3507(d).) Despite this long-standing statutory language, which has been interpreted and bolstered by decades of case law, the Hospital argues that public agencies have the unfettered right to issue rules on representation and apply those rules as they see fit, no matter how many times they get it wrong and even

if they *intend* to get it wrong. According to this one Hospital Employer, the MMBA affords it the "unequivocal" power to make unit appropriateness determinations and so long as it has a rule on appropriateness, PERB should have no say in its unit determinations. (SVMH's Opening Brief pp. 28-30.)

In making this argument, the Hospital wholly ignores the statutory limitations on its rule-making authority—namely, the requirement that employer rules regarding recognition must be "reasonable" (Gov. Code § 3507(a)) and can be challenged when unreasonably applied. (Gov. Code § 3507(d).) It is the reasonableness requirement set forth in section 3507(a) and 3507(c) that both Judge Ginoza and PERB itself rightly relied on when ordering the Employer to cease and desist from "[u]reasonably applying Regulation 2 of the Hospital's employer-employee ordinance regarding unit appropriateness" and "[u]nreasonably withholding recognition of ESC as the exclusive representative of the proposed unit of Laboratory employees." (PERB 0677, 1103.)

PERB's interpretation of MMBA section 3507 as setting forth a reasonableness requirement and its application of that section to its own factual determinations, should not be set aside as it "is not clearly erroneous. To the contrary, it is clearly correct." (See *Boling I*, *supra*, 5 Cal.5th at 917.)

C. PERB Has Broad Remedial Authority Empowering It to Require The Employer to Process the Union's Petition and Recognize the Lab Unit

Government Code Section 3541.3(i) states that PERB may "take any action and make any determinations in respect of these charges or alleged violations [of the statutes PERB enforces] as the board deems necessary to effectuate the policies of this chapter."[14] (Gov. Code § 3541(i); see also *City of Palo Alto* (2019) Dec. No. 2664-M.) In addition, to empowering employee organizations to challenge unreasonable rules, Government Code Section 3507(d) affirms PERB's authority to remedy unfair practices committed in violation of the MMBA, including those involving a public agency's unreasonable application of local rules, and or any "unreasonable withhold[ing of] recognition" from an employee organization. Section 3507(d) explicitly invokes PERB's remedial power by citing Section 3509 to address violations of 3507(a) through (c). Section 3509(b) explains that a complaint alleging a violation of section 3507 "shall be processed as an unfair practice charge by the board" and the "determination as to whether the charge of unfair practice is justified, and if so, the appropriate remedy necessary to effectuate the purposes of this chapter, *shall be a matter within*

[14] Government Code Section 3541.3 is part of the Educational Employee Relations Act ("EERA") which existed before the MMBA. The MMBA later incorporated the broad remedial authority granted therein into Government Code Section 3509, the remedial authority language of the MMBA.

the exclusive jurisdiction of the Board." (Gov. Code § 3509(b) [emphasis added].)

There can be no dispute, PERB has the authority to order an employer to cease and desist unlawful conduct and to order bargaining. It has a long-standing history of doing so in a wide variety of MMBA and EERA unfair practice cases. (*City of Palo Alto*, *supra*, PERB Dec. No. 2664-M [going beyond an order to bargain by requiring a specific bargaining proposal be placed on the bargaining table]; *Inglewood Teachers Assoc.* (2018) PERB Dec. No. 2558 p. 35 [ordering bargaining and compelling employer to produce a list of bargaining unit members and contact information] [citing *Anaheim Union High School District* (2015) PERB Decision No. 2434, p. 100]; *Stockton Unified School District* (1980) PERB Decision No. 143 pp. 33-34.)

PERB cited this broad remedial authority when issuing its remedy in this case: ordering the Hospital to cease and desist from "[u]nreasonably withholding recognition of ESC as the exclusive representative of the proposed unit of Laboratory employees," and to "grant ESC's petition for recognition, and proceed to meet and confer over terms and conditions of employment upon request." (PERB 1102-1103.) PERB's remedy is entirely justified; indeed, a deferential remand to the same Employer that has already demonstrated its bad faith by repeatedly *refusing* to apply unit determination analysis in a reasonable manner would be nothing short of

punitive to the Union and the workers who seek ESC's representation. Given SVMH's repeated "history of unfair practices" and repeated failure to consider "the fundamental employee rights to form and join employee organizations and to be represented by those organizations in their employment relationships" any other remedy would encourage and reward stonewalling (Decision 4, pp. 25, 33 [PERB 1089, 1097].)

1. PERB Has a History in Similar Circumstances of Ordering MMBA Employers to Process Petitions for Recognition and/or Recognize Unions

In its Opening Brief, SVMH argues that the only appropriate outcome is to leave it free to deny any new unit as if it were "inappropriate." To support this argument, the Hospital cites cases where PERB has ordered a public agency to process a petition, but declined to go so far as to issue a bargaining order. Those cases are distinguishable in that none of them involve a similar pattern of repeatedly refusing to act lawfully following an election or card check.

SVMH cites *County of Ventura*, (2009) PERB Decision No. 2067-M. (SVMH Opening Brief p. 32.) In that case, the public agency refused to process a representation petition, claiming it was not the employer of the petitioning employees. The County employer never applied its local rule on bargaining units to the petition or considered the appropriateness of the unit. Rather, it rejected the petition on its face. PERB found the County *was* the employer of the petitioning employees and ordered it to process the

petition according to its local rules – something it had, up to that point, never done. When fashioning a remedy, PERB agreed with the ALJ who found it was "premature" to order recognition and bargaining because the establishment of a bargaining unit was not litigated or set forth in the complaint, and the County had not yet considered the unit's appropriateness. (*Id*. at 7.)

Similarly, in *County of Orange*, (2016) PERB Decision No. 2478-M, also cited by the Hospital, PERB ordered the employer to cease and desist from applying its rules regarding severance petitions unreasonably and to process the union's petition. (SVMH Opening Brief p. 32.) PERB stopped short of ordering recognition of the physicians and dentists petitioning for severance from a larger bargaining unit, as the County had not yet processed the recognition petition and "the only issue before [PERB] [wa]s whether the County violated the MMBA and its local rules by denying the professional employees included in [the] severance petition the right to be represented separately from non-professional employees." (*Id*. at 13.)

Unlike *County of Ventura* and *County of Orange*, *supra*, the instant matter came before PERB following a government-run card check election that the Union won. Further, unlike the employers in *County of Ventura* and *County of Orange*, the Hospital has issued multiple decisions about the appropriateness of the unit, all of which were litigated. PERB in *County of Ventura* and *County of Orange* stopped short of ordering recognition

because of the procedural posture of the cases, not because it lacked authority to issue such a remedy. PERB says absolutely nothing, in either case, to indicate its chosen remedy was the result of a statutory or case-based limit on its authority.

Indeed, in cases where an election has been held and a public agency unreasonably applies its local rule to withhold recognition, PERB has not hesitated to use its broad remedial authority and order recognition. In *Butte County* (2016) PERB Decision No. 2492-M, PERB found that the County violated the MMBA when it unreasonably enforced its local rule so as to withhold recognition from the incumbent union during the period before a decertification election. The County also stopped collecting dues for the incumbent union. (*Id.* at p. 1.) The Board ordered the County not only to cease and desist from unreasonably withholding recognition from the incumbent union but also to pay back dues for the period when they should have been recognized. (*Id.* at p. 11.)

In *Oak Valley Hospital* (2018) PERB Decision No. 2583-M, the Board held that it was unreasonable for the Hospital to use its local rule to withdraw recognition without an election. The Board ordered the Hospital to cease and desist from refusing to meet with the union and denying the union "its right to represent employees in their employment relations with the District." (*Id*. at pp. 9 – 11.)

Viewed as a whole, these PERB decisions undermine the Hospital's baseless argument that PERB's remedial authority in representation cases is limited to remanding to the public agency, again and again and again and yet again. To the contrary, PERB can and does order employers to cease and desist withholding recognition and to bargain with the union in cases similar to this one.

2. Before PERB Gained Jurisdiction Over MMBA Cases, Courts Interpreting the MMBA Also Ordered Recognition

PERB's remedy in this case is also in line with long-standing MMBA precedent, preceding the creation of PERB. In *Alameda* County, *supra*, 33 Cal.App.3d 825, the County's Board of Supervisors rejected a petition for recognition of a unit of public defenders and instead established a single unit for 360 professional employees in various classifications. (*Id.* at 828.) The public defenders filed a writ of mandate seeking to have the County's decision overturned and have established a new, much smaller bargaining unit limited to public defenders. The County of Alameda's Employee Relations Ordinance, held in part that "any single representation unit shall encompass as many position classifications as possible" and that the factors may include "*community of interest among employees*, history of representation and the general field of work." (*Id.* at 830-31.)

The Court noted the County's power to make and apply their own rules, but understood that this power was limited by section 3507's

command that "[n]o public agency shall unreasonably withhold recognition of employee organizations." (*Id*. at 831.) It then conducted its own analysis of the reasonableness of that determination, stating:

> The question to be decided then becomes whether requiring all professional employees, regardless of type, to be in one organization for the administration of employer-employee relations is reasonable and appropriate.

(*Ibid*.)

The Court then looked into the facts surrounding the petition and found that public defenders have "little community of interest with the other professional groups which Unit XI tries to place in one organization," such as auditors, planners, and librarians. (*Id.* at 831-32.) The Court went on to hold that "[d]enying recognition" of this new, smaller unit is a violation of Section 3507 because public defenders are "unreasonably forced into an organization with other employees with whom there exists little, if any, community of interest." (*Id.* at 832.) The Court issued a writ of mandamus compelling recognition of the new, smaller unit. (*Ibid.*) Importantly, it did not remand the petition for an additional round of processing by the County.

A few years later, in *City of Santa Monica*, *supra*, 63 Cal.App.3d 433, the City of Santa Monica processed a petition for recognition by the Santa Monica Police Officer's Association, denying the requested inclusion of the chief of police in the unit. On review of a denied writ of mandate

contesting the City's exclusion of the chief of police, the Court of Appeal considered whether the City's decision to exclude the chief of police and place him in his own bargaining unit—separate from the assistant chief—was "reasonable" under MMBA section 3507. (*Id*. at 440.) The Court disagreed with the exclusion because it seemed there would be "sufficient community of interest between a chief of police and an assistant chief" and "there is a similarity in their general field of work" such that segregation into different bargaining units was "unreasonable on its face." (*Id.* at 441.) As a result, the Court deemed the City's application of its local rule, a city ordinance, unreasonable and ordered the City to pay the now retired chief of police the accumulated sick leave he would have received as a member of the bargaining unit. (*Id*. at 444.) The Court did not remand the issue to the City for reconsideration of the appropriate unit. Instead, it ordered recognition, indeed retroactive recognition (as the chief had retired by the time the Court ruled). Just like PERB did in this case, it made its own unit determination.

Neither of these Courts interpreted section 3507 as granting public agencies an "unequivocal statutory right to determine a unit's appropriateness" as the Hospital suggests. (SVMH Opening Brief p. 28.) Instead, both interpreted section 3507 as having a clear statutory mandate that prohibits employers from unreasonably withholding recognition.

When such unreasonable withholding occurs, PERB has broad remedial authority granted by the MMBA to make it stop.

3. PERB's Remedy Is Entirely Appropriate to The Circumstances and Effectuates The Purposes of The MMBA; As It Does Not Reflect An Abuse of Discretion, It Must Not Be Set Aside

As set forth above, PERB remedial orders are granted deference and set aside only where there was an abuse of discretion. (*Boling II*, *supra*, 33 Cal.App.5th at 388.) Put another way, when reviewing a PERB remedial order, a court should generally permit it to "'stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the Act.'" (*Ibid* [quoting *Carian*, *supra*, 36 Cal.3d at 674].)

Here, the remedy requiring the Hospital to cease and desist from refusing to recognize ESC and meet and confer with ESC upon request is a standard remedy issued in unfair practice cases where a public agency unreasonably withholds recognition. The Hospital, in its Opening Brief, does not seem to deny this. Instead, the crux of the Hospital's argument is that PERB exceeded its authority by "conducting its own unit determination analysis" rather than simply accepting the Hospital's unreasonable one (or unreasonable three as is the case here). (SVMH Opening Brief, p. 52.) At its core, the Hospital's objection is to the fact that PERB looked into

whether the Hospital's decision was reasonable and found it to lack a rational basis.

The problem with the Hospital's argument is that section 3507(c) says that "no public agency shall unreasonably withhold recognition of employee organizations." (Gov. Code § 3507(c).) By the plain language of the statute, in order for PERB to enforce this statutory mandate, it necessarily *must* consider the reasonableness of a public agency's unit determination, as happened in this case. This mandate is clear and has been interpreted to require the exact reasonableness review PERB performed in this case. The remedy issued is well within PERB's broad remedial authority, both under the plain language of its statutes as well as case law. PERB's remedial order thus did not constitute an abuse of discretion.

D. Petitioner Argues for an "Objective Test" that Does Not Exist, Seeking Permission from this Court for it – and Other Employers – To Act in Bad Faith

The Hospital contends that PERB in this case has departed from a supposedly "long-standing objective test" for determining whether an employer has reasonably applied their local rule on unit determinations. (SVMH Opening Brief, p. 33.) There is no such test, let alone a longstanding one. Indeed, the four pages it dedicates to this argument, the Hospital fails to cite a single case that stands for the proposition that PERB may not consider evidence that an employer engaged in bad faith when reviewing the employer's application of local rules for reasonableness.

(SVMH Opening Brief p. 33-36.) Instead, the Hospital references a single PERB decision—*City & County of San Francisco* (2017) PERB Dec. No. 2540-M—for the proposition that PERB cannot consider evidence of bad faith when determining whether an employer applied its local rule reasonably or not.

In *City & County of San Francisco*, the employer was accused of maintaining a facially invalid rule and defended by arguing that it had bargained in good faith with the complaining union. PERB rejected this defense, explaining that "[i]t is of no consequence that the employer bargained in good faith after the rule was enacted." (*Id*. at p. 23.) PERB's rejection of the employer's good faith bargaining defense in *City & County of San Francisco* has absolutely nothing to do with the Decision at issue in this case.

This case does not involve a facial challenge to ERO Rule 2, nor could the Employer argue that it has ever bargained in good faith with ESC so as to obviate any concern over its six-year unreasonable refusal to recognize ESC. Rather, this case concerns the Hospital's unreasonable application of its rule, not a facial challenge to that rule. PERB's Decision 4 examines the reasonableness of the Hospital's application of its local rule regarding unit determinations and the reasonableness of withholding recognition from the ESC lab unit as required by the plain language of the MMBA. (Gov. Code § 3507(a), (c).)

None of the cases cited by the Hospital in its Opening Brief, or the Union for that matter, rely on *City & County of San Francisco* to set forth the test for determining reasonableness. To say PERB's three-year-old *City & County of San Francisco* decision sets forth a "long-standing objective test" applicable to this Court's review of PERB's Decision 4serves only to obfuscate and confuse. This argument must be dismissed for what it is—a tactical and formalistic last-ditch attempt to limit PERB's authority to consider the reasonableness of a public agency's withholding of recognition, something the statute plainly envisioned. An employer's track record may evince bad faith in its actions, and there is no reason that PERB should disregard such evidence. Indeed, the Employer's request for a court order that bad faith conduct should never be considered in a challenge to the unreasonable application of a local rule seeks permission for it - and theoretically, other public agencies - to engage in bad faith conduct in order to thwart employee organizing with no consequence of any kind.

City & County of San Francisco and the concept of an "objective test" under the MMBA for examining as-applied challenges in union recognition cases is simply inapposite here. No facially unlawful rule could be saved because it was enacted in good faith. Nor does a facially unlawful rule fail because it was enacted with bad intent. A facial challenge succeeds or fails based on the language at issue, not the author's motives. (See *City & County of San Francisco*, *supra*, PERB Dec. No. 2540-M at p. 23.) In

contrast, a challenge to the unreasonable application of a local rule considers the totality of the circumstances, which, of course, includes evidence of the employer's bad faith conduct and/or failure or refusal to act as the case may be. There could not be a "long-standing *objective* test" in such cases because the inquiry is inherently subjective; it is *as-applied* to the parties and the facts of each case.

This distinction between facial and as-applied challenges flows from PERB's reasonableness analysis under the MMBA in *City & County of San Francisco* and Decision 4. But it echoes basic due process principles that are deeply engrained in California law. (See *Baluyut v. Superior Court* (1996) 12 Cal.4th 826, 832.) As the California Supreme Court has observed, "the unlawful administration by state officers of a state statute that is fair on its face, which results in unequal application to persons who are entitled to be treated alike, denies equal protection if it is the product of intentional or purposeful discrimination." (*Ibid* [finding a pattern of discriminatory arrest and prosecution of homosexuals to deny them equal protection of the law] [citing *Snowden v. Hughes* (1944) 321 U.S. 1, 8].) The U.S. Supreme Court has likewise held that unlawful discriminatory intent "may appear on the face of the action taken with respect to a particular class or person, or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself." (*Snowden, supra,* 321

U.S. at 8.) If this Court is looking for a "long-standing" principle on which to hang its reasoning in this case, it need look no further than these cemented precedents holding discriminatory intent and a pattern of discriminatory conduct to be the essence of unlawful state action.

V. CONCLUSION

The Hospital's repeated, protracted refusal to comply with the MMBA must be put to a stop. The workers in the ESC lab unit are real people, entitled to union representation and all of the rights such representation offers. They have been denied these rights, due to no acts of their own, for *six years*. The Court must not lose sight of the denial of their rights. Their rights are what is at stake in this Court's review of PERB Decision 4.

PERB's findings in this matter should be left to stand, as they rest on substantial evidence. PERB's conclusions stem from reasoning that is not clearly erroneous or an abuse of discretion: specifically, that the Hospital's application of its local rule regarding unit determinations was not reasonably applied to ESC and its efforts to become certified as bargaining representative for a new unit at SVMH. This is especially true given PERB's legislatively delegated expertise to interpret the MMBA and review local rules for reasonableness. (Gov. Code § 3507(b); *Boling I*, *supra*, 5 Cal.5th at 911-913.) Given this, ESC respectfully asks that this

///

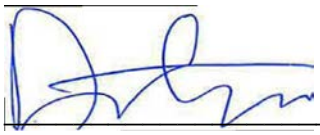
///

///

Court affirm PERB's Decision in its entirety.

DATE: September 28, 2020

Respectfully submitted,

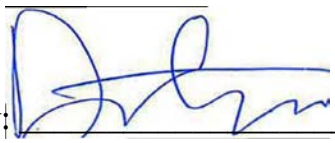
BY: 

Danielle Lucido, Chief Counsel
Engineers and Scientists of California
Local 20, IFPTE, AFL-CIO
Real Party in Interest

CERTIFICATE OF COMPLIANCE WITH CALIFORNIA RULE OF COURT 8.204(C)(1)

Counsel of Record, hereby certifies pursuant to rule 8.204(c)(1) of the California Rules of the Court, the enclosed brief of Real-Party-in-Interest Engineers and Scientists of California, Local 20, IFPTE, AFL-CIO & CLC is produced using 13-point Times New Roman Font and contains, including footnotes, 12,219 words, which is less than the maximum – 14,000 words – permitted by this rule. Counsel relies on Microsoft Word which was used to prepare this brief.

DATED: September 28, 2020

By: 

Danielle A. Lucido, Chief Counsel
Engineers and Scientists of California
Local 20, IFPTE, AFL-CIO
Real Party in Interest

PROOF OF SERVICE

I am employed in Alameda County. I am over the age of eighteen (18) years and not a party to the within action. My business address is 1999 Harrison Street, Suite 2700, Oakland, California 94612. At the time of service, I was at least 18 years of age. On September 28, 2020, I served by email a copy of the following document(s) as indicated below:

Real Party in Interest's Opening Brief
ENGINEERS & SCIENTISTS OF CALIFORNIA
LOCAL 20, IFPTE, AFL-CIO & CLC
Case No. H047857

J. Felix de la Torre
Felix.delatorre@perb.ca.gov
Wendi L. Ross
Wendi.ross@perb.ca.gov
Daniel Trump
Daniel.trump@perb.ca.gov
Jessica S. Kim
Jessica.kim@perb.ca.gov
Public Employment Relations Board
1031 18th Street
Sacramento, California 95811-4124

Ramanpreet K. Dheri
RDheri@littler.com
Robert G. Hulteng
RHulteng@littler.com
Littler Mendelson, PC
333 Bush St., 34th Floor
San Francisco, CA 94104

I electronically served the documents (via TRUEFILING on the recipients designated above pursuant to California Rule of Court, Rule 8.70. The electronic notification address of the person making the service is cedgerton@leonardcarder.com

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Concord, California on September 28, 2020.

/s/CEdgerton

Carol Edgerton