STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ORANGE COUNTY WATER DISTRICT EMPLOYEES ASSOCIATION, Charging Party, v. ORANGE COUNTY WATER DISTRICT, Respondent.	Case No. LA-CE-856-M PERB Decision No. 2454-M September 23, 2015

Appearances: Donald Drozd, Attorney, for Orange County Water District Employees Association; Rutan & Tucker by George W. Shaeffer, Jr., Attorney, for Orange County Water District.

Before Martinez, Chair; Winslow and Gregersen, Members.

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Orange County Water District (District) to a proposed decision (attached) by a PERB administrative law judge (ALJ). The complaint alleges that the District refused to participate in an agency shop election in violation of section 3502.5 of the Meyers-Milias-Brown Act (MMBA).[1] The District asserts that an employer is entitled to

[1] The MMBA is codified at Government Code section 3500 et seq. All further undesignated code sections are to the Government Code. Section 3502.5 provides, in pertinent part:

> (a) Notwithstanding Section 3502, any other provision of this chapter, or any other law, rule, or regulation, an agency shop agreement may be negotiated between a public agency and a recognized public employee organization that has been recognized as the exclusive or majority bargaining agent pursuant to reasonable rules and regulations, ordinances, and enactments, in accordance with this chapter. As used in this chapter, "agency shop" means an arrangement that requires an employee, as a condition of continued employment, either to join the recognized employee organization or

withhold its consent to the conduct of an agency shop election where the organizational security arrangement sought by the recognized employee organization is unlawful. The type of organizational security arrangement sought by the Orange County Water District Employees Association (Association) is referred to by the parties as a modified agency shop. It applies to future hires, not current employees. According to the District, because the modified agency shop permits current employees to "free ride," it violates the very principle courts have relied on in finding agency shop to be a valid form of union or organizational security. Therefore argues the

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> to pay the organization a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of the organization.
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> (b) In addition to the procedure prescribed in subdivision (a), an agency shop arrangement between the public agency and a recognized employee organization that has been recognized as the exclusive or majority bargaining agent shall be placed in effect, without a negotiated agreement, upon (1) a signed petition of 30 percent of the employees in the applicable bargaining unit requesting an agency shop agreement and an election to implement an agency fee arrangement, and (2) the approval of a majority of employees who cast ballots and vote in a secret ballot election in favor of the agency shop agreement. The petition may be filed only after the recognized employee organization has requested the public agency to negotiate on an agency shop arrangement and, beginning seven working days after the public agency received this request, the two parties have had 30 calendar days to attempt good faith negotiations in an effort to reach agreement. An election that may not be held more frequently than once a year shall be conducted by the California State Mediation and Conciliation Service in the event that the public agency and the recognized employee organization cannot agree within 10 days from the filing of the petition to select jointly a neutral person or entity to conduct the election. In the event of an agency fee arrangement outside of an agreement that is in effect, the recognized employee organization shall indemnify and hold the public agency harmless against any liability arising from a claim, demand, or other action relating to the public agency's compliance with the agency fee obligation.

(c) [religious objector exemption]
(d) [agency shop rescission election]
(e) [management employee exclusion]
(f) [financial reporting requirement]

District, the modified agency shop is unlawful and the District is privileged to withhold its consent to the conduct of the petitioned-for election.

A pre-hearing conference with the ALJ was held to discuss the presentation of evidence. The parties agreed that the issue to be decided was purely a question of law. Thus, the parties agreed that the matter would be submitted for decision following the filing of a joint stipulation of material facts, the filing of opening briefs, oral argument before the ALJ and the filing of closing briefs. In addition, the District filed two requests for judicial notice. The first sought to introduce legislative history materials concerning MMBA section 3502.5 and a page from PERB's website titled "Procedures for mandated agency shop elections;" the second, federal district court attorney's fees orders. The ALJ granted both requests.

The ALJ issued her decision on February 26, 2015, concluding that the District violated MMBA section 3502.5 when it refused to participate in a properly petitioned-for agency shop election. The proposed decision also concluded that the District failed to assert a valid defense to its actions. The District timely filed a statement of exceptions, and the Association timely filed a response.

The Board has reviewed the hearing record in its entirety, including the joint stipulation of material facts, the opening and closing briefs, the transcript of the oral argument and the judicially or officially noticed materials. The Board has considered the issues on appeal raised by the District in its statement of exceptions and by the Association in its response thereto, in light of the applicable law. Based on this review, the Board concludes that the proposed decision is adequately supported by the evidentiary record, well-reasoned and consistent with all relevant legal principles. We find no merit in the District's exceptions. Accordingly, the Board hereby affirms in full the conclusion reached in the proposed decision that the modified agency shop petitioned for by the Association is lawful and the District violated the MMBA

when it refused to participate in the properly petitioned-for election. The Board adopts the proposed decision, including its procedural history, statement of jurisdiction, findings of fact, identification of issue, conclusions of law, remedy, proposed order and Notice, as the decision of the Board itself as supplemented by a discussion of the District's exceptions.

FACTUAL SUMMARY

The essential stipulated material facts on which the ALJ based her decision are as follows: In May 2011, the Association proposed a modified agency shop in the course of successor agreement negotiations. The proposed agency shop arrangement would apply to all new District employees hired on or after a future date whereas current employees would be exempt. In or about July 2012, the Association made a second attempt to reach agreement with the District, requesting that the District reopen the parties' labor contract to negotiate over the Association's modified agency shop proposal. The District rejected each attempt, asserting that the proposed modified agency shop is not authorized under MMBA section 3502.5 because it applies only to new hires.

On or about November 14, 2012, the Association served the District and the State Mediation and Conciliation Service (SMCS) with a "Petition [and] Request for Agency Shop Election" (Petition), stating that no confidential or management employees were included in the bargaining unit and that the Petition was signed by approximately 98 percent of unit members.[2] The Petition provides:

> We, the undersigned employees of the Orange County Water District represented by the Orange County Employees Association, hereby request a Modified Agency Shop Agreement and an election to implement an Agency Fee Arrangement, pursuant [to] California Government Code Section 3502.5 and

[2] There are 184 employees in the bargaining unit represented by the Association. Of that total, 126 are dues-paying members. The Petition bears the signature of 125 bargaining unit employees. It appears that approximately 98 percent of *union* members, not *unit* members, signed the Petition.

> other applicable laws or regulations. Pursuant to the Modified Agency Shop Agreement and Arrangement, all employees hired on or after **March 1, 2013**, will be required to join as members [of] the Orange County Employees Association or pay to the Orange County Employees Association a "service fee" as set forth in Government Code Section 3502.5 (a), et seq. All employees hired prior to **March 1, 2013** are specifically excluded from the Modified Agency Shop Agreement and Arrangement.

(Bold in the original.)

SMCS contacted the District, in an e-mail received by the Director of Human Resources, to request a meeting to discuss the mechanics of the election. The District's legal counsel responded, requesting a postponement of the meeting, raising the issue whether SMCS had the authority to conduct an election for the proposed modified agency shop. SMCS informed the District that it did not have the authority under the MMBA to rule on the legality of a proposed agency fee arrangement, but that it was available to check the level of support and, if sufficient, conduct an election.

After receiving further direction from the District's governing board, the District's legal counsel informed SMCS that it would not consent to an election for the petitioned-for modified agency shop. The District reasserted its position that an agency shop arrangement is permissible only if it applies to *all* bargaining unit employees.

PROPOSED DECISION[3]

Harmonizing MMBA section 3502.5 with PERB Regulation 32999[4] in light of the purpose of the statutory amendment to allow for agency shop elections, the ALJ determined

[3] For the convenience of the reader, a summary of the proposed decision is provided in the body of the Board's decision. This summary is no substitute for reading the proposed decision itself, which contains PERB's first analysis of the novel issue presented, an analysis endorsed by the Board.

[4] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32999 provides:

that the regulatory requirement that the public agency employer "consent" to an election cannot be interpreted to mean that the public agency employer's participation in an agency shop election is "voluntary," as the District argued. As the ALJ stated:

> In essence, the District argues that it may lawfully prevent an agency shop election by refusing to participate in the SMCS process to determine the time, place and manner of the election. If true, this would defeat the entire purpose for which Senate Bill 739 was adopted—to eliminate the employer's ability to unilaterally prevent the conduct of an agency shop election. Such an interpretation eviscerates the statutory right of an employee organization to permit *employees* to choose whether to enact an agency shop. On this basis alone, the District's interpretation of PERB regulations must be rejected.

(Proposed decision, p. 19, italics in the original.)

The District defended its actions before the ALJ on several grounds. The District argued that the Association's petitioned-for modified agency shop is unlawful because it violates the First Amendment of the United States Constitution. The District also argued that because the petitioned-for modified agency shop does not apply to all bargaining unit employees and therefore does not serve the purpose of preventing all bargaining unit employees from becoming free riders, it does not fit the statutory definition of an agency shop. The District also argued that the indemnity provision under MMBA section 3502.5,

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> (a) The provisions of this Article are applicable whenever SMCS conducts representation and agency shop elections pursuant to the local rules of an MMBA, Trial Court Act or Court Interpreter Act employer.
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> (b) SMCS shall conduct such elections only pursuant to a Consent Election Agreement entered into by all parties and SMCS. The term "Consent Election Agreement" means either an agreement by the parties as to the time, place and manner of an election, or an agreement by the parties that authorizes the election supervisor assigned by SMCS to determine the time, place and manner of the election.

subdivision (b),[5] is inadequate protection against potential employer liability arising out of agency fee litigation. The ALJ correctly rejected each of the District's arguments.

Regarding the District's First Amendment argument, as the ALJ reasoned, under current United States Supreme Court law, agency shop arrangements are permitted in public sector employment. (*Abood v. Detroit Board of Education* (1977) 431 U.S. 209 (*Abood*).) Although recent Supreme Court opinions have been critical of public sector agency shop arrangements, the Supreme Court to date has not found the agency shop unconstitutional on any ground, including the First Amendment. (See *Pamela Harris, et al. v. Pat Quinn, Governor of Illinois, et al.* (2014) 134 S.Ct. 2618 (*Harris*); *Diane Knox, et al. v. Service Employees International Union, Local 1000* (2012) 132 S.Ct. 2277 (*Knox*.).)

Regarding the District's statutory argument, the ALJ appropriately took guidance from federal private sector law in concluding that nothing in the language of MMBA section 3502.5 expressly disallows the type of agency shop sought by the Association. Regarding the argument that agency fee litigation could expose the District to liability far in excess of the Association's financial wherewithal, the ALJ concluded that notwithstanding the speculative nature of the District's assertion, the statute's explicit indemnification provision precludes the District from raising its concern about potential liability as a defense to its refusal to participate in the petitioned-for agency shop election. Such concerns, as the ALJ appropriately noted, should be directed to, and addressed by, the Legislature. Finally, the ALJ stated that to the

[5] The statutory indemnity provision states:

> In the event of an agency fee arrangement outside of an agreement that is in effect, the recognized employee organization shall indemnify and hold the public agency harmless against any liability arising from a claim, demand, or other action relating to the public agency's compliance with the agency fee obligation.

(MMBA, § 3502.5, subd. (b).)

extent the District is attempting to assert the rights of bargaining unit employees who would be required to pay an agency fee under the modified agency shop, such argument must be rejected for lack of standing.

To remedy the District's violation of MMBA section 3502.5, the ALJ ordered the District to cease and desist from refusing to participate in the properly petitioned-for agency shop election. The ALJ also ordered the District to, within 10 days of service of a final decision, enter into a "Consent Election Agreement" (CEA) with the Association or authorize the SMCS to prepare a CEA governing the mechanics of said election.

THE DISTRICT'S EXCEPTIONS

On appeal, the District makes many of the same arguments it made before the ALJ. The District argues that MMBA section 3502.5 is clear in its purpose to prevent free riders. According to the District, a modified agency shop encourages free riders and therefore is in direct conflict with the statute. The District contends that after *Knox* and *Harris*, "modified agency shops cannot stand in the face of United States Supreme Court evolving First Amendment jurisprudence."

The District's exceptions to the proposed decision total 90. There are 72 exceptions to statements of rationale and 18 exceptions to conclusions of law. Pages 23 through 31 of the "Respondent's Statement of Exceptions and Supporting Brief" (Appeal) is copied, almost verbatim, from pages 5 through 13 of the District's opening brief to the ALJ; and pages 31 through 37 of the District's Appeal is copied, with minor variation, from various sections of the District's opening and closing briefs to the ALJ. It is not until page 38 that the Appeal specifically identifies how the ALJ erred. The District states:

> The ALJ fails to identify in its rationale (PD pp. 6-22), any authority under California law or federal law which expressly authorizes or approves an agency shop which exempts current

> employees in the bargaining unit, and which only applies to newly hired employees after a future date.

The District's substantive exceptions are identified and addressed in the discussion below.

DISCUSSION

Despite the surplus of exceptions, this case boils down to a relatively straightforward question of law, a question of law that was comprehensively explored and rationally and reasonably decided by the ALJ. Moreover, many of the District's arguments contained in the Appeal were already made to the ALJ in briefing and oral argument, and were already addressed by the ALJ in the proposed decision with which the Board agrees.

While it is true that the ALJ did not identify "any authority under California or federal law that expressly authorizes or approves" the petitioned for modified agency shop arrangement, it is also true the District has not identified any authority under California or federal law that expressly invalidates or disapproves such arrangement.[6] As the District knows from the Association's briefing below, there appears to be only one authority that directly addresses the validity of a modified agency shop, which the ALJ chose not to rely on. That authority is California Attorney General Opinion No. 02-309, issued on September 24, 2003. It concerns an MMBA employer like the District, and it found that a modified agency shop, such as the one contemplated here, falls within the scope of MMBA section 3502.5. (86 Ops.Cal.Atty.Gen. 169 (2003).) The issue was whether an agency shop election could be

[6] In a version of this same argument, the District argues that the cases relied on in the proposed decision do not support the proposition that a modified agency shop is lawful. *City of Hayward, et al. v. United Public Employees, Local 390, Service Employees International Union. AFL-CIO* (1976) 54 Cal.App.3d 761, 768 (*City of Hayward*) nor *Rae, et al. v. Bay Area Rapid Transit Supervisory and Professional Assn, et al.* (1980) 114 Cal.App.3d 147, 153 were relied on in the proposed decision, but not as direct authority for the ultimate conclusion reached that a modified agency shop is lawful. Rather, these cases were cited for their historical value and for the general proposition that agency shop in the public sector is the practical equivalent of union shop in the private sector. As acknowledged at the outset of the proposed decision, the issue presented in this case is a novel issue of first impression. That, by definition, means that there is no case authority directly on point.

conducted during the term of an existing memorandum of understanding containing a modified agency shop provision. The Attorney General concluded that such an election could be conducted if the current agency shop provision is first rescinded by the employees or removed from the agreement by negotiations. In reaching this conclusion, the Attorney General had to determine as a threshold matter whether the current modified agency shop provision met the statutory definition of agency shop. After first defining a modified agency shop provision as an "agency shop provision that excludes employees hired before a specified date" and examining the language of MMBA section 3502.5, the opinion states:

> Applying these principles of statutory construction, we first note that a "modified" agency shop provision comes within the terms of section 3502.5, meeting the definition contained in subdivision (a) of "an arrangement that requires *an* employee, as a condition of continued employment, either to join the recognized employee organization, or to pay the organization a service fee…." (Italics added.) Not *all* employees are required to join the union or pay a service fee under the statute. For example, employees are to be excluded if they object to union membership based upon religious grounds (§ 3502.5, subd. (c)) . . . .

(86 Ops.Cal.Atty.Gen, *supra*, slip opn., p. 4, italics in the original.)[7]

[7] Opinions of the Attorney General are not binding, but are entitled to considerable weight by the courts. (*County of Orange v. Association of Orange County Deputy Sheriffs* (2011) 192 Cal.App.4th 21, 36-37.) As *County of Orange* stated:

> "Reliance on Attorney General opinions is particularly appropriate where, as here, no clear case authority exists, and the factual context of the opinions is closely parallel to that under review." (*Thorpe v. Long Beach Community College Dist.* (2000) 83 Cal.App.4th 655, 662–663, 99 Cal.Rptr.2d 897.) There is no clear case authority on this issue, and the 1982 opinion has a similar factual context involving the state's analogous debt limitation provision. We find the analysis in the 1982 opinion persuasive, and that analysis supports the conclusion that a UAAL such as the $100 million cited by the County in this case is an actuarial estimate projecting the impact of a change in a benefit plan, rather than a legally enforceable obligation measured at the time of the County's 2001 resolution approving the 3% at 50 formula.

Although PERB is not bound by the analysis or outcome expressed in the Attorney General opinion, it is at least of note that the only existing authority addressing the validity of modified agency shop provides no support for the District's position. Although the ALJ did not rely on this Attorney General opinion, she reached the same result by a careful examination of MMBA section 3502.5's language and purpose, the regulatory scheme and relevant private sector and PERB precedent. Interpretation of the statutory schemes administered by PERB draws on PERB's judicially-recognized expertise in the area of California public sector labor law. (See, e.g., *Banning Teachers Association v. PERB* (1988) 44 Cal.3d 799, 804.)

Along with its statement of exceptions, the District made two procedural requests, one for oral argument and another for judicial notice. Regarding the District's request for oral argument, which the Association opposes, the Board historically denies requests for oral argument when an adequate record has been prepared, the parties had ample opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear to make oral argument unnecessary. *(Antelope Valley Health Care District* (2006) PERB Decision No. 1816-M; *Monterey County Office of Education* (1991) PERB Decision No. 913.) Here, the material facts are not in dispute. They, in fact, were stipulated to. The legal issue, while novel, is clear and straightforward. The parties have submitted three sets of briefs, two to the ALJ and one to the Board. The parties presented oral argument to the ALJ, the transcript of which has been reviewed by the Board. Accordingly, the District's request for oral argument is denied. The District's repetition of significant portions of its written argument before the ALJ in its Appeal to the Board confirms that there is a limit on how much can be said, and that no further argument, whether written or oral, is necessary.

Regarding the District's request for judicial notice, the District requests judicial notice of the same materials that were the subject of the District's request for judicial notice directed

to the ALJ. The ALJ granted both requests. The ALJ's rulings were not excepted to, and we do not disturb them here.[8]

I. MMBA Section 3502.5

The MMBA itself did not explicitly authorize agency shop agreements until 1981 when MMBA section 3502.5 was enacted. Under the original version of MMBA section 3502.5, agency shop could only be adopted by mutual consent of the parties. Almost 20 years later, in 2000, the Legislature amended MMBA section 3502.5 with Senate Bill 739 (Stats. 2000, ch. 901, § 3) to authorize agency shop by a negotiated agreement as well as by a secret ballot election at the option of the exclusive representative. As acknowledged by both the supporters and opponents of the amendment, the amendment was intended to reduce the public agency employer's control over *the decision* whether to adopt agency shop. With the amendment, public agency employers could no longer prevent an agency shop from being adopted in the absence of a mutual agreement. Instead, where the exclusive representative desires agency shop and cannot reach agreement with the public agency employer to incorporate an agency shop provision into the parties' labor contract, a simple voting majority can override that stalemate by voting agency shop into effect. A bargaining unit majority can also vote agency shop out of effect through a rescission election. (MMBA, § 3502.5, subd. (d).) In other words, in the absence of a mutual agreement, *the decision* whether to be governed by agency shop is decided by employees, and employees alone.

Under the current version of MMBA section 3502.5, the exclusive representative must make a good faith attempt in negotiations to include an agency shop provision in the parties' labor contract, as the Association has done here. If unsuccessful, an agency shop arrangement "shall be placed in effect" without a negotiated agreement upon the satisfaction of two

[8] An exception not urged is waived. (PERB Reg. 32300, subd. (c).)

conditions: (1) a signed petition of at least 30 percent of bargaining unit employees requesting an election to implement an agency shop arrangement; and (2) the approval of a majority of employees who voted in the election. "An election . . . *shall be conducted* by [SMCS] in the event that the public agency and the recognized employee organization cannot agree within 10 days from the filing of the petition to select jointly a neutral person or entity to conduct the election." (§ 3502.5, subd. (b), emphasis supplied.)

PERB Regulation 32999, subdivision (b), provides that SMCS shall conduct such an election pursuant to a CEA entered into by the parties and SMCS. A CEA means one of two things: (1) an agreement by the parties as to the time, place and manner of an election; or (2) an agreement by the parties authorizing the SMCS election supervisor to determine the time, place and manner of the election.

II. The Meaning and Purpose of the Statutory and Regulatory Scheme

A. The Statutory Meaning of Agency Shop

The District relies on *City of Hayward, supra,* 54 Cal.App.3d 761 for the proposition that "a court may not add or detract from a statute or insert or delete words to accomplish a purpose that does not appear on its face or from its legislative history." (*Id*. at p. 766.) The District argues that MMBA section 3502.5 applies only to full agency shop and that the ALJ erred by re-writing the statute to include modified agency shop.

In construing any statute, "[w]ell-established rules of statutory construction require us to ascertain the intent of the enacting legislative body so that we may adopt the construction that best effectuates the purpose of the law." (*Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715.)

> "We first examine the words themselves because the statutory language is generally the most reliable indicator of legislative intent. [Citation.] The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context."

> (*Ibid*.) If the statutory language is unambiguous, "we presume the Legislature meant what it said, and the plain meaning of the statute governs." (*People v. Robles* (2000) 23 Cal.4th 1106, 1111, 99 Cal.Rptr.2d 120, 5 P.3d 176.)

(*Whaley v. Sony Computer Entertainment America, Inc*. (2004) 121 Cal.App.4th 479, 485.)

MMBA section 3502.5 refers neither to full agency shop nor modified agency shop. It simply refers to agency shop or agency fee agreement or arrangement. The District argues that agency shop must refer to an agreement or arrangement that obligates *all* employees to pay dues or fees. But the language in question merely refers to an arrangement "that requires an employee, as a condition of continued employment, either to join the recognized employee organization or to pay the organization a service fee . . . ." The statute does not refer to "all" employees, just "an" employee.[9]

Compelling payment of agency fees as a condition of continued employment is all that the statute dictates. The particular terms and conditions of the agency shop arrangement are left to the exclusive representative to propose and negotiate with the employer or to the bargaining unit employees to vote on. If the bargaining unit employees do not like the exclusive representative's proposal, they can vote it down. Also, under MMBA section 3502.5, subdivision (d), an agency shop may be rescinded by a majority vote of all employees in the bargaining unit at any time during the term of the labor contract. Thus, despite the District's contention to the contrary, a modified agency shop that applies only to newly-hired employees in no way disenfranchises them from petitioning for, and participating in, a rescission election under section 3502.5, subdivision (d).

[9] The District points out that *City of Hayward, supra*, 54 Cal.App.3d 761 uses the word "all" to modify "employees" in describing employees subject to agency shop. That full agency shop applies to "all" bargaining unit employees does not mean that lesser forms of union or organizational security, like modified agency shop, are unlawful. As the District points out, judicial opinions are not authority for propositions not considered. (*Loeffler v. Target Corp*. (2014) 58 Cal.4th 1081, 1134.)

Although future hires cannot vote in an election to adopt modified agency shop, they also cannot vote in an election to adopt a full agency shop. At the time of the election for either form of agency shop, they have yet to be hired. As a general matter, future hires are bound by the terms and conditions of employment existing at their time of hire. Their prospective satisfaction or dissatisfaction with agency shop, whether modified or full, is not a statutory consideration.[10] Under the plain meaning of the statute, there is no basis on which to conclude that MMBA section 3502.5's definition of agency shop does not include the modified agency shop arrangement petitioned for by the Association.

The District is correct that agency shop addresses the problem of free riders. But the 2000 amendment to MMBA section 3502.5 was intended by the Legislature to address a different problem. That problem was the unwillingness or refusal of some public agency employers to incorporate an agency shop provision into their labor contract by mutual agreement. As mentioned above, the 2000 amendment to MMBA section 3502.5 took the decision whether to adopt agency shop out of the hands of public agency employers and placed it squarely and firmly in the hands of bargaining unit employees. The District's position in this case is at odds with the purpose of that amendment. Under the ordinary rules of statutory construction, a construction of the statute that allows bargaining unit employees, rather than public agency employers, to decide whether to adopt *any* form of agency shop best effectuates the purpose of the statute.[11]

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[10] Future hires are not covered within the definition of public employee under the MMBA. (§ 3501, subd. (d) ["'[p]ublic employee' means any person employed by any public agency, . . ."].)

[11] As the United States Supreme Court recently concluded in rejecting a construction of the Patient Protection and Affordable Care Act that likely would have the effect of creating death spirals in individual insurance markets, a result Congress designed the Act to avoid:

B. The District Lacks Authority to Withhold its Consent to the Election

The District argues that the ALJ erred in harmonizing PERB Regulation 32999 with MMBA section 3502.5 to conclude that the District lacks authority to withhold its consent to the election. The District asserts that PERB Regulation 32999 "clearly and unmistakably" requires the public agency employer's consent to an agency shop election. The District states: "The District, as an MMBA employer, must consent to an agency shop election for it to occur."

PERB Regulation 32999 states that SMCS shall conduct elections pursuant to a CEA. But, under the regulation, the public agency employer has only two options. It may enter into an agreement with the exclusive representative as to the time, place and manner of an election. Or, it may enter into an agreement with the exclusive representative authorizing the SMCS election supervisor to determine the time, place and manner of the election. The "consent" required of the public agency employer under the regulation concerns the manner of determining election mechanics. Requiring the public agency employer to consent to one or another manner of determining election mechanics does not translate into a broad power to refuse to participate in the election itself.

The District's construction of PERB Regulation 32999 would defeat the very purpose of the 2000 amendment to MMBA section 3502.5, which was to disempower public agency employers from determining the fate of agency shop for a bargaining unit. The District's construction would also directly contradict the statute's command that an agency shop "shall

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> Congress passed the Affordable Care Act to improve health insurance markets, not destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter. Section 36B can fairly be read consistent with what we see as Congress's plan, and that is the reading we adopt.

(*King v. Burwell* (2015) 135 S.Ct. 2480, 2496.)

be placed in effect" without a negotiated agreement upon the satisfaction of only two conditions, a signed petition of 30 percent of bargaining unit employees and the approval of a majority of employees casting ballots. In the event the parties cannot agree to a neutral person or entity to conduct the election, the election "shall be conducted" by SMCS. (§ 3502.5, subd. (b).) There is no further requirement that the public agency employer "consent to an agency shop election for it to occur" and we will not interpret our regulations to defeat the Legislature's clear intent.

The District asserts that PERB Regulation 32999 "is designed to avoid the absurdity of being forced to participate in an agency shop election that is unlawful." No reading of PERB Regulation 32999 supports that assertion. In the event a future hire who becomes an agency fee payer under the petitioned-for modified agency shop disagrees with the Association's determination of chargeable expenditures, that person may file an agency fee challenge. (PERB Reg. 32994.) A public agency employer does not have standing to challenge that determination. (*Ibid*.) To the extent a public agency employer is concerned about its own liability for participating in an agency shop found to be unlawful, MMBA section 3502.5 allows the employer to be held harmless and to seek indemnity from the exclusive representative. (§ 3502.5, subd. (b).)

The District claims that this statutory indemnification and hold harmless provision is inadequate because employee organizations lack adequate resources to fulfill their statutory obligations. Public agency employers such as the District may appeal to the Legislature to address such concerns.[12]

[12] Article III, section 3 of the California Constitution contains the separation of powers clause. It precludes one branch of government from usurping or improperly interfering with the essential operations of either of the other two branches. (7 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 137, p. 249.)

The Petition was signed by at least 30 percent of employees in the bargaining unit, thus meeting the threshold statutory requirement. That these bargaining unit employees would be exempt from compulsory dues/fees obligations under the petitioned-for modified agency shop does not give the District license to deprive them and their fellow bargaining unit members of their statutory right to vote. The District's position in this case is premised in part on the notion that bargaining unit employees, if given the choice, would rather ride free than financially support the recognized employee organization that represents them in collective bargaining. The facts do not support the District's position. With no compulsory dues system currently in place, 126 out of 184 bargaining unit employees, or 68 percent of the bargaining unit, have become dues-paying members of the Association of their own free will. The District's alleged concern about the problem of free riders is overstated at best, and not shared by the Association, the party that would be most directly affected by the problem of free riders.

In sum, as the ALJ concluded, the specific intent of the 2000 amendment to MMBA section 3502.5, which allowed bargaining unit employees to determine for themselves whether to approve an agency shop by way of a secret ballot election, was to limit the public agency employer's sphere of decision-making to selection of a neutral to conduct the election. Pursuant to PERB Regulation 32999, the public agency employer's options are to enter into an agreement with the exclusive representative as to the time, place and manner of the election or agree with the exclusive representative to allow SMCS to determine election mechanics. We therefore decline the District's invitation to adopt an interpretation of MMBA section 3502.5 that would empower the District to undermine fundamental principles of organizational security and majority vote by refusing to participate in a secret ballot election provided to the bargaining unit by the Legislature. Accordingly, the District's statutory construction argument is rejected.

III. The First Amendment[13]

The District relies on *Harris* and *Knox* to argue that a modified agency shop implicates First Amendment concerns. Agency shop arrangements in the public sector raise First Amendment concerns "because they force individuals to contribute money to unions as a condition of government employment." (*Davenport v. Washington Education Association* (2007) 551 U.S. 177, 181.) Under *Abood, supra*, 431 U.S. 209, however, the United States Supreme Court held that bargaining unit members in the public sector can be compelled to pay agency fees (also referred to as financial core fees) to the union for the cost of performing the representational duties of an exclusive representative. But, public sector unions are prohibited under the First Amendment from using the fees of objecting nonmembers for ideological purposes that are not germane to the union's collective bargaining duties. (*Id.* at pp. 235-236.) And, under *Chicago Teachers Union v. Hudson* (1986) 475 U.S. 292, 302, 304-310 (*Hudson*), public sector unions collecting fees must observe certain procedural requirements in order to ensure that objecting nonmembers can prevent the use of their fees for impermissible purposes. The Supreme Court in *Knox* and *Harris* declined to revisit *Abood*, but expressed criticism of its fundamental premise, i.e., that an agency fee payment can be compelled under an organizational security provision without infringing on the First Amendment.

[13] An administrative agency has no power to declare a statute unconstitutional. (Cal. Const., art. III, § 3.5, subd. (b).) Neither can an administrative agency declare a statute enforceable, or refuse to enforce it, on the grounds that it is unconstitutional unless it previously has been determined to be unconstitutional by an appellate court. (Cal. Const., art. III, § 3.5, subd. (a).) Article III, section 3.5 of the California Constitution does not prevent PERB from construing the statutory schemes it administers "in light of constitutional standards." (See, *Cumero v. PERB* (1989) 49 Cal.3d 575, 583.)

No court has declared MMBA section 3502.5 to be unconstitutional and therefore this agency is duty bound to enforce it. The District may disagree with PERB's construction of the statute, but cannot argue that PERB is constrained from applying or enforcing it based on a litigant's assertion of its unconstitutionality.

The United States Supreme Court granted writ of certiorari in *Friedrichs, et al. v. California Teachers Association, et al.* (2015) 135 S.Ct. 2933, a case in which the petitioners seek to persuade the Supreme Court to overturn *Abood* and invalidate agency shop arrangements in the public sector on First Amendment grounds. That case is on the docket for the Supreme Court's 2015 term. Unless and until the high court decides otherwise, however, *Abood* is the law of the land.[14] The "compulsory" nature of agency shop does not, *under current law*, violate the First Amendment.

The District's First Amendment argument is inconsistent with its position that a "full" agency shop covering both current employees and future hires would be acceptable. The First Amendment interest the District seeks to protect as it affects future hires is no different under modified agency shop than it is under full agency shop. Payment of an agency fee would be compulsory for future hires under either form of organizational security. It is the compulsory nature of the fee payment that lies at the heart of the First Amendment concern *(Knox*; *Harris*), not the scope of the particular agency shop arrangement determined by the exclusive representative to best suit its needs. As one court described the First Amendment infringement concern under United States Supreme Court authorities:

> The distinction between permissible and impermissible union security devices is not measured by whether additional employees are compelled to pay fees to the union, but by whether those fees which employees are compelled to pay are used to subsidize only

[14] See also, *Cumero v. PERB, supra,* 49 Cal.3d 575 (the provisions for organizational security arrangements under the Educational Employment Relations Act, section 3540 et seq., prevail over nonmembers' more general right to refuse to participate in activities of employee organizations); *Champion v. State of California* (9th Cir. 1984) 738 F.2d 1082 (in a challenge to the constitutionality of the organizational security provision under the State Employer-Employee Relations Act (the Ralph C. Dills Act), section 3512 et seq., district court's denial of a motion for preliminary injunction seeking to restrain the deduction and collection of a portion of employees' wages as fair share fees was affirmed).

> the union's collective bargaining activities or are additionally used to fund activities of the union that are political and ideological in nature.

(*Zorica, et al. v. AFSCME* (Pa. Commw. Ct. 1996) 686 A.2d 461, 464.)

In sum, the petitioned-for modified agency shop raises no First Amendment concerns under *Knox* or *Harris*, as the District contends. The District's approval of full agency shop belies its First Amendment concern.

IV. The District's Standing

The District argues that the ALJ erred in concluding that the District lacks standing to assert the interests of bargaining unit employees who would be required to pay an agency fee under the petitioned-for modified agency shop. We agree with the ALJ.

Under the plain meaning of MMBA section 3502.5, the District has ultimate control over a finite number of matters. The District has the right not to use the SMCS in favor of a different, mutually agreed-to neutral. (§ 3502.5, subd. (b).) Under the statute's promulgating regulation, the District has the right to authorize the SMCS election supervisor to determine the time, place and manner of the election rather than seeking agreement with the exclusive representative over election mechanics. (PERB Reg. 32999.) The District has standing to assert these rights.

The District does not, however, have standing to contest the validity of the particular type of agency shop arrangement sought by the Association as a defense to an unfair practice charge alleging that it is refusing to participate in the election process.[15] To the extent of any

[15] Once an agency fee arrangement is placed into effect by agreement of the parties or by the results of an election under MMBA section 3502.5, public employees have the right to authorize that payroll deductions be made for this purpose (§ 3508.5, subd. (a)) and public agency employers "*shall deduct* the payment of dues or service fees to a recognized employee organization." (§ 3508.5, subd. (b), emphasis supplied.) Agency fee obligations, including payroll deductions made by the public agency employer "on behalf of the recognized employee organization, *shall continue* in effect as long as the employee organization is the recognized

invalidity in the agency shop arrangement, as stated above, the bargaining unit employees' remedy against the exclusive representative is an agency fee challenge,[16] and the public agency employer's remedy is the statutory indemnification and hold harmless provision. The statutory and regulatory scheme adequately protects the interests of all parties – the public agency employer, the bargaining unit public employees and the recognized employee organization.

In support of its standing argument, the District states the following:

> [T]he District has the authority under PERB Reg. 32999 to withhold consent from an election that is unlawful. For example, the District would be justified in withholding consent to an election for a modified agency shop which had the purpose of requiring the payment of union dues or agency fees to all future employees except women, African American, Hispanics, the physically handicapped, etc.

(Appeal, p. 54.)

In referring to "women, African American, Hispanics, the physically handicapped, etc.," the District appears to be expressing a concern about the potential for discrimination by the exclusive representative against bargaining unit employees who belong to a class that enjoys protected status under anti-discrimination laws. There are at least two problems with this argument.

First, the District's argument is premised on a faulty notion. In the event a recognized employee organization were to memorialize in a petition for agency fees its intention to discriminate against bargaining unit employees on the basis of their membership in a protected

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bargaining representative, notwithstanding the expiration of" the parties' labor contract. (§ 3508.5, subd. (c), emphasis supplied.)

[16] Only an employee who pays an agency fee has standing to challenge the employee organizations' retention of that fee. (*California Nurses Association* (*O'Malley*) (2004) PERB Decision No. 1607-H.)

class, the California Legislature has provided the method for redress under the state's anti-discrimination laws. Under the Fair Employment and Housing Act (FEHA), it is unlawful:

> For a labor organization, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status of any person, to exclude, expel, or restrict from its membership the person, or to provide only second-class or segregated membership or to discriminate against any person because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status of the person in the election of officers of the labor organization or in the selection of the labor organization's staff or to discriminate in any way against any of its members or against any employer or against any person employed by an employer.

(§ 12940, subd. (b).)[17]

Second, the District assumes that a recognized employee organization is prohibited from making distinctions amongst bargaining unit employees in its organizational security arrangements. While there is no PERB precedent on this point, there are countless private sector

[17] FEHA is codified at section 12900 et seq. Section 12960, subdivision (b) provides:

> Any person claiming to be aggrieved by an alleged unlawful practice may file with the department a verified complaint, in writing, that shall state the name and address of the person, employer, labor organization, or employment agency alleged to have committed the unlawful practice complained of, and that shall set forth the particulars thereof and contain other information as may be required by the department. The director or his or her authorized representative may in like manner, on his or her own motion, make, sign, and file a complaint.

The duty of fair representation also protects against racial classifications. (*Steele v. Louisville* (1944) 323 U.S. 192; see also fn. 19, *post*.)

decisions and none supports the District's position.[18] In *Actors' Equity Association* (1980) 247 NLRB 1193 (*Actors' Equity Assn.*), enforced (2nd Cir. 1981) 644 F.2d 939, for example, the union imposed higher dues on a class of union members (including Lynn Redgrave and Yul Brynner) based on their country of citizenship and residence. The General Counsel for the National Labor Relations Board (NLRB) argued that maintenance of the two-tiered dues structure in conjunction with the contractual union-security clause subjected a nonresident alien to discharge for nonpayment of dues other than dues "uniformly required" within the meaning of the proviso to section 8(a)(3) [19] of the NLRA. The General Counsel argued that such conduct established a *per se* violation of the NLRA to which there could be no defense as a matter of law, thereby making irrelevant the union's reasons for the maintenance of a dual dues structure. (*Actors' Equity Assn., supra,* 247 NLRB 1193, 1197.) The NLRB disagreed with the General Counsel, concluding that maintenance of a two-tiered dues structure was not a per se violation of the NLRA. The NLRB stated:

> "Classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." Implicit is that such classifications may be justified after close judicial scrutiny, and the object of scrutiny is to determine whether there is a legitimate interest to be served by discrimination based on alienage.

(*Actors' Equity Assn., supra,* at p. 1197, quoting *Graham v. Richardson* (1971) 403 U.S. 365, 372.)

[18] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq., and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

[19] The requirement in section 8(a)(3) of the NLRA that dues be "uniformly required" does not mean that all members must be charged the same dues, but that distinctions between classes of members must be based on "reasonable general classification." (*Actors' Equity Assn., supra,* 247 NLRB 1193, 1196.)

The NLRB agreed with the General Counsel's alternate contention that the dues structure was presumptively invalid and that the union failed to meet its burden to show reasons for the discrimination and to show that the reasons were sufficient to overcome the strong expressions of policy against it. (*Actors' Equity Assn., supra*, 247 NLRB 1193, 1197 ["Discrimination based on alienage is inherently suspect, and rarely will it be possible to show that alienage has relevance to employment or any legitimate union or business interest."].) The question is not whether a union's dues structure differentiates between members on some protected basis. Such classifications are "inherently suspect," but may be justified if there is a legitimate interest to be served.

By this discussion, the Board does not conclude that this line of private sector precedent should necessarily be adopted as PERB precedent. Nor do we conclude that this line of precedent would even apply to a question concerning the validity of a proposed agency shop, rather than to a question concerning union dues structure. Nor do we suggest that "future hires" describes a protected class. This discussion of private sector precedent is merely intended to demonstrate that the District's standing argument rests on another faulty basis. The District assumes incorrectly that a union is prohibited from making distinctions amongst bargaining unit employees in union affairs.

The District may perceive a need to protect future bargaining unit employees from possible, but highly improbable, acts of invidious discrimination at the hands of their statutory bargaining representative. But the District's refusal to participate in a statutorily required election cannot be justified on that basis.[20]

[20] Bargaining unit employees, unlike public agency employers, do have standing to bring an unfair practice charge against the recognized employee organization for breach of the duty of fair representation. While the MMBA does not expressly impose a statutory duty of fair representation upon employee organizations, the courts have held that "unions owe a duty of fair representation to their members, and this requires them to refrain from representing their members arbitrarily, discriminatorily, or in bad faith." (*Hussey v. Operating Engineers, Local Union No. 3* (1995) 35 Cal.App.4th 1213.) In *Hussey*, the court further held that a union is to

In its final argument on standing, the District relies on two cases. The first is *County of Los Angeles v. Los Angeles County Employee Relations Commission* (2013) 56 Cal.4th 905. The California Supreme Court held that the county's failure to disclose represented employees' contact information to the recognized employee organization violated the MMBA and that the privacy clause of the state constitution did not excuse the county from disclosing that information.

The District argues that if the county had standing to assert the privacy interest of bargaining unit employees in that case, the District also has standing to assert "the first amendment rights of current and future new hires in a modified agency shop." (Appeal, p. 57.) In making this argument, the District ignores a crucial difference between *County of Los Angeles* and this case. An employer has the duty to disclose information requested by the employee organization as part of its good faith bargaining obligation. The duty to bargain in good faith

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be "accorded wide latitude in the representation of its members, . . . absent a showing of arbitrary exercise of the union's power." Regarding its collective bargaining duty, as a general rule, an exclusive representative enjoys a wide range of bargaining latitude. As the United States Supreme Court stated in *Ford Motor Co. v. Huffman* (1953) 345 U.S. 330, 338:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Acknowledging the need for such discretion, PERB determined that an exclusive representative is not expected or required to satisfy all members of the unit it represents. (*California School Employees Association and its Chapter 107 (Chacon)* (1995) PERB Decision No. 1108.) Moreover, the duty of fair representation does not mean an employee organization is barred from making an agreement which may have an unfavorable effect on some members, nor is an employee organization obligated to bargain a particular item benefiting certain unit members. (*Ibid.*; *Los Rios College Federation of Teachers, CFT/AFT (Violett, et al.)* (1991) PERB Decision No. 889.)

belongs to the employer and to the exclusive representative of the bargaining unit employees. The exclusive representative has the duty to represent the bargaining unit employees fairly. And, because the employer maintains the information requested, the employer has a direct interest in and responsibility for ensuring the propriety of disclosure in its role as the bargaining unit employees' employer. In carrying out their good faith bargaining duties, it is left to the employer and the exclusive representative to make decisions and take action on matters directly affecting the interests of bargaining unit employees.

In stark contrast, with election matters, it is left to bargaining unit employees to act on their own interests. They, and they alone, decide for themselves, by majority vote, representation questions, i.e., whether to seek exclusive representation by an employee organization, whether to seek decertification, etc. And, they, and they alone, decide for themselves whether to approve an agency shop where there is no mutual agreement. These are matters of employee free choice, not matters in which the public agency employer has a legitimate role to play in attempting to protect employee interests. The public agency employer's role in election matters is mainly ministerial in nature.

The second case on which the District relies in making its standing argument is *Davenport, supra*, 551 U.S. 177. The state of Washington litigated the matter in its role as defender of a voter initiative. The initiative enacted a law restricting a union's ability to spend the agency fees that it collects from nonmembers for election-related purposes without the nonmembers' affirmative consent. Reliance on this case is unfounded as it concerns the District's standing argument given that the state of Washington did not litigate the case in its capacity as a public employer. Therefore, we reject the District's attempt to use this case as support for its contention that public agency employers have standing to assert the interests of

bargaining unit employees who would be required to pay an agency fee under the petitioned-for modified agency shop.

V. Agency Shop Includes Lesser Forms of Organizational Security

The District criticizes the proposed decision for its reliance on "inapposite authority" in concluding that the definition of agency shop is broad enough to include lesser forms of organizational security than "full" agency shop. The District's criticism is misplaced. The District argues, for example, that the ALJ's reliance on *Public Service Company of Colorado* (1950) 89 NLRB 418 was in error because that decision discusses a prior version of the relevant NLRA proviso, section 8(a)(3). As the District states, the amendment was intended to accomplish twin purposes. (*NLRB v. General Motors Corp*. (1963) 373 U.S. 734, 740 (*General Motors Corp.*).) The amendment abolished what was considered to be the most serious abuse of compulsory unionism, the closed shop. It also removed expulsion from union membership as a ground of compulsory discharge so long as there is no delinquency in paying the initiation fee or dues. (*Id.* at pp. 740-741.) The proposed decision relied on *Public Service Company of Colorado*, however, not for any principle relating to this amendment to section 8(a)(3), but, rather, for the principle that the NLRA does not prohibit forms of organizational security less restrictive than "full" union or agency shop.

In attempting to prove the ALJ's analytical error, the District relies on the United States Supreme Court decision *General Motors Corp*., *supra*, 373 U.S. 734, which the District asserts stands for the proposition that under the amendment to section 8(a)(3) "all employees *would be required* to pay their way." (Appeal, p. 43, emphasis supplied.) Not so. The correct quotation is: "As far as the federal law was concerned, all employees *could be required* to pay their way." (*General Motors Corp., supra,* at p. 741, emphasis supplied.) The Supreme Court went on to say:

> We find nothing in the legislative history of the Act indicating that Congress intended the amended proviso to § 8(a)(3) to validate only the union shop and simultaneously to abolish, in addition to the closed shop, all other union-security arrangements permissible under state law.

(*Ibid*.)

The District similarly argues that the proposed decision's reliance on *The Steel Products Engineering Company* (1956) 116 NLRB 811 is in error because the sole issue in that case concerned the failure of the organizational security clause to afford new employees a 30-day notice period as required under section 8(a)(3) of the NLRA. The point made by the ALJ, however, was that the union security clause was found to be unlawful, not because it was a modified union security clause that applied only to new employees, similar to the petitioned-for modified agency shop involved here, but because the notice period was too short.

CONCLUSION

The central premise of the District's appeal is that an agency shop arrangement is unlawful unless it applies to all bargaining unit members equally. For this, there is no authority.

Currently, there are a minority of employees who choose to ride free on the Association's efforts. In addition, dues-paying members who are current employees have the opportunity to drop their membership and stop paying dues. The system employees currently enjoy is a voluntary one. The Association has opted to pursue an organizational security arrangement that allows these employees to continue under the voluntary dues system currently in place.

Although expressed as a concern about free riders, the District's concern does not extend to free riders in a voluntary system. The District's apparent concern is about the

introduction of a compulsory dues/fees system that only addresses the free rider problem prospectively. As discussed above and in the proposed decision, the "compulsory" nature of the petitioned-for modified agency shop poses no First Amendment problem so long as the fees of objecting nonmembers are not used for ideological purposes that are not germane to the Association's collective bargaining duties (*Abood, supra,* 431 U.S. 209) and the Association follows the procedural requirements necessary to prevent the expenditure of fees for impermissible purposes (*Hudson, supra,* 475 U.S. 292).

The distinctions made in the petitioned-for modified agency shop between current bargaining unit employees and future hires only make for a less robust organizational security arrangement. The phrase "agency shop" as used in MMBA section 3502.5, however, is broad enough to encompass any compulsory dues/fees system regardless of which bargaining unit employees are covered. Agency shop is the public sector equivalent of union shop. Union or agency shop has been stripped down to only one requirement that may be compelled of bargaining unit employees, the payment of financial core fees to the union for the cost of performing the representational duties of an exclusive representative.[21] That a recognized employee organization chooses not to exercise this right to the fullest extent legally possible, as it could by proposing an organizational security arrangement that applies both to current employees and to future hires, does not constitute an employer defense to an unfair practice charge alleging a violation of MMBA section 3502.5.

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[21] As the Ninth Circuit held in *NLRB v. Hershey Foods Corp*. (9th Cir. 1975) 513 F.2d 1083, 1087:

> The union, of course, still has the right to prescribe its own rules for acquisition or retention of full membership. 29 U.S.C. § 158(b)(1)(A). But the employee need not become a full-fledged member of the Union to be protected from discharge. So long as an employee tenders fees uniformly required of union members, he is a "member" for purposes of sections 8(a)(3) and 8(b)(2).

For all the reasons discussed herein, we conclude that the District violated MMBA section 3502.5 by refusing to participate in the properly petitioned-for election.

ORDER

Upon the herein findings of fact and conclusions of law, and the entire record in the case, it is found that the Orange County Water District (District) violated the Meyer-Milias-Brown Act (MMBA), Government Code section 3502.5. The District violated the MMBA by refusing to participate in good faith in a properly petitioned-for agency fee election.

Pursuant to section 3509 of the Government Code, it hereby is ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Refusing to participate in an agency shop election.

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

1. Within ten (10) workdays of the service of a final decision in this matter, either enter into a consent election agreement with the Orange County Water District Employees Association (Association) or authorize the California State Mediation and Conciliation Service (SMCS) to prepare a consent election agreement governing the mechanics of an agency shop election.

2. Provide to SMCS any documentation deemed by SMCS to be necessary for the conduct of an agency shop election, pursuant to Public Employment Relations Board (PERB or Board) Regulation 32999 et seq. (codified at Cal. Code Regs., tit. 8, sec. 31001, et seq.), including but not limited to a list of names of all employees included in the voting unit as of the cutoff date for voter eligibility. (See PERB Reg. 33004.)

3. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the Association customarily are

posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the District to communicate with its employees in the bargaining unit represented by the Association.

4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of PERB, or the General Counsel's designee. The District shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on the Association and SMCS.

Members Winslow and Gregersen joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. SA-CO-474-S, *Orange County Water District Employees Association v. Orange County Water District*, in which all parties had the right to participate, it has been found that the Orange County Water District (District) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq. by failing and refusing to participate in good faith in a properly petitioned-for agency fee election by the Orange County Water District Employees Association (Association).

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

A. CEASE AND DESIST FROM:

Refusing to participate in properly petitioned-for agency fee elections.

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

1. Within ten (10) workdays of the service of final decision in this matter, either enter into a consent election agreement with the Association or authorize the California State Mediation and Conciliation Service (SMCS) to prepare a consent election agreement governing the mechanics of an agency shop election.

2. Provide to SMCS any documentation deemed by the organization to be necessary for the conduct of an agency shop election, pursuant to PERB Regulation 32999 et seq. (Cal. Code Regs., tit. 8, sec. 31001, et seq.), including but not limited to a list of names of all employees including in the voting unit as of the cutoff date for voter eligibility. (See PERB Reg. 33004.)

Dated: _____ ORANGE COUNTY WATER DISTRICT

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.