STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 721, Charging Party, v. COUNTY OF SAN BERNARDINO, Respondent.	Case No. LA-CE-923-M PERB Decision No. 2556-M March 6, 2018

Appearances: Weinberg, Roger & Rosenfeld by Monica T. Guizar and Jacob J. White, Attorneys, for Service Employees International Union Local 721; Renne Sloan Holtzman Sakai by Timothy G. Yeung and Erich W. Shiners, Attorneys, for County of San Bernardino.

Before Gregersen, Chair; Banks and Winslow, Members.

DECISION

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on the County of San Bernardino's (County) exceptions to a proposed decision (attached) by an administrative law judge (ALJ). The ALJ found that the County violated the Meyers-Milias-Brown Act (MMBA)[1] and the County's Employee Relations Ordinance (ERO) by: (1) prohibiting non-employee representatives of Service Employees International Union, Local 721 (SEIU) from accessing non-working areas of County facilities; and (2) photographing County employees meeting with SEIU organizers.[2] The County excepts to the first conclusion, contending that SEIU had no right of access under the MMBA because

[1] The MMBA is codified at Government Code section 3500 et seq. Unless otherwise noted, all statutory references are to the Government Code.

[2] The ALJ also dismissed allegations that the County unlawfully favored another employee organization over SEIU. SEIU has not excepted to the dismissal of those allegations, so we do not consider them here.

it was not a recognized employee organization. It excepts to the second conclusion, contending that the photographing did not interfere with employee rights.

The Board itself has reviewed the administrative hearing record in its entirety and considered the County's exceptions and SEIU's responses thereto. The record as a whole supports the ALJ's factual findings, and the proposed decision is well reasoned and consistent with applicable law. Accordingly, the Board affirms the ALJ's rulings, findings and conclusions of law and adopts the proposed decision as the decision of the Board itself, subject to the discussion of the County's exceptions below. We also modify the order to require electronic posting of the notice to employees, in accordance with our decision in *City of Sacramento* (2013) PERB Decision No. 2351-M.

SUMMARY OF FACTS

The facts relevant to the County's exceptions are not in dispute. At all times relevant to this case, SEIU was an employee organization within the meaning of MMBA section 3501, subdivision (a), but not a *recognized* employee organization within the meaning of MMBA section 3501, subdivision (b). In late 2013, SEIU began an organizing campaign aimed at employees in some of the eight County bargaining units represented by the San Bernardino Public Employees Association (SBPEA). As part of its campaign, SEIU dispatched organizers and rank-and-file members to speak with employees at various County facilities, in an effort to persuade them to decertify SBPEA.

The only provision of the County's ERO that mentions access by employee organizations of any kind is section 13.0213(d), which states:

> Access to County work locations and the use of County paid-time, facilities, equipment, hardware or software and other resources by *exclusive recognized employee organizations* shall be authorized only to the extent provided for in a memorandum of

> understanding and/or applicable administrative procedures and shall be limited to activities pertaining directly to the employer-employee relationship and shall not interfere with the efficiency, safety and security of County employees or County operations. Access to and use of County paid time, facilities, equipment and other resources shall not be authorized for such activities as: any that violates County Policy, soliciting membership, soliciting business by or for any non-County sponsored/sanctioned company, campaigning for office, selling insurance plans, organizing elections, or other similar activities.

(Emphasis added.)

On May 9, 2014, Andrew Lamberto, the County's director of human resources, issued a memorandum titled "CAMPAIGN/SOLICITATION ACTIVITIES" to department heads and other management staff. The memorandum stated in relevant part:

> Over the last several months the County bargaining team has been negotiating with [SBPEA] on a successor Memorandum of Understanding. On April 24, 2014, a Tentative Agreement was reached between the parties, and SBPEA is currently reaching out to their membership to communicate the details of the Agreement.
>
> In an aggressive effort to disrupt those communications, certain organizations, including the Service Employees International Union (SEIU), have been visiting various County facilities to solicit County employees to vote no on the Tentative Agreement.
>
> As a reminder, the following is the County's position with respect to access for all campaign/solicitation activities:
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> - There will be no access allowed by any organization representatives in non-public areas for purposes of campaign or solicitation activities, including access to bulletin boards reserved for County use or for employee organizations. "Non-public areas" include, but are not limited to, offices, employee work sites, break rooms, employee lunch rooms, and employee parking lots.
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> - Campaign/solicitation activities may not occur in work areas, including the distribution and/or posting of literature, and must not disrupt County business. "Work areas" would

include offices, employee work sites, break rooms, employee lunch rooms, and employee parking lots.

- County employees that are off duty shall have no greater access to non-work areas for the purpose of engaging in campaign/solicitation activities than other off duty County employees who are not engaging in such activities.

The County will act to insure the continued delivery of public services. As managers and supervisors, you have an important role to play. While maintaining a neutral role, you must work to insure that service to the public is not disrupted by campaign/ solicitation activities. Further, you must act to insure that your employees adhere to the limits placed on such activities.

On at least two occasions in May 2014, SEIU organizers entered non-working, non-public areas of County facilities. On the first occasion, May 8, 2014, Robin Feldhaus (Feldhaus), a County manager, asked the SEIU organizers to leave. When they did not do so, Feldhaus posted a security guard next to the area. She later returned and used her cell phone to take a photograph of the organizers speaking with employees. When the SEIU organizers objected, Feldhaus deleted the photograph immediately and told one of the organizers, Adriel Peterson (Peterson), that she had done so, offering to show him her phone. Feldhaus left the area, and the SEIU group eventually left as well. On the second occasion, May 22, 2014, three SEIU organizers were asked to leave an employee breakroom and were ultimately escorted from the premises.

DISCUSSION

I. Access by Unrecognized Employee Organizations

The ALJ concluded that the County's policy prohibiting access to non-work areas for the purposes of campaign or solicitation activities, as well as its enforcement of that policy, interfered with SEIU's right of access to County facilities under the MMBA. The County excepts to this conclusion, arguing that "unrecognized" employee organizations—such as

SEIU—have no access rights under the MMBA, that is, unrecognized organizations have only the same right of access as does the public at large.[3] We disagree. Without determining the contours of access for unrecognized organizations in every context, we conclude that in this case, the County violated the MMBA by denying SEIU access to non-working areas of the County's premises to solicit for union membership and distribute literature to employees during their non-work time.[4]

The various labor relations statutes within PERB's jurisdiction do not treat the subject of employee organization access rights uniformly, but we find no basis in our case law or in the purposes of the MMBA that supports the County's contention that non-recognized organizations have no right of access under the statute. Both the Educational Employment Relations Act (EERA)[5] and the Higher Education Employer-Employee Relations Act (HEERA)[6] expressly grant all employee organizations a "right of access at reasonable times to areas in which employees work." (EERA, § 3543.1, subd. (b); HEERA, § 3568.) The Ralph C. Dills Act (Dills Act),[7] on the other hand, contains no express access right.

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[3] As the County asserts in its exceptions: ". . . unrecognized employee organizations have no statutory right to access non-public areas of a public agency employer's premises." (Exceptions, p. 1.)

[4] For convenience, this decision refers to this right as a "right of access" or an "access right." Our use of this phrase is not intended to mean that unrecognized employee organizations are necessarily entitled to the same access as recognized or exclusively recognized employee organizations. (Cf. *F & P Growers Assn. v. Agricultural Labor Relations Bd.* (1985) 172 Cal.App.3d 1127, 1132 [right of access after a union's certification as employees' bargaining representative springs from different source than pre-certification "organizational" access]; *State of California (Departments of Personnel Administration, Developmental Services, and Mental Health)* (1986) PERB Decision No. 601-S.)

[5] EERA is codified at section 3540 et seq.

[6] HEERA is codified at section 3560 et seq.

[7] The Dills Act is codified at section 3512 et seq.

Nonetheless, the Board has found that the Dills Act includes an implied right of access, based on the statute's purpose and intent, and the language of section 3519, subdivision (a), which prohibits interference with employee rights under the statute. (*State of California (Department of Transportation)* (1983) PERB Decision No. 304-S, adopting proposed decision at pp. 17-18; *State of California (California Department of Corrections)* (1980) PERB Decision No. 127-S, pp. 5-6 (*Corrections*).) In *Corrections*, which involved unrecognized employee organizations, the Board noted:

> The right of employees to join and participate in an employee organization of their choice necessarily implies that organizations have the right to communicate with employees and members at their work site, where they are generally most accessible. Access to employees to facilitate an exchange of information is clearly a threshold concern not only *in an organizing campaign* but during the course of the ongoing relationship between the employee organization and its members.

(*Id*. at p. 5, emphasis added.)

Like the Dills Act, the MMBA contains no express right of access. However, the Board has consistently held that there is a presumptive right of access, beginning with *Omnitrans* (2009) PERB Decision No. 2030-M. In that case the Board found that such a right is implied in section 3506—the MMBA's prohibition against interference with employee rights—as well as in section 3507, subdivision (a). As relevant here, that section provides:

> A public agency may adopt reasonable rules and regulations after consultation in good faith with representatives of a recognized employee organization or organizations for the administration of employer-employee relations under this chapter. The rules and regulations may include provisions for all of the following:
>
> [¶…¶]
>
> (6) Access of employee organization officers and representatives to work locations.

(§ 3507, subd. (a).) Observing that this section "has no parallel" in the Dills Act, the Board noted that this language "contemplates a right of access that is subject to reasonable regulation much like the statutory access right under EERA and HEERA." (*Omnitrans, supra,* at p. 16.)[8] It concluded:

> Considering the language of the MMBA in light of the well-established implied right of access grounded in the non-interference and non-discrimination provisions of other labor relations statutes, we hold that the MMBA grants a recognized employee organization a right of access to a public agency's facilities for the purpose of communicating with employees subject to reasonable regulation by the public agency.

(*Ibid.*) Despite finding the access right in the broader statement of employee rights, the Board appeared to limit its holding to employee representatives of an employee organization. (*Id.* at p. 17, fn. 11.)

Three years later, in *County of Riverside* (2012) PERB Decision No. 2233-M, the Board held that the right of access extends to non-employee agents of employee organizations, a matter not decided in *Omnitrans*:

> We conclude that by expressly placing in the MMBA the provision for organizational access, the Legislature intended to and did assure employees the right to confer with non-employee organizational representatives at their work locations, subject only to reasonable regulation. This construction harmonizes MMBA with our other statutes providing expressly for access by employee organization officers and representatives to employee work locations. . . .
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> In sum, we construe the MMBA to afford employee and non-employee representatives of employee organizations alike, access to areas in which employees work.

[8] In fact, the Board recognized this language as supporting an implied right of access in the MMBA even before the Legislature placed the MMBA under PERB's jurisdiction. (See *Corrections, supra*, PERB Decision No. 127-S, p. 6, fn. 6.)

(*County of Riverside*, *supra*, pp. 7-8.) The Board explained the scope of this right as follows:

> In general, . . . non-employee representatives of employee organizations enjoy access to non-work areas, and may solicit for union membership or activity, or distribute literature to, employees in such areas on the employees' non-work time. Employer restrictions, if any, must be reasonable, that is, both necessary to the employer's efficient operations and/or safety of employees or others, and narrowly drawn to avoid unnecessary interference.

(*Id.* at p. 8.)

In this case, the ALJ relied on *Omnitrans*, *supra*, PERB Decision No. 2030-M and *County of Riverside*, *supra*, PERB Decision No. 2233-M to conclude that the right of access extends to unrecognized employee organizations. The County argues that those cases are inapplicable because they dealt with recognized employee organizations. While it is true that the facts of those cases involved recognized organizations, nothing in the reasoning of those decisions suggested that access rights belong only to recognized organizations. *Omnitrans* and *County of Riverside* would be persuasive authority even if they are not factually on all fours with this case. (See generally 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 511.) As we explain below, the ALJ was correct that both decisions are based on statutory language that draws no distinction between recognized and unrecognized employee organizations, and, contrary to the County's arguments, we find no basis for such a distinction in our case law interpreting our other statutes or in the purposes of the MMBA itself.

First, we consider whether the text of the MMBA supports a distinction between the access rights of recognized and unrecognized employee organizations. As the ALJ pointed out, both *Omnitrans* and *County of Riverside* relied on section 3507, subdivision (a)(6), which does not distinguish between recognized and unrecognized employee organizations. Rather, that section authorizes local rules regulating "[a]ccess of *employee organization* officers and

representatives to work locations." (§ 3507, subd. (a)(6), emphasis added.) This language is significant because the terms "[e]mployee organization" and "[r]ecognized employee organization" are separately defined in the MMBA (§ 3501, subds. (a) & (b)),[9] and certain other MMBA provisions grant rights only to *recognized* employee organizations.[10] If the Legislature had similarly intended to grant access rights only to *recognized* employee organizations, it knew how to do so.

The County argues that reliance on section 3507, subdivision (a)(6), is misplaced, because the provision itself does not grant access rights. According to the County, *Omnitrans* determined that access rights "flow" from the MMBA's non-interference and non-

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[9] As relevant here, section 3501 provides:

> (a) "Employee organization" means either of the following:
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> (1) Any organization that includes employees of a public agency and that has as one of its primary purposes representing those employees in their relations with that public agency.
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> (2) Any organization that seeks to represent employees of a public agency in their relations with that public agency.
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> (b) "Recognized employee organization" means an employee organization which has been formally acknowledged by the public agency as an employee organization that represents employees of the public agency.

[10] For instance, recognized employee organizations have the rights to: (1) negotiate an agency shop agreement with the public agency (§ 3502.5, subd. (a)); (2) obtain an agency shop arrangement by secret ballot election (§ 3502.5, subd. (b)); (3) "represent their members in their employment relations with public agencies" (§ 3503); (4) receive "reasonable written notice to each recognized employee organization affected of any ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the governing body or the designated boards and commissions" and meet with the governing body, board, or commission (§ 3504.5, subd. (a)); (5) "meet and confer in good faith regarding wages, hours, and other terms and conditions of employment" with the public agency (§ 3505); and (6) consult in good faith before the public agency adopts local rules (§ 3507).

discrimination provisions, while section 3507, subdivision (a)(6), is only "evidence of the implied access right, . . . not the source of the access right itself." We are unable to find such a distinction in *Omnitrans*, which relied on both section 3506 and section 3507, subdivision (a)(6), as evidence that the MMBA includes an implied right of access. (*Omnitrans*, *supra*, PERB Decision No. 2030-M, p. 16.) Moreover, *County of Riverside* relied even more clearly on section 3507. (*County of Riverside*, *supra*, PERB Decision No. 2233-M, p. 7.) Therefore, we agree with the ALJ that the Legislature's use of the phrase "employee organization," rather than "recognized employee organization," in section 3507, subdivision (a)(6), supports the conclusion that all employee organizations enjoy a right of access.[11]

Despite the County's insistence that section 3506 is the sole source of the MMBA's implied right of access and restricts that right to recognized employee organizations, section 3506 offers further support for our conclusion that the right of access applies to unrecognized employee organizations. Section 3506 makes it unlawful for a public agency to "interfere with, intimidate, restrain, coerce or discriminate against public employees because of

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[11] The County argues that giving recognized and unrecognized employee organizations the same access rights leads to an absurd result. According to the County, because only recognized employee organizations would be subject to local rules regulating access, recognition would become "not a benefit, but a disability."

This argument is based on a mistaken premise and confuses the duty to meet and consult with a recognized organization with the permissible reach of a reasonable regulation concerning access applicable to all employee organizations. The right of access is always subject to reasonable regulation, and section 3507, subdivision (a)(6), makes explicit that an employer may adopt reasonable rules and regulations concerning access by "employee organizations," not just "recognized employee organizations."

Moreover, we need not and do not decide whether recognized and unrecognized employee organizations have the same right of access in all circumstances. We are concerned here only with unrecognized employee organizations' right of access to solicit for union membership and to distribute literature to employees in non-work areas during non-work time.

their exercise of their rights under Section 3502." Section 3502, in turn, protects the right of employees "to form, join, and participate in the activities of *employee organizations* of their own choosing for the purpose of representation on all matters of employer-employee relations." (Emphasis added.) Once again, we assume that the Legislature used the defined term "employee organization"—rather than "recognized employee organization"—for a reason. The Board has long recognized that "[t]he right of employees to join and participate in an employee organization of their choice necessarily implies that organizations have the right to communicate with employees and members at their work site, where they are generally most accessible." (*Corrections, supra,* PERB Decision No. 127-S, p. 5.) Accordingly sections 3502 and 3506 provide additional evidence that the Legislature intended to grant a right of access to unrecognized employee organizations.

We therefore conclude that the language of the MMBA demonstrates the Legislature's intent to grant a right of access to all employee organizations.

This conclusion is consistent with the case law interpreting other statutes within our jurisdiction. We look to that case law mindful that by vesting PERB with jurisdiction over the MMBA, the Legislature intended "a coherent and harmonious system of public employment relations laws." (*Coachella Valley Mosquito and Vector Control Dist. v. Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1090.)

The Board has considered the access rights of employee organizations under EERA, HEERA, and the Dills Act. Like the MMBA, these statutes differentiate between employee organizations based on whether they have been formally certified or recognized as the exclusive representative. Under all three, an "[e]mployee organization" is not required to be formally recognized or certified (EERA, § 3540.1, subd. (d); HEERA, § 3562, subd. (f)(1);

Dills Act, § 3513, subd. (a)); under EERA and HEERA, an "[e]xclusive representative," is an employee organization certified by the Board or recognized by the employer (EERA, § 3540.1, subds. (b), (e), (l); HEERA, § 3562, subds. (c), (i), (p)); and under the Dills Act, a "[r]ecognized employee organization" is "an employee organization that has been recognized by the state as the exclusive representative of the employees in an appropriate unit" (Dills Act, § 3513, subd. (b)). And the two statutes with an express right of access—EERA and HEERA—grant that right to "employee organizations." (EERA, § 3543.1, subd. (b); HEERA, § 3568.)

A review of our case law under these statutes confirms that the Board has found that unrecognized employee organizations have access rights. This was stated most directly in *Clovis Unified School District* (1984) PERB Decision No. 389: "EERA guarantees a nonexclusive representative[12] certain statutory rights—the right to represent its members, the right of reasonable access to school facilities, and the right to dues deduction." (*Id.* at p. 5.) The Board has also found violations of an unrecognized employee organization's access rights in a number of cases. (See, e.g., *The Regents of the University of California* (1985) PERB Decision No. 504-H, revd. in part on other grounds by *Regents of the University of California v. PERB* (1986) 177 Cal.App.3d 648; *The Regents of the University of California, University of California at Los Angeles Medical Center* (1983) PERB Decision No. 329-H; *State of California (Department of Transportation), supra*, PERB Decision No. 304-S; *Regents of the*

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[12] An "[e]xclusive representative" under EERA is "the employee organization recognized or certified as the exclusive negotiating representative of public school employees, . . . in an appropriate unit of a public school employer." (§ 3540.1, subd. (e).) Thus, "nonexclusive representative" refers to an employee organization, as defined by section 3540.1, subd. (d), that has not been recognized or certified as the exclusive representative. (See, e.g., *Mt. Diablo Unified School District* (1978) PERB Decision No. 68, p. 9.)

University of California, Lawrence Livermore National Laboratory (1982) PERB Decision No. 212-H; *Marin Community College District* (1980) PERB Decision No. 145.)[13] In *University of California at Berkeley* (1984) PERB Decision No. 420-H, reversed on other grounds by *Regents of the University of California v. Public Employment Relations Bd.* (1988) 485 U.S. 589, the Board explained:

> Employee organizations possess access rights irrespective of whether they are exclusive representatives or, . . . nonexclusive representatives. Since the right of access is a statutory right, it exists whether the employer and the employee organization have a formal, informal, good, bad, or no relationship at all.

(*Id.* at p. 27.)

The County argues that other PERB cases "suggest" that unrecognized employee organizations have only the same access rights as members of the public. For instance, it notes that in both *West Contra Costa Healthcare District* (2010) PERB Decision No. 2145-M and *Salinas Valley Memorial Healthcare System* (2010) PERB Order No. Ad-387-M (*Salinas*), the unrecognized employee organization, which had filed a decertification petition, was denied

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[13] The County argues that the ALJ erroneously cited *Regents of the University of California, Lawrence Livermore National Laboratory, supra,* PERB Decision No. 212-H to support the proposition that PERB case law does not distinguish between recognized and unrecognized employee organizations. The County claims that this case involved recognized employee organizations. However, the employee organizations had previously been recognized under the Brown Act, former section 3525 et seq., which HEERA supplanted. (See *id.* at p. 4.) This recognition was legally irrelevant, because HEERA's definition of "[e]mployee organization" does not include a recognition requirement. (HEERA, § 3562, subd. (f)(1).) Therefore, the ALJ correctly relied on this case.

The County's objection to the ALJ's reliance on *State of California (Departments of Personnel Administration, Mental Health and Developmental Services)* (1985) PERB Decision No. 542-S fails for similar reasons. In that case, the employer purported to "recognize" the employee organization as an "[e]mployee organization" under Dills Act section 3513, subdivision (a). As with HEERA, however, the Dills Act's definition of "[e]mployee organization" does not require employer recognition. As a result, the employer's recognition was legally irrelevant, and the ALJ's reliance on this case was proper.

access to employee break rooms. However, as the County notes elsewhere in its exceptions, these cases actually involved the rights of the exclusive representative. Both cases arose from election objections filed by the exclusive representative, meaning the lawfulness of the denial of access to the unrecognized employee organization was not at issue. We find nothing in either case—and the County does not cite anything—that even implies the Board's approval of the proposition that unrecognized organizations enjoy no greater access than the general public.[14]

Nor do we find anything suggesting Board approval of this proposition in *State of California (Department of Personnel Administration)* (1992) PERB Decision No. 948-S, also cited by the County. That case involved several election objections filed by an unrecognized employee organization after it lost a decertification election. Among the objections addressed by the ALJ were that representatives of the organization were prevented from accessing secure facilities in the middle of the night or without making advance arrangements. The ALJ dismissed those objections, but sustained a different objection concerning voter eligibility, and ordered a re-run of the election based on that objection alone. The exclusive representative then filed exceptions with the Board, challenging the ALJ's conclusion regarding the voter eligibility objection. Thus, the Board's decision only addressed the ALJ's treatment of the voter eligibility issue and his order to re-run the election. It does not address or imply approval of the ALJ's treatment of the access objections.

The California State University, Chico (1989) PERB Decision No. 729-H (*Chico I*) is also unavailing to the County. The issue in that case was whether the employer applied a

[14] To the contrary, the Board in *Salinas*, *supra*, PERB Order No. Ad-387-M, adopted the administrative determination that stated: "The MMBA grants *employee organizations* a right of access, subject to reasonable regulation." (Admin. Determination, p. 22, emphasis added.)

verification requirement, which was a prerequisite to access to the internal mail system, in a discriminatory or inconsistent manner. The Board found a violation of the organization's access rights under HEERA due to "discriminatory and inconsistent application" of this verification requirement. (*Id.* at pp. 6-7.) On a request for reconsideration, the Board then determined that there was insufficient evidence of discriminatory application of the verification requirement. (*The California State University, Chico* (1989) PERB Decision No. 729a-H, p. 3 (*Chico II*).)

The County observes that the Board in *Chico I* did not find that the verification requirement itself was an unreasonable regulation of employee organization access rights. While true, this does not support the County's argument that unrecognized employee organizations have no greater access rights than members of the public, for two reasons. First, the Board did not consider whether the verification requirement itself was unreasonable, either in *Chico I* or in *Chico II*. "Cases are not authority for propositions not therein considered." (*Alameida v. State Personnel Bd.* (2004) 120 Cal.App.4th 46, 58.) Second, even if the Board's silence regarding the verification requirement could be read as "suggesting" approval, the verification requirement was not the equivalent of certification as an exclusive representative under HEERA. To be "verified" an employee organization was required to provide its name, the names and addresses of its officers and authorized representatives, the classifications it sought to represent, a copy of its constitution and bylaws, and a statement affirming that one of its purposes was to represent employees. (*Chico I, supra*, PERB Decision No. 729-H, p. 5, fn. 5.) The verification requirement therefore did not prevent unrecognized employee organizations, i.e., nonexclusive representatives, from accessing the mail system.

Finally, *Long Beach Unified School District* (1980) PERB Decision No. 130 (*Long Beach*), also cited by the County, does not support the proposition that unrecognized employee organizations have no greater access rights than members of the public. The facts in that case arose before an exclusive representative was chosen. The Board considered several rules that were alleged to violate the unrecognized employee organization's right of access. One rule imposed more onerous identification requirements on non-employee union representatives than it did on members of the public. (*Id.* at p. 15.) The Board found this rule unlawful because it discriminated between members of the public and union representatives "without justification." (*Id.* at p. 16.)

Long Beach, supra, PERB Decision No. 130 therefore stands for the proposition that an employer may not discriminate between union representatives and members of the public. In other words, an employee organization has *at least* the same rights as members of the public. It does not follow, however, that unrecognized employee organizations have *no more* rights than members of the public. And, in fact, the Board in *Long Beach* struck down another rule without reference to the public. That rule limited a union representative to meeting informally with no more than three employees at a time without advance arrangements. (*Id.* at pp. 18-22.) The Board held that "the organization's right of access which extends to nonworking employees in nonworking areas cannot be subjected to an artificial limitation based on the number of employees with whom the representative meets." (*Id.* at p. 19.) The Board's rationale regarding this rule does not rely on (or even mention) discrimination between union representatives and members of the public. Accordingly, *Long Beach* does not support the County's argument.

In sum, we agree with the ALJ that PERB's case law has recognized a right of access for unrecognized employee organizations.

Our final consideration is whether a statutory right of access for unrecognized employee organizations is consistent with the MMBA's purposes. Like any statute, the MMBA cannot be interpreted in a manner inconsistent with its purpose. (*San Diego Housing Commission v. Public Employment Relations Bd.* (2016) 246 Cal.App.4th 1, 18.) Section 3500, subdivision (a), describes the MMBA's two general purposes: (1) "to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations"; and (2) "to promote the improvement of personnel management and employer-employee relations within the various public agencies in the State of California by providing 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."

In *County of Riverside, supra*, PERB Decision No. 2233-M, we determined that the general right of access is consistent with these purposes:

> Our statutes contain express reference to access rights and express a common legislative purpose to promote communications and improve employer-employee relations between public employers and their employees through recognition of the employees' right to join and be represented by employee organizations. We therefore have formulated a presumptive right of access to California's public facilities by union agents, subject to reasonable regulation . . . .

(*Id.* at p. 7, fn. omitted.) A right of access for unrecognized organizations is equally consistent with the MMBA's purposes. Employees' right to choose their representative is central to the legislatively-declared purposes of improving public agencies' personnel management and

employer-employee relations. This concept is reinforced in MMBA section 3502, which, as we have noted, secures the right of public employees to "form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." Providing *all* employee organizations access to the workplace, subject to reasonable regulation, is a practical, obvious, and entirely sensible method of facilitating employees' right to choose the employee organization to represent them. "Access to employees to facilitate an exchange of information is clearly a threshold concern not only in an organizing campaign but during the course of the ongoing relationship between the employee organization and its members." (*Corrections*, *supra*, PERB Decision No. 127-S, p. 5; cf. *NLRB v. Magnavox Co. of Tennessee* (1974) 415 U.S. 322, 326-327.)

The County urges a more blinkered view of the MMBA's purposes, which it claims are fulfilled only when employee organizations obtain recognition and serve as the representatives of a public agency's employees. We acknowledge that these are *also* among the MMBA's purposes, but the County does not articulate—and we do not perceive—how an access right for unrecognized employee organizations *conflicts* with those purposes.

Instead of pointing to an actual conflict, the County argues only that the MMBA relegates unrecognized employee organizations to a "lesser status." The difference in status is undeniable, given that the MMBA reserves its most significant rights for recognized employee organizations. (See footnote 10, *ante*.) Such is necessary in a statutory scheme that provides for exclusive representation. But a lesser status with respect to bargaining and representational rights does not mean that *access* rights for unrecognized employee organizations conflict with the MMBA's purpose. As our earlier cases have noted, employees cannot meaningfully exercise their right to choose their own representatives unless non-incumbent organizations are

permitted access to the work site, subject to reasonable regulation. To completely ban from the work site an organization seeking to ultimately decertify a recognized organization is not a reasonable regulation, and violates employee and organizational rights guaranteed by the MMBA.

After concluding that the MMBA's right of access extended to unrecognized employee organizations, the ALJ considered the specific details of the County's access policy and how it was applied in this case. The ALJ concluded that the blanket prohibition on organizational activities in non-working areas was unreasonable, and that both of the instances in which the County enforced its policy involved non-working areas. The County has not excepted to those conclusions.[15] Therefore, we affirm the ALJ's conclusion that the County denied SEIU its right of access.

II. Surveillance

The County's second exception is to the ALJ's conclusion that the County interfered with employee rights when Feldhaus took a photograph of SEIU organizers meeting with County employees.

MMBA section 3506 prohibits public agencies from interfering with or discriminating against public employees because of the exercise of their rights under MMBA section 3502.

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[15] We note that the ALJ concluded that ERO section 13.0213(d) was confined to "exclusive recognized employee organizations," and did not regulate access by unrecognized employee organizations. The County argues that this conclusion was clearly "erroneous," without advancing a specific exception on this point or explaining how it would change the result. The only significance we perceive is that, if section 13.0213(d) were applied to unrecognized employee organizations, the County would "enforce a local rule that is not in conformance with [the] MMBA." (Cal. Code Regs., tit. 8, § 32603, subd. (f).) But because the ALJ's proposed order did not refer to section 13.0213(d), and SEIU has not filed any exceptions, we do not consider this issue further. We affirm the ALJ's proposed order directing that the County cease and desist denying employee organizations their right of access, which would preclude the County from enforcing ERO section 13.0213(d) to deny access to any employee organization.

"If the employer's conduct interferes with protected conduct, the burden shifts to the employer to articulate a legitimate justification for its conduct. The scrutiny with which the employer's conduct will be examined depends on the severity of the harm." (*County of San Bernardino (Office of the Public Defender)* (2015) PERB Decision No. 2423-M, p. 36.) If the harm to employee rights is slight, a violation will be found unless the employer's business justification outweighs the harm to employee rights. (*Stanislaus Consolidated Fire Protection District* (2012) PERB Decision No. 2231-M, pp. 22-23.) If the employer's conduct is, instead, inherently destructive of employee rights, it "'will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available.'" (*Id.* at p. 23, quoting *Carlsbad Unified School District* (1979) PERB Decision No. 89.)

In its only decision addressing allegations of unlawful surveillance, the Board turned to case law developed under the National Labor Relations Act:

> The National Labor Relations Board (NLRB) has generally found that an employer has engaged in unlawful surveillance when the employer photographs or videotapes employees or openly engages in recordkeeping of employees participating in union activities. (*F.W. Woolworth Co.* (1993) 310 NLRB 1197.) The mere observation of open, public union activity on or near the employer's property, however, does not constitute unlawful surveillance. (*National Steel & Shipbuilding Co.* (1997) 324 NLRB 499.)

(*Lake Tahoe Unified School District* (1999) PERB Decision No. 1361, adopting warning letter at p. 2.) Photographing and recordkeeping are proscribed because of their "tendency to intimidate." (*F.W. Woolworth Co., supra*, 310 NLRB 1197, 1197.)

The County argues that Feldhaus's action of taking a photograph did not interfere with employee rights because Feldhaus quickly deleted the photograph and announced that she had

done so. In light of this, according to the County, the employees present "could not have reasonably believed that Feldhaus would use the photograph to enact reprisals on them."

The ALJ rejected this argument on the grounds that even creating the impression of surveillance would have been unlawful, citing *NLRB v. Simplex Time Recorder Co.* (1st Cir. 1968) 401 F.2d 547. We agree that harm to employee rights occurred if employees saw Feldhaus taking or appearing to take a photograph. That she deleted the photograph only after the SEIU organizers objected establishes that she was observed taking the photograph and that enough time passed for a reasonable employee to have been intimidated by her action.

Moreover, the fact that Feldhaus informed Peterson that she had deleted the photograph was not sufficient to repudiate or retract her conduct. Claims that an employer's interference with employee or employee organization rights was negated by subsequent actions have been analyzed under the Board's retraction doctrine. Under that doctrine, "an honestly given retraction can erase the effects of a prior coercive statement if the employer retraction was made in a manner that completely nullified the coercive effects of the earlier statement." (*Jurupa Unified School District* (2015) PERB Decision No. 2458, p. 12, internal quotation marks omitted.) An effective retraction must be: (1) timely; (2) unambiguous; (3) specific in nature to the coercive conduct; (4) free from other illegal conduct; (5) adequately publicized to the affected employees; (6) not followed by other illegal conduct; and (7) accompanied by assurances that the employer will not interfere with their protected rights in the future. (*Ibid.*, citing *Passavant Memorial Area Hospital* (1978) 237 NLRB 138, 138-139.)

Here, Feldhaus testified that in response to Peterson's protests, she deleted the photograph "[r]ight away" and offered to show him that it was no longer on her phone. These actions were not unambiguous; Feldhaus did not acknowledge any wrongdoing. They were

also not free from other illegal conduct, as they occurred in the context of Feldhaus's attempts to enforce an unlawful policy denying SEIU access to the area. Nor were they adequately publicized to the affected employees, since they were directed only at Peterson. And they were not accompanied by any assurances against future acts of interference. Therefore, there was no effective retraction or repudiation of Feldhaus's surveillance.

The County also argues that Feldhaus did not engage in "premeditated surveillance," having decided to take the photograph "on the spur of the moment," and that the evidence shows that the SEIU organizers were able to "successfully intimidate management into doing as they wished," i.e., deleting the photograph. Feldhaus's state of mind, including her lack of premeditation, is irrelevant to the question of whether employee rights were harmed. (See *County of Merced* (2014) PERB Decision No. 2361-M, p. 9 [unlawful motive or intent not required].) The employer that interferes with employee rights on a whim is no less culpable. (*City & County of San Francisco* (2017) PERB Decision No. 2536-M, p. 29.) In addition, even if employees were not actually intimidated by Feldhaus's original actions, "'[t]he test of coercion and intimidation is not whether the misconduct proves effective.'" (*Clovis Unified School District* (1984) PERB Decision No. 389, p. 14, quoting *NLRB v. Triangle Publications, Inc.* (3d Cir. 1974) 500 F.2d 597, 598.) Therefore, we reject these arguments and conclude that at least slight harm to employee rights has been established.

Because there was at least slight harm, the burden shifts to the County to introduce a legitimate business justification for its actions. Photographic or video surveillance may be justified as necessary to gather evidence when the employer reasonably believes that union organizers or employers are engaging in misconduct. (See, e.g., *Rahn Sonoma Ltd.* (1997) 322 NLRB 898, 902 [trespassing claim]; *Roadway Express* (1984) 271 NLRB 1238, 1244

[injunctive relief action to enforce contractual no-strike clause].) The County argues that Feldhaus had a reasonable, objective belief that SEIU organizers were violating the County's access policy, which justified her actions. We disagree. It is undisputed that the SEIU organizers were violating the access policy, but that policy was unlawful. Documenting a violation of an unlawful policy cannot be a cognizable justification for engaging in surveillance. To hold otherwise would allow the County to justify Feldhaus's actions by her presumed lack of intent to interfere with employee rights. An employer's lack of intent to interfere with employee rights, when coupled with a legitimate business justification, may serve as a valid defense to an interference allegation. (*Community Learning Center Schools, Inc.* (2017) PERB Order No. Ad-448, p. 9.) But mere lack of intent, standing alone, does not.

Because SEIU has demonstrated slight harm to employee rights and the County has failed to introduce a legitimate business justification, we affirm the ALJ's finding that the County interfered with employee rights by engaging in surveillance.

ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, it is found that the County of San Bernardino (County) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3502, 3506, and 3506.5, subdivisions (a) and (b); Public Employment Relations Board (PERB) Regulation 32603, subdivisions (a) and (g) (Cal. Code Regs., tit. 8, sec. 31001 et seq.); and section 13.0211(a)(1), of the County's Employee Relations Ordinance by adopting an unlawful policy governing the organizational activities of unrecognized employee organizations and applying this policy to deny representatives of Service Employees International Union Local 721 (SEIU) access to County facilities in May 2014. It has also been found that the County interfered with

employee rights by denying them the ability to speak to SEIU's representatives and by photographing employees as they were speaking to SEIU's representatives. All other allegations in the unfair practice charge filed by SEIU are dismissed.

Pursuant to MMBA section 3509, subdivision (b), it is hereby ORDERED that the County, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Denying employee organizations the right to access County facilities for the purpose of engaging in organizational activities.

2. Interfering with the right of employees to be represented by the employee organization of their own choosing.

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

1. Rescind the current access policy for unrecognized employee organizations as articulated in the memorandum from Andrew Lamberto dated May 9, 2014.

2. Within ten (10) working days of the service of a final decision in this matter, post copies of the Notice attached hereto as an Appendix at any County facility where SEIU engaged in organizational activities between January and June of 2014, including the TAD office and the Behavioral Health Services building. The Notice must be signed by an authorized agent of the County, 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. The Notice shall also be posted by electronic message, intranet, internet site, and other electronic means customarily used by the County to communicate with employees.

3. Written notice 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 County shall provide reports in writing, as directed by the General Counsel or her designee. All reports regarding compliance with this Order shall be concurrently served on SEIU.

Chair Gregersen and Member Banks joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 721, Charging Party, v. COUNTY OF SAN BERNARDINO, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-923-M PROPOSED DECISION (October 9, 2015)

Appearances: Weinberg, Roger & Rosenfeld by Jacob J. White, Attorney, for Service Employees International Union Local 721; Renne Sloan Holtzman Sakai by Timothy G. Yeung and Erich W. Shiners, Attorneys, for County of San Bernardino.

Before Kent Morizawa, Administrative Law Judge.

In this case, an employee organization alleges that a public employer violated the Meyers-Milias-Brown Act (MMBA) and Public Employment Relations Board (PERB or Board) Regulations[1] by refusing to allow it access to the employer's facilities and by showing preference for one employee organization over another. The employer denies any violation.

PROCEDURAL HISTORY

On May 12, 2014, the Service Employees International Union Local 721 (Local 721) filed an unfair practice charge against the County of San Bernardino (County) with subsequent amendments on May 27 and June 16, 2014. On July 24, 2014, the San Bernardino Public Employees Association (SBPEA) filed a motion to be joined as a party in the case.

[1] MMBA is codified at Government Code section 3500 et seq. PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

On December 15, 2014, Local 721 withdrew from its charge allegations asserting that the County's Employee Relations Ordinance violated the MMBA and PERB Regulations. The following day, PERB's Office of the General Counsel issued a complaint alleging that the County violated the MMBA and PERB Regulations when: (1) a County agent told Local 721's organizers to leave an outdoor rest area and took a photo of the organizers; (2) the County issued a memorandum limiting Local 721's access to the County's facilities; (3) a County agent prohibited Local 721's organizers from speaking to a County employee in a breakroom; and (4) a County agent drafted a declaration in support of an application for a temporary restraining order filed by SBPEA against Local 721.

On January 12, 2015, the County answered the complaint denying any violation of the MMBA or PERB regulations and setting forth its affirmative defenses. On April 1, 2015, the parties participated in an informal settlement conference, but the matter was not resolved.

On June 18, 2015, SBPEA filed a renewed motion for intervention to be joined as a party in the case. Both SBPEA's original and renewed motions for intervention were denied the following day.[2]

Formal hearing was held on July 6 and 7, 2015. At the hearing, the complaint was amended to state that the facts alleged in the complaint to have violated the MMBA and PERB Regulations also violated the County's Employee Relations Ordinance. The matter was submitted for proposed decision with the submission of closing briefs on September 18, 2015.

FINDINGS OF FACT

The Parties

[2] On June 26, 2015, SBPEA appealed the denial of its motions to the Board. On July 3, 2015, the Board denied the appeal for failure to comply with PERB Regulation 32200.

Local 721 is an employee organization within the meaning of MMBA section 3501, subdivision (a).

The County is a public agency within the meaning of MMBA section 3501, subdivision (c), and PERB Regulation 32016, subdivision (a).

Background

In late 2013, Local 721 began an organizing campaign with the goal of convincing workers in several County bargaining units to decertify SBPEA and elect Local 721 as their exclusive representative. At the same time, the County and SBPEA were in the process of negotiating a successor memorandum of understanding (MOU) for eight bargaining units in the County. In April 2014, SBPEA and the County reached a tentative agreement on an MOU, subject to ratification by SBPEA's membership.

As part of its organizing campaign, Local 721 dispatched organizers and rank-and-file members to speak with employees at various County facilities. These individuals discussed a number of issues with County employees, including urging them to reject the tentative agreement between SBPEA and the County. Local 721's organizers typically met with County employees in public areas, such as parking lots.

Pursuant to the County's Employee Relations Ordinance (ERO), an employee organization may file a decertification petition within the period 30 days prior to the expiration of an existing MOU or at any time when a valid MOU is not in effect. In late June 2014, Local 721 filed a petition to decertify SBPEA as the exclusive representative for at least one County bargaining unit.

The County's Access Policy

Bob Windle is the County's Assistant Director of Human Resources. He testified that he became aware of Local 721's organizing activities in March 2014, and Local 721's activities were discussed in subsequent staff meetings. At these meetings, the County reminded managers of its solicitation and distribution policy, which Windle testified has always been to prevent any employee organization, whether incumbent or an employee organization seeking to become an exclusive representative, from conducting solicitation activities in non-public areas. Windle testified that this policy is memorialized in ERO section 13.0213, subdivision (d), which states:

> Access to County work locations and the use of County paid-time, facilities, equipment, hardware or software and other resources by exclusive recognized employee organizations shall be authorized only to the extent provided for in a memorandum of understanding and/or applicable administrative procedures and shall be limited to activities pertaining directly to the employer-employee relationship and shall not interfere with the efficiency, safety and security of County employees or County operations. Access to and use of County paid time, facilities, equipment and other resources shall not be authorized for such activities as: any that violates County Policy, soliciting membership, soliciting business by or for any non-County sponsored/sanctioned company, campaigning for office, selling insurance plans, organizing elections, or other similar activities.

Pursuant to this language, the County has negotiated access language into all of its MOUs. Windle testified that as of May 2014, the language in the MOUs for bargaining units represented by SBPEA permitted that organization, with sufficient notice to the County, to enter non-public areas in County facilities for the purpose of what he called "representational activities," which include meetings with employees for grievance and disciplinary meetings.

On May 9, 2014, Andrew Lamberto, the County's Director of Human Resources, issued a memorandum titled "Campaign/Solicitation Activities" to department heads and other management staff. The memorandum stated in relevant part:

> Over the last several months the County bargaining team has been negotiating with [SBPEA] on a successor [MOU]. On April 24, 2014, a Tentative Agreement was reached between the parties, and SBPEA is currently reaching out to their membership to communicate the details of the Agreement.
>
> In an aggressive effort to disrupt those communications, certain organizations, including the Service Employees International Union (SEIU), have been visiting various County facilities to solicit County employees to vote no on the Tentative Agreement. As a reminder, the following is the County's position with respect to access for all campaign/solicitation activities:
>
> - There will be no access allowed by any organization representatives in non-public areas for purposes of campaign or solicitation activities, including access to bulletin boards reserved for County use or for employee organizations. "Non-public areas" include, but are not limited to, offices, employee work sites, break rooms, employee lunch rooms, and employee parking lots.
>
> - Campaign/solicitation activities may not occur in work areas, including the distribution and/or posting of literature, and must not disrupt County business. "Work areas" would include offices, employee work sites, break rooms, employee lunch rooms, and employee parking lots.
>
> - County employees that are off duty shall have no greater access to non-work areas for the purpose of engaging in campaign/solicitation activities than other off duty County employees who are not engaging in such activities.
>
> The County will act to insure the continued delivery of public services. As managers and supervisors, you have an important role to play. While maintaining a neutral role, you must work to insure that service to the public is not disrupted by campaign/solicitation activities. Further, you must act to insure that your employees adhere to the limits placed on such activities.

The County felt it necessary to remind managers of its policy as the vote on the tentative agreement drew nearer because it had begun receiving numerous reports of activity that

violated the solicitation/distribution policy, such as individuals getting access to employees during work time and in work areas.

Local 721's Access to County Facilities

On May 8, 2014, Adriel Peterson, a Local 721 organizer, and several of Local 721's rank and file members arrived at a Transitional Assistance Department (TAD) office to speak to County employees. The TAD office is open to the public and provides a number of services, including helping families in need and assisting people get access to health insurance. Peterson and those with him stationed themselves in several areas outside the building, including an outdoor break area, where they spoke to employees about joining Local 721.

The outdoor break area is located in the back of the TAD office adjacent to a parking lot used by employees and members of the public. Although the break area is covered by a roof, it is otherwise open to the elements and contains several picnic tables and benches. Employees use the break area to eat or smoke cigarettes. On occasions when members of the public are found in the break area, they are asked to leave. However, there is no gate to enter the break area or any signage indicating the break area is exclusively for the use of County employees.

While Peterson's group was speaking to County employees in the outdoor break area, they were approached by Robin Feldhaus, a District Manager in charge of the TAD office. Feldhaus testified she was aware the group was affiliated with Local 721 and that on prior occasions when Local 721 organizers were at the facility, they had limited their activities to the parking lots. When she saw Peterson's group in the outdoor break area, she told them that they were not permitted to be there. Peterson replied that it was a public area, and the group had the

right to be there. Feldhaus entered the building, and Peterson's group resumed speaking to employees.

Once inside, Feldhaus directed a security guard to post outside near the outdoor break area. She then checked her emails to confirm her understanding of the County's policy regarding organizing activities at County facilities. Her search yielded the following March 24, 2014 email from a TAD Assistant Director, which stated:

> Just a reminder that SEIU is not allowed in the work area or break areas of our offices, including outside break areas. They can be in public parking lots. Please ensure that we are following this. I was told that they were at a few more offices as well as some other departments. Please see attached memo for further details and info. Let me know if you have any questions. Thanks.

She forwarded this email to the TAD Deputy Director and requested guidance on how to proceed with Peterson's group.

At some point after sending the email to the TAD Deputy Director, Feldhaus went to the outdoor break area to take a break. Peterson's group was still there talking to County employees. Feldhaus testified that Peterson's group became rowdy and obnoxious when she entered the break area. Peterson testified that he was measured but firm in his position that his group had the right to be where they were. Feldhaus photographed the group to document what she perceived to be inappropriate behavior. Peterson told her that what she had done was illegal, and Feldhaus deleted the picture. She then returned inside the TAD office. Peterson's group left some time thereafter.

On May 22, 2014, Daniel Lopez, a Local 721 organizer, visited the County Behavioral Health Services building to speak to an employee working in the Westside Clinic, which is among three County departments housed in the County Behavioral Health Services building.

Lopez had spoken to the employee on a prior occasion in the building's parking lot, and they arranged to meet on May 22 during the employee's lunch break.

When Lopez arrived at the County Behavioral Health Services building, he entered the main entrance and spoke to the receptionist in the public lobby area. Although he had visited the building several times before, this was his first time inside. The receptionist escorted him to the employee breakroom located towards the back of the building. Getting to the breakroom required Lopez to pass through several locked doors and traverse one of two hallways, one adjacent to a mental health facility and the other adjacent to an alcohol and drug services clinic. Lopez' path to the breakroom did not require him to pass through the Westside Clinic itself, which is physically detached from the public lobby area, both of the previously described hallways, and the breakroom itself. Once in the breakroom, the receptionist left without giving Lopez any directions. Lopez then located the employee he was there to meet and began speaking to her.

Akemy Bon-Flores, another Local 721 organizer, arrived at the County Behavioral Health Services building shortly after Lopez. He entered the main entrance and spoke to the receptionist, who escorted him to the breakroom where Lopez was already meeting with the employee. Although Bon-Flores had visited the building on prior occasions, this was his first time inside. Bon-Flores traveled the same path as Lopez to get to the breakroom. Once inside the breakroom, the receptionist left without giving Bon-Flores any directions. Bon-Flores joined Lopez and the employee at their table. Bon-Flores testified that there were about 15 employees in the breakroom when he entered. While in the breakroom, he got up to speak to employees at other tables. Some were receptive to him and others were not. He ultimately ended up back at the first table with Lopez and the employee who had invited them both there.

While Bon-Flores and Lopez were speaking to employees, a security guard approached them and asked what their purpose was for being in the breakroom. Bon-Flores responded that they were speaking to employees about joining Local 721. The security guard asked them to leave, and Bon-Flores replied that he would do so when they had finished their conversation. The security guard then left. A short time later, another security guard approached Bon-Flores and Lopez, again asking the pair what their business was in the breakroom. Bon-Flores gave a similar response as before, and the guard then stood post in the breakroom.

At some point in time, Sherwin Farr, the building manager, received complaints that an employee organization was in the breakroom bothering employees. When Farr went to the breakroom to investigate, he found Bon-Flores and Lopez speaking to County employees. Farr informed them that they were not permitted to be in the breakroom. Bon-Flores stated they would leave when they were done with their conversation. Farr returned to his office and emailed his boss, who replied that Bon-Flores and Lopez were not permitted to be in the breakroom and needed to remain in the parking lot. Farr returned to the breakroom and showed Bon-Flores the email from his boss, after which Bon-Flores and Lopez were escorted out of the building.

Windle's Declaration

The Employee Management and Compensation System (EMACS) is the County's payroll system. The County considers employees' personal information stored in EMACS, such as home addresses, home telephone numbers, and emergency contact information, to be confidential and prohibits such information from being disclosed unless required to by law.

In May 2014, the County began receiving complaints from employees that Local 721 had sent mailers to their home addresses and placed phone calls to their personal telephone

numbers, some which were listed as their emergency contact numbers. Some of the employees surmised that the only source of such contact information was EMACS and blamed the County for providing their personal information to Local 721. The County launched an investigation to ascertain whether or not someone had made unauthorized access to EMACS for the purpose of obtaining employees' personal information.

After about a week and a half into the County's investigation, Windle was contacted by Michelle Hribar, an attorney for SBPEA. Hribar inquired about EMACS and whether the County had disclosed employees' personal information. After a discussion with Windle about the particular of EMACS, she asked him to submit a declaration. Windle agreed, and Hribar sent him a draft declaration, which he revised with the assistance of County Counsel. On May 21, 2014, Windle signed a final version of the declaration, which states in pertinent part

> 3. The Service Employee International Union ("SEIU") has requested from the County the names and work contact information of County employees in certain units represented by the San Bernardino Public Employees Association ("SBPEA"), but has never requested from the County the home or personal contact information of any County employees.
>
> 4. The County of San Bernardino has never provided the SEIU or any of its affiliates or agents with the work or home addresses, work or home telephone numbers, or other work or personal contact information of any County employees, including those employees represented by SBPEA.
>
> 5. In or about May 2014, County staff and SBPEA staff informed me about, and in some instances forwarded to me, complaints made by County of San Bernardino employees in which these employees complained that they had received unsolicited and unwarranted mailers at their home addresses from SEIU, or had received unsolicited and unwanted telephone calls from SEIU to their personal telephone numbers. Some of these County employees

> raised concerns about the possibility that their personal contact information had been disclosed to SEIU.
>
> 6. As a result of these complaints, the County of San Bernardino commenced an investigation. Based on the results of the investigation to date, the County of San Bernardino believes that there is a more than reasonable possibility that the personal telephone numbers and home addresses of County employees have been accessed, without authorization from the County of San Bernardino, from the County's electronic database containing such information and provided to SEIU.

Windle had no further communications with Hribar after submitting his declaration.

At the time Windle filed his declaration, the County was still in the midst of its investigation. It had not obtained any evidence that Local 721 was responsible for any unauthorized access to EMACS. Windle testified that at the time he signed the declaration he was unaware what SBPEA sought to do with it. However, the County admits in its answer that the declaration was submitted in support of an application for temporary restraining order filed by SBPEA against Local 721, which the San Bernardino County Superior Court ultimately granted.[3] Furthermore, the draft declaration itself contains a caption indicating that the declaration is being made in connection with a lawsuit brought by SBPEA against Local 721. Therefore, I find it more likely than not that Windle knew that his declaration was being submitted in furtherance of SBPEA's lawsuit.

The County concluded its investigation on June 27, 2014, and was unable to substantiate one way or the other whether someone made unauthorized access to EMACS because EMACS does not log each and every instance when an employee accesses the system. It only logs usage when an employee saves any accessed information. Therefore, even if an

[3] As of the date of the formal hearing in this matter, the litigation between SBPEA and Local 721 was ongoing.

employee had improperly accessed employees' personal contact information, if he or she did not save the information, EMACS would not have logged the query. Because of these gaps in the way EMACS tracks employee usage, the County could not make any definitive findings as to whether someone had accessed EMACS without authorization. The County did not follow up with SBPEA to inform it of the findings from its investigation nor did Windle submit a supplemental declaration regarding those findings.

ISSUES

1. Does the litigation privilege apply to Windle's declaration?
2. Did the County unlawfully deny Local 721 access to County facilities?
3. Did the County unlawfully interfere with employee rights?
4. Did the County provide unlawful assistance to SBPEA?
5. Did the County violate its ERO?

CONCLUSIONS OF LAW

Litigation Privilege

The rules of privilege apply in formal hearings for unfair practice cases. (PERB Regulation 32176.) At issue here is whether the litigation privilege set forth in Civil Code section 47, subdivision (b), shields the County from liability based on Windle's declaration. The litigation privilege applies to "any communication: (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action. [citations omitted.]" (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.) The privilege is absolute, and its application does not depend on the publisher's motive or intent. (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 913.) The purposes of the litigation privilege include affording litigants

and witnesses access to the courts without fear of being subsequently harassed by derivative tort actions, encouraging open channels of communication, promoting complete and truthful testimony, giving finality to judgments, and avoiding unending litigation. (*Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 955.) To further these purposes, the privilege has been broadly applied. (*Ibid.*) Any doubt as to whether the privilege applies is resolved in favor of applying it. (*Kashian, supra*, 98 Cal.App.4th at 913.)

Windle's declaration meets all the requirements to be subject to the litigation privilege. It was made in a judicial proceeding before the San Bernardino County Superior Court as part of litigation initiated by SBPEA against Local 721. Windle's statements in the declaration are made as a witness under penalty of perjury and are squarely within the type statements that the litigation privilege seeks to immunize from future liability. Finally, the declaration had a logical connection to SBPEA's lawsuit since SBPEA presented it as evidence in support of a temporary restraining order against Local 721.

Local 721 argues that Windle's declaration is not subject to the litigation privilege because Windle did not have a substantial interest in the outcome of the litigation. In support of its argument, Local 721 cites to *Costa v. Superior Court* (1984) 157 Cal.App.3d 673 (*Costa*). There, a local chapter of an international lodge brought a libel suit against the international lodge based on a letter the international lodge wrote to members of the local chapter. (*Id.* at 676-677.) In finding that the letter was subject to the litigation privilege, the court found that the members of the local chapter to whom the letter was addressed possessed a substantial interest in the outcome of the pending litigation and were therefore authorized participants in the litigation. (*Id.* at 678.)

It is unclear that a showing of "substantial interest" is required in this case since witness testimony is exactly the type of activity that the litigation privilege seeks to shield from future liability. In *Costa*, *supra*, 157 Cal.App.3d 673, the court made a finding of substantial interest in order to extend the litigation privilege to non-litigants who were not actively involved in the case, but merely potential beneficiaries of the litigation. Since Windle was more than a passive beneficiary to the litigation, *Costa* is inapposite to resolving whether his declaration falls within the scope of the privilege, and the County is not required to make a showing of substantial interest in order to invoke the privilege. Furthermore, even assuming a showing of substantial interest is required, the County has met its burden. Windle and the County have a substantial interest in the outcome of the litigation between SBPEA and Local 721 since it deals with an alleged breach of EMACS. Any facts disclosed about the breach as a result of the litigation would benefit the County, particularly in light of the inconclusive findings of its own internal investigation.

Based on the above, Windle's declaration meets the requirements of the litigation privilege and its use in this proceeding is absolutely precluded. Preventing its use here furthers the purposes of the privilege, namely to foster witness testimony and prevent an endless cycle of litigation. Accordingly, all claims in the complaint relating to Windle's declaration are dismissed.

Denial of Access

In *Omnitrans* (2009) PERB Decision No. 2030-M, the Board first held that the MMBA grants employee organizations a right of access to a public agency's facilities for the purpose of communicating with employees subject to reasonable regulation by the public agency. In reaching this conclusion, the Board noted the importance of interpreting each California labor

relations statute with reference to the others to maintain "a coherent and harmonious system of public employment relations laws." (*Ibid.* at p. 13, citing *Coachella Valley Mosquito and Vector Control Dist. v. Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1089-1090.) It then stated that in addition to creating an implied right of access, the MMBA section 3507, subdivision (a), also contains an express provision further supporting a right of access for employee organizations. (*Ibid.*) That section provides in relevant part:

> A public agency may adopt reasonable rules and regulations after consultation in good faith with representatives of a recognized employee organization or organizations for the administration of employer-employee relations under this chapter. The rules and regulations may include provisions for all of the following:
>
> [* * *]
>
> (6) Access of employee organization officers and representatives to work locations.

Because the facts in *Omnitrans* only involved the employer's denial of access to an employee, the Board left unanswered the question of non-employee union representatives' access rights under the MMBA. (*Ibid.*)

In *County of Riverside* (2012) PERB Decision No. 2233-M (*Riverside*), the Board addressed the question left unanswered in *Omnitrans*, *supra*, PERB Decision No. 2030. It reaffirmed that MMBA section 3507, subdivision (a)(6), is a specific provision providing employee organizations and their representatives access to employee work locations. (*Ibid.*) It then formulated a presumptive right of access by non-employee union agents, subject to reasonable regulation, upon the employer's showing that a particular regulation is: (1) necessary to the efficient operation of the employer's business and/or safety of its employees; and (2) narrowly drawn to avoid overbroad, unnecessary interference with the exercise of statutory rights. (*Ibid.*) In general, non-employee representatives of employee organizations

enjoy access to non-work areas and may solicit for union membership or activity and distribute literature to employees in such areas on the employees' non-work time. (*Ibid.*) A reasonable regulation might include a requirement of advance notice prior to accessing non-work areas or a requirement that a union representative identify himself upon arrival. (*Ibid.*) The Board noted that its holding is consistent with the other statutes it administers and "in accordance with the MMBA's express access provision and its purpose of improving employer-employee relations by facilitating communication between employees, through their organization, and their public employer." (*Id.* at p. 5.)

The County argues the right of access set forth in *Omnitrans, supra,* PERB Decision No. 2030, and *Riverside, supra,* PERB Decision No. 2233, only applies to an employee organization that is a "recognized employee organization."[4] Since Local 721 was not a recognized employee organization as of May 2014, it only had the same access rights as members of the public. However, *Omnitrans* and *Riverside* firmly root the access rights of employee organizations to MMBA section 3507, subdivision (a)(6), which makes no distinction between recognized and unrecognized employee organizations. Additionally, nothing in those two cases suggests that the Board sought to treat access rights under the MMBA differently than it does under its other statutes, where it makes no distinction between recognized and unrecognized employee organizations. (See *State of California (Departments of Personnel Administration, Mental Health and Developmental Services)* (1985) PERB Decision No. 542-S; *Regents of the University of California, Lawrence Livermore National Laboratory* (1982) PERB Decision No. 212-H; *Long Beach Unified School District* (1980)

[4] MMBA section 3501, subdivision (b), defines "recognized employee organization" as "an employee organization which has been formally acknowledged by the public agency as an employee organization that represents employees of the public agency."

PERB Decision No. 130.) Accordingly, the County's argument that Local 721 possessed a lesser form of access rights as an unrecognized employee organization is rejected.

Lamberto's May 9 memorandum sets forth the County's solicitation policy for unrecognized employee organizations and prohibits all organizational activities by any employee organization in "non-public" areas, which are defined to include "employee work sites, break rooms, employee lunch rooms, and employee parking lots." The policy further prohibits such activities by any employee organization in all "work areas," which are defined to include "offices, employee work sites, break rooms, employee lunch rooms, and employee parking lots." The County asserts that its access policy for unrecognized employee organizations flows from ERO section 13.0213, subdivision (d). Nothing in the plain language of that ERO section indicates it applies to unrecognized employee organizations. That ERO provision consists of only two sentences. It is unlikely that the drafters would have written the first sentence to address only the rights of exclusive recognized employee organizations[5] then, without any transition or other signal, written the second sentence to address the rights of all employee organizations. Windle's testimony that ERO section 13.0213, subdivision (d), applies to all employee organizations is unpersuasive in light of the fact that the County never cites to that ERO section in its memoranda or other correspondence as the source of its policy prohibiting solicitation activities by unrecognized employee organizations. Accordingly, I find it more likely than not that the County's solicitation policy for unrecognized employee

[5] ERO section 13.0202, subdivision (k), defines "exclusive recognized employee organization" as "an employee organization that has been certified by the County as the employee organization, which received the majority of votes in a valid representation election for an authorized employee representation unit."

organizations does not flow from ERO section 13.0213, subdivision (d), but developed elsewhere.

The record is unclear as to the genesis of the County's policy regarding access rights of unrecognized employee organizations. However, as early as March 2014, County managers had articulated in writing that Local 721 was not permitted to engage in organizational activities in work areas or break areas, including outdoor break areas, and were limited to public parking lots. As set forth in Lamberto's memorandum and implemented by its managers, the County's access policy for unrecognized employees is invalid on its face as overbroad. Not only does the County's policy deny access to nonpublic areas, but it also precludes access to areas where employee organizations traditionally have access, such as break rooms, by defining them as "work areas." The Board has held that is unreasonable for an employer to deem an entire facility a "work area." (*County of Riverside*, *supra*, PERB Decision No. 2233-M.) Even assuming some regulation of access by representatives of unrecognized employee organizations is necessary, particularly to healthcare facilities, the County has not met its burden to show that a blanket prohibition on access to all County facilities is necessary to further the County's efficient operations or the safety of its employees.

As applied to the events at issue in this case, the County has not adequately articulated a justification for denying access to Local 721's representatives. The outdoor break area at the TAD office is undoubtedly a non-work area that employees use exclusively for non-work activities. It is unclear why Local 721's representatives should be denied access to this area, especially since the County takes minimal steps to ensure that members of the public stay out of the area. The only countermeasure to a member of the public accessing the area is an employee telling them to leave.

Similarly, the breakroom in the Behavioral Health Services building is also undoubtedly a non-work area that employees use exclusively for non-work activities. The County asserts that it denied Lopez and Bon-Flores access to the breakroom because traveling to the break room required passage through patient care areas. However, when a public health facility uses its public passageways for both patient care and for access to non-work areas, it must permit non-employee representatives to traverse the public passageways in order to access the non-work areas. (*The Regents of the University of California, University of California at Los Angeles Medical Center* (1983) PERB Decision No. 329-H.)[6] Since the hallways that Lopez and Bon-Flores traversed are used to access both patient care clinics and the breakroom, the County was required to permit Lopez and Bon-Flores to use those hallways to access the break room. Although Lopez and Bon-Flores had to pass through locked doors to gain entry into the hallways, so do members of the public.[7] There was no evidence that their use of the hallway caused any disruption to the delivery of patient care nor was there any evidence that Lopez and Bon-Flores were engaged in conduct that warranted their ejection from the break room, such as causing a disturbance, camping out there all day, or harassing employees.[8]

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

[7] The record does not reflect whether members of the public are also escorted to their destination by a County employee.

[8] Although Farr testified that he received a report that a "union" was in the break room bothering people, his testimony is uncorroborated hearsay and cannot be relied upon to make a finding that Lopez or Bon-Flores were causing a disturbance. (See PERB Regulation 32176.) Lopez and Bon-Flores were the only percipient witnesses to testify regarding their interactions with employees, and Bon-Flores testified that when an employee made clear she did not want to speak to him, he respected her wishes.

Based on the above, the County violated Local 721's access rights when it denied its representatives access to the breakroom at the Behavioral Health Services building and the outdoor break area at the TAD office. While I am cognizant of the need for the County to regulate access to its facilities, a categorical restriction on access is impermissible under the MMBA.

Interference

The test for whether a respondent has interfered with the rights of employees under the MMBA does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. The courts have described the standard as follows:

> All [a charging party] must prove to establish an interference violation of section 3506 is: (1) That employees were engaged in protected activity; (2) that the employer engaged in conduct which tends to interfere with, restrain or coerce employees in the exercise of those activities, and (3) that employer's conduct was not justified by legitimate business reasons.

(*Public Employees Association of Tulare County, Inc. v. Board of Supervisors of Tulare County* (1985) 167 Cal.App.3d 797, 807.)

1. Employee communication with Local 721's organizers

MMBA section 3502 grants employees "the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." The County inhibited employees from exercising this right when it prevented Lopez and Bon Flores from speaking to an employee inside the breakroom at the Behavioral Health Services building and when it openly took the position with Peterson's group that they were not permitted inside the outdoor break area at the TAD office. As discussed in more detail above, the County did not articulate a legitimate business reason for its blanket prohibition on solicitation by employee organizations anywhere on

County facilities, including those traditionally deemed appropriate for such activities. Accordingly, the County's conduct vis-à-vis Local 721 organizers at the Behavioral Health Services building and the TAD office constituted unlawful interference with employee rights.

2. Photographing County employees

An employer engages in unlawful surveillance when the employer photographs or videotapes employees or openly engages in record keeping of employees participating in union activities. (*F.W. Woolworth Co.* (1993) 310 NLRB 1197.) The mere observation of open, public union activity on or near the employer's property does not constitute unlawful surveillance. (*National Steel & Shipbuilding Co.* (1997) 324 NLRB 499.) However, an employer violates an employee's right to engage in protected activity if it creates the impression among employees that it is engaged in surveillance. (*NLRB v. Simplex Time Recorder Co.* (1968) 401 F.2d 547.)

Feldhaus admitted to taking a photograph of Peterson speaking to County employees in the outdoor break area. The fact that she deleted the photograph does not cure the harm because the mere impression of surveillance is sufficient to chill the exercise of protected activities. The County argues that Feldhaus was justified in taking the photograph based on her belief that Peterson and other Local 721 representatives were engaged in inappropriate behavior. However, Feldhaus' testimony describing Peterson's alleged inappropriate behavior seems exaggerated under the circumstances. By the time she went outside and took the picture, a security guard had already been posted near the outdoor break area. It seems unlikely that with the guard present Peterson would act in the way Feldhaus described or that the guard would take no action to assist Feldhaus if Peterson was acting in the manner Feldhaus described. The fact that the security guard was present also eliminates any need to

document Peterson's alleged inappropriate behavior since the security guard could corroborate Feldhaus' account if necessary. Accordingly, Feldhaus unlawfully interfered with employee rights when she photographed Peterson speaking to County employees.

Unlawful Assistance

To state a prima facie violation of MMBA sections 3502 and 3503 and PERB Regulation 32603, subdivision (d), the charging party must allege facts which demonstrate that the employer's conduct tends to interfere with the internal activities of an employee organization or tends to influence the choice between employee organizations. (*Santa Monica Community College District* (1979) PERB Decision No. 103 (*Santa Monica CCD*); *Redwoods Community College District* (1987) PERB Decision No. 650 (*Redwoods CCD*).) Proof that an employer intended to unlawfully dominate, assist or influence employees' free choice is not required. Nor is it necessary to prove that employees actually changed membership as a result of the employer's act. (*Santa Monica CCD, supra*, PERB Decision No. 103; *Redwoods CCD, supra*, PERB Decision No. 650.) The threshold test is "whether the employer's conduct tends to influence [free] choice or provide stimulus in one direction or the other." (*Santa Monica CCD, supra*, PERB Decision No. 103 at p. 22.)

Local 721 asserts that the County's access policy for unrecognized employee organizations violated its duty of strict neutrality. While Lamberto's May 9 memorandum and the County's correspondence directly reference Local 721's organizational activities, there is nothing in the record to reflect that Local 721 was specifically targeted for exclusion from County facilities. To the contrary, the County granted Local 721 and SBPEA the same level of access to its facilities for organizational activities—none. There was no testimony or other evidence that SBPEA representatives were granted access to County facilities for the purpose

of engaging in organizational activities. This is consistent with ERO section 13.0213, subdivision (d), which creates a blanket prohibition on all solicitation activities by SBPEA and mirrors the restrictions placed on Local 721. Although Windle testified SBPEA accessed County facilities for the purpose of engaging in "representational activities" as set forth in ERO section 13.0213, subdivision (d), allowing this type of access did not constitute unlawful support for SBPEA since the exclusive representative has certain responsibilities, such as processing grievances, that a challenging employee organization does not have. (See generally *State of California (Departments of Personnel Administration, Developmental Services, and Mental Health)* (1986) PERB Decision No. 601-S.) Accordingly, Local 721 did not establish a prima facie case for unlawful assistance.

Violation of Local Rules

PERB Regulation 32603, subdivision (g), makes it an unfair practice for a public agency to violate any local rule adopted pursuant to MMBA section 3507. At the formal hearing, the complaint was amended to assert that the County's conduct as already alleged in the complaint violated ERO section 13.0211, subdivisions (a)(1) and (2). Those ERO provisions state:

> (a) It shall be an unfair labor practice for the County:
>
> (1) To impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (2) To dominate or interfere with the formation of any employee organization or contribute financial support to it, provided the rights recognized or granted to employee organizations in this chapter shall not be construed as financial support.

ERO section 13.0204 mirrors MMBA section 3502 and states:

> (a) All employees shall have the following rights which may be exercised in accordance with state law, the County Charger, and applicable ordinances, rules and regulations or as provided in a current memorandum of understanding that is in full force and effect.
>
> (1) The right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.
>
> (2) The right to refuse to join or participate in the activities of employee organizations and the right to represent themselves individually in their employment relations with the County.

Subdivisions (a)(1) and (2) mirror unfair practices under MMBA section 3506.5, subdivisions (a) and (d), respectively. Both parties agree that a violation under the MMBA would constitute a derivative violation under the corresponding section of the ERO.

As discussed above, the County unlawfully interfered with employee rights in the way it applied its access policy to Local 721's organizers and by photographing Local 721's organizers speaking to employees. Accordingly, this conduct also interfered with employee rights as articulated in ERO section 13.0204, subdivision (a), and violated ERO section 13.0211, subdivision (a)(1).

REMEDY

Pursuant to Government Code sections 3509, subdivision (a), and section 3541.3, subdivision (i), PERB is given the power:

> To investigate unfair practice charges or alleged violations of this chapter, and take any action and make any determinations in respect of these charges or alleged violations as the board deems necessary to effectuate the policies of this chapter.

It has been found that the County violated the MMBA, PERB Regulations, and its ERO by adopting an unlawful policy governing the organizational activities of unrecognized employee organizations and applying this policy to deny Local 721's representatives access to County facilities in May 2014. It has also been found that the County interfered with employee rights by denying them the ability to speak to Local 721's representatives and by photographing employees as they were speaking to Local 721's representatives. The appropriate remedy is to order the County to cease and desist from such unlawful conduct. (*City of Torrance* (2008) PERB Decision No. 1971-M.)

It is also appropriate to order the County to rescind its current restrictive policies governing the access rights of unrecognized employee organizations as set forth in Lamberto's May 9, 2014 memorandum.

Finally, it is also appropriate to order the County to post a notice incorporating the terms of this order. Since the County's policy applied to Local 721's organizing efforts across the County, the notice must be posted at all locations where notices are usually posted to employees at any County facility where Local 721 engaged in organizational activities between January and June of 2014, including the TAD office and the Behavioral Health Services building. Posting such a notice, signed by the authorized representative of the County, will provide employees with notice that the County acted in an unlawful manner, that it is required to cease and desist from such activity, and that it will comply with the order. It effectuates the purposes of the MMBA that employees be informed of the resolution of this controversy. (*Omnitrans* (2010) PERB Decision No. 2143-M.) In addition to physical posting of paper notices, the notice shall be posted by electronic message, intranet, internet site, or other electronic means customarily used by the County to communicate with employees at the

County facilities where Local 721 engaged in organizational activities between January and June of 2014, including the TAD office and the Behavioral Health Services building. (*City of Sacramento* (2013) PERB Decision No. 2351-M.)

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, it is found that the County of San Bernardino (County) violated the Meyers-Milias-Brown Act (MMBA or Act), Government Code sections 3502, 3506, and 3506.5, subdivisions (a) and (b); Public Employment Relations Board (PERB or Board) Regulation 32603, subdivisions (a) and (g) (Cal. Code Regs., tit. 8, sec. 31001 et seq.); and section 13.0211, subdivision (a)(1), of the County's Employee Relations Ordinance by adopting an unlawful policy governing the organizational activities of unrecognized employee organizations and applying this policy to deny representatives of Service Employees International Union Local 721 (Local 721) access to County facilities in May 2014. It has also been found that the County interfered with employee rights by denying them the ability to speak to Local 721's representatives and by photographing employees as they were speaking to Local 721's representatives. All other claims in the unfair practice charge filed by Local 721 are dismissed.

Pursuant to MMBA section 3509, subdivision (b), it is hereby ORDERED that the County, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Denying employee organizations the right to access County facilities for the purpose of engaging in organizational activities.

2. Interfering with the right of employees to be represented by the employee organization of their own choosing.

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

1. Rescind the current access policy for unrecognized employee organizations as articulated in the memorandum from Andrew Lamberto dated May 9, 2014.

2. Within 10 working days of the service of a final decision in this matter, post copies of the Notice attached hereto as an Appendix at any County facility where Local 721 engaged in organizational activities between January and June of 2014, including the TAD office and the Behavioral Health Services building. The Notice must be signed by an authorized agent of the County, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 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.

3. Written notice 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 County shall provide reports in writing, as directed by the General Counsel or her designee. All reports regarding compliance with this Order shall be concurrently served on Local 721.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street

Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960
E-FILE: PERBe-file.Appeals@perb.ca.gov

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135, subdivision (d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c), and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)

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. LA-CE-923-M, *Service Employees International Union Local 721 v. County of San Bernardino*, in which all parties had the right to participate, it has been found that the County of San Bernardino (County) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq., PERB Regulations (Cal. Code Regs., tit. 8, § 31001 et seq.), and its Employee Relations Ordinance by adopting an unlawful policy governing the organizational activities of unrecognized employee organizations, applying this policy to deny representatives of Service Employees International Union Local 721 (SEIU) access to County facilities, and photographing representatives of SEIU speaking to County employees.

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

A. CEASE AND DESIST FROM:

1. Denying employee organizations the right to access County facilities for the purpose of engaging in organizational activities.

2. Interfering with the right of employees to be represented by the employee organization of their own choosing.

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

1. Rescind the current access policy for unrecognized employee organizations as articulated in the memorandum from Andrew Lamberto dated May 9, 2014.

Dated: _____ COUNTY OF SAN BERNARDINO

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.