*** * * JUDICIAL APPEAL PENDING * * ***

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 721, Charging Party, v. COUNTY OF VENTURA, Respondent.	Case No. LA-CE-655-M PERB Decision No. 2600-M December 7, 2018

Appearances: Weinberg, Roger & Rosenfeld by Monica Guizar, Attorney, for Service Employees International Union Local 721; Matthew Smith, Attorney, for County of Ventura.

Before Winslow, Shiners, and Krantz, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions to a proposed decision by an administrative law judge (ALJ). The proposed decision dismisses an unfair practice charge that Service Employees International Union, Local 721 (SEIU) filed against the County of Ventura (County), alleging that the County violated the Meyers-Milias-Brown Act (MMBA)[1] and PERB Regulations[2] by refusing to process SEIU's petition for certification (certification petition).

The County, through its Health Care Agency (HCA), owns and operates the Ventura County Medical Center (VCMC). VCMC includes Santa Paula Hospital (Hospital) and two types of ambulatory care clinics offering outpatient care: specialty care clinics located at the

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

[2] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Hospital campus (campus clinics) and primary care satellite clinics spread throughout the County (satellite clinics or Clinics).[3]

SEIU petitioned to represent non-physician Clinic employees. The ALJ concluded that the County properly refused to process SEIU's certification petition because, he found, Clinic employees are solely employed by private for-profit medical corporations (Clinic corporations) that contract with the County. The ALJ rejected SEIU's arguments that the single employer and joint employer doctrines apply. SEIU filed exceptions asking us to reverse the proposed decision as to both of these theories.

We have reviewed the entire administrative record, including SEIU's exceptions and the County's responses, in light of applicable law. We reverse the proposed decision, as we find that SEIU has met its burden under the single employer doctrine and, alternatively, under the joint employer doctrine.

PROCEDURAL HISTORY

We have twice before considered the County's claim that Clinic employees are solely-employed by the Clinic corporations. (*County of Ventura* (2009) PERB Decision No. 2067-M (*Ventura I*); *County of Ventura* (2012) PERB Decision No. 2272-M (*Ventura II*).) We decided both *Ventura I* and *Ventura II* in the context of an organizing effort by Clinic physicians who were seeking to establish the Union of American Physicians & Dentists (UAPD) as their

[3] Only satellite clinics are at issue in this case, and we use the term "Clinics" to refer to them. At the time of trial, there were seventeen Clinics: the Conejo Clinic, the Fillmore Clinic, the Las Posas Clinic, the Magnolia Family Clinic, the John Flynn Clinic, the Mandalay Bay Women and Children's Clinic, the Moorpark Clinic, the Piru Clinic, the Santa Paula Hospital Clinic, the Santa Paula Medical Clinic, the Santa Paula Clinic–West, the Sierra Vista Clinic, the West Ventura Medical Clinic, the Pediatric Diagnostic Center, and the Las Islas North Clinic, South Clinic, and Mobile Medical Clinic. The ALJ found that SEIU waived inclusion of an eighteenth Clinic that SEIU raised for the first time toward the end of the trial, Anacapa Surgical Clinic, which is the only satellite clinic providing specialty care. SEIU did not except to the ALJ's waiver finding, and we do not disturb it.

exclusive representative. For context, we briefly summarize the procedural history of *Ventura I* and *Ventura II* before turning to events involving SEIU and the County.

In 2006, UAPD filed a certification petition covering non-supervisory Clinic physicians, pursuant to the Employer/Employee Relations Article of the County's Personnel Rules and Regulations (Personnel Rules). The County refused to process UAPD's petition, asserting that while the County is the provider licensed to operate the Clinics, it subcontracts operations to the Clinic corporations. The County therefore claimed the petitioning physicians were purely private sector employees who could seek representation only under the National Labor Relations Act (NLRA). UAPD filed an unfair practice charge with PERB, and the parties litigated the case over the next three years. In *Ventura I*, we found the County to be a joint employer with the Clinic corporations, because the County retained a right to control the manner and method in which the work is performed. (*Ventura I*, *supra*, PERB Decision No. 2067-M, p. 6.) On this basis, we ordered the County to process UAPD's certification petition.

The County processed UAPD's certification petition and found that UAPD had established majority status. Soon thereafter, however, the County refused to bargain with UAPD, claiming that it had changed its contracts with the Clinic corporations and was no longer a joint employer of Clinic employees. UAPD filed a new unfair practice charge, the Office of the General Counsel (General Counsel) issued a complaint, and an ALJ issued a proposed decision finding that the County violated the MMBA when it refused to bargain with UAPD. Relying on *Ventura I*, the ALJ declined to consider whether any allegedly new facts undermined the Board's prior joint employer determination. The County took exceptions, leading to our second decision regarding the County and its Clinics. In *Ventura II*, we

criticized the County for its actions (*Ventura II*, *supra*, PERB Decision No. 2272-M, p. 15), but nonetheless remanded the case for an expedited formal hearing. (*Id*. at p. 22.)[4]

By the time we decided *Ventura II*, SEIU had filed a certification petition covering non-physician staff at the Clinics. The County refused to process SEIU's petition, relying on the purported new facts that it had cited to UAPD. SEIU filed the instant unfair practice charge, contending that the joint employer and single employer doctrines apply, and the General Counsel issued a complaint. In light of those intervening developments, UAPD and the County placed their case in abeyance pending PERB's resolution of this case. SEIU and the County proceeded to litigate this case exhaustively, compiling a lengthy factual record. We recount the most important facts and then analyze the record under applicable law.

FACTUAL BACKGROUND

VCMC provides integrated safety net care to underserved patients at its Hospital, campus clinics, and satellite clinics. The County advertises all of these services, including primary care offerings at the Clinics, as being part of VCMC. The County has successfully petitioned the United States Health Resources and Services Administration (HRSA) to designate its Clinics as Federally Qualified Health Centers (FQHCs).[5] This designation allows the County to receive a higher reimbursement rate for medical services provided, and also allows the County to apply for specialized federal grant funding. Either a public entity or a

[4] Because UAPD did not assert a single employer claim in either of its PERB charges, we did not consider the single employer doctrine in *Ventura I* or *Ventura II*. Furthermore, while UAPD asserted that the County unlawfully refused to bargain after UAPD established majority support, UAPD did not allege that the County's purported delegation of further control to the Clinic corporations amounted to a unilateral change, discrimination, retaliation, or interference in violation of the MMBA, PERB Regulations, or the County's Personnel Rules.

[5] An FQHC provides primary care to a medically underserved population within the parameters set forth in federal law. (42 U.S.C. § 254b(a)(1).)

nonprofit may apply to become licensed as an FQHC and to receive FQHC funding, but for-profit entities such as the Clinic corporations cannot do so. (42 U.S.C. § 254b(e)(1)(A).) In this case, it was at all times the County itself that applied for FQHC status and associated funding. In its applications, the County lists the Clinics as being part of its operations, the County uses a single unified HRSA grant number for all of the Clinics, and the County identifies itself as the sole HRSA grantee.[6]

The County asserts that while its HCA employs staff at the Hospital and at campus clinics, it does not employ satellite clinic staff. Instead, the County has structured its health care delivery system so that each physician who serves as a Clinic medical director (director) forms a corporation and serves as the sole proprietor of that corporation. The County then enters into a Professional Services and Operations Agreement (PSOA) with each Clinic corporation.[7] The County claims before PERB that this arrangement constitutes arm's-length subcontracting and that the County has fully delegated managerial control over the Clinics.[8] While a for-profit corporation cannot obtain a license to run an FQHC, federal law appears to contemplate a public entity such as the County attaining FQHC status while subcontracting with other entities to provide health services. (42 U.S.C. § 254b(a)(1).)[9] Here, however, the

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[6] VCMC's main accrediting agency, the Joint Commission, similarly treats the Clinics as County operations that are part of VCMC.

[7] Some of the Clinic directors have formed more than one corporation, and certain corporations operate more than one Clinic. At the time of trial, there were ten physician-owners serving as Clinic directors, and these ten individuals had formed a total of twelve corporations.

[8] We use the terms "contracting" and "subcontracting" interchangeably. We similarly do not intend any difference between the terms "contractor" and "subcontractor."

[9] SEIU claims that HRSA guidance severely restricts the extent to which the County can transfer to a subcontractor control over FQHC operations. The County disputes this

factual record shows that the County did not engage in truly arm's-length contracting and retained significant managerial control over the Clinics.

I. The County's Sworn Statements to The Federal and State Governments

The record contains substantial evidence regarding the County's representations to state and federal authorities. For instance, the County has submitted more than a dozen sworn Medi-Cal Provider Applications (Medi-Cal Applications), separately on behalf of each Clinic, to the State of California (State). Section Five of each Medi-Cal Application is entitled "Subcontractor." In that section, the State asks: "Does the applicant/provider contract or delegate any management functions or responsibilities for providing [health care services?]" For each Clinic, the County specifically denies, under penalty of perjury, that it has subcontracted or delegated management functions or responsibilities. These denials appear at the top of the two-page questionnaires found in Section Five of the Clinic Medi-Cal Applications. Because the County answers this initial question in the negative on each application, the County then skips the dozens of follow-up questions in the next two pages, including questions regarding each subcontractor's ownership and leadership, as well as questions asking the County to describe the past five years of monetary transactions with each subcontractor, to the extent such transactions exceeded $75,000 in value.[10]

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contention. We do not pass on such arguments. Based on the County's representations, we assume, without deciding, that the County would be permitted to subcontract all or some of its FQHC operations to one or more private, for-profit corporations.

[10] As background, we note several other aspects of the Medi-Cal Applications. The first page of each application notes that the applicant/provider's rights and obligations "may not be transferred or assigned." The County reports itself as the sole applicant/provider for the Clinics, and the County notes that the Clinics' names are "Doing Business As" names of the County. The County reports that it owns and operates each Clinic, and that each Clinic is a "Governmental" rather than "Corporation" or "Nonprofit" entity.

The County takes substantially the same position in the Medicare Enrollment Applications (Medicare Applications) that it submits to the federal government for each Clinic. In Section Five of each Clinic's Medicare Application, the federal government requires the County to list any "managing organization," including any organization that "conducts the day-to-day operations of the provider." The application instructions caution that "in order to qualify as a managing organization," an entity "need not have an ownership interest in the provider." "For instance," the instructions continue, "it could be a management services organization under contract with the provider to furnish management services for the business." In responding on behalf of each Clinic, the County denies, under penalty of perjury, that there is any organization other than the County having such management control.

In Section Six of each Clinic's Medicare Application, the federal government asks the County to list all "managing employees." The application instructions include a broad definition of "managing employee" that includes "a general manager, business manager, administrator, director, or other individual who exercises operational or managerial control over, or who directly or indirectly conducts, the day-to-day operations of the provider, either under contract or through some other arrangement, regardless of whether the individual is a W-2 employee of the provider." The County's sworn answers list only a County administrator but not the Clinic directors, even though the County asserts to PERB that the directors have sole control over most significant day-to-day Clinic operations.

Each Medicare Application contains more than two pages of admonitions regarding the significance of an official's signature on the application, the official's affirmative duty to correct any statements made in the application as soon as there is any additional or changed information responsive to any question, and the extensive criminal and civil penalties for

making false statements, concealing information, or failing to make required updates. There is no evidence that the County has ever sought to update its responses, despite the fact that its sworn statements contradict the positions it has taken before PERB.

II. The County's Relationship with the Clinic Corporations

Each PSOA recites that it is a contract between the County and a for-profit corporation owned and controlled by a single physician. For instance, the 2010-2011 PSOA covering Sierra Vista Family Medical Clinic recites that it is an agreement between the County and "Asra Siddiqui, M.D., A Professional Medical Corporation" that is "owned and controlled by Asra Siddiqui, M.D." The PSOAs provide that a Clinic medical director wishing to assign another person as his or her designee for any purpose must obtain the County's advance approval.

The terms found in the various PSOAs are substantially similar to one another, and the County periodically signs updated PSOAs with the various Clinic corporations. Each PSOA states that the County is the licensed Clinic operator and that the Clinic must identify itself as being "a clinic of the Ventura County Medical Center." Under the PSOAs, Clinic patients are by definition VCMC patients. Patient records are VCMC property.

The PSOAs grant VCMC the full right to use the premises for any and all purposes, including but not limited to VCMC's right to administer its programs, coordinate patient care, coordinate and review medical records, and review financial and statistical records. The Clinic corporations are required to provide working space at the Clinics for the County to place its staff who assist members of the public in determining their eligibility for public benefits. The County admits that these eligibility workers are County employees.

Under the terms of each PSOA, the County pays the signatory Clinic corporation a set monthly Administration Fee, plus the opportunity to earn a smaller bonus if the Clinic attains certain goals. For instance, in the 2010-2011 PSOA covering Sierra Vista Family Medical Clinic, the County agreed to pay the Clinic corporation an Administration Fee of $3,000 per month, plus up to an additional $2,000 per month depending upon the Clinic's performance in three areas. The PSOA made the Clinic corporation eligible to earn: (1) up to $600 per month in additional compensation depending upon the Clinic's scores on patient satisfaction surveys, (2) up to $600 per month in additional compensation for setting total medical provider compensation at a level that equals or exceeds total support staff compensation and (3) up to $800 per month in additional compensation depending upon the Clinic's compliance with accrediting agency goals.

The County owns the revenues and accounts receivables that the Clinics generate. The County also handles Clinic billing and establishes the fee levels for Clinic services. After collecting revenues on the Clinics' behalf, the County generally returns the revenues to the Clinics for the Clinics' use in partially covering their expenses. Over the course of each year, these revenues always prove insufficient to cover the Clinics' expenses, and the County covers such shortfalls by transferring money to the Clinics' accounts. To the extent the County at any point has transferred money to a Clinic to such a degree that the Clinic's cash balance exceeds its operating cash requirements, the County may recoup such excess money by withholding revenues or having the Clinic corporation pay the County in amounts that the County requests.

The County directly covers some Clinic expenses and reimburses the Clinic corporations for other expenses. Typically, the County directly covers or provides ancillary items and services such as housekeeping, laundry, linen, utilities, forms, telephone and

facsimile services, biohazard removal, medical malpractice insurance, general liability insurance, admissions services, utilization review services, quality assurance services, and information technology.[11] The County also owns and maintains all Clinic facilities, including virtually all necessary equipment and furnishings. The PSOAs require the County to make reasonable efforts to purchase, maintain, and replace any necessary items, as well as to "provide additional operating capital as necessary to meet [Clinic] operating expenses," up to a maximum of $1,000,000 per year.[12]

The County generally reimburses the Clinic corporations for many other expenses, including, principally, wages and benefits paid to Clinic staff. Aside from staff compensation, examples of typically reimbursed expenses include a director's attorney fees and other costs associated with establishing his or her corporation(s), a Clinic corporation's bookkeeping and accounting costs, workers' compensation insurance premiums, wrongful employment practices insurance premiums, and costs associated with health care services not provided by Clinic staff, such as laboratory services, radiology services, physical therapy services, occupational therapy services, pharmaceuticals, and medical supplies.[13]

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[11] The PSOAs permit Clinics to request permission from the County to establish an alternative insurance arrangement under which a Clinic could obtain separate malpractice insurance coverage, or separate general liability coverage, and have the County reimburse the cost, provided that the County will not reimburse the cost if it exceeds what the County would pay to provide such insurance directly.

[12] As one Clinic director testified, the County owns virtually all the equipment used to take care of patients.

[13] The PSOAs require the County to provide or arrange for Clinic medical supplies. When the Clinics use County-provided medical supplies, the Clinics purchase these supplies from the County out of their operating budgets. As noted above, those budgets are funded in part by the County remitting to the Clinics the revenues that the County collects for Clinic patient care, and in part by the County supplementing such revenues to cover shortfalls. The

Prior to the start of a fiscal year, the County works with each medical director to prepare an annual Clinic operating budget, which the County must approve. This budget includes all projected expenses requiring reimbursement, including base employee compensation and projected changes in compensation costs during the year. As noted, when a Clinic's operating expenses exceed its revenues, the County covers the shortfall, and all of the Clinics operate at a loss each year.

III. Clinic Management

Counsel for the parties questioned Greg Facktor (Facktor), a health care compliance consultant, regarding the advice he gives FQHC license holders such as the County. Facktor explained that he advises FQHC license holders that they must maintain administrative and operational control over the services they provide, and that he has given this advice based on federal guidance. We need not rely on Facktor's testimony, however, as the County, responding to an HRSA query that explicitly refers to one of the policies that Facktor cited, has reported that Clinic management is integrated within the County HCA's management structure.[14] The County also provides HRSA with organizational charts showing such integration.

County Deputy Director of Ambulatory Care Joan Araujo (Araujo) testified that VCMC has ceded to the Clinic corporations full authority to hire and promote Clinic employees, to

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financial arrangement in which the Clinics "purchase" certain supplies from the County is thus akin to a recharge within a company or government entity.

[14] The County made this written representation in response to a written question on an HRSA form. HRSA's question, citing a policy that Facktor identified in his testimony, asked the County whether its Clinics are "integrated into the health center's management structure." In response, the County not only reported that the Clinics are integrated into the County's management structure, but further indicated that the County's CEO "is responsible [for]" the "administration and coordination of all county operations and programs," and that the CEO appoints the HCA Administrator, who oversees the Ambulatory Care Clinics.

train, schedule, evaluate, correct, and discipline them, as well as to compensate them and direct their day-to-day activities. However, the record evidence as a whole shows a more complex reality in which the County sometimes exercises partial control, and in any event shares a right of control as to certain terms and conditions of employment.

The County has the right to set and approve Clinic policies covering day-to-day work and conditions at the Clinics. Pursuant to this authority, Clinic employees have at relevant times been covered by more than one hundred County policies, including dozens of patient care procedures, the VCMC bylaws, code of conduct, mission statement, medical staff guidelines, Hospital-wide and departmental rules, prohibition on cell phone use, dress code, work-incurred injury and illness policies, injury and loss reporting requirements, error reporting procedures, emergency closure policies, code blue policies, triage policies, medical records policies, cash handling procedures, utilization review procedures, quality assurance plans, and other clinical and administrative policies and procedures. The County retains the right to add new policies and requirements, and does so periodically.

Clinic staff must follow VCMC policies in carrying out the Clinic's functions, and the County places on each Clinic employee's computer desktop a link to applicable VCMC policies. This link includes sub-links that lead Clinic employees not only to many of the above-referenced policies, but also to County policies and mandates on information technology, permissible use and disclosure of confidential information, permissible and impermissible abbreviations for use in medical records, and many other topics.

Clinic employees receive a VCMC protocol and procedure handbook, which the County periodically updates. The handbook includes instructions regarding the VCMC Administrative Policies governing patient rights, patient responsibilities, and patient complaints. The

handbook also incorporates by reference the VCMC Administrative Policies on reporting abuse, and it urges Clinic staff to consult with the County's Ethics Committee regarding difficult care decisions.

Clinic staff members must report to a County facility to obtain their identification badges, which they must wear at work. These badges clearly identify all staff as affiliated with VCMC. Moreover, Clinic employees use County e-mail addresses for their work.

Newly-hired Clinic employees attend VCMC orientations, where they receive VCMC orientation materials, including VCMC sexual harassment policies and substance abuse policies, as well as information about the County's Employee Assistance Program.[15] While Clinic managers provide day-to-day training, most systematic training is provided by the County, both in person and online. Clinic employees use the County's web-based system to complete trainings and tests.[16]

VCMC requires the Clinic corporations to cooperate with one another to ensure minimum staffing at each Clinic and attempt to fill inter-Clinic staffing requests. When Clinics participate in such inter-Clinic scheduling transfers, the County instructs the various Clinics to follow the County's inter-company billing protocols. These protocols dictate the exact costs that the Clinics must pay one another (with reimbursement from the County) to cover the personnel transfers.

Employee interchange and partial County control over scheduling are not limited to personnel exchanges between Clinics. Rather, there is also required employee interchange

[15] Before being hired, applicants for Clinic positions must pass a physical, which is most often administered by Ventura County Employee Health Services.

[16] Each Clinic can, at least theoretically, determine whether to use the County's trainings or find another way to train Clinic staff in certain instances, but the norm is to use County trainings for practical reasons.

between the Clinics and the Hospital. For example, in 2008 the County trained Manuel Angel De La Trinidad (De La Trinidad) as a new orthopedic casting technician. The County trained De La Trinidad at the VCMC Hospital, and thereafter required him to work both at the Hospital and at Las Islas Clinic.[17] Other orthopedic technicians were also required to go back and forth between the Hospital and Clinic locations. When Las Islas Clinic needed extra coverage, De La Trinidad would contact the Hospital to send coverage, and when the Hospital needed extra coverage, De La Trinidad would work there. Similarly, an orthopedic casting technician at the Fillmore Clinic, Patty Ortiz, was called over to work at the Hospital when needed. Clinic medical directors also work at the Hospital.[18]

The County dictates many aspects of Clinic employees' clerical and administrative work. The County requires Clinic employees to produce a host of specific documents, and the County often mandates what must appear in these documents and when they must be produced. For instance, the County requires Clinic staff to produce monthly financial projections, monthly accounting statements, and reports regarding payroll and non-payroll expenses, gross revenues by financial class, patient visits, clinic procedures, physician time studies, and other matters. The County explicitly reserves the power to insist on other administrative tasks as well, and the County periodically uses this right. For example, the County created a

[17] Our dissenting colleague does not agree that De La Trinidad was "required" to work at the Hospital. We do not believe the dissent adequately recognizes that an employee whose direct supervisor "requested" him to perform certain work within his job description will not generally be in a position to decline such a "request."

[18] We agree with the dissent that the County waived hearsay objections to the declarations of De La Trinidad and other declarants, when it declined the opportunity to cross examine them. The County further waived any evidentiary objections by not filing exceptions based on hearsay or other evidentiary objections.

PowerPoint presentation and directed a Clinic medical director to present it to the County's Board of Supervisors.

County-employed VCMC personnel periodically instruct Clinic employees in their work and review or inspect their work to see if it adequately meets standards. When VCMC personnel find deficient work, they direct Clinic staff to redo it. Clinic employees are subject to discipline for violating VCMC policies, as well as for performance issues that VCMC personnel identify. While the County does not directly discipline Clinic staff, when County personnel know of performance issues, they raise such issues with Clinic management. Such issues may lead to negative performance reviews or discipline.[19]

Clinic employees must use County forms in many of their functions, and must use the County's internal mail courier system to send inter-office mail and equipment between the Clinics and the County's Hospital or other locations. Clinic employees also must use several different County information technology systems to register, schedule, and bill patients, as well as to record and access written medical records, medical scan images, and other test results. Clinic employees access other County systems to help sign patients up for County-provided self-pay discounts and a County program for uninsured patients.

[19] County Community Services Coordinator Leticia Alvarez (Alvarez) generally endorsed the idea that County personnel should raise performance issues with Clinic management rather than directly disciplining Clinic employees. But Alvarez also identified instances in which she has become more directly involved in positive approaches to improving employee performance. First, Alvarez testified that she discovered a Clinic employee's "really bad" documentation error, and the Clinic manager suggested to Alvarez that perhaps the Clinic employee should be terminated as a result. Alvarez replied that she "wouldn't go that route" and instead, as part of a "positive, progressive discipline" approach, she would visit that Clinic more often to provide guidance and direction. More generally, Alvarez testified that her approach is to "micromanage" Clinic employees to assure that their documentation is "perfect." Alvarez further testified that, as part of her positive approach to supervising Clinic employees, she provides Clinic employees with gift cards and movie tickets if they perform well.

IV. SEIU's Certification Petition and the County's Response

On October 15, 2010, SEIU delivered to the County a certification petition, in the form of a letter asking the County to direct that a card check be held to determine whether SEIU enjoyed majority support among "all service employees jointly employed by the County of Ventura and Medical Directors of the Ventura County Medical Center Satellite Clinics." SEIU's letter referenced *Ventura I*, *supra*, PERB Decision No. 2067-M, as a basis for its joint employer claim. The letter also referenced the MMBA's card check provisions, codified at MMBA section 3507.1, subdivision (c), as well as Section 2009 of the County's Personnel Rules, which implement the MMBA's card check provisions.

SEIU's letter noted that it was seeking to create a separate bargaining unit of service employees at the Clinics, and was not attempting to accrete Clinic staff into any existing bargaining unit. SEIU offered to provide proof of majority support to the State Mediation and Conciliation Service (SMCS), once the County processed the petition and directed that the card check proceed.[20] SEIU also asked the County for a list of active employees, including their job titles, and further asked the County to indicate which employees the County believed should be included in the proposed unit of service employees, plus the reason(s) for any exclusion(s).

By letter dated November 12, 2010, County Counsel Leroy Smith (Smith) acknowledged receiving SEIU's certification petition dated October 15, 2010.[21] The County responded, however, that it "has not recognized [SEIU] as the bargaining representative of

[20] Although the County's Personnel Rules provide that any election be conducted in accordance with SMCS procedures, the Personnel Rules do not identify the exact procedure to be used in the event of a card check.

[21] The County's Personnel Rules use the term "petition for certification." The parties use a number of other terms interchangeably, including "request for recognition" and "petition for recognition."

persons employed at the County's satellite clinics because the County is not the employer, joint or otherwise, of the persons SEIU purports to represent." The County noted that SEIU had correctly summarized the Board's *Ventura I* decision, but asserted that *Ventura I* involved physicians rather than non-physician staff and was in any event subject to further litigation before PERB. The County's letter continued, "Therefore . . . [we] will not process SEIU's petition for recognition because the petition is not filed on behalf of County employees."[22]

DISCUSSION

Our task is to determine whether Clinic operations, management, and financial control are sufficiently integrated within the County's HCA and VCMC structure that the single employer doctrine applies. Alternately, we must determine whether the County and the Clinic corporations share sufficient control over terms and conditions of employment to satisfy the joint employer standard. Although the County intended that the Clinic corporations should be the sole employers of Clinic staff, and the County has drafted the PSOAs with that object in mind, we are bound neither by the County's intent nor by contractual recitations. (*Ventura County Community College District* (2003) PERB Decision No. 1547, p. 20.) A public entity may not abrogate employee rights by entering into a "cleverly written contract with a third party." (*Id.* at p. 21.)

[22] Smith's letter of November 12, 2010 also criticized SEIU for submitting a petition that did not establish that the petition signers wished to be exclusively represented by SEIU. The parties substantially cleared up this misunderstanding via their trial testimony. SEIU was waiting to submit its proof of support, as SEIU wanted the County first to tell SEIU about any titles the County wished to exclude, as well as notify SMCS or otherwise designate who would conduct the card check. However, when County Counsel Smith wrote the County's response letter, his file included a petition signed by members of the community supporting Clinic workers in their organizing efforts. SEIU had solicited community members to sign this petition, and had delivered it to the County. County Counsel wrongly believed that petition to constitute SEIU's proffered majority support, and he noted that it was patently insufficient to accomplish that purpose.

The single employer doctrine and the joint employer doctrine "require distinct analyses." (*California Virtual Academies* (2016) PERB Decision No. 2484, p. 57 (*CAVA*).) In distinguishing between the two doctrines, PERB has looked to federal law for guidance. (*Id*. at pp. 58-64 [adopting *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.* (3d Cir. 1982) 691 F.2d 1117, 1122 (*Browning-Ferris I*)].) A single employer relationship exists "where two nominally separate entities are actually part of a single integrated enterprise so that, for all purposes, there is in fact only a 'single employer.'" (*Browning-Ferris I*, *supra*, 691 F.2d at p. 1122.) In contrast, two entities are joint employers if they "are in fact separate" but "share or co-determine" employment terms or conditions. (*Id*. at p. 1123.) Therefore, "in 'joint employer' situations no finding of a lack of arm's length transaction or unity of control or ownership is required, as in 'single employer' cases." (*Id*. at p. 1122.)

For the reasons discussed below, we find that the County and the Clinic corporations do not operate at arm's length and that VCMC is in fact a single employer of Clinic staff. In the interest of clarity and completeness, and given the parties' extensive litigation efforts in this matter, we also analyze the record evidence under the joint employer doctrine. We find that the County and the Clinic corporations have shared rights of control over various employment terms or conditions. For this reason, we find that even if the single employer doctrine did not apply, the County and Clinic corporations would nonetheless qualify as joint employers.

I. Single Employer Analysis

In assessing a single employer claim, PERB looks at four factors: (1) functional integration of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership or common financial control. (*CAVA*, *supra*, PERB Decision No. 2484, p. 64.) Single employer status "does not require the presence of all four factors."

(*Ibid*.) This is especially the case given that our inquiry must take into account not only how many of the factors are present, but also to what extent they are present. In this case, the record strongly supports a single employer finding, even though there is some countervailing evidence. Indeed, we have previously noted that even when the evidence is sufficient to support a single employer finding, there may be "evidence of commonality as well as evidence of independent operations." (*Ibid*.)

Here, the County's sworn statements to federal and state authorities belie its arguments that the Clinic corporations manage the Clinics autonomously.[23] In addition, we assess below other evidence regarding each relevant factor.

A. Functional Integration of Operations

There is extensive evidence that Clinic operations are integrated into VCMC. While we have already described significant aspects of that evidence, *ante*, we summarize here some of the most salient facts.

VCMC provides integrated health care services at the Hospital, campus clinics, and satellite clinics, sending patients back and forth as needed and also exchanging employees, supervision, training, protocols, test results, medical records, medical advice, and other information as necessary. VCMC owns all patient records. There is similar integration on the administrative and operational side of VCMC affairs, with County personnel, Clinic staff, and contractors working together on statements and reports regarding payroll, expenses, revenues, other financial matters, clinic procedures, physician time studies, and other clerical,

[23] The County has never adequately explained the inconsistency between the County's statements to other governmental authorities and its position before PERB. For instance, while the County has explained why its own personnel signed the Medicare and Medi-Cal Applications allowing the County to bill those programs for Clinic services, it has failed to explain why the County does not identify the Clinic corporations as subcontractors or other actors with control over Clinic operations.

administrative and operational matters. Moreover, the County advertises the Clinics as being part of VCMC, a circumstance that we have found relevant in applying the single employer doctrine. (*CAVA, supra*, PERB Decision No. 2484, p. 70.)

Clinic employees use County e-mail addresses and must wear badges that identify them as being affiliated with VCMC. Clinic staff attend VCMC orientations and participate in other County training programs, including VCMC's online system for enhancing and assessing skills and knowledge. The Clinics provide staff with a handbook that references VCMC procedures and protocols, including VCMC's Administrative Policies. The County establishes dozens of other policies that apply at the Clinics, and Clinic staff computers feature a desktop link to those policies.[24]

As a few further examples, Clinic staff use County forms, the County mail system, and multiple County information technology systems. The Clinics' use of several centralized County technology systems is akin to the facts of *CAVA, supra*, PERB Decision No. 2484, p. 70, wherein we noted that the CAVA schools used a common online enrollment process.

B. Centralized Control of Labor Relations

Because Clinic staff members have not been represented by an employee organization, there is no evidence regarding control of labor-management relations to date. In these circumstances, we examine human resources management in general, even in the absence of any formal labor relations. While we concur with the County that individual Clinic managers have considerable discretion in handling individual human resources issues, we find that such

[24] We have no quibble with our dissenting colleague's observation that the Clinics could, at least theoretically, opt out of certain VCMC trainings and instead train employees in another fashion. This theoretical option does not, however, change the integrated nature of County and Clinic operations. To the extent the dissent claims that the Clinics "choose" to be governed by County policies and could opt out of those policies altogether, we believe that as to many County policies the weight of the record points toward the opposite inference.

discretion is in many ways akin to a department head's discretion in many governmental entities, and we further find that the record reflects several important matters over which the County exerts centralized control.

There is centralized control over important aspects of compensation and staffing. Most importantly, the County has a dispositive role in establishing the amount of resources available for compensation and staffing, as it is the County that applies for federal grant support, sets the charges that lead to patient revenue, works with the Clinics to develop annual budgets, and has sole final authority to approve these budgets.

As another important example, the County requires the Clinics to cooperate with one another to ensure minimum staffing at each Clinic by attempting to fill inter-Clinic staffing requests. The County further requires the Clinics to follow the County's internal billing protocols to account for such transfers. The County also requires staff to go back and forth, at times, between the Clinics and the County's Hospital.

These facts show centralized control on selected human resource issues, including significant influence over compensation and staffing levels. Such centralized control coexists in harmony with substantial Clinic-level authority to establish individual compensation levels, schedules, and duties, to set local policies, and to evaluate, promote, and discipline individual employees. In assessing this evidence and to what extent it should be given weight in the overall analysis, we are cognizant that in large governmental organizations, it is common for individual departments to have similar authority, subject to upper management's right of control on key budgetary and services-related issues.

In other words, centralized control of labor relations does not necessarily depend on centralized authority over day-to-day matters. (*El Camino Hospital District* (2009) PERB

Decision No. 2033-M, pp. 20-21 (*El Camino*) [entity has centralized control by virtue of its right to ratify collective bargaining agreements, even though it neither negotiated such agreements nor exercised day-to-day authority].)[25] Indeed, devolved management structures are common even when there is only one entity involved in managing a public enterprise. The Clinics, for all their localized control over numerous matters, could not significantly alter course on high level labor relations matters without approval from the County. For instance, if a Clinic wished to substantially increase its budget in order to begin funding a pension plan, we have little doubt that the County would have a centralized role in that decision process, akin to the district's high level labor relations role in *El Camino*.[26]

C. Common Management

County managers are the legal Clinic managers. The federal and state governments, as well as the Joint Commission, treat the Clinics as being part of the County. These governmental and accrediting authorities deal with County managers regarding most important Clinic affairs. In sworn statements, the County denies subcontracting or delegating managerial functions. Rather, the County reports to HRSA that the Clinics are integrated into the

[25] We partially disapproved of *El Camino* on other grounds in *Alliance College-Ready Public Schools* (2017) PERB Decision No. 2545 (*Alliance*). We note that *Alliance* is presently subject to review in the California Court of Appeal. Even though *Alliance* is not final, we rely only on those parts of *El Camino* that *Alliance* did not disturb. Thus, even were the Court of Appeal to reverse *Alliance* and reinstate all aspects of *El Camino*, that would not alter the outcome of our decision in this matter.

[26] Moreover, the unified manner in which the County has amended each of its Clinic PSOAs at the same time and in the same manner, together with other record evidence, helps demonstrate that it is unlikely the County would allow just one of its Clinics to make such a change. This example illustrates how centralized control over critical issues is consistent with devolved management over day-to-day affairs, as is common in a large government bureaucracy such as the County, which features departments and sub-departments within its HCA and throughout its structure.

County's management structure. As noted *ante*, the County has never adequately explained the inconsistency between its sworn representations to HRSA and its arguments to PERB.

Just as each of the schools in *CAVA* was formed when the same person signed their charter documents as their "Authorized Representative" (*CAVA*, *supra*, PERB Decision No. 2484, p. 12), the County is the license holder for each Clinic, and the same County personnel executed the various Clinic applications to state and federal authorities. Moreover, we found it notable in *CAVA* that the eleven schools had used nearly identical Charter Proposals and governing documents (*id*. at p. 12), and the record here includes similar evidence of common management: the County drafted the various Clinics' PSOAs, Medicare Applications, and Medi-Cal Applications in a nearly identical manner.

County organizational charts also show the Clinic medical directors as fitting within the County's management structure. While each of these charts supports a finding of common management, two of these charts take on particular significance because the County has relied on them in a critical change of scope submission to HRSA. Indeed, the County referenced these organizational charts in describing its governance. We find this to be particularly significant given that one primary County goal in this submission was to answer HRSA's query, noted *ante*, regarding whether the Clinics are "integrated into the health center's management structure." The County not only reported that the Clinics are integrated into the County's management structure, but attached two organizational charts showing such integration.

Araujo testified that the County managers shown on the organizational charts are ultimately responsible for oversight of how the Clinics function, but emphasized that day-to-

day control rests with the Clinic directors.[27] We disagree with the County's suggestion that such evidence of localized control overcomes the County's own organizational charts, statements to regulators, and other record evidence, including evidence that County personnel perform high level management functions for the Clinics. We view the evidence this way based on an overall record review, including the above-noted similarity between local control at the Clinics and local control in many governmental departments. We need not choose between finding common management and finding localized control over day-to-day affairs. In suggesting that those are the only alternatives, the County establishes a false dichotomy that misconstrues the "common management" factor. (*CAVA*, *supra*, PERB Decision No. 2484, p. 73.) Common management can be found even in the presence of a dispersed management structure. (*Ibid*.; accord *Sakrete of Northern California, Inc. v. NLRB* (9th Cir. 1964) 332 F.2d 902, 907, cert. den. (1965) 379 U.S. 961 [common management, centralized control of labor relations, and integration of operations can be demonstrated at the executive or top level, even where there is separation at a more localized level].)[28]

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[27] Araujo supervises the County's Ambulatory Care Medical Director for Primary Care Services, Michelle Laba (Laba), who, in turn, serves as chairperson for a monthly meeting of Clinic corporation physician-owners. The County has employed Laba as an independent contractor, and she has also served as director of one Clinic. When she chairs the monthly meetings, Laba provides the other Clinic directors with updated County requirements on numerous issues. While the County's witnesses attempted to emphasize localized control, there were significant facts and conclusions that they had to admit. For instance, Araujo testified that the County runs the Clinics, the Clinics are public entities, and the County's applications to HRSA accurately refer to the County's Board of Supervisors as the ultimate Board of Directors for each Clinic. A Clinic director similarly admitted that his Clinic sits within a branch of the County's Health Care Agency.

[28] The dissent asserts that the multiple County organizational charts in the record have limited import due to: (1) the fact that one of the charts places the Clinics in a dotted box to distinguish them from campus clinics, and (2) Aruajo's testimony that her function is to provide administrative oversight of the Clinics as a whole. We disagree for several reasons. The organizational charts in the record show the Clinics as being integrated into the County's management structure through multiple lines of authority, including both dotted lines showing

Our assessment of the factual record also takes into account the practical and economic realities of the entities' relationship. In *CAVA*, for instance, we found that the realities demonstrated common management at the top level, even though each school was ostensibly managed by an independent governing board. (*CAVA*, *supra*, PERB Decision No. 2484, pp. 72-79.)[29] In the present case, several practical realities reinforce the significant common management shown in the County managers' sworn statements to regulators. As discussed *ante*, the County's management role is necessary to allow the Clinics to operate in a complex federal and state regulatory scheme, particularly given that the Clinic corporations are light on management structure. Indeed, a Clinic director may not be able to attend to regulatory requirements, for instance, while also serving as a physician and medical director and therefore attending to individual patients and supervising the Clinic's patient care team.

Thus, while a Clinic's medical director serves as physician-owner of the Clinic corporation, and typically serves simultaneously in the other highest corporate capacities, including president, chief financial officer, secretary, and sole member of the board, in reality

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indirect control and solid lines demonstrating more direct control. Moreover, while the record demonstrates that County's role in Clinic affairs goes beyond mere "oversight," such oversight is relevant evidence of common management.

[29] Each *CAVA* school was a separate corporation with its own bylaws and five-member governing board. Bylaws for the individual boards ostensibly gave them significant authority, including but not limited to the power to hire and fire employees, agents and officers, oversee the school's management, operation, activities and affairs, set school policies, exercise responsibility for financial development, authorize the annual budget, set the school calendar, change facilities, become indebted, enter into contracts, and approve salaries and compensation. (*CAVA*, *supra*, PERB Decision No. 2484, pp. 17-18.) We declined to place form over substance, however, and assigned little weight to this ostensible authority, especially given that the boards met only four times a year for less than an hour and did not make their own policies or exercise their authority independently. (*Id*. at pp. 75-77.) The Clinic corporations in this case feature similarly light governance, highlighted by Clinic corporation board meetings consisting solely of a single Clinic medical director serving as the only corporate board member.

he or she defers to County management to handle many difficult and important matters. For instance, several Clinic directors, under questioning by SEIU counsel, did not know if their Clinics possessed licenses to operate independently of the County's operations; the directors generally rely on the County to handle such essential management functions. Another Clinic director explained that it is the County's Fiscal Department that puts together and sends her, on a monthly basis, the accounting documents relevant to her Clinic corporation. In sum, we find that the Clinic corporations are able to function with a minimal management structure because County personnel fill certain critical management roles.

D. Common Ownership or Financial Control

The County owns all Clinic premises, as well as all Clinic equipment and all Clinic revenues. All such revenues, and many Clinic expenses, are integrated into the County's budget. The County covers all Clinic losses. The Clinics' operating expenses exceed their revenues every year, and the County absorbs this shortfall.

Each year, the County works with each Clinic to prepare an operating budget, which the County must approve. Then, throughout the year, the County and Clinics collaborate on Clinic-level accounting. As noted above, the County's Fiscal Department prepares and sends monthly accounting documents relevant to a Clinic corporation. The County and Clinic corporations transfer funds back and forth fungibly based on Clinic need, with the County providing extra funds when needed and recouping funds when a Clinic has excess cash. To this end, the PSOAs provide in relevant part as follows:

> [The County] will also provide additional operating capital as necessary to meet [Clinic] operating expenses . . . In order to meet such operational needs, operating funds will occasionally be received by the [Clinic corporation] in advance of the actual need. All such operating funds shall be accounted for via the "Operating Capital / Advances" line of the clinic financial

> statements and the figures reconciled by [County] fiscal staff on a monthly basis . . . If [the Clinic corporation]'s average cash balance exceeds the average [Clinic] monthly operating cash requirements, [the County] may recoup such excess cash. Recoupment may be accomplished either by [the County] withholding cash transfers to [the Clinic corporation] or by [the Clinic corporation] paying amounts to [the County] as requested by [the County] [¶] At the end of each fiscal year, [the County] shall reconcile total operating capital paid and revenues and expenses. Appropriate adjustments in the level of operating capital will be made. Such reconciliations are not part of any compensation to [the Clinic corporation] under this Agreement.[30]

The evidence of common ownership and financial control in this case is even more persuasive than the strong evidence we found in *El Camino*, *supra*, PERB Decision No. 2033-M, p. 22, wherein the hospital's assets would revert to the district only in the event of corporate dissolution. And the evidence differs sharply from cases in which we have found no common ownership, in part, because the two entities maintain separate budgets. (E.g., *Plumas Unified School District and Plumas County Superintendent of Schools* (1999) PERB Decision No. 1332, p. 24; *Paso Robles Union School District, et al.* (1979) PERB Decision No. 85, p. 4; *Turlock School Districts* (1977) EERB[31] Order No. Ad-18, p. 12.)[32]

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[30] As detailed above, all Clinic revenues are, by definition, County revenues, and the County's return of such revenues to its Clinics does not turn the County into merely a billing service for the Clinics. Indeed, as noted, the County must supplement such revenues with additional moneys, and the County also must directly pay for, provide, or reimburse other cost items, because the revenue each Clinic earns from providing patient care is not sufficient to fund Clinic operations. While the dissent characterizes these forms of support as "cover[ing] the costs of treating uninsured and underinsured patients," the dissent fails to appreciate that providing care for such patients is the Clinics' primary mission. Thus, even under the dissent's characterization, there is an extremely porous financial border between the County and the Clinics.

[31] Before January 1, 1978, PERB was known as the Educational Employment Relations Board or EERB.

[32] As we noted in *CAVA*, *supra*, PERB Decision No. 2484, pp. 74-75, our decisions considering whether two school districts form a single employer also reflect our caution when faced with governing boards that are separately elected by different groups of voters. As in

In sum, all four of the single employer factors support our conclusion. Moreover, we note that the relationship between the County and the Clinic corporations does not resemble an arm's-length business agreement in which one entity contracts with another for services at a negotiated price, and then each side lives with that deal until the first point at which renegotiation or termination becomes possible.[33]

II. Joint Employer Analysis

In order to demonstrate that the County and the Clinic corporations constitute joint employers, SEIU must show that the County and the Clinic corporations share influence over, or co-determine, one or more terms or conditions of employment. (*Ventura I*, *supra*, PERB Decision No. 2067-M, p. 4.) In *Ventura I*, we found that the evidence satisfied this standard because the County retained "the right to control the manner and method in which the work is performed." (*Id.* at p. 6)[34] Significantly, we followed the "right to control" test, and we noted

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CAVA, we have no such concern here. To the contrary, all of the revenues, expenses, and services at issues are squarely within the jurisdiction of the County's unitary Board of Supervisors.

[33] The facts of this case differ sharply, for instance, from those in *Fresno Unified School District* (1979) PERB Decision No. 82, where we declined to find a single employer relationship between a school district and a privately held bus company (Abbey). The district contracted with Abbey to provide transportation services for a set price, Abbey could either profit from or lose money on the deal, and Abbey had discretion to control both labor relations and all its other affairs to help it maximize profits and avoid losses. (*Id*. at p. 2.) Moreover, no more than half of Abbey's total business operations involved providing services to the district. (*Ibid.*). The district's sole relevant influence over Abbey was in reserving the right to change the pickup routes and hours based on student needs. (*Id*. at p. 3.) There was no evidence of common ownership, common management, or centralized control of labor relations, and very little operational integration, since bus services were ancillary to the district's primary educational services. (*Id*. at p. 5.) Even so, we were careful not to speculate as to whether we would have reached a contrary result if the union had proven that the school district involved itself in training bus drivers or holding meetings with them. (*Id*. at p. 6, fn. 4.)

[34] Decisions explaining the joint employer doctrine often refer to a right to control terms and conditions of employment, and other times refer to a right to control the manner and

that it is irrelevant whether an employer having such a right of control chooses to use it by exerting actual control over employment terms or conditions. (*Ibid*.)

The most widely-cited basis for the right of control test is *Browning-Ferris I*, *supra*, 691 F.2d at pp. 1123-1124. The *Browning-Ferris I* standard has governed MMBA joint employer cases for over a quarter-century, since the California Court of Appeal endorsed it in *United Public Employees v. PERB* (1989) 213 Cal.App.3d 1119, 1128 (*United Public Employees*).

We have repeatedly endorsed this standard, most recently in *Ventura II*, *supra*, PERB Decision No. 2272-M, p. 18. In discussing the right of control test, we have explained that it derives from the common law standard for determining whether an employment relationship exists:

> Where the one for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, the relationship is one of employment; while, on the other hand, where control is reserved only as to the result[s] sought, the relationship is that of an independent contractor. The resolution of this question depends on the facts of each case, and no one factor is determinative.

(*Ventura County Community College District*, *supra*, PERB Decision No. 1547, p. 22, citing *News Syndicate Co.* (1967) 164 NLRB 422, 423-424; accord *Service Employees Internat. Union v. County of Los Angeles* (1990) 225 Cal.App.3d 761, 769 & 773 [finding that a right of control is the "essential characteristic" of any employment relationship, and that a joint

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method by which the work is performed. These alternate references need not cause confusion, as the manner and method of performing work is typically an employment condition. Thus, stated most accurately, the relevant inquiry is whether an entity possesses a right to control the manner and method by which the work is performed or one or more other terms or conditions of employment.

employer relationship exists if two entities have "the right to control and direct the [employee's] activities"].)

In interpreting the NLRA, the National Labor Relations Board (NLRB) has vacillated between relying on a right of control standard versus requiring that an employer exert actual control in order to support a joint employer finding. In 2015, in *Browning-Ferris Industries of California, Inc.* (2015) 362 NLRB No. 186 (*Browning-Ferris II*), the NLRB returned to a right of control standard and explained that meaningful bargaining can occur even when one or more joint employers have only a right of control that is "indirect," "reserved," "limited," and "routine." (*Id*. at pp. 10, 14 & 16-20.) Thereafter, in *Hy-Brand Industrial Contractors Limited* (2017) 365 NLRB No. 156 (*Hy-Brand*), the NLRB purported to overturn *Browning-Ferris II* and return to an actual control standard. In 2018, the NLRB vacated *Hy-Brand*, thereby at least temporarily returning to the right of control standard, while also initiating rulemaking and issuing a proposed rule that would overturn *Browning-Ferris II*.

While PERB's joint employer jurisprudence has not vacillated as starkly as the NLRB's inconstant approach, PERB has, at times, been less than consistent. For instance, in *San Jose/Evergreen Community College District* (2007) PERB Decision No. 1928 (*San Jose/Evergreen*), an ALJ found that the charging party had satisfied the joint employer standard, but a divided Board reversed. In an apparent departure from the Board's longstanding right of control test, the majority stated that "the key inquiry in joint employer cases is the level of actual control exerted." (*Id*. at p. 17) The *San Jose/Evergreen* dissent, in contrast, adhered to the traditional test by stating that a public entity with a right of control maintains its status as an employer "regardless of the level of actual control it decides to

exercise at any given time." (*Id*. at p. 27.) Although the Board later declined to read *San Jose/Evergreen* as establishing an actual control test (*Ventura I*, *supra*, PERB Decision No. 2067-M, p. 6), to foreclose any confusion, we hereby disapprove any suggestion that a joint employer finding depends on actual control. Like both parties in this matter, we endorse the right of control test as articulated in our caselaw and consistent with both California appellate precedent and the NLRB's full explanation of the right of control test in *Browning-Ferris II*.[35]

Applying that standard to the facts of this case, we begin by noting the import of the County's organizational charts and its sworn statements to the state and federal government. By affirmatively representing that Clinic management is integrated into the County's management structure, and by denying that the County has contracted for or otherwise delegated the management of Clinic operations, the Clinic admits its continuing right of control.[36]

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[35] As the County notes in its response to SEIU's exceptions: "While the NLRB's joint employment standard changed over time, PERB's did not. The 'expanded' standard announced by the NLRB [*in Browning-Ferris II*] is simply a return to [*Browning-Ferris I*], . . . which is the standard PERB has used, and continues to use. Thus, the NLRB's joint employment standard is now consistent with the PERB's joint employment standard."

[36] The County's most relevant admissions regarding its right of control are as follows: (1) Section Five of each Clinic's Medi-Cal Application asks: "Does the applicant/provider contract or delegate any management functions or responsibilities for providing [health care services?]" In each Clinic's application, the County responds by denying that it has subcontracted or delegated any management functions or responsibilities; (2) Section Five of each Clinic's Medicare Application requires the County to list any "managing organization," including any organization that "conducts the day-to-day operations of the provider." The instructions note that "in order to qualify as a managing organization," an entity "need not have an ownership interest in the provider" and "could be a management services organization under contract with the provider to furnish management services for the business." In each Clinic's application, the County responds by denying that there is any organization having such management control at any Clinic; (3) Section Six of each Clinic's Medicare Application asks the County to list all "managing employees." The application defines "Managing

Further evidence of the County's right of control, as set forth *ante*, comes from the County's integration of Clinic operations and management within the County's health services, and from the fact that Clinic corporation finances are largely subsumed within the County's finances. The County therefore accurately reported to HRSA that the Clinics are integrated into the County's management structure. Within that management structure, the County delegates many functions to Clinic medical directors. However, such delegation is common within large governmental bureaucracies and it is not dispositive, particularly given the full evidentiary record and the County's ability to assume greater or lesser control in different areas as it sees fit. (Cf. *Browning-Ferris II*, *supra*, 362 NLRB No. 186, p. 14 & fn. 76 [right of control may be indirect or attenuated, including, under the common law "subservant doctrine," where entity possesses right of control over employees' conduct but exercises control only through a purported intermediary employer].)

Reviewing the evidence in the wake of the County's effort to reduce its right of control in order to no longer qualify as a joint employer,[37] we find that the resulting circumstances are insufficient to reverse our *Ventura I* decision. A public entity with a right of control maintains its status as an employer regardless of the extent to which it exercises actual control. In order to reverse our determination, the County would have needed to move to a true arm's-length

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Employee" as including "a general manager, business manager, administrator, director, or other individual who exercises operational or managerial control over, or who directly or indirectly conducts, the day-to-day operations of the provider, either under contract or through some other arrangement, regardless of whether the individual is a W-2 employee of the provider." In each Clinic's application, the County responds by listing only a County administrator but not the Clinic directors.

[37] The record does not exhaustively detail the County's exact course of conduct in altering its relationship with the Clinic corporations over time. Nor do we necessarily require such a detailed timeline, as our task is to analyze the resulting facts under applicable law.

subcontracting arrangement in which it contracts only for results and gives up its right of control. It did not do so.

A joint employer is required to bargain only with respect to those terms over which it possesses at least a partial right of control. (*Ventura II*, *supra*, PERB Decision No. 2272-M, pp. 20-21.) In *Ventura II* we cited this principle to support our remand to the ALJ, noting that "a well-developed evidentiary record will greatly aid the parties in determining the County's bargaining obligations." (*Id*. at p. 20.) Although the County in this case must bargain over all terms and conditions of employment as a result of our single employer finding, for the sake of clarity we organize the remainder of our joint employer analysis around the primary terms and conditions of employment over which the County has at least a partial right of control.

A. Compensation and Staffing Levels

In *Browning-Ferris II*, *supra*, 362 NLRB No. 186, the NLRB found that Browning-Ferris, Inc. (BFI) and its subcontractor, Leadpoint, shared a joint right to control compensation, even though BFI did not directly set or adjust compensation levels. (*Id.* at pp. 4 & 19.) To reach this conclusion, the NLRB relied, in part, on BFI's right to set a cap on compensation, as well as on the fact that BFI reimbursed Leadpoint for labor costs. (*Ibid.*)[38]

Here, too, the County possesses a shared right of control even if it does not set or adjust particular employees' compensation. To begin with, not only does the County reimburse the Clinic corporations for labor costs, but even more fundamentally, the County is the sole entity applying for grant funding to support the Clinics. The Clinic corporations, because they do not apply for such grants and do not set the rates for their services, have limited if any ability to

[38] The NLRB noted that "[c]ontractual arrangements under which the user employer reimbursed the supplier for workers' wages or imposed limits on wages" have tended to support a finding of joint employer status. (*Browning-Ferris II*, *supra*, 362 NLRB No. 186, p. 9.)

increase revenue flow to support wage or staffing increases. There are also further critical respects in which the County and the Clinic corporations exercise joint control over economic matters. For instance, the County works with each Clinic corporation to develop an annual budget, including projected compensation and staffing, and the County has final approval authority over these Clinic budgets.[39] While the Clinic corporations can exceed their projected budgets, those budgets serve as a goal throughout the year, thereby granting the County year-round influence.

In annual reports to the State, the County lists Clinic employees' wages as being County "DIRECT PAYROLL COSTS." This characterization makes sense in light of the porous boundaries in the financial relationship between the County and its Clinics, and also in light of the economic reality that the County's budget process gives it an important right of control over Clinic staffing and compensation. While a Clinic medical director has discretion to make compensation decisions such as setting starting salaries for newly hired employees, this discretion is largely akin to the authority that department managers have in many government departments, subject to an overall goal of staying within budget.

The record also reflects the County exerting downward pressure on compensation and staffing levels in certain titles, and upward pressure with respect to other titles, by disallowing reimbursement for Clinics staff salaries exceeding the regional average salary, as well as by offering a bonus to Clinic corporations if total medical provider compensation exceeds total support staff compensation. The dissent discounts the PSOAs containing these levers of influence because the County replaced them with new contractual bonus provisions in each

[39] One Clinic corporation medical director described the shared control between his corporation and the County, explaining that, prior to hiring employees, he and the Clinic's office manager would work to figure out what the employees' salaries and benefits would cost, and then they would put that figure into their budget request to the County.

PSOA, several months before SEIU filed its certification petition. However, the relevant inquiry remains the extent to which the County has a right of control, rather than which time periods and in what ways it chooses to exercise that control.[40]

B. Means, Methods, Policies, and Standards

The number and scope of County policies applicable to Clinic employees, as set forth *ante*, indicates that the County has gone beyond merely contracting for a particular result, and has instead retained and periodically exercised an extensive right of control over the Clinic corporations' means and methods. SEIU has therefore demonstrated that the County continues to maintain a right of control regarding "the manner and method in which the work is performed." (*Ventura I*, *supra*, PERB Decision 2067-M, p. 6.)

Most of the County policies in the record apply equally to all Clinic staff irrespective of whether they are medical providers (physicians, nurse practitioners, and physician assistants).[41] For instance, the PSOAs require all Clinic staff to follow VCMC's Code of Conduct. Araujo, in her testimony, confirmed this is the case. The Code of Conduct establishes multiple terms and conditions of employment that are within the scope of representation, including a policy on

[40] Moreover, the fact that the County amended all of the PSOAs on a uniform, across-the-board basis further evidences its right of control.

[41] Although no party argues that the County is a joint employer solely as to medical providers, several County policies apply only to medical providers. For instance, the County requires these medical providers to obtain and maintain medical staff privileges at the Hospital. The County has also influenced their workload by providing bonuses to the Clinic corporations if physicians average 4,200 patient visits per year and non-physician medical providers average 2,100 patient visits per year. Moreover, the County prohibits the Clinics from hiring any physician who has been convicted of a crime or had a suspended license. These examples, in which the County exercised control over terms and conditions relevant to medical providers, confirm the County's strong ability to influence Clinic affairs. (See, e.g., *Browning-Ferris II*, *supra*, 362 NLRB No. 186, pp. 3 & 18 [even without input into day-to-day hiring process, right to set minimum qualifications indicates a partial right of control].) While the County may exercise its right of control to a greater extent for medical providers, this is fully consistent with the County possessing a right of control regarding all Clinic staff.

progressive discipline. As part of this policy, the Code of Conduct creates an exception to progressive discipline for certain types of egregious conduct, and dictates that the Code provides the "sole process" for dealing with such egregious conduct and that the County's HCA shall be the entity responsible for interpreting and enforcing such provisions. Furthermore, the Code of Conduct prohibits use of profanity, acceptance of gifts, and reimbursements of costs that fall outside of the County's Reimbursement Policy. The Code of Conduct, moreover, is but one example among many of a County policy that controls employment terms and, based on the record and arguments before us, contains terms that are not needed to obtain or maintain accreditation.[42]

The County's influence over these policies also gives it a right to control standards by which employees are evaluated. Moreover, while the County does not normally involve itself directly in disciplining Clinic staff, County personnel raise performance issues with Clinic staff. As part of raising such issues, County personnel can recommend whether Clinic staff should receive a negative performance review or other personnel action. (Cf. *Browning-Ferris II*, *supra*, 362 NLRB No. 186, pp. 4 & 18 [BFI demonstrated that it possessed a right of control when it prompted a disciplinary decision on two occasions by reporting misconduct to Leadpoint and requesting dismissal].) Moreover, as noted *ante*, County Community Services Coordinator Alvarez testified that her approach is to "micromanage" Clinic employees to assure that their documentation is "perfect," that she provides Clinic employees with gift cards and movie tickets if they perform well, and that she recommended to a Clinic manager to use a

[42] For that reason, and given the other means by which the County maintains a right of control, we need not speculate regarding the extent to which a different legal conclusion may be drawn if a public agency possesses a right of control that is no broader than necessary to achieve accreditation or to comply with state or federal law.

positive, progressive discipline approach rather than terminating an underperforming Clinic employee.

While the Clinic corporations make most day-to-day scheduling decisions, the County also possesses a partial right of control in this area. As detailed *ante*, the PSOAs require each Clinic corporation to provide supplemental staffing to the Hospital, and to attempt to provide supplemental staffing to other Clinics that are understaffed. Such assignments can impact employee work hours. The dissent finds it significant that PSOA section 2.4(b) merely requires the Clinics to "cooperate" with one another to ensure minimum staffing and to make "efforts" to comply with reasonable requests. While that requirement alone shows that the County shares influence over scheduling, and it leads to interchange that is relevant to both our single employer and joint employer analysis, PSOA section 2.1(c) is even more prescriptive; it requires that each Clinic "shall provide" staffing at the Hospital "through a system of shared call with other Hospital departments and affiliated medical clinics."[43]

The dissent discounts what it terms "anecdotal" evidence of Clinic employees being required to work at the Hospital. In this respect, the dissent's objection is of a piece with its complaint that the record only includes a single instance in which a County employee testified that she recommended to Clinic management that they address performance issues in an employee's review rather than disciplining the employee. The dissent would apparently require, for each term or condition of employment subject to an employer's right of control, multiple examples in which the employer has exercised its right. This approach contravenes the right of control test. Given that the right of control test guides our inquiry, there is no need

[43] The Clinics' contractual duty to participate in shared call at the VCMC Hospital encompasses both physician services and "inpatient hospital services," which federal law defines as including non-physician services. (42 USC § 1395x(b).)

to provide multiple examples in which an employer exercises actual control on a given term or condition of employment, particularly where, as here, the County's right of control is also shown via contract, policies, and budget processes.

In sum, we find that the County has a right of control as to several important terms and conditions of employment, and that sound labor relations require that an exclusive representative have the opportunity to meet and confer with the County over such terms. Therefore, even if the single employer doctrine were inapplicable, the County and the Clinic corporations would nonetheless constitute joint employers.

As we did in *Ventura I*, *supra*, PERB Decision No. 2067-M, we find that by refusing to process SEIU's certification petition, the County violated the MMBA and PERB Regulations.

III. Jurisdictional Analysis

SEIU did not name the Clinic corporations as respondents in this matter, and no party has asked us to assert jurisdiction over the Clinic corporations. Thus, we do not do so, even though there may have been sufficient evidence for SEIU to assert that the Clinic corporations are "public agenc[ies]" within the meaning of MMBA section 3501, subdivision (c).[44] The outcome of this case does not turn on such a finding. Rather, our holding remains the same

[44] Under the MMBA, a "public agency" includes "every governmental subdivision, every district, every public and quasi-public corporation, every public agency and public service corporation and every town, city, county, city and county and municipal corporation, whether incorporated or not and whether chartered or not." (MMBA, § 3501, subd. (c).) We have noted that this definition is "broad" and "sweeping." (*Workforce Investment Board* (2014) PERB Order No. Ad-418-M, p. 22.) The definition includes not merely entities that are established as public agencies by law, but also any private sector entity "whose operations and characteristics bearing on its relationship" to a governmental entity indicate "attributes commonly associated with public bodies." (*Id*. at pp. 22-23.) We have identified three factors relevant to this inquiry: public purpose, public funding, and public control. (*Id*. at pp. 24-25.) While the parties have neither asked us to assert jurisdiction over the Clinic corporations nor briefed the issues involved, and we therefore reach no legal conclusion on such issues, we note that when County counsel asked Araujo if the Clinics are "public entities," she confirmed in no uncertain terms: "**Yes, they are.**" (Emphasis supplied.)

even if the Clinic corporations do not meet the criteria to be covered by the MMBA. Even without asserting jurisdiction over the Clinic corporations, and even assuming for the sake of argument that they would not constitute "public agencies" under the MMBA, PERB maintains jurisdiction over the County, as it is covered by the MMBA and has entered into both a single employer and joint employer relationship role with respect to Clinic employees.

This point reveals another disagreement between us and our dissenting colleague. While our primary differences relate to the issues the parties briefed—whether the single employer and/or joint employer tests are satisfied—the dissent would also have us hold, sua sponte, that PERB does not maintain jurisdiction over the County if it meets the single employer test but not the joint employer test. We proceed to explain why we do not share this view, and we clarify our precedent by holding that PERB maintains jurisdiction over an employer covered under a PERB-administered statute when it enters into a single employer or joint employer relationship with an entity over whom PERB does not assert jurisdiction.

In *United Public Employees*, *supra*, 213 Cal.App.3d 1119, the Court of Appeal found a joint employer relationship to exist between an employer subject to PERB jurisdiction and another employer not subject to PERB jurisdiction.[45] In the wake of that decision, PERB maintained jurisdiction only over the PERB-covered employer in that joint employer relationship. (See, e.g., *San Francisco Community College District* (1994) PERB Decision No. 1068, p. 2; *San Francisco Community College District* (1995) PERB Order No. JR-16, p. 2.) The NLRB, for its part, similarly maintains jurisdiction over a private sector entity that qualifies as an employer under the NLRA, irrespective of whether that entity is in a joint

[45] In 1989, PERB did not have jurisdiction over the City and County of San Francisco, an MMBA employer, because the Legislature did not vest PERB with jurisdiction over the MMBA until 2001.

employer relationship with a public agency over which the NLRB has no jurisdiction. (*Management Training Corp.* (1995) 317 NLRB 1355, 1358 & fn. 16.) In explaining this area of law, the NLRB has noted that its duty to apply the NLRA to an employer over which it has jurisdiction is unaffected by that employer's relationship with an entity outside of the NLRB's jurisdiction. (*Ibid.*)

We took an analogous approach in *Ventura I* and *Ventura II*. There, as in the instant case, no party asked us to assert jurisdiction over the Clinic corporations. We therefore assumed they fell outside of PERB jurisdiction. This in no way barred our *Ventura I* finding that the County met the definition of employer due to its partial right of control as to certain terms and conditions of employment. Thus, our decision turns on the fact that the County satisfies the single employer and joint employer tests with respect to Clinic employees, and we therefore have jurisdiction, as in *Ventura I*, even if the Clinic corporations fall outside of PERB jurisdiction.

While the above precedent is clear in demonstrating that PERB maintains jurisdiction over a PERB-covered entity engaged in a joint employer relationship with a non-PERB-covered entity, our precedent has not been as clear on PERB's jurisdiction when faced with a single employer relationship between such entities. In *El Camino, supra*, PERB Decision No. 2033-M, the Board overreached in its suggestion that a non-PERB covered entity places itself under PERB jurisdiction merely by entering into a single employer relationship with a PERB-covered entity. (*Id.* at p. 22.) The Board erred because it failed to recognize that a single employer relationship, like a joint employer relationship, is not a formal merger of separate entities, but rather is a legal construct for collective bargaining purposes. (*CAVA, supra*, PERB Decision No. 2484, p. 67 ["Under the single employer doctrine, the 'single

employer' is . . . an analytical construct that is imposed under judicially developed doctrines on legally distinct but nominally separate and functionally integrated entities *solely* for the purpose of representation and collective bargaining" (Emphasis in original)].) Recognizing that a single employer relationship is a legal construct rather than a formal change in the status of the relevant entities, in *Alliance* we overruled *El Camino* to the extent it suggested that PERB automatically obtains jurisdiction over a private sector entity merely because it enters into a single employer relationship with a PERB-covered entity. (*Alliance*, *supra*, PERB Decision No. 2545, p. 12.)

Just as PERB will not assert jurisdiction over a private sector entity merely because it enters into a joint employer or single employer relationship with a PERB-covered entity, we clarify our precedent by holding that PERB also does not *lose* jurisdiction over an entity such as the County that enters into a single employer or joint employer relationship with an entity over which we do not assert jurisdiction. This conclusion follows from the same principle noted above—a single employer or joint employer relationship is a legal construct for purposes of collective bargaining; it does not mean that two separate entities have legally merged into one. Moreover, despite its protestations to the contrary, the dissent's proposed rule would mean that a public entity that enters into a single employer relationship with a private entity avoids both PERB and NLRB jurisdiction.[46] The rule the dissent suggests is also unbalanced because PERB would only lose jurisdiction, and never gain jurisdiction, by virtue of a single employer relationship. Given that a single employer relationship does not constitute a formal change in the nature of the entity, the better rule is the neutral one we adopt: entering into a

[46] The NLRB will not assert jurisdiction over a political subdivision of a state such as the County, irrespective of its relationship with an allegedly private sector employer. (29 U.S.C. § 152(2); *Management Training Corp.*, *supra*, 317 NLRB at p. 1358 & fn. 16.)

single employer or joint employer relationship neither confers PERB with jurisdiction over a non-PERB-covered employer nor destroys PERB's jurisdiction over a public employer.

Alliance, supra, PERB Decision No. 2545 is instructive. There, we held that we would not assert jurisdiction over a private charter management organization (CMO), even if it had entered in a single employer relationship with individual schools that qualify as employers under the Educational Employment Relations Act (EERA).[47] (*Id*. at pp. 10-13.) While the ALJ's proposed decision in *Alliance* asserted jurisdiction over the CMO because it had entered into a single employer relationship with public school employers, we reversed that determination as required under *CAVA*. However, neither the parties nor the Board in any way suggested that the public school employers' relationship with the CMO, if it did meet the single employer test, might cause PERB to lose jurisdiction over the public school employers. (*Id.* at p. 15.)

Lastly, we note that the legal construct in the instant case bears a "Doing Business As" name—Ventura County Medical Center. In *CAVA*, *supra*, PERB Decision No. 2484, the parties similarly identified the single employer construct by its trade name, "CAVA." (*Id*. at pp. 66 & 79.) The respondent charter schools argued that we erred in using the trade name CAVA to identify the single employer, as there was no entity whose legal name was CAVA. (*Id*. at p. 67.) We rejected this argument, holding that:

> [w]hether CAVA is a trade name or a legally-recognized entity in itself is not of import to these proceedings. Under the single employer doctrine, the "single employer" is not necessarily a legally distinct entity. It is an analytical construct that is imposed under judicially developed doctrines on legally distinct but nominally separate and functionally integrated entities *solely* for the purpose of representation and collective bargaining.

[47] EERA is codified at Government Code section 3540 et seq.

(*Ibid*. Emphasis in original.) We noted that our use of this legal construct "enables CAVA Schools and [the union representing their teachers] to have one set of negotiations instead of 11 sets of separate negotiations." (*Id*. at p. 66.)

Similar considerations are at play here, where VCMC is a doing-business-as name used by both the County and the Clinics. The County, moreover, exerts overarching control over VCMC, including by insisting on integrating the Clinics into County operations in ways both visible and invisible to VCMC patients. In contrast with *CAVA*, *supra*, PERB Decision No. 2484, in the instant case the party overseeing the network of related entities is indisputably a public body, the County.[48]

For the above reasons, our single employer and joint employer findings constitute neither a basis to confer jurisdiction over a non-PERB-covered entity nor to destroy jurisdiction over a PERB-covered entity. Since the County is a public agency within the meaning of the MMBA, and it satisfies the single employer and joint employer tests with respect to Clinic employees, PERB maintains jurisdiction over the County.

REMEDY

PERB has broad remedial authority to prescribe those remedies needed to enforce obligations, and preserve rights, under the MMBA. (MMBA, §§ 3509, subd. (a), 3541.3, subd. (i); *International Federation of Professional & Technical Engineers v. Bunch* (1995)

[48] The dissent questions the practicality of maintaining jurisdiction over the County without also asserting jurisdiction over the Clinic corporations. However, as in *Ventura I*, *Ventura II*, *Alliance*, and other cases, the record here suggests that it is feasible to assert jurisdiction only over the County. Indeed, in the period immediately following *Ventura I*, the County processed UAPD's certification petition and commenced negotiations. Thereafter, when the County refused to continue negotiations and asked PERB to revisit its *Ventura I* decision, the County did not claim that its new legal argument was based on any impracticality in following PERB's order.

40 Cal.App.4th 670, 679.) To do so in this case, the County must process SEIU's certification petition and any future petition that SEIU may file with respect to Clinic employees.[49] The County must also provide SEIU with reasonable lists of Clinic employees, together with associated information including, but not limited to, their placement into reasonable bargaining units.[50]

For this remedy to be meaningful, we must order the County to cease and desist from enforcing section 2010 of its Personnel Rules as to any certification petition regarding Clinic employees filed by SEIU. Section 2010 specifies that "[p]etitions for certification, modification or decertification may be filed only during the time period of September 15 to November 1." While an MMBA employer may by rule establish a limited timeframe each year for filing a decertification petition (*City of Madera* (2016) PERB Decision No. 2506-M, p. 9),

[49] SEIU may choose to go forward with a card check based on its 2010 certification petition. If SEIU chooses to do so, the County must, in accordance with its local rules, establish one or more reasonable units of Clinic employees, appoint a neutral to conduct the card check, and give him or her a list of unit employees as of the date of SEIU's 2010 certification petition. (See *Children of Promise Preparatory Academy* (2013) PERB Order No. Ad-402, adopting administrative determination at p. 16 [proof of support remains valid during contested unit determination].) SEIU must then submit proof of support to the neutral, and the neutral must compare that proof of support to the County-provided lists. Alternatively or in addition to pursuing the 2010 certification petition, SEIU may choose to obtain new authorization cards and file one or more new certification petitions, which the County must process based on updated lists reflecting the Clinics' employee census as of the date(s) of such new petition(s).

[50] An order to provide such lists is appropriate given that the County has substantially frustrated employee rights by refusing to comply with the Board's 2009 order and relitigating the extent to which it is an employer of Clinic employees. (See, e.g., *Excel Case Ready* (2001) 334 NLRB 4, 5 [ordering employer to provide list of employees where necessary to remedy employer violations]; *Blockbuster Pavilion* (2000) 331 NLRB 1274, 1275 (*Blockbuster*) [ordering employer to provide employee list helps to rebalance labor relations, particularly in the absence of a bargaining order].) Here, we do not issue the more severe remedy—a bargaining order—because we have no basis to conclude that SEIU attained majority status. As in *Blockbuster*, in the absence of a bargaining order it is appropriate for the County to provide a list of Clinic employees. While we cannot undo past delays, this remedy will help to minimize future delays while balancing all competing interests.

the same cannot be said for an employer's attempt to limit certification petitions for unrepresented employees. Moreover, given the present circumstances in which employees' efforts to form a union have been long delayed, it would particularly interfere with protected rights were the County to enforce section 2010 to limit SEIU's rights to attempt to represent Clinic employees.

ORDER

Based on the foregoing findings of fact and conclusions of law and the entire record in this matter, it is found that the County of Ventura (County) unlawfully refused to process Service Employees International Union Local 721's (SEIU) certification petition regarding employees of the VCMC satellite primary care clinics (Clinics). By this conduct, the County violated MMBA sections 3502, 3506, 3507, subdivision (c), and 3507.1, subdivision (c), and PERB Regulation 32603, subdivisions (a), (b), and (g).

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

A. CEASE AND DESIST FROM:

1. Refusing to process: (a) SEIU's certification petition dated October 15, 2010; and (b) certification petitions that SEIU may hereafter file with respect to Clinic employees.

2. Enforcing Section 2010 of its Personnel Rules as to any certification petition by SEIU regarding Clinic employees.

3. Interfering with Clinic employees' rights to be represented by the employee organization of their choosing and to participate in the activities of an employee organization of their own choosing.

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

1. Within twenty (20) workdays following the date this Decision is no longer subject to appeal, provide SEIU with a list of non-physician Clinic employees as of October 15, 2010, together with the employees' addresses, job titles, departments, assigned facilities, and hire dates, and showing such positions and employees to be within one or more reasonable units of non-physician employees at the Clinics.

2. Within twenty (20) days of a request made by SEIU no later than one year after the date this Decision is no longer subject to appeal, provide SEIU with a list of all Clinic employees as of the date of the request, together with the employees' addresses, job titles, departments, assigned facilities, and hire dates, and showing such positions and employees to be within reasonable units of employees at the Clinics.

3. Process SEIU's certification petition dated October 15, 2010, if SEIU so requests. Within twenty (20) days of any such request, the County shall appoint a neutral to conduct the card check and give him or her a list of non-physician Clinic employees as of October 15, 2010, together with the employees' job titles, departments, assigned facilities, and hire dates, and showing such positions and employees to be within one or more reasonable units of non-physician employees at the Clinics. SEIU must then submit proof of support to the neutral, and the neutral must compare that proof of support to the County-provided lists.

4. Process certification petitions that SEIU may hereafter file with respect to Clinic employees.

5. Within ten (10) workdays following the date this Decision is no longer subject to appeal, post at all work locations where notices to employees are customarily posted, copies of the Notice attached hereto. The Notice must be signed by an authorized agent of the County,

indicating the County will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the County to communicate with VCMC employees. (*City of Sacramento* (2013) PERB Decision No. 2351-M.) Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

6. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board or the General Counsel's designee. The County shall provide reports, in writing as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on SEIU.

Member Winslow joined in this Decision.

Member Shiners' dissent begins on p. 48

SHINERS, Member, dissenting: I respectfully dissent from the majority's conclusion that Respondent County of Ventura (County) is an employer of the non-physician staff at the seventeen privately-owned and-operated satellite medical Clinics contractually affiliated with the Ventura County Medical Center (VCMC). As explained below, I conclude on the record before us—as did the administrative law judge (ALJ)—that the County and the Clinics are not a single employer, and that the County is not a joint employer of the Clinics' non-physician staff. Accordingly, I would dismiss the complaint and underlying unfair practice charge for lack of jurisdiction.

1. PERB Cannot Assert Jurisdiction over a Single Employer that Includes a Private Entity

Before addressing the merits of the arguments made by the parties, I briefly respond to the majority's sua sponte discussion of PERB's jurisdiction in single employer and joint employer cases. I agree with my colleagues that when a public employer and a private entity are joint employers of the same employees, PERB has jurisdiction over the public employer. I disagree, however, that PERB may assert jurisdiction over a single employer composed of a public employer and a private entity.

We recently described as "good law" the following principle:

> PERB cannot assert its jurisdiction over a matter involving the question whether two entities constitute a single employer where one of the entities is a private entity because private entities do not fall within EERA's definition of public school employer.

(*California Virtual Academies* (2016) PERB Decision No. 2484, p. 66 (*CAVA*).) The majority claims this principle only precludes PERB from asserting jurisdiction over the private entity found to constitute a component of a single employer relationship, and therefore, in this case, PERB may assert jurisdiction over the County, but not the Clinics, under a single employer theory.

The majority supports this position by noting that "a single employer relationship is a legal construct rather than a formal change in the status of the relevant entities." (Maj. Opn. p. 42.) Although true, this statement ignores the practical realities of finding a single employer relationship. Single employer status "exists where two [or more] nominally separate entities are actually part of a single integrated enterprise so that there is, in reality, only a single employer." (*CAVA, supra*, PERB Decision No. 2484, p. 64; *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.* (3d Cir. 1982) 691 F.2d 1117, 1122.) In other words, the entities, having collectively pooled their authority, have become so entwined that they can no longer be viewed as separate entities but instead function as the single employer of the entire workforce. (*CAVA, supra*, PERB Decision No. 2484, p. 58.) The entities thus become one "for the purpose of representation and collective bargaining." (*Id.* at p. 67.) Under this authority, it is impossible to assert jurisdiction over only the public entity portion of a single employer because, by definition, the public employer is inseparable from the private entity for all purposes relevant to PERB's jurisdiction.

I acknowledge the majority's concern about PERB losing jurisdiction over a public employer that constitutes a single employer with a private entity. (Maj. Opn. p. 42.) But "PERB has only such jurisdiction and powers as have been conferred on it by statute." (*Central Contra Costa Transit Authority* (2012) PERB Decision No. 2263-M, p. 6; *North Orange County Regional Occupational Program* (1990) PERB Decision No. 857, p. 6.) The statutes we administer do not give PERB jurisdiction over private entities. (*El Camino Hospital District* (2009) PERB Decision No. 2033-M, p. 11 (*El Camino*).) Thus, as we held in *CAVA*, PERB cannot assert jurisdiction over a single employer when one of the component

entities is not a covered employer under one of our statutes. (*CAVA*, *supra*, PERB Decision No. 2484, p. 66.)[51]

Nor is the majority's concern about public/private single employers falling outside the bounds of any labor board's jurisdiction grounds for expanding our jurisdiction beyond that set forth in PERB's governing statutes. My colleagues appear to believe that a public/private single employer will always constitute a political subdivision of the state and therefore fall outside the jurisdiction of the National Labor Relations Board (NLRB). (Maj. Opn. p. 42.) If that is the case, then, notwithstanding its private entity component, such a single employer would meet the definition of an employer under our statutes.[52] If it does not meet that definition, then it would fall under the NLRB's jurisdiction as a private entity. Thus, the majority's expansion of PERB's jurisdiction is not necessary to fill a potential jurisdictional gap.[53]

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[51] I find unpersuasive the majority's reliance on *Alliance College-Ready Public Schools* (2017) PERB Decision No. 2545, to "clarify" *CAVA*'s holding. There, the private entity was a named respondent. The Board concluded, relying on *CAVA*, that it could not assert jurisdiction over the private entity under a single employer theory. (*Id.* at pp. 12-13.) This was a straightforward application of *CAVA*'s holding to a private entity, not a clarification of how that holding would apply to the public employer component of a public/private single employer.

[52] The majority suggests that the Clinics meet the definition of "public agency" under section 3501, subdivision (c), of the Meyers-Milias-Brown Act (MMBA) because there is sufficient evidence in the record to satisfy the test set forth in *Workforce Investment Board* (2014) PERB Order No. Ad-418-M (*WIB*). (Maj. Opn. p. 39.) In the absence of any analysis supporting this suggestion, I decline to address its substance. Nor do I express any opinion on whether *WIB* set forth the proper test for determining "public agency" status under the MMBA. I do note, however, that in two prior decisions involving these same Clinics, the Board has treated them as private entities. (*County of Ventura* (2012) PERB Decision No. 2272-M, p. 15 (*Ventura II*); *County of Ventura* (2009) PERB Decision No. 2067-M, p. 4 (*Ventura I*).)

[53] To the extent such a jurisdictional gap does exist, it is the product of the legislative schemes governing private and public sector labor relations, and should be addressed through the legislative process, not through administrative adjudication.

Finally, I note that in most cases where the evidence establishes a single employer relationship, it also will establish a joint employer relationship. Indeed, in this case the majority's analysis of the evidence under both tests is substantially the same and leads to the same result. Thus, in cases where PERB lacks jurisdiction over a single employer composed of a public employer and a private entity, PERB still would have jurisdiction over the public employer under a joint employer theory. This—rather than the majority's unwarranted expansion of PERB's jurisdiction—is "the better rule."[54]

2. The County and the Clinics Are Not a Single Employer

Notwithstanding my conclusion that we lack jurisdiction to decide this issue, I will address the merits of the majority's finding that the County and the private entity Clinics constitute a single employer. Cases involving single employer status require a fact-intensive, case-by-case analysis. (*CAVA*, *supra*, PERB Decision No. 2484, p. 64.) To determine the existence of a single employer relationship, PERB considers four factors: "(1) functional integration of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership or financial control." While no single factor is controlling and all need not be present, common ownership is the least critical factor, and centralized control of labor relations is particularly important. (*Ibid.*; *El Camino*, *supra*, PERB Decision No. 2033-M, p. 19; *Regents of the University of California* (1999) PERB Order No. Ad-293-H, adopting proposed decision, p. 15; *Covanta Energy Corporation* (2011)
356 NLRB 706, 726.)

[54] Indeed, in its two prior decisions involving these same Clinics, the Board has proceeded on a joint employer theory. (*Ventura II*, *supra*, PERB Decision No. 2272-M, p. 15; *Ventura I*, *supra*, PERB Decision No. 2067-M, p. 4.)

A. Functional Integration of Operations

I agree with the majority that there is functional integration between VCMC and the Clinics insofar as VCMC relies on the Clinics to provide the majority of its outpatient primary care services, the Clinics hold themselves out as being affiliated with VCMC, and the Clinics share patients, records, and information technology systems with VCMC. Other evidence cited by the majority, however, does not support finding functional integration.

For example, the majority finds that the County maintains an integrated personnel system that requires the VCMC Hospital, County-operated campus clinics, and privately-operated satellite Clinics to exchange personnel between each other. (Maj. Opn. pp. 14, 20.) In *CAVA*, the Board found "the interchange of employees between employers as indicative of an interrelationship of operations." (*CAVA*, *supra*, PERB Decision No. 2484, pp. 71-72.) But no such interchange is shown by the record here.

The Professional Services and Operations Agreement (PSOA) between each of the Clinics and the County only addresses supplemental staffing between Clinics.[55] PSOA section 2.4(b) states: "CONTRACTOR shall cooperate with other HOSPITAL affiliated clinics to ensure minimum physician and support staffing at those outpatient facilities." To implement this cooperation, section 2.4(b) allows Clinics to submit "reasonabl[e] request[s]" for supplemental staffing and instructs that the other Clinics "shall make [every] effort" to provide such staffing. This provision does not appear to mandate that a Clinic provide supplemental staffing to another Clinic, nor is there any extrinsic evidence to that effect in the record. The record also does not show that any decision to exchange employees between Clinics is made by County administrators for the sake of VCMC as a whole.

[55] The PSOAs do not, as the majority claims (Maj. Opn. p. 38), require the Clinics to provide supplemental staffing to the Hospital.

As to staffing exchanges between the Hospital and the Clinics, the majority relies solely on anecdotal evidence that two Clinic employees have worked at the Hospital. (Maj. Opn., pp. 14-15.) This evidence consists entirely of hearsay testimony in a declaration stating that two orthopedic casting technicians, Angel De La Trinidad and Patty Ortiz, worked at the Hospital when needed. Because this testimony is hearsay, I give it little weight, especially the double hearsay testimony about Ortiz.[56] But even if true, this meager evidence does not show the County has a right to require Clinic employees to work at the Hospital. De La Trinidad's hearsay testimony explains that his "direct supervisor," Orthopedic Supervisor Ryan Lafayette, would request that he work at the Hospital. This is similar to evidence regarding Clinic employee Yvonne Robledo that Service Employees International Union, Local 721 (SEIU)—but not the majority—cites as proof of required personnel exchanges between the Clinics and the County. Robledo testified that she would voluntarily assist at County health fairs on weekends, in which case either the County representative or she would ask her Clinic supervisor if she could be spared during that time. Nothing in the record indicates that the County did not similarly request for De La Trinidad or Ortiz to work at the Hospital. Thus, there is no conclusive evidence in the record that either the County or the Hospital itself required De La Trinidad or Ortiz to work at the Hospital.

But even if Lafayette had directed De La Trinidad or Ortiz to work at the Hospital, this would be insufficient to show a general right by the County to compel Clinic employees to work at the Hospital. If such a right in fact existed, one would expect it to be exercised with

[56] Because the record contains no corroborating non-hearsay evidence on this issue, De La Trinidad's hearsay testimony ordinarily could not support a factual finding. (PERB Reg. 32176; PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.) However, here the County had the opportunity to cross-examine De La Trinidad but declined to do so. Under these circumstances, I do not believe the majority erred in making factual findings based solely on this hearsay evidence.

respect to more than two employees. Yet the only evidence presented on this point was De La Trinidad's declaration. Unlike my colleagues, I am unwilling to extrapolate from what appears to be an isolated incident a broad right to commandeer Clinic personnel for Hospital work.

The majority also finds that Clinic staff is required to attend VCMC orientations and participate in other County training programs, where they receive a handbook referencing VCMC procedures, protocols, and administrative policies. (Maj. Opn. p. 20.) This finding relies on the testimony of County Ambulatory Care Administrator Joan Araujo and several Clinic directors, each of whom consistently testified that the Clinics have the option to use the County or another training facility, including private, third-party companies. Clinic directors testified they have elected to utilize County services because they either feel it is the most cost-effective option available or prefer the level of training provided during the County's new employee orientation. The evidence thus does not support the majority's finding that Clinic staff must participate in County orientation and training programs.

B. Centralized Control of Labor Relations

In *CAVA*, the Board found centralized control of labor relations based on the uniformity of terms and conditions of employment across the eleven individual schools that were found to constitute a single employer. Here, SEIU failed to present evidence of actual terms and conditions of employment at the Clinics, much less that terms are uniform across the Clinics. Moreover, each Clinic director is free to establish terms and conditions of employment for his or her Clinic's staff. The record thus does not establish the centralized control of terms and conditions of employment that existed in *CAVA*.

In the absence of such evidence, the majority instead finds a "devolved" management structure where the Clinics make day-to-day decisions over terms and conditions of

employment with the County simultaneously exerting decisive control over those decisions. In support of this finding, the majority cites *El Camino, supra*, PERB Decision No. 2033-M, for the proposition that "centralized control of labor relations does not necessarily depend on centralized authority over day-to-day matters." (Maj. Opn. p. 22.) In *El Camino* we found that, by virtue of its authority to approve collective bargaining agreements covering the purportedly separate hospital, the district's governing board had the "authority to *dictate* wages, hours or other terms and conditions of employment" for the hospital's employees. (*El Camino, supra*, PERB Decision No. 2033-M, p. 21, emphasis added.) Contrary to the majority, I find the County does not have similar authority to dictate non-physician Clinic staff's terms and conditions of employment.

The majority's finding of centralized control is based on just two terms of employment: compensation and staffing. (Maj. Opn. p. 21.) The majority acknowledges—as it must based on uncontroverted evidence—that employees' compensation and benefits are set and adjusted by Clinic management without consultation or approval by the County. (Compare *Spurlino Materials, LLC* (2011) 357 NLRB 1510, 1518 [finding common control over labor relations where owner, president, and general manager of two companies determined initial wages for both companies' employees and was involved in deciding the amount of wage increases granted to employees of both companies].) The majority nonetheless finds control based on the County's involvement in the Clinics' billing and budgeting processes.

Clinic revenues come from two sources: the Clinics' billable services and a supplemental payment from the County to cover the costs of treating uninsured and underinsured patients. According to the PSOAs, the County owns the revenues that the Clinic generates. The County's witnesses testified without contradiction that the PSOAs were drafted

in this way to allow the County to bill and collect fees on the Clinics' behalf. Once it collects the fees, the County immediately returns all revenues to the Clinics' operating budgets. This shows that the County does not take proprietary rights to the Medicare, Medi-Cal, and private insurance fees it collects, but rather acts merely as a pass-through billing service for the Clinics.

As for the budgeting process, the Clinics annually project their revenues and costs, including employee compensation, with the County helping to estimate the costs of certain supplies and materials. But the Clinics themselves ultimately determine their projected budget, which is then sent to the County Health Care Agency (HCA) for approval. As the ALJ properly found based on the record:

> [T]he County's review and approval of the Clinics' budgets is designed to check the Clinics' budgetary assumptions regarding expenses, such as the cost of pharmaceuticals, and to give the County a better idea of how much it will likely need to supplement each Clinic. The County does not impose any limits on Clinic expenses, and the record does not reflect that the County has ever required a Clinic to adjust its budget in a manner that inhibited a Clinic medical director's freedom to dictate his or her staff's salary and benefits.

There simply is no evidence that the County has used—or can use—its role in the budgeting process as means of controlling Clinic employee compensation.[57] Thus, I find no evidentiary support for the majority's view that the Clinics cannot significantly alter course on labor relations without County approval.

[57] As further examples of how the County may influence compensation, the majority points to PSOA provisions making salaries that exceed the regional average an unallowable expense and granting Clinics a bonus if total support staff compensation is equal to or lower than total compensation paid to the Clinics' medical providers. (Maj. Opn. p. 35.) But these terms were removed from the PSOAs before SEIU filed the petition in the instant matter. They accordingly are irrelevant. (See *Ventura II*, *supra*, PERB Decision No. 2272-M, p. 14 [joint employer status is determined as of the date the petition was filed].)

As for staffing, I have discussed above why the evidence does not show a shared personnel system between the County and the Clinics. Nor is there evidence that the County has any input on staffing levels at the Clinics, much less the authority to dictate how Clinic directors must staff their Clinics.

Finally, I give this factor more weight than the other three because it goes to the crux of the issue to be decided, viz., whether the entities that purportedly constitute a single employer share control over terms and conditions of employment such that it is possible to impose a collective bargaining obligation on the entities as a whole. Because SEIU failed to present sufficient evidence to establish this crucial factor, I find the County does not exercise centralized control over the Clinics' labor relations.

C. Common Management

Common management may exist if, despite a regionally dispersed management structure, control over employment conditions is centrally organized under a shared hierarchy. (*CAVA*, *supra*, PERB Decision No. 2484, pp. 72-73.) Here, the record establishes that there are no County employees serving in management or supervisory positions at the Clinics, and Clinic directors make decisions about the operations of the Clinics independently from staff at VCMC. Although the majority concedes that Clinic directors possess substantial authority to establish individual compensation levels, schedules, and duties, to set local policies, and to evaluate, promote, and discipline individual employees, it nonetheless finds that "County managers are the legal Clinic managers." (Maj. Opn. p. 23.) But the record does not show a central management hierarchy over the Clinics at the County level.

The majority's finding of common management relies primarily on forms the County filed with federal and state agencies to receive Medicare and Medi-Cal reimbursement on

behalf of the Clinics, and organizational charts attached to those filings. As the majority acknowledges (Maj. Opn. p. 18.), we do not defer to statements made in documents when determining whether an employee or employer falls under PERB's jurisdiction. Rather, PERB's jurisdiction over an individual or employer "is an issue for the Board to decide by examining the record in light of the statutory language." (*Ventura County Community College District* (2003) PERB Decision No. 1547, pp. 20-21; see also, *CAVA*, *supra*, PERB Decision No. 2484, p. 78 [". . . the way the operating documents are drafted does not take precedence over the parties' actual practices"]; *Goleta Union School District* (1984) PERB Decision No. 391, p. 16.) Based on my review of the entire record, I decline to give these documents the almost dispositive effect the majority gives them.

The County must submit Medicare Applications so that its HCA may bill and collect from Medicare for services rendered by the Clinics. HCA then passes the collected payments on to the Clinic that rendered the services. For that reason, on its Medicare Applications the County listed HCA Manager Paul Lorenz as the managing employee for billing services. In its Medi-Cal Applications, the County similarly reports itself as the sole applicant for billing and reimbursement purposes but later reports that it is "Doing Business As" or under the specific Clinic's name. According to County witnesses' unrebutted testimony, this was the best way to differentiate between the County's billing responsibilities and the Clinics' responsibility for patient care. The County's decision to list its Chief of Hospital Operations for Billing, not a Clinic director, as the individual with a management role in the applicant entity is consistent with the Clinics being private entities separate from the County.[58]

[58] The majority appears to misinterpret the form's question asking the applicant to name any entity with an ownership interest or managerial control of the applicant. (Maj. Opn. p. 7.) By checking the "not applicable" box, the County indicated that no entity had an ownership

As for the organizational charts, the majority appears to rely on the fact that one chart places the Clinic directors in a box directly under Ambulatory Care Medical Director Michelle Laba. But Ambulatory Care Administrator Araujo, Dr. Laba, and the Clinic directors testified without contradiction that Dr. Laba has no authority over the Clinics' day-to-day operations, and that her function is solely to provide administrative oversight of the Clinics as a whole. Additionally, the organizational chart places the Clinics in a dotted box, while the campus clinics run directly by the County are placed in a solid box. This indicates the private Clinics do not have the same status as the campus clinics run directly by the County.

The majority also emphasizes Araujo's testimony to support its conclusion that County management is ultimately responsible for management of the Clinics. First, they highlight her general statement that the County runs the Clinics. Her testimony, however, describes the County's management of a Healthcare for the Homeless Program on the Clinics' premises; she did not testify that the County was responsible for the administration of the Clinics themselves.[59] Second, although Araujo testified that the Clinics are public entities, read in context her testimony demonstrates that she only believed they were such because they contracted to provide Healthcare for the Homeless Program services through the County. Additionally, the HRSA applications cited by the majority do not say the County Board of Supervisors is the board of directors for each Clinic; the documents only say that the Las Islas

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interest in, or managerial control over, *the County*. The form did not ask the applicant to indicate any entities it has an ownership interest in, or managerial control of, that would be providing healthcare services to Medicare recipients. The County's answer on the form thus does not support finding County control of the Clinics.

[59] Likewise, the organizational charts attached to the County's change of scope submission to the United States Health Resources and Services Administration (HRSA)—which the majority give substantial weight—show the Healthcare for the Homeless Clinics as being underneath Ambulatory Care Director Araujo in the County HCA structure. They do not, however, show that the Clinics themselves are part of the HCA structure.

Clinic falls within the "representation area" of the Board of Supervisors. To me, this evidence does not demonstrate that County managers sit atop a hierarchy overarching an otherwise dispersed management structure for each Clinic. Instead, they manage self-contained programs within the County's sphere of control and allow the Clinics to operate as true independent contractors. (See *San Diego Community College District* (1988) PERB Decision No. 662, p. 33 [finding district's oversight function was not sufficient to make it a single employer with a non-profit foundation that taught foreign language classes on behalf of the district].)

Unlike the majority, I do not find that the Medicare and Medi-Cal reimbursement forms and accompanying organizational charts amount to an admission by the County that the Clinics are County facilities, not private entities. Rather, the evidence shows the County did its best to accurately describe the contractual relationship between the Clinics and the County on standardized forms which were not designed for that purpose. Accordingly, I find that the County's role as an intermediary between the Clinics and the Medicare and Medi-Cal programs does not constitute common management of the Clinics by the County.

D. Common Ownership or Financial Control

Turning to the least important of the four factors (*CAVA*, *supra*, PERB Decision No. 2484, p. 64), I disagree with the majority's conclusion that the County owns all Clinic revenues and equipment. This conclusion relies primarily on the PSOAs between the County and the Clinics. As noted previously, we do not defer to statements made in documents when determining our jurisdiction over an individual or employer; rather, we are guided by the parties' actual practices. (*Id.* at p. 78; *Ventura County Community College District*, *supra*,

PERB Decision No. 1547, pp. 20-21; *Goleta Union School District, supra*, PERB Decision No. 391, p. 16.)

Despite the PSOAs providing that the County owns the revenues that each Clinic generates, the parties' actual conduct shows the County does not actually own Clinic revenues and operating budgets. Percipient witnesses presented uncontroverted testimony that the PSOAs are so drafted to allow the County to bill and collect fees on the Clinics' behalf. Once it collects those fees, the County returns all revenues to the Clinics for their operations.

As discussed above, the Clinics individually prepare their own operating budgets. The County has limited involvement in this process: it assists the Clinics in estimating the costs of certain supplies and materials, and provides comparative employee compensation data. The record therefore demonstrates that, although the County has a role in the billing and budgeting processes for the Clinics, including advising them on planned courses of action, it lacks the right to unilaterally determine or control the Clinics' final decision on their annual budgets. Thus, the County does not own or maintain financial control of the Clinics.

Additionally, according to the PSOAs, the County provides the Clinics with some equipment and supplies. But the record does not support a finding that the County owns or pays for all of the equipment utilized by the Clinics. For example, while the County is contractually bound to provide some bandages, medications, linens, and medical supplies, the County's witnesses each testified, without contradiction, that the Clinics may purchase those materials from either the County or other sources, and that all such equipment and supplies are paid for out of their own operating budget. Under the PSOAs, the County may also purchase additional equipment for the Clinics when it determines the equipment is necessary but nothing precludes the Clinics from purchasing additional equipment on their own, although the

purchase is then the respective Clinic's responsibility. At the termination of their contract, each Clinic is contractually bound to restore all County-provided equipment and supplies to their initial inventory levels. The record thus shows that the Clinics own and are responsible for the use and care of these materials throughout the parties' contractual relationship, synonymous with their status as independent contractors.

In sum, while there is some integration of operations between VCMC and the Clinics, the evidence as a whole does not support the existence of the remaining factors. Most critically, SEIU has failed to prove centralized control of labor relations because the County has no authority to dictate non-physician Clinic employees' terms and conditions of employment. Accordingly, I would find that the County and the Clinics are not a single employer.

3. The County Is Not a Joint Employer of the Clinics' Non-Physician Staff

A joint employer situation exists "where two or more employers exert significant control over the same employees—where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment." (*United Public Employees v. PERB* (1989) 213 Cal.App.3d 1119, 1128.) The analysis of joint employer status focuses on the relationship between the purported employer and the particular employees at issue. (*Ventura I, supra*, PERB Decision No. 2067-M, p. 4.) The specific question to be answered is whether the purported employer "retains the 'right to control and direct the activities of the person rendering service, or the manner and method in which the

work is performed.'"[60] (*Id*. at pp. 4-5, quoting *Service Employees Internat. Union v. County of Los Angeles* (1990) 225 Cal.App.3d 761, 769.)[61]

Unlike the majority, I do not believe SEIU met its burden to prove the County has a right to control the terms and conditions of employment of the Clinics' non-physician staff. Proceeding from the false premise that the Clinics are integrated into the County's management structure, the majority finds the County has the right to control the compensation of non-physician Clinic staff as well as the means and methods by which they perform their work. I disagree on both points.

Much of the majority's conclusion that the Clinics and the County are joint employers is based on the same interpretation of the evidence that underlies the majority's finding of a single employer relationship. There is no need for me to recapitulate my disagreement with the majority on those points. I therefore turn to the other three bases the majority relies on to find the County has the right to control how the Clinics' non-physician employees perform their duties.

First, the majority points out that Clinic employees are subject to numerous VCMC policies, such as the VCMC Code of Conduct, which govern how they perform their duties. But a contractor's choice to be subject to the contracting entity's policies, by itself, does not give the contracting entity control over how the contractor's employees perform their duties. (*San Diego Community College District*, *supra*, PERB Decision No. 662, p. 33; *Fresno Unified*

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[60] I agree with my colleagues that the proper inquiry is whether the purported employer has a right to control terms and conditions of employment, not whether it actually has exercised that right. (Maj. Opn. pp. 29-31.)

[61] The Board has also framed this inquiry as whether the employees at issue fall under the statutory definition of "employee" because they are employed by a statutory employer. (E.g., *Port of West Sacramento* (2018) PERB Decision No. 2577-M, p. 10; *Ventura County Community College District*, *supra*, PERB Decision No. 1547, p. 21.)

School District (1979) PERB Decision No. 82, p. 5.) Moreover, the record shows that Clinic directors also have implemented their own employment-related policies independent of the County. Thus, the Clinics' contractual obligation to abide by certain County policies does not show the County has a right to control the means and methods by which the Clinics' non-physician staff perform their work.

Second, the majority finds the County has "a right to control standards by which employees are evaluated." (Maj. Opn. p. 37.) This finding overstates the record. County employees testified that they have brought Clinic employee performance issues to the attention of Clinic management. Additionally, *one* County employee testified that she recommended to a Clinic employee's supervisor that the performance issue be addressed in the employee's performance review. But it is undisputed that the final decision whether to discipline a Clinic employee or otherwise resolve a complaint of substandard performance lies with Clinic management, not the County. The record thus fails to prove that County employees have any right to control discipline or performance evaluations of non-physician Clinic staff.[62]

Third, the majority finds a right of control based on PSOA provisions that require Clinic medical providers to obtain staff privileges at the Hospital, prohibit the Clinics from hiring physicians with certain criminal convictions or license suspensions, and provide bonuses to Clinics if physicians average a certain number of patient visits per year. (Maj. Opn. p. 36, fn. 41.) Although these findings are supported by the record, they are irrelevant because they

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[62] *Browning-Ferris Industries* (2015) 362 NLRB No. 186, cited by the majority, is distinguishable. There, the contractor's employees worked at the contracting entity's facilities. (*Id*. at p. 3.) The contracting agreement allowed the contracting entity "to dictate who works at its facility." (*Id*. at pp. 5, 22.) Thus, when the contracting entity asked the contractor to immediately dismiss employees observed engaging in misconduct, the contractor had no choice but to dismiss them. (*Id*. at p. 22.) Here, there is no evidence that the County has such absolute authority, contractual or otherwise, over discipline or dismissal of non-physician Clinic staff.

apply to physicians, not to the non-physician staff SEIU has petitioned to represent. This evidence thus does not support finding that the County is a joint employer of the Clinics' *non-physician* employees. (See *Ventura I*, *supra*, PERB Decision No. 2067-M, p. 4 [joint employer status focuses on the relationship between the purported employer and the particular employees at issue].)

For these reasons, SEIU has failed to prove that the County has a right to control or direct the activities of non-physician Clinic employees, or the means and methods by which they perform their work. Consequently, I would find that the County is not a joint employer of those employees.

In conclusion, I would find—as the ALJ did—that the County and the Clinics are not a single employer, and that the County is not a joint employer of non-physician Clinic employees. Accordingly, I would affirm the ALJ's dismissal of this case for lack of jurisdiction.

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-655-M, *Service Employees International Union Local 721 v. County of Ventura*, in which the parties had the right to participate, the Public Employment Relations Board (PERB) has found that the County of Ventura (hereinafter "County" or "We") violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3502, 3506, 3507, subdivision (c), and 3507.1, subdivision (c), and PERB Regulation 32603 (Cal. Code of Regs., tit. 8, § 31001, et seq.), subdivisions (a), (b), and (g), by refusing to process a certification petition relating to employees of the Ventura County Medical Center satellite primary care clinics (Clinics).

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

A. CEASE AND DESIST FROM:

1. Refusing to process: (a) Service Employees International Union Local 721's (SEIU) certification petition dated October 15, 2010; and (b) certification petitions that SEIU hereafter files with respect to Clinic employees.

2. Enforcing Section 2010 of the County's Personnel Rules as to any certification petition by SEIU regarding Clinic employees.

3. Interfering with Clinic employees' rights to be represented by the employee organization of their choosing and to participate in the activities of an employee organization of their own choosing.

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

1. Within twenty (20) days provide SEIU with a list of non-physician Clinic employees as of October 15, 2010, together with the employees' addresses, job titles, departments, assigned facilities, and hire dates, and showing such positions and employees to be within one or more reasonable units of non-physician employees at the Clinics.

2. Within twenty (20) days of a request made by SEIU no later than one year after the date this Decision is no longer subject to appeal, provide SEIU with a list of all Clinic employees as of the date of the request, together with the employees' addresses, job titles, departments, assigned facilities, and hire dates, and showing such positions and employees to be within reasonable units of employees at the Clinics.

3. Process SEIU's certification petition dated October 15, 2010, if SEIU so requests. Within twenty (20) days of any such request, the County shall appoint a neutral to conduct the card check and give him or her a list of non-physician Clinic employees as of October 15, 2010, together with the employees' job titles, departments, assigned facilities, and hire dates, and showing such positions and employees to be within one or more reasonable units

of non-physician employees at the Clinics. SEIU must then submit proof of support to the neutral, and the neutral must compare that proof of support to the County-provided lists.

4. Process certification petitions that SEIU may hereafter file with respect to Clinic employees.

Dated: _____ COUNTY OF VENTURA

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.