STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNITED CHIEF OFFICERS ASSOCIATION, Charging Party, v. CONTRA COSTA COUNTY FIRE PROTECTION DISTRICT, Respondent.	Case No. SF-CE-693-M PERB Decision No. 2632-M March 7, 2019

Appearances: Law Offices of Robert J. Bezemek by Robert J. Bezemek, Attorney, for United Chief Officers Association; Office of the County Counsel by Christina J. Ro-Connolly, Deputy County Counsel, for Contra Costa County Fire Protection District.

Before Banks, Shiners and Krantz, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the United Chief Officers Association (Association) to the proposed decision of a PERB Administrative Law Judge (ALJ). The complaint alleged that the Contra Costa County Fire Protection District (District) interfered with organizational and employee rights and discriminated against employees represented by the Association because of protected activity in violation of the Meyers-Milias-Brown Act (MMBA)[1] and PERB Regulations[2] when the District granted unrepresented management employees a longevity differential while denying it to employees represented by the Association. The ALJ

[1] The MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, 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.

determined that the Association had not established a prima facie case of any violation, and dismissed the complaint and underlying unfair practice charge.

The Association has excepted to several of the ALJ's factual findings and legal conclusions. The District has filed no exceptions and urges PERB to affirm the proposed decision. We have reviewed the Association's exceptions and supporting brief, the District's responses thereto, and the entire record in this matter in light of applicable law. Based on our review, we reverse the proposed decision for the reasons set forth below.

PROCEDURAL HISTORY

The Association filed an unfair practice charge on September 21, 2009, alleging that the District had: (1) failed and refused to bargain in good faith, (2) interfered with organizational and employee rights, and (3) discriminated against Association-represented employees because of their protected activities, including forming, joining, and bargaining collectively through the Association. On January 10, 2011, the Association filed an amended charge, which included additional factual allegations and legal authorities and reiterated the unfair practice allegations of the original charge.

On March 11, 2011, PERB's Office of General Counsel issued a complaint alleging that the District had interfered with protected rights and discriminated against employees because of protected activity, by refusing to grant Association-represented employees a longevity benefit granted to unrepresented managerial employees, in violation of MMBA sections 3503, 3506, and 3509, subdivision (b), and PERB Regulation 32603, subdivisions (a) and (b). On the same date, the Office of the General Counsel dismissed the Association's bad faith bargaining allegation. The Association did not appeal the partial dismissal.

On March 29, 2011, the District answered the complaint by denying the material allegations and any violation of the MMBA or PERB regulations and asserting various affirmative defenses, including that its actions were "privileged, immune, justifiable, based solely on good faith, and/or otherwise lawful." On April 28, 2011, an informal settlement conference was conducted, but the dispute was not resolved.

A formal hearing was held on September 13 and 14, 2011. The ALJ issued his proposed decision on June 11, 2014, dismissing all allegations in the complaint.

The Association timely filed its exceptions and supporting brief and the District timely filed a response to the Association's exceptions, but filed no exceptions of its own.[3]

FACTUAL BACKGROUND

The Parties and their Bargaining History

The District is a special district of the County of Contra Costa (County) and a public agency within the meaning of Government Code section 3501, subdivision (c), and PERB Regulation 32016, subdivision (a). Although the District is a separate entity from the County, the County's Board of Supervisors serves as the District's governing body, and the County's Chief Administrative Officer oversees the District's budget. The District also utilizes other County administrative services, including payroll, human resources, and labor relations.

[3] The District's response argues that the Association's exceptions should be summarily rejected for failure to designate by page citation or exhibit number the portions of the record, if any, relied upon for each exception, as required by PERB Regulation 32300, subdivision (a)(3). This argument is misplaced. As explained in correspondence from counsel for the Association, the Association's exceptions and supporting brief cite to the electronic version of the transcript, which apparently had four fewer lines per page than the paper version. Because our regulations express no preference between the electronic and paper versions of the transcript, nor account for variations in the format or pagination between the two, we decline to read such a preference or requirement into the Regulation.

The Association is the exclusive representative of the District's Fire Management Unit, which consists of employees in the following classifications: (1) battalion chief; (2) chief, fire emergency medical services; and (3) fire training supervisor.[4] At the time of the hearing, battalion chief was the only active classification in the unit. At any given time, the District employs ten to thirteen battalion chiefs.

All management employees of the District were unrepresented until 1998. Late that year, employees in those classifications now comprising the Fire Management Unit formed the Association and selected it as their exclusive representative. All other management employees of the District remained unrepresented. Although the fire marshal and fire training chief classifications remained unrepresented, these positions had comparable pay and benefits as the battalion chiefs, and were regarded as lateral peers of the battalion chiefs.

The County has two units of represented management employees: a unit of deputy sheriff managers represented by the Deputy Sheriffs' Association (DSA) and a unit of management professional and technical employees represented by the American Federation of State, County and Municipal Employees Local 512 (AFSCME Local 512).

After negotiating for approximately three years, the Association and the District executed their first Memorandum of Understanding (MOU) on December 4, 2001, which was effective July 1, 2000 through June 30, 2002, and which was then extended through the end of 2006.

[4] Despite the term "management" in the name of the bargaining unit, there is no evidence that the District has ever designated any of these classifications as "management employees" within the meaning of sections 3507.5 and 3509, subdivision (f). We conclude that PERB jurisdiction is proper and use the term "management" in this decision to conform to the parties' convention and not as a statutory term of art.

The Longevity Benefit Granted to Unrepresented County Employees

On December 5, 2006, the Board of Supervisors passed Resolution No. 2006/743, which provided about 600 classifications of County employees with a longevity differential consisting of a 2.5 percent increase in pay for 15 years of service, effective January 1, 2007. The Resolution and its attachments described the eligible County employees as "Management, Exempt and Unrepresented Employees."[5]

County deputy sheriff managers had received a 5 percent differential under their MOU with the County, effective October 1, 2005. However, County employees in the management unit of professional and technical employees represented by AFSCME Local 512 were deemed ineligible for the longevity benefit, and no other represented employees of the County or the District have received this differential.

Successor Negotiations between the District and the Association

The District and the Association began negotiations for a successor agreement in March 2007. The District's bargaining team referred to itself as the "County/District negotiations committee." Its chief negotiator and spokesperson was Glenn Berkheimer (Berkheimer), a labor relations consultant employed by Industrial Employers Distributors Association. Berkheimer served as the County's chief negotiator in labor relations beginning in approximately 1995 and worked in the same capacity for the District beginning about 2005. Other members of the

[5] Although the Resolution also identifies managers and supervisors employed by the District as eligible for the longevity differential, apparently only the categories of County employees were eligible for this benefit as of January 2007. As discussed below, the District provided the longevity differential to its unrepresented management employees, through adoption of Resolution No. 2008/218, which took effect on May 6, 2008. It appears, however, that the Association formulated its initial bargaining demands for parity, including its demand for a 2.5 percent longevity benefit for 15 years of service (discussed below) based, in part, on the belief that this benefit had already been granted to the District's unrepresented employees by Resolution 2006/743.

District's team included Assistant Fire Chief Richard Grace (Grace), Chief of Administrative Services Jackie Lorrekovich (Lorrekovich), Labor Relations Analyst Glynis Hughes, and Al Aragon and Linda Ashcraft, who were labor relations officials employed by the County. The Association's representatives were Business Agent Bob Adams (Adams), Steve Maiero (Maiero), Henry Warren and Mark McCullah.

A primary objective of the Association was to restore parity in benefits between employees in its unit and unrepresented management employees of the District and the County. The Association's parity demands included the same longevity differential of 2.5 percent for 15 years of service previously granted to unrepresented management employees of the County. The Association also proposed increases in the administrative leave allowance, the uniform allowance, employer contributions to the deferred compensation plan, and reimbursements for career development/training. When the Association first proposed the 15-year longevity benefit in March 2007, all but one employee in the Fire Management Unit had the required 15 years of service. The benefit would also increase unit members' compensation for purposes of calculating pensions.

On May 4, 2007, Berkheimer advised the Association's bargaining team that he would need to get direction from the Board of Supervisors regarding the difference between represented and unrepresented management employees in the District.[6]

[6] The Association's bargaining notes for May 4, 2007 recorded Berkheimer's statement on the longevity differential as follows: "Need to get some direction rep vs. unrep mgrs." Lorrekovich's bargaining notes for that day similarly summarize Berkheimer as follows: "Need to gt [sic] direction from BOS [D]iff btwn rep & unrep mgmt—i.e. in what they got[.]" Berkheimer never denied making this statement. During cross examination, Berkheimer was directed to this passage in Lorrekovich's bargaining notes. After repeated objections from the District's attorney, counsel for the Association asked, without reference to Lorrekovich's notes, whether it was true that in negotiations with the Association Berkheimer had "said

The parties agree that when they met again on June 29, 2007, the District rejected the Association's proposed longevity differential "outright." However, they dispute whether the District offered any explanation of its position at this meeting. Berkheimer testified that the District rejected the proposal for financial reasons, to maintain promotional incentives, and because the District wanted to treat the Association the same as AFSCME Local 512, whose request for the longevity bonus had also been denied. The Association contends that the only explanation ever provided for rejecting the longevity differential proposal was the District's desire to maintain a "hierarchy" in benefits between represented and unrepresented management employees, and that this explanation was not provided until bargaining sessions in September and October 2007, which were not discussed in the proposed decision.

For several reasons, we regard Berkheimer's testimony regarding the June 29, 2007 session as suspect and instead credit the Association's account. First, Lorrekovich's contemporaneous bargaining notes for the June 29, 2007 meeting reference no statements by Berkheimer about the District's financial concerns, maintaining promotional incentives, or providing battalion chiefs with compensation parallel to that of AFSCME Local 512-represented employees with respect to the longevity differential proposal.[7] Lorrekovich

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words to the effect that [he] needed to get directions from the Board of Supervisors about differences between represented and unrepresented management." Berkheimer's answer was non-responsive. He said that he "did not ask the Board of Supervisors for direction regarding the differences between represented and unrepresented management." He never answered the question posed to him, which was *what he had said* during negotiations about seeking direction from the Board of Supervisors on the difference between represented and unrepresented managers.

[7] Under PERB Regulation 32176, hearsay evidence offered in an unfair practice case "is admissible but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." Although Lorrekovich was able to recall how she took notes, she could not recall any proposals or discussions and was therefore unable to

testified that she did not record verbatim what was said during negotiations but that her notes "captured as much as [she] could that seemed relevant." Under the circumstances, the absence of any indication in Lorrekovich's notes for June 29, 2007 that Berkheimer offered an explanation for rejecting the proposed longevity differential tends to support the Association's account that no such explanation was provided on this date.

Second, no other witnesses corroborated Berkheimer's testimony on this point. Lorrekovich had no independent recollection of any proposals or discussions and, even after having reviewed her own notes, repeatedly testified that she could not recall any specific details because of the passage of time. Grace testified that he was present when the District rejected the Association's longevity differential proposal, but, like Lorrekovich, Grace could recall no "specific discussions about the proposal or about [] why we rejected it, or the proposal itself." Nor did he offer testimony or notes identifying any date(s) when the District purportedly explained its reason(s) for rejecting the longevity differential proposal.

Third, Berkheimer acknowledged that he had reviewed his own bargaining notes in preparation for the hearing, but the District chose not to introduce those notes into evidence. Under the circumstances, the absence of any corroborating evidence tends to undermine

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corroborate any of the contents of her notes. However, applying the business records exception to the hearsay rule recognized under California and federal law, PERB may consider bargaining notes for the truth of the matters asserted therein and sufficient by themselves to support a factual finding, where the notes were taken in the regular course of business, were taken at or near the time of the negotiations they purport to record, the custodian or other qualified witness testifies to their identity and mode of preparation; and the circumstances surrounding their method and time of preparation indicate their trustworthiness. (Evid. Code, § 1271; *Salinas Valley Memorial Healthcare System* (2015) PERB Decision No. 2433-M, adopting proposed decision at p. 10, fn. 8; see also *City of San Ramon* (2018) PERB Decision No. 2571-M, pp. 5-6 [In determining weight to be given to bargaining notes, PERB considers "all relevant factors, including but not limited to the notes' quality, their consistency with other evidence, and whether the notes were taken contemporaneously"].)

Berkheimer's account. (*Rainbow Municipal Water District* (2004) PERB Decision No. 1676-M, adopting proposed dec. at p. 8.) Accordingly, we find it more likely than not that the District offered no explanation on June 29, 2007 for rejecting the proposed longevity differential, and that the only explanations offered by Berkheimer occurred at the September and October 2007 meetings, which are discussed below.

Moreover, even assuming that Berkheimer had mentioned a promotional incentive as a basis for the District' position, we would not credit that explanation in these circumstances. Such a rationale would be untenable given the lateral relationship between battalion chiefs and certain unrepresented managers who did receive the longevity differential. In any event, as discussed below, the District admitted on several occasions that it denied the Association the longevity differential to ensure that unrepresented employees are paid more than represented employees. These admissions also belie the alleged financial rationale that Berkheimer claims to have given on June 29, 2007. Such a financial rationale is also inconsistent with the District's assertion that its total economic offer was more expensive and generous than the Association's demands.[8] The third rationale that Berkheimer claims to have asserted on

[8] Because the District proposed a four-year agreement, while the Association's proposal was for a two-year term, the dollar figures associated with each side's proposal are not directly comparable. It is thus not possible to evaluate the accuracy of this claim based on the existing record. Perhaps for this reason, the ALJ also did not analyze whether the District's self-described "generous" counteroffers effectively negated its own "financial costs" justification for rejecting the Association's proposed longevity benefit.

Because we find direct evidence of unlawful motive with respect to the complaint's discrimination allegation (see below), strictly speaking it is unnecessary to determine whether the District's finance-based justification was pretextual for resolving that issue. However, whether the District's proffered justifications for its conduct are supported by the evidence remains relevant to whether it has proven its affirmative defense to the complaint's interference allegation. (*Community Learning Center Schools, Inc.* (2017) PERB Order No. Ad-448, p. 9.) Consequently, as discussed herein, because we find the explanations offered by the District are

June 29, 2007—treating the Association equivalently to AFSCME Local 512—is consistent with the discriminatory rationale that the District later admitted, so it does not matter to our analysis whether Berkheimer provided that explanation in June 2007 or at any other point.

Negotiations continued through the fall of 2007, including meeting on September 24, and October 18, 2007. On these two occasions, Berkheimer explained that the District would not agree to the proposed longevity benefit for represented units, including the Fire Management Unit and the professional and technical employees represented by AFSCME Local 512, *because of* their status as unionized employees. Specifically, on September 24, 2007, Adams asked the District's team to explain its rejection of the Association's parity proposals. According to Maiero's testimony and bargaining notes, Berkheimer responded that, "it was the desire of the County and the District to create some separation between represented managers and unrepresented managers," and that "the County wanted to assure that it could reserve some benefits for the unrepresented managers that it would not give to the represented managers." Berkheimer elaborated as follows:

> [W]e're looking at unrepresented managers compared to AFSCME and DSA managers. We didn't move there either. We're not sensitive to just one bargaining group, we're sensitive to looking at all of them. . . .The County is not looking at making benefits available to represented managers that may be given to unrepresented managers.

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not supported by the record, including contemporaneous evidence of the District's bargaining conduct, we find that it has not met its burden either to show that it acted in response to circumstances beyond its control or that it had no reasonable alternatives. Moreover, even if the District's conduct were found to have caused only comparatively slight harm to protected rights, it has not met its burden of showing that it acted in good faith for reasons of operational necessity or for any other legitimate business purpose that it has asserted. (See, e.g., *Regents of the University of California (Irvine)* (2018) PERB Decision No. 2593-M, pp. 9-12; *Chula Vista Elementary School District* (2018) PERB Decision No. 2586, p. 29, fn. 11.)

Lorrekovich's bargaining notes for September 24, 2007 confirm Maiero's testimony regarding the District's stated desire to maintain "separation" between represented and unrepresented managers. Her notes state: "County hasn't increased those benefits for other rep mgrs—consistency. HR thought process—higher benefits for unrep mgrs." (Underlining in original.) Accordingly, there is no material difference between the parties' accounts of Berkheimer's explanation on this date.

Adams followed up by asking whether the District's position was that unrepresented managers should receive better benefits "because" they are unrepresented. Berkheimer responded by referring to a hierarchy, with unrepresented managers at the top, represented managers and supervisors next, followed by the rank and file. Adams responded angrily, advising Lorrekovich to save her notes because they would likely be subpoenaed. Maiero challenged the hierarchy Berkheimer posited, by pointing out that the unrepresented employees were not defined by higher skills or functions, and that, in fact, the unrepresented fire marshal and training chief classifications are at the same level as battalion chiefs. Adams then reiterated the Association's proposals, and Berkheimer stated that he would be meeting with the Board of Supervisors regarding the proposals.

When the parties met again on October 2, 2007, Berkheimer stated that he had not yet met with the Board of Supervisors and there was no discussion of the Association's longevity differential proposal.

The parties next met on October 18, 2007. The District maintained its rejection of the Association's parity proposals for increased administrative leave, deferred compensation, and longevity pay. Adams asked again for an explanation. Berkheimer reiterated that the District was "looking for a differential between represented and unrepresented managers." When

Adams asked whether the battalion chiefs would receive the longevity differential if they had not organized, Berkheimer responded that he did not know. Maiero's testimony and bargaining notes indicate that Berkheimer informed the Association that this was the full extent of his authority but not the District's last, best, and final offer (LBFO). Maiero interpreted this statement as indicating that there was no room for movement on the longevity differential and other parity proposals, unless Berkheimer were to get further direction from the Board of Supervisors. However, there is no evidence of any further negotiations about the longevity differential at this or any subsequent meeting.

At the October 18, 2007 meeting, the District also proposed a 14 percent increase in salary over the course of a four-year proposed MOU. This was a substantial increase over the District's initial wage proposal, which called for no increase in the first year of the MOU and a 2 percent increase in the second year. The District's new wage proposal was identical to the wage increase for rank-and-file firefighters recently agreed to by United Professional Firefighters Local 1230 (Local 1230). The District also presented a new overtime proposal, which would compensate battalion chiefs at 1.5 times their base pay rate for overtime hours. Previously, overtime for these employees was compensated at the lower captain's base pay rate. According to District figures, this revised overtime proposal was valued at $6,000 to $7,000 per year more than each Associated-represented employee had earned in overtime compensation during the previous three-year period. Unrepresented management employees in the District are not eligible for overtime.

The parties dispute whether the District's enhanced overtime and other economic proposals were specifically presented as concessions or offsets to the Association's longevity differential proposal. Maiero testified that Grace had characterized the revised overtime

proposal as being "in lieu of all of [the Association's] other economic proposals," with no specific reference to the longevity differential. However, Grace gave a completely different explanation for the District's overtime proposal. He testified that non-supervisory firefighters represented by Local 1230 "had engaged in some contentious actions during negotiations that impacted [the District's] operations," and that the District offered a "very generous" overtime proposal to battalion chiefs because they had "stepped up to the plate" and "gone above and beyond," presumably to cover staffing shortages caused by these "contentious" actions of the District's rank-and-file firefighters.

The record includes no bargaining notes or other contemporaneous evidence corroborating either explanation but, to the extent there is a conflict, we credit Grace's testimony on this point. As a member of the District's team, he was presumably knowledgeable of the genesis and intended purpose of the District's overtime proposal, even if the District did not fully explain its purpose in offering the enhanced overtime proposal. More importantly, Grace had no discernible interest in offering testimony that essentially undermined the District's argument before PERB that it had specifically developed a "very generous" overtime proposal in response to, i.e., as an offset for, rejecting the Association's longevity differential proposal. On the existing record, we find that the District did not specifically identify or offer its enhanced overtime proposal, or any of its other economic proposals, as a concession or offset for rejecting the Association's proposed longevity differential.

Ultimately, the record does not allow us to compare the value of the longevity benefit and the value of overtime payments that Association-represented employees receive, nor, more generally, to compare the overall packages that the District proposed or implemented for

different groups. In this case, where the District repeatedly admitted that its proposals were intended to compensate unrepresented managers at a higher level than represented managers, we are unable to infer, as the District now asks, that the District's overall economic packages to the two groups were in fact comparable. The District's admissions belie that argument and the District would have had to introduce sufficient evidence for us to make a finding at odds with its admissions. The District did not do so.

Negotiations End and the District Grants the Longevity Benefit to Unrepresented Managers

The parties met several more times, but reached no agreement. On December 10, 2007, the District presented its LBFO, which would provide all members of the Association's bargaining unit a Class A dress coat; increase the employer contribution to the deferred compensation plan from $50 per month to $75 per month, only $10 less than unrepresented managers received, and increase the annual reimbursement for career training/development to $750, which was also in line with what unrepresented management employees received.[9] The District's LBFO included the same overtime and wage proposals presented on October 18, 2007. It did not include the longevity differential, an administrative leave allowance, or an increase in the uniform allowance.

The Association's membership rejected the LBFO.

On February 5, 2008, the District presented a revised LBFO, which was identical to the previous LBFO with respect to the essential terms in dispute. The District again rejected the Association's demand for a longevity differential and characterized its overtime and wage

[9] As of the date of the hearing, management employees represented by DSA received an annual reimbursement of $650 for career development/training and did not receive any employer contribution to the deferred compensation plan.

proposals as "more than adequate."[10] The District's negotiators advised the Association that, if rejected by the Association, the revised LBFO would be withdrawn in its entirety, including the proposed wage increases and enhanced overtime eligibility. The Association's members voted to accept the revised LBFO, as did its Board of Directors.

On April 15, 2008, six weeks after negotiations with the Association concluded, the Board of Supervisors adopted Resolution No. 2008/218. This Resolution extended the 2.5 percent longevity differential upon completion of fifteen years of service to more than 1,000 "unrepresented" supervisory and managerial employees of the District, effective May 6, 2008. The affected employees included both those who were in a higher classification than employees in the Association's bargaining unit, such as the fire chief and assistant fire chief classifications, and employees classified at the same level as Association-represented employees, such as the fire marshal and fire training chief classifications. Thus, the practical effect of Resolution 2008/218 was to extend the longevity differential demanded by the

[10] Citing the Association's bargaining notes, the District asserts that, on February 5, 2008, the District stated "that it would not provide the longevity bonus and that the overtime and wage increases were more than an adequate substitute." However, the Association's bargaining notes for this date state, in relevant part: "Board feels the wage agreement + OT compensation is more than adequate." The notes make no mention of the word "substitute," and, other than Berkheimer's self-serving testimony at the hearing, there is no other evidence that the District ever proposed salary increases or enhanced overtime compensation *as a substitute* for rejecting the longevity benefit demanded by the Association. To the contrary, the record demonstrates that the District refused to offer or agree to the proposed longevity differential because it wished to maintain a "hierarchy" between represented and unrepresented employees and, to the extent it offered any explanation for its overtime proposal, it was to reward the battalion chiefs for going "above and beyond" when rank-and-file firefighters were engaged in "contentious actions" affecting the District's operations. Moreover, as noted above, the District failed to introduce record calculations or evidence to rebut its admissions that it compensated the unrepresented managers at a higher level. We therefore do not find, in directing the appropriate remedy for the District's admitted discrimination in this case, that the District's proposed increases in base salary or overtime compensation were a substitute or cost offset for the longevity differential.

Association to all unrepresented management employees of the District, but not to those in the Fire Management bargaining unit represented by the Association.

On May 10, 2008, the Association filed a grievance claiming that the District had discriminated against the Association and its members by denying them certain benefits, including the longevity differential, that were provided to the unrepresented management employees. At a grievance meeting held on May 22, 2008, Assistant Chief John Ross (Ross) explained the District's position as follows: "I think there's a difference between an unrep[resented] [manager] & choosing to leave to a bargaining unit. They're two different operations. The Dist[rict] did what they saw to be fit. It's not going to be a me-too type of situation." When pressed further, Ross confirmed "that the County views and treats the rep[resented] and unrep[resented] group[s] as distinct and separate groups." (*Ibid.*)

In a letter dated June 5, 2008, the District offered as further justification for its actions, the following:

> There is no foundation for complaining that unrepresented employees are given different benefits than those of represented employees. An employer may compensate unrepresented managers in a manner that distinguishes that set of employees from represented employees. When members of [the Association] chose to organize and become associated with an employee association, the rights, benefits and working conditions were thereafter governed by a collectively bargained MOU. Absent a "me too" clause, there is no merit to your complaint and no provision of the MOU that has been violated.

The Association continued to pursue its grievance, but the matter was not resolved.[11]

[11] The Association asserts the ALJ erred by failing to make findings regarding the treatment of an Association-represented employee who temporarily served in an unrepresented position, and an unrepresented employee who temporarily served in an Association-represented position, during the spring or summer of 2008. Although the Association presented evidence of these facts at hearing, it did not cite any of that evidence in its post-

DISCUSSION

The MMBA guarantees public employees "the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." (MMBA, § 3502; *International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191, 197-198 (*IBEW v. City of Gridley*); *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553, 557–558 (*San Leandro*).) MMBA section 3506 makes it unlawful for a public agency to "interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise" of these rights. Section 3506.5, subdivision (a), similarly makes it unlawful for a public agency to "[i]mpose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by [the MMBA]," while subdivision (b) of the same section makes it unlawful for a public agency to "[d]eny to employee organizations the rights guaranteed to them by [the MMBA]," including the right of recognized employee organizations "to represent their members in their employment relations with public agencies." (MMBA, § 3503; *Los Angeles County Employees Assn. v. County of Los Angeles* (1985)

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hearing brief to the ALJ, nor argue how these facts were relevant to the issues before the ALJ. Although the Board may, as part of its de novo review, consider new legal arguments based on the same evidence previously presented (*State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2013-S, pp. 2-3), we find it unnecessary to address this exception, because we conclude that, even without this evidence of the District's treatment of employees working in out-of-class assignments, the record demonstrates that the District interfered with and discriminated against employees based on the exercise of protected rights.

168 Cal.App.3d 683, 687; *County of Riverside* (2010) PERB Decision No. 2119-M, pp. 20-21, 23.)[12]

Over the years, PERB and California's courts have developed several tests for analyzing allegations arising under the above provisions of the MMBA and the virtually identical language of other PERB-administered statutes. (*Carlsbad Unified School District* (1979) PERB Decision No. 89, pp. 10-11 (*Carlsbad*); *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416, 424-425 (*Campbell*); *Novato Unified School District* (1982) PERB Decision No. 210, pp. 3-7 (*Novato*); *Los Angeles County Superior Court* (2018) PERB Decision No. 2566-C, p. 15 (*LA Superior Court*).) Broadly speaking, the various acts proscribed by sections 3506 and 3506.5 may be characterized as either interference or discrimination. (*LA Superior Court*, *supra*, PERB Decision No. 2566-C, pp. 24-25, fn. 17.)

The focus of an interference allegation is on the actual or reasonably likely harm of an employer's conduct to the protected rights of employees, employee organizations, or both. (*County of Sacramento*, *supra*, PERB Decision No. 2393-M, p. 33; *Carlsbad*, *supra*, PERB Decision No. 89, p. 10.) The employer's motive, intent or purpose is not part of a prima facie case of interference and issues regarding the employer's subjective state of mind are only germane at all in an interference case where the employer has asserted as an affirmative defense that it acted in good faith for a bona fide business purpose, i.e., for determining whether the

[12] PERB Regulation 32603, subdivisions (a) and (b), implement these provisions of the MMBA in language that generally tracks the key provisions of the statute. Although earlier Board decisions suggested that the standard for evaluating harm to protected rights may be more stringent for proving interference with organizational as opposed to employee rights (see, e.g., *State of California (Franchise Tax Board)* (1992) PERB Decision No. 954-S, p. 4 ["actual" harm required]), the Board has since repudiated that view and the test is now the same, regardless of whether the protected rights at issue are those of employees, employee organizations or both. (*County of Sacramento* (2014) PERB Decision No. 2393-M, p. 33; *County of Riverside*, *supra*, PERB Decision No. 2119-M, pp. 20-21, 23.)

employer acted for the reason it has asserted. (*Community Learning Center Schools, Inc*., *supra*, PERB Order No. Ad-448, p. 9; *Regents of the University of California* (1984) PERB Decision No. 470-H, adopting proposed decision at pp. 49-50.) While the analysis differs depending upon the nature or severity of likely harm ascribed to the employer's conduct, regardless of how one gets there, an interference violation will be found when the resulting harm to protected rights outweighs the business justification or other defense asserted by the employer. (*Carlsbad*, *supra*, PERB Decision No. 89, pp. 10-11; *Santa Monica Community College District* (1979) PERB Decision No. 103 pp. 19-20 (*Santa Monica CCD*), affirmed by (1980) 112 Cal.App.3d 684; *State of California (Department of Forestry)/State of California, Governor's Office of Employee Relations* (1981) PERB Decision No. 174-S, p. 32; see also *County of San Bernardino (Office of the Public Defender)* (2015) PERB Decision No. 2423-M, pp. 24, 37-38 (*San Bernardino*); *Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, p. 51 (*Petaluma*).)

By contrast, in cases alleging discrimination or reprisal, the respondent's unlawful state of mind is the specific nexus required to establish a prima facie case, and "a charge will be sustained where it is shown that the employer would not have engaged in the complained-of conduct *but for* an unlawful motivation, purpose or intent." (*Carlsbad*, *supra*, PERB Decision No. 89, pp. 11-12, emphasis added; *Novato*, *supra*, PERB Decision No. 210, p. 6.) Such nexus may be established by direct evidence, as when the employer's words or conduct demonstrate that it acted on the basis of union activity or other protected conduct. (*Chula Vista Elementary School District* (2011) PERB Decision No. 2221, pp. 19-20; *Contra Costa Community College District* (2006) PERB Decision No. 1852, adopting proposed decision at pp. 10, 14-16; *Regents of the University of California* (1997) PERB Decision No. 1188-H, p. 29 (*Regents of*

UC).) When the natural and probable consequence of an employer's conduct is to discourage (or encourage) protected activity, the Board may fairly presume that this was the intended result. (*Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M, p. 23 (*Santa Clara Valley*), fn. 8; *Campbell*, *supra*, 131 Cal.App.3d at pp. 422-424; *NLRB v. Great Dane Trailers, Inc.* (1967) 388 U.S. 26, 32 (*Great Dane*); cf. *LA Superior Court*, *supra*, PERB Decision No. 2566-C, p. 17 [no presumption of discrimination where employer had non-discriminatory reason for treating employee groups differently].) Unlawful motive, intent or purpose may also be established by circumstantial evidence or by a combination of direct and circumstantial evidence and inferred from the record as a whole. (*Carlsbad*, *supra*, PERB Decision No. 89, p. 11; *Novato*, *supra*, PERB Decision No. 210, p. 6; *NLRB v. Wright Line, a Div. of Wright Line, Inc.* (1st Cir. 1981) 662 F.2d 899, 902–903 (*Wright Line*).)

In this case, the complaint alleges that granting unrepresented managerial employees a longevity benefit which the District refused to grant to battalion chiefs represented by the Association constituted three concurrent unfair labor practices: (1) interference with the Association's right to represent employees, (2) interference with the employee rights guaranteed by section 3502, and (3) discrimination against employees by treating groups of employees differently based on protected activity. We address these allegations in the order in which they appear in the complaint. For the sake of convenience and brevity, we consider the two interference allegations together, as they turn on the same test and, insofar as they affect the representational rights of the Association and employees, the scope of affected rights is the same. (*Trustees of the California State University* (2017) PERB Decision No. 2522-H, p. 9; *Capistrano Unified School District* (2015) PERB Decision No. 2440, p. 14, fn. 8 (*Capistrano*); see also

Hartnell Community College District (2015) PERB Decision No. 2452, p. 34 (*Hartnell*) ["there can be no right of an employee to representation without an organizational right to represent"].)

A. Interference with Organizational and Employee Rights

A.1 Interference Allegations May Arise from an Employer's Bargaining Conduct

As noted above, an interference violation will be found where the employer's conduct interferes or tends to interfere with the exercise of protected rights and the employer is unable to justify its actions. (*Carlsbad, supra*, PERB Decision No. 89, pp. 10-11.) A finding of interference, coercion or restraint does not require evidence that any employee or organization representative subjectively felt threatened or intimidated or was actually discouraged from participating in protected activity. (*Hartnell, supra*, PERB Decision No. 2452, p. 24; *Sacramento City Unified School District* (1982) PERB Decision No. 214, pp. 14-16; *County of Riverside, supra*, PERB Decision No. 2119-M, pp. 20-21, 23.)

Employer statements or other conduct containing a threat of reprisal or force or a promise of benefit on the basis of protected activity are unprotected and constitute a prima facie case of interference, coercion or restraint. (*City of Oakland* (2014) PERB Decision No. 2387-M, pp. 25-26; *Rio Hondo Community College District* (1980) PERB Decision No. 128, pp. 18-20; *NLRB v. Exchange Parts Co*. (1964) 375 U.S. 405, 409-410.) Employer statements that convey the impression that collective bargaining is futile may also reasonably tend to discourage participation in protected activity and thereby interfere with the rights of employees and/or employee organizations. (*Hartnell, supra*, PERB Decision No. 2452, pp. 56-57; *County of Riverside, supra*, PERB Decision No. 2119-M, pp. 18-20; *Regents of UC, supra*, PERB Decision No. 1188-H, pp. 21-26; *Office of Kern County Superintendent of Schools* (1985) PERB Decision No. 533, adopting proposed decision at pp. 63-64.)

Under *Carlsbad*, if the harm to protected rights is slight and the employer offers justification based on operational necessity, the competing interests are balanced to determine whether the harm to employee rights outweighs the asserted business justification. (*Carlsbad, supra*, PERB Decision No. 89, p. 10; *Omnitrans* (2009) PERB Decision No. 2030-M, pp. 22-24.) If the employer's conduct is deemed inherently destructive of protected rights, it will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available. (*Carlsbad, supra*, PERB Decision No. 89, pp. 10-11; *City & County of San Francisco* (2017) PERB Decision No. 2536-M, p. 30.)

An interference violation may be found only where the pertinent PERB-administered statute provides the right(s) asserted by the charging party. (*Hartnell Community College District* (2018) PERB Decision No. 2567, p. 5; *Regents of the University of California* (2006) PERB Decision No. 1804-H, adopting warning letter at p. 5.) Consequently, while an interference allegation may arise from an employer's bargaining conduct (*Regents of UC, supra*, PERB Decision No. 1188-H, pp. 18-26), it cannot expand or otherwise alter the scope of the employer's duty to meet and confer in good faith. (MMBA, §§ 3504, 3505.)

Establishing a bargaining violation is not a prerequisite for proving up an independent interference or discrimination allegation, even when the latter arises from the employer's bargaining conduct. (*San Bernardino City Unified School District* (1998) PERB Decision No. 1270, adopting proposed decision at pp. 38-41; *Campbell, supra*, 131 Cal.App.3d at pp. 421–422; *Los Angeles County Employees Assn v. County of Los Angeles, supra*, 168 Cal.App.3d at pp. 685, 688; *Stanislaus Consolidated Fire Protection District* (2012) PERB Decision No. 2231-M, pp. 17-23; see also *Regents of UC, supra*, PERB Decision No. 1188-H,

p. 26.)[13] The MMBA prohibits public agencies from taking actions which are otherwise *entirely lawful*, when undertaken for an unlawful discriminatory purpose, or, in interference cases, with an unlawful coercive effect without regard to intent. (*City of Oakland*, *supra*, PERB Decision No. 2387-M, pp. 33-34, citing *Campbell*, *supra*, 131 Cal.App.3d 416; *Carlsbad*, *supra*, PERB Decision No. 89, p. 10.) Even where it has unquestioned discretion to act, a public agency is not free to exercise its authority in a manner that violates the rights of employees or employee organizations. (*City of Monterey* (2005) PERB Decision No. 1766-M, p. 12; *McFarland Unified School District v. PERB* (1991) 228 Cal.App.3d 166, 169; see also *Berkeley Unified School District* (2003) PERB Decision No. 1538; *San Leandro Unified School District* (1983) PERB Decision No. 288, p. 13.)

The general rule in negotiations is that no unit is entitled to parity with other employees, nor to a presumption of parity, in the absence of an agreement or established past practice. (*Overnite Transp. Co. v. NLRB* (4th Cir. 2002) 280 F.3d 417, 431.) Parity in wages, benefits or

[13] Our dissenting colleague mistakenly asserts that PERB decisional law does not recognize that particular bargaining conduct may constitute unlawful interference, and further urges us not to do so here, ostensibly out of respect for employer free speech. However, while promoting full and free communication between public employers and their employees is a declared purpose of the MMBA, PERB has never held that employer statements are immunized from interference liability, simply because they occur in negotiations, grievance proceedings, or any other context. (*Los Angeles Unified School District* (1987) PERB Decision No. 611, pp. 6-7; see also *City of Oakland*, *supra*, PERB Decision No. 2387-M, pp. 23-26; *County of Riverside*, *supra*, PERB Decision No. 2119-M, pp. 22-23.) To the contrary, it is well-settled that employer speech, including an employer's actual or threatened bargaining position, loses its protection and may be found to interfere with protected rights where it implies a promise of benefit or a threat of reprisal because of protected activity. (*Santa Monica CCD*, *supra*, PERB Decision No. 103, pp. 19-21 [implied promise to give pay raises based on a waiver of rights and subsequent denial of raises based on organization's refusal to waive rights "clearly interfered with, restrained and coerced employees because of their exercise of [protected] rights"; *San Bernardino City Unified School District*, *supra*, PERB Decision No. 1270, adopting proposed decision at pp. 38-41 [employer's threat to "take it out on [you] in contract negotiations," if employee organization pursued arbitration or filed unfair practice charge constituted unlawful threat of reprisal].)

other terms and conditions of employment is itself an employment condition and therefore subject to good-faith negotiation. There is no statutory right or presumption favoring parity either between units of represented employees, nor between represented and non-represented employees. (*Anaheim Union High School District* (2016) PERB Decision No. 2504, p. 14; *Banning Teachers Assn. v. PERB* (1988) 44 Cal.3d 799, 806.) Just as the duty to meet and confer in good faith does not require making concessions or agreeing to any proposal (*Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9, 23), neither does it require an employer to offer every benefit provided to unrepresented employees or agreed to with one bargaining unit to any other bargaining unit. (*State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2085-S, p. 8.) However, because parity is itself subject to negotiation, an employer cannot simply *refuse to consider* a demand for parity in wages, benefits, or other employment conditions. (*Dublin Professional Fire Fighters, Local 1885 v. Valley Community Services Dist.* (1975) 45 Cal.App.3d 116, 118; *Sierra Joint Community College District* (1981) PERB Decision No. 179, p. 4; see also *City of San Jose* (2013) PERB Decision No. 2341-M, pp. 38-39.)

Notwithstanding its right to engage in hard bargaining, an employer may not refuse to consider, nor reject demands for parity, based on union membership, the unionized status of a unit, the use of impasse resolution procedures, or other protected activity. (*San Leandro*, *supra*, 55 Cal.App.3d at p. 558.) Conditioning employment benefits on surrendering protected rights necessarily tends to discourage employees and/or employee organizations from participating in such activity. (*Regents of UC*, *supra*, PERB Decision No. 1188-H, pp. 16, 22.) Nor may an employer grant or deny benefits to non-represented employees so as to encourage employees to forego the exercise of protected activity. (*Ibid*.) In sum, employer statements made during

negotiations lose their protection and may be found to interfere with protected rights, where they imply a promise of benefit or a threat of reprisal because of protected activity. (*Santa Monica CCD, supra,* PERB Decision No. 103, pp. 20-21[14]; see also *NLRB v. Exchange Parts Co., supra,* 375 U.S. 405, 409-410.)

A.2. The District's Conduct Tended to Harm Protected Rights

Here, the record amply demonstrates that the District and its agents repeatedly expressed a desire to maintain "separation" or a "hierarchy" in compensation between represented and unrepresented managers. Berkheimer cited the distinction between "represented" and "unrepresented" employees as the basis for the District's rejection of the longevity benefit proposed by the Association during negotiations with the Association. After negotiations had concluded, the District confirmed Berkheimer's explanation by granting the longevity benefit to unrepresented managers, including those at the same level as the Association-represented battalion chiefs. Thereafter, Ross repeated this explanation when denying the Association's grievance challenging the District's refusal to grant it the longevity differential. Because the District conveyed a policy of favoring unrepresented employees over represented ones on the basis of whether or not they unionized, the District's conduct and explanations reasonably tended to discourage employees from participating in organizational activities.

The District makes several arguments aimed at showing that the evidence relied on by the Association is "ambiguous and incomplete," that the Association's arguments are

[14] In *Santa Monica CCD, supra*, PERB Decision No. 103, a public school employer was found to have interfered with the protected right to *refrain from* joining an employee organization by denying *unrepresented* part-time faculty members a pay increase, because the employee organization representing other part-time faculty members had refused to waive the rights of its members. (*Id*. at pp. 20-21.)

"overblown," and that the District did not engage in unlawful interference. However, none of these arguments is persuasive.

First, the District contends that there is no policy or language in which the District explicitly distinguished between represented and unrepresented employees when discussing eligibility for the 15-year, 2.5 percent longevity differential. This contention is both factually incorrect and legally misplaced. As noted above, Resolution 2008/218 expressly identified "unrepresented" employees of the District as eligible for certain employment benefits, including a longevity differential identical in substance to the one proposed by the Association and repeatedly rejected by the District. By necessary implication, Association-represented employees were not eligible under the Resolution. Statements made by Berkheimer and Ross similarly indicated that Fire Management Unit employees, by choosing to organize, lost the right to be treated in parity with their colleagues at the same level.

Moreover, under *Carlsbad*, an employer may be held liable for statements by its agents that would reasonably convey the impression that engaging in union or other concerted activity is futile. (*Hartnell*, *supra*, PERB Decision No. 2452, pp. 56-57; *County of Riverside*, *supra*, PERB Decision No. 2119-M, pp. 18-20.) It is not necessary that the employer formally adopt such statements as policy, only that employees or their representatives under the given circumstances would reasonably perceive such statements as expressing the employer's policy. (*Coachella Valley Mosquito & Vector Control District* (2009) PERB Decision No. 2031-M, pp. 20-21; *John Swett Unified School District* (1981) PERB Decision No. 188, pp. 5-8 (*John Swett*), adopting proposed decision. at pp. 27-28.) Generally, an employer's high-ranking officials, particularly those whose duties include employee or labor relations or collective bargaining matters, are presumed to be familiar with the employer's policies and therefore to

speak and act on behalf of the employer when communicating with employees and/or their representatives on such matters. (*City of San Diego* (2015) PERB Decision No. 2464-M, p. 23; *Trustees of the California State University* (2014) PERB Decision No. 2384-H, p. 41; *County of Riverside*, *supra*, PERB Decision No. 2119-M, pp. 18-20.) Berkheimer and Ross have expressly held themselves out as the District's chief spokesperson in contract negotiations and its grievance representative, respectively, and there is no evidence suggesting that they were acting outside the scope of their authority when rejecting the Association's longevity differential proposal or denying its grievance on the basis that Association-represented employees were ineligible for this benefit *because* they were represented. In fact, there is overwhelming evidence to the contrary.

On May 4, 2007, in response to the Association's parity proposals, including the longevity differential, Berkheimer advised the Association's team that he would need to get direction from the Board of Supervisors regarding the difference between represented and unrepresented management employees of the District. On June 29, 2007, the District's negotiators then rejected the Association's longevity differential proposal without explanation. However, contemporaneously recorded bargaining notes of both parties, as well as hearing testimony, indicates that Berkheimer returned to the distinction between represented and unrepresented managers at the September 24, 2007 bargaining session, citing that distinction as the basis for rejecting the proposed longevity benefit. Berkheimer reiterated this explanation at the October 18, 2007 meeting, after he had met with the Board of Supervisors to get direction on the Association's proposals, and thus, presumably with the full knowledge and authority of the District's governing body.

After negotiations concluded, the Board of Supervisors adopted Resolution No. 2008/218 extending the longevity differential exclusively to "unrepresented" employees of the District. When the Association filed a grievance challenging the battalion chiefs' exclusion from this benefit, Ross repeated the distinction between represented and unrepresented managers as the District's basis for denying the grievance. At the hearing, Berkheimer again explained the District's rejection of the proposed longevity benefit by asserting the District's desire to maintain "separation" between represented and unrepresented management employees.

The District also argues that the two bargaining sessions in which Berkheimer distinguished between represented and unrepresented employees as the basis for rejecting the Association's parity proposals fail to provide sufficient evidence for PERB to find an MMBA violation. Again, we disagree. As suggested already, not only were there more than two occasions on which District representatives expressed the view that Association-represented employees were ineligible for certain benefits because they were represented, but even the evidence regarding the two such instances discussed by the District undermine its argument.

The first instance discussed by the District was the September 24, 2007 bargaining session. Maiero's testimony and bargaining notes indicate that on that date Berkheimer said the District was "not looking at making benefits available to represented managers that may be given to unrepresented managers." The District urges us to interpret Maiero's notes as pertaining not to the longevity benefit, but to the District's reason for rejecting the Association's administrative leave and professional development proposals, which were also based on considerations of parity with other District and/or County employees. That is not our interpretation, and, in any event, it is unclear that such an interpretation would substantially assist the District, as it would still leave multiple District admissions regarding the unlawful reason for its distinction between employee

groups, and it would in fact reinforce the fact that the District relies on that unlawful distinction as a matter of course. Whether Berkheimer indicated that the District wished to restrict access to one employment benefit or several, in either instance Maiero's notes are further evidence that the District has created an unlawful distinction and hierarchy between employees who have participated in organizational activities and those who have refrained from doing so.

The second instance discussed by the District involves Maiero's bargaining notes of October 18, 2007, which say: "looking for a differential between represented & unrepresented [managers]." According to the District, the notes themselves do not attribute this comment to anyone, and Maiero had to testify that Berkheimer was the speaker. However, Berkheimer did not deny making the statement. Rather, he testified that his intent during that bargaining session was to explain that the District wanted to maintain certain benefits for *higher ranking* unrepresented managers and that "there should be some type of differential maintained between . . . the battalion chief[s] and the classifications that they would like to promote to, such as an assistant chief[,] so that there's a reason for them to promote." According to Berkheimer, his use of the terms *represented* and *unrepresented* was simply a short-hand way to refer to this promotional hierarchy.

On cross examination, Berkheimer was asked whether he had said during negotiations that the County is not looking at making benefits available to represented managers that may be given to unrepresented managers. Berkheimer responded: "I believe I did say that." He then elaborated: "I also would have, through the negotiations, . . . expanded more upon that as I've stated in testimony earlier. There's more to it than just the difference between represented and unrepresented managers." However, Berkheimer also conceded that he may, in fact, have never used the word "promotion" in his explanations of this point during negotiations, and

Lorrekovich's bargaining notes indicate that the District's position, as explained by Berkheimer, was to provide better benefits to unrepresented managers, without reference to preserving promotional incentives. Moreover, as noted above, even had Berkheimer cited promotional incentives as the District's explanation, we would find that assertion to be pretextual given that the District extended the longevity differential to all unrepresented managers, including those at the same level as the Association-represented employees.

Under *Carlsbad* and similar cases, whether an employer's speech is protected or constitutes a proscribed threat or promise of benefit is determined by applying an objective rather than a subjective standard. (*Chula Vista City School District* (1990) PERB Decision No. 834, p. 12; *Carlsbad, supra*, PERB Decision No. 89, pp. 5, 7-8.) The fact that an employer's agent "did not mean it that way" is thus no defense, when employees or their representatives would reasonably perceive the agent's statement as containing a threat of reprisal or promise of benefit based on protected activity. (*County of Riverside, supra*, PERB Decision No. 2119-M, pp. 18-19; see also *County of Merced* (2014) PERB Decision No. 2361-M, pp. 9-10) While Berkheimer's *intended* meaning is relevant to our discrimination analysis, *post*, our interference analysis focuses on the reasonably likely *effect* of his statements on present or future protected activity. (*County of Merced, supra*, PERB Decision No. 2361-M, pp. 9-10; *City of Oakland, supra*, PERB Decision No. 2387-M, p. 25, fn. 5; see also *Trustees of the California State University, supra*, PERB Decision No. 2522-H, p. 20.)

Berkheimer's testimony that he "would have" explained that the District's distinction between represented and unrepresented employees stemmed from a need to preserve promotional incentives does not alter the fact that he apparently offered no such explanation of this point during negotiations. Subsequent statements of the District's policy, including its decision to

grant the same longevity differential to unrepresented managers that it had repeatedly denied to Association-represented employees, and its written response to the Association's grievance, reiterated the same unlawful distinction between represented and unrepresented employees as the basis for granting employment benefits. The District's conduct tended to lead the Association and Association-represented employees to conclude that the District would compensate unrepresented employees at a higher level even when their skills and work did not merit such preferential treatment. We therefore have little doubt that the practical effect of the District's conduct was to discourage protected activity.

We also reject the District's related contention that the Association has taken the District's statements out of context to assign them an unintended and unlawful meaning. The District's argument here is essentially that the line between permissible and impermissible statements is too vague to withstand scrutiny, and that an employer cannot be held liable for misunderstandings arising from its conduct. This argument was considered and rejected by the U.S. Supreme Court in *NLRB v. Gissel Packing Co.* (1969) 395 U.S. 575, 620, and has been similarly considered and repeatedly rejected by PERB. (*City of Oakland, supra*, PERB Decision No. 2387-M, p. 25, fn. 5; see also *Coachella Valley Mosquito & Vector Control District, supra*, PERB Decision No. 2031-M, pp. 20-21; *John Swett, supra*, PERB Decision No. 188, pp. 5-8, adopting proposed decision at pp. 27-28.) In *City of Oakland, supra*, PERB Decision No. 2387-M, we observed that parties to a collective bargaining relationship must be afforded wide latitude to engage in "uninhibited, robust, and wide-open debate," particularly in contract negotiations and grievance proceedings, without incurring liability for every impulsive act or intemperate remark. (*Id.* at p. 23; see also *Chula Vista Elementary School District, supra*, PERB Decision No. 2586, p. 16.) However, we also noted that, "[b]ecause the employer has

control over the employment relationship and knows it best, it is expected to make its views known without engaging in implied threats, brinkmanship or deliberate exaggerations likely to mislead employees" or their representatives. (*City of Oakland*, *supra*, PERB Decision No. 2387-M, p. 25, fn. 5, citing *NLRB v. Gissell Packing*, *supra*, 395 U.S. at pp. 619-20.) Thus, the fact that an employer's statement occurred at the bargaining table or in grievance proceedings may be part of the overall context in which it is examined (*City of Torrance* (2008) PERB Decision No. 1971-M, pp. 20-21; *Los Angeles Unified School District* (1988) PERB Decision No. 659, pp. 9-10), but that fact alone will not rebut a prima facie case of interference, where the statement, when viewed in light of the surrounding circumstances, contains an implied threat or promise of benefit linked to protected activity. (*Regents of UC*, *supra*, PERB Decision No. 1188-H, pp. 24-26; *Santa Monica CCD*, *supra*, PERB Decision No. 103, p. 20.)

While an employer statement need not specifically threaten reprisal or expressly promise benefits on the basis of protected activity to be found unlawful (see *Los Angeles Community College District* (2014) PERB Decision No. 2404, p. 6), in this case, the District has *expressly* distinguished between represented and unrepresented employees as the basis for granting employment benefits. Moreover, far from disavowing or otherwise clearing up its unlawful distinction, the District repeated it and defended it. (*Cf. Petaluma*, *supra*, PERB Decision No. 2485, pp. 46, 51-52; see also *Jurupa Unified School District* (2015) PERB Decision No. 2458, pp. 12-13, adopting NLRB standards in *Passavant Memorial Area Hospital* (1978) 237 NLRB 138, 138-139.) Not only did the District fail to rectify its interfering conduct at the table, but the District's subsequent statements on the subject, including Resolution 2008/218 and the fire chief's *written* response to the Association's grievance, reasonably

conveyed the same impression of an implied threat and/or promise of benefit on the basis of protected activity. The fact that some unrepresented managers receiving this benefit were not in higher classifications, but were on the same level of the promotional hierarchy as the battalion chiefs, only served to confirm the Association's view that District policy was to exclude represented employees from certain benefits *because of* their unionized status. Under the circumstances, including the fact that the District has repeatedly and explicitly distinguished between represented and unrepresented employees *as its basis* for granting different employment benefits, we reject the District's post hoc argument that the Association has "misunderstood" or "overblown" the District's statements. To the contrary, we find that the Association reasonably noted the plain meaning of the District's statements.

By promising and providing differential benefits to employees on the basis of their participation (or non-participation) in organizational activities, the District has engaged in conduct that would reasonably tend to interfere with the exercise of protected rights, including the rights of the Association to represent employees and the rights of employees to join, form and participate in organizational activities. Following *Carlsbad*, we next determine whether the District's conduct may be fairly characterized as inherently destructive of protected rights or as causing only relatively slight harm before considering the District's proffered defense.

A.3. Determining the Severity of Harm Caused by the District's Conduct

Once at least slight tendency to harm protected rights has been established, the Board balances the severity of that harm against any operational necessity defense(s) asserted by the employer. Under *Carlsbad*, the Board's balancing analysis uses one of two standards, depending upon the severity of the harm to protected rights. If the harm is "comparatively slight" and the employer asserts an operational necessity, the competing interests are balanced.

(*Carlsbad*, *supra*, PERB Decision No. 89, p. 10; *John Swett*, *supra*, PERB Decision No. 188, pp. 6-7.) If the harm to protected rights outweighs the asserted business justification, a violation will be found. (*Omnitrans*, *supra*, PERB Decision No. 2030-M, pp. 22-24.) Where employer conduct is "inherently destructive" of protected rights, it will be excused only for circumstances beyond the employer's control and when no alternative course of action was available. (*San Bernardino*, *supra*, PERB Decision No. 2423-M, pp. 36-37; *Santa Monica CCD*, *supra*, PERB Decision No. 103, pp. 19-20; *Carlsbad*, *supra*, PERB Decision No. 89, pp. 10-11.)

In *Carlsbad*, the Board explained that employer conduct will be deemed "inherently destructive" of protected rights, if its "natural and probable consequence" would be to discourage the exercise of such rights. (*San Dieguito Union High School District* (1977) EERB Decision No. 22,[15] pp. 14, 16-17, overruled in part by *Carlsbad*, *supra*, PERB Decision No. 89.) The "inherently destructive"/"slight harm" framework adopted by the *Carlsbad* majority was borrowed from *Great Dane* and other federal private-sector cases. (*Pittsburg Unified School District* (1978) PERB Decision No. 47, p. 20, fn. 16 (*Pittsburg*).)

In an early decision applying *Carlsbad*, PERB held that requiring employees to give up organizational activities as a condition for receiving a pay increase was inherently destructive of employee rights, because it would tend to discourage both present and future protected activity. (*Santa Monica CCD*, *supra*, PERB Decision No. 103, pp. 19-20, citing *Great Dane*, *supra*,

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

388 U.S. 26.)[16] This result is hardly surprising, as it is difficult to conceive of many employer actions that would be more inherently destructive of protected rights, other than perhaps threatening employees with job losses for protected activity.

In addition to the *Santa Monica CCD* case cited above, in which the Board held that conditioning a pay increase on surrendering the right to self-organization is inherently destructive of protected rights, in several cases, PERB has found employer speech inherently destructive when it contains express or implied threats or conveys the message that collective bargaining is futile, or when its natural and probable consequence is to discourage employees from attending union meetings, seeking union assistance or using the grievance procedure. (*Compton Unified School District* (2003) PERB Decision No. 1518, adopting proposed decision at pp. 23-24; *Woodland Joint Unified School District* (2004) PERB Decision No. 1722, adopting proposed decision at p. 32;[17] *City & County of San Francisco*, *supra*, PERB Decision No. 2536-M , p. 28.)

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[16] In *Regents of UC*, *supra*, PERB Decision No. 1188-H, PERB found, also in the context of a representation election, that a higher education employer's inaccurate statements to employees about a pending salary increase constituted promises of benefit or threats of reprisal, because they implicitly conditioned the increase on the outcome of the representation election. (*Id*. at pp. 24-26.) The Board concluded that conditioning receipt of the salary increase on employees not electing an exclusive representative interfered with employees' right to participate in an election to choose an exclusive representative. (*Id*. at p. 26.) However, PERB did not explicitly characterize the severity of harm caused by the employer's conduct as either inherently destructive or comparatively slight, and, although the decision cited *Santa Monica CCD* for the proposition that a make-whole remedy is necessary to compensate employees for an employer's unlawful discriminatory conduct (*Id*. at p. 33), it did not cite to *Great Dane* or other federal authority nor otherwise mention or distinguish *Santa Monica CCD*'s holding that conditioning employment benefits on a forfeiture of protected rights constitutes inherently destructive conduct.

[17] As recognized in *Walnut Valley Unified School District* (2016) PERB Decision No. 2495, *Woodland Joint Unified School District*, *supra*, PERB Decision No. 1722 was superseded by statute on other grounds.

Additionally, in *Petaluma, supra*, PERB Decision No. 2485, the Board held that the inherently destructive prong of the *Carlsbad* test is satisfied when an employer policy expressly singles out "union" activity for prohibition. (*Id*. at p. 51, see also *Lafayette Park Hotel* (1998) 326 NLRB 824, 825; *Martin Luther Memorial Home, Inc.* (2004) 343 NLRB 646, 647 [employer rule that explicitly restricts protected activity is per se unlawful].) The Board explained that, although unlawful intent is not required for proving employer interference, where an employer rule expressly references "union" materials as the basis for restricting non-disruptive organizational activity, its natural and probable consequence is to discriminate based on an impermissible content-based classification and to deny rights protected by our statutes. (*Petaluma, supra*, PERB Decision No. 2485, p. 51, citing *Carlsbad, supra*, PERB Decision No. 89, pp. 10-11.)

The District's conduct here not only tended to interfere with protected activity but was so significant that its natural and probable consequence was to interfere with Association and employee rights. By explicitly distinguishing between represented and unrepresented employees and insisting on its intent to compensate the latter group at a higher level, the District's positon inherently discourages union activity. Accordingly, under *Carlsbad*, the District's conduct may be excused only on proof that it was occasioned by circumstances beyond the District's control and that no alternative course of action was available. (*Carlsbad, supra*, PERB Decision No. 89, pp. 10-11.)[18]

[18] According to our dissenting colleague, we should overrule *Carlsbad* and 40 years of its progeny, because "the concept of inherently destructive conduct has no place in our interference standard," apparently, because it plays no such role under private-sector cases interpreting differently-worded statutes. To the contrary, we find the concept of inherently destructive conduct to be a logical part of our precedent, and one that has stood the test of time. Moreover, both PERB and California courts have repeatedly affirmed the view that federal law

A.4. The District's Affirmative Defenses

While motive is not part of the prima facie case of interference, where the respondent has asserted that it acted for a legitimate business purpose, PERB analyzes the affirmative defense, in part, using principles applicable in a "mixed motive" discrimination case. Specifically, the Board may consider not only whether the stated justification is legitimate, but also whether it was, in fact, the reason for the employer's conduct. (*Community Learning Center Schools, Inc.*, *supra*, PERB Order No. Ad-448, p. 9; *Regents of the University of California, supra*, PERB Decision No. 470-H, adopting proposed decision at pp. 49-50; see also *Palo Verde Unified School District* (2013) PERB Decision No. 2337, p. 32 [whether employer's affirmative defense was "honestly invoked" and whether its proffered justification was in fact the cause of its action].) Here, the District's proffered explanations do not meet these standards. Indeed, the District's arguments would not even satisfy the operational necessity standard applicable to employer conduct that tends to have a comparatively slight impact on protected activity; a fortiori, the District has not come close to showing that it acted in response to circumstances beyond its control.

The District argues that the distinction between represented and unrepresented managers was introduced by the Association, and that the District should not be held liable for simply

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is illustrative, *but not exhaustive*, of the rights of public employees in California, while federal authorities offer *no guidance whatsoever* regarding the separate statutory rights of employee organizations, which have no counterpart in the National Labor Relations Act [29 U.S.C. section 151 et seq.]. (*Capistrano, supra*, PERB Decision No. 2440 at p. 29, fn. 15; *Redwoods Community College District v. PERB* (1984) 159 Cal.App.3d 617, 623; see also *San Bernardino, supra*, PERB Decision No. 2423-M, pp. 37-38 [applying *Carlsbad* analysis to find employer policies inherently destructive of employee *and employee organizational* rights].) We respectfully decline the dissent's suggestion to upend settled Board precedent, with no apparent offsetting benefit, other than to adopt a lockstep uniformity with federal precedents interpreting *different* statutory language.

repeating this verbiage when responding to the Association's bargaining proposals. This contention is undermined by the record. A December 5, 2006 memo to the Board of Supervisors from Human Resources identified the following categories of employees as authorized to receive the longevity benefit: "County Elected and Appointed Department Heads, Management, Exempt and Unrepresented Employees." The County's Resolution No. 2006/743 similarly specified the benefits for "unrepresented employees," a term used throughout that document. Both resolutions pre-date the District's negotiations with the Association by several months. While the lawfulness of these resolutions is not before us, their repeated references to represented and unrepresented groups to distinguish eligibility for employment benefits demonstrates that this distinction was not one introduced by the Association. Rather, as Maiero explained at the hearing, the Association's parity proposals were themselves responses to the County's resolutions providing certain benefits to its unrepresented employees.[19] The Association reasonably chose to mention represented and unrepresented groups in order to argue against what it believed to be a discriminatory distinction in need of prompt remediation. We reject the District's argument that the Association, by pointing out this unfair situation and seeking to remedy it, is somehow to blame for the District's decision to adopt and defend a pay structure based on a discriminatory distinction.

As noted above, Berkheimer also testified that his repeated distinction between represented and unrepresented managers during negotiations was simply an awkward, but

[19] While we need not and do not decide whether the District and the County operate as alter egos or joint employers, there is no dispute that the wages and benefits of District employees were tied to those of County employees. By way of example, Berkheimer testified that the District's rejection of the proposed longevity benefit "was based upon consistency with other represented managers," which he described as the same position the County took, when rejecting similar parity demands in its negotiations with AFSCME Local 512.

otherwise innocent, way of describing the District's promotional hierarchy or chain of command and its desire to preserve incentives to promote into higher positions. However, for reasons discussed previously, we do not credit this explanation. There is no credible evidence that the District ever truly believed or gave this explanation during negotiations or at any relevant time. The fact of the matter is that the key distinction at the heart of the unlawful pay structure is not a distinction in which employees earn more due to higher skill or higher level work; to the contrary, the only explanation that accurately describes the District's pay structure is that the District wanted unrepresented managers to earn more, even if they were at the same level as represented managers.

The District also offers no credible evidence of operational necessity, much less evidence that it had no alternative course of action. The instant case thus contrasts sharply with *LA Superior Court*, *supra*, PERB Decision No. 2566-C. There, while one employer communication referenced the charging parties' unrepresented status and therefore could have interfered with their right to remain unrepresented, the communication and other employer statements demonstrated that the charging parties were distinguished primarily by a lower skill level, not their unrepresented status. (*Id*. at pp. 17-18, 20-21.) In analyzing the employer's communication and entire course of conduct, we found no doubt that the but-for reason the employer treated represented and unrepresented employee groups differentially was their differential skill levels. (*Ibid*.)

Accordingly, we find the District interfered with protected rights, as alleged in the complaint and as described above, in violation of MMBA sections 3503, 3506, 3506.5, subdivisions (a) and (b), and 3509, subdivision (b), and PERB Regulation 32603, subdivisions (a) and (b).

B. Discrimination

Allegations of discrimination or reprisal, whether analyzed under *Campbell* or the *Novato* line of cases, require the charging party to prove more likely than not that the respondent acted with an improper motive, intent, or purpose. How the charging party goes about making this showing differs under *Campbell* and *Novato*. The Board's *Novato* line of cases generally applies when a charging party seeks to establish motive through analyzing indirect evidence (nexus factors). In contrast, following *Great Dane, Campbell* holds that where the employer's conduct is facially or inherently discriminatory, an unlawful motive may be presumed, such that the employer may be required to disprove it. (*Campbell*, *supra*, 131 Cal.App.3d at pp. 422-424; *Great Dane*, *supra*, 388 U.S. at p. 32; see also *Santa Clara Valley*, *supra*, PERB Decision No. 2349-M, p. 23, fn. 8; *LA Superior Court*, *supra*, PERB Decision No. 2566-C, pp. 14-15 [the presence of facially or inherently discriminatory employer conduct triggers the *Campbell/Great Dane* analysis, as opposed to the *Novato/Wright Line* analysis].)

B.1. Applying *Campbell* to the Instant Case

Following the *Great Dane* line of cases, it is well settled that granting employment benefits to some employees, while withholding those same benefits from others who are distinguishable mainly by their participation in protected activity, has the natural or probable consequence of discouraging present or future protected activity and is thus the kind of facially or inherently discriminatory conduct justifying an inference of unlawful motive, intent or purpose. (*LA Superior Court*, *supra*, PERB Decision No. 2566-C, p. 14; *Campbell*, *supra*, 131 Cal.App.3d at p. 423; *International Paper Company* (1995) 319 NLRB 1253, 1269, e*nforcement denied*, (D.C. Cir. 1997) 115 F.3d 1045; *National Fabricators, Inc. v. NLRB* (5th Cir. 1990) 903

F.2d 396, 399, citing *NLRB v. Haberman Constr. Co.* (5th Cir.1981) 641 F.2d 351, 359 (*en banc*); see also *NLRB v. Great Atlantic & Pac. Tea Co.* (5th Cir. 1969) 409 F.2d 296, 298.)[20]

Here, there is no question that the District treated Association-represented employees differently from other, unrepresented employees. Contemporaneous statements by the District's high-ranking labor relations officials, together with the other evidence noted above, demonstrates that the District made eligibility for certain employment benefits dependent on unrepresented status and that it sought to maintain "separation" in employment benefits based on this distinction. The District's allocation of the longevity differential to all unrepresented employees, including those managerial employees who stood in lateral positions to the Association-represented managerial employees, belies any notion that the District's desire for "separation" was based on a legitimate need to maintain promotional incentives.

This case is thus distinguishable from *LA Superior Court*, *supra*, PERB Decision No. 2566-C. In that case, as noted *ante*, one employer communication referenced the charging parties' unrepresented status and therefore could have interfered with their right to remain unrepresented, but the communication and other employer statements demonstrated that the charging parties were distinguished primarily by a lower skill level, not their unrepresented status. (*Id*. at pp. 17-18, 20-21.) In analyzing the employer's communication and entire course of conduct, we found no doubt that the but-for reason the employer treated represented and unrepresented employee groups differentially was their differential skill levels. (*Ibid*.)

[20] We found, *ante*, that the District engaged in "inherently destructive" conduct by making employment decisions based on whether employee groups were represented or unrepresented. Inherently destructive conduct is a subset of inherently discriminatory conduct. (*Great Dane*, *supra*, 388 U.S. at pp. 33–34; *NLRB v. Erie Resistor Corp.* (1963) 373 U.S. 221, pp. 230–232; see also *Local 357, International Brotherhood of Teamsters v. NLRB* (1961) 365 U.S. 667, 676.)

In contrast, the District's high-ranking labor relations officials repeatedly and expressly relied on the distinction between represented and unrepresented employees as the basis for determining eligibility for employment benefits. These statements provide direct evidence of motive and, indeed, of facially or inherently discriminatory conduct sufficient to support a discrimination allegation. (*LA Superior Court*, *supra*, PERB Decision No. 2566-C, p. 20, fn. 13.)

We need not repeat here our complete analysis of the District's attempts to justify its unlawful basis for wishing to create "separation" between certain employee groups. In summary, however, we do not credit the District's alternative rationales, and, even if we were to find them credible and not pretextual, we find that, both singly and together, none of them were a but-for cause of the District's decision. There are numerous reasons for these findings noted above. Most importantly, we reject the District's argument at trial that the terms "represented" and "unrepresented" really reflected a desire to maintain a legitimate promotional hierarchy. This rationale conflicts with the District's own statements and the facts as a whole, including, chiefly, that the District granted the longevity differential to the unrepresented fire marshal and training chief classifications, who were lateral peers of Association-represented employees. Thus, our holding today does not create a rule or even a presumption favoring parity between represented and unrepresented employees, as the District argues, so long as the employer's conduct is truly motivated by factors unrelated to the exercise of protected rights. An employer's desire to create promotional incentives, for instance, is a legitimate nondiscriminatory reason. Overwhelming evidence in this case, however, including the District's own repeated statements, shows that the District distinguished between employee groups mainly based on protected activity.

Nor is there any question that the District's conduct was adverse to the interests of employees engaged in protected activity, to the interests of the bargaining unit as a whole, and to the present and future exercise of protected rights. The Association presented a spreadsheet prepared by Association President Alan Hartford containing a list of bargaining unit members, their dates of hire, their dates of promotion to battalion chief, and other personnel and payroll data from which to determine their eligibility.[21] On the basis of these data, he estimated the total amount of money each employee would have received, if the proposed longevity benefit had been implemented. According to that estimate, the unit as a whole had lost at least $65,173 as of April 28, 2010, the date of the PERB settlement conference, and $140,106 by the date of the hearing.

Notably, the spreadsheet was offered not as a precise calculation of backpay owed, but simply to establish that employees had suffered some cognizable and measurable injury. Whatever discrepancies might exist with respect to the total amounts lost, Lorrekovich confirmed that the dollar amount of retroactive pay calculated by the Association for one bargaining unit member corresponded to the District's own calculations. Thus, while the District denies liability, it does not dispute that if battalion chiefs were wrongly denied the longevity differential, the resulting impact on unit members' compensation was more than de minimis.

B.2 *Regents (Irvine)* Provides No Persuasive Authority for the District's Position

The ALJ concluded that the Association had not stated a prima facie case of discrimination under *Campbell* in part because it had not shown that the District's refusal to provide the longevity differential had discouraged union membership. The ALJ observed that,

[21] Not all bargaining unit members would have been eligible for the proposed longevity benefit because some, such as Maiero, retired before reaching the 15-year mark.

even if Association members had resigned their membership, because they were exclusively-represented employees, they would still be ineligible to receive the longevity benefit afforded to the District's unrepresented management employees. The ALJ also found this case distinguishable from *San Leandro*, *supra*, 55 Cal.App.3d at p. 553, because, according to the proposed decision, the Association had not shown that the proposed longevity benefit could not be obtained through collective bargaining, or that the District had outright refused to meet and confer with the Association as opposed to engaging in lawful hard bargaining. The ALJ reasoned that, because the District was not opposed to granting parity on other benefits, it had not categorically foreclosed the possibility that the Association might obtain the longevity differential through negotiations as well. In a similar vein, the District argues that no adverse action occurred, because, unlike in *Campbell*, here "the represented employees would not have been eligible for the [longevity benefit] that was given to unrepresented employees even if they [had] resigned from the union because the union still represents the bargaining unit regardless of whether an employee is a member of the union."

The primary source of this reasoning, in both the proposed decision and in the District's brief, is the Board's decision in *Regents of the University of California (Irvine)* (2011) PERB Decision No. 2177-H (*Regents (Irvine)*). We find that even if *Regents (Irvine)* were correct, it would not provide a defense to the District; in any event, we find that *Regents (Irvine)* erred and is hereby overruled.

Regents (Irvine) involved the University of California's Staff Recognition and Development Program.[22] According to the charge allegations, funds from this program had

[22] The case came before the Board on review of a dismissal/refusal to issue a complaint and thus, pursuant to long-standing PERB precedent, the Board made no factual findings but

historically been distributed in various ways and, in the particular year at issue, the University wished to distribute this money as a "reward" to employees for enduring furloughs and surviving layoffs. (*Id*. at p. 3.) However, the University announced that represented employees were not eligible for this award, and then distributed the funds as a one-time $600 bonus to non-represented employees. (*Ibid*.) The charge alleged, in relevant part, that by granting the one-time bonus to represented employees, without offering it to employees represented by the charging party employee organization, the University had unlawfully discriminated on the basis of protected activity. (*Id*. at pp. 3-4.)

The Office of the General Counsel dismissed the charge for failure to state a prima facie case and the Board affirmed, reasoning that "mere resignation of union membership would not make a []represented employee eligible for the [] bonus," because the "program excludes all represented employees, whether or not they are members of the employee organization that represents their bargaining unit." (*Id*. at p. 5.) Alternatively, the Board cited *Dallas Morning News* (1987) 285 NLRB 807 for the proposition that a union is not automatically entitled to a particular benefit, simply because the employer has granted it to other, unrepresented employees. The Board also noted that the charging party had not alleged that it had requested bargaining with the University over distribution of incentive award funds and thus, according to the Board, the charge failed to allege that the one-time bonus granted to unrepresented employees could not have been obtained for represented employees through negotiations.

Accepting the *Regents (Irvine)* holding for the sake of argument, it would not protect the District from a discrimination finding here. There was no evidence one way or the other as to

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treated the charge allegations as true for the purpose of deciding the appeal. (*San Juan Unified School District* (1977) EERB Decision No. 12, p. 5; *Golden Plains Unified School District* (2002) PERB Decision No. 1489, p. 6.)

whether the employer would have agreed that represented employees should be treated the same as unrepresented employees, had the union made such a parity proposal. Thus, *Regents (Irvine)* is fundamentally different from the instant case, in which the Association proposed parity between represented and unrepresented employees and the District adamantly refused on the basis that it wished to have "separation" in which unrepresented employees would be paid more than laterally-situated represented employees.

Moreover, *Regents (Irvine)* erred in several respects. As an initial matter, the Board's decision focused on an issue not raised by the factual allegations in that case. The material allegation in the charge was that the University had provided unrepresented employees with a one-time bonus, after announcing that represented employees were ineligible for the bonus. The charging party in *Regents (Irvine)* did not contend that its unit members were *automatically* entitled to a one-time bonus, but that the University could not lawfully promulgate and maintain a policy of *automatically excluding* represented employees from eligibility for the bonus, when the matter was not covered by an existing agreement. The Board's reliance on *Dallas Morning News* was thus misplaced, as that case held that a union is not *automatically entitled to* a particular benefit simply because the employer has granted it to non-represented employees. *Regents (Irvine)* thus failed to address the theory of liability actually raised by the charge, which was that an employer cannot discriminate against represented employees mainly on the basis of their represented status, nor automatically exclude them from eligibility for a benefit on that basis.

In addition to relying on inapplicable case law, *Regents (Irvine)* also reached the wrong result, as the charging party stated a valid prima facie case by asserting that the University could not lawfully promulgate and maintain a policy of *automatically excluding* represented employees

from eligibility for the bonus. If those facts could have been established, it would not matter whether the charging party requested bargaining over the one-time bonus. In failing to so conclude, *Regents (Irvine)* ignored that where an employer grants a wage increase to its unrepresented employees, but does not offer it to represented employees, "the key issue in determining whether there was discrimination is whether the union employees were foreclosed from the opportunity to receive the wage increase through negotiation." (*Overnite Transp. Co. v. NLRB, supra*, 280 F.3d at p. 431; see also *San Leandro, supra*, 55 Cal.App.3d at p. 558.) In *Regents (Irvine)*, rather than announcing that the one-time bonus would be provided to unrepresented employees and that it was subject to negotiation for represented employees, the University simply declared represented employees ineligible for the bonus. Under the circumstances alleged in the charge, that announcement to employees warranted a complaint alleging interference and/or discrimination, regardless of whether the union requested negotiations.

The *Regents (Irvine)* Board's attempt to distinguish *San Leandro* is unavailing. In *San Leandro*, a public agency advised employees that, by "choosing to be represented by your respective associations, you would not [] be eligible for salary and benefit programs developed for [unrepresented] management personnel." (*San Leandro, supra*, 555 Cal.App.3d at p. 556.) In *Regents (Irvine)*, the University repeatedly announced that "represented employees are not eligible" for an employment benefit granted to unrepresented employees. (*Regents (Irvine), supra*, PERB Decision No. 2177-H p. 3.) An employer who automatically and pre-emptively excludes union-represented employees from an otherwise negotiable benefit granted to unrepresented employees unlawfully discriminates and interferes with protected rights, because its conduct indicates that employees who choose union representation will automatically forfeit

participation or eligibility for the benefit, and/or that the benefit is not subject to negotiation. (*Voca Corp.* (1999) 329 NLRB 591, 594, 597-598; *San Leandro, supra,* 55 Cal.App.3d at pp. 556-558; see also *Handleman Co*. (1987) 283 NLRB 451, 452; *Empire Pacific Industries, Inc.* (1981) 257 NLRB 1425, 1426; *Rangaire Corp.* (1966) 157 NLRB 682, 684.)[23]

Compounding the above errors, the Board in *Regents (Irvine)* failed to consider the full scope of protected activity under our statutes, as evidence by its puzzling focus on whether represented employees stood to gain any benefit by resigning their union membership. An individual employee's choice with respect to union membership is certainly protected activity, but it is not the only employee right guaranteed by our statutes. It is well settled that seeking exclusive representation through recognition or certification, bargaining collectively through a designated representative, and using statutory or other impasse resolution procedures to resolve labor disputes are also protected rights under our statutes. (MMBA, § 3502; *IBEW v. City of Gridley*, *supra*, 34 Cal.3d at pp. 201, 204; *Regents of UC*, *supra*, PERB Decision No. 1188-H, pp. 16, 22; *Campbell*, *supra*, 131 Cal.App.3d at p. 422.) PERB precedents and controlling judicial interpretations of the MMBA alike have held that an employer may violate the anti-discrimination provisions of our statutes by treating represented and non-represented *groups of employees* differently, when the differential treatment is based on that distinction. (*San Leandro, supra*, PERB Decision No. 288; *Santa Monica CCD, supra*, PERB Decision No. 103, p. 20.) Federal cases are in accord. (*Goya Foods* (2008) 352 NLRB 884, adopting recommended

[23] *Regents (Irvine)* also failed to consider why PERB would not treat the employer's alleged pre-emptive determination as akin to an employer's *fait accompli* in a unilateral change case, when no demand to bargain need be made. (*Lost Hills Union Elementary School District* (2004) PERB Decision No. 1652, adopting proposed decision at p. 6; *Arcohe Union School District* (1983) PERB Decision No. 360, p. 10; *San Francisco Community College District* (1979) PERB Decision No. 105.)

decision and order, slip. op. at pp. 4-6; *Ryder Truck Rental, Inc.* (2004) 341 NLRB 761, 772; *Phelps Dodge Mining Co.* (1992) 308 NLRB 985, 995; *Handleman Co., supra*, 283 NLRB 451, 452; *Niagara Wires* (1979) 240 NLRB 1326, 1328; *Dura Corp.* (1965) 156 NLRB 285, 288–289; *Melville Confections, Inc.* (1963) 142 NLRB 1334, 1335.) In none of these cases was it necessary to determine whether any individual employee had resigned his or her union membership or whether any employees stood to benefit by doing so, because these cases did not consider allegations of discrimination *within* a bargaining unit of represented employees, but discrimination *between* two or more groups of employees on the basis of union status or other protected conduct.

Regents (Irvine) thus conflates the question of discrimination between represented and unrepresented groups of employees with whether individual employees *within* an exclusively-represented unit would receive different treatment based on their union membership or non-membership. Like the charging party union in *Regents (Irvine)*, the Association argues not that management discriminated *within* a bargaining unit comprised of union members and non-members, but that it did so *between* a represented unit and other, non-represented employees, by categorically refusing to consider the requested benefit in negotiations. Additionally, by requiring a union to request bargaining over a benefit provided to unrepresented employees but denied to represented employees, *Regents (Irvine)* reduces interference and/or discrimination allegations to whether the union has proved a separate bad-faith bargaining allegation, even where the employer has already announced that the benefit is categorically off limits for represented employees, rather than subject to negotiation.

For all of the foregoing reasons, we overrule *Regents (Irvine)*.

B.3. The Severity of Harm to Protected Rights

Having determined that the District harmed protected rights via its policy of expressly allocating different employment benefits on the basis of unionized status, we further conclude that the harm inflicted may be fairly characterized as inherently destructive of protected rights, as the District's conduct reasonably conveys the message to employees and employee organizations that the process of collective bargaining is futile. (*Los Angeles County Employees Assn. v. County of Los Angeles*, *supra*, 168 Cal.App.3d at p. 690; *Hartnell*, *supra*, PERB Decision No. 2452, pp. 56-57.) As noted previously, the District does not deny that its agents repeatedly made statements distinguishing between represented and unrepresented status as the basis for determining eligibility for employment benefits. Rather, the District argues that its intended meaning was misunderstood. We have rejected, *ante*, the District's alternative explanation. Moreover, as explained in *Santa Clara Valley*, *supra*, PERB Decision No. 2349-M, "there are some practices which are inherently so prejudicial to union interests and so devoid of significant economic justification" that no specific evidence of intent to discourage union membership or other antiunion animus is required. (*Id*. at p. 23, fn. 8, quoting *American Ship Bldg. Co. v. NLRB* (1965) 380 U.S. 300, 311.) Here, by its statements and by granting the longevity differential to all unrepresented managerial employees, without regard to the District's own promotional hierarchy, the District repeatedly confirmed the unlawful distinction at the heart of its stated policy of maintaining "separation" in employment benefits between represented and unrepresented employees.

Under *Campbell*, if an employer's discriminatory conduct is "inherently destructive" of protected rights, no further proof of improper motivation is needed and we may find the employer guilty of an unfair labor practice even if it introduces evidence that its conduct was

motivated by legitimate business considerations. (*Campbell*, *supra*, 131 Cal.App.3d at p. 423.) However, even if we were to find the District's conduct caused only comparatively slight harm to protected rights, we would still find merit to the present charge and complaint, given the combination of direct and circumstantial evidence of discrimination and the pretextual nature of the District's explanations. The District's post-hoc arguments, including its alleged financial concerns and its desire to maintain certain benefits for higher-ranking unrepresented managers so as to preserve promotional incentives, have already been considered and found unpersuasive.

Accordingly, we find the District discriminated against Association-represented employees because of protected activity, in violation of MMBA sections 3506, 3506.5, subdivision (a), and 3509, subdivision (b), and PERB Regulation 32603, subdivision (a).

B.4. Contrary to the Dissent's Suggestion, We Do Not Establish a Presumption in Favor of Parity, nor Do We Discourage Free Exchange of Lawful Ideas During Negotiations

Our dissenting colleague states that today's decision imposes on California public employers a "presumption of parity." We are puzzled by that assertion and other aspects of the dissent that similarly misunderstand our analysis and do not comport with established precedent.

Most importantly, in the instant case the District violated the MMBA not because we have established a presumption in favor of parity, but because the District based a crucial bargaining position on employees' represented or unrepresented status rather than on a legitimate distinction in their duties, skills, qualifications, or other lawful business reasons. This critical truth is doubly apparent when the instant case is read in context with *LA Superior Court*, *supra*, PERB Decision No. 2566-C and *City of Yuba City* (2018) PERB Decision No. 2603-M (*Yuba City*). These three cases, decided in an eight-month timeframe, each involved a claim that an employer had interfered with or discriminated against protected

activity by treating different groups of employees differently, and in each case we considered the employer's explanatory statements, along with all other relevant evidence.

In *LA Superior Court* and *Yuba City*, we found no violation by the respondent employers, whereas in the instant case we find both interference and discrimination violations. In none of the three cases do we describe anything remotely amounting to a presumption in favor of parity between different employee groups. Rather, comparing our analyses in these three cases, one central distinction shows what sort of conduct is likely to be found lawful or unlawful. In *LA Superior Court* and *Yuba City*, the employers prevailed because we found that they based their decisions on legitimate business reasons, unlike the District in the instant case, which explicitly and repeatedly distinguished between groups based on their protected activity and was unable to succeed in its post hoc effort to establish that it had actually relied upon a different, lawful rationale.

Indeed, the practical effect of the dissent's argument would make it nearly impossible to find that an employer has treated groups differently based on represented status and would thereby badly distort the MMBA and binding precedent, including *San Leandro, supra*, 55 Cal.App.3d 553 [City violated MMBA by failing to offer represented employees a deferred management compensation program offered to unrepresented employees]. If the dissent were right that we have insufficient evidence to find a *San Leandro* violation even when the employer's stated criterion for distinguishing between employee groups was their represented or unrepresented status, then, a fortiori, it would be hard to imagine finding a violation in the more common factual scenarios in which there is no such direct evidence of a violation and we consider circumstantial evidence to determine whether an employer's asserted explanation is pretextual.

We also disagree with the dissent's claim that we infringe on a free exchange of ideas by finding that the District was out of bounds in stating—both at the bargaining table and away from it—that it wished to compensate unrepresented employees more highly than represented employees. As an initial matter, we decline to elevate exchange of ideas above the MMBA's proscriptions against interference and discrimination. Indeed, in numerous bargaining cases we have long proscribed a party from a variety of unlawful acts; for instance, a party evidences bad faith if it puts forward a regressive proposal, unless the party can prove changed circumstances or another lawful reason. (*Anaheim Union High School District*, *supra*, PERB Decision No. 2504, pp. 43-44.) Our ruling today similarly disallows the District's conduct because it was based on a rationale that was inherently discriminatory and inherently destructive of protected rights.

Our holding leaves wide latitude for free ranging discussion that is not characterized by discrimination and interference. For instance, the District could have come to negotiations and stated a desire to provide better total compensation to higher level employees as a matter of fairness or to preserve promotional incentives, rather than because of a fundamental viewpoint that unrepresented employees should be compensated at a higher level. Grounding a bargaining position on such a legitimate business reason rather than on a quintessentially discriminatory one would have opened up many topics for the parties to discuss, including comparing duties and qualifications among the various employee classifications, and preserving morale and fairness by distinguishing on the basis of such duties and qualifications rather than based on represented or unrepresented status. The District's rationale actively tended to discourage such discussions by indicating the District's intent to maintain separation in compensation between unrepresented and represented employees. Similarly, the District

could have come to the table and asserted that it had a proposal to offset the fact that represented employees are paid overtime. This would have opened a valuable discussion of the relative monetary worth of different pay schemes and the relative merits and/or fairness of different pay packages. But the District's approach tended to discourage that discussion, too, by stating from the outset an unlawful goal of maintaining a separation in which employee groups receive more compensation if they choose to stay unrepresented. For these reasons, we reject the idea that allowing the District's interference and discrimination would encourage dialogue, and we find the opposite to be true.

The dissent also raises purely speculative issues with the Association's evidence that battalion chiefs are at the same level as fire marshals and training chiefs. We do not join in that view, especially as the employer had ample opportunity to counter the Association's evidence and did not succeed in doing so. Similarly, while the dissent imagines that there could be sufficient differences in classification duties to amount to a legitimate business reason for the District's proposed "separation" in pay, or that the District perhaps did not carry through with its intent to compensate its unrepresented employees more highly (if overtime payments or other factors were sufficient to close the separation the District intended to create), we believe the District should have both asserted such arguments in negotiations and proven them at trial.

REMEDY[24]

The Legislature has vested PERB with broad authority to investigate, adjudicate and remedy unfair practices, including alleged violations of the MMBA and/or of a public agency's local rules, as the Board deems necessary to effectuate the policies and purposes of the Act. (MMBA, § 3509, subds. (a), (b); Gov. Code, § 3541.3; *City of San Jose v. International Assn. of Firefighters, Local 230* (2009) 178 Cal.App.4th 408, 413–414; *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th at p. 1077; *City of Pasadena* (2014) PERB Order No. Ad-406-M, p. 12.) Where it has determined that a public employer has committed unfair practices, PERB has the power and the duty to declare such actions void and to order the employer to cease and desist its unlawful conduct and to take such actions as are necessary both to "undo" its effects and to make injured parties and any affected employees whole. (*City of Palo Alto v. PERB* (2016) 5 Cal.App.5th 1271, 1312, 1315, 1319, review denied (Mar. 15, 2017) (*Palo Alto*); *San Leandro*, *supra*, 55 Cal.App.3d at p. 558; *Campbell*, *supra*, 131 Cal.App.3d at pp. 424-425; *Modesto City Schools*, *supra*, PERB Decision No. 291, pp. 67-68; *Santa Monica CCD*, *supra*, PERB Decision No. 103, pp. 27-29.) Under long-standing PERB precedent, a "properly designed remedial order seeks a restoration of the situation as nearly as possible to that which would have obtained but for the unfair labor

[24] Our dissenting colleague criticizes the standard make-whole remedy ordered in this case by observing that, "If the Association had proven the District met and conferred in bad faith, the remedy would have been an order to bargain in good faith over the differential, not an order granting the differential retroactively." However, bad-faith bargaining was not the allegation before the Board, and neither the District nor our dissenting colleague has offered any authority or policy justification for departing from PERB's long-standing rule that a "properly designed remedial order seeks a restoration of the situation as nearly as possible to that which would have obtained but for the unfair labor practice." (*Modesto City Schools* (1983) PERB Decision No. 291, pp. 67-68; see also *City of San Diego*, *supra*, PERB Decision No. 2464-M, p. 41.)

practice" (*Modesto City Schools, supra,* PERB Decision No. 291, pp. 67-68), and both PERB and judicial authorities have routinely followed this formula in cases involving employer interference with protected rights and discrimination because of protected activity. (*Regents of UC, supra,* PERB Decision No. 1188-H, p. 33; *Santa Monica Community College Dist. v. PERB* (1980) 112 Cal.App.3d 684, 691–692, affirming PERB remedial order in *Santa Monica CCD, supra,* PERB Decision No. 103, at pp. 27-29; *San Leandro, supra,* 55 Cal.App.3d at p. 558; *Campbell, supra,* 131 Cal.App.3d at pp. 424-425.)

In this case, the Association requests that PERB order the District to pay the affected members of the Fire Management Unit the 2.5 percent longevity differential, retroactive to the MOU's March 2007 effective date, plus interest at the annual rate customarily ordered by PERB. The Association also argues that a make-whole remedy requires the District to remit supplemental retirement contributions based on employees' retroactive longevity differential earnings, and that former unit members who have retired while this case was pending before PERB are due corresponding supplemental pension distributions.

The District has raised various concerns regarding any remedy in this case, including that an order involving retroactive retirement benefits would cause the District additional financial stress when it was already running a budget deficit and exhausting its reserves. The District has also argued that, consistent with the Court of Appeal's *San Leandro* decision, the District must retain discretion to eliminate any unfair practices by any lawful means, including eliminating the longevity benefit afforded to unrepresented management employees. (*San Leandro, supra,* 55 Cal.App.3d at p. 558.) Although not specifically identified as separation of powers concerns, the District's closing brief before the ALJ argued that allowing the District to retain such discretion is consistent with the District's constitutional authority to fix compensation for its

employees and/or avoids the constitutional prohibition against granting "extra" compensation or allowances to public employees after services have been rendered. (Cal. Const. art. XI, § 10, subd. (a); *San Joaquin County Employees' Assn., Inc. v. County of San Joaquin* (1974) 39 Cal.App.3d 83, 88.)

In assessing the parties' arguments, we begin by noting that PERB and the courts have previously rejected the contention that a backpay award pursuant to a make-whole remedy constitutes "extra money" or an improper gift within the meaning of the California constitution. (*Los Angeles Unified School District* (2001) PERB Decision No. 1469, p. 3; *Paramount Unified School Dist. v. Teachers Assn. of Paramount* (1994) 26 Cal.App.4th 1371, 1388–1389 [arbitrator's backpay award under collective bargaining agreement authorized by EERA not improper gift of public funds]; see also *Martin v. Santa Clara Unified School Dist.* (2002) 102 Cal.App.4th 241, 253–254 [backpay award under Education Code not improper gift of public funds].) Accordingly, we find it unnecessary to repeat or otherwise address these arguments.

Additionally, the courts have repeatedly affirmed the powers of PERB, and other labor boards operating under similar statutory schemes, to order backpay, front pay, or other forms of compensation necessary to make injured parties and/or affected employees whole for any out-of-pocket expenses suffered as the result of an employer's unfair labor practice. (*Santa Monica Community College District v. PERB*, *supra*, 112 Cal.App.3d at pp. 691–692, affirming PERB remedial order in *Santa Monica CCD, supra*, PERB Decision No. 105, at pp. 27-29; *Mt. San Antonio Community College Dist. v. PERB* (1989) 210 Cal.App.3d 178, 189-190; *Oakland Unified School Dist. v. PERB* (1981) 120 Cal.App.3d 1007, 1015; *Bellflower Unified School District v. PERB* (July 9, 2018) Case No. B287462 [order summarily dismissing writ petition for

review of *Bellflower Unified School District* (2017) PERB Decision No. 2544]; see also *NLRB v. J. H. Rutter-Rex Mfg. Co.* (1969) 396 U.S. 258, 263, 265; *Nish Noroian Farms v. Agricultural Labor Relations Bd.* (1984) 35 Cal.3d 726, 743–745; *Rivcom Corp. v. Agricultural Labor Relations Bd.* (1983) 34 Cal.3d 743, 771–772.) Thus, there is no serious question that retirement contributions and/or retirement benefits are appropriately included in PERB's traditional make-whole remedy, when employees have lost such compensation as a result of unfair practices. (*City of San Diego*, *supra*, PERB Decision No. 2464-M, pp. 41-42, 45-46, affirmed *sub nom. Boling v. PERB* (2018) 5 Cal.5th 898, 920, *reh'g denied (Oct. 10, 2018)*; *County of Sacramento* (2009) PERB Decision No. 2044-M, p. 3, fn. 2; *County of Sacramento* (2009) PERB Decision No. 2045-M, p. 5.)

We also find no merit in the District's implicit argument that its constitutional power to determine wages precludes PERB from ordering backpay to remedy interference and/or discrimination. The MMBA incorporates by reference the Board's broad powers under EERA to effectuate the purposes of the Act. (MMBA, § 3509, subds. (a), (b); Gov. Code, § 3541.3, subds. (i), (n).) By contrast, the MMBA expressly limits PERB's power to award monetary damages only in cases involving an unlawful strike, which is not at issue here. (MMBA, § 3509, subd. (b).) Thus, the principle that the expression of one thing excludes others further confirms that PERB's broad remedial powers include the power to direct public agencies to compensate employees with backpay, or other forms of remuneration necessary to make employees whole or to otherwise effectuate the statute's purposes.

The MMBA's legislative history also confirms this interpretation. In 2001, when the Legislature transferred jurisdiction over most MMBA disputes to PERB, it expressly endorsed, and directed PERB to follow, pre-existing judicial interpretations of the MMBA. (MMBA,

§§ 3509, subd. (b), 3510, subd. (a).) In doing so, the Legislature was certainly aware of extensive and long-standing judicial precedents requiring public agencies to make employees whole with backpay and/or back benefits, wherever necessary to remedy a violation of the MMBA. (*San Joaquin County Employees Assn. v. City of Stockton* (1984) 161 Cal.App.3d 813, 820; see also *San Leandro*, *supra*, 55 Cal.App.3d at p. 558; *Campbell*, *supra*, 131 Cal.App.3d at pp. 424-425.) The Supreme Court has also held that even constitutional powers of public agencies, such as the right to determine employee compensation, must give way to general laws of statewide concern, including the MMBA's unfair practice provisions. (*People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, 600.) The District's argument thus contravenes both the plain language of the MMBA and settled law regarding its scope and purpose.

Nor does the District's argument gain support from *Palo Alto v. PERB*, *supra*, 5 Cal.App.5th at p. 1312, review denied (Mar. 15, 2017). *Palo Alto* was concerned with whether a public agency acted in derogation of its duty to meet and consult under MMBA section 3507 by resolving to place before voters a proposed city charter amendment that would eliminate interest arbitration of bargaining disputes with employee organizations representing certain public safety employees. The *Palo Alto* court criticized the reasoning underlying the remedy in *San Leandro* as improperly intruding on the separation of judicial and legislative powers by directing a public agency to rescind a legislative act containing unlawful discriminatory provisions. According to the *Palo Alto* court, while PERB may declare a legislative act void, it must leave to the public agency's discretion how or whether to take further legislative action to eliminate the effects of its unfair labor practices. (*Palo Alto*, *supra*, 5 Cal.App.5th at p. 1315.)

A future case might require us to determine and resolve any tensions between the traditional remedies for discrimination, as set forth in *San Leandro*, and the *Palo Alto* Court's distinction between voiding an unlawful act and ordering a local agency to take legislative action. However, this case is not the occasion to do so. Even under an expansive reading of *Palo Alto*, there is no separation of powers problem in an order to make affected employees whole from March 2007 until such time as the discrimination and interference ends, because our order does not compel a legislative act, nor even attempt to void a legislative act as *Palo Alto* expressly permits.

Under *Palo Alto*, PERB undoubtedly has authority to void the District's April 15, 2008 resolution granting unrepresented managers the longevity differential that was improperly denied to Association-represented employees. *Campbell* involved roughly analogous circumstances, in that a public agency had granted retroactive salary and insurance premium increases to some employees but denied the same benefits to other, similarly-situated employees because of the latter's participation in protected activity. The *Campbell* court observed that it was "theoretically possible to remedy [the] discrimination by rescinding the additional retroactivity granted to other employees," but rejected this approach as "an obviously impractical, if not impermissible solution" because of the passage of time. (*Campbell*, *supra*, 131 Cal.App.3d at p. 424.) We likewise reject a remedy that would remove the effect of the District's discrimination by effectively punishing employees who are not involved in this litigation. California and federal authorities, including the U.S. Supreme Court, are unanimous that injured parties and affected employees should not be made to bear the consequences of an employer's unfair labor practices. (*Mt. San Antonio Community College District v. PERB*, *supra*, 210 Cal.App.3d at p. 190, citing *NLRB v. J.H. Rutter-Rex Mfg. Co.*, *supra*, 396 U.S. at p. 265; see also *City of Pasadena*, *supra*,

PERB Order No. Ad-406-M, pp. 13-14, 27.) Although the District's unrepresented employees were not adversely affected by its unfair practices, given the passage of time and settled expectations, we see no reason to make them, rather than the District, bear the burden of eliminating the effects of the District's discriminatory conduct.

We therefore follow the Legislature's directive and controlling judicial interpretations of the MMBA in concluding that where a public employer has interfered with and/or discriminated on the basis of protected rights, PERB may properly order awards of backpay and/or retroactive benefits until the interference and/or discrimination have ceased, or such other affirmative relief as may be necessary to effectuate the policies and purposes of the MMBA. (MMBA, §§ 3508, subds. (a), (b), 3510, subd. (a); *Campbell*, supra, 131 Cal.App.3d at pp. 424-425; *San Leandro, supra*, 55 Cal.App.3d at p. 558; see also *Santa Monica Community College District v. PERB*, *supra*, 112 Cal.App.3d at pp. 691–692.)

Santa Monica CCD, *supra*, PERB Decision No. 103 is also instructive. In that case, a school district increased the wages of full-time employees because one employee organization agreed to waive collective negotiation rights on salaries for its full-time faculty members. At the same time, the district declined to increase part-time employees' wages because another employee organization refused to waive such rights on behalf of its members who were part-time faculty. PERB concluded that this conduct constituted discrimination and interference with protected rights and, as an appropriate remedy, ordered the school district to make all part-time employees whole, by paying them the full 8 percent wage increase granted to other employees, plus interest. (*Id*. at p. 29.) Moreover, the *Santa Monica CCD* Board considered and expressly rejected the kind of argument the District makes here. While we ordinarily do not order a backpay remedy in a surface bargaining case, when doing so would amount to dictating the

substantive terms of the parties' agreement without an adequate basis, such circumstances are very different from those raised by an employer's discriminatory denial of benefits, even if the act of discrimination arose in the course the employer's bargaining conduct. (*Id*. at pp. 26-28, and NLRB and federal court decisions cited therein.)

The EERA language at issue in *Santa Monica CCD*, which makes it unlawful for a public school employer to "[i]mpose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of [protected] rights," is, in all material respects, identical to that found in MMBA sections 3506 and 3506.5. The two statutes also contain materially identical provisions recognizing the rights of an exclusive representative to represent employees in their employment relations. (MMBA, § 3503; Gov. Code, 3543.1. subd. (a).) Because the MMBA is part of the same "coherent and harmonious system of public employment relations laws" as EERA (*Coachella Valley Mosquito & Vector Control Dist. v. PERB*, *supra*, 35 Cal.4th at p. 1090), we look to the Board's decision and remedial order in *Santa Monica CCD* for guidance in fashioning an effective remedy in the present case.

As in *Santa Monica CCD*, the District's discriminatory conduct in this case consists of denying an employment benefit to some employees, while granting the same benefit to others, on the basis of protected activity. An effective make-whole remedy in this case therefore includes ordering the District to make Association-represented employees whole until such interference and discrimination cease. Additionally, as in *Santa Monica CCD*, the appropriate measure of backpay and back benefits is not what the employees affected by unlawful discrimination might have obtained through negotiations between their representative and the employer, but the benefit actually granted to other, employees not engaged in protected activity.

Accordingly, in addition to a cease and desist order and our customary notice posting requirement, the District shall be ordered to make affected eligible current and former members of the Fire Management Unit whole by paying to them the same 2.5 percent longevity differential for 15 years of service granted to the District's unrepresented management employees, including supplemental retirement contributions or pension distributions. Such payments shall be retroactive to May 6, 2008, the effective date of Resolution No. 2008/218 granting this benefit to the District's unrepresented managers, and shall be augmented by interest at the rate of 7 percent per annum.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, the Public Employment Relations Board (PERB) finds that the Contra Costa County Fire Protection District (District) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3506, 3506.5, and 3509, subdivision (b), and PERB Regulation 32603, subdivisions (a) and (b) (Cal. Code Regs., tit. 8, § 31001 et seq.), by interfering with the organizational and representational rights of by the United Chief Officers Association (Association) and employees represented by the Association, and by discriminating against employees represented by the Association. Pursuant to the MMBA, Government Code section 3509, subdivision (b), it is hereby ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Imposing or threatening to impose reprisals on employees, discriminating or threatening to discriminate against employees, or otherwise interfering with, restraining, or coercing employees because of the exercise their protected rights, by threatening to make

employees represented by the Association ineligible for certain employment benefits provided to other, unrepresented employees, and by denying employment benefits to employees represented by the Association on the basis of protected activity, while providing such benefits to other, unrepresented employees.

2. Denying the Association the right to represent bargaining unit members in their employment relations with the District, by the conduct described in A.1. above.

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

1. Pay to each eligible current and former member of the District's Fire Management Unit the 2.5 percent longevity differential for completing 15 years of service which was granted to other, unrepresented employees of the District but denied to Fire Management Unit employees on the basis of protected activity. The longevity benefit shall be retroactive to May 6, 2008, the date on which it was granted to unrepresented District employees, and shall affect the compensation of current and former Fire Management Unit members, including the retirement benefits of eligible current and former Association-represented employees, in the same manner and to the same extent as the benefit has been applied to the District's unrepresented employees.

2. The amounts owed to current and former employees as specified in B.1 above shall be compounded by interest computed at 7 percent per annum.

3. Within ten (10) workdays following the date this Decision is no longer subject to appeal, post at all work locations where notices to employees in the District are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. In

accordance with *City of Sacramento* (2013) PERB Decision No. 2351-M, 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 the Association-represented employees of the District's Fire Management Unit. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

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

Member Krantz joined in this Decision.

Member Shiners' dissent begins on page 66.

SHINERS, Member, dissenting: I respectfully but strongly dissent from the majority's conclusion that Respondent Contra Costa County Fire Protection District (District) interfered with employee and employee organization rights, and discriminated against employees for engaging in protected activity, by rejecting a bargaining proposal from the United Chief Officers' Association (Association) for a longevity salary differential identical to that for unrepresented employees of the County of Contra Costa, which the District later provided to its unrepresented management employees. Despite its pronouncements to the contrary, the majority opinion creates automatic parity of benefits between represented and unrepresented employees, or at least a strong presumption of such parity, by cloaking what is essentially a bargaining case in the garb of discrimination and interference. Unlike my colleagues, I am unwilling to impose non-negotiated parity of benefits on every public employer in California. Accordingly, for the following reasons I would affirm the administrative law judge's (ALJ) dismissal of the complaint and unfair practice charge.

1. Interference with Employee and Association Rights

The majority's finding of interference is untenable because it inhibits the free exchange of ideas during collective bargaining, and relies on an anomaly in our decisional law that is ripe for correction. Before turning to those points, however, I address the majority's overbroad and troubling assertion that "an interference allegation may arise from an employer's bargaining conduct."

A. Interference Based on Bargaining Conduct

The majority's sweeping contention that particular bargaining conduct may constitute interference is both unsupported by our decisional law and problematic as a matter of policy. First, the authority the majority cites for this proposition is inapposite. *San Bernardino City*

Unified School District (1998) PERB Decision No. 1270 did not involve statements at the bargaining table. Rather, the statement found to constitute interference was a threat that if the union filed an unfair practice charge, the employer would "take it out on" the union in contract negotiations. (*Id*., adopting proposed decision at pp. 38-41, 72.)

Similarly, *Regents of the University of California* (1997) PERB Decision No. 1188-H did not involve the employer's conduct in negotiations. Rather, the interference occurred during a pre-election period when the employer told employees a scheduled salary increase would not take place if they voted in favor of exclusive representation. (*Id*. at pp. 24-26.) Because no exclusive representative had yet been selected, there was no bargaining conduct at all. The interference therefore could not have arisen from the employer's bargaining conduct.

The other authority cited by the majority is equally unavailing on this point. In *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416 (*Campbell*) and *Los Angeles County Employees Assn. v. County of Los Angeles* (1985) 168 Cal.App.3d 683, each court addressed the limited question of whether the employer had engaged in *discrimination*, not *interference*. Moreover, the discrimination in each case arose out of how the employer implemented the parties' negotiated agreement, not from its conduct during negotiations. Similarly, in *Stanislaus Consolidated Fire Protection District* (2012) PERB Decision No. 2231-M (*Stanislaus*), the alleged interference occurred after the parties had completed meeting and conferring over the District's proposal to eliminate release time provisions in the contract and after the parties had reached agreement on a successor contract. (*Id*. at pp. 8-10.) The alleged interference thus did not arise out of the employer's conduct at the bargaining table.

Not only is the majority's statement that an interference violation may arise from bargaining conduct unsupported by decisional law, it is also contrary to one of the primary

purposes of our governing statutes, viz., open communication between management and employee representatives. This Board has consistently affirmed the importance of the free exchange of positions and ideas at the bargaining table. (E.g., *County of Orange* (2018) PERB Decision No. 2594-M, p. 30; *Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, pp. 33-34.) Applying our interference doctrine to statements made during negotiations, as the majority does, will inhibit management negotiators from candidly communicating their positions at the bargaining table, especially when those positions involve groups of unrepresented employees. We should not be adopting legal rules counterproductive to the Meyers-Milias-Brown Act's (MMBA) express purpose of "promot[ing] full communication between public employers and their employees" (MMBA, § 3500, subd. (a)) by inhibiting—instead of promoting—open and frank discussions during negotiations.

Additionally, the majority opinion allows an employee organization that cannot prove the employer bargained in bad faith to nonetheless obtain a benefit it sought unsuccessfully in bargaining by showing the employer's bargaining position on that benefit constituted interference or discrimination. This case illustrates the problem. The Office of the General Counsel dismissed the allegation in the Association's charge that the District bargained in bad faith during successor contract negotiations. The Association did not appeal the partial dismissal and proceeded to hearing on discrimination and interference theories. Finding the District's bargaining conduct was discriminatory and interfered with employee and organizational rights, the majority now grants the Association the very longevity salary differential it was unable to obtain in bargaining, plus interest.[25] If the Association had proven the District met and conferred

[25] This remedy appears to violate our longstanding policy against imposing contractual terms on parties. (*City of Pasadena* (2014) PERB Order No. Ad-406-M, pp. 13-14; see *H.K.*

in bad faith, the remedy would have been an order to bargain in good faith over the differential, not an order granting the differential retroactively.[26] (*Children of Promise Preparatory Academy* (2018) PERB Decision No. 2558, p. 35; *Stockton Unified School District* (1980) PERB Decision No. 143, pp. 33-34.) The majority has thus guaranteed that future bad faith bargaining charges will be accompanied by discrimination and interference allegations—or perhaps such allegations will supersede bad faith bargaining allegations altogether—in pursuit of benefits the charging party could not obtain in negotiations.

By discussing the problematic nature of the majority's position, I do not suggest an employer's bargaining conduct may never constitute interference or discrimination. After all, an employer may not take a lawful action in a way that violates statutory rights of employees or employee organizations. (*City of Monterey* (2005) PERB Decision No. 1766-M, p. 12.) But we must tread carefully when interference or discrimination allegations are based on conduct at the bargaining table so as not to impede the collective bargaining process that is the hallmark of the

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Porter Co. v. NLRB (1970) 397 U.S. 99, 108 ["allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the [National Labor Relations] Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract"].)

[26] The majority contends its remedial order seeks to restore "the situation as nearly as possible to that which would have obtained but for the unfair labor practice." (*Modesto City Schools* (1983) PERB Decision No. 291, pp. 67-68.) This contention rests on the false premise that Fire Management Unit members were entitled to the longevity differential. But nothing in the record establishes that, had the District not rejected the Association's longevity differential proposal, the parties would have agreed to the exact same differential subsequently granted to the District's unrepresented employees. Thus, the majority's award of that differential to the Association is based on nothing more than speculation. (Cf. *City of Pasadena, supra*, PERB Order No. Ad-406-M, p. 14 ["back pay cannot be awarded in cases involving bad faith bargaining because there is no objective way of determining what the parties would have agreed to, had they bargained in good faith"].)

statutes under our jurisdiction. I next explain how the majority has veered off the narrow path we should walk in such cases.

B. Prima Facie Case

To establish a prima facie case of interference, the charging party need only prove "that the respondent's conduct tends to or does result in harm to employees' rights." (*Stanislaus*, *supra*, PERB Decision No. 2231-M, p. 22.) The majority finds a prima facie case of interference based on statements by two District representatives—one at the bargaining table, and the other in response to a grievance—that the District rejected the Association's proposal for a longevity salary differential because the District desired to maintain "separation" of benefits between represented and unrepresented managers. In finding interference on these facts, the majority elevates form over substance. Both the employees represented by the Association and the unrepresented group of employees who were subsequently granted the longevity differential were management employees within the District. Thus, it appears the parties used "represented" and "unrepresented" as shorthand to distinguish between the two management groups during bargaining. This common practice throughout public sector labor relations must now cease, according to the majority, because using these terms to distinguish between the two groups tends to discourage protected activity. Instead, it appears employers must now use another term for their unrepresented employees, such as "higher management group," when discussing that group during negotiations. Indeed, had the District used such a term instead of "unrepresented" in this case, perhaps the majority would find no violation. If that is the case, then the majority's ruling is based on nothing more than the facial meaning of the word without regard to how it was used by the parties in the context of bargaining, directly contrary to our established precedent for determining whether employer speech interferes with protected rights. (See, e.g., *City of*

Oakland (2014) PERB Decision No. 2387-M, p. 28 [examining context of employer representative's comments at the bargaining table to determine whether they conveyed "a threat of reprisal, force or promise of benefit"]; *Los Angeles Unified School District* (1988) PERB Decision No. 659, p. 9 ["Statements made by an employer are to be viewed in their overall context (i.e., in light of surrounding circumstances) to determine if they have a coercive meaning."].)

But the majority's failure to identify alternative, lawful language the District might have used suggests its ruling is based, not on the District's use of the word "unrepresented," but on the fact that employees who received the longevity differential were unrepresented. If so, this ruling has troubling ramifications. As the majority acknowledges, there is neither a right to parity of benefits nor a presumption of such parity between represented and unrepresented employees. (*City of Yuba City* (2018) PERB Decision No. 2603-M, p. 12; see *Banning Teachers Assn. v. Public Employment Relations Bd*. (1988) 44 Cal.3d 799, 806 [parity clauses are within the scope of representation].) Nor is an employer required to offer represented employees every benefit offered to unrepresented employees. (*State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2085-S, p. 8.) Thus, in the absence of actual or presumed parity, an employer's explanation that it rejected a bargaining proposal because it believes the particular benefit is one only unrepresented employees should have does not, without more, tend to discourage protected activity. Accordingly, I would find the District's use of the words "represented" and "unrepresented" to distinguish between two groups of management employees with regard to certain benefits did not tend to harm protected rights.

In finding a prima facie case of interference on these facts, the majority has created a parity requirement, or at least a presumption of parity, between represented and unrepresented

employees' terms and conditions of employment. In doing so, the majority has removed the subject of parity from the scope of representation and effectively inserted a parity clause in every public sector collective bargaining agreement in the state. Because this is contrary to the principles underlying the MMBA, as well as the other statutes under our jurisdiction, I cannot join the majority's finding of interference.

C. Severity of Harm to Protected Rights

Once a prima facie case of interference is established, "the burden shifts to the employer to articulate a legitimate justification for its conduct." (*County of San Bernardino (Office of the Public Defender)* (2015) PERB Decision No. 2423-M, p. 36.) Under our current decisional law, the level of scrutiny to be applied to the employer's justification depends upon the severity of the harm to protected rights. (*Ibid*.) When the harm is slight, the employer's interest will be balanced against the employees' rights. "Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available." (*Stanislaus*, *supra*, PERB Decision No. 2231-M, pp. 22-23; *Carlsbad Unified School District* (1979) PERB Decision No. 89, pp. 10-11 (*Carlsbad*).)

The majority finds the District's explanation for rejecting the Association's longevity differential proposal inherently destructive of protected rights because it indicated the differential could not be obtained by Fire Management Unit employees due to their represented status.[27] I would not reach this issue in my interference analysis because the concept of

[27] The majority hedges on this point by finding the District's justifications would not even survive the lower level of scrutiny applied to employer conduct that causes slight harm to employee rights. If this is so, there is no need for the majority to characterize the District's conduct as inherently destructive. (See, e.g., *Regents of the University of California (Irvine)*

inherently destructive conduct has no place in our interference standard. The purpose of the inherently destructive conduct test is to establish the employer's unlawful motive from the nature of the conduct itself. (See *NLRB v. Great Dane Trailers, Inc.* (1967) 388 U.S. 26, 33 (*Great Dane*) [conduct inherently destructive of employee rights carries its own "indicia of intent" because it includes "unavoidable consequences which the employer not only foresaw but which he must have intended" and therefore no specific proof of unlawful motivation is required]; *Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M, p. 23, fn. 8 [quoting additional U.S. Supreme Court precedent similarly describing inherently destructive conduct].)[28] But, as we have long held, the employer's motive is irrelevant in determining whether its conduct interfered with protected rights.[29] (*City & County of San Francisco* (2017)

(2018) PERB Decision No. 2593-M, p. 8, fn. 6 [declining to decide the level of harm because the employer's justifications did not survive the lower level of scrutiny for slight harm].)

[28] The unfair labor practice in *Great Dane*, *supra*, 388 U.S. 26, was grounded in Section 8(a)(3) of the National Labor Relations Act (NLRA), which prohibits private sector employers from discriminating in any term or condition of employment to encourage or discourage membership in any labor organization. The Court thus rightly considered the employer's motive in finding it engaged in unlawful discrimination.

[29] Perpetuating an improper conflation of interference and discrimination standards in our recent decisional law, the majority states that once a prima facie case is established, the employer's reason for its conduct is evaluated "using principles applicable in a 'mixed motive' discrimination case." From its citation of *Community Learning Center Schools, Inc.* (2017) PERB Order No. Ad-448, and *Regents of the University of California* (1984) PERB Decision No. 470-H, in support of this proposition, it appears the majority is saying that we examine the employer's proffered reason to determine if it is pretextual. But *Regents of the University of California*, *supra*, PERB Decision No. 470-H does not support injecting a motive inquiry into our interference analysis. There, the Board adopted, without further review, an ALJ's conclusion that the employer's "valid [or legitimate] business reasons for its actions" outweighed the slight harm done to employee rights. While balancing the parties' competing interests, the ALJ opined that there was no evidence the employer's reasons were pretextual and, while a union may not agree with the employer's reasons, that fact alone, absent such evidence, will not render them any less legitimate. (*Id.*, adopting proposed decision at pp. 49-50.) In addition to being unsupported by the ALJ's unexamined, off-hand comment in *Regents*

PERB Decision No. 2536-M, p. 28; *Moreland Elementary School District* (1982) PERB Decision No. 227, p. 16; *Carlsbad, supra,* PERB Decision No. 89, at pp. 7-8.) Because proving the employer's motive is not necessary in an interference case, there is no need for inherently destructive conduct to serve as a proxy for unlawful motive in such cases.

Furthermore, when an employer's conduct is found to be inherently destructive of protected rights, the only way the employer can successfully defend against an interference claim is to show the conduct "was occasioned by circumstances beyond the employer's control and that no alternative course of action was available." (*Stanislaus, supra*, PERB Decision No. 2231-M, pp. 22-23; *Carlsbad, supra*, PERB Decision No. 89, pp. 10-11.) Because the employer's motive is irrelevant in interference analysis, the inherently destructive conduct element serves no purpose under our *Carlsbad* interference analysis other than to limit an employer's ability to mount a successful defense to an interference allegation. As an example, this anomaly has allowed PERB to strike down workplace rules as inherently destructive in situations where the National Labor Relations Board (NLRB) would not even apply the inherently destructive test but would instead balance the harm to employee rights against the employer's justification for the rule. (Compare *Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, pp. 50-51 [finding

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of the University of California, supra, PERB Decision No. 470-H—which no decision prior to *Community Learning Center Schools, Inc., supra,* PERB Order No. Ad-448, had followed on this point—importing motive principles into our interference standard is unnecessary because *Carlsbad* already requires the employer to establish the reason for its conduct was "legitimate" under the circumstances. When the employer fails to do so, its reason is outweighed by even slight harm to employee rights. (See, e.g., *County of San Bernardino* (2018) PERB Decision No. 2556-M, pp. 22-23 [because employer engaged in surveillance based on an unlawful union access policy, its conduct did not outweigh the slight harm to employee rights from taking a single photograph of union organizers].) Thus, I cannot join my colleagues in further obscuring the distinction between our interference and discrimination standards.

a rule prohibiting distribution of "political or union" materials inherently destructive], with *The Boeing Co.* (2017) 365 NLRB No. 154, p. 26, fn. 13 (Pearce, Member, dissenting in part) [noting the NLRB does not apply the *Great Dane* inherently destructive framework when determining whether a work rule interferes with employee rights].)

While the *Carlsbad* test was an attempt to synthesize existing rules under separate interference and discrimination provisions of the NLRA (*Carlsbad*, *supra*, PERB Decision No. 89, at pp. 9-11), the fact that our statutes prohibit interference and discrimination in the same provision does not compel us to include an anomalous motive element in our test for interference.[30] Indeed, in clarifying the *Carlsbad* standard in *Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*), this Board stated:

> Unlike Wright Line [(1980) 251 NLRB 1083 (*Wright Line*)] and the instant case, in interference cases where motive/intent is not an issue, the charging party need only make a prima facie showing that the respondent's conduct tends to or does result in harm to employee rights granted under EERA. The respondent then has the burden of producing an operational necessity justification. The Board will then balance the competing interests of the parties and resolve the charge accordingly.

(*Id*. at p. 5, fn. 7, emphasis in original.) Consistent with both *Novato* and federal law, I would remove the inherently destructive conduct element from the *Carlsbad* interference test, thereby eliminating any consideration of employer motivation, and instead balance the harm to protected rights against the employer's asserted justification for its conduct.[31]

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[30] Notably, in interpreting the interference prohibition in MMBA section 3506, the courts have not adopted the inherently destructive conduct concept but instead have simply balanced the harm to protected rights against the employer's justification for its conduct. (*Public Employees Assn. v. Board of Supervisors* (1985) 167 Cal.App.3d 797, 807.)

[31] The majority asserts it is improper to follow federal authority on this point because, unlike the NLRA, the statutes under PERB's jurisdiction explicitly provide representational rights to employee organizations. Although this is true, neither the statutory provisions

Applying the proper balancing test, I would find the District's rejection of the Association's longevity differential proposal did not tend to harm protected rights but, if it did, the harm was slight and outweighed by the District's need to maintain the ability to distinguish between groups of employees with respect to terms and conditions of employment. Consequently, I would affirm the ALJ's dismissal of the interference allegation.

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prohibiting interference with employee organization rights—nor any other provisions of these statutes—show a legislative intent to adopt a different substantive interference standard than that which existed under the NLRA at the time our statutes were enacted, and which the NLRB continues to apply today. (See *Nishikawa Farms, Inc. v. Mahony* (1977) 66 Cal.App.3d 781, 786-788 [noting that in enacting a statute modeled on a federal statute the Legislature is presumed to be aware of existing interpretations of the federal law and to have intended the same meaning, and finding a certification order under California's Agricultural Labor Relations Act (ALRA) is appealable under the same circumstances such an order is appealable under the NLRA, upon which the ALRA was modeled]; see also *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 616-617 [looking to NLRA for guidance in interpreting "parallel language" in the MMBA]; *PERB v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 895-896 [looking to NLRA for guidance in interpreting parallel language in EERA].) Moreover, as explained above, federal interference law is consistent with the *Carlsbad* standard as clarified in *Novato*.

As for the majority's claim that following federal law here would overrule decades of PERB precedent, I note this Board has not hesitated to put our decisional law back on track when it feels prior decisions have departed from precedent. (See, e.g., *County of Santa Clara* (2013) PERB Decision No. 2321-M, pp. 27-30 [overruling decisions that required an employee organization to demand effects bargaining as a precondition to filing an unfair practice charge alleging the employer refused or failed to bargain over effects of a non-negotiable decision]; *County of Sacramento* (2013) PERB Decision No. 2315-M, pp. 6-9 [disavowing decisions that required an employee organization to identify specific effects of the employer's non-negotiable decision over which it desires to bargain].) And I am aware of no point in time when it becomes impossible for the Board to correct an error in its decisional law. (See, e.g., *Oroville Union High School District* (2019) PERB Decision No. 2627, pp. 14-18 [rejecting *Burbank Unified School District* (1978) PERB Decision No. 67]; *Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M, p. 33 [overruling *Compton Unified School District* (1987) PERB Order No. IR-50]; *Sweetwater Union High School District* (2014) PERB Order No. IR-58, pp. 15-16 [disavowing *South Bay Union School District* (1990) PERB Decision No. 815]; *County of Santa Clara*, *supra*, PERB Decision No. 2321-M, p. 30 [overruling, among other decisions, *Sylvan Union Elementary School District* (1992) PERB Decision No. 919].) Because the decisions relied on by the majority have departed from *Carlsbad*, as clarified by *Novato*, I would disavow their use of the inherently destructive element and reinstate the proper interference standard.

2. Discrimination Against Association-Represented Employees

I also disagree with the majority's conclusion that the District discriminated against Fire Management Unit employees when it rejected the Association's proposal for the same longevity differential as unrepresented managers. I do not find this differential treatment inherently discriminatory nor do I find evidence of unlawful motive on the part of the District. Accordingly, I would not find discrimination under any theory.

A. Prima Facie Case under *Campbell*

Under *Campbell*, a prima facie case of discrimination is established by "conduct that is facially or inherently discriminatory, such that the employer's unlawful motive can be inferred without specific evidence." (*Los Angeles County Superior Court* (2018) PERB Decision No. 2566-C, p. 14.) "Common examples of facially or inherently discriminatory conduct include: (1) providing different pay, benefits, or other working conditions based explicitly on union membership or other protected activity; and (2) changing policies in response to protected activity, where the operative comparison is not between two different groups of employees, but between an employer's policies before and after the exercise of protected rights." (*City of Yuba City*, *supra*, PERB Decision No. 2603-M, pp. 10-11.)[32]

[32] I express no opinion whether I agree entirely with the formulation or examples of inherently discriminatory conduct in *Los Angeles County Superior Court*, *supra*, PERB Decision No. 2566-C, and *City of Yuba City*, *supra*, PERB Decision No. 2603-M, but quote them here as extant Board law. I note, however, that—as this case illustrates—those decisions may easily be used to find a prima facie case of discrimination whenever two groups of employees are treated differently.

The majority does not find a prima facie case based on sequential discrimination, i.e., an employer action taken in response to protected activity.[33] Rather, the majority finds discrimination because the District rejected the Association's proposal for the longevity differential and then granted the same benefit to its unrepresented employees. It is undisputed the District treated Association-represented employees differently than unrepresented employees when it granted the longevity differential to unrepresented employees via District Resolution No. 2008/218. But, unlike the majority, I would not find this demonstrates a prima facie case of discrimination under *Campbell*.

First, differential treatment of represented and unrepresented employees is not per se discriminatory. As we noted in *Los Angeles County Superior Court*, *supra*, PERB Decision No. 2556-C "[i]t cannot be assumed that an employer that treats represented employees better than unrepresented employees does so to punish unrepresented employees and encourage them to organize." (*Id*. at p. 16.) Unlike my colleagues, I would not assume the opposite, viz., that an employer who treats unrepresented employees better than represented employees necessarily does so to punish the represented employees, thereby discouraging them from engaging in protected activity and encouraging unwanted litigation. Indeed, as the NLRB has long held with regard to an issue similar to the one before us:

> *Absent an unlawful motive*, an employer is privileged to give wage increases to his unorganized employees, at a time when his other employees are seeking to bargain collectively through a statutory representative. Likewise, an employer is under no obligation under the Act to make such wage increases applicable to union members, in the face of collective bargaining negotiations on their behalf involving much higher stakes.

[33] Indeed, nothing in the record indicates the District's rejection of the Association's longevity differential proposal was a response to the battalion chiefs' selection of the Association as their exclusive representative nine years before.

(*Shell Oil Co.* (1948) 77 NLRB 1306, 1310, emphasis added.) As the italicized language indicates, where an employer has provided a benefit to unrepresented employees but not to represented employees, unlawful intent may not be inferred from that conduct alone. Instead, the charging party must prove by additional evidence that the employer withheld the benefit from represented employees because of their protected activity. (*Arc Bridges, Inc. v. NLRB* (D.C. Cir. 2017) 861 F.3d 193, 196-197.) Consequently, the analytical framework set forth in *Novato, supra*, PERB Decision No. 210, is the proper standard to apply in this case. (*Los Angeles County Superior Court*, *supra*, PERB Decision No. 2566-C, p. 17; see *Arc Bridges*, *supra*, 861 F.3d at p. 196 [applying the framework from *Wright Line*, upon which the *Novato* framework is based, to determine whether an employer's granting of a wage increase to unrepresented employees during negotiations with represented employees constituted discrimination].)

But even under the *Campbell* standard, I would not find the District's conduct inherently discriminatory because employees in the Fire Management Unit were not similarly situated to the unrepresented managers who received the longevity salary differential. It is undisputed the fire chief and assistant fire chief are higher-ranking classifications and thus not similarly situated to the battalion chiefs in the Fire Management Unit. The majority's finding of discrimination therefore relies on a conclusion that the unrepresented fire marshal and fire training chief, who also received the longevity differential as a result of Resolution No. 2008/218, are similarly situated to the battalion chiefs. This finding rests solely on the testimony of Association witness Steve Maiero (Maiero) that the District views the fire marshal and training chief as "lateral peers of the battalion chiefs." But Maiero is not a District manager and, thus, cannot authoritatively speak to the District's view or treatment of the fire marshal and fire training chief positions vis-à-vis the battalion chiefs. I thus give little weight to Maiero's testimony, and, in turn, to the

majority's finding arising solely from his testimony that the fire marshal and training chief are at the same level in the District's management hierarchy as the battalion chiefs.[34]

But even if Maiero's testimony on this point is credited, it does not show the two groups of employees are similarly situated. *Los Angeles County Superior Court*, *supra*, PERB Decision No. 2566-C, is instructive. There, the Board found no prima facie case of discrimination under *Campbell* because the employer distinguished between represented and unrepresented employees based on factors unrelated to their representational status. (*Id*. at p. 15.) Specifically, we concluded the unrepresented employees who were laid off were not similarly situated to the represented employees who were retained because the represented employees had skills and experience the unrepresented employees did not possess. (*Id*. at pp. 15-16.)

Similarly here, the unrepresented fire marshal and training chief are not similarly situated to the represented battalion chiefs. Assuming they hold the same rank and therefore receive the same salary as battalion chiefs, their duties and benefits are significantly different. Specifically, neither the fire marshal nor the training chief is qualified to serve as a shift battalion chief. They consequently cannot direct fire suppression activities in the field. Nor did the Association present any evidence that battalion chiefs can perform the duties of the fire marshal or training

[34] The majority accepts at face value Maiero's testimony that the fire marshal and fire training chief were at the "same level" as the battalion chiefs without addressing his testimony, discussed below, that the unrepresented positions had different duties and compensation than the battalion chiefs. The majority also puzzlingly faults the District for not presenting evidence of differences between the battalion chiefs and the two unrepresented positions. A party claiming discrimination based on being treated less favorably than similarly situated employees bears the burden of proving the comparator employees are, in fact, similarly situated. (*Campbell v. Hawaii Dept. of Education* (9th Cir. 2018) 892 F.3d 1005, 1015; *McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1535-1536; *Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 172-173.) The Association failed to meet that burden here. The District's failure to present evidence of differences between the two groups therefore is irrelevant.

chief positions. Moreover, the fire marshal and training chief are not eligible for overtime compensation,[35] which renders them more like the other unrepresented managers than the battalion chiefs. Conversely, battalion chiefs, who are eligible for overtime compensation, continue to receive such compensation and other specialty pays when they work out of class, including in the training chief classification.[36] Because of these significant differences in working conditions—which are not based on managers' representational status—the District's differential treatment of the two groups of managers was not facially or inherently discriminatory.[37]

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[35] Notably, these positions are not eligible for overtime because the fire chief excluded them from overtime opportunities at the Association's request. The Association's role in creating the disparity in working conditions between the two groups weighs against its claim that the groups are similarly situated.

[36] These are not "speculative issues" or the product of imagination, as the majority claims. They are facts established by the Association's evidence and witnesses, and reasonable inferences drawn therefrom.

[37] The majority asserts that finding no facially or inherently discriminatory treatment on these facts would preclude PERB from ever finding discrimination under *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553 (*San Leandro*). This is not so because *San Leandro* is distinguishable. There, certain management employees of the city's police and fire departments elected to be represented by the police and firefighters unions, respectively. (*Id*. at p. 556.) The city then adopted a civil service rule granting a deferred compensation benefit to all unrepresented management employees. (*Ibid*.) In response to protests by the unions, the city manager explicitly said in a letter to each management employee denied the benefit that the denial was a direct consequence of their choice to be represented. (*Ibid*.) Contrary to my colleagues, I do not find such an explicit statement of discriminatory intent here. Moreover, the San Leandro city council adopted its civil service rule shortly after the management employees at issue chose to become represented. Here, the District granted the longevity differential to unrepresented management employees *nine years after* the battalion chiefs became represented by the Association. Because this case has neither the explicit language nor the close temporal proximity present in *San Leandro*, that case is not controlling here.

B. Severity of Harm to Protected Rights under *Campbell*

The majority finds the District's conduct inherently destructive of protected rights because its statements about the longevity differential during and after negotiations conveyed to represented employees that bargaining over the differential was futile. I disagree for two reasons.

First, the evidence before us does not support the majority's finding that the District categorically refused to consider granting the longevity differential to the Fire Management Unit. The majority relies primarily on statements attributed to the District's chief negotiator, Glenn Berkheimer (Berkheimer), at the September 24, 2007 bargaining session by the Association's note taker, Steve Maiero. From memory, Maiero testified that Berkheimer said the District was rejecting the longevity differential proposal because "it was the desire of the County and the District to create some separation between represented managers and unrepresented managers." Maiero then read from his notes—which he admitted were not verbatim—that Berkheimer said, "The County is not looking at making benefits available to represented managers that may be given to unrepresented managers." District bargaining team member Jackie Lorrekovitch's (Lorrekovitch) notes from this same session indicated discussion of higher benefits for unrepresented managers but provided no detail of the discussion, nor could she testify as to any. Maiero also testified that at the October 18, 2007 bargaining session, "[t]here was some additional discussion from Glenn reaffirming the rationale of separation of the represented and unrepresented managers." Berkheimer testified he was unable to recall specific statements he made about the longevity differential but conceded he may have made the statements attributed to him by Maiero.

I find this evidence a very slim reed upon which to rest the majority's conclusion that the District absolutely refused to consider the Association's longevity differential proposal. The evidence consists partly of Maiero's testimony four years after the bargaining sessions took place. The chances that he was relaying Berkheimer's statements verbatim are slight, and his choice of words may have been based on his perception of what Berkheimer said, not what actually was said. Similarly, Maiero admitted his notes were not verbatim and thus he may have written down words that conveyed his impression of what Berkheimer said rather than what he actually said. In my view, to prove an employer's statements at the bargaining table constituted inherently destructive conduct, the record must clearly establish what those statements were. Here, the record is simply too equivocal about Berkheimer's statements for me to find the District absolutely refused to consider the Association's longevity differential proposal.

Nor did the District's resolution granting unrepresented employees the longevity differential nor the District's response to the Association's grievance over not receiving the differential indicate the differential would never be obtainable by the Association through negotiations. The District's decision not to agree to the proposal at that time did not indicate it would not consider it in the future.[38]

Second, even viewing the evidence as the majority does, I would not find the District's statements inherently destructive of protected rights. PERB has not articulated a test for

[38] The Association asserts that "[w]hen an employer differentiates between its unionized and nonunionized employees, it is the employer's burden to, by word or conduct, assure that the benefit is still negotiable with its unions." But the cases cited in support of this assertion find violations in statements that "purport[] to exclude the possibility of bargaining over continuation of an existing condition of employment." (*The Rangaire Corporation* (1966) 157 NLRB 682, 684; *Handleman Co.* (1987) 283 NLRB 451, 452 [no violation where benefit could be continued through collective bargaining agreement].) Here, the longevity differential was not an existing condition of employment for Fire Management Unit employees and thus the cases cited by the Association are inapposite.

determining when employer conduct is inherently destructive.[39] The NLRB, however, has provided some guidelines. In *International Paper Co.* (1995) 319 NLRB 1253 (*International Paper*), the NLRB recognized the following four criteria relevant to the determination of inherently destructive conduct:

> 1. The severity of harm to the particular employees and on the statutory right being exercised;
>
> 2. The temporal nature of the conduct in question;
>
> 3. Whether the employer's conduct demonstrated hostility to the process of collective bargaining as opposed to a simple intention to support its bargaining position; and
>
> 4. Whether employer conduct 'discourage[d] collective bargaining in the sense of making it seem a futile exercise in the eyes of employees.'

(*Id*. at pp. 1269-1270.)[40] The unifying theme of all four criteria is whether the employer's conduct "merely influences the outcome of a particular dispute" (*International Broth.*

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[39] The majority does not attempt to fashion such a test, instead continuing this Board's ad hoc determinations of what constitutes inherently destructive conduct in particular cases. That practice works well enough when the employer's conduct is so egregious it leaves little doubt as to its destructive impact on employee rights. (See, e.g., *Regents of the University of California (Berkeley)* (2018) PERB Decision No. 2610-H [laying off employees and contracting their work to a private entity after union filed a grievance]; *Santa Monica Community College District* (1979) PERB Decision No. 103 [denying salary increase after union refused to waive its right to negotiate over salary].) But it provides little guidance to parties in other cases, such as this one, where the employer's conduct is not clearly destructive. Although it is a difficult task, we owe it to California's public employers, employee organizations, and employees to attempt to fashion a workable test for inherently destructive conduct.

[40] Despite the NLRB's attempts to articulate a workable standard for determining inherently destructive conduct, commentators have continued to criticize the standard as giving too much leeway to Board member preferences. (See, e.g., Secunda, *Politics Not As Usual: Inherently Destructive Conduct, Institutional Collegiality, and the National Labor Relations Board* (2004) 32 Fl. St. U. L.Rev. 51, 77 (*Secunda*) ["The inherently-destructive-conduct standard would appear, even under *International Paper*'s guiding principles, to give unguided

Boilermakers Local, 88 v. NLRB (D.C. Cir. 1988) 858 F.2d 756, 763) or has "far reaching effects which would hinder future bargaining" (*Portland Willamette Co. v. NLRB* (9th Cir. 1976) 534 F.2d 1331, 1334.)

Unlike my colleagues, I find nothing in the statements made by or attributed to the District showing that its position of maintaining certain benefits for unrepresented managers during the negotiations at issue would hinder future bargaining. Indeed, during the negotiations at issue the District ultimately agreed to modified versions of the Association's proposals on deferred compensation and career development—two of the Association's self-identified parity items—to bring those items closer to what unrepresented managers were receiving. Thus, the District's philosophy on parity was not monolithic or intractable. Additionally, the District also proposed to the Association certain items, such as enhanced overtime compensation, that were not available to unrepresented managers. The record therefore does not indicate it would be futile for the Association to bargain for parity in the future, either via direct proposals on certain items or through proposals for other compensation or benefits in lieu of those granted to unrepresented managers.[41] I thus would find that, to the extent the District's statements as to

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discretion to Board Members to determine whether discriminatory intent should be inferred from employer conduct."]; Fick, *Inherently Discriminatory Conduct Revisited: Do We Know It When We See It?* (1991) 8 Hofstra Lab. L.J. 275, 276-277 ["One is often left with the feeling that attempts to define inherently discriminatory conduct, like attempts to define obscenity, may never be completely successful, but that experienced labor lawyers know it when they see it."].)

[41] This is similar to *Regents of the University of California (Irvine)* (2011) PERB Decision No. 2177-H (*Regents (Irvine)*), in which the employer was alleged to have discriminated against represented employees by giving a bonus to unrepresented employees. The Board found no discrimination in part because the charging party union did not ask to negotiate over a comparable bonus for represented employees and thus there was no evidence the bonus could not be obtained through negotiations. (*Id.* at p. 6.) The majority nonetheless overrules *Regents (Irvine)*, claiming it is inconsistent with discrimination precedent because it

why it was rejecting the Association's longevity differential proposal caused any harm to employee rights, that harm was limited to the negotiations at issue and therefore slight.[42] I also would agree with the ALJ that such slight harm was outweighed by the District's interest in being able to propose and agree to acceptable and appropriate compensation packages for different groups of employees.

Finally, I note the importance of crafting an objective and workable standard for defining inherently destructive conduct. When an employer's conduct is found to be inherently destructive of protected rights, the only way the employer can successfully defend against a discrimination claim is to show the conduct "was occasioned by circumstances beyond the employer's control and that no alternative course of action was available." (*Carlsbad*, *supra*, PERB Decision No. 89, pp. 10-11.) A finding of inherently destructive conduct thus allows PERB to ignore any legitimate operational justification for the employer's conduct that does not arise from circumstances outside its control. (*Campbell*, *supra*, 131 Cal.App.3d at p. 423.) This, in turn, poses the danger that PERB may use a finding of inherently destructive conduct to limit employer defenses in order to produce a preferred outcome. (Secunda, *supra*, 32 Fl. St. U.

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requires the charging party to establish a bargaining violation to prove interference. It does nothing of the kind. The majority reads too much into the Board's reliance on the absence of a bargaining demand, which was just one piece of evidence the Board said could have shown the employer had taken the position that the bonus could not be obtained through bargaining. Moreover, that *Regents (Irvine)* relied in part on a prior Board decision addressing differential treatment between union members and non-members in the same bargaining unit does not render the entire decision incorrect. Instead of attempting to square *Regents (Irvine)* with subsequent decisions that further clarify the *Campbell* discrimination standard, which is certainly possible, the majority has thrown the baby out with the bathwater because it does not like the result the Board reached.

[42] See *Viejas Casino & Resort* (2018) 366 NLRB No. 113, pp. 8-9 [providing lower bonus to represented employees than that granted to unrepresented employees was not inherently destructive because the lower bonus was offset by a wage increase double that received by unrepresented employees].)

L.Rev. at p. 104; see *Regents of the University of California (Berkeley), supra*, PERB Decision No. 2610-H, p. 58 [recognizing that "the level of scrutiny used to evaluate the employer's affirmative defense . . . may even determine the outcome of the case"].) To lessen this possibility, and to provide guidance to PERB's staff and constituents, I urge my colleagues and future Board members to establish objective criteria to structure and guide the Board's discretion in determining whether employer conduct is inherently destructive.[43] Unfortunately, the majority today avoids that difficult task and instead perpetuates this Board's ad hoc approach to deciding the issue.

C. Evidence of Discriminatory Motive under *Novato*

When the employer's conduct is not inherently discriminatory, we apply the test for discriminatory motivation set forth in *Novato*. (*Los Angeles County Superior Court, supra*, PERB Decision No. 2566-C, p. 17.) Under *Novato*, the charging party must prove that: (1) the employees exercised rights under the applicable statute; (2) the employer had knowledge of the employees' exercise of those rights; (3) the employer took adverse action against the employees; and (4) the employer took the adverse action because of the employees' exercise of those rights. (*Novato, supra*, PERB Decision No. 210 at pp. 6-7.)

Once the charging party establishes a prima facie case of discrimination, the burden shifts to the employer to prove it would have taken the same adverse action even if the employees had not engaged in protected activity. (*Novato, supra*, PERB Decision No. 210, p. 14; *Martori Brothers Distributors v. ALRB* (1981) 29 Cal.3d 721, 729-730; *Wright Line, supra*, 251 NLRB at

[43] Over the years, the NLRB has developed a set of presumptions that apply in specific recurring scenarios to structure and confine Board members' discretion. (Secunda, *supra*, 32 Fl. St. U. L.Rev. at pp. 99-100.) As a result, the NLRB has achieved significant consistency in its rulings in inherently destructive conduct cases, particularly those involving strikes and lockouts. (*Id*. at p. 102.)

p. 1089.) To prevail, the employer must show it had an alternative non-discriminatory reason for taking the adverse action and it acted because of this alternative non-discriminatory reason, not because of the employees' protected activity. (*Palo Verde Unified School District* (2013) PERB Decision No. 2337, pp. 12-13.)[44]

The majority finds a prima facie case of discrimination on the basis that the District rejected the Association's longevity differential proposal because of the represented status of Fire Management Unit employees. The majority then finds the District's asserted reason for rejecting the proposal, i.e., the desire to maintain a promotional hierarchy between represented and unrepresented managers, was a pretext for discrimination.[45]

As discussed above, the record before us does not support finding the District rejected the Association's proposal because employees in the bargaining unit had exercised their right to be represented by the Association. But even if the differential treatment of the two groups of management employees is sufficient to establish a prima facie case, the District proved it had a non-discriminatory reason for rejecting the proposal and that it acted because of that reason.

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[44] Because it has been developed in cases alleging discriminatory or retaliatory conduct against an individual employee, the *Novato* framework is not a perfect fit for group discrimination cases. Nonetheless, the ultimate goal of the *Novato* test is to determine whether the employer acted for a discriminatory reason. (*Regents of the University of California* (2012) PERB Decision No. 2302-H, p. 3.) Consequently, *Novato*'s balancing of evidence of the employer's unlawful motivation against evidence supporting its non-discriminatory reason(s) for the action provides a general framework for determining whether a group of employees was subject to discrimination because of their protected activity. (See, e.g., *A.S.V., Inc.* (2018) 366 NLRB No. 162, p. 1, fn. 4 [applying *Wright Line* framework to allegation that mass employee layoff was unlawfully motivated by protected activity].)

[45] I agree with the majority that during bargaining the District never asserted financial justifications as a reason for rejecting the longevity differential proposal, and therefore they do not appear to have been a motivating factor in the rejection.

The District rejected the Association's longevity differential proposal because it wished to maintain "separation" between represented and unrepresented managers with respect to certain benefits. When asked by the Association for a specific reason why the proposal was rejected, Berkheimer responded the District had a hierarchy with unrepresented managers at the top, represented managers and supervisors below them, and rank and file employees below them. As the majority notes, Berkheimer may not have explained at the bargaining table that the purpose of maintaining this hierarchy of benefits was to provide promotional incentives for lower-level represented managers like the battalion chiefs. But Berkheimer's use of the word "separation" and explanation of a hierarchy at the bargaining table, along with Lorrekovitch's notation of a bargaining discussion of higher benefits for unrepresented managers, indicate this was in fact the basis for the District's rejection of the proposal.

The majority nonetheless finds the District's reason pretextual because the unrepresented managers who were granted the longevity differential included the fire marshal and fire training chief, who were at the same rank as the battalion chiefs in the Fire Management Unit. In response to Berkheimer's explanation of the promotional hierarchy, Maiero pointed out the fire marshal and training chief were at the "same level" as battalion chiefs. The record does not show, however, any further discussion of those two positions at that bargaining session or at any other time during this round of negotiations. Nor is there any evidence the District fabricated its promotional hierarchy explanation so it could reward the fire marshal and training chief for not being represented by the Association. Absent any evidence that those two positions played any part in the District's rejection of the Association's proposal, I cannot conclude the District's reason for the rejection was pretextual.

Moreover, there is no evidence the District harbored any animus toward the Association. No evidence was presented that the District opposed or disapproved of the battalion chiefs organizing in 1998. And even if it did, it is highly unlikely the District would have waited nine years to punish them for doing so, and then limit the punishment to rejecting one bargaining proposal. Additionally, Assistant Fire Chief Richard Grace testified the District offered the battalion chiefs a "very generous" overtime proposal because they had "stepped up to the plate" during "contentious" actions by the District's rank-and-file firefighters. Thus, at the time of the statements alleged to constitute discrimination, it appears the District was grateful to the battalion chiefs, not unhappy with them. Simply put, there is no evidence the District harbored animus toward the Association at any time relevant to this case.

In sum, I find no evidence that the District rejected the Association's longevity differential proposal because of Fire Management Unit employees' represented status. Rather, the evidence shows the District rejected the proposal to maintain a promotional hierarchy by reserving certain benefits for unrepresented managers. Since there is no requirement that a public employer maintain parity of benefits between represented and unrepresented employees, I find no discrimination in this conduct. Accordingly, I would affirm the ALJ's dismissal of the discrimination allegation.

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. SF-CE-693-M, *United Chief Officers Association v. Contra Costa County Fire Protection District*, in which all parties had the right to participate, it has been found that the Contra Costa County Fire Protection District (District) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq.

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

A. CEASE AND DESIST FROM:

1. Imposing or threatening to impose reprisals on employees, discriminating or threatening to discriminate against employees, or otherwise interfering with, restraining, or coercing employees because of the exercise of their protected rights, by threatening to make employees represented by the United Chief Officers Association (Association) ineligible for certain employment benefits provided to other, unrepresented employees, and by denying employment benefits to employees represented by the Association on the basis of protected activity, while providing such benefits to other, unrepresented employees.

2. Denying the Association the right to represent bargaining unit members in their employment relations with the District, by the conduct described in A.1. above.

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

1. Pay to each eligible current and former member of the District's Fire Management Unit the 2.5 percent longevity differential for completing 15 years of service which was granted to other, unrepresented employees of the District but denied to Fire Management Unit employees on the basis of protected activity. The longevity benefit shall be retroactive to May 6, 2008, the date on which it was granted to unrepresented District employees, and shall affect the compensation of current and former Fire Management Unit members, including the retirement benefits of eligible current and former Association-represented employees, in the same manner and to the same extent as the benefit has been applied to the District's unrepresented employees.

2. The amounts owed to current and former employees as specified in B.1 above shall be compounded by interest computed at 7 percent per annum.

Dated: _____ Contra Costa County Fire Protection District

By: _____
Authorized Agent

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