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.