STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

INTERNATIONAL FEDERATION OF PROFESSIONAL & TECHNICAL ENGINEERS, LOCAL 20 (ENGINEERS & SCIENTISTS OF CALIFORNIA),	
Charging Party,	Case No. SF-CE-1620-M
v.	PERB Decision No. 2689-M
SALINAS VALLEY MEMORIAL HOSPITAL DISTRICT,	January 13, 2020
Respondent.	

Appearances: Danielle A. Lucido, Chief Counsel, for International Federation of Professional and Technical Engineers, Local 20 (Engineers and Scientists of California); Littler Mendelson, by Robert G. Hulteng and Luis F. Arias, Attorneys, for Salinas Valley Memorial Hospital District.

Before Banks, Shiners, and Paulson, Members.

DECISION

PAULSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions to the proposed decision of an Administrative Law Judge (ALJ) issued on June 14, 2019. This proposed decision was the third to conclude that the Salinas Valley Memorial Hospital District (Hospital) violated the Meyers-Milias-Brown Act (MMBA or Act)[1] by unreasonably interpreting and applying its local rules in order to deny recognition of the International Federation of

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

Professional and Technical Engineers, Local 20 (Engineers and Scientists of California) (ESC), which has sought to become the exclusive representative of the Hospital's laboratory scientists since filing its petition for recognition on September 16, 2014.

Having reviewed the full record of this matter, as well as the two prior related cases,[2] we agree that the Hospital violated the MMBA and that it must recognize and bargain with ESC. That is, we affirm the most recent ALJ's conclusion that in June 2018 the Hospital again unlawfully withheld recognition of ESC as the exclusive representative of a proposed unit of laboratory employees by unreasonably enforcing its local rule on unit determination.

In the Third Proposed Decision now before us, the ALJ definitively ordered the Hospital to recognize and bargain with ESC. While we agree that is the appropriate remedy, in affirming this decision we depart from the ALJ's conclusions of law by explicitly assessing the June 2018 unit determination in the context of the Hospital's past unfair conduct toward ESC.[3] Thus, we do not adopt the full proposed decision in

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[2] PERB may take official notice of the contents of its own records. (*Antelope Valley Union High School District* (2000) PERB Decision No. 1402; *County of Riverside* (2012) PERB Decision No. 2280-M; *Workforce Investment Board* (2014) PERB Order No. Ad-418-M.) We therefore take notice of PERB's records in Case Nos. SF-CE-1287-M (First Proposed Decision), issued November 15, 2015, and SF-CE-1391-M (Second Proposed Decision), issued November 30, 2017. We refer to the decision issued on June 14, 2019 as the Third Proposed Decision.

[3] The most recent complaint and proposed decision immediately before us—but the third in the series—also address whether the Hospital dominated or interfered with the administration of ESC by engaging in conduct that encouraged employees to join another employee organization. Neither party excepted to the finding dismissing this allegation. Accordingly, this conclusion is not before the Board, and the ALJ's

this matter, but we do endorse the result reached therein, and adopt the ALJ's factual findings, found at pages 2 through 17 of the proposed decision, as clarified and summarized below.

FACTUAL AND PROCEDURAL SUMMARY

The Hospital's Structure and Local Rules

Salinas Valley Memorial Hospital District is a public healthcare district governed by the MMBA; it operates Salinas Valley Memorial Hospital, an acute care hospital. Under its current configuration, the Hospital has three represented bargaining units. The largest is represented by the National Union of Healthcare Workers (NUHW). NUHW's unit is large and diverse, containing 810 employees in clerical, service, technical, and professional classifications. The NUHW unit includes some laboratory employees, but its memorandum of understanding notes the unit explicitly excludes "laboratory technologists (scientists)." The California Nurses Association (CNA) represents all of the Hospital's registered nurses in the second unit, containing 683 employees. The International Union of Operating Engineers, Stationary Engineers, Local 39, AFL-CIO (IOUE) represents 29 employees in various engineering related classifications. 390 employees remain unrepresented.[4]

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conclusions regarding this issue are binding only on the parties. We do not speculate as to whether those findings are supported by the record and consistent with applicable law. (PERB Regs. 32215, 32300, subd. (c); *City of Torrance* (2009) PERB Decision No. 2004-M, p. 12. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.)

[4] Some of these persons occupy positions that may not be eligible for membership in a represented bargaining unit. The evidence does not show the

Pursuant to section 3507 of the MMBA, the Hospital adopted a local employer-employee relations ordinance (ERO). In the resolution formally adopting the ERO, Resolution 92-02, the Hospital's Board of Directors declared that "[t]he appropriate officers of the District and the Chief Executive Officer are hereby authorized and directed to take all steps necessary to carry out the full intent of this Resolution."

Various amendments to the MMBA since the adoption of the ERO have rendered the Hospital's local rules outdated.[5] The only local rule with any relevance to these proceedings is Regulation 2 of the ERO, which contains the following language:

> "APPROPRIATE UNIT. The Board of Directors will decide the extent of the appropriate unit. The hospital has historically recognized three employee organizations who represent approximately 80% of the employees in the hospital. Any additional units must take into account a) the appropriateness of the unit in relation to the organizational structure of the hospital, the possibility of proliferation of units, and the history of labor relations in the hospital. . . ."[6]

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precise number of such employees but the ALJ estimated that, at most, 15 percent of the workforce eligible for organization remains unrepresented.

[5] For instance, the ERO is titled, "Ordinance Regarding Election of Labor Organizations," and all 17 subparts, referred to as numbered "Regulations," purport to require a secret ballot election as the exclusive method for an employee organization to establish majority support through a secret ballot election. Since 2001, section 3507.1, subdivision (c) has required MMBA-governed employers like the Hospital to "grant exclusive or majority recognition to an employee organization based on a signed petition, authorization cards, or union membership cards showing that a majority of the employees in an appropriate bargaining unit desire the representation." (MMBA, § 3507.1, subd. (c).)

[6] The Hospital adopted this language in 1992, as part of its original ERO. After the second proposed decision found a portion of Regulation 2 to be invalid, the

The Underlying Request for Recognition

On September 16, 2014, Dominic Chan (Chan), an organizer for ESC, sent a letter to the Hospital's Senior Administrative Director for Human Resources, Michelle Childs (Childs), requesting that the Hospital recognize it as the exclusive employee organization and collective bargaining representative of all Clinical Laboratory Scientists. Two days later, Chan sent a second letter amending his initial request to include Medical Laboratory Technicians. Chan's request also stated that ESC had in its possession proof of majority support among the employees, and he suggested that State Mediation and Conciliation Service (SMCS) conduct a card check to verify that support.

The employees in the proposed bargaining unit all work for the Hospital's laboratory, the principal purpose of which is to analyze various specimens for clinical purposes. The laboratory has divisions that include chemistry, hematology, urinalysis, blood bank, and microbiology. At the time of ESC's request for recognition, the proposed unit included 30 laboratory employees: 22 clinical laboratory scientists, three lead clinical laboratory scientists, two certified medical laboratory technicians, and one non-certified medical laboratory technician. One certified histology technician and one lead histology technician were included in the unit upon Childs' request. 42 laboratory employees were excluded from the unit, including eight pathology clerks, 27 laboratory technician assistants (phlebotomists), two lead laboratory technician assistants, one

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Hospital amended the ERO in February 2018, striking the illegal portion but retaining the pertinent quoted language.

laboratory aide, one receptionist, two supervisors, and one director. The pathology clerks, laboratory technician assistants, and the receptionist are represented by NUHW.

There is no dispute that Childs, in her capacity as Senior Administrative Director, was "an appropriate officer" whom the Hospital "authorized and directed to take all steps necessary to carry out the full intent of . . . Resolution [2]," including receipt and processing of requests for recognition like that of ESC. However, Childs' initial reaction was to dispute ESC's proposed card-check process and to request that the matter of majority support be determined through a secret-ballot election under the local rules.[7] Several rounds of remonstrations followed. Childs testified that she ultimately relented and agreed to permit SMCS to conduct a card check "in the interest of moving the process forward."

Parties' Card-Check Agreement

With the assistance of an SMCS Mediator, Kenneth Glenn (Mediator), the parties moved the process forward. On November 3, 2014, ESC furnished the proof of support to the Mediator, while the Hospital produced a list of classifications and the names of the incumbents. On November 11, 2014, the parties executed a "Card/Petition Cross-Check Election Agreement" (card-check agreement), expressly

[7] This was improper, as the MMBA mandates card-check procedures for recognition where, as here, the employee organization seeks it. As a statute, the MMBA controls over the local rule. (See MMBA,Gov. Code § 3507.1, subd. (c); *Los Angeles County Firefighters Local 1014 v. City of Monrovia* (1972) 24 Cal.App.3d 289, 295 ["[I]f the rules and regulations of a public agency do not meet the standard established by the Legislature, the deficiencies of those rules and regulations as to rights, duties and obligations of the employer, the employee, and the employee organization, are supplied by the appropriate provisions of the act."])

authorizing SMCS to conduct the card check and setting out all substantive terms of the process:

> "2. [the parties jointly request SMCS to make a] cross-check among all employees in the Unit [Clinical Laboratory Scientists] who appear on the Employer's payroll for the period indicated below [ending date of 11/9/14, list furnished by Hospital on 11/3/14], to determine whether or not they desire to be represented by [ESC] for purposes of collective bargaining.
>
> "3. <u>In the event [ESC] establishes a majority in the Cross-Check, the [Hospital] agrees to recognize the Employee Organization as the exclusive representative for the Unit defined below</u> [i.e., Clinical Laboratory Scientists.]
>
> [¶. . .¶]
>
> "7. Report on Cross-Check Election: Election Supervisor shall conduct the cross-check and will issue a Report on Cross-Check Election, finding and determining whether the Union has been designated and selected as the exclusive bargaining representative of all employees in the Unit.
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> "8. Binding Results: It is agreed that the results of this Cross-Check Election shall be accepted as binding on both parties.
>
> "For the [Hospital]: /s/ Michelle Childs [Senior Administrative Director of Human Resources]
>
> "For [ESC]: /s/ Dominic Chan [Organizer]"

(Emphasis added.)

The Mediator conducted the card check that same day in accordance with the parties' agreement. The letter publicly certifying the results stated:

> "The employer and the employee organization have agreed upon the Unit and the employees that constitute that Unit. The agreed number of employees in the Unit is 31. The majority designation would be 16 of the signed authorization to bargain cards/petitions against the employer submitted employee records. After the comparison, the undersigned found that the petitioning employee organization met or exceeded the majority designation."

The Hospital filed no objections to the process, nor did it contest the results of the card check.

After taking no action for more than a month, on December 19, 2014, the Hospital announced that the unit named and defined in the agreement was not an appropriate unit for collective bargaining purposes and simply refused to recognize ESC. Instead, the Hospital offered to submit its unit appropriateness objection to PERB for decision, followed by a writ of review in the court of appeal. The parties again argued the issue extensively, but ultimately the Hospital simply refused to recognize and bargain with ESC absent a court order compelling it to do so.

On February 12, 2015, ESC filed the first unfair practice charge, SF-CE-1287-M. On April 23, 2015, PERB's Office of the General Counsel issued the first complaint, which was later set for hearing before an ALJ.

Case No. SF-CE-1287-M: The First Proposed Decision

The First Proposed Decision found that the Hospital refused to recognize ESC after a duly authorized SMCS Mediator concluded the union enjoyed majority support among the employees which the parties had mutually agreed belonged to the proposed unit. The factual findings further noted that Childs contacted Chan in approximately December 2014 regarding a disciplinary matter involving a clinical

laboratory scientist, provided Chan with the employee's disciplinary records, and that Chan represented the employee in that matter.[8]

As to the merits of the Hospital's failure and refusal to recognize ESC, the First Proposed Decision found that the Hospital gave no explanation other than to repeat that it believed the unit contained in the card-check agreement was somehow inappropriate. Indeed, ESC filed the original unfair practice charge in this matter because the Hospital simply refused to bargain or take any action to resolve its then-undefined concerns about the appropriateness of the stipulated unit. On the basis of these facts, to which no party excepted, the ALJ concluded that ESC was indeed the recognized employee organization and ordered the Hospital to cease and desist failing to recognize ESC. The ALJ further ordered the Hospital to follow its own local rules by rendering a unit appropriateness determination, and subsequently meet and confer with ESC.

[8] Additional evidence in the record suggests other instances where the Hospital engaged with ESC as if it was a recognized employee organization. The Hospital's answer to the complaint in that matter admitted that it had responded fully to various requests for information from ESC. Complaint paragraph 14 of Case No. SF-CE-1287-M alleged that ESC requested the following: wage rates, hours status, medical and pension benefits, and vacation, sick-time, and overtime policies for Clinical Lab Scientists, Medical Laboratory Technicians, and Histology Technicians employed by Respondent. The Hospital's answer provided an Attachment A, showing that the information provided to ESC included the following: Retirement Plan Summary Plan Descriptions; Summary of benefits for all Salinas Valley Medical Hospital employees, including Non-affiliated lab employees; Health Plan Summary Plan Description for Non-affiliated employees; Paid Time Off Policy for Non-affiliated employees; Current employee listing with FTE and pay rate. The record reflects that ESC ultimately declined to pursue this portion of the complaint.

On remand, the Hospital's efforts to comply with this order and cure its legal violations resulted in a conclusory written determination that the proposed unit was inappropriate issued by its Board of Directors on December 17, 2015.[9] The one-page memorandum briefly explained the Hospital's determination and noted that "splitting a single department into groups of employees represented by separate unions and those unaffiliated with any union would increase the probability of conflict or work disruption," and "maintain[ing] the long-standing balance of three established bargaining units" would be a more reasonable use of the Hospital's resources.

Accordingly, the Hospital decided that because it determined the unit was inappropriate, it had no further obligations. Faced with this response, ESC demanded that the matter be submitted to SMCS for a determination on the composition of the unit, but the Hospital declined to participate in mediation.[10] Additionally, the Hospital once more affirmatively refused to recognize ESC, asserting that ESC had no right to bargain on behalf of the unit and denying its duty to respond to ESC's additional information requests. ESC filed another charge again alleging that the Hospital had unlawfully failed to recognize it, which resulted in another PERB complaint and hearing.

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[9] In its correspondence to PERB regarding compliance with the order in the first proposed decision, the Hospital stated that "because there are no 'represented employees,' the Hospital is not required to meet and confer with the Union . . . [A]ccordingly, the Hospital need not undertake any action to be compliant with . . . the Order."

[10] The version of Regulation 2 in effect at that time included procedures to utilize SMCS in the event of such a dispute.

Case No. SF-CE-1391-M: The Second Proposed Decision

In the Second Proposed Decision, the ALJ again found the Hospital had not reasonably applied its local rules.[11] The proposed decision offered detailed guidance on unit appropriateness decisions under the National Labor Relations Board (NLRB) for private hospital facilities, including a discussion of the Health Care Rule.[12] As a remedy, the ALJ again remanded the matter to the Hospital, this time with specific directions as to how to reasonably reach and support the unit determination. The ALJ expressed significant reluctance in sending the case back to the Hospital:

> "Given that three years have already lapsed, during which time the Hospital has failed on more than one occasion to provide the Union with an articulated rationale for its continued failure to recognize the proposed bargaining unit, I am loathe [sic] to remand the case yet again to Respondent with an order for it to exercise its discretion. Respondent has already demonstrated its unwillingness to exercise its discretion over the matter, as it did so only after it was ordered to do so in SF-CE-1287-M; as well as its reluctance to provide an adequate rationale for its asserted exercise of discretion, as this most recent unfair practice charge demonstrates."

Nevertheless, the ALJ declined to find that the petitioned-for unit described in the card-check agreement was appropriate. Neither party excepted to the findings of the Second Proposed Decision, leading to the instant dispute.

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[11] The ALJ made the following jurisdictional finding, consistent with her conclusion in the First Proposed Decision: ESC is the "Recognized Employee Organization of the proposed unit of Laboratory Employees, as described in MMBA section 3501, subdivision (b)."

[12] See Appropriate Bargaining Units in the Health Care Industry, 29 C.F.R. § 103.30 (2005).

Case No. SF-CE-1620-M: The Third Proposed Decision

Given its third chance, the Hospital repeated its past practice—it decided the unit was inappropriate and refused to recognize ESC, this time in a unit determination adopted by the Hospital's Board of Directors on June 18, 2018.[13] The Hospital followed this vote with the release of a seven-page "Factual Background & Analysis Report: Unit Appropriateness Determination" on June 27, 2018, justifying the vote. ESC promptly filed another charge, leading to the Third Proposed Decision now before us.

At the third hearing, a new ALJ reviewed the Hospital's latest, and until then, most thorough explanation for its refusal to recognize and bargain with ESC. The Hospital's June 27, 2018 report identified four factors it considered in the analysis: (1) the organizational structure of the Hospital; (2) the possibility of proliferation of units; (3) the history of labor relations in the Hospital; and (4) the community of interest and disparity of interest, as reflected by departmental structure, supervision, frequency of contact and workspace, skills and training, job functions and duties (i.e. nature of functions, functional integration, overlap and interchange of duties), and terms and conditions of employment. The first three of these factors were drawn directly from the Hospital's local rules. The last factor was based on the Second Proposed Decision. The Hospital found each of the four factors weighed against finding the unit appropriate, as follows.

[13] A bare majority voted to reject the agreed-to unit only after one Board Member changed his vote, claiming he misunderstood the motion.

The Hospital found that its organizational structure did not support the proposed unit as it included neither all unrepresented laboratory employees, nor all unrepresented professional and technical employees, and therefore it was "non-conforming" according to the Health Care Rule of the NLRB. Because members of the proposed unit shared core functions with members of NUHW's unit within the laboratory, the Hospital noted concerns with "work jurisdiction disputes and other work conflicts resulting from that will undermine the smooth functioning of the Laboratory."

The Hospital found the potential for unit proliferation constituted additional grounds for denying the proposed unit, stating that proliferation would be "practically unavoidable if the Hospital decided to recognize a small, non-conforming unit within a single department of the Hospital." In response to ESC's argument that the unit was contained within a single department, the Hospital reasoned that "if that made a unit appropriate, the [Hospital] would be unable to deny the petitions of any other union seeking to represent employees in any one of the 42 separate departments of the Hospital." The report stated:

> "While the Hospital did acknowledge the existence of two non-conforming units (CNA and NUHW), these are very large traditional units that are Hospital-wide. They are not at all comparable to the Petitioned Unit here, which is small and encompasses only a portion of one department."

The Hospital found that the history of labor relations and the unprecedented organization of the proposed unit weighed against appropriateness. In describing the Hospital's collective bargaining history, the report only cited the fact that bargaining within the Hospital had been limited to three units. In relation to the history of bargaining as it pertained to the laboratory, the report stated:

> "[T]he Hospital has not exclusively collectively bargained with half of the Lab as a single unit. It has only done so for Lab employees who are represented in a much larger unit (the NUHW unit) that exceeds the boundaries of the Lab. There is therefore no precedent set for bargaining with only a portion of the Lab independently. Moreover the Hospital Report confirms that it could not find any legal precedent for recognizing a unit with the same composition as the Petitioned Unit."

As to community of interest/disparity of interest, the Hospital found "some base level of commonality between the employees in the Petitioned Unit because they are all employees of the Laboratory," but found that base level insufficient to require a finding that the unit was appropriate. The Hospital noted that frequency of contact and shared workspace failed to support the proposed unit because histology technicians worked on a different floor from other employees in the proposed unit, and in another workspace, meaning proposed unit employees worked alongside excluded. According to the Hospital, interaction between histology technicians and others in the unit was not frequent because of their work location.

In reaching its determination that the unit was inappropriate, the Hospital notably made no reference to the parties' card-check agreement in which it agreed to recognize ESC as the exclusive representative upon proof of majority support of the employees in the unit. The Hospital also did not consider the fact that it permitted ESC to represent at least one of those employees in a disciplinary matter, and that it had responded to at least some of ESC's requests for information before categorically refusing to recognize and bargain. Instead, the Hospital determined, yet again, that it would not recognize ESC or the previously agreed-to unit.

On October 25, 2018, ESC again filed an unfair practice charge against the Hospital in response to the new unit determination and corresponding report.[14] On December 17, 2018, PERB's Office of the General Counsel issued the related complaint, alleging in part that the Hospital acted inconsistently with its local rules and unreasonably withheld recognition of ESC as the exclusive representative of the Hospital's laboratory scientists. A three-day hearing was held in February 2019. With issuance of the Third Proposed Decision, PERB rejected the Hospital's determination for a third time. Referring to the clear conflict of interest underpinning any employer's unit determination, and especially this employer, the ALJ concluded that the Hospital's rationale should be subject to heightened scrutiny. He then concluded that the Hospital's analysis of each Regulation 2 factor was either self-serving, one-sided, easily refuted by counterevidence, or all three. Simply put, neither the evidence nor the law supported the Hospital's conclusions. As noted, the ALJ disregarded the Hospital's determination as unreasonable, found that the requested unit was appropriate under the MMBA, and again certified ESC as the exclusive representative of that unit.

The Hospital timely filed exceptions to the Third Proposed Decision, arguing that the ALJ had exceeded PERB's jurisdiction under the MMBA by making a unit appropriateness determination and ordering it to recognize the union. Additionally, the

[14] Simultaneously on October 25, 2018, ESC initiated compliance proceedings related to the Second Proposed Decision, alleging that the Hospital failed to comply with the ALJ's second remedial order. Though the Hospital alleged its compliance with each order, PERB's records show that compliance with both the first and second remedial order remain open.

Hospital contends that the ALJ erroneously overruled the Hospital's reasonable determination that the unit was not appropriate.[15] ESC timely filed its responses to the exceptions, urging the Board to reject the Hospital's exceptions and affirm the proposed decision.[16] On December 3, 2019, the Board, via an Order to Show Cause (OSC), directed the Hospital to provide any legal reason why it should not order the Hospital to recognize ESC as the exclusive representative of the unit of Clinical Laboratory Scientists, in accordance with the plain terms of the parties' November 11, 2014 card-check agreement and the remedial order of the First Proposed Decision. The Hospital timely filed responsive briefing, and ESC filed a timely reply.

DISCUSSION[17]

The Hospital argues that the contents of its third attempt to justify its persistent refusal to recognize and bargain with this union are sufficient to satisfy the purposes of

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[15] The Hospital's exceptions also allege that the ALJ wrongly relied on collective bargaining agreements and other documents not in evidence. Because the footnoted citations the Hospital excepted to are merely examples added to testimony from the record, and thus would not impact the outcome in this matter, we decline to address this alleged error. (See *City of San Ramon* (2018) PERB Decision No. 2571-M, p. 5.)

[16] ESC also requested that a decision be expedited and reminded the Board that the matter had been expedited at the lower levels of PERB's process. We have granted this request, in the interest of a timely resolution given the long history of litigation on this topic.

[17] The Hospital has requested oral argument in this case; ESC opposes the request. The Board typically denies such requests when an adequate record has been prepared, the parties had ample opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear as to make oral argument unnecessary. (*County of Santa Clara* (2018) PERB Decision No. 2613-M, p. 6, fn. 3.) Because these criteria are met here, we deny the request for oral argument.

the MMBA, and in accordance with its local rules, specifically Regulation 2 of the ERO. We disagree.

As the facts of this long journey have already revealed, neither the Hospital's local rules nor the policies of the MMBA entitle it to hold the collective bargaining rights of these employees in suspense for more than five years while it evades ESC's lawful demands to recognize and bargain. Exercising our authority to consider all evidence before us, including taking administrative notice of our own records, we find that the Hospital's most recent application of its local rule in these circumstances was unreasonable and in conflict with the MMBA.

The Board applies a de novo standard of review when evaluating exceptions to a proposed decision. (*City of Milpitas* (2015) PERB Decision No. 2443-M, p. 12.) The Board also may decline to address alleged errors that would not impact the outcome. (*City of San Ramon*, *supra*, PERB Decision No. 2571-M, p. 5.) As part of its de novo review, the Board may affirm, modify or reverse a proposed decision, order the record reopened for the taking of further evidence, or take such other action as it considers proper. (PERB Reg. 32320; *Los Rios College Federation of Teachers, Local 2279 (Deglow)* (2003) PERB Decision No. 1515, p. 5.) On the other hand, we may address issues not raised by the parties when necessary to correct a serious mistake of law and thus prevent an erroneously-decided issue from becoming Board precedent. (*State Employees Trades Council United (Ventura, et al)* (2009) PERB Decision No. 2069-H, pp. 6-7; *Morgan Hill Unified School District* (1985) PERB Decision No. 554, pp. 21-22, fn. 13; *Fresno Unified School District* (1982) PERB Decision No. 208, pp. 23-24.) Although the Board will generally defer to the issues decided by

the ALJ and raised in the parties' briefing, the Board is not precluded from reviewing unappealed matters or applying legal analysis not urged by the parties. (*Fall River Joint Unified School District* (1998) PERB Decision No. 1259a, pp. 5-6; *Apple Valley Unified School District* (1990) PERB Order No. Ad-209a, p. 3; *ABC Unified School District* (1991) PERB Decision No. 831b, p. 4.) The ultimate "determination of the issues to be considered in an unfair practice proceeding before PERB is made by the Board and its agents, and not by the parties to the proceeding." (*Barstow Unified School District* (1996) PERB Decision No. 1138a, p. 10.)

<u>The Hospital's June 2018 Unit Determination</u>

We affirm the finding of the Third Proposed Decision that the Hospital unreasonably applied its ERO in its June 2018 unit determination and effectively denied employees and ESC their rights guaranteed by the MMBA. Specifically, the Third Proposed Decision found that the Hospital's unit determination unreasonably applied the factors set forth in Regulation 2 and failed to properly analyze the other factors an employer must consider in the context of a residual unit. The Hospital's exceptions and supporting brief set forth two overarching arguments: 1) the ALJ cannot order the Hospital to recognize ESC because the MMBA provides the agency, not PERB, with the authority to make unit appropriateness determinations; and 2) if the MMBA empowers PERB to make unit appropriateness determinations, the ALJ erroneously overruled the Hospital's reasonable determination.

We reject both of these arguments. While the Third Proposed Decision only implicitly recognizes the unique circumstances presented by the two prior unfair practice findings against the Hospital, we take this opportunity to address explicitly the

appropriate deference to be applied to the unit determination in light of those unique facts. That is, we rely on the Board's authority and specialized experience in these matters to scrutinize the Hospital's most recent unit determination in its full context, i.e., as the third in a series of related unfair practices. Considered in this proper context, it is clear that the Hospital again applied its local rule in order to deny employees their right to representation and ESC's concomitant right to bargain on their behalf. Such repeated and methodical unfair practices are anathema to the purposes and policies of the MMBA. Therefore, we find ample legal and factual support to justify the ALJ's conclusion and remedial order in the Third Proposed Decision.

A. PERB is Empowered by the MMBA to Enforce and Apply Local Rules

The MMBA gives public agencies the right to adopt reasonable rules and regulations for the administration of employer-employee relations, including rules on recognition of employee organizations. (MMBA, § 3507.) The MMBA also empowers PERB to enforce and apply a public agency's rules governing unit determinations. (*Id*., § 3509 subd. (c).) In order to be lawful, an agency's rules and regulations may not undercut or frustrate the MMBA's policies and purposes. (*International Federation of Professional & Technical Engineers, Local 21 v. City & County of San Francisco* (2000) 79 Cal.App.4th 1300, 1306 (*IFPTE*); *Huntington Beach Police Officers' Association v. City of Huntington Beach* (1976) 58 Cal.App.3d 492, 501-502.) In other words, and contrary to the Hospital's assertions, public agencies do not have an unqualified right under the MMBA to apply their rules to unit determinations. PERB is

further empowered by the MMBA to determine the appropriate remedy for an unfair practice under the Act. (MMBA, § 3509, subd. (b).)

Before reaching the merits of the Hospital's latest unit determination, we consider the applicable standard of review in this context. The MMBA differs from other statutes under our jurisdiction in that it allows public agencies to establish reasonable local rules for managing labor relations. (MMBA, § 3507, subd. (a).) Thus, a public agency governed by the MMBA is in the position of setting rules to which it, as an employer, will be subject. This dual role allows local tailoring and diversity of local rules, but it also creates the risk that an employer intent on subverting its employees' fundamental rights will misuse its authority to achieve improper ends. Thus, while the MMBA does not preempt local regulation, any local rule or application thereof that frustrates its purposes is unlawful. (*IFPTE*, *supra*, 79 Cal.App.4th at p. 1305.) Accordingly, our review of the application of local rules must consider the purpose of section 3507's grant of authority and the relevant purposes of the MMBA.

"The power reserved to local agencies to adopt rules and regulations was intended to permit supplementary local regulations which are consistent with, and effectuate the declared purposes of, the statute as a whole." (*International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191, 202, internal quotations and citation omitted.) Among these statutory purposes are public employees' "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.)

In the typical dispute concerning a unit determination, where reasonable minds could disagree, the Board does not substitute its judgment for that of the local agency. (*United Clerical Employees v. County of Contra Costa* (1977) 76 Cal.App.3d 119, 125, citing *Organization of Deputy Sheriffs v. County of San Mateo* (1975) 48 Cal.App.3d 331, 338-39.) Under this deferential standard, the Board will uphold a unit determination as reasonable unless there is proof to the contrary (*Id*.) Similarly, the courts instruct us to apply the substantial evidence test to a local agency's unit determinations and to scrutinize it for an abuse of discretion. (See *Covina–Azusa Fire Fighters Union v. City of Azusa* (1978) 81 Cal.App.3d 48, 61 [a city's appropriate-unit determination regarding its firefighter employees is to be reviewed by the superior court for an abuse of discretion, and superior court should not determine on its own review of the evidence what the appropriate unit is].) Under this substantial evidence test, the agency's findings are presumed to be supported by the administrative record and the challenging party has the burden to show that they are not (*JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1062.) thereby allowing the Board to avoid disturbing municipal autonomy while also guarding against local rules or applications that frustrate the Act.

However, the Board has never applied such a deferential standard of review to the unit determinations of an employer that has on more than one prior occasion unreasonably applied its same local rule in such a manner as to frustrate the fundamental organizational rights of employees and their union.[18] In view of the two

[18] Neither have the courts, which is why the dissent's reliance on judicial interpretations of the appropriate standard for review is misplaced. Insofar as those

prior unfair practice findings against the Hospital that center on its unreasonable application of its local rules to deprive these employees of representation, we believe the Hospital's latest unit determination in this matter is not entitled to customary deference. Stated another way, to the extent the Hospital's determination is entitled to a presumption of correctness, the Hospital's past misconduct is more than sufficient to rebut that presumption. Accordingly, we conclude that ESC met its burden of showing that the Hospital's reasons for its latest determination fail to withstand scrutiny in light of its past unfair practices and constituted an abuse of discretion, as explained below.

B. The Hospital Unreasonably Applied Regulation 2

The Hospital argues that the ALJ erred in substituting PERB's judgment for the reasonable judgment of the Hospital. We disagree. The ALJ appropriately rejected the Hospital's application of Regulation 2 because it undercut the purpose of the MMBA and denied employees and ESC fundamental rights guaranteed by the Act.[19]

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cases deal with employers that have not demonstrated a proclivity to violate the MMBA, they tell us nothing about whether the unit determinations of a recidivist employer are entitled to customary deference. Unlike Member Shiners, we will not pretend as if the Hospital comes to these proceedings with clean hands nor will we ignore its history of unfair practices.

[19] While the Hospital excepts to nearly each of the ALJ's findings of law related to the application of unit criteria to the proposed unit as "erroneous," we decline to analyze some findings to the extent they do not alter the outcome. (*City of San Ramon*, supra, PERB Decision No. 2571-M, p. 5.)

a. The Hospital Frustrates the Purposes of the MMBA and Employees' Statutory Rights to Representation

Foremost, the Hospital failed to apply its unit determination criteria in accordance with the purposes of the MMBA.[20] Citing *County of Riverside* (2010) PERB Decision No. 2119-M, p. 13. (*County of Riverside*), the Hospital relies on the proposition that because reasonable minds could differ regarding its application of the unit criteria, PERB may not substitute its judgment for the judgment of the agency. As noted *ante*, we reject the applicability of that proposition to this case, in light of the history of unfair practices. In any event, although the Hospital repeats *County of Riverside*'s ruling, it fails to consider the other pertinent inquiry underlying an unfair practice charge arising from the application of a local rule under the MMBA: whether the rule or its application is consistent with and effectuates the purposes or express provisions of the MMBA. (See *County of Amador* (2013) PERB Decision No. 2318-M; *County of Imperial* (2007) PERB Decision No. 1916-M; *International Brotherhood of Electrical Workers, Local Union 1245 v. City of Gridley* , *supra*, 34 Cal..3d 191, 202.) In enacting the MMBA, the Legislature stated its purpose of "providing a uniform basis for recognizing the right of public employees to join organizations of their own choice and be represented by those organizations in their employment relationships with

[20] We reject the dissent's contention that our determination places the Hospital at odds with the Second Proposed Decision, or places it in a Catch-22 situation. We do not fault the Hospital for applying the criteria indicated by that ALJ, but rather note that despite the efforts of the Second Proposed Decision to direct the Hospital to reasoned decision-making, it instead applied those criteria in a demonstrably self-interested and unlawful manner. Rather than a Catch 22 for the employer, it would be more appropriate to refer to this saga as a Kafkaesque quagmire for the employees whose rights the Hospital has held in suspense for 5 years.

public agencies." (MMBA, § 3500). The Hospital ignored and frustrated the stated purpose of the MMBA and the rights granted to employees when it applied the unit criteria specified in its ERO.

In assessing and applying unit criteria under its statutes, PERB notes that those criteria must be applied holistically, not mechanistically, with a view to fulfilling the purposes of the statute. (See *Regents of the University of California* (2015) PERB Decision No. 2422-H, pp. 5-6 (*Regents*).) *Regents* is instructive here, even though, unlike under the MMBA, unit determinations under the Higher Education Employer-Employee Relations Act (HEERA)[21] are determined by PERB using criteria established by statute. (See MMBA, § 3521).[22] Notably, however, the holistic approach in *Regents* considers not only the statutory criteria, but also the obligation to harmonize those criteria with the remainder of the statute—the same task set to PERB when reviewing an agency's application of a local rule. (See *City of Long Beach* (2012) PERB Decision No. 2296-M, p. 19 [obligation to attempt to harmonize local

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[21] HEERA is codified at Government Code section 3560 et seq.

[22] The Hospital repeatedly excepts to citations under statutes other than the MMBA. While the MMBA does have unique attributes, where the statutes are similar, agency and court interpretations under one statute are instructive under another and may establish applicable precedent. (See Zerger, ed. (2nd ed. 2019) *California Public Sector Labor Relations* § 2.10, fn 1; *Los Angeles County Superior Court* (2018) PERB Decision No. 2566-C, p. 25, fn. 17, citing *Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072, 1090 [Board endeavors to harmonize, when possible, the various statutes under its jurisdiction]; *Alameda County Medical Center* (2004) PERB Decision No. 1620-M, p. 2 ["when interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions" quoting *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608].)

rules with the requirements of the MMBA].) The ALJ correctly noted that the importance of a balanced analysis is elevated under the MMBA because the employer exercises a quasi-judicial function while possessing a vested interest in the outcome. (Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Court* (1972) 23 Hastings L.J. 719, 741-742.) Here, the employer's vested interest in the outcome is even more pronounced when viewed through the lens of the two prior proposed decisions that found the Hospital unreasonably applied its unit determination rule in violation of the MMBA. The Hospital explained in relative detail how it applied the surrounding facts to its four unit determination criteria, but there was no indication in the factual record that the Hospital considered or balanced its own desires—operational efficiency, possible unit proliferation, the hospital's history of labor relations, and community/disparity of interest—alongside the fundamental employee rights to form and join employee organizations and to be represented by those organizations in their employment relationships. (See MMBA, § 3500.) In our view, this failure to give weight to the interests of its own employees is consistent with the Hospital's past unfair conduct and thus patently unreasonable.

Indeed, a review of the extensive record underlying this dispute reveals substantial evidence to support the factual findings of the Hospital's repeated bad faith and unlawful conduct toward ESC. In the first case, the Hospital simply refused to recognize or bargain with ESC after declaring the petitioned-for unit inappropriate without any written determination under its local rules. In the second case, the Hospital issued a conclusory determination, declaring the unit inappropriate without any rational analysis. These findings are conclusive for purposes of this case; the

Hospital cannot deny committing these unfair practices since it took no exception to the underlying proposed decisions. (PERB Reg. 32305, subd. (a).) In all instances, including this latest determination now on review, the Hospital made no reference to its card-check agreement with ESC and thus never explained whether or how its agreement to recognize ESC as the exclusive representative of the unit functioned in its determination to declare the unit inappropriate. The Hospital's repeated failure to give any weight to its agreement to recognize ESC evinces a wanton disregard for significant facts and evidence. It should go without saying that a unit determination that ignores the central evidence, like an employer's agreement to grant recognition, is unreasonable and an abuse of discretion.[23]

Further, the record also contains evidence that the Hospital's determination was motivated by its desire to maintain its current structure of three units and three unions.[24] The MMBA does not give the Hospital the right to determine which employees get the benefit of the statute or which must remain unrepresented, and it certainly does not empower it to determine the number and identity of the employee organizations that represent its employees. (See MMBA, § 3502.) By considering each of its four factors in a vacuum, and willfully disregarding the organizational rights

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[23] The dissent strangely suggests that relying on the card-check agreement creates a due process concern. We note that the card-check agreement was admitted into evidence at the hearing. Furthermore, we provided the parties an opportunity to brief whether the card-check agreement and/or remedial order resolves the current dispute.

[24] The Hospital's report notes that the history of labor relations weighs against ESC based on the fact that the employees had not previously been organized or represented, and further that bargaining within the Hospital had been limited to three units.

of employees and ESC, the Hospital unlawfully focused on its desired outcome at the expense of rights conferred by the MMBA.

Our dissenting colleague cites to *City & County of San Francisco* (2017) PERB Decision No. 2540-M (*City & County of San Francisco*) for the proposition that intent is irrelevant in PERB's review of a local rule. We find this statement from *City & County of San Francisco* inapposite to the present facts, as well as unsupported by any other caselaw.[25] In *City & County of San Francisco* the union alleged that the employer's local rule violated the MMBA on its face. (*Id*. at p. 19.) The employer countered that it had bargained in good faith with the union regarding the impact of the rule, thus excusing it from such a facial challenge. (*Id*. at p. 23.) It was in response to this argument that the Board found the employer's good faith irrelevant in assessing whether a local rule violated the MMBA on its face. (*Ibid*.) In other words, the presence of a good faith motivation did not immunize the rule from a finding that it violated the Act.[26]

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[25] While *County of Monterey* (2014) PERB Decision No. 1663-M, p. 18, which *City and County of San Francisco*, *supra*, PERB Decision No. 2540-M cites for this proposition, indeed does not include a requirement of intent in its discussion assessing the local rule, it only references the irrelevance of intent in discussing domination, which uses a distinct analysis. (*County of Monterey* (2004) PERB Decision No. 1663-M, p. 18.) We are aware of no other PERB matter that has directly addressed the relevance of motivation or intent in assessing a local rule.

[26] The Board simultaneously noted that it did not rely on comments by the County Supervisor that suggested the proposition behind the rule was intended to be anti-labor, in part because these statements could not be imputed to the voters who ultimately enacted the rule. (*City & County of San Francisco*, *supra*, PERB Decision No. 2540-M, p. 23 at fn. 14.) This finding appears to turn on the sufficiency of the evidence, which is also distinguishable.

Here, ESC alleges that the Hospital unreasonably applied its local rule when making the unit determination at issue. PERB's review of an as-applied challenge, by its definition and as contrasted with a facial challenge, requires evidence regarding the manner in which an employer rule or policy was actually enforced. In considering whether an employer has unreasonably applied a local rule, evidence of an employer's conduct and motivation is clearly relevant to the analysis. To insist the Hospital's motivations are irrelevant in this context is to willfully disregard the circumstances surrounding its application of Regulation 2.[27] The circumstances surrounding the Hospital's application of the rule, including its intentions, are indeed relevant here where it is apparent that the Hospital's repeated unlawful conduct and results-oriented approach deprived employees and the employee organization of their rights under the MMBA to choose a representative and be represented in their dealings with the employer. (MMBA, § 3500.)

b. The Hospital's Specific Application of the Unit Criteria is Also Unreasonable

The Hospital's analysis fails on a more granular level as well, since it unreasonably applied each of the four factors it considered in its determination: (1) the organizational structure of the Hospital; (2) the possibility of proliferation of

[27] We disagree with Member Shiners' dissent, which characterizes this line of analysis as a potential due process concern. The history of the Hospital's repeated unfair practices toward ESC has always been squarely at issue in this proceeding. We note that ESC did indeed argue in its opening statement that the Hospital had an "unlawful motive" for the unit determination, giving the Hospital specific notice that its intent was at issue.

units; (3) the history of labor relations in the Hospital; and (4) the community of interest and disparity of interest.

The Hospital's analysis of organizational structure found the unit to be inappropriate because it failed to include all remaining unrepresented employees throughout the Hospital, or all remaining unrepresented professional and technical employees. In the absence of such breadth, the unit was deemed to be "non-conforming" under the so-called Health Care Rule of the NLRB.[28] The Hospital further noted that with the shared core functions between the proposed ESC employees and members of NUHW's unit within the laboratory, the Hospital had concerns with "work jurisdiction disputes and other work conflicts that will undermine the smooth functioning of the Laboratory." The Hospital's analysis exemplifies the mechanistic approach that is to be avoided. (See *Regents*, *supra*, PERB Decision No. 2422-H, pp. 5-6.) A more rational approach would acknowledge that the current unit configurations are already non-conforming, meaning that the Hospital never cared about achieving conformity with the NLRB's rules in the past. Thus, a unit cannot be declared inappropriate on this basis alone. Recognizing this, the Hospital further argued that its existing non-conforming units are appropriate for collective bargaining purposes because they are large. But this simply means that the Hospital's collective bargaining program is sufficiently agile and robust to tolerate a lot of nonconformity; it does not mean that a smaller non-conforming unit is inappropriate for collective bargaining purposes. Further, the potential for work jurisdiction disputes is already present under the existing organizational structure. Some members of the laboratory

[28] See 29 C.F.R. § 103.30 (2005).

are represented by NUHW while some are unrepresented, and some employees like licensed vocational nurses represented by NUHW work alongside registered nurses represented by CNA. The Hospital offered no evidence to support its alarmist concerns about any increased potential for friction between workers.

The ALJ correctly found that the Hospital's concern with the potential for future unit proliferation—the factor upon which the Hospital relies most heavily—is flawed and unreasonable. The Hospital's analysis fails to consider and weigh the fact that the current configuration of three units dates back many decades, indicating little outside interest in organizing the residual unrepresented employees.[29] Moreover, the small size of ESC's proposed unit is not a disqualifying factor alone: it contains the same number of employees as IUOE's unit.

The Hospital challenges the ALJ's determination that decisional law regarding severance petitions (e.g. *City of Glendale* (2007) PERB Order No Ad-361-M; *County of Orange* (2016) PERB Decision No. 2478-M, which the Hospital cited to support its determination), can be distinguished from unit determination matters where unrepresented employees seek a new unit. We concur with the ALJ that the instant facts are distinguishable from severance matters, and further note that requiring the Hospital to recognize the distinction is not tantamount to ordering it not to consider all of the factors contained in Regulation 2, including the history of labor relations at the

[29] NUHW Organizer Grant Hill testified at hearing that NUHW lacked interest in organizing such a small group of employees.

hospital.[30] The Hospital's problem is that it unreasonably interpreted its history of labor relations to mean it may only maintain the current three units and three unions. Decisions regarding severance petitions are not relevant here because employees seeking to sever from an existing unit are already represented, and thus already exercising their basic right to join and be represented in their dealings with the employer. And it is true that unit determination criteria applied in the severance context may be consistent with a preference for broad units over a proliferation of smaller units. (See, e.g*., County of Orange*, *supra*, PERB Decision No. 2478-M, pp. 3-4; *City of Glendale*, *supra*, PERB Order No. Ad-361- M, pp. 5-6.) But unlike a severance petition, ESC does not seek to dilute and fragment an existing unit. Rather it seeks to represent employees who historically have had no representation or bargaining rights. Where the decision to deny certification of the unit is tantamount to deciding the employees must remain unrepresented in practical perpetuity, the employer must meaningfully grapple with this impact when applying its local rule.[31] Having failed to do so, the Hospital's determination is unreasonable.

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[30] The Hospital argues that the ALJ's analysis that severance matters can and must be distinguished from initial representation matters was akin to ordering it to ignore the history of labor relations at the hospital as part of its unit determination.

[31] The ALJ dismissed the allegation of domination, and we do not revisit it here. Notably, however, the Hospital repeatedly suggests that the only appropriate way for the petitioned-for lab scientists to be represented is by NUHW, which the record reflects neither the employees of the proposed unit nor NUHW support. While the legal question of domination is not before us, the record evidence on this topic provides additional compelling support for ESC's assertion that the Hospital unreasonably applied ERO Regulation 2. The dissent dismisses the deprivation of representation as speculative; we find that to be wishful thinking which ignores record evidence. Such a result turns a blind eye to the facts and the Hospital's conduct,

Though employees have a right to choose their employee organization, PERB has noted they do not have a similar right to choose their bargaining unit. (*Regents of the University of California* (2017) PERB Order No. Ad-453-H, p. 9; *County of Riverside*, *supra*, PERB Decision No. 2280-M at p. 9.) The circumstances here, however, require a more nuanced consideration of these overlapping concepts. Where the Hospital misuses the unit appropriateness determination as a smokescreen to thwart employees' choice of representative—effectively forcing them, through its recurring unlawful conduct, to continue to have no union at all—the systematic and repeated denial of the unit becomes inextricable from employee choice.

The Hospital's conclusion that the proposed unit lacks sufficient community of interest is likewise flawed. All of the employees in the laboratory work in relatively close proximity to one another, have the same supervision, have frequent contact with each other, and share a common function. They share substantial mutual interest in matters subject to meeting and conferring.[32] (See *Monterey Peninsula Community College District* (1978) PERB Decision No. 76, p. 13.) That there is also interchange with non-bargaining unit employees in the laboratory is not sufficient to defeat the overall community of interest in this context because the duties of employees within the unit are distinct, and the mere fact that they work with others outside the unit is not evidence that their respective interests will collide or merge.

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including the historic exclusion of these employees from any unit, despite past accretions and unit modifications to NUHW's unit.

[32] The Hospital itself adjusted the composition of the unit by adding histology technician classifications to its list for the card-check, so it may not now rely on those additions to attack the community of interest within the unit.

Finally, we cannot agree with the Hospital's conclusion that the creation of this unit would negatively impair its operations. In cases where unit proliferation is at issue, the employer may rely on the adverse impact on its operational efficiency in its unit determination analysis. (*Pleasanton Joint School District/Amador Valley Joint Union High School District* (1981) PERB Decision No. 169, p. 4.) However, if dismissing the petition effectively denies employees the right to representation, the employer's rejection based on the inappropriateness of the unit is generally warranted only where there is "convincing evidence in support of the . . . claim that efficiency of its operations would be impaired." (*Ibid*.) Here, as with potentially disruptive jurisdictional disputes, the Hospital's evidence was purely speculative and insufficient to demonstrate concrete operational harm. That is, there is no reason to conclude that negotiations with a fourth bargaining unit would unduly impact the Hospital's ability to conduct its business or manage its employees.

In summary, the Hospital applied its unit determination criteria in a manner that cannot withstand rational scrutiny and thus constituted an abuse of discretion. Rather, in each instance the Hospital aggrandized selected facts to arrive at a self-serving conclusion. From its history of unfair practices, we surmise that the Hospital never intended to act in good faith in considering ESC's unit appropriateness, and that its primary purpose has always been to deny these employees their right to representation. Consequently, its latest determination was unreasonable and unlawful.

c. The Hospital Failed to Consider Evidence that the Unit Is Appropriate

In addition to applying its unit determination criteria in an unreasonable manner, the Hospital failed to consider significant evidence of its history of labor relations that favors establishment of the unit. First and foremost, the Hospital utterly disregarded the card-check agreement in which it agreed to recognize ESC as the exclusive representative of the unit. Secondly, the Hospital failed to consider the fact that it had bargained with ESC in several instances after the card-check. Together, this evidence militates strongly in favor of the establishment of the unit. The Hospital's failure to account for this evidence or even address it is further proof that its unit determination was unreasonable.[33]

The parties' card-check agreement stated in clear and unambiguous terms that "[i]n the event [ESC] establishes a majority in the [card-check], the [Hospital] agrees to recognize [ESC] as the exclusive representative for the [Laboratory Unit]." The First Proposed Decision concluded that this provision did not constitute a waiver of the Hospital's opportunity to determine the appropriateness of the unit; thus followed the first order remanding the matter for a unit determination under the Hospital's local rules.[34] However, in conducting both the first determination and the one now before us, the Hospital never acknowledged its agreement to recognize ESC as the exclusive

[33] Ignoring this evidence is particularly egregious as the Hospital's analysis of the history of labor relations relies on a lack of evidence viz. no history of separate representation and no precedent for bargaining with half the lab independently.

[34] Since no party took exception to the First Proposed Decision, that conclusion is not precedential. We therefore take no position on the correctness of the ALJ's legal analysis.

representative of the employees in the unit. One should expect that a prior agreement to recognize ESC as the exclusive representative of the putative bargaining unit would at least factor into a determination of that unit's appropriateness for collective bargaining purposes, even if only to explain the agreement's relative weight in the overall analysis. But instead, the Hospital simply ignored its agreement. As explained *ante*, we conclude that the Hospital's failure to account for the card-check agreement was an abuse of discretion and renders its unit determination unreasonable.

Indeed, the card-check agreement tips the balance strongly in favor the unit's appropriateness. According to the plain terms of the agreement, the Hospital promised to recognize ESC upon a showing of majority support. The agreement contains a description of the unit along with an attached list of all employees in the unit. The Hospital's promise to recognize ESC as the exclusive representative necessarily implies a promise to bargain. That the Hospital itself made this promise is strong evidence that the unit is appropriate for collective bargaining purposes. Thus, not only are the Hospital's arguments opposing the unit unavailing, the Hospital's own promise to bargain supports the establishment of the unit. The Hospital was not free to ignore this promise in its determination.

This is not all. As recounted in the First Proposed Decision, the Hospital did in fact take actions consistent with an intent to voluntarily recognize ESC after the card-check when it permitted an ESC representative to appear on behalf of and represent a unit employee during a disciplinary investigation. (See *Capistrano Unified School District* (2015) PERB Decision No. 2440, generally [public employers must permit the recognized employee organization to represent its members during investigatory

interviews].) Moreover, as the Hospital admits in its answer to the first complaint, it furnished information to ESC in response to ESC's requests.[35] (See *City of Burbank* (2008) PERB Decision No. 1988-M [a recognized employee organization is entitled to all information that is necessary and relevant to discharging its duty to represent unit employees].) Thus, whether or not the card-check agreement constituted a waiver of its opportunity to contest the unit's appropriateness, the Hospital's decision to deal with and treat ESC as the exclusive representative is palpable proof of the unit's appropriateness.

Taken together, the Hospital's agreement to recognize ESC and its voluntary decision to deal with ESC as the recognized employee organization strongly weigh in favor of the establishment of the unit. We highlight this evidence in order to illustrate the unreasonableness of the Hospital's latest determination and to make clear our reasons for setting that determination aside.

The Hospital has now had three separate opportunities to reasonably apply its own rule in assessing ESC's proposed unit; it has failed to do so in each instance. In view of the Hospital's history with ESC, and its own clearly demonstrated self-interest in the result, a reasonable interpretation of Regulation 2 cannot fail to acknowledge that the local rule must be applied consistent with and in consideration of the rights guaranteed by the MMBA. The evidence weighs in favor of the unit's appropriateness, and the Hospital's determination does not withstand scrutiny. Therefore the Hospital

[35] The Hospital appears to have provided ESC with sensitive employee information, like disciplinary records, which would only be released to an exclusive representative.

unreasonably withheld recognition and unlawfully applied its local rules, in violation of the MMBA.

REMEDY

The Hospital also challenges PERB's authority to institute a remedy, and specifically its authority to order the Hospital to recognize ESC and commence bargaining. The Legislature has delegated to PERB broad authority to effectuate the remedies it deems necessary to fulfill the purposes of the MMBA. (MMBA, §§ 3509, subd. (b), 3510; *City of San Diego* (2015) PERB Decision No. 2464-M, p. 42, affirmed sub nom. *Boling v. PERB* (2018) 5 Cal.5th 898, 920, rehearing denied (Oct. 10, 2018); *Mt. San Antonio Cmty. Coll. District v. Public Employment Relations Board* (1989) 210 Cal.App.3d 178, 189-190.) MMBA section 3509 subdivision (b) authorizes PERB to order "the appropriate remedy necessary to effectuate the purposes of this chapter." (MMBA, § 3509, subd. (b); *Omnitrans* (2010) PERB Decision No. 2143-M, p. 8.) The Board cannot ignore, and the ALJ was right to consider, the Hospital's repeated failure to apply its own rule reasonably, resulting in an "exhaustive history of litigating" similar issues.[36]

This same petition for recognition has now been before an ALJ on three occasions, and in each instance the ALJ found the Hospital's conduct unlawful. Indeed, the first proposed decision ordered the Hospital to cease and desist its failure "to recognize [ESC] as the Recognized Employee Organization of the proposed unit of

[36] The dissent claims that we are punishing the Hospital by putting an end to its five-year flight from its legal obligations. We do not seek to punish the Hospital; we seek to vindicate the rights the MMBA guarantees to these public employees and their employee organization.

Laboratory Employees," an order with which it has never complied.[37] It may be common among agencies subject to the MMBA for the final decision on representation issues to be made by the local agency. (See Zerger, ed. (2nd ed. 2019) *California Public Sector Labor Relations* § 4.46.) However, where, as here, the employer has over the course of five years repeatedly refused to reasonably apply its own rules in order to deny a group of employees representation and an opportunity to bargain, it is well within PERB's broad jurisdiction to consider the specific circumstances and to order a conclusive resolution.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is found that the Salinas Valley Memorial Hospital District (Hospital) violated the Meyers-Milias-Brown Act (Act). The Hospital unreasonably withheld recognition of International Federation of Professional and Technical Engineers, Local 20 (Engineers and Scientists of California) (ESC) as the exclusive representative of a proposed unit of Laboratory employees, by unreasonably enforcing its local rule as it pertained to unit determinations. These actions violated section 3507, subdivision (c), and Public Employment Relations Board (PERB or Board) Regulation 32603, subdivision (g). (Cal. Code of Regs., tit. 8, § 31001 et seq.). By this conduct, the Hospital also interfered with the right of employees to participate in the activities of an employee organization of their own choosing, in violation of Government Code section 3506 and PERB Regulation 32603, subdivision (a), and denied ESC its right to

[37] The Hospital admitted as much in its response to the OSC, insisting the first remedial order did not actually require it to cease and desist its failure to recognize ESC.

represent employees in their employment relations with a public agency, in violation of Government Code section 3503 and PERB Regulation 32603, subdivision (b). All other allegations are dismissed.

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

A. CEASE AND DESIST FROM:

1. Unreasonably applying Regulation 2 of the Hospital's employer-employee relations ordinance regarding unit appropriateness.

2. Unreasonably withholding recognition of ESC as the exclusive representative of the proposed unit of Laboratory employees.

3. Interfering with bargaining unit members' right to participate in the activities of an employee organization of their own choosing.

4. Denying ESC its right to represent employees in their employment relations with the Hospital.

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

1. Rescind the June 27, 2018, unit determination decision and denial of ESC's request for recognition of the proposed unit of Laboratory employees.

2. Grant ESC's petition for recognition, and proceed to meet and confer over terms and conditions of employment upon request.

3. Within 10 workdays of the service of a final decision in this matter, post at all work locations in the Hospital, where notices to employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the Hospital, indicating that the Hospital will comply

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

4. Within 30 workdays of service of a final decision in this matter, notify the General Counsel of PERB, or his or her designee, in writing of the steps taken to comply with the terms of this Order. Continue to report in writing to the General Counsel, or his or her designee, periodically thereafter as directed. All reports regarding compliance with this Order shall be served concurrently on ESC.

Member Banks joined in this Decision.

Member Shiners' dissent begins on p. 41

SHINERS, Member, dissenting: This case arises from a determination by the Salinas Valley Memorial Hospital District (Hospital) that a proposed bargaining unit of laboratory employees petitioned for by the International Federation of Professional and Technical Engineers, Local 20 (Engineers and Scientists of California) (ESC) was not an appropriate unit for collective bargaining. The complaint issued by PERB's Office of the General Counsel (OGC) in this case alleges, in pertinent part, that the Hospital's unit determination violated the Meyers-Milias-Brown Act (MMBA or Act) because it was inconsistent with the Hospital's employer-employee relations ordinance (ERO). Following an evidentiary hearing, the administrative law judge (ALJ) concluded the Hospital violated the MMBA as alleged in the complaint.

Under long-established precedent, PERB must defer to a public agency's reasonable unit determination, even if it would reach a different result on the same facts. Applying that standard to the factual record developed at the hearing in this case, I would defer to the Hospital's unit determination, and dismiss the complaint and underlying unfair practice charge.

The majority, in contrast, finds the Hospital abused its discretion because the determination was the product of the Hospital's bad faith conduct toward ESC—an issue not litigated at the hearing. The majority then proceeds to conduct its own unit determination analysis that goes far beyond traditional unit determination criteria. I decline to join my colleagues in their unprecedented grafting of an intent consideration onto the long-standing objective test for determining when a public agency has acted reasonably regarding its local rules, simply to allow PERB to overturn a unit

determination with which it disagrees. Because I cannot join in the majority's unwarranted departure from established law, I dissent.

A. The Hospital's Unit Determination Was Reasonable and Must be Upheld

The majority finds the Hospital unlawfully withheld recognition from ESC by unreasonably applying its local rule to reach its unit determination. In so finding, the majority departs from existing precedent by adding an entirely new—and in this case dispositive—intent consideration in determining whether a public agency's application of its local rules was reasonable. Further, the majority's conclusion that the Hospital improperly applied the unit determination criteria is wrong, as well as inconsistent with the governing legal standard.

1. Legal Standard for Determining the Reasonableness of a Public Agency's Unit Determination

The MMBA allows public agencies like the Hospital to adopt "reasonable rules and regulations . . . for the administration of employer-employee relations." (MMBA, § 3507, subd. (a).) Such rules may include criteria for determining what constitutes "an appropriate unit" of employees for collective bargaining purposes. (MMBA, § 3507, subd. (a)(4); *City of Glendale* (2007) PERB Order No. Ad-361-M, p. 4.)

"The power reserved to local agencies to adopt rules and regulations was intended to permit supplementary local regulations which are consistent with, and effectuate the declared purposes of, the statute as a whole." (*International Brotherhood of Electrical Workers, Local Union 1245 v. City of Gridley* (1983) 34 Cal.3d 191, 202, internal quotations and citation omitted.) "A local public agency employer may not adopt or enforce a local rule that is contrary to or frustrates the declared policies and purposes of the MMBA." (*Oak Valley Hospital District* (2018)

PERB Decision No. 2583-M, p. 9.) Thus, a public agency's local rule is "reasonable" under the Act unless it "abridges the exercise of a fundamental right, or frustrates the fulfillment of an affirmative duty, prescribed by the MMBA." (*County of Monterey* (2004) PERB Decision No. 1663-M, , adopting proposed decision at pp. 28-29; see *International Federation of Professional & Technical Engineers v. City & County of San Francisco* (2000) 79 Cal.App.4th 1300, 1311 [a local rule is unreasonable when it violates a standard set by the MMBA that "cannot be varied by local rules or regulations and is jurisdictionally exclusive within its field"].)

Here, the Hospital adopted a local rule, Regulation 2, for determining appropriate bargaining units. The complaint does not allege that Regulation 2 is unreasonable on its face. Rather, the issue in this case is whether the Hospital applied Regulation 2 to ESC's representation petition in a reasonable manner.

As we recently affirmed:

> "PERB and judicial authority requires that, when evaluating the reasonableness of a public agency's unit determination made pursuant to a local rule, the party challenging the unit determination bears the burden of demonstrating that the decision was not reasonable. (*Organization of Deputy Sheriffs v. County of San Mateo* (1975) 48 Cal.App.3d 331, 338.) Thus, if reasonable minds could differ over the appropriateness of a determination, PERB should not substitute its judgment for that of the local agency. (*Id.* at pp. 338-339; see also *County of Riverside* (2010) PERB Decision No. 2119-M, p. 13; *City of Glendale* (2007) PERB Order No. Ad-361-M, p. 4; *Alameda County Assistant Public Defenders Assn. v. County of Alameda* (1973) 33 Cal.App.3d 825, 830.)"

(*Santa Clara Valley Water District* (2017) PERB Decision No. 2531-M, p. 11.)

Although PERB has stated these legal rules in many cases, the Board has never clearly articulated a standard for how they govern review of a local agency's unit determination. Binding California appellate court decisions, however, elucidate the proper standard.[38]

In *Organization of Deputy Sheriffs v. County of San Mateo* (1975) 48 Cal.App.3d 331 (*County of San Mateo*) the court affirmed the county's decision to place management employees of the sheriff's department in a separate bargaining unit from the department's non-management employees. (*Id*. at p. 339.) In reaching this conclusion, the court applied the general rule that legislative actions by a local agency's governing board "are presumed to be reasonable in the absence of proof to the contrary." (*Id.* at p. 338.) The court then explained: "If reasonable minds may be divided as to the wisdom of the board's action, its action is conclusive and courts should not substitute their judgment for that of the board." (*Id.* at pp. 338-339.)

In *United Clerical Employees v. County of Contra Costa* (1977) 76 Cal.App.3d 119 (*County of Contra Costa*), the court applied the "reasonableness" rule from *County of San Mateo* to conclude that the county's local rule deeming supervisors to be "management employees" was reasonable.[39] (*Id.* at pp. 127-129.) In so concluding, the court observed that showing "a different regulatory definition of

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[38] The MMBA provides that "[t]he provisions of this chapter shall be interpreted and applied by the board in a manner consistent with and in accordance with judicial interpretations of this chapter." (MMBA, § 3510, subd. (a).)

[39] MMBA Section 3507.5 allows public agencies to "adopt reasonable rules and regulations providing for designation of the management and confidential employees of the public agency."

‘management employee’ would have been equally reasonable” would not have been sufficient for the court to find the county’s local rule unreasonable. (*Id.* at p. 129.) The court then applied a substantial evidence standard of review to the county’s application of the local rule to particular employees. (*Id.* at pp. 130-131.)

In *Covina-Azusa Fire Fighters Union v. City of Azusa* (1978) 81 Cal.App.3d 48 (*City of Azusa*), the court found the evidentiary record insufficient to determine whether the city’s decision to exclude fire captains from the firefighters’ bargaining unit was reasonable. (*Id.* at p. 61.) Remanding the matter to the trial court, the appellate court rejected the union’s argument that the trial court “should determine on its own review of the evidence what the appropriate unit is.” (*Ibid.*) The court then stated: “The city’s determination may be upset by the courts only for an ‘abuse of discretion,’ applying the traditional tests associated with a mandate action brought under Code of Civil Procedure section 1085.” (*Ibid.*)

As this binding judicial precedent instructs, the standard for reviewing a public agency’s unit determination is one of deference to the public agency. This comports with PERB’s longstanding decisional law holding that a public agency’s discretion in representation matters governed by its local rules is limited only by the requirement that its conduct not “abridge[] the exercise of a fundamental right, or frustrate[] the fulfillment of an affirmative duty, prescribed by the MMBA.” (*County of Monterey*, *supra*, PERB Decision No. 1663-M, adopting proposed decision at pp. 28-29.) Harmonizing PERB’s decisional law with California appellate court decisions the MMBA compels PERB to follow, it is appropriate to apply an abuse of discretion standard under which the public agency’s unit determination is reasonable unless the

challenging party proves: (1) the public agency applied the wrong law, (2) its factual findings are not supported by substantial evidence in the record, or (3) its weighing of interrelated factors "exceed[ed] the bounds of reason or contravene[d] the uncontradicted evidence." (*County of Kern v. T.C.E.F., Inc.* (2016) 246 Cal.App.4th 301, 316 (*County of Kern*); see *International Brotherhood of Electrical Workers v. Aubry* (1996) 42 Cal.App.4th 861, 869-870 (*Aubry*) [adopting substantial evidence standard for review of transit district unit determinations made by the Director of the Department of Industrial Relations].)

The majority finds an abuse of discretion here based on the Hospital's conduct leading up to the unit determination. The majority's thesis appears to be that a public agency's intent to deprive employees of statutory rights, as shown by circumstances surrounding the agency's application of its local rule, takes precedence over whether the agency's application of the rule objectively conflicts with the MMBA. The majority cites no authority for this new motive element because there is none.

The only time the Board has addressed the motive issue, it held "there is no requirement of intent when assessing the reasonableness of a [local] rule." (*City & County of San Francisco* (2017) PERB Decision No. 2540-M, p. 23.)[40] In *City &*

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[40] Although *County of Monterey*, *supra*, PERB Decision No. 1663-M, which *City & County of San Francisco* cites for this proposition, explicitly references the irrelevance of intent in discussing domination of an employee organization, the concept is implicitly embraced in its subsequent analysis of the as-applied challenge to the County's application of its local rule. There, the decision focuses solely on the objective effect of the alleged unreasonable application on rights granted by the MMBA. (*Id.*, adopting proposed decision at pp. 27-30.) The analysis in this seminal case contains no discussion of the County's motivation or intent in applying its local rule, and we are aware of no other PERB decision so attempting to alter this long-established objective standard.

County of San Francisco, we found the proposed decision's conclusion that the local rule "was intended to be 'anti-labor'" irrelevant to the reasonableness analysis and declined to rely on it. (*Id.* at p. 23, fn. 14.) As the majority points out, *City & County of San Francisco* involved a facial challenge to a local rule. But there is no reason to draw a distinction between facial challenges and as-applied challenges. A public agency's intent would be just as relevant when it adopts a local rule as when it applies the rule. Indeed, a public agency's unlawful intent in adopting a local rule could impact employee rights more than unlawful intent in applying that rule in a specific situation. Yet the Board has never held intent should be considered in facial challenges, and there is no more compelling reason to do so in as-applied challenges.

The majority insists that consideration of intent or motive is necessary here to avoid "willfully disregard[ing] the circumstances surrounding [the Hospital's] application of Regulation 2." Be that as it may, the controlling legal standard does not include the public agency's intent as a relevant consideration in determining whether the agency's application of its local rule is reasonable. (*City & County of San Francisco*, *supra*, PERB Decision No. 2540-M, p. 23.) Rather, our review is limited to determining whether, as an objective matter, the specific application of the local rule is inconsistent with the MMBA. (*Santa Clara Valley Water District*, *supra*, PERB Decision No. 2531-M, p. 11.) No precedent supports deviating from that long-standing rule based on the public agency's subjective intent in applying its local rule in a particular way.

Additionally, the majority suggests that public agency unit determinations should be subject to heightened scrutiny because the agency has "a vested interest in

the outcome." This observation was first raised by Justice (then-Professor) Joseph Grodin in his early commentary on the MMBA, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts* (1972) 23 Hastings L.J. 719, 741-742. Yet, despite citing Professor Grodin's article for various propositions, the courts of appeal adopted a deferential standard of review for public agency unit determinations. (*Aubry*, *supra*, 42 Cal.App.4th at p. 869; *City of Azusa*, *supra*, 81 Cal.App.3d at p. 61; *County of Contra Costa*, *supra*, 76 Cal.App.3d at pp. 129-131.) When the Legislature gave PERB jurisdiction over the MMBA in 2001, it did not modify the existing statutory scheme to give PERB a greater role in reviewing public agency unit determinations than the courts had performed.[41] Of particular importance, as part of the transfer of jurisdiction the Legislature enacted MMBA section 3510, subdivision (a), which explicitly requires PERB to interpret and apply the MMBA consistent with court decisions. Thus, despite the criticism of allowing public agencies to determine appropriate bargaining units, the Legislature explicitly preserved the existing standard

[41] In contrast, other statutes under PERB's jurisdiction—the Ralph C. Dills Act (Dills Act) (§ 3512 et seq.), Educational Employment Relations Act (EERA) (§ 3540 et seq.), Higher Education Employer-Employee Relations Act (HEERA) (§ 3560 et seq.), Judicial Council Employer-Employee Relations Act (JCEERA) (§ 3524.50 et seq.), and Transit Employer-Employee Relations Act (TEERA) (Public Util. Code (PUC), § 99560 et seq.)—grant PERB plenary authority to determine appropriate bargaining units in accordance with specific unit determination criteria. (§§ 3521 (Dills Act); 3544.7, subd. (a); 3545 (EERA); 3575-3577, subd. (a), 3579 (HEERA); 3524.77 (JCEERA); PUC § 99565 (TEERA).) Under those statutes PERB is afforded great flexibility in weighing and balancing the statutory criteria. (E.g., *Unit Determination for Technical Employees of the University of California* (1982) PERB Decision No. 241-H; *Unit Determination for the State of California* (1979) PERB Decision No. 110-S; *Antioch Unified School District* (1977) EERB Decision No. 37.) (Before January 1, 1978, PERB was known as the Educational Employment Relations Board or EERB.)

of review applicable to those determinations. (See *Gutierrez v. Carmax Auto Superstores California* (2018) 19 Cal.App.5th 1234, 1254 ["when the Legislature reenacts the statute without changing the interpretation given to the statute by the courts, the Legislature is presumed to have been aware of, and acquiesced in, the courts' construction of that statute"].) Nor has the Legislature changed that standard in any of the subsequent amendments to the Act. (See *People v. Scott* (1987) 194 Cal.App.3d 550, 554 ["The amendment of a statute ordinarily has the legal effect of reenacting (thus enacting) the statute as amended, including its unamended portions."].) Given this history, I cannot join my colleagues' departure from the long-standing objective standard of review to allow greater scrutiny of a unit determination when PERB suspects it was the product of improper motivation.

2. Reasonableness of the Hospital's Unit Determination

"[T]he party challenging the unit determination bears the burden of demonstrating that the decision was not reasonable." (*Santa Clara Valley Water District*, *supra*, PERB Decision No. 2531-M, p. 11.) On the record before us, I would find that ESC has not met its burden to prove the Hospital's unit determination is unreasonable under the abuse of discretion standard.

a. The Hospital's Determination Applied the Correct Law

In making its determination, the Hospital assessed the three factors in Regulation 2—the Hospital's organizational structure, possible proliferation of units, and history of labor relations—as well as the community of interest among employees in the proposed unit. These are common factors used to determine whether a proposed bargaining unit is appropriate. (See, e.g., *Santa Clara County District Attorney Investigators Association v. County of Santa Clara* (1975) 51 Cal.App.3d 255,

260 (*County of Santa Clara*) [appropriate unit factors include "whether there is a sufficient 'community of interest' among those placed within the unit, the employer's authority to bargain effectively at the level of the unit, and the effect of a unit on the efficient operation of the public service"]; *County of San Mateo*, *supra*, 48 Cal.App.3d at p. 339, fn. 6 [appropriate unit factors include "community of interests; history of bargaining; desires of employees; nature and organization of business; public interest, etc."]; *City of Glendale*, *supra*, PERB Order No. Ad-361-M, p. 2, fn. 2 [local rule's unit determination criteria included "community of interest of the employees," "history of employee relations in the unit," and "[t]he effect of the unit on the efficient operations of the public service and sound employee relations"].) Thus, the Hospital applied the correct legal standard.

In fact, the Hospital applied the legal standard articulated at length by the ALJ in the proposed decision in Case No. SF-CE-1391-M, which involved this same petition. By penalizing the Hospital for following that decision, the majority sends the message that a party acts in accordance with a final and binding PERB decision at its own peril. This leaves a party in the Hospital's position with a choice between two equally undesirable alternatives: (1) deviate from the decision and risk being found out of compliance, or (2) follow the decision and risk being found to have committed an unfair practice. Such "catch-22" situations are to be avoided in a fair adjudicative system.[42] (*Ung v. Koehler* (2005) 135 Cal.App.4th 186, 204; *In re Steven H.* (2001) 86 Cal.App.4th 1023, 1031.)

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[42] Merriam-Webster defines "catch-22" as "a problematic situation for which the only solution is denied by a circumstance inherent in the problem or by a rule" or,

b. The Hospital's Determination Was Supported by Substantial Evidence

In applying the substantial evidence standard, we must examine all relevant evidence in the record, contradicted or uncontradicted, to determine whether it adequately supports the public agency's findings. (*Doe v. University of Southern California* (2016) 246 Cal.App.4th 221, 248-249 (*Doe*).) "[W]e do not reweigh the evidence[, and i]f there is a plausible basis for the [public agency's] factual decisions, we are not concerned that contrary findings may seem to us equally reasonable, or even more so." (*Boling v. PERB* (2018) 5 Cal.5th 898, 912.) The standard of review is satisfied if the record contains "evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value," from which a reasonable mind could make the same finding as the public agency. (*Doe*, *supra*, 246 Cal.App.4th at p. 249; *Vessey & Co. v. Agricultural Labor Relations Bd.* (1989) 210 Cal.App.3d 629, 642.)

The Hospital's unit determination contains factual findings about the duties and working conditions of employees in the proposed unit, the relationship and interaction of those employees with other employees inside and outside of the laboratory, the hospital's organizational structure, and the history of representation of the laboratory employees. ESC did not challenge these factual findings before the ALJ, nor does it challenge them on appeal. The majority does not identify any findings that are unsupported by the record, and my own review reveals none. Accordingly, the

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alternatively, "a situation presenting two equally undesirable alternatives." ("catch-22." *Merriam-Webster* https://www.merriam-webster.com (last updated 15 Sept. 2019). The term was coined by Joseph Heller in his 1961 novel *Catch-22*, in which an army psychiatrist explains that any pilot requesting an insanity evaluation to escape combat duty demonstrates his sanity by making the request.

Hospital's unit determination is supported by substantial—and in fact, uncontradicted—evidence.

c. The Hospital Reasonably Applied the Appropriate Criteria to the Evidence

In analyzing this factor, we must determine whether, given the established evidence, the public agency's decision falls within the permissible range of options under the applicable legal criteria. (*Bank of America, N.A. v. Superior Court* (2013) 212 Cal.App.4th 1076, 1089.) As prior decisions have recognized, unit determination "involves a judgmental assessment of a number of relevant criteria" (*Aubry*, *supra*, 42 Cal.App.4th at p. 870), and thus "criteria may receive different weight and consideration in different factual settings" (*Regents of the University of California* (2015) PERB Decision No. 2422-H, pp. 5-6).

The Hospital's written determination, as described in the majority opinion, shows the Hospital considered the evidence relevant to each criterion and balanced the criteria in this specific factual setting to reach its conclusion that the proposed unit of laboratory employees is not appropriate. While reasonable minds may disagree about how the applicable criteria should be balanced in this case (as shown by the 3-2 vote of the Hospital's Board of Directors on the unit determination decision, as well as the disagreement among this Board panel), the record does not show the Hospital's determination was arbitrary or contrary to the evidence. (*County of Kern*, *supra*, 246 Cal.App.4th at p. 316; compare, e.g., *Reinbold v. City of Santa Monica* (1976) 63 Cal.App.3d 433, 441 [unreasonable to exclude police chief from management bargaining unit that included assistant police chief]; *Alameda County Assistant Public Defenders Association v. County of Alameda* (1973) 33 Cal.App.3d 825, 832

[unreasonable to place public defenders in general professional bargaining unit when they shared little community of interest with other unit employees].) Accordingly, ESC has not met its burden to prove the Hospital's determination is unreasonable.

d. The Majority's Objections to the Unit Determination

The majority raises several objections to how the Hospital applied the unit determination criteria. Although under the proper deferential standard of review mere disagreement with how the public agency applied the relevant criteria is not enough to overturn a unit determination (*County of Contra Costa*, *supra*, 76 Cal.App.3d at p. 129; *Santa Clara Valley Water District*, *supra*, PERB Decision No. 2531-M, p. 11), I nonetheless address the majority's objections, which in my view lack merit.

First, the majority contends the Hospital gave too much weight to the proliferation of units criterion. Specifically, the majority recognizes proliferation as a concern when a group of represented employees seeks to sever from an existing bargaining unit, but downplays the concern when a residual group of unrepresented employees seeks to create a new unit. Yet in establishing initial bargaining units for the University of California, the Board established a single unit of residual health care professionals specifically to avoid a proliferation of units along patient care discipline lines. (*Unit Determination for Professional Patient Care Employees of the University of California* (1982) PERB Decision No. 248-H, pp. 10-11.) It therefore was appropriate for the Hospital to give potential unit proliferation significant weight in its unit determination analysis.

Second, contrary to the majority's conjecture, the evidence in this case does not establish that the petitioned-for employees would remain unrepresented forever if

ESC's petition is denied. The memorandum of understanding between the Hospital and the National Union of Healthcare Workers (NUHW) excludes the petitioned-for employees from the NUHW unit. At hearing, NUHW organizer Grant Hill testified that once ESC began its organizing campaign, NUHW chose not to interfere by attempting to represent the petitioned-for employees. This evidence leaves open the possibility that NUHW may attempt to represent the petitioned-for employees in the future, or that the Hospital may find some other unit configuration including those employees to be appropriate.[43] Thus, the majority's finding that the petitioned-for employees will never have another opportunity to be represented is speculative.

The majority also improperly conflates unit determination with employees' choice of representative. As the court observed in *County of Santa Clara*: "A clear distinction must be drawn between public employees' rights to organize and their right to separate bargaining units. As this court stated in *Organization of Deputy Sheriffs* [citation]: 'We have noted that MMB[A] differentiates between the designation of appropriate bargaining units and the formation of employee organizations.'" (*County of Santa Clara*, *supra*, 51 Cal.App.3d at p. 264.) Likewise, PERB has recognized that "[w]hile employees have the right to choose which employee organization, if any, will represent them in their employment relations, they have no right to choose the bargaining unit in which their classification or position is placed." (*Regents of the University of California* (2017) PERB Order No. Ad-453-H, p. 9; *County of Riverside* (2012) PERB Decision No. 2280-M, p. 9; see also *San Diego Metropolitan Transit*

[43] Indeed, in the proposed decision in this case the ALJ observed that "nothing prevents the hospital from establishing a unit of all residual unrepresented employees through section 3507 rulemaking."

System (2019) PERB Decision No. 2667-P, pp. 33-34 [employee preference is just one factor to be considered in a unit determination].) Indeed, PERB has long recognized that in the public sector employee choice may be subordinated "to the overriding policy of avoiding proliferation of bargaining units." (*Regents of the University of California* (2010) PERB Decision No. 2107-H, pp. 23-24; *San Joaquin Regional Transit District* (2019) PERB Decision No. 2650-P, pp. 13-14; *Los Angeles Unified School District* (1998) PERB Decision No. 1267, pp. 5-6 and adopting proposed decision at pp. 64-65.) The majority's conflation of these two concepts not only is contrary to precedent, but also exposes a public agency to liability any time it determines a proposed unit of unrepresented employees is not appropriate.

Third, the majority finds employees within the proposed unit share a community of interest with each other and that the disparity of interest with employees outside the proposed unit does not weigh against finding the unit appropriate. On the one hand, the petitioned-for employees work in proximity to one another, share some common supervision, have frequent contact, and perform similar functions. On the other hand, they also work close to and have frequent contact with employees outside the proposed unit and share supervision with those employees. If this case was before us under a statute that grants PERB plenary authority to determine appropriate bargaining units, I might agree with the majority that the facts establish a sufficient community of interest. But under the governing deferential standard of review, I find there is substantial evidence to support the Hospital's determination that the community of interest is not strong enough to outweigh other criteria pointing away from an appropriate unit. (See, e.g., *St. HOPE Public Schools* (2018) PERB Order

No. Ad-472, pp. 5-8 [finding "weaker than average" community of interest did not outweigh extent of employee organization criterion].)

Finally, the majority faults the Hospital for failing to consider, as part of its analysis of the history of labor relations criterion, the November 2014 card check agreement and the Hospital's provision of information to ESC in December 2014 about a disciplinary matter.[44] Given that no prior PERB or court of appeal decision involving a unit determination has ever suggested such evidence is relevant in determining an appropriate unit, it is not surprising the Hospital did not address it. Thus, I find no error in the Hospital's failure to account in its unit determination for the card check agreement or response to ESC's information request. In fact, this is not really a unit determination issue at all but simply another iteration of the majority's position that the Hospital's perceived bad faith conduct renders the unit determination unreasonable.

Additionally, the majority's reliance on the card check agreement and the Hospital's provision of information to ESC—and its exploration of the Hospital's intent in general—is troubling from a due process perspective. Intent has never been an element or relevant factor in determining whether a public agency has reasonably applied its local rule. The complaint in this case did not allege any violation that would implicate the Hospital's intent. Nor did ESC indicate in its opening statement at the

[44] While the majority claims to "take no position on the correctness of the ALJ's legal analysis" in Case No. SF-CE-1287-M regarding the card check agreement, it nonetheless finds the agreement constituted a "promise to bargain" with ESC, thereby implying the Hospital agreed to recognize the proposed unit "as is." Yet the ALJ in Case No. SF-CE-1287-M did not order the Hospital to find the unit appropriate or to meet and confer with ESC, which would have been the expected means to enforce the Hospital's purported promise.

hearing or its questioning of witnesses that it considered the Hospital's motive to be relevant to the alleged violation in this case. The record thus does not show the Hospital was on notice that its intent in rendering its unit determination would be litigated in this proceeding. This lack of notice raises the concern I expressed in my concurrence in *City of Davis* (2018) PERB Decision No. 2582-M, viz., that a violation may be found based on evidence the respondent did not know would be used to establish its intent, in violation of its due process right to "notice of 'the facts and conduct alleged to constitute an unfair practice' (PERB Reg. 32615, subd. (a)(5)." (*Id.* at p. 37, fn. 19.)

B. Conclusion

In its zeal to punish the Hospital for what they perceive as bad faith conduct toward ESC, the majority engages in unprecedented legal contortions to justify overturning the Hospital's unit determination. Specifically, the majority creates from whole cloth a new rule that a public agency's intent in applying its local rule in a particular way—rather than the objective effect of that application—is a relevant consideration. In this case, it turns out to be the dispositive consideration. Despite the majority's assurance that this is a unique case, I am concerned it is the camel's nose under the tent toward allowing PERB to sidestep the well-established deferential standard of review whenever it disagrees with a public agency's unit determination.

While I am mindful of my colleagues' concerns about the Hospital's conduct regarding ESC's petition over the past five years, I nonetheless feel constrained to apply existing precedent in this case. On the record before us, the Hospital's unit determination is not in conflict with the language or purposes of the MMBA, nor does it "exceed the bounds of reason" under the applicable legal criteria. Because the

Hospital's determination is reasonable under the deferential standard of review mandated by controlling precedent, I would dismiss the complaint and underlying unfair practice charge.

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-1620-M, in which all parties had the right to participate, it has been found that the Salinas Valley Memorial Hospital District violated the Meyers-Milias-Brown Act (MMBA or Act). The Hospital unreasonably withheld recognition of International Federation of Professional and Technical Engineers, Local 20 (Engineers and Scientists of California) (ESC) as the exclusive representative of a proposed unit of Laboratory employees by unreasonably applying its local rule on unit determinations. This action violated section 3507, subdivision (c), and Public Employment Relations Board (PERB or Board) Regulation 32603, subdivision (g). (Cal. Code of Regs., tit. 8, sec. 31001 et seq.). By this conduct, the Hospital also interfered with the right of employees to participate in the activities of an employee organization of their own choosing, in violation of Government Code section 3506 and PERB Regulation 32603, subdivision (a), and denied ESC its right to represent employees in their employment relations with a public agency, in violation of Government Code section 3503 and PERB Regulation 32603, subdivision (b).

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

A. CEASE AND DESIST FROM:

1. Unreasonably applying Regulation 2 of the Hospital's employer-employee relations ordinance regarding unit appropriateness.
2. Unreasonably withholding recognition of ESC as the exclusive representative of the proposed unit of Laboratory employees.
3. Interfering with bargaining unit members' right to participate in the activities of an employee organization of their own choosing.
4. Denying ESC its right to represent employees in their employment relations with the Hospital.

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

1. Rescind the June 27, 2018, unit determination decision and denial of ESC's request for recognition of the proposed unit of Laboratory employees.
2. Grant ESC's petition for recognition, and proceed to meet and confer over terms and conditions of employment upon request.

Dated: _____ Salinas Valley Memorial Hospital District

By: _____
Authorized Agent

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