STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1021, Charging Party, v. COUNTY OF SAN JOAQUIN, Respondent.	Case No. SA-CE-1095-M PERB Decision No. 2775-M June 30, 2021

Appearances: Weinberg, Roger & Rosenfeld by Matthew J. Gauger and Andrea C. Matsuoka, Attorneys, for Service Employees International Union Local 1021; Liebert Cassidy Whitmore by Che I. Johnson and Lars T. Reed, Attorneys, for County of San Joaquin.

Before Banks, Chair; Shiners and Krantz, Members.

DECISION

BANKS, Chair: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Service Employees International Union Local 1021 (SEIU or Union) to a proposed decision by an administrative law judge (ALJ). SEIU alleges that the County of San Joaquin violated the Meyers-Milias-Brown Act (MMBA) at sections 3503, 3506, 3506.5, subdivisions (a) and (b), and 3507 by denying SEIU access to conduct health and safety walk-throughs in certain employee work areas and by denying an SEIU representative access to the site of a large heating, ventilation, and air conditioning (HVAC) pipe spill at the main County Human

Services Agency (HSA) building.[1] The ALJ concluded that the County did not violate the MMBA and dismissed the complaint and underlying unfair practice charge.

SEIU filed exceptions to the proposed decision challenging the ALJ's findings. The County did not file any exceptions, but it responded to SEIU's exceptions and urges us to affirm the proposed decision. We have reviewed the entire record and considered the parties' arguments in light of applicable law. For the reasons below, we conclude that the County's denial of access interfered with SEIU's right to represent its members and employees' right to be represented by SEIU. Accordingly, we reverse the proposed decision.

PROCEDURAL HISTORY

On March 28, 2019, SEIU filed the unfair practice charge in this case. On June 7, 2019, the County filed its position statement responding to the charge.

On August 2, 2019, PERB's Office of the General Counsel issued a complaint alleging that on November 2 and 14, 2018, and February 20, 2019, SEIU requested access to secure HSA workspaces to meet with employees and inspect the workspaces' health and safety conditions, and on November 9 and December 13, 2018, and February 20, 2019, HSA denied SEIU's requests in violation of MMBA sections 3503, 3506, 3506.5, subdivisions (a) and (b), and 3509, subdivision (b).

On August 22, 2019, the County filed an answer generally denying any legal violation and setting forth several affirmative defenses including the defense "that its actions were reasonable based on justifiable business reasons." On September 15,

[1] The MMBA is codified at Government Code section 3500 et seq. All further statutory references are to the Government Code unless otherwise specified.

2019, the parties participated in an informal settlement conference but were unable to resolve the matter.

The case was assigned to an ALJ, and a formal hearing was held on December 17, 2019, and February 26, 2020. After the parties filed post-hearing briefs, the ALJ issued a proposed decision on July 15, 2020, finding that the County had not unreasonably restricted SEIU's access to the secure HSA work areas. Finding no violation, the ALJ dismissed the charge and complaint.

SEIU timely filed exceptions arguing that the proposed decision erred by: incorrectly characterizing some of the Union's evidence as hearsay; failing to analyze whether the County's access restrictions were necessary to the efficient operation of business or the safety of employees or others; incorrectly concluding that the County's denials of access were narrowly drawn; and failing to consider that the County discriminated against protected activity. SEIU further argued that the County waived any defense based upon privacy or confidentiality of HSA information.

The County did not file exceptions but responded to SEIU's exceptions, arguing that the ALJ correctly found that it provided SEIU with reasonable access to HSA facilities and that its access restrictions were reasonable.

FACTUAL BACKGROUND[2]

The County is a public agency within the meaning of MMBA section 3501, subdivision (c), and PERB Regulation 32016, subdivision (a).[3] HSA is a County

[2] This factual summary includes findings from the proposed decision to which neither party excepted as well as additional findings based on our review of the administrative record.

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

department tasked with determining eligibility for, and administering, federal and state public assistance, social services, and welfare programs. At the time of hearing, Christopher Woods was the Director of HSA, having succeeded Michael Miller as HSA Director in September 2019. Woods previously was HSA Assistant Director. Samuel Kaisch is HSA Deputy Director of Administration. Suzanne Astabie is an Administrative Assistant and Secretary to the HSA Director.

Charging Party SEIU is the exclusive representative of approximately 4,000 County employees, including HSA employees. SEIU is a recognized employee organization within the meaning of MMBA section 3501, subdivision (b) and PERB Regulation 32016, subdivision (b). SEIU represents five County bargaining units: Office/Office Technical; Para-Professional/Technical; Professional; Supervisors; and Trades/Labor/Institutional. Ulysses Madison is the SEIU Field Representative assigned to HSA. Denise Vaughn is an Eligibility Worker and SEIU shop steward in the Para-Professional unit. Angela Radford and Jeffrey Dumlao are SEIU stewards.

Contract Language

SEIU and the County executed five Memoranda of Understanding (MOUs) corresponding to each of the above bargaining units. Each MOU was effective December 12, 2016, through September 5, 2019, and contained the following clauses.

Section 1.5, subdivision (d), titled "Representatives Access to Employees," provides in pertinent part:

> "Authorized representatives of SEIU shall be allowed reasonable access to employees of the unit at their work locations during the working hours of the employees concerned for the purpose of discussing matters within the scope of representation, including but not limited to the processing of grievances and complaints and distributing materials and information provided that the work of the

> employee and the service to the public are not unduly impaired. The authorized representative shall give advance notice to the department head when contacting departmental employees during their duty period."

Section 1.5, subdivision (f), titled "SEIU-County Facilities Use," grants SEIU the right to use County facilities for bargaining unit employee meetings where space is available and official permission is obtained. SEIU also has the right to reasonably use existing bulletin board space in each building or department at mutually agreed upon locations and under specified conditions.

Section 10.5 is titled "Disputes Involving Safety Issues" and states that "[t]he following constitutes the sole health and safety appeal procedure between the parties and the issues brought to this Committee are not subject to appeal under Complaint Procedure." Section 10.5 provides that the "Safety Committee will be comprised of one member from each SEIU represented bargaining unit, and an equal number of members designated by the County." At HSA, the Joint Labor Management Committee (JLMC), which meets quarterly, also functions as the Safety Committee. Section 10.5 further states:

> "By majority vote of the Committee, as assigned and scheduled, the Safety Committee members, in Labor Management pairs, will be responsible for conducting workplace safety and health surveys and inspections to identify safety and health hazards at worksites and address worker concerns. County safety personnel will be kept fully apprised of all committee activity, and will assist the committee as requested.
>
> "Employees shall report any health and safety concerns first to their immediate supervisor. The supervisor shall have up to five business days, depending on the immediacy of the issue, to respond in writing to the employee. If the employee is not satisfied with the supervisor's response,

> they may appeal the matter in writing to the Department Head or his or her designee, within five business days. Unless there is a hazard or a danger, which would require an immediate response, the department head or his or her designee shall respond to these reports in writing within ten business days.
>
> "If not satisfied with the response from the department head or his or her designee, the employee or his or her designated representative may appeal, in writing, the issue to the Safety Committee. By majority vote, at its regular meeting, the Safety Committee may agree to address the issue and make a recommendation to the County Administrator for resolution."

Since 2000, health and safety issues have appeared on JLMC agendas and discussed at almost every meeting. Vaughn has been a member of the JLMC since 2006, and she confirmed health and safety matters are frequently considered. The MOU provides that disputes involving safety issues are to be resolved under MOU section 10.5, not through the grievance or complaint procedures set forth in the MOU. No HSA employee has invoked the section 10.5 health and safety appeal process during Woods' tenure on the JLMC.

HSA's Mission and Security Requirements

HSA administers public benefits and social service programs on behalf of the California Department of Health Care Services (DHCS) and the California Department of Social Services (DSS). In order to administer these services, HSA uses confidential personally identifiable information (PII) from the Social Security Administration (SSA), Medi-Cal Eligibility Data System, and Applicant Income and Eligibility Verification System. Without this data, HSA would be unable to provide benefits and services.

SSA requires that DHCS and DSS enter into data-sharing agreements with counties to ensure the privacy and security of PII in electronic, paper, verbal, and

recorded forms. Since 2008, HSA has entered into Privacy and Security Agreements with DHCS and DSS to allow its continued access to PII. The State dictates the terms of these non-negotiable agreements to comply with federal requirements. The agreements require HSA to train employees on privacy and security awareness, have all employees sign confidentiality statements, conduct background checks on employees who work with PII, and administer appropriate discipline for mishandling PII.

The Privacy and Security Agreements also require HSA to establish physical and technical security measures and controls to secure all areas where HSA employees assist in program administration, use or disclose PII, or store PII in paper or electronic format. Specifically, section V of the Medi-Cal Privacy and Security Agreement sets forth the following physical security requirements:

> "The County Department shall ensure PII is used and stored in an area that is physically safe from access by unauthorized persons at all times. The County Department agrees to safeguard PII from loss, theft, or inadvertent disclosure and, therefore, agrees to:
>
> "A. Secure all areas of the County Department facilities where county staff assist in the administration of their program and use, disclose, or store PII.
>
> "B. These areas shall be restricted to only allow access to authorized individuals by using one or more of the following:
>
> "1. Properly coded key cards
>
> "2. Authorized door keys
>
> "3. Official identification
>
> "C. Issue identification badges to county staff.

> "D. Require county staff to wear these badges where PII is used, disclosed, or stored.
>
> [¶] . . . [¶]
>
> "G. Ensure data centers with servers, data storage devices, and/or critical network infrastructure involved in the use, storage, and/or processing of PII have perimeter security and physical access controls that limit access to only authorized county staff. Visitors to the data center area must be escorted at all times by authorized county staff.
>
> "H. Store paper records with PII in locked spaces, such as locked file cabinets, locked file rooms, locked desks, or locked offices in facilities which are multi-use meaning that there are County Department and non-County Department functions in one building in work areas that are not securely segregated from each other. It is recommended that all PII be locked up when unattended at any time, not just within multi-use facilities.
>
> [¶] . . . [¶]
>
> "K. Use all reasonable measures to prevent non-authorized personnel and visitors from having access to, control of, or viewing PII."

Both the DHCS and DSS Privacy and Security Agreements establish security requirements for paper documents. Among these is a provision titled "Escorting Visitors," which requires that "[v]isitors to areas where PII is contained shall be escorted, and PII shall be kept out of sight while visitors are in the area."

In HSA work areas, PII exists in paper and electronic format, and employees discuss PII with clients over the telephone. Testimony suggests that HSA employees secure paper documentation in locked drawers or cabinets and empty shredder baskets daily when leaving work.

SEIU's Access to the HSA Building

The main HSA building located in downtown Stockton has two entrances. The public entrance has a large lobby, waiting room, and elevators. To access the rest of the building from this area, an employee key card is required. The employee entrance has a smaller lobby and security desk. Visitors must check in and obtain a pass before accessing non-public areas. Employees, who must display photo identification badges while in the building, use key cards to pass through three lanes of turnstiles and enter the elevators. Employee key cards are required to access the second floor. On floors three, four, and five, the elevators open into an open atrium and hallways connected by stairs. Employee key cards are required to access work areas from the stairwells. Only one employee is permitted to enter secured entry points at a time.

The fifth floor of the main HSA building has a cafeteria with a bulletin board located outside that has space reserved for union communications.[4] The building has 15-20 conference and meeting rooms, varying in size from four-person to 150-person capacity. HSA provides available rooms to SEIU upon request. In 2019, SEIU requested, reserved, and used the HSA cafeteria and conference/meeting rooms 22 times.

The existing HSA building security measures were implemented between 2008 and 2011. On October 20, 2008, then-Director of HSA Joseph Chelli sent a letter to SEIU stating that the County Board of Supervisors had approved the DHCS Medi-Cal Privacy and Security Agreement in September. Chelli's letter stated in pertinent part:

> "public access for trainings, presentations, meetings, or other functions that are either attended by or facilitated by

[4] In their communications, testimony, and briefing, the parties also refer to the cafeteria as the lunchroom and the break room interchangeably.

> non-HSA employees would be limited to fifth floor conference rooms and the break room. Non-employees will no longer be allowed access to the work areas of HSA staff on any floor."

Since 2008, HSA has only permitted people with security clearance and the appropriate passes to enter secure work areas unescorted. People without security clearance or passes must be escorted in these areas by authorized personnel.

Based on these policies, Madison and other SEIU representatives who are not County employees may enter the HSA building from either the public or the employee entrance. Madison may proceed past the security desk and turnstiles after checking in, and he has unlimited access to the first-floor elevators, third through fifth floor atrium and stairs, fifth-floor cafeteria and bulletin board, and the conference or meeting rooms on all floors. Madison is not required to provide HSA with advance notice before entering these areas, and he is not required to be escorted through these areas. However, Madison is generally not permitted to access work areas in the HSA building other than the conference and meeting rooms.

In contrast, SEIU stewards such as Vaughn have access to most of the building, including work areas. Prior to 2008, non-employee SEIU representatives accessed work areas to hand out flyers, but since then SEIU has relied upon employee stewards to hand out Union flyers.

Vaughn's undisputed testimony established that she regularly sees non-employee contractors in the second-floor work area during working hours. Woods corroborated that some non-employee contractors are allowed in work areas during working hours. Non-employee contractors who work in the HSA building include contractors for security, cable installation, janitorial services, copy machine

technicians, pest control, document shredding services, cubicle moving services, vending machine stocking, and information systems services. When the information systems contractor began working at the HSA building, an agency-wide e-mail was sent informing employees of the contractor, explaining that employees would see him throughout the building, and providing his photo so employees could identify him. He performs his duties in work areas throughout the day. Janitorial staff are also in the HSA building throughout the day, including in work areas, both during and after work hours. On Fridays, paper shredding contractors enter work areas during work hours to empty shredding bins. Except when security staff occasionally deliver items to employees, these contractors do not interrupt employees' work at their desks. Other contractors do not provide their services during the workday.

SEIU's Request for Monthly Access to HSA Building Secure Work Areas

On November 2, 2018, Madison sent a letter to then-Director of HSA Miller requesting access to HSA building secure work areas, stating:

> "SEIU Local 1021 has established for the Human Services Agency of San Joaquin County that our members be provided with monthly Health and Safety welfare checks by the Union. This will require the Union to have direct access to work areas where our members are located.
>
> "The intent of this Health and Safety welfare check is for the Union to walkthrough and have direct observation of the working conditions of our members. What has prompted our need to conduct a monthly walkthrough are reports of roaches, excessive dust, and other complaints received by the Union. The Union would welcome someone from San Joaquin County's Risk Management to be a part of our agency walkthrough If you would like.
>
> "It is the Union's intent to conduct our initial Health and Safety welfare check during the month of November 2018

> preferably during the week of November 12, 2018 but no later than November 21, 2018."

On November 9, Woods replied to Madison's letter, stating that Madison's request would be discussed with County Labor Relations and additional correspondence would follow, but "the Health and Safety Welfare Checks will not take place as you have proposed." Woods testified that because Madison's letter did not specify areas of the building subject to member complaints, he interpreted the letter as a request for unfettered access to wander about the HSA building on a monthly basis. Woods further testified that Madison's request did "not indicat[e] that there has been an issue that has been communicated to the department, the department has not taken action, and therefore he needs to follow up."

Madison testified that he had requested access to work areas during the workday, which could mean employee break times or lunch times. He explained that this would allow employees to "be present to provide . . . direct knowledge and bring [Madison] directly to the location or area where they say that there's unsafe conditions."

The Pipe Spill at HSA and Madison's Request for Access to Affected Work Areas

On the morning of November 14, 2018, a pipe broke while a maintenance crew was working on the HVAC system on the fourth floor of the HSA building. This caused 100 gallons of an unknown liquid to spill and leak through to the third floor. One maintenance employee near the pipe when it burst was injured and taken to the hospital. The spill affected 16 to 20 workstations on the fourth floor and 10 to 15 workstations on the third floor. The fire alarm was activated, and employees evacuated the building. After an hour, first and second floor employees were asked to

return to work. Third and fourth floor employees were told to report to the fifth-floor cafeteria or atrium later in the day.

HSA brought in a restoration company to begin cleanup. The restoration company put up plastic sheets from floor to ceiling to seal off affected work areas and contain the odor, fluid was extracted from the carpets, soiled carpet and ceiling tiles were removed, and charcoal air scrubbers were installed. HSA also brought in an environmental health consultant to determine what liquid had spilled and assess the appropriate safety precautions. When third and fourth floor employees returned, they were sent home for the day to allow cleanup work to continue. Workers training on the fifth floor who complained of odors or feeling ill were also sent home. At 2:00 p.m., Astabie sent an e-mail directing third and fourth floor employees to report to the fifth-floor cafeteria for an 8:00 a.m. meeting the next day.

After receiving numerous calls from SEIU members, Madison went to the HSA building to meet with Miller, who informed him of the spill. According to Madison's testimony, he requested access to the affected work areas to see the conditions that existed, what pipe had burst, and what type of fluid was leaking, especially since one employee had been injured. Miller denied the request, explaining that it was not safe for anyone to enter the area. Miller invited Madison to a meeting with impacted employees the next morning and said that Madison would be allowed to walk through the affected area after the meeting.

Kaisch testified that he, Miller, Madison, and Radford met between 2:30 and 3:00 p.m. on November 14, and SEIU was informed about the spill and cleanup efforts. Madison and Radford asked why HSA did not send all employees home. They were told that anyone affected, including those with workstations on the third and

fourth floors, or anyone who complained about odors or feeling ill, was sent home.[5] Kasich testified that no one from the Union asked to inspect the flooded workspace on November 14.[6] On cross-examination, however, Kaisch said he did not recall whether Madison requested access to the affected areas on November 14.

After his meeting with Miller, Madison went to the County Risk Management Department to determine whether that department was aware of the pipe spill and to try to address employee concerns. Madison was informed that someone from Risk Management was "dealing with the situation," and an incident report would be provided to him.

On November 15, 2018, at 7:30 a.m., the environmental consultant informed Miller and Kaisch that the liquid was similar to radiator fluid and was safe to breathe but would irritate skin if there was significant contact. Kaisch and Miller met with third and fourth floor employees at 8:00 a.m. to explain what happened and the ongoing cleanup and safety measures. The 26 to 35 staff whose workspaces were affected were relocated to other areas on the third and fourth floors; all other employees returned to their workstations. Staff impacted by the spill were told to work with supervisors to arrange time to retrieve their personal property and were instructed that "[i]f there was liquid on a belonging . . . [to] leave it alone." Employees were told they would be compensated for any damage to their personal property, and HSA would assist employees with submitting reimbursement claims to the County. Employees

[5] Kaisch testified that "a couple hundred" employees were sent home out of the 800-900 who worked in the building.

[6] Kaisch testified that he entered the sealed-off area briefly to ensure cleanup was underway, but no one other than environmental inspectors, cleanup crew, or restoration workers was allowed in the affected areas that day.

whose workstations were affected by the spill were allowed to go behind the plastic sheeting that day to retrieve their uncontaminated personal belongings. Kasich testified that he did not believe that the employees were given any other protocol or precautions to follow while accessing the affected area. After the morning meeting, Madison saw employees enter what he understood was the sealed-off work area.

After the meeting, Madison approached Miller and Kaisch, discussed the incident, and requested a walkthrough. Miller and Kaisch took Madison to the affected area and showed Madison where the pipe had broken from the outside of the plastic sheet sealing off the spill areas. Cleanup efforts were underway, including installation of the plastic sheeting, commercial fans, and air scrubbers. HSA employees were not present during the walkthrough.

Madison testified that he was taken behind the locked doors into work areas, but there was a wall of plastic sheeting between him and the entire spill area so he "could not physically see the area that was affected." Madison was unable to clearly see the area behind the plastic sheeting, which was installed from the floor to the ceiling. He could make out some figures behind the sheeting who appeared to be wearing construction clothing, but he did not see them wearing any hazmat suits or personal protective equipment.[7] He could see two commercial fans in the sealed-off

[7] Madison testified: "I expected to do a walkthrough and physically see the area that was impacted by the pipe break. [. . .] [W]hat Mr. Miller considered to be a walkthrough was he walked me up inside behind the locked door up to a wall of plastic paper with two big, I guess, commercial fans that were blowing through–that the plastic was around that was blowing inside of an area. So, I couldn't see anything. I could not physically see the area that was affected."

area. Madison testified that he requested to go behind the plastic sheeting, but Miller said he was not allowed to because the area was being worked on at the time.

Kaisch testified that he and Miller took Madison to the affected third and fourth floor areas, and showed him the plastic sheeting and cleanup efforts, including venting the smell with air scrubbers redirecting air to rooftop vents. Kasich further testified that he did not hear Madison request to enter the sealed-off area, but that Madison told Kasich and Miller that they had done a good job reacting so quickly, and that he appreciated being able to see the area. The walkthrough lasted approximately five to ten minutes.

At 11:45 a.m., Kaisch sent an e-mail to HSA staff describing the prior day's spill, cleanup efforts, and safety considerations.[8] Cleanup continued for eight weeks after the incident. Workstations touched by fluid were dismantled and new ones built in the affected areas.

The County's Denial of SEIU's Requests to Conduct Monthly Health and Safety Inspection Walkthroughs

On December 13, 2018, Woods e-mailed Madison to follow up on SEIU's November 2 request, stating:

[8] The e-mail states: "Yesterday, during a regularly scheduled maintenance on floor 4, fluid from the HVAC system was unintentionally released and affected the work areas on floors 4 and 3. The spill has been cleaned, requiring the extraction of the spilled fluid, removal of carpet, ceiling tiles, and some workstations. Additionally, there is plastic sheeting affixed to the walls and ground in order to contain the odor to the immediately affected areas. There are negative pressure units moving the odor out of the building, as well as charcoal-based air scrubbers that are removing the odor from the air. We have consulted with an Industrial Hygienist and he has reviewed the contents of the released fluid, assuring us that it is only harmful if you come into direct contact with the fluid."

> "In your letter, you asked that you be allowed to walkthrough the building because you received reports of roaches and excessive dust, among other things. The department is unaware of the concerns you describe and you have not presented these concerns in previous Joint Labor Management Committee (JLMC) meetings, including the one held on October 29, 2018. I suggest you consider adding the concerns you expressed in the letter to the next JLMC meeting agenda. Your request to walkthrough restricted areas is denied. Should specific circumstances exist which the department deem appropriate, as was the case on November 15, 2018 when Mr. Miller provided you a guided walkthrough of the unoccupied workspace affected by flooding, a guided after-hours walkthrough may be arranged."

Woods testified that, pursuant to this e-mail, a guided walkthrough would be permissible if SEIU could point to actual, unremedied health or safety threats.

On February 14, 2019, Madison e-mailed Miller and Astabie, copying 11 SEIU stewards including Vaughn, Radford, and Dumlao. The e-mail proposed seven agenda items for the February 20 JLMC Meeting, and requested release time for the stewards. Item 3 was "Union Access to Worksite & Health and Safety Inspections."

At the February 20, 2019 JLMC meeting, Madison explained that members had complained to SEIU of roaches in the lunchroom, breakrooms, and adjacent areas, and excessive dust in the file room.[9] Madison said that SEIU wanted to access these areas to address the health and safety concerns. Madison repeated his request for SEIU to perform health and safety walkthroughs of HSA work areas. Madison testified

[9] Madison "was told" by members that the breakrooms and adjacent areas were in restricted work areas, or behind locked doors on the first through fourth floors. He did not have personal knowledge of whether these breakrooms actually existed because since 2008 he has not had access to secured HSA work areas.

that Miller denied the request, stating that HSA management needed an opportunity to address health and safety concerns before involving SEIU and that: management had not received any employee complaints about roaches or dust; HSA brings in exterminators for roaches; and other county HSAs did not allow unions access to members' worksites. Madison stated that it was unfair SEIU did not have access to employee worksites.

Woods testified about his recollection of a JLMC meeting where excessive dust was discussed. During this meeting, file room employee Dumlao stated that dust was not an issue, and accordingly Madison was not given access for a walkthrough. However, further questioning of Woods revealed that Woods was recalling a different JLMC meeting, not the meeting at issue here.[10] Vaughn received Madison's February 14, 2019 e-mail and proposed agenda, but did not remember anything about the February 20 JLMC meeting.[11]

[10] When asked whether the County offered to escort Madison to the file room at the February 20, 2019 JLMC meeting, Woods replied: "I didn't offer to escort him because he has an employee and member that was there that said it wasn't a problem. [. . .] The issue was dropped in that meeting at that point. It wasn't my responsibility to offer that access. [Madison] should request that access." However, when asked about the agenda for the JLMC meeting he was recalling, he stated that the February 20, 2019 meeting agenda was not for the meeting he recalled because he "distinctly remember[ed]" it contained the agenda item of dust in the file room.

[11] Vaughn saw roaches on her desk in 2018 but not in 2019. She did not report the roaches to HSA management and has not filed grievances over pests or dust. In 2017, Vaughn observed a large amount of dust in ceiling tiles and vents in a second-floor bathroom. She took pictures and raised the health and safety issue at a JLMC meeting. Woods asked her to forward the pictures and said he would handle it. Vaughn sent Woods the pictures, and thereafter she did not see the dust again.

DISCUSSION

The Board reviews exceptions to a proposed decision de novo. Under this standard of review, the Board is free to draw its own, and perhaps contrary, inferences from the evidence presented, and form its own conclusions. (*City of Culver City* (2020) PERB Decision No. 2731-M, p. 10.)

Madison's Testimony about Miller's Denial of His Access Requests

We first address SEIU's exception that the ALJ incorrectly deemed Madison's testimony about Miller's denials of his access requests as insufficient to support a finding that the County denied SEIU access to HSA work areas. "PERB Regulation 32176 sets forth PERB's unremarkable rule that hearsay evidence is admissible, but 'shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.' Pursuant to this rule hearsay evidence is regularly admitted in PERB proceedings, but absent other non-hearsay evidence may not be relied upon to support a finding." (*Palo Verde Unified School District* (2013) PERB Decision No. 2337, p. 20.) The proposed decision found that SEIU's "allegations about the November 14, 2018 pipe spill affected work areas, November 15 walkthrough, and February 20, 2019 JLMC worksite health and safety inspections/walkthroughs are supported only by the uncorroborated hearsay testimony of Madison." Based on this reasoning, the proposed decision found that "Madison's testimony alone cannot support factual findings of the truth of these matters, i.e., HSA denials of these SEIU access requests." We disagree.

"Hearsay may be briefly understood as an out-of-court statement offered for the truth of its content." (*People v. Sanchez* (2016) 63 Cal.4th 665, 674-675.) Hearsay is defined by the Evidence Code as "evidence of a statement that was made other than

by a witness while testifying at the hearing and that is offered *to prove the truth of the matter stated*." (Evid. Code, § 1200, subd. (a), emphasis added.) "Senate committee comments to Evidence Code section 1200 explain that a statement 'offered for some purpose other than to prove the fact stated therein is not hearsay.'" (*People v*. *Sanchez*, *supra*, 63 Cal.4th at pp. 674-675, quoting Sen. Com. on Judiciary com., 29B pt. 4 West's Ann. Evid. Code (2015 ed.) foll. § 1200, p. 3.) A "statement" may be either an "oral or written verbal expression" or the "nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression." (*People v*. *Sanchez*, *supra*, 63 Cal.4th at pp. 674-675, quoting Evid. Code, § 225.) "Thus, a hearsay statement is one in which a person makes a factual assertion out of court and the proponent seeks to rely on the statement to prove that assertion is true." (*People v*. *Sanchez*, *supra*, 63 Cal.4th at pp. 674-675.)

Testimony regarding an out-of-court statement that is not offered to prove the truth of the matter asserted is not hearsay. (*People v*. *Sanchez*, *supra*, 63 Cal.4th at p. 674; *People v. Superior Court (Couthren)* (2019) 41 Cal.App.5th 1001, 1019.) "Where the fact that a particular statement was made is of itself a relevant fact, regardless of the truth or falsity of such statement, the statement is admissible in evidence as an independently relevant fact[,]" and the hearsay rule does not apply because the statement is akin to a verbal act. (*Store of Happiness v*. *Carmona & Allen*, *Inc*. (1957) 152 Cal.App.2d 266, 274; see *Smith v*. *Whittier* (1892) 95 Cal. 279, 293-294 ["If the fact sought to be established is that certain words were spoken, without reference to the truth or falsity of the words, . . . the testimony of any person who heard the statement is original evidence, and not hearsay"].)

Madison testified that he requested to see the spill area on November 14, but was denied access:

> "[Madison:] He had informed me about the situation. I then asked for access to the area and it was denied.
>
> "[Direct Examiner Q:] Did Mr. Miller state a reason for the denial?
>
> "[Madison A:] He said because it wasn't safe for anybody to be in and that he did not want to allow me access to an area where workers were not allowed to be in."

Madison also testified that during the November 15 walkthrough he requested to access the spill area located in the sealed-off area, but was denied:

> "[Direct examiner Q:] . . . And did management allow you to go through the plastic screen and see any of the affected area that was blocked off?
>
> "[Madison A:] No.
>
> "[Direct examiner Q:] Did you ask for that access?
>
> "[Madison A:] Yes.
> "[Direct examiner Q:] Did they provide a reason why you could not go through there?
>
> "[Madison A:] Because it was being worked on at the time."

Madison's testimony about Miller denying his access requests on November 14 and 15 was not offered to prove the truth of the matters Miller asserted—that he did not want to allow Madison to access an area where workers were not allowed, and that the area was being worked on at the time. Rather, SEIU offered this testimony to show that Miller denied Madison's access requests, regardless of the truth of the

reasons provided. Therefore, Madison's testimony was not hearsay but was instead original testimonial evidence sufficient to support a finding.

Madison also testified that during the February 20, 2019 JLMC meeting, he requested to conduct a health and safety walkthrough because of members' complaints about excessive dust and roaches, but Miller denied his request:

> "[Direct Examiner Q:] . . . Was your request granted or denied at the meeting? Was it resolved?
>
> "[Madison A:] It was denied.
>
> "[Direct Examiner Q:] Denied. And who denied the request?
>
> "[Madison A:] Mr. Miller did.
>
> "[Direct Examiner Q:] And did he state a reason for the denial?
>
> "[Madison A:] He said—He said that management needed to have—first have the opportunity to address the concerns first before getting the Union involved. And he also identified that they had not received any complaints from the members about roaches or dust. And he went on to say how they bring somebody in to take care of the roaches and things and that they had not received any complaints related to the dust. He went on to say that he had done a survey of other Human Services Agencies and that they did not allow the Union to have access to the members. And so, because of all those reasons, he denied access to the Union."

Madison's testimony that Miller denied his access request is also not hearsay, as it was not being offered for the truth of the matters asserted by Miller.

Even if Miller's explanation as to why SEIU's request was being denied was offered for the truth, and thus was hearsay, as the Director of HSA at the time and an agent of the County, Miller's statement would qualify as a party admission, which is an

exception to the rule against hearsay. (Evid. Code, § 1222; *O'Mary v*. *Mitsubishi Electronics America*, *Inc*. (1997) 59 Cal.App.4th 563, 570; *City of San Diego* (2020) PERB Decision No. 2747-M, p. 20, fn. 11.) We therefore find Madison's testimony recounting Miller's denial of his access requests to be original, non-hearsay evidence.

Because of its erroneous treatment of Madison's testimony as hearsay, the proposed decision failed to make a credibility determination among the competing testimony from Madison on behalf of SEIU and that of the County's agents Woods and Kaisch. Based on the entire record, we credit Madison's testimony as to these events. Madison's testimony was credible throughout the hearing, and he demonstrated a clear recollection of the substance of the conversation that occurred on November 14, including Miller's reason for denying the request. In contrast, while Kaisch initially testified that no one from SEIU asked to inspect the flooded workspace on November 14, directly contradicting Madison's testimony that he made such a request, Kaisch later admitted on cross-examination that he did not recall whether Madison requested access to the affected areas on November 14. We credit Madison's testimony over Kaisch's here.

Similarly, Madison testified that during the November 15 walkthrough with Miller and Woods he requested to access the sealed-off area, and he was told that he could not enter the area because it was being worked on at the time. Miller did not testify at the hearing despite SEIU issuing him a subpoena, so Madison's testimony was not directly rebutted. Woods testified that he did not hear Madison make a request to enter the sealed-off area, but instead heard Madison state that they had done a good job reacting so quickly and that he appreciated being able to see the area. When asked whether it was possible that Madison directed his question to Miller rather than

to him, Woods stated that he would have been surprised if he did not hear Madison make that request. Due to the circumstances of the walkthrough, where the spill area had commercial air-scrubber fans blowing likely making a good deal of noise, we are not as sure as Woods that he would have heard Madison's request to enter the sealed-off area. Madison, in contrast, demonstrated a clear memory of the conversation as he reiterated the reasoning given for denying access. Because Madison's testimony is generally credible, and he is in a better position to know what he said and was told during the November 15 walkthrough, which was not directly rebutted, we credit Madison's version of the event.

Interference Standard

A prima facie case of interference is established when a charging party shows the employer engaged in conduct that tends to or does result in at least slight harm to rights guaranteed by the MMBA. (*Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, p. 42 (*Petaluma*); see also *Carlsbad Unified School District* (1979) PERB Decision No. 89, pp. 10-11.) No showing of unlawful motive, purpose, or intent is required. (*Petaluma*, *supra*, PERB Decision No. 2485, p. 42.) Once a prima facie case is established, the burden shifts to the employer. (*County of San Joaquin* (2021) PERB Decision No. 2761-M, p. 23 (judicial review pending); *Contra Costa County Fire Protection District* (2019) PERB Decision No. 2632-M, pp. 18-19.) If the harm is "inherently destructive" of protected rights, the employer must show that the interference results from circumstances beyond its control and that no alternative course of action was available. (*County of San Joaquin*, *supra*, PERB Decision No. 2761-M, p. 23; *Contra Costa County Fire Protection District*, *supra*, PERB Decision No. 2632-M, p. 22.) For conduct that is

harmful but not inherently destructive, the respondent may attempt to justify its actions based on operational necessity. (*Ibid*.) Within the category of actions or rules that are harmful but not inherently destructive, the asserted business need is balanced against the tendency to harm protected rights; if the tendency to harm outweighs the necessity, we find a violation. (*Ibid*.) When balancing, the stronger the tendency to harm, the greater the respondent's burden becomes to show its business need was important and that its actions or rules were narrowly tailored to attain that purpose while limiting harm to protected rights as much as possible. (*Ibid*.)[12]

Interference Analysis

SEIU alleges that the County unreasonably restricted its access to HSA work areas by denying Madison access to view the spill site on November 14, denying him access to the sealed-off spill area while on the November 15 walkthrough, and denying his November 2, 2018 and February 20, 2019 requests to conduct monthly health and safety walkthroughs. The County contends that taking Madison on the guided walkthrough on November 15 was a reasonable response to SEIU's request to view the spill site, and that rejecting Madison's requests to conduct monthly health and safety walkthroughs was also reasonable.[13]

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[12] For the reasons stated in his dissent in *Contra Costa County Fire Protection District*, *supra*, PERB Decision No. 2632-M, Member Shiners disagrees that the concept of "inherently destructive conduct" should be part of PERB's interference standard. (*Id*. at pp. 72-76.) Instead, in all interference cases he would simply "balance the harm to protected rights against the employer's asserted justification for its conduct." (*Id*. at p. 75.)

[13] While the unfair practice charge alleged violations on both November 14 and 15, the complaint alleges only that Madison was denied access on November 14, and it does not allege a separate incident occurring on November 15. We nonetheless consider this allegation as it meets the criteria for an unalleged violation: "(1) adequate

In our below analysis, we do not tarry long on SEIU's prima facie case since it is virtually self-evident. Rather, this case turns primarily on the County's affirmative defense that it reasonably denied SEIU's request for monthly walkthroughs due to legitimate business justifications related to the need to maintain the security of PII.[14]

The MMBA affords both employee and non-employee representatives of employee organizations access to areas in which employees work. (*County of Tulare* (2020) PERB Decision No. 2697-M, p. 18 (*Tulare*).) A union's presumptive right of access is subject to reasonable regulation. (*Regents of the University of California,*

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notice and opportunity to defend has been provided to respondent; (2) the acts are intimately related to the subject matter of the complaint and are part of the same course of conduct; (3) the unalleged violation has been fully litigated; and (4) the parties have had the opportunity to examine and be cross-examined on the issue." (*Lake Elsinore Unified School District* (2019) PERB Decision No. 2671, p. 26.) The charge contemplates the November 14 and 15 requests and alleged denials, which are related to SEIU's access request to view the same spill site, and the parties have fully litigated each alleged denial, both at hearing and in briefing.

[14] To the extent SEIU argues that the County waived this defense by not pleading in its answer that its actions were based on the need to maintain privacy or confidentiality of PII, we disagree. The County's answer sets forth the affirmative defense that "its actions were reasonable based upon justifiable business reasons." Because PERB does not strictly construe pleadings, we find that the County sufficiently pled this affirmative defense. (*Eastern Municipal Water District* (2020) PERB Decision No. 2715-M, p. 8, quoting *City of Roseville* (2016) PERB Decision No. 2505-M, p. 23 ["PERB has observed that so long as a party is informed of the substance of the charge or defense and afforded the basic, appropriate elements of procedural due process, the party 'cannot complain of a variance between administrative pleadings and proof.'"].)

However, as discussed at length *post*, the County's reliance on its alleged need to secure PII suffers from several fatal flaws: The County waived that position long before SEIU filed the instant charge, because the County did not raise the concern with SEIU; and, even if the County had raised the concern contemporaneously, the record demonstrates that the County could have adequately secured PII via an escorted walkthrough.

Lawrence Livermore National Laboratory (1982) PERB Decision No. 212-H, pp. 14-15 (*Lawrence Livermore*); *State of California (California Department of Corrections)* (1980) PERB Decision No. 127-S, p. 6.) It is the employer's burden to demonstrate that its restriction of a union's access is reasonable. (*Regents of the University of California* (2012) PERB Decision No. 2300-H, p. 20, fn. 8.)

For an access restriction to be reasonable, the employer must establish two elements: (1) the regulation must be shown to be necessary to the efficient operation of the employer's business or the safety of its employees and others; and (2) the regulation must be narrowly drawn to avoid overbroad, unnecessary interference with the exercise of statutory rights. (*County of Riverside* (2012) PERB Decision No. 2233-M, p. 8 (*Riverside*); see also *Lawrence Livermore*, *supra*, PERB Decision No. 212-H, pp. 13-15 & adopting proposed decision at pp. 51-53; *Regents of the University of California, University of California at Los Angeles Medical Center* (1983) PERB Decision No. 329-H, pp. 4-6 (*UCLA Medical Center*).) In other words, the inquiry is "whether the regulations established by the employer are properly related to justifiable concerns about disruption of [the employer's] mission, and whether the rules are narrowly drawn to avoid overbroad, unnecessary interference with the exercise of statutory rights." (*Lawrence Livermore*, *supra*, PERB Decision No. 212-H, p. 15.)

While private sector labor law affords an employer more leeway to regulate non-employee union representatives than employee representatives, the statutes we enforce differ substantially from private sector law on this point. (*Riverside*, *supra*, PERB Decision No. 2233-M, pp. 6-8.) Thus, we apply the above-described principles irrespective of whether a union's access charge involves employee representatives, non-employee representatives, or a combination. (*Id*. at pp. 7-8.) However, depending

on the circumstances, some employer rules regarding non-employees may be reasonable, such as a rule requiring a union representative to identify themselves when they arrive at a worksite, if members of the public are also required to do so. (*Id*. at p. 8, citing *San Ramon Valley Unified School District* (1982) PERB Decision No. 230, p. 12, fn. 11.)

Even California public employers providing sensitive services, such as acute patient care and classified national defense research, must narrowly tailor their access rules to avoid overbroad, unnecessary interference with statutory rights. (*UCLA Medical Center*, *supra*, PERB Decision No. 329-H, p. 10; *Lawrence Livermore*, *supra*, PERB Decision No. 212-H, pp. 13-14 [rejecting employer's argument that the presumptive right of access either does not apply or is rebutted by national security requirements].) The Board has thus previously addressed access rights in workplaces that deal with private information, applying the operative test in a fact-intensive inquiry that carefully considers the sensitive work being performed and the safeguards needed to protect such work while still affording statutory rights to the degree possible. (See, e.g., *Riverside*, *supra*, PERB Decision No. 2233-M, p. 9; *Lawrence Livermore*, *supra*, PERB Decision No. 212-H, p. 14.)

Balancing these interests in an acute care hospital setting, the Board held that a non-discriminatory restriction on non-business solicitation and distribution is presumptively valid if it is limited to immediate patient care areas. (*Regents of the University of California* (2018) PERB Decision No. 2616-H, p. 11; *Riverside*, *supra*, PERB Decision No. 2233-M, p. 9.) But a public hospital must normally allow both employee and non-employee union representatives to traverse patient care areas if necessary to reach areas where non-business activities are permitted. (*Riverside*,

supra, PERB Decision No. 2233-M, pp. 9 & 11; *UCLA Medical Center*, *supra*, PERB Decision No. 329-H, pp. 9-10, 14, 16-17.) The availability of non-work areas within or near the hospital where union representatives may meet with employees during their non-work time may be considered when assessing the reasonableness of an employer's restrictions. (*Riverside*, *supra*, PERB Decision No. 2233-M, p. 9.) But the employer must demonstrate "that such alternative venues are a reasonable substitute for more traditional venues." (*Id*. at p. 10, citing *UCLA Medical Center*, *supra*, PERB Decision No. 329-H.)

In *Lawrence Livermore*, the national defense laboratory was closed to the public to protect national security. (*Lawrence Livermore*, *supra*, PERB Decision No. 212-H, p. 13.) Rather than construing the importance of maintaining national security as sufficient to totally rebut the union's presumptive right of access, the Board instead considered national security needs "as a weighty factor to be considered in reaching the necessary accommodation" between the union's statutory right of access and the employer's operational needs when determining whether particular access restrictions were reasonable. (*Id*. at p. 14.) Based on the record evidence, the Board found it reasonable to require the union to provide a short amount of advance notice prior to access, but the employer needed to downgrade the security rating of the employee lunchroom to allow union access, and could not charge the union for the necessary security escort.[15] (*Id*. at pp. 16-17.)

[15] Notably, the foregoing cases focused on a union's right to communicate with employees at their workplace rather than its right to conduct health and safety inspections of the worksite. As discussed below, health and safety inspections raise somewhat different considerations, since they are location-specific and not easily moved to a break room or other non-work area.

Since approximately 2008, the County has restricted non-employee SEIU representatives such as Madison from accessing secure work areas at the main HSA building.[16] Rather than accessing work areas, Madison is instead given access to non-work areas at the HSA building, which includes the entrance areas, the lunchroom and the large atrium that connects several floors to the lunchroom. Madison is not required to provide advance notice to access these areas of the building. Madison is also given access to HSA conference and meeting rooms. However, Madison is generally prohibited from entering work areas, except for the guided walkthrough on November 15 following the HVAC pipe spill.

Because the County's access rules themselves are not at issue in this case, rather only several instances where the County has denied SEIU's access requests, we examine each instance in light of the appropriate legal framework to determine whether each denial was reasonable. We first note that all access requests at issue are based on SEIU's desire to inquire into health and safety concerns regarding HSA work areas.[17] Because it is appropriate to consider the impact of the County's access

[16] The complaint alleges the County violated the MMBA via discrete access denials, and it does not allege that the County maintains an unreasonable access rule. We therefore express no opinion as to the latter issue.

[17] The County has not disputed that a union has the right to monitor workplace health and safety conditions. Nonetheless, we hold that a union's right to reasonable access includes access to work areas for the purpose of monitoring workplace health and safety conditions. In this regard, an access request is akin to an information request, and there is no dispute that "workplace safety is firmly within the scope of representation." (*City of Santa Maria* (2020) PERB Decision No. 2736-M, p. 23, citing *International Assn. of Fire Fighters, Local 188, AFL-CIO v. Public Employment Relations Bd.* (2011) 51 Cal.4th 259, 275.)

restrictions upon the principles underpinning the MMBA (*Regents of the University of California* (2004) PERB Decision No. 1700-H, adopting proposed decision at p. 60), we consider the unique circumstances where SEIU would require physical presence in work areas to evaluate members' health and safety concerns. Indeed, unions have a significant task in evaluating the many complaints and issues that employees bring to them and deciding which ones merit a grievance or other action, and on-site inspection is a critical component of this task. (*New Surfside Nursing Home*, *supra*, 322 NLRB at p. 535 [while employees can report information to union representative based on their direct observations, the union is entitled to investigate independently before deciding whether employees have raised a meritorious issue that union should pursue]; *Gilberton Coal Co*. (1988) 291 NLRB 344, 348 [onsite inspection allows the

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Because private property rights are not involved, the MMBA and public sector labor statutes provide more robust access rights to unions than the NLRA does. (*Riverside*, *supra*, PERB Decision No. 2233-M, p. 7.) But even applying the narrower access rights that private sector law affords to non-employee representatives, the NLRB and reviewing courts have found that unions are entitled to access workplaces for the purpose of monitoring health and safety conditions. (See *NLRB v*. *American Nat*. *Can Co*., *Foster-Forbes Glass Div*. (4th Cir. 1991) 924 F.2d 518, 524-525 [noting that union access request was a form of information request and therefore covered by NLRB's "broad discovery-type standard," and affirming NLRB's grant of access because there was no alternative means of responsibly representing members regarding heat conditions in factory]; *New Surfside Nursing Home*, *Local 144*, *Hotel*, *Hosp*., *Nursing Home & Allied Services Union*, *Serv*. *Employees Intern*. *Union*, *AFL-CIO* (1996) 322 NLRB 531, 535 (*New Surfside Nursing Home*) [despite fact that employer's nursing home cared for fragile patients, and notwithstanding union's failure to identify what information it sought and why inspection was necessary to obtain that information, NLRB required employer to provide non-employee union representative access for inspection based on union's identifying general problem areas it wished to examine]; *C.C.E*., *Inc*. (1995) 318 NLRB 977, 978 [holding that where union sought to evaluate safety concerns among other issues, there "can be no adequate substitute for the Union representative's direct observation"].)

Union to "determine the current accuracy of the employees[']' allegations" regarding health conditions at the employer's facility].)

SEIU's Requests to Access Work Areas Affected by the HVAC Pipe Spill

On November 14, 2018, after the broken HVAC pipe spilled liquid onto workstations and injured a maintenance worker, Madison requested to access the spill area located in the secured HSA workspace. Madison requested access to the spill area in order to see the conditions that existed, what pipe had burst, and what type of fluid was leaking. Miller denied the request, explaining that it was not safe for anyone to enter the area and he did not want to allow Madison to access an area where workers were not allowed to enter. Instead, Miller invited Madison to the following morning's meeting in the cafeteria and told him that there would be a walkthrough after the meeting.[18]

Following the HVAC leak, the County had evacuated all employees from the affected areas and brought in specialists to clean the spill and determine what the liquid was. Some employees had complained of the odor and feeling ill, and the maintenance worker attending to the spill had to be taken to the hospital. That day, the County did not yet know the nature of the leaked fluid, or whether it was harmful to be near or breathe. Due to the many unknown potential dangers on November 14 when Miller initially denied Madison's access request, we find this denial to be necessary for the safety of Madison and others who would be escorting him through the work area. (*Riverside*, *supra*, PERB Decision No. 2233-M, p. 8.) Because Madison was offered a walkthrough the following day, after the liquid was identified and the spill was mostly

[18] For the reasons explained above, we credit Madison's version of the events.

cleaned, the County's access restriction in this instance was narrowly drawn to address the County's safety concerns. (*Ibid.*) We do not find the denial of access on November 14 to constitute an unreasonable restriction of SEIU's access right.

During the November 15 walkthrough, Madison was taken into the third and fourth floor work areas near the spill, but the spill area was sealed off behind thick plastic taped from the ceiling to the floor. Madison's request to see the area behind the plastic was denied because it was being worked on at the time.[19] At the time of this request, Miller and Woods had been made aware the HVAC fluid was similar to radiator fluid, was not an airborne contaminant, and was only harmful if a significant amount of the liquid comes into contact with skin. Additionally, following the November 15 morning meeting, Miller had directed employees whose workstations had been impacted by the spill to retrieve their personal belongings from their workspaces. Employees were advised to leave behind items that had been touched by the liquid; no other safety instructions were provided, nor was personal protective equipment provided. Because HSA employees were allowed to enter the sealed off area that same day, and in the absence of other evidence that it would have been unsafe to briefly escort Madison to the same area, the County has not shown a valid reason for refusing to do so. (*Riverside*, *supra*, PERB Decision No. 2233-M, p. 8.) The County's denial was therefore an unreasonable restriction on SEIU's statutory right to access. (*Ibid.*)

[19] For the reasons explained above, we again credit Madison's version of the events.

SEIU's Requests for Monthly Health and Safety Inspection Walkthroughs

On November 2, 2018, Madison requested monthly health and safety walkthroughs of HSA work areas to inspect those areas where members had expressed concerns regarding health and safety issues. Madison's letter explained that his request to directly observe members' workspaces was due to "reports of roaches, excessive dust, and other complaints received by the Union." The letter stated that SEIU "would welcome someone from San Joaquin County's Risk Management to be a part of our agency walkthrough." The County does not dispute rejecting Madison's initial request because it did not specify the areas of the HSA building that Madison wanted to inspect, and therefore, the County was unwilling to grant "unfettered" access to "roam about" the HSA work areas. Woods explained at hearing that an additional reason for denying Madison's request was because it did "not indicat[e] that there has been an issue that has been communicated to the department, the department has not taken action, and therefore he needs to follow up."

We do not construe Madison's letter as a request for unfettered access. Madison stated that SEIU was amenable to being accompanied by a County employee on the walkthroughs. Also, Madison specified the member complaints that caused SEIU to want to begin monthly walkthroughs. As we proceed to explain, there was no reason the County could not accommodate SEIU's right to represent employees regarding their health and safety concerns by allowing Madison to personally observe the relevant work areas while still securing PII in accordance with the Privacy and Security Agreements.

First, the County was reasonable to the extent it desired to know the locations of any proposed walkthroughs and appropriately limit such walkthroughs to the areas in question in order to limit any disruptions and undertake necessary PII precautions. Such details are appropriate for discussion with SEIU. (See *Riverside*, *supra*, PERB Decision No. 2233-M, adopting proposed decision at p. 29 [access rights are within the scope of representation].) Indeed, because an access request is a form of information request and SEIU made a presumptively appropriate request, the County was obligated not to summarily refuse it but rather to raise any concerns it had and attempt in good faith to reach an agreement. (See, e.g., *Tulare*, *supra*, PERB Decision No. 2697-M, pp. 13-14.) Here, far from raising its concern over PII, the County refused SEIU's request without even mentioning PII. This was the case, first, in the County's November 9 e-mail, which did not mention PII and indicated that the "Health and Safety Welfare Checks will not take place as you have proposed." Woods sent a follow-up e-mail to Madison on December 13, 2018, which again failed to mention PII and instead stated that HSA was unaware of SEIU's concerns of roaches and excessive dust, as they had not been expressed in previous JLMC meetings. Woods suggested Madison add the concerns to the next JLMC agenda, and reiterated HSA's denial of Madison's access request, stating, "[s]hould specific circumstances exist which the department deem appropriate, as was the case on November 15, 2018 when Mr. Miller provided you a guided walkthrough of the unoccupied workspace affected by flooding, a guided after-hours walkthrough may be arranged."

The County's response was problematic for multiple reasons. First, by relying on the alleged absence of a real safety issue rather than mentioning PII, the County prevented the parties from contemporaneously discussing the issue. PERB has

repeatedly held that such a response waives the employer's concern. (See, e.g., *Tulare*, *supra*, PERB Decision No. 2697-M, pp. 13-15; *State of California (Department of State Hospitals*) (2018) PERB Decision No. 2568-S, pp. 14-16.) Second, by stating that the County would provide a walkthrough if there were a safety issue the County thought was sufficient, the County largely admitted that its PII concerns could be accommodated.[20]

Madison made a second request to perform monthly health and safety walkthroughs at the February 2019 JLMC meeting. There, he specified the concerns to be addressed and the areas of the HSA building he wished to access. Miller rejected this request, stating that: HSA management needed an opportunity to address health and safety concerns before involving SEIU; management had not received any employee complaints about roaches or dust; HSA brings in exterminators for roaches; and other county HSAs allegedly do not allow unions access to members' worksites. The County's response again was deficient. First, the County again failed to raise privacy or confidentiality of PII. Second, while we are aware of no support for the premise that management must be given the chance to address a safety concern before granting an otherwise valid access request, here the County had already received Madison's November letter requesting access because of complaints of

[20] Holding a guided walkthrough after business hours might be appropriate for certain health or safety conditions, provided one or more bargaining unit employees are permitted to take part. In other circumstances, an after-hours walkthrough may not be necessary or sufficient. As we proceed to discuss below, there are means to secure PII during working hours. However, we express no opinion as to whether it would have been sufficient in this instance to allow a union representative and one or more employees a guided walkthrough after hours. That is one of the issues the parties could have discussed had the County not flatly refused SEIU's request.

roaches and dust. Accordingly, management had notice of these issues and an opportunity to address these concerns. Third, it is difficult to ascertain what relevance, if any, we might find in whether other HSAs allow unions to access work areas, and in any event, the County introduced into the record no evidence supporting this argument.

In support of restricting non-employee union representatives from work areas as reasonable, the County points out that employee union stewards have unrestricted access to work areas. However, this argument is contrary to the MMBA's affording both "employee and non-employee representatives of employee organizations alike, access to areas in which employees work." (*Riverside*, *supra*, PERB Decision No. 2233-M, p. 8.) The MMBA does not require employee stewards to shoulder the burden of handling all union matters that require physical access to work areas. As noted above, even under private sector labor law—which affords fewer rights to non-employee union representatives—such non-employees should be permitted access to verify for themselves employees' reports of safety issues. Here, Vaughn testified that she spends considerable time handling workplace complaints, Madison is better prepared to handle more complicated matters, and Madison has more time to allocate to addressing employee concerns since Vaughn also needs to perform her HSA job duties. While employee stewards' ability to access work areas may be considered, we do not find it sufficient to justify the County's denials of access here.

The County argues that restricting Madison and other non-employee union representatives from work areas is reasonable considering the virtually unrestricted access to non-work areas such as the entrance, lunchroom, atrium, and conference rooms. This consideration certainly could be relevant with regard to Madison's ability

to speak with employees, but it is of less relevance in the context of inspecting the workplace for health and safety issues. As discussed above, in that context there is simply no substitute for viewing work areas personally.

At hearing, Madison explained that he desired access during working hours, either during employees' breaktimes or lunchtime, so that members could explain their concerns to him. While management was free to make counterproposals involving after-hours walkthroughs with employees and non-employee representatives, we find the record as a whole shows that a guided walkthrough would not imperil privacy even if done during working hours. Indeed, for the following reasons, even setting aside that the County waived its privacy concerns by failing to raise them with SEIU contemporaneously, we do not find that they would justify the County's position.

The County is required to enter into contracts setting forth minimum safety and security precautions to protect the privacy of PII. Adhering to these terms is mandatory for the County to continue receiving the PII that is vital to performing its services. The Privacy and Security Agreements do not prohibit escorted visitors from entering work areas with PII. To the contrary, the contracts explicitly contemplate having non-employee visitors in areas containing PII, and the contracts specify safety precautions such as escorting visitors and keeping PII out of view when a visitor is nearby. The record reveals no reason why the County could not simply follow the PII safeguarding practices required by the Privacy and Security Agreements, while providing Madison with access to workspaces to view health and safety conditions. (*UCLA Medical Center*, *supra*, PERB Decision No. 329-H, pp. 8-10.)

Surely it is of the utmost importance to maintain the privacy and security of PII. However, the County has provided no factual basis to warrant the total exclusion of

non-employee union representatives from secure work areas. Providing Madison with escorted access to secure work areas strikes a reasonable balance between SEIU's need to view member concerns and the County's need to conform with the Privacy and Security Agreements. Because this walkthrough could occur while employees are on their breaks, any potential interruption to employees' work is speculative.[21] (See *Omnitrans* (2009) PERB Decision No. 2030-M, p. 19 [differentiating between "working time" when employees perform job duties and "working hours" which includes employees' own time].)

In sum, balancing all relevant considerations, we find that the County's denials of SEIU's request to perform monthly health and safety walkthroughs have not been shown to be necessary for the efficient operation or safety of HSA or those HSA serves. (*Riverside*, *supra*, PERB Decision No. 2233-M, p. 8.) Nor have they been shown to be narrowly drawn to avoid overbroad, unnecessary interference with the exercise of statutory rights. (*Ibid*.) The County has not met its burden of rebutting SEIU's presumptive right of access, and its denials of SEIU's November 2 and 15, 2018, and February 20, 2019 access requests constituted an unreasonable restriction of SEIU's statutory right to access.

MOU Provisions Affecting Access Rights and County's Waiver Argument

As an additional justification for its access denials, the County argues that SEIU has a means of accessing work areas to address safety concerns, through the safety committee provision in the parties' five virtually identical MOUs. While PERB lacks the authority to enforce contracts, it may interpret

[21] The County has not provided any factual basis for an efficiency concern. (*UCLA Medical Center*, *supra*, PERB Decision No. 329-H, pp. 8-10.)

them when necessary to resolve an unfair practice allegation. (*Region 2 Court Interpreter Employment Relations Committee & California Superior Courts of Region 2* (2020) PERB Decision No. 2701-I, p. 38 (*Region 2*) (judicial appeal pending), citing *San Francisco County Superior Court & Region 2 Court Interpreter Employment Relations Committee* (2018) PERB Decision No. 2609-I, p. 7.)

"A union and employer may agree to restrict union activity during paid, non-working time, as long as the restriction does not seriously impair employees' right to communicate about union matters." (*Omnitrans*, *supra*, PERB Decision No. 2030-M, p. 21.) However, a "waiver of statutory rights must be 'clear and unmistakable,' and the evidence must demonstrate an 'intentional relinquishment' of a given right."[22] (*Region 2*, *supra*, PERB Decision No. 2701-I, p. 39, fn. 30; *Modoc County Office of Education* (2019) PERB Decision No. 2684, p. 11.) The party asserting the affirmative defense of waiver carries "the burdens of production and persuasion." (*Bellflower Unified School District* (2017) PERB Decision No. 2544, p. 7.) "'[N]ot only must waiver be clearly established, but any doubts must be resolved against the party asserting waiver.'" (*County of Merced* (2020) PERB Decision No. 2740-M, p. 10, quoting *Placentia Unified School District* (1986) PERB Decision No. 595, p. 8.)

[22] The Board has applied the clear and unmistakable standard to an employer's allegation that a union waived statutory access rights. (*Regents of the University of California*, *supra*, PERB Decision No. 2300-H, p. 27.)

The five MOUs pertaining to SEIU's HSA bargaining units all address SEIU's access rights in Section 1.5, subdivision (d), titled "Representatives Access to Employees," which provides in relevant part:

> "(1) Authorized representatives of SEIU shall be allowed reasonable access to employees of the unit at their work locations during the working hours of the employees concerned for the purpose of discussing matters within the scope of representation,[23] including but not limited to the processing of grievances and complaints and distributing materials and information provided that the work of the employee and the service to the public are not unduly impaired. The authorized representative shall give advance notice to the department head when contacting departmental employees during their duty period."

The County argues that SEIU has a means of accessing work areas to address safety concerns, through the safety committee provision in the parties' MOUs. This provision states in relevant part:

> "10.5. Disputes Involving Safety Issues
>
> [¶] . . . [¶]
>
> "The following constitutes the sole health and safety appeal procedure between the parties and the issues brought to this Committee are not subject to appeal under Complaint Procedure.
>
> [¶] . . . [¶]
>
> "By majority vote of the Committee, as assigned and scheduled, the Safety Committee members, in Labor Management pairs, will be responsible for conducting

[23] The County has not argued that workplace health and safety is not within the scope of representation. Longstanding PERB precedent recognizes that health and safety concerns are a mandatory subject of bargaining. (*Salinas Valley Memorial Healthcare System* (2012) PERB Decision No. 2298-M, p. 19.)

> workplace safety and health surveys and inspections to identify safety and health hazards at worksites and address worker concerns. County safety personnel will be kept fully apprised of all committee activity, and will assist the committee as requested.
>
> "Employees shall report any health and safety concerns first to their immediate supervisor. The supervisor shall have up to five business days, depending on the immediacy of the issue, to respond in writing to the employee. If the employee is not satisfied with the supervisor's response, they may appeal the matter in writing to the Department Head or his or her designee, within five business days. Unless there is a hazard or a danger, which would require an immediate response, the department head or his or her designee shall respond to these reports in writing within ten business days.
>
> "If not satisfied with the response from the department head or his or her designee, the employee or his or her designated representative may appeal, in writing, the issue to the Safety Committee. By majority vote, at its regular meeting, the Safety committee may agree to address the issue and make a recommendation to the County Administrator for resolution."

Notably, Section 10.5 of the parties' MOUs does not contain any language limiting SEIU's access to work areas to address or view members' health and safety concerns. Rather, this provision states that it is the "sole health and safety appeal procedure between the parties." The plain language of this section does not clearly and unmistakably waive SEIU's access rights. Indeed, even if we were to consider this provision ambiguous, we would not find it to be a clear and unmistakable waiver of SEIU's right to reasonable access for health and safety walkthroughs. Section 1.5 strengthens this conclusion, further preventing us from construing Section 10.5 as a clear and unmistakable waiver of SEIU's right for non-employee representatives to

access members' workspaces because it would render Section 1.5 surplusage. (*Region 2*, *supra*, PERB Decision No. 2701-I, p. 38.)

In sum, the County has not met its burden to demonstrate a waiver of SEIU's access right. (*Regents of the University of California*, *supra*, PERB Decision No. 2300-H, p. 27; *Omnitrans*, *supra*, PERB Decision No. 2030-M, p. 21; *Region 2*, *supra*, PERB Decision No. 2701-I, p. 39, fn. 30; *Bellflower Unified School District*, *supra*, PERB Decision No. 2544, p. 7; *County of Merced*, *supra*, PERB Decision No. 2740-M, p. 10.)

For these reasons, we reject the County's argument that its denial of SEIU's requests was reasonable in light of the parties' MOUs.

Discriminatory Denial of Access

In its final exception, SEIU asks us to find interference on an additional ground beyond those discussed above. Specifically, SEIU notes that an employer may neither "single out union activities for special restriction," nor "enforce general restrictions more strictly with respect to union activities." (*Regents of the University of California (Irvine)* (2018) PERB Decision No. 2593-H, p. 8.) SEIU contends that the County did so by discriminatorily granting access to non-employee contractors while denying access to non-employee union representatives.

A long line of precedent illustrates that otherwise valid access restrictions nonetheless interfere with protected rights if they are discriminatory in either scope or application. (*The California State University, Chico* (1989) PERB Decision No. 729-H, pp. 6-7; *County of Orange* (2018) PERB Decision No. 2611-M, p. 3, citing *Sierra Sands Unified School District* (1993) PERB Decision No. 977, adopting proposed decision at pp. 11-12 & fn. 12; *Lawrence Livermore*, *supra*, PERB Decision No. 212-H,

p. 16 [noting that if the employer required only the union to reimburse for security escort, but did not require reimbursement from other visitors, that requirement would be discriminatory, which is another ground for it being unlawful]; *West Contra Costa Healthcare District* (2010) PERB Decision No. 2145-M, pp. 19-20 [sign-in requirement did not constitute interference because employer imposed same requirement on other members of the public wishing to access the same areas].) "Whatever the occasion or cause, if the limited intrusion into worktime and work areas is permitted, it cannot be denied for other, equally or less intrusive solicitation or concerted employee activities." (*Petaluma*, *supra*, PERB Decision No. 2485, p. 50.) Indeed, PERB has many times applied these principles to find that rules restricting union activity during working time are impermissible when a similar level of non-business activity is permitted. (*County of Orange*, *supra*, PERB Decision No. 2611-M, pp. 3-4; *Regents of the University of California (Irvine)*, *supra*, PERB Decision No. 2593-H, pp. 8-9.)

The instant case poses a related scenario, as the record demonstrates that non-employee contractors are provided access to HSA work areas throughout the workday.[24] While these non-employee contractors are performing business activities—meaning that the County is not favoring certain non-business activity over union activity—the fact remains that management's duty to protect PII is the same vis-à-vis these non-employee contractors as it is vis-à-vis Madison or any other non-employee

[24] Specifically, HSA has allowed an information systems contractor to be in work areas regularly throughout the workday. Janitorial staff are in the HSA building throughout the day, including in work areas, both during and after work hours. On Fridays, paper shredding contractors enter work areas during work hours to empty shredding bins. Further, security contractors occasionally deliver items or paperwork to employees at their workstations.

union representative. Management's ability to secure PII from non-employee contractors suggests that the same mechanisms (including those discussed above) would be sufficient during a brief escorted walkthrough to look at health or safety issues. (*C.C.E.*, *Inc.*, *supra*, 318 NLRB at p. 977.) Indeed, the contractors do not work exclusively during employee breaks, whereas a union walkthrough could be so scheduled. Moreover, the record does not reflect that contractors are always escorted, whereas Madison could be escorted. Thus, the comparison to contractors is particularly persuasive, as SEIU's requested walkthrough would, if anything, be less likely to lead to accidental PII disclosure. We therefore find that the ALJ further erred by not taking into account the County's ability to secure PII from non-employee contractors. The County's access restriction was discriminatorily applied to SEIU's access requests. For the foregoing reasons, we reverse the proposed decision and issue the following Order.

ORDER

Based upon the foregoing findings of fact and conclusions of law, and the entire record in this case, the Public Employment Relations Board (PERB) finds that the County of San Joaquin violated the Meyers-Milias-Brown Act (MMBA), codified at Government Code section 3500 et seq. Specifically, the County violated MMBA sections 3503, 3506, and 3506.5, subdivisions (a) and (b), and PERB Regulation 32603, subdivisions (a) and (b), by denying Service Employees International Union Local 1021 (SEIU) reasonable access to work areas in the Human Services Agency (HSA) building.

Pursuant to Government Code section 3509, it is hereby ORDERED that the County, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing to provide SEIU reasonable access to work areas in County buildings;

2. Interfering with SEIU's right to represent employees, and employees' right to be represented by SEIU.

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

1. Within 10 workdays following the date this decision is no longer subject to appeal, post at all locations in the County where notices to SEIU-represented employees are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the County, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the County to communicate with its employees in bargaining units represented by SEIU. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.[25]

[25] In light of the ongoing COVID-19 pandemic, Respondent shall notify PERB's Office of the General Counsel (OGC) in writing if, due to an extraordinary circumstance such as an emergency declaration or shelter-in-place order, a majority of employees at one or more work locations are not physically reporting to their work location as of the time the physical posting would otherwise commence. If Respondent so notifies OGC, or if Charging Party requests in writing that OGC alter or extend the posting period, require additional notice methods, or otherwise adjust the manner in which employees receive notice, OGC shall investigate and solicit input from all parties. OGC shall provide amended instructions to the extent appropriate to ensure

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

Members Shiners and Krantz joined in this Decision.

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adequate publication of the Notice, such as directing Respondent to commence posting within 10 workdays after a majority of employees have resumed physically reporting on a regular basis; directing Respondent to mail the Notice to all employees who are not regularly reporting to any work location due to the extraordinary circumstance, including those who are on a short term or indefinite furlough, are on layoff subject to recall, or are working from home; or directing Respondent to mail the Notice to those employees with whom it does not customarily communicate through electronic means.

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. SA-CE-1095-M, *Service Employees International Union Local 1021 v. County of San Joaquin*, in which all parties had the right to participate, it has been found that the County of San Joaquin violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3506, and 3506.5, subdivisions (a) and (b), and PERB Regulation 32603, subdivisions (a) and (b), by denying Service Employees International Union Local 1021 (SEIU) reasonable access to work areas in the Human Services Agency.

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

A. CEASE AND DESIST FROM:

1. Failing to provide SEIU reasonable access to work areas in County buildings;

2. Interfering with SEIU's right to represent employees, and employees' right to be represented by SEIU.

Dated: _____ COUNTY OF SAN JOAQUIN

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.