**STATE OF CALIFORNIA**
**DECISION OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| PASADENA NON-SWORN EMPLOYEES ASSOCIATION,<br><br>Charging Party,<br><br>v.<br><br>CITY OF PASADENA,<br><br>Respondent. | Case No. LA-CE-1465-M<br><br>PERB Decision No. 2788-M<br><br>September 1, 2021 |

Appearances: City Employees Associates by Jeffrey M. Natke, Attorney, for Pasadena Non-Sworn Employees Association; Lesley Cheung, Deputy City Attorney, for City of Pasadena.

Before Banks, Chair; Krantz and Paulson, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) for a decision based upon a stipulated record. Pasadena Non-Sworn Employees Association (PNSEA) alleges that the City of Pasadena unreasonably denied a representation/severance petition and thereby violated the City's Employer-Employee Relations Resolution (EERR), the Meyers-Milias-Brown Act (MMBA), and PERB Regulations.[1]

[1] The MMBA is codified at Government Code section 3500 et seq. Unless otherwise specified, all further statutory references are to the Government Code. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

We have reviewed the record and considered the parties' arguments. For the reasons explained below, we find that PNSEA did not establish any violation. We therefore dismiss the complaint and the underlying unfair practice charge.

## PROCEDURAL HISTORY

PNSEA filed its charge on July 23, 2020, together with a motion to expedite the case in all PERB divisions.[2] The Board directed the Office of the General Counsel (OGC) to expedite its charge processing and denied the remainder of the motion to expedite, without prejudice to PNSEA's right to later file a renewed motion with the Division of Administrative Law or the Board. After the City responded to the charge and PNSEA withdrew one of its claims, OGC issued a complaint on the remaining claims. The City answered the complaint on October 13. In its answer, the City denied the material allegations and raised multiple affirmative defenses.

On November 4, the parties participated in an informal settlement conference, but efforts to settle the case were unsuccessful. In January 2021, an administrative law judge (ALJ) convened a virtual hearing to accept into evidence the parties' stipulated facts and joint exhibits. The parties agreed that each joint exhibit should be admitted into evidence for all purposes. The parties further agreed that the joint exhibits and stipulated facts would form the sole evidentiary record in this matter, and the ALJ found the record appropriate for a decision.[3] After the parties filed post-

[2] All dates refer to 2020, unless otherwise specified.

[3] PERB Regulation 32207 provides: "The parties may submit stipulated facts where appropriate to the Board agent. No hearing shall be required unless the parties dispute the facts in the case."

hearing briefs, the Board directed that the record be submitted to the Board itself for decision pursuant to PERB Regulation 32320, subdivision (a)(1).

## FACTUAL FINDINGS

### The Parties

The City is a "public agency" within the meaning of MMBA section 3501, subdivision (c) and PERB Regulation 32016, subdivision (a). PNSEA is an "employee organization" within the meaning of MMBA section 3501, subdivision (a).

### The City's Employer-Employee Relations Resolution

In 1970, the City adopted the EERR pursuant to its authority under MMBA section 3507, subdivision (a). EERR sections 10-11 cover recognition procedures and unit determination criteria, including the following relevant provisions:

> "SECTION 10. PETITION FOR RECOGNITION.
>
> "(A) Formal Recognition – The Right to Meet and Confer in Good Faith as Majority Representative. An employee organization that seeks formal recognition for purposes of meeting and conferring in good faith as the majority representative of employees in an appropriate unit shall file a petition with the Municipal Employee Relations Officer containing the following information and documentation:
>
> [¶] . . . [¶]
>
> "(12) A request that the Municipal Employee Relations Officer recognize the employee organization as the majority representative of the employees in an appropriate unit as defined in Section 11."

“SECTION 11. DETERMINING APPROPRIATE UNIT.

“(A) The Municipal Employee Relations Officer, after reviewing the petition filed by an employee organization seeking formal recognition as a majority representative, shall determine whether the proposed unit is an appropriate unit. The principal criterion in making this determination is whether there is a community of interest among such employees. The following factors, among others, are to be considered in making such determination:

“(1) Which unit will assure employees the fullest freedom in the exercise of rights set forth under this resolution.

“(2) The history of employee relations: (i) in the unit; (ii) among other employees of the City; and (iii) in similar public employment.

“(3) The effect of the unit on the efficient operation of the City and sound employer-employee relations.

“(4) The extent to which employees have common skills, working conditions, job duties or similar educational requirements.

“(5) The effect on the existing classification structure of dividing a single classification among two or more units.

“Provided, however, no unit shall be established solely on the basis of the extent to which employees in the proposed unit have organized.

“(B) In the establishment of appropriate units:

[¶] . . . [¶]

“(2) Supervisory employees shall not be included in the same unit with non-supervisory employees for the purpose of meeting and conferring, nor may they represent such employees on matters within the scope of representation;

[¶] . . . [¶]

> "(D) If the Municipal Employee Relations Officer finds that the proposed unit is not an appropriate unit, he shall state the reasons and notify the employee organization thereof."

The EERR provides that a party may seek to modify an established bargaining unit, as follows:

> "SECTION 15. MODIFICATION OF ESTABLISHED UNIT.
>
> "A petition for modification of an established unit may be filed by an employee organization with the Municipal Employee Relations Officer during the month of November of each year following the first full one year of formal recognition . . . The petition for modification shall contain all of the information set forth in Section 10(A) of this resolution, along with a statement of all relevant facts in support of the proposed modified unit. The petition shall be accompanied by written proof that at least 50% of the employees within the proposed modified unit have designated the employee organization to represent them in their employment relations with the City. The Municipal Employee Relations Officer shall hold a hearing on the petition at which time all affected employee organizations shall be heard. Thereafter, the Municipal Employee Relations Officer shall determine the appropriate unit or units as between the existing unit and the proposed modified unit. . . ."

EERR section 3, subsection (Q) designates Pasadena's City Manager as the Municipal Employee Relations Officer (ERO). The ERO may delegate his or her powers and duties under the EERR to any management employee.

The City's Existing Bargaining Units

The City currently has nine bargaining units: Police Officers; Firefighters; Fire Management; Supervisors, Managers and Professionals; Solid Waste Truck Operators; Clerical and Technical; Power Plant Workers; Electrical Workers/Street Light and Signal Maintenance Workers; and General Municipal Employees.

Laborers' International Union of North America Local 777 (LIUNA) has exclusively represented the Clerical and Technical bargaining unit since at least 1987. About 330 bargaining unit employees across approximately 45 classifications perform clerical and technical functions in all City departments.

American Federation of State, County and Municipal Employees Local 858 (AFSCME) has exclusively represented the General Municipal Employees bargaining unit since at least 1981. The AFSCME-represented bargaining unit numbers 300 employees in approximately 80 classifications.

PNSEA's Representation/Severance Petition

On November 12, 2019, PNSEA filed a severance and representation petition (Petition) with the City, seeking recognition as the exclusive representative of a new bargaining unit composed of all non-sworn classifications employed in the City's Police Department. The proposed unit contains approximately 87 employees in at least 14 separate classifications. Together with the Petition, PNSEA submitted proof of support from approximately 82 percent of the petitioned-for employees.

The Petition was unusual in that it asked the City to form a new unit that would combine currently unrepresented employees with employees severed from two represented bargaining units. Specifically, PNSEA requested that the City: (1) sever

from the AFSCME-represented General Municipal Employees bargaining unit the entire Detention Office classification as well as the one Maintenance Repairer and three Maintenance Assistants who work in the Police Department; (2) sever from the LIUNA-represented Clerical and Technical bargaining unit the following Police Department classifications: Community Services Officer, Computer Forensics Examiner, Police Support Assistant, Police Cadet, Helicopter Maintenance Technician, Forensic Specialist, Police Records Technician, Property and Evidence Technician, Range Master, and Police Dispatcher; and (3) include in the new unit all 12 employees in an unrepresented Police Supervisor title.[4]

The Hearing and the ERO's Determination

On February 26, 2020, the City convened a hearing to determine whether the petitioned-for unit was appropriate. City Manager Steve Mermell designated Assistant City Manager Nicholas Rodriguez to serve as the hearing officer. Representatives for PNSEA, the City, AFSCME, and LIUNA presented evidence and argument.

In a written decision issued on May 13, 2020, Rodriguez explained the City's findings on each unit determination factor set out in EERR section 11. Based on these findings, the City denied the Petition, concluding that PNSEA: (1) failed to show that the classifications in the proposed unit share a community of interest that is separate and distinct from the overall bargaining units represented by AFSCME and LIUNA; and (2) failed to establish a community of interest between the Police Supervisors and

[4] The Police Supervisor title is a non-sworn classification that includes employees with duties related to digital media, dispatch, records, and the City's jail.

the other classifications in the proposed unit. Thereafter, the City ceased processing the Petition.

## DISCUSSION

MMBA section 3507, subdivision (a) authorizes public agencies to "adopt reasonable rules and regulations after consultation in good faith with representatives of a recognized employee organization or organizations for the administration of employer-employee relations." Such local rules may include provisions for, among other things, determination of appropriate bargaining units. (§ 3507, subds. (a)(3), (a)(4); *Covina-Azusa Fire Fighters Union v. City of Azusa* (1978) 81 Cal.App.3d 48, 60.)

We apply PERB Regulations regarding severance, decertification, or unit determination if an MMBA employer either has no applicable rule on such a topic or has adopted an unreasonable rule. (*Central Basin Municipal Water District* (2021) PERB Order No. Ad-486-M, p. 8.) In this case, however, no party claims that any such condition exists. Rather, PNSEA challenges as unreasonable the way the City applied its EERR to the instant facts.

When evaluating a public agency's unit determination under its local rules, PERB's inquiry is whether the agency's determination was reasonable, provided the determination conforms to the MMBA and the employer's local rules. (*Reinbold v. City of Santa Monica* (1976) 63 Cal.App.3d 433, 440; *City of Glendale* (2021) PERB Decision No. 2773-M, p. 27 (*Glendale*); *Santa Clara Valley Water District* (2017) PERB Decision No. 2531-M, pp. 10-11.) The party challenging a unit determination has the burden of demonstrating the decision was not reasonable. (*Organization of*

*Deputy Sheriffs v. County of San Mateo* (1975) 48 Cal.App.3d 331, 338 (*San Mateo*); *Glendale*, *supra*, PERB Decision No. 2773-M, p. 27.) If reasonable minds could differ over the appropriateness of the determination, PERB should not substitute its judgment for that of the local agency. (*San Mateo*, *supra*, 48 Cal.App.3d at pp. 338-339.)

While a severance petitioner has the burden of proving its proposed unit is an appropriate unit, it need not demonstrate that its proposed unit is "the ultimate unit or the most appropriate unit."[5] (*Glendale, supra,* PERB Decision No. 2773-M, p. 26, citing *City of Lodi* (2010) PERB Decision No. 2142-M, adopting proposed decision at p. 10 (*Lodi*); *Alameda County Assistant Public Defenders Assn. v. County of Alameda* (1973) 33 Cal.App.3d 825, 830 (*Alameda*); *County of Orange* (2016) PERB Decision No. 2478-M, adopting proposed decision at p. 8.) To meet its burden, a severance petitioner must show that the proposed unit has a community of interest separate and distinct from other employees in the existing bargaining unit. (*Alameda*, *supra*, 33 Cal.App.3d at p. 831; *Glendale*, *supra*, PERB Decision No. 2773-M, p. 27.)

Here, PNSEA filed its Petition pursuant to EERR section 10 (recognition) and section 15 (unit modification), and the parties have referred to it variously as a recognition petition, a severance petition, and a unit modification petition. It is of no import how the Petition is denominated, as the central, dispositive issue is whether the City reasonably determined that the proposed unit is not appropriate. We examine the City's determination, assessing the evidence it considered and its findings regarding

[5] However, if the existing bargaining unit was certified by PERB, the severance petitioner must show that the proposed unit is "more appropriate" than the existing unit. (*Glendale*, *supra*, PERB Decision No. 2773-M, p. 27, fn. 14.)

the evidence. (*Glendale*, *supra*, PERB Decision No. 2773-M, p. 28 [City's decision denying severance petition contained sufficient factual findings and analysis to conclude that it reasonably applied its local rules to reach its unit determination]; *City of Livermore* (2017) PERB Decision No. 2525-M, adopting proposed decision at p. 48 ["[I]t is not sufficient for the City to simply state the standard that applies and then provide a conclusion without also including the analytical process in its decision"].)

A. PNSEA Failed to Establish that the City Unreasonably Applied the EERR's Unit Determination Criteria.

1. History of City's labor relations; freedom in exercise of employee rights

AFSCME and LIUNA have represented their respective units since the 1980s, during which time they achieved numerous bargaining gains and their memberships approved a series of labor agreements by large margins. The City's determination reflects the principle that severing classifications from an established unit can destabilize negotiating relationships. (*Los Rios Community College District* (2018) PERB Decision No. 2587, pp. 4-6 (*Los Rios*).) Accordingly, maintaining continuity generally weighs against severance, absent proof that collective negotiations are incapable of addressing the needs of a discrete minority within an existing unit. (*Ibid*.) The City's findings as to these issues lie at the crux of the instant dispute, as we proceed to explain.

LIUNA-represented Police Dispatcher David Covarrubias summed up one aspect of PNSEA's position as follows: "We would like to have our own union. We would like to be [a] police department unit only."[6] It is well established, however, that

[6] The February 26, 2020 hearing transcript erroneously identifies witness David Covarrubias as "David Corroreas."

"while employees have the right to choose which employee organization, if any, they want to represent them, they have no right to choose the bargaining unit in which their classification or position is placed." (*Regents of the University of California* (2010) PERB Decision No. 2107-H, p. 24; *City of Livermore*, *supra*, PERB Decision No. 2525-M, p. 14, fn. 6.)

PNSEA also attempted to provide evidence that refashioning the City's unit structure to place all Police Department non-sworn staff in a new unit would provide those employees the fullest freedom to exercise their MMBA rights because they would receive better representation. Covarrubias testified that LIUNA did not take the 24-hour nature of his classification's duties into account when scheduling union meetings and generally was unresponsive to the needs of Police Department employees. Randi Cornelius, an AFSCME-represented Property and Evidence Technician, likewise complained that AFSCME did a poor job representing and communicating with Police Department employees. Cornelius also contended that in AFSCME's last contract negotiations, bargaining proposals were not "specifically tailored to the jails." In response, both incumbent unions point to specific efforts and resulting gains in wages and benefits for Police Department employees, including wage studies leading to substantial wage increases for those employees.[7]

Rodriguez addressed these points in his decision, finding that they supported the City's decision to dismiss the Petition. First, Rodriguez found that the City and the incumbent unions have "a stable and productive historical relationship." He then noted

[7] AFSCME also notes that it negotiated additional compensation improvements specifically for Detention Officers and increased tool and uniform allowances for Police Specialists.

that members of the petitioned-for classifications (including Cornelius) participated in the last round of both incumbent unions' negotiations, and he detailed the provisions in both incumbent unions' agreements that address Police Department employees' specific needs. Moreover, citing *State of California* (2011) PERB Decision No. 2214-S, p. 9, Rodriguez concluded that even if the incumbent unions did not achieve bargaining success in every area of concern to non-sworn police personnel, PNSEA failed to demonstrate that any lack of bargaining success was due to the incumbents' failure to represent non-sworn personnel interests adequately in relation to other classifications.

In challenging the City's determination, PNSEA asserts that "employee relations were not stable," "employees are not adequately represented," and the incumbent unions' "poor representation . . . has left the employees' unique needs unaddressed." But PNSEA does not point to sufficiently persuasive supporting evidence. The Police Department employees' assertions are akin to general dissatisfaction with bargaining results that commonly exists within a bargaining unit. (*Los Rios*, *supra*, PERB Decision No. 2587, p. 5.) Rodriguez reasonably found that collective negotiations can simultaneously address the interests of the non-sworn Police Department classifications and the interests of other unit employees, and that PNSEA failed to demonstrate that any lack of bargaining success was due to the incumbents' failure to represent adequately non-sworn Police Department employees' interests.[8]

[8] We agree with the City that *State of California*, *supra*, PERB Decision No. 2214-S sets a high bar in requiring a severance petitioner to show that lack of bargaining success resulted from the incumbent unions' failure to represent adequately the petitioned-for employees. (*Id*. at p. 9.) Rodriguez erred to the extent that he cited the same PERB decision as requiring PNSEA to show that its proposed

In sum, Rodriguez reasonably found the positive history of labor relations spanning several decades evidenced a stable collective bargaining relationship weighing against severing classifications from established units.

2. Labor relations in similar public employment

Rodriguez considered PNSEA's evidence regarding unit structure in selected Southern California cities. Rodriguez detailed multiple respects in which the units in these cities vary from the petitioned-for unit, and his analysis reflects that there is variation even among the small group of cities that PNSEA chose as comparators. In these circumstances, we do not find that the City unreasonably failed to afford sufficient weight to other cities' practices.

3. Common skills, working conditions, job duties, and educational requirements

Although PNSEA did not present the City with evidence regarding Police Department non-sworn employees' common skills, job duties, and educational requirements, PNSEA did present evidence regarding their working conditions. PNSEA argued that the classifications in the proposed unit share a common, unique work environment, in that the Police Department has a 24/7 operation, including "a

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unit is more appropriate than the existing unit. Unlike the City's bargaining units at issue here, PERB had established the unit at issue in *State of California*, *supra*, PERB Decision No. 2214-S, and accordingly the severance petitioner in that matter had the burden to show that the petitioned-for unit was more appropriate than the existing unit configuration. (*Id*. at pp. 5-8; see footnote 5, *ante*.) No such rebuttable presumption applies here. Although Rodriguez erred in his single reference to this rebuttable presumption, our review of the entire decision reveals that Rodriguez mainly applied the correct standard, including when he concluded that "PNSEA has not demonstrated that the classifications in the proposed unit share a community of interest that is separate and distinct" from the established bargaining units.

common chain of command within a para-military organization" and "uniquely demanding" working conditions. Several PNSEA witnesses testified that they work nights, weekends, holidays, and long shifts. PNSEA witnesses further testified regarding the emotional impact of handling police dispatch calls, the physical risks of certain law enforcement tasks, and other unique aspects of their jobs. AFSCME and LIUNA responded that numerous other bargaining unit employees have similarly challenging work schedules and jobs that require public interface in tense and unsafe situations, including certain assignments in the City's Parks and Housing Departments.

Taking this evidence into consideration, Rodriguez rejected PNSEA's claim that the petitioned-for employees have a community of interest separate and distinct from those employees in the established General Municipal Employees and Clerical and Technical bargaining units. Rodriguez identified City employees, such as Park Safety Specialists, Code Compliance Officers, and Water Treatment-related classifications, who work nights, weekends and holidays, and other classifications who interact with the public in difficult and often emotionally charged and potentially violent situations, including those who enforce parking laws or provide security in various City locations.

We agree that round-the-clock work shifts and difficult interactions with the public—the primary community of interest factors PNSEA addressed—are neither unique to the Police Department's non-sworn employees nor always sufficient on their own to warrant separate representation. We therefore do not disturb the City's conclusion that PNSEA failed to establish the non-sworn employees assigned to the Police Department share a community of interest that is separate and distinct from

other AFSCME and LIUNA-represented employees. (*Los Rios*, *supra*, PERB Decision No. 2587, p. 5; *Lodi*, *supra*, PERB Decision No. 2142-M, adopting proposed decision at p. 10.)

4. Effect on the existing classification structure

AFSCME currently represents the four Maintenance Repairers and fifteen Maintenance Assistants who work in multiple City departments. PNSEA proposes to sever the one Maintenance Repairer and three Maintenance Assistants who work in the Police Department, leaving most employees assigned to those classifications in the General Municipal Employees bargaining unit. PNSEA concedes that if its severance request is granted, the two classifications would be divided among two bargaining units. PNSEA also concedes that the Maintenance Repairer and Maintenance Assistant job duties are common across all City departments, and that there is no distinction in their work, whether they are assigned to the Police Department or any other City department.

While there is no bright line rule against splitting classifications where other factors warrant it, Rodriguez reasonably found that this factor cuts against granting the Petition, as Maintenance Repairers and Maintenance Assistants perform comparable work in the Police Department and in other City departments. Citing *Oakland Unified School District* (2016) PERB Decision No. 2509, Rodriguez noted that PERB generally disfavors splitting a single classification across multiple units when the employees within the same classification perform the same work under virtually identical conditions of employment. (*Id*. at pp. 19-20.)

PNSEA argues that it is unreasonable "to allow a minor fragmentation to supersede all other criteria," and that "[s]uch a low level of fragmentation is not sufficient to overcome an otherwise strong community of interest." We agree that fragmentation is but one factor and it is not necessarily determinative. It does, however, further support the City's determination. Moreover, although PNSEA argues that the Police Department's Maintenance Repairer and three Maintenance Assistants have "an otherwise strong community of interest" with other non-sworn Police Department employees, the record does not contain persuasive evidence to support this assertion.

5. Efficiency of City operations

PNSEA argued that granting the Petition would result in labor negotiation efficiencies for the City. PNSEA specifically believes it is more efficient to place all non-sworn Police Department employees into a single bargaining unit represented by a single exclusive representative. For instance, PNSEA argued that the Police Department's administration of employer-employee relations would improve if its employees were represented by fewer unions. In contrast, AFSCME and LIUNA argue that because PNSEA's proposal would bring to 10 the total number of City bargaining units, the City would suffer from reduced efficiency in its labor relations.

Rodriguez found that granting the Petition could set a precedent that would lead employees in other classifications assigned to the AFSCME or LIUNA-represented bargaining units to seek severance, ultimately leading to undue unit proliferation. While there is no question that the Petition sought to increase the number of City units to 10, it is far from clear that the City is right in predicting that other employee groups

would follow in the footsteps of non-sworn personnel and seek smaller bargaining units. In any event, unit proliferation is not determinative by itself; for instance, potential inefficiency resulting from such proliferation can be offset by other factors, such as providing residual unrepresented employees a reasonable unit placement and therefore an opportunity to exercise their statutory rights. (*Salinas Valley Memorial Hospital District* (2020) PERB Decision No. 2689-M, pp. 30-31 [despite employer's prediction regarding potential future inefficiencies, employer was required to create a separate unit for residual unrepresented employee group where union representing larger unit had declined opportunity to have the residual employees added]; *Los Rios*, *supra*, PERB Decision No. 2587, p. 7 [efficiency argument militates against severance only if there is concrete evidence that an employer's operational efficiency will be unduly impaired].)

Although the City may have placed too much stock in its efficiency argument as an overriding factor given the absence of concrete supporting evidence, the same is true of PNSEA's efficiency argument. Indeed, the supposed efficiencies PNSEA envisions are speculative and offset by the inefficiency of fragmenting classifications between more than one unit, as discussed above. PNSEA's argument regarding efficiency therefore does not weigh in favor of finding that the City unreasonably applied its local rules.

B. PNSEA Failed to Establish the Remaining Complaint Allegations.

The complaint in this case alleged the City unreasonably applied its EERR by: (1) requiring PNSEA to demonstrate that its proposed unit was more appropriate than the existing units; (2) rejecting PNSEA's contention that its proposed unit was appropriate

based on evidence of unit configurations in surrounding cities; (3) declining to find a community of interest between supervisory and non-supervisory classifications; and (4) denying PNSEA's alleged alternative request to create a new unit solely comprised of the residual, unrepresented Police Supervisor classification. As explained *ante*, PNSEA failed to establish the first and second allegations. For the reasons explained below, we also dismiss the third and fourth allegations.

PNSEA petitioned to create a unit that would include the City's 12 unrepresented Police Supervisors, in addition to nearly 80 employees currently represented by AFSCME and LIUNA. All parties appear to assume that the Police Supervisors' duties include supervising other employees, while the would-be severed employees have no such duties. Our analysis therefore assumes that to be the case.

MMBA section 3507.5 explicitly permits an employer to adopt reasonable rules for determining which employees are "managerial" or "confidential," and an employer may consider such determinations when configuring bargaining units. (*City of Palmdale* (2011) PERB Decision No. 2203-M, p. 6, fn. 7.) In contrast, while an employer may have reason to label certain employees as "supervisors" for operational reasons, that label has no independent legal significance under the MMBA. (*Ibid*.) An MMBA employer may not categorically require that all employees with supervisory duties be excluded from any bargaining unit that contains non-supervisors; rather, supervisory duties at most may be relevant to unit determination solely as one of numerous community of interest factors. (*Id*. at p. 14.)

These principles would support a facial challenge to EERR section 11(B)(2), as it purports to require that supervisors be in a separate unit from non-supervisors. But

PNSEA brought only an as-applied claim, challenging the City's decision to deny the specific unit PNSEA sought. This as-applied claim would be meritorious if section 11(B)(2) in fact prevented the City from creating the petitioned-for unit. However, because the City reasonably determined not to sever non-supervisory positions from their existing bargaining units, the City had a valid threshold reason not to create the petitioned-for unit, even without relying on the apparently unenforceable EERR section 11(B)(2).

Finally, because PNSEA has not established that the City rejected a stand-alone unit consisting of 12 Police Supervisors, we need not consider whether such a denial would be reasonable. PNSEA did not seek a stand-alone supervisors' unit in its Petition, nor did PNSEA at any time request to represent solely the supervisors if the City rejected its petitioned-for unit. PNSEA did suggest at the hearing that even if there were valid grounds to refrain from mixing supervisors and non-supervisors in a single unit, the City could segregate these groups into separate units. In this alternative request to represent two new units, PNSEA still sought to represent all the employees originally envisioned to be in the unitary petitioned-for unit. PNSEA never suggested that the City should consider, if it rejected the unitary unit, certifying PNSEA as a representative of just one new unit consisting solely of 12 Police Supervisors. We therefore decline to consider what unit placements might be reasonable for the 12 unrepresented Police Supervisors, particularly as that question might turn on whether a union representing an existing City bargaining unit is willing to have the City add the Police Supervisors to such an existing unit. (*Santa Clara Valley Water District*, *supra*, PERB Decision No. 2531-M, p. 17.)

Accordingly, we dismiss PNSEA's claim that the City unreasonably applied its EERR when it dismissed the Petition. We also dismiss PNSEA's derivative interference claim.

## ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-1465-M are hereby DISMISSED.[9]

Chair Banks and Member Paulson joined in this Decision.

[9] For the reasons discussed *ante*, this decision prejudices neither a future claim premised on the validity of EERR section 11(B)(2) nor a claim that the City may act unreasonably in a future unit placement decision regarding Police Supervisors, such as acting on a request to place them in an existing bargaining unit or a new stand-alone unit.