STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1021, Charging Party, v. ALAMEDA HEALTH SYSTEM, Respondent.	Case No. SF-CE-1793-M PERB Decision No. 2856-M March 23, 2023
SABER ALAOUI, Joined Party.	

Appearances: Weinberg, Roger & Rosenfeld by Kerianne R. Steele and Katharine R. McDonagh, Attorneys, for Service Employees International Union, Local 1021; Hanson Bridgett by Gilbert J. Tsai, Winston K. Hu, and Matthew B. Seipel, Attorneys, for Alameda Health System.

Before Banks, Chair; Krantz and Paulson, Members.

DECISION

PAULSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on Service Employees International Union, Local 1021's (SEIU or Union) exceptions to the proposed decision of an administrative law judge (ALJ). The complaint, as amended, alleges that Alameda Health System (AHS) violated the Meyers-Milias-Brown Act (MMBA)[1] by various conduct, including releasing

[1] The MMBA is codified at Government Code section 3500 et seq. Undesignated statutory references are to the Government Code. PERB Regulations

AHS employee Saber Alaoui from probation in retaliation for his protected activity, and interfering with MMBA protected rights by releasing Alaoui from probation and by sending several communications in April 2020.[2] The allegedly interfering communications included verbal comments by AHS Board of Trustees member Joe DeVries at a public meeting on April 7, a written statement issued by AHS and posted on Twitter by AHS Board of Trustees member Maria Hernandez on or about April 14 (April 14 statement), and a memorandum to employees issued by AHS Chief Executive Officer (CEO) Delvecchio Finley on April 22 (April 22 memo). The proposed decision dismissed the complaint and underlying unfair practice charge in its entirety. SEIU filed timely exceptions, urging the Board to overturn the ALJ's dismissal of each interference allegation. AHS filed a timely response to SEIU's exceptions, asking the Board to affirm the proposed decision.[3]

After reviewing the entire record and the parties' arguments in light of the law, we affirm the ALJ's factual findings and affirm in part and reverse in part the ALJ's

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are codified at California Code of Regulations, title 8, section 31001 et seq.

[2] All further dates are in 2020, unless otherwise indicated.

[3] No party excepted to the ALJ's dismissal of the claim that Alaoui's release from probation was retaliatory. We therefore decline to address that allegation. (*County of Santa Clara* (2018) PERB Decision No. 2613-M, p. 2, fn. 2; PERB Reg. 32300, subd. (e).) Though SEIU's exceptions sought to incorporate its post-hearing briefing, "merely incorporating an earlier brief by reference is not sufficiently specific to explain a party's exceptions." (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 2, fn. 4; citing *San Diego Community College District* (1983) PERB Decision No. 368, p. 13.) We accordingly express no opinion about whether the ALJ's ruling on retaliation was correct. However, as addressed further *post*, we accept as final and binding on these parties the ALJ's finding that AHS proved its defense that it had a legitimate nondiscriminatory reason for releasing Alaoui from probation.

legal conclusions. We find that, in context, DeVries' statement during the April 7 public meeting that "political theater is not acceptable" fell outside the safe harbor for employer free speech and constituted unlawful interference under the MMBA. We otherwise affirm the proposed decision, subject to the below discussion of SEIU's exceptions.

FACTUAL AND PROCEDURAL BACKGROUND[4]

The Parties and PERB's Jurisdiction

AHS is a public agency within the meaning of MMBA section 3501, subdivision (c). AHS is comprised of a series of hospitals and other healthcare facilities in the Oakland, California area. Its largest location is Highland Hospital, where the incidents at issue in this case take place. Prior to 1988, Alameda County managed AHS facilities. At that time, AHS became a public health authority, and its operations became governed by a Board of Trustees appointed by the County Board of Supervisors. The AHS CEO oversees day-to-day operations. At the times relevant to this case, Finley was the CEO.

SEIU is a recognized employee organization within the meaning of MMBA section 3501, subdivision (b), and an exclusive representative within the meaning of PERB Regulation 32016, subdivision (b). SEIU is the exclusive representative of employees in three of AHS's bargaining units, the Registered Nurse unit (RN Unit), a general employees unit, and a unit for AHS's San Leandro Hospital. This case

[4] No party excepted to the ALJ's factual findings. The factual background is largely drawn from the proposed decision, condensed and supplemented to include the facts relevant to SEIU's exceptions.

primarily involves the RN Unit. From April 2017 to March 31, 2020, SEIU and AHS were parties to a Memorandum of Understanding governing terms and conditions of employment for the RN Unit. SEIU and AHS were in successor negotiations at the times relevant to this case. Before AHS released him from probation, Alaoui was a public employee within the meaning of MMBA section 3501, subdivision (d), as a Clinical Nurse II (CNII), which is in the RN bargaining unit.

During the time period relevant to this case, SEIU raised concerns about employee safety to AHS management, its Board of Trustees, and the County Board of Supervisors. Since the start of the COVID-19 pandemic, SEIU voiced particular concerns about personal protective equipment (PPE) shortages. At the start of the pandemic, AHS began locking its PPE supplies in areas accessible only to supervisors.

SEIU also advocated for more County oversight over AHS. As SEIU AHS Chapter President John Pearson explained, SEIU maintained that AHS's appointed Board of Trustees is less accountable to the public than the elected County Board of Supervisors. SEIU further maintained that County oversight would improve AHS's financial situation. SEIU advocated for its goals through public demonstrations and messaging in both traditional and social media. Pearson, on behalf of SEIU, was featured in local print and television news outlets. Pearson also used social media platforms including Facebook, Instagram, and Twitter to publicize union safety concerns and other issues. SEIU additionally organized donation drives to collect money and PPE supplies for area hospitals.

Telemetry and Oncology Unit

Highland Hospital's Telemetry and Oncology unit is sometimes referred to as 7-ACT because it is the only unit housed on the seventh floor of Highland's Acute Care Tower. Nursing in 7-ACT is generally split between two 12-hour shifts: a day shift running from 7:00 a.m. to 7:00 p.m. of the same day, and a night shift running from 7:00 p.m. to 7:00 a.m. of the following morning. Other staff in the unit include Certified Nursing Assistants (CNAs), who assist staff nurses with patient care, and Environmental Services (EVS) employees, who perform custodial and disinfecting work. The Telemetry and Oncology unit is overseen by a Nurse Manager, who at all relevant times was Wosilat Busari. The unit also has an Assistant Nurse Manager, who at all relevant times was Erik Abacan.

Each shift on the Telemetry and Oncology unit is supervised by a charge nurse, who is a Clinical Nurse IV, and not in any bargaining unit represented by SEIU. The unit did not have a regular night shift charge nurse and relied heavily on relief charge nurses during the night shift between November 2019 and March 2020. Maria Mendoza-Sanchez was a CNII who regularly served as a relief charge nurse in the Telemetry and Oncology unit. On March 21, Mendoza-Sanchez was hired for the full-time night shift charge nurse position.

The Garbage Bag Incidents

The on-duty charge nurse is responsible for managing access to the Telemetry and Oncology unit's PPE supplies. PPE supplies used in 7-ACT include N95 masks, surgical masks, fluid-resistant gowns, gloves, face shields, and disinfecting wipes. Fluid-resistant gowns are commonly called "isolation gowns" because they are part of

AHS's contact isolation precautions, which are special protocols used when caring for patients with dangerous and highly infectious conditions. Isolation protocols are designed to reduce the patient's contact with others. For example, a patient infected or suspected to be infected with COVID-19 would require isolation precautions. Unlocked carts with PPE supplies are stationed in the hallways at 7-ACT near patient rooms. If the unit is caring for any isolation patients, isolation carts stocked with additional PPE are stationed outside those patient rooms. Excess PPE supplies are locked in the supervisors' office which is only accessible by the charge nurses and management. The charge nurse is responsible for replenishing PPE carts and for requesting additional supplies from AHS's Central Supply department.

1. The March 28-29 Night Shift

Maria Garcia-Valdivia was the charge nurse for the Saturday March 28 day shift. That afternoon, Garcia-Valdivia went to the Central Supply department to replenish PPE supplies for the Telemetry and Oncology unit before the night shift began. The Central Supply clerk gave her 50 isolation gowns, rather than the typical allotment of 100. Although the unit was not in short supply of isolation gowns at the time, Garcia-Valdivia decided that that the unit should conserve the gowns in the event of a possible surge of COVID-19 patients. Garcia-Valdivia did not inform Busari or Abacan about her plan because they had just completed their regular work hours and she did not want to disturb them.

Garcia-Valdivia conducted the huddle[5] for the incoming night shift later that day.

[5] Each shift in the Telemetry and Oncology unit begins with a meeting for all nurses on the shift, colloquially called the "huddle."

As the incoming charge nurse, Mendoza-Sanchez attended the huddle as well. Garcia-Valdivia told staff nurses that isolation gowns would be saved for those caring for COVID-19 patients and that nurses should wear cloth gowns when caring for other isolation patients. It is unclear to what extent Garcia-Valdivia explained to nurses that they could still request isolation gowns.

That shift, Alaoui was assigned a patient who was infected with a Multi-Drug Resistant Organism (MDRO), and thus required isolation precautions. Alaoui was one of multiple night shift nurses who expressed concern about the directive to use cloth gowns for non-COVID-19 isolation patients.

Alaoui did not consider it safe to wear only a cloth gown when caring for the MDRO patient. Alaoui, who had a young child and an immunocompromised family member, was concerned about infecting his family with the MDRO. Rather than wearing a cloth gown, Alaoui decided to take a large plastic garbage bag from EVS staff, make holes for his arms and head, and wear the bag over his torso. Alaoui believed that the plastic bag would offer more protection from sprayed fluids than a cloth gown. He wore a garbage bag for the first time around 8:00 p.m., when visiting the MDRO patient's room. Alaoui did not inform Mendoza-Sanchez, Busari, or Abacan of his plan to wear a garbage bag as PPE, but he also did not conceal what he was doing, and he readily wore the garbage bag in front of others whenever he visited the MDRO patient. He also photographed himself wearing the garbage bag. In one photo, Alaoui's arms and face can be seen, but most of his face is obscured by a protective mask. Alaoui saw other staff members wearing garbage bags during the shift. Mendoza-Sanchez saw him wearing the garbage bag and responded positively,

stating something to the effect of “good job, you found a solution to the problem.”

At some point, an SEIU employee representative approached Alaoui and asked if he would share the picture of himself wearing a garbage bag. Alaoui agreed because SEIU was advocating about PPE issues, and he thought that the Union might assist with improving access to isolation gowns. SEIU representatives put a version of Alaoui’s picture on Facebook, Instagram, and Twitter.

2. The March 29 Day Shift

Garcia-Valdivia was the charge nurse for the day shift again on March 29. CNII Alexis Rivers was assigned to the MDRO patient. Before visiting that patient, Rivers saw that the supply cart near the patient room was out of isolation gowns and asked Garcia-Valdivia to replenish it. According to Rivers, Garcia-Valdivia said that isolation gowns were being saved for COVID-19 patients and that she should wear a cloth gown when entering the MDRO patient’s room.

Like Alaoui, Rivers believed that wearing a cloth gown was not safe for preventing infections, so she requested some garbage bags from EVS staff. She wore a garbage bag as PPE when visiting the MDRO patient’s room for the first part of her shift. Rivers took pictures of herself wearing a garbage bag but did not share them with anyone at AHS or SEIU.

Finley visited the Telemetry and Oncology unit during the March 29 day shift to shadow an EVS employee and learn about their work. The EVS employee told Finley that a nurse asked for a garbage bag to wear. Other 7-ACT staff also told Finley that a nurse had worn a garbage bag due to the lack of accessible isolation gowns. Finley had just received an update that AHS had adequate PPE supplies, so he did not

understand why the nurses could not access isolation gowns. Eventually, Rivers saw Finley at the nurses' station, and she told him that she had worn a garbage bag as PPE. She explained to him how Garcia-Valdivia instructed her to wear cloth gowns in the MDRO patient room, which Rivers considered to be unsafe. She also told Finley that she photographed herself wearing the garbage bag, but she did not show it to him. Finley discussed the matter with Garcia-Valdivia, who confirmed that she told Rivers to wear a cloth gown due to the shipping delay for isolation gowns. After speaking with Finley, Garcia-Valdivia contacted Abacan at around 10:00 a.m. and asked if she should release the additional isolation gowns stored in the charge nurse office. Abacan responded, "of course, why wouldn't you?" Garcia-Valdivia then went to replenish the PPE supply cart with isolation gowns, but found that someone else had already put gowns into the cart. After that, Rivers had enough gowns for the remainder of her shift.

That afternoon, Rivers texted Abacan about her decision to wear a garbage bag as PPE and her conversation with Finley. Because March 29 fell on a Sunday, it was not a regular workday for Abacan. She explained to Abacan that she wore the garbage bag because she was told not to use isolation gowns. She also told him that she had spoken to Finley about the matter. Over the course of several texts, Rivers suggested that Highland Hospital would benefit from updated PPE protocols because it was unclear where the directive to wear cloth gowns originated. Rivers also informed Abacan that another nurse wore a garbage bag during the prior night shift, although she did not identify the nurse as Alaoui. Abacan acknowledged that Rivers had valid concerns and said that management had not put any new restrictions on

accessing isolation gowns. Abacan then held a telephone conference with Busari, Garcia-Valdivia, and Rivers. During the call, Rivers reiterated her concerns about lacking clear PPE protocols. She expressed concern that what happened was not an isolated incident and said she wanted to avoid future occurrences. Busari and Abacan thanked her for bringing up the matter. Rivers e-mailed Finley that evening, thanking him for speaking with her and suggesting that AHS develop clear, system-wide protocols for using and distributing PPE during the pandemic. Finley responded, thanking her for raising her concerns. Rivers also e-mailed unit management, repeating her suggestion for developing PPE protocols.

On March 29, after Rivers sent her e-mail, Busari e-mailed all staff in the Telemetry and Oncology unit. Her message was titled "PPE Concerns this weekend." Busari wrote "[i]t was brought to my attention that the staff used trash bags this weekend to care for one of our patients on MDRO contact isolation." She explained management had not directed that to happen, "AHS is doing well with PPE supplies," and the incident was caused by a "communication breakdown." Busari committed to making sure that staff are prepared to handle PPE shortages. She said that staff could bring their concerns to her at any time. She did not comment on why staff were instructed to use cloth gowns as PPE and did not mention Alaoui or Rivers by name.

3. The April 2 San Francisco Chronicle Article

On April 2, the San Francisco Chronicle, a San Francisco-based newspaper, published an article entitled "Coronavirus: Nurses are wearing trash bags at one Bay Area hospital facing a protective equipment shortage." The article reported on PPE shortages for healthcare workers. According to the article, nurses during the night shift

at the Highland Hospital Telemetry unit were not given protective gowns on March 29, so they “created their own protective equipment by cutting holes in trash bags and placing them over their uniforms.” Pearson was interviewed for the article and he said that nurses were instructed by their supervisors to wear cloth gowns instead of disposable fluid-resistant gowns. Pearson said that instruction put them at greater risk for contracting COVID-19. Pearson then opined that supply shortages would cause other PPE improvisations, which would make the hospital less safe. Neither Alaoui nor Rivers were interviewed.

The article quoted AHS’s Director of Public Affairs and Community Engagement, Terry Lightfoot. He stated that AHS had been preparing for a possible surge of COVID-19 patients by conserving PPE supply consistent with the U.S. Centers for Disease Control guidelines, and that doing so would ensure that AHS had available PPE supplies to protect AHS’s patients and staff. No AHS representative commented in the article about claims that nurses had worn garbage bags.

The article was available for viewing on the San Francisco Chronicle’s website. The online version of the article includes multiple photographs. At the top is a picture of a public demonstration over lack of PPE supplies. The article also includes two photographs of Pearson with his dog. There is also a picture of Alaoui wearing a garbage bag over his nurse scrubs. The article does not identify Alaoui as the person in the photograph, and his eyes are cropped out of the picture and his face is obscured by a mask covering his nose and mouth. The caption indicates that Pearson posted the photograph on Twitter on March 30. At around 10:20 a.m. that day, ICU Critical Care Director Cheryl Wilson-Talford e-mailed a link to the article to Busari and

other AHS managers.

The April 7 Board of Trustees Meeting

On April 7, AHS's Board of Trustees held a joint public meeting with the County Board of Supervisors. The meeting took place over videoconference. Part of the meeting focused on AHS's response to the pandemic. The group discussed media reports of the nurse who wore a garbage bag as PPE. DeVries asked Finley if staff were being denied necessary PPE, and Finley responded that they were not. DeVries then asked Finley, "for the purpose of political theater, have you required staff to wear garbage bags?" Finley responded, "no," and said that he happened to be visiting 7-ACT when the nurse reported wearing a garbage bag. Finley characterized the incident as an "unfortunate episode" and said that isolation gowns were made available later in the day. DeVries responded, "that kind of political theater is not acceptable [in] a time of crisis and we need to keep our heads level and . . . our eyes on the . . . real problem."

A County Supervisor asked Finley what he knew about the incident. Recalling his conversation with Rivers, Finley explained how staff told him that a charge nurse instructed them to wear cloth gowns and to save isolation gowns for attending to COVID-19 patients. Finley stated that a nurse elected to wear a garbage bag for protection because she believed that cloth gowns were unsafe. Later, additional isolation gowns were found and made available. Finley also reported that AHS did not have a shortage of PPE isolation gowns. No one mentioned Alaoui or Rivers by name or displayed their photographs at the meeting. DeVries spoke again, stating that he did not believe that individual incidents, like the one about the garbage bag, should be

used to “suggest a wholesale change in the leadership of the system in the middle of a pandemic.” He further noted that he “hope[d] we can focus more on the system and what we can do to support it and less on these one off claims where people um, sensationalize things by putting plastic trash bags on.” At hearing, DeVries explained that he was referring to SEIU’s advocacy for disbanding the Board of Trustees and returning direct control of AHS facilities to the County Board of Supervisors.

The meeting included a public comment period. Community members, including AHS employees, spoke. Some appeared at SEIU’s request to raise concerns about mismanagement and lack of PPE at AHS. Certain employees expressed anger at DeVries’ suggestion that the nurse who wore garbage bags as PPE was engaging in “political theater.”[6]

Alaoui’s Work History at AHS and Release from Probation

Alaoui began working the night shift in Highland Hospital’s Telemetry and Oncology unit around July 2019. Alaoui was initially a traveler nurse.[7] In or around November 2019, a night shift CNII position became available and Alaoui applied for it. Busari interviewed Alaoui briefly before offering him the position.

Between July 2019 and March 2020, none of Alaoui’s formal or informal supervisors reported that he had any performance deficiencies. Busari and Abacan

[6] A recording of most of the meeting was made available on the Board of Supervisors’ website. For unknown reasons, 30 minutes of the recording are missing.

[7] Travelers are employed by a temporary staffing agency and AHS does not consider them to be its employees. Travelers supplement the AHS nurse workforce as needed to maintain adequate staffing levels. The on-duty charge nurse oversees any travelers during the shift.

began investigating Alaoui on March 30, when they learned from Mendoza-Sanchez of anomalies in Alaoui's care for an alcohol withdrawal patient.

The ALJ made detailed findings about Alaoui's work performance leading up to his release from probation, to which no party excepted. These findings included that during the March 29-30 night shift, Alaoui failed to administer medication to an alcohol withdrawal patient as required by the patient's treatment plan and alcohol withdrawal assessment scores. On the morning of March 30, Mendoza-Sanchez approached Alaoui for an explanation regarding the patient's electronic medical record. Alaoui was "really, really angry," when Mendoza-Sanchez stressed the importance of following protocol and the physician's medication plan. Mendoza-Sanchez reported to Abacan that Alaoui had not medicated the patient in accordance with the treatment plan. In her communication with Abacan, Mendoza-Sanchez described this exchange with Alaoui as "an argument, rather than a conversation."[8] The ALJ also found that Alaoui improperly pulled medications for more than one patient at the same time in December 2019, and left medication unattended on a patient cart during the April 3-4 night shift.

Starting around April 6, Busari and Abacan began discussing whether to release Alaoui from his probationary period, ending on May 6, because of his handling of the alcohol withdrawal patient and patient medications over the preceding week. They reviewed Alaoui's previous charting and recent coaching e-mails sent to him. On the evening of April 6, Busari and Abacan drafted a probationary release letter for

[8] While Mendoza-Sanchez also told Abacan that Alaoui failed to perform the related alcohol withdrawal assessments, the ALJ found that Alaoui did perform them, but failed to promptly record them in the electronic medical record.

Alaoui. On April 7, Busari sent the draft letter to Human Resources Business Partner Paul Liem. His job duties include reviewing management decisions to release employees from probation. Liem responded on April 9, removing some details included in the earlier draft. Liem's version described the basis for Alaoui's release as follows: "This action is being taken, because we have coached you on numerous occasion[s] not to leave medication unattended . . . and not to pull medication for more than one patient at a time. Moreover[,] on March 29, you failed to follow the instructions of the [c]harge [n]urse and MD regarding treatment of a patient. These errors pose a risk to patient safety." Neither the draft nor the final version of the letter included any reference to Alaoui's wearing a garbage bag in lieu of PPE or SEIU publicizing that incident.

Busari briefed her supervisor, Director of Nursing Menbere Tequame about her decision to release Alaoui from probation. At hearing, Busari emphasized how the combination of Alaoui's misconduct led to her decision. She considered Alaoui arguing with Mendoza-Sanchez and failing to medicate the alcohol withdrawal patient to be significant transgressions. She also found Alaoui's multiple violations of medication handling policies highly problematic. There was no evidence that the letter, or the decision itself, was reviewed by anyone else.

On April 13, Busari asked to meet with Alaoui at the end of his shift. They went to a room where Abacan was already present. Busari handed Alaoui the final version of the letter informing him that AHS was releasing him from probation, effective April 23. Busari told Alaoui that his release was because of his handling of the alcohol withdrawal patient. Alaoui was surprised and tried to explain what happened with that

patient but Busari was not receptive. Alaoui then asked, “does this have anything to do with me wearing the trash bag and going on social media?” Busari responded, “What are you talking about?” Alaoui responded: “[D]o not worry. You will hear from me.” Alaoui then collected his belongings, turned in his employee badge and left.

Alaoui’s Conversation with Pearson About His Release from Probation

After leaving 7-ACT, Alaoui notified the on-site SEIU representative, and they went to speak with Pearson in the Highland Hospital emergency room. Alaoui and Pearson had not met before. Alaoui confirmed to Pearson that he was the nurse in the photograph wearing the garbage bag that Pearson and others had been publicizing. Alaoui explained he believed he was being retaliated against for wearing the garbage bag. Alaoui also explained that he was scared to lose his medical benefits because of the impact on his family. Pearson asked whether he could share what happened on social media. Alaoui agreed.

Pearson’s Social Media Posts About Alaoui’s Release from Probation

Shortly after meeting with Alaoui, Pearson posted a “tweet” on Twitter. Pearson’s tweet included a video of him announcing that AHS fired the nurse who was photographed wearing a garbage bag as PPE. Without identifying Alaoui by name, Pearson described the situation as “an incredibly transparent move by AHS to retaliate against him for whistleblowing.” Pearson mentioned that the firing affected the nurse’s wife’s ability to receive medical care for her serious illness and he demanded that AHS reinstate the nurse. Pearson used profanity in the video. In text written above the video message, Pearson included Finley’s office telephone number and e-mail address. Pearson asked viewers to contact Finley and implore AHS to “do the right

thing."

Pearson's tweet received more than a thousand "likes," indicating approval, and more than a thousand "retweets," indicating that others were sharing Pearson's tweet. Several users also commented responding to Pearson's tweet. Some comments stated that they had contacted Finley. Some comments expressed their opinions on the termination. Some comments were media inquiries. Pearson continued to engage with those who commented on his tweet, adding additional details about Alaoui's situation. One of the commenters, whose Twitter username is @GunterNine, commented, "Calling isn't going to do shit. Lynch the mother fucker." Another Twitter user, Molly Anderson, asked the commenter to delete the message, describing it as offensive and not helpful; the commenter did not comply.

Pearson does not know who @GunterNine is. Pearson reported the comment to Twitter under its program for identifying offensive or abusive content. Although Twitter labeled the comment as containing sensitive material, Twitter did not remove it. Pearson has no ability to remove other users' comments on his tweets, short of deleting his original tweet.

Management's Initial Response to Pearson's Tweet

Starting on April 13, Finley began receiving a high volume of telephone messages and e-mail accusing him of retaliating against the nurse who wore the garbage bag. Several messages used profane or graphic language. At first, Finley was not aware that Alaoui had been released from probation. He also had not seen Pearson's tweet from that morning or any earlier social media postings featuring Alaoui's photo. He saw both later that day. Finley reviewed comments on Pearson's

tweet and saw additional messages accusing AHS of retaliation and demanding that Alaoui be reinstated. He also saw @GunterNine's "Lynch the mother fucker" comment. Finley is African American.

Sometime that day, Hernandez responded to Pearson's tweet, stating that she was looking into the matter and that AHS appreciates the work of its healthcare staff. Finley sent a copy of the tweet to the AHS Board of Trustees, informing them that he was looking into the matter. He then contacted Chief Nurse Executive Janet McInnes and asked if Rivers had been fired. McInnes, in turn, asked Vice President of Patient Care Teresa Cooper. McInnes and Cooper are above Tequame in the chain-of-command. Cooper told McInnes that she was not aware of any nurse terminations that day. McInnes did not contact Busari or Tequame at the time. McInnes reported to Finley that she had no knowledge of any terminations. Finley informed the Board of Trustees that no nurse had been terminated.

McInnes continued to receive inquiries about Pearson's tweet that day. At around 10:47 a.m., Tequame e-mailed Cooper with details from Busari's decision to release Alaoui from probation. Cooper relayed the message to McInnes, who notified Finley. This was shortly after Finley e-mailed the Board of Trustees that there had been no terminations. Finley then informed the Board of Trustees that a nurse had, in fact, been released from probation and that he would update them when he heard more. Finley met with McInnes, who explained that Alaoui's care for an alcohol withdrawal patient was inconsistent with accepted standards of care. She also told him that Mendoza-Sanchez had given Alaoui guidance or corrections on other issues. Because Finley knew Mendoza-Sanchez, he contacted her to discuss what had

happened. She provided similar information as McInnes and also told Finley that she did not know that Alaoui wore a garbage bag or was featured in any media. Finley next spoke to Busari and Abacan. Busari explained to Finley that it was difficult being publicly accused of retaliation and poor leadership. She told him that releasing Alaoui from probation was the right thing to do in the interest of patient safety.

Early that afternoon, Finley followed up to inform the Board of Trustees that a nurse was released from probation for performance reasons, and that those who made the decision did not know that he posted images of himself wearing a garbage bag on social media. He then said, "[t]he optics are bad. However, I can only discern that the optics do not comport with the underlying facts."

AHS's April 14 Statement

By the afternoon, Hernandez requested that Finley develop an official AHS response to the allegations in Pearson's tweet, reasoning that "silence is deadly here." Lightfoot similarly felt that AHS should respond in order to "set the record straight." He also wanted to spotlight the type of offensive comments and messages directed towards Finley, in particular the "Lynch the mother fucker" comment, which Lightfoot interpreted as threatening. Lightfoot is also African American. Although he did not hold Pearson directly responsible for comments made about his tweet, Lightfoot believed that saying incendiary things on social media tends to elicit inflammatory responses.

At 1:23 p.m., Lightfoot sent the Board of Trustees, Finley, and other AHS managers the statement he drafted, which had already been approved by Finley. He also informed the Board of Trustees that he had already begun contacting local elected officials who may have been notified of Alaoui's release from probation. The

statement is titled "STATEMENT REGARDING RECENT EMPLOYEE TERMINATION" and reads:

> "Claims today by John Pearson, of SEIU 1021 that a nurse was terminated based on his concerns regarding availability of personal protective equipment are false and reflect an ongoing agenda to conflate labor negotiations with a public health crisis. Sadly, his unsubstantiated claims have misdirected attention from herculean efforts by Alameda Health System providers, nurses and staff to address the COVID-19 pandemic. Furthermore, his irresponsible actions inflame others to take egregious actions including threats calling for the lynching of AHS's chief executive officer. By practice, AHS does not discuss individual personnel actions. We make these decisions based on our overriding priority of delivering patient care and fulfilling our mission of serving all."

Hernandez thanked Lightfoot for drafting the statement and asked for assistance with formatting it in a way that she could post it to her social media accounts. By the following morning, April 14, Lightfoot confirmed that the statement was sent to media outlets. Later in the day, Hernandez tweeted a copy of the April 14 statement using her personal Twitter account.[9]

Finley's April 22 Memo to AHS Staff

On April 22, Finley issued a memo to all AHS employees. It read:

> "So many of you have stepped up in this difficult time and your efforts reflect the best of our organization. Seeing this character of AHS reveal itself, I am troubled by the recent spate of public criticism leveled at our organization and our people. Unfounded allegation and insinuation — worse yet,

[9] While the statement was drafted on April 13, it is not entirely clear when AHS issued it. However, we refer to this statement as the "April 14 statement," as that is the date Hernandez posted it on Twitter, and is consistent with the proposed decision.

> hate-filled speech, have no place in this organization and when such occurs, it undermines the good work of AHS and every employee. I am immensely proud of your excellent care and service. I will always support anyone acting in a manner that reflects our values, including defending you and our organization from unfair attacks. Likewise, I will also appropriately handle any actions that violate these same values. As your CEO, I am accountable for leading in a manner that warrants your trust. This occasionally involves circumstances where I may be unable to share pertinent but sensitive facts openly. Consequently, this past Monday I asked the Chair of our Board of Trustees to use the recently established Covid-19 Response Task Force to also look into the allegation of retaliation against an employee relative to access to PPE. I have recommended that the Board Chair assign the Chief Compliance Officer — who reports directly to the Board — to conduct this investigation and report the facts of what occurred. Involving the Board and Chief Compliance Officer in a personnel decision for an employee and frontline managers is an extraordinary action. However, I am hopeful this investigation will reassure and underscore our commitment to transparency and allow all of us to continue to focus on our patients and the community who count on us each day and even more so during these challenging times."

Relevant Procedural History

On April 23, SEIU filed this unfair practice charge.[10] On April 29, PERB's Office of the General Counsel issued a complaint alleging that AHS interfered with rights protected under the MMBA by DeVries' April 7 "political theater" comments about employees who wore garbage bags , by terminating Alaoui's employment, by issuing the April 14 statement that was critical of Pearson, and by Hernandez posting that

[10] SEIU simultaneously filed a request for injunctive relief, pursuant to PERB Regulation 32450. On May 5, the Board denied SEIU's request for injunctive relief.

same and other negative comments about Pearson on Twitter on April 14. The complaint also alleged that Alaoui's termination was retaliation for expressing PPE concerns and sharing with SEIU a photograph of himself wearing a garbage bag as PPE.

On May 19, AHS filed an answer to the PERB complaint admitting some allegations, denying others, and asserting multiple affirmative defenses. On June 18, SEIU filed a motion to join Alaoui as a party to the case. AHS did not oppose said motion, which was granted on June 20. The formal hearing took place over 16 days between June 18 and November 10. After the second day of hearing, on July 29, SEIU filed a motion to amend the PERB complaint. SEIU sought to include the allegation that AHS further interfered with protected rights by issuing Finley's April 22 memo. On August 24, the ALJ issued an amended complaint, adding the requested allegation. AHS denied the new allegation in an amended answer filed on September 10. Closing arguments consisted of two rounds of briefs. SEIU and Alaoui filed joint briefs. The case was fully briefed by February 1, 2021.

On February 15, 2022, the ALJ issued the proposed decision, dismissing all aspects of the amended complaint and underlying unfair practice charge. Broadly, the ALJ found that though SEIU had established a prima facie case of retaliation regarding Alaoui's release from probation, AHS met its burden of proving Alaoui's work performance problems, and not his protected activities, were the true reasons that AHS released him from probation. The ALJ also dismissed the various interference allegations, including finding that any harm caused by Alaoui's release from probation was outweighed by AHS's legitimate reasons for the release, and that

each of AHS's allegedly interfering communications fell under the safe harbor for employer free speech.

SEIU filed timely exceptions, challenging only the ALJ's dismissal of the interference allegations.[11] Specifically, SEIU argues that it proved its interference allegations because: (1) the ALJ erred by failing to analyze Alaoui's release from probation under the "inherently destructive" standard described *post*; (2) DeVries' comment that "political theater is not acceptable" was both threatening and inaccurate; (3) AHS's April 14 statement and April 22 memo showed a pattern of brinkmanship; and (4) applying a new standard for "racially charged" speech that SEIU urges us to adopt, AHS's April 14 statement and April 22 memo constituted interference.

AHS filed a timely response, urging the Board to affirm the ALJ's factual findings and legal conclusions and dismiss the complaint in its entirety.

DISCUSSION

When resolving exceptions to a proposed decision, the Board applies a de novo standard of review. (*County of Santa Clara* (2019) PERB Decision No. 2629-M, p. 6.) However, to the extent that a proposed decision has adequately addressed issues raised by certain exceptions, the Board need not further analyze those exceptions. (*Ibid*.) The Board also need not address alleged errors that would not affect the outcome. (PERB Reg. 32300, subd. (e)(2); *City of San Ramon*, *supra*, PERB Decision No. 2571-M, p. 5.) PERB Regulation 32300 provides that "absent good cause, the

[11] Alaoui did not file his own exceptions or response, nor did SEIU name Alaoui as a party to its exceptions. While Alaoui remains a joined party to the case, we interpret the exceptions as filed on behalf of SEIU alone.

Board itself will not consider . . . issues and arguments not raised in the statement of exceptions." (*Id*., subd. (e)(1).) Further, the Board need not address matters that were not raised before the ALJ. (See *Colusa Unified School District* (1983) PERB Decision No. 296, p. 4 ["It is a well-established rule of administrative appellate procedure that a matter never raised before the trial judge is not properly reviewed by the appellate tribunal on appeal"].)

SEIU did not except to the ALJ's dismissal of the claim that Alaoui's release from probation was retaliatory. We therefore consider this claim abandoned, and those parts of the proposed decision are final and binding only on the parties to this case. (PERB Reg. 32215; *County of Orange* (2018) PERB Decision No. 2611-M, p. 2, fn. 2; *City of Torrance* (2009) PERB Decision No. 2004-M, p. 12.) In our interference analysis, we therefore accept the ALJ's finding that AHS had a legitimate, non-discriminatory reason for releasing Alaoui on probation, viz., Alaoui's work performance problems, and not his protected activities, were the true reasons that AHS released him from probation.

To establish a prima facie interference case, a charging party must show that an employer's conduct tends to or does result in some harm to protected union and/or employee rights. (*City of San Diego* (2020) PERB Decision No. 2747-M, p. 36 (*San Diego*).) A charging party need not establish that the employer acted because of an unlawful motive. (*Claremont Unified School District* (2019) PERB Decision No. 2654, p. 20.) If a charging party establishes a prima facie case, the burden shifts to the employer. (*San Diego*, *supra*, PERB Decision No. 2747-M, p. 36.) The degree of harm dictates the employer's burden. (*Ibid*.) 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. (*Ibid*.) For conduct that is not inherently destructive, the respondent may attempt to justify its actions based on operational necessity. (*Ibid*.) In such cases, PERB balances the asserted business need against the tendency to harm protected rights; if the tendency to harm outweighs the necessity, PERB finds a violation. (*Ibid*.) Within the category of actions or rules that are not inherently destructive, the stronger the tendency to harm, the greater is the respondent's burden to show its business need was important and that it narrowly tailored its actions or rules to attain that purpose while limiting harm to protected rights as much as possible. (*Id*. at pp. 36-37, fn. 19.)

In SEIU's exceptions asking us to reverse the ALJ's interference conclusions as to Alaoui's release from probation and certain AHS communications, SEIU urges us to amend and supplement this framework. As discussed below, we decline one of SEIU's suggestions and find no need to reach two others, as our traditional standards are adequate to address this case.

I. Alaoui's release from probation

SEIU, noting that the ALJ found sufficient indications of unlawful motive to establish a prima facie case of retaliation, urges us to hold that any evidence of animus triggers the inherently destructive standard. SEIU contends that this approach "harmonizes the plain language" of *Carlsbad Unified School District* (1979) PERB Decision No. 89 (*Carlsbad*) and *Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*). We disagree and explain.

If a charge or complaint alleges interference based upon the same conduct giving rise to another claim, the interference claim is independent if it can be established without the other claim being established. (*County of San Joaquin* (2021) PERB Decision No. 2761-M, p. 18 (*San Joaquin*).) In contrast, if it is impossible to establish interference without establishing the other claim, then the interference claim is a derivative one. (*Ibid*.; *County of Santa Clara* (2021) PERB Order No. Ad-485-M, p. 9.) Interference can be either an independent violation or derivative of another violation, depending upon whether the facts at issue permit a charging party to establish interference without establishing any other violation. (*Id*. at p. 9, fn. 8.) When a complaint alleges both interference and retaliation based on the same set of facts, and PERB sustains a retaliation finding, it will also at least find derivative interference. (See *City of Santa Maria* (2020) PERB Decision No. 2736-M, adopting proposed decision at p. 47 [city's retaliatory investigation of union executive board members also interfered with the union's right to represent bargaining unit members].) While retaliation claims may be accompanied by derivative interference claims, where properly pled the same underlying facts may also support an independent interference claim. (*San Joaquin*, *supra*, PERB Decision No. 2761-M, p. 18.)

In *Carlsbad*, the Board first established its test for interference under PERB administered statutes. (*San Joaquin*, *supra*, PERB Decision No. 2761-M, p. 23, citing *Carlsbad*, *supra*, PERB Decision No. 89, p. 5.) To establish a prima facie interference claim, *Carlsbad* does not require evidence of unlawful motive, but rather only that the employer conduct has a tendency to create at least "slight harm" to protected union and/or employee rights. (*San Joaquin*, *supra*, PERB Decision No. 2761-M, p. 23.)

Novato built upon *Carlsbad* and established the primary framework PERB uses to assess retaliation claims. (*Novato*, *supra*, PERB Decision No. 210, p. 3.) While a party need not demonstrate motive to establish interference, under the *Novato* framework, the charging party's prima facie case requires each of the following four elements: (1) one or more employees engaged in activity protected by a labor relations statute that PERB enforces; (2) the respondent had knowledge of such protected activity; (3) the respondent took adverse action against one or more employees; and (4) the respondent took the adverse action "because of" the protected activity, which PERB interprets to mean that the protected activity was a substantial or motivating cause of the adverse action. (*City of San Diego*, *supra*, PERB Decision No. 2747-M, p. 26; *City and County of San Francisco* (2020) PERB Decision No. 2712-M, p. 15 (*San Francisco*).) If the charging party establishes a prima facie case, and the evidence also reveals a non-discriminatory reason for the employer's decision, the respondent may prove, by a preponderance of the evidence as an affirmative defense, that it would have taken the exact same action even absent protected activity. (*San Francisco*, *supra*, PERB Decision No. 2712-M, p. 15.) In such "mixed motive" or "dual motive" cases, the question becomes whether the adverse action would not have occurred "but for" the protected activity. (*Id.* at p. 16.)

SEIU relies on a footnote in *Novato*, which states:

> "Unlike . . . the instant case, in interference cases where motive/intent is not an issue, the charging party need only make a *prima facie* showing that the respondent's conduct *tends to* or *does* result in harm to employee rights granted under EERA. The respondent then has the burden of producing an operational necessity justification. The Board will then balance the competing interests of the

parties and resolve the charge accordingly."

(*Novato*, *supra*, PERB Decision No. 210, p. 5, fn. 7.) SEIU interprets this footnote to mean that in interference cases where there is some evidence of unlawful motive, the Board does not balance the competing interests of the parties, but rather must apply the inherently destructive standard. That interpretation, however, would upend decades of Board precedent. *Novato* merely confirmed that a charging party can establish a prima facie interference case without evidence of unlawful motive. It did not mean that any evidence of unlawful motive establishes inherently destructive conduct, thereby requiring the respondent to show that no alternative course of action was available. (See *San Diego*, *supra*, PERB Decision No. 2747-M, p. 36.)

In 40 years, the Board has never analyzed an interference allegation in the way SEIU urges. Rather, to decide whether conduct is inherently destructive, the Board focuses on the conduct's impact. (*San Diego*, *supra*, PERB Decision No. 2747-M, p. 36, fn. 18.) Thus, an adverse employment action taken against a known union activist need not be inherently destructive if nondiscriminatory reasons warrant the action, because in such circumstances the action does not send the message that union activists will be disadvantaged. For instance, in *Office of the Los Angeles Superintendent of Schools* (1982) PERB Decision No. 263 (*Los Angeles*), the Board dismissed an allegation that the transfer of a union activist was retaliatory. (*Id*. at pp. 6-8.) While the Board found a prima facie inference of retaliatory motive based on a highly critical performance appraisal which referred to the employee's absences for union meetings, the Board ultimately found the employer proved that it would have transferred the employee regardless of her protected activities. (*Ibid*.) The Board also

found the employer's conduct was neither inherently destructive nor otherwise constituted interference. (*Id*. at pp. 8-9.)

Under slightly different circumstances, in *State of California (Department of Consumer Affairs)* (2004) PERB Decision No. 1711-S, the Board held that even though the charging party union established indicia of unlawful motive when the employer demoted a supervisor who testified on behalf of employees at an arbitration, the employer had not interfered with employee rights because the employer had a "legitimate basis for its action." (*Id*. at pp. 21-22.)

SEIU offers no compelling reason for a different finding here. This matter is distinguishable from instances where the Board has found discipline inherently destructive, such as where an employer disciplined an employee solely for conduct undertaken as a union steward. (See *State of California (Department of Corrections & Rehabilitation)* (2012) PERB Decision No. 2282-S, p. 16 (*Corrections*).)

SEIU's proposed interpretation would mean that when a charging party establishes a prima facie case of retaliation, then it is not enough for the employer to show it would have taken exactly the same action even absent protected activity, as it must also show that it had "no alternative course of action." (*San Diego*, *supra*, PERB Decision No. 2747-M, p. 36.) We find this impermissibly onerous. While there are instances where animus establishing a prima facie case also triggers the inherently destructive standard (*Corrections*, *supra*, PERB Decision No. 2282-S, p. 16), a nondiscriminatory personnel action like Alaoui's release from probation need not be inherently destructive (see *Los Angeles*, *supra*, PERB Decision No. 263, pp. 8-9).[12]

[12] We do not view SEIU's role in publicizing Alaoui's release from probation as

The ALJ thus did not err by balancing AHS's asserted business need against the tendency to harm protected rights caused by Alaoui's release from probation. This analysis assessed whether AHS's interests in ensuring that its patients receive care consistent with AHS policies and physicians' orders outweighed the potential harm caused by the release from probation of an employee who recently engaged in protected conduct.

We agree with the ALJ that Alaoui's release from probation, in the context of both serious work performance issues and contemporaneous protected activity, tended to cause comparatively slight harm to protected rights.[13] Where employer conduct would reasonably tend to discourage protected activity, this likely chilling effect may, itself, constitute unlawful interference. (*San Diego Unified School District* (1980) PERB Decision No. 137, p. 18.) Ending the employment of an employee who has recently engaged in protected activity is likely to have a chilling effect on other employees' likelihood of engaging in similar actions, though that effect may be lessened where serious work performance issues justified the employee's termination.[14] Alaoui drew attention to employee safety concerns by allowing SEIU to

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relevant to whether the action was inherently destructive.

[13] "Comparatively slight" signifies only that the tendency to harm protected rights is something less than inherently destructive. (*San Diego*, *supra*, PERB Decision No. 2747-M, pp. 36-37, fn. 19.)

[14] To the extent *Los Angeles* can be read to suggest that an employer's affirmative defense to retaliation automatically negates the possibility of harm under a related but independent interference allegation, we reject any such automatic rule and clarify that an employer's business defense is properly considered as part of the *Carlsbad* balancing analysis. (See *Los Angeles*, *supra*, PERB Decision No. 263,

post a picture of himself wearing a garbage bag in lieu of an isolation gown. When he was released from probation shortly thereafter, it tended to harm protected rights.

We weigh that harm against AHS's asserted business reasons for the release from probation. SEIU did not except to the ALJ's conclusion that AHS had a legitimate nondiscriminatory reason for releasing Alaoui from probation for purposes of the retaliation analysis; as noted *ante*, we do not disturb that conclusion. While there may be instances when an employer's established defense to retaliation does not defeat an independent interference allegation based on the same underlying facts, that is not the case here. We find the same justifications which the ALJ found, and to which SEIU does not except, when independently applied to the balancing test, justify AHS's conduct sufficient to defeat this interference allegation. That is, the harm caused by releasing Alaoui from probation shortly after he engaged in protected activity is outweighed by AHS's right to release an employee from probation for serious work performance issues. The retaliation allegation is therefore dismissed.[15]

II. Employer Speech as Interference

In an interference case involving employer speech, the surrounding circumstances are relevant to determine if an employee or union representative would

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pp. 8-9.)

[15] This case notably does not fall into the category of cases where the record demonstrates an employer would not have undertaken an investigation absent protected activity, which generally precludes the employer from relying on information it would not have otherwise uncovered. (*Regents of the University of California* (2020) PERB Decision No. 2704-H, pp. 35, 42; *State of California (California Correctional Health Care Services)* (2019) PERB Decision No. 2637-S, pp. 20-21; *California Virtual Academies* (2018) PERB Decision No. 2584, pp. 33-34.)

objectively tend to feel that the communication coerces, restrains, or otherwise interferes with protected rights. (*San Diego*, *supra*, PERB Decision No. 2747-M, p. 37.) Generally, an employer does not commit an interference violation if it expresses or disseminates its views, arguments, or opinions on employment matters, unless such expression contains a threat of reprisal or force or promise of benefit. (*Regents of the University of California* (2021) PERB Decision No. 2755-H, p. 29 (*Regents*).) This safe harbor for employer speech does not apply, however, "to advocacy on matters of employee choice such as urging employees to participate or refrain from participation in protected conduct, statements that disparage the collective bargaining process itself, implied threats, brinkmanship, or deliberate exaggerations." (*Ibid*., quoting *Hartnell Community College District* (2015) PERB Decision No. 2452, p. 25 (*Hartnell*).) The Board examines the context of employer statements to determine whether they convey a threat of reprisal or force, promise of benefit, or demonstrate a preference for either one organization over another, or one group or another within a single organization. (*City of Arcadia* (2019) PERB Decision No. 2648-M, pp. 28-29; *Hartnell*, *supra*, PERB Decision No. 2452, p. 25, citations omitted.) In cases involving employer speech, PERB considers the accuracy of the communication in conjunction with the employer's need to communicate in deciding whether the employer can establish an affirmative defense. (*San Diego*, *supra*, PERB Decision No. 2747-M, p. 37.)

1. DeVries' April 7 statement that "political theater is not acceptable"

The ALJ found that DeVries' statements at the April 7 meeting were permissible expressions of opinion on a controversial topic debated by the employer and the

union, and that his statements contained no direct or indirect threats or promises.[16] SEIU excepts to this finding, focusing on DeVries' statement that "that kind of political theater is not acceptable." SEIU argues that in context, "political theater" referred to protected activity, and by stating that activity was "not acceptable," DeVries lost the safe harbor for free speech and engaged in conduct which tended to harm protected rights.[17] Viewed in context, we find DeVries' statement fell outside the range of

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[16] The ALJ also found that as an appointed member of AHS's governing body, acting in his official capacity, DeVries was considered an agent of AHS. No party excepted to this conclusion, and it is therefore final and binding on these parties. Even had AHS not waived any further challenge on this issue, we would affirm the ALJ's conclusion. "Agency is employed to impose liability on the charged party for the unlawful acts of its employees or representatives even when the principal is not at fault and takes no active part in the action." (*Alliance Marc & Eva Stern Math & Science High School et al.* (2021) PERB Decision No. 2795, p. 44 [judicial appeal pending], citing *City of San Diego* (2015) PERB Decision No. 2464-M, adopting proposed decision at p. 39, affd. sub nom. *Boling v. Public Employment Relations Board* (2018) 5 Cal.5th 898 (*Alliance*).) Even had AHS excepted to the ALJ's conclusion, we would find that DeVries had at least apparent authority to act on behalf of AHS. (*Ibid*.) "The inquiry is best framed as whether under the circumstances a reasonable employee would believe the alleged agent 'was reflecting company policy and speaking and acting for management.'" (*Alliance*, *supra*, PERB Decision No. 2795, at p. 48, citing *Compton Unified School District* (2003) PERB Decision No. 1518, p. 5, fn. 3, quoting *Great Am. Products* (1993) 312 NLRB 962, 963.) This is an objective inquiry. (*Ibid*., citing *City of San Diego*, *supra*, PERB Decision No. 2464-M, p. 18; *Chula Vista Elementary School District* (2004) PERB Decision No. 1647, pp. 8-9.) Members of the AHS Board of Trustees set the agency's policy and have authority over AHS executive staff, including over Finley. Under these circumstances, a reasonable employee would perceive that DeVries had at least apparent authority to represent the official view of AHS. (See *Alliance*, *supra*, PERB Decision No. 2795, at p. 50.)

[17] The complaint paraphrased Devries' statement, clearly alleging that "political theater" referred to protected activity but omitting the "not acceptable" portion of DeVries' statement. AHS's response to exceptions does not assert that SEIU's argument falls outside of the complaint or is otherwise barred. Further, had AHS

permissible employer speech. We explain.

First, we find that the actions DeVries described as "political theater," in context, were protected activities. DeVries' statement occurred amidst an environment of ongoing union and employee actions around safety and PPE shortages. At the time of the meeting, employee access to PPE had been a major topic of discussion in both traditional and social media. Employees were understandably fearful for their health in the early days of a lethal pandemic, and SEIU publicized that employees wore garbage bags instead of isolation gowns. SEIU was also holding public demonstrations protesting lack of access to PPE and other safety issues around the same time. DeVries believed SEIU was trying to leverage community sympathy over the need for PPE in hospitals in order to draw more scrutiny from the County Board of Supervisors of management practices at AHS.

DeVries' own statements during the meeting further demonstrate that "political

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raised such an argument, we would reject it, first, because PERB requires only notice pleading. (*State of California (State Water Resources Control Board)* (2022) PERB Decision No. 2830-S, pp. 14-15; *San Joaquin*, *supra*, PERB Decision No. 2761-M, p. 21.) Moreover, even if the complaint were deficient, this allegation would meet the standard for an unalleged violation. Nothing precludes the Board from considering an unalleged violation on exceptions to a proposed decision if all of the necessary criteria are met. (*Alliance College-Ready Public Schools* (2017) PERB Decision No. 2545, p. 13.) "Under the unalleged violations doctrine, PERB has the discretion to consider allegations not included in the charge or the complaint if: (1) the respondent has had adequate notice and opportunity to defend against the unalleged matter; (2) the unalleged conduct is intimately related to the subject matter of the complaint and is part of the same course of conduct; (3) the matter has been fully litigated; (4) the parties have had the opportunity to examine and be cross-examined on the issue; and (5) the unalleged conduct occurred within the same limitations period as those matters alleged in the complaint." (*Superior Court v. Public Employment Relations Bd.* (2018) 30 Cal.App.5th 158, 192-193.)

theater" described MMBA-protected conduct. First, DeVries asked Finley whether "for the purpose of political theater, have you required staff to wear garbage bags?" After Finley answered no, and explained that he was not sure what led to staff wearing garbage bags, DeVries continued: "that kind of political theater is not acceptable [in] a time of crisis and we need to keep our heads level and . . . our eyes on the . . . real problem." Finley and others continued the discussion, and then DeVries again spoke to return to the issue, stating:

> "Can I just point out, I'm sorry, can I just point out that these like individual stories that are being used to suggest a wholesale change in the leadership of the system in the middle of a pandemic uhh, is is extremely disturbing so I hope we can focus more on the system and what we can do to support it and less on these one off claims where people um, sensationalize things by putting plastic trash bags on."

This follow up statement provided additional context to what DeVries meant by his repeated use of "political theater" – individual stories and visible actions being used by employees and SEIU to advocate for changes at AHS. It is well established that "advocacy on behalf of a group of employees concerning working conditions is protected activity." (*Berkeley Unified School District* (2015) PERB Decision No. 2411, p. 19.) DeVries' characterization of the political theater engaged in by employees and SEIU is at the heart of this type of protected activity – bringing attention to individual problematic instances to advocate for changes in working conditions.

The MMBA gave DeVries the right to express even unflattering views on SEIU's actions so long as his statements did not include any threats of reprisal or promises of benefit. (See *City of Oakland* (2014) PERB Decision No. 2387-M, pp. 25-26.) That

some employees felt DeVries belittled protected activities by labeling them as "political theater" did not convert that phrase into a threat or promise. But his direct statement that protected activity is "not acceptable [in] a time of crisis" sent a different message, one that was not confined to DeVries' opinion.

An employee listening to DeVries' comments at the public meeting could reasonably infer that he or she would be punished for engaging in the types of actions which DeVries labeled "not acceptable." That is because a reasonable employee would understand "not acceptable" to mean disallowed or prohibited. (*Alliance Environmental Science and Technology High School et. al.* (2020) PERB Decision No. 2717, adopting proposed decision at pp. 24-25 [under PERB's objective test, implied threats constitute interference]; *Los Angeles Unified School District* (1987) PERB Decision No. 611, adopting proposed decision at p. 50, citing *Roadway Express, Inc.* (1979) 241 NLRB 397, 398 [employee who protested working conditions at a demonstration in Akron, Ohio reasonably felt coerced when his supervisor later asked him, "don't you think you have done enough by going down to Akron?"].) While DeVries did not state explicitly that employees would be punished, we find his use of the phrase "not acceptable" to be sufficiently coercive to fall outside the safe harbor for free speech. AHS does not directly assert an affirmative defense to this conduct outside of arguing DeVries' statement was a permissible expression of opinion, and in any case we find the statement's tendency to harm outweighs AHS's need to respond to employees' or SEIU's manner of expressing concerns about working conditions. We thus conclude that DeVries' April 7 comment that "that kind of political theater is not acceptable" constituted interference under MMBA section 3506.5, and accordingly

order that AHS cease and desist from such conduct and post a notice to employees.

2. AHS's April 14 Statement and April 22 Memo

The complaint, as amended, also alleged that AHS interfered with employee rights guaranteed by the MMBA when it issued its April 14 statement and Finley's April 22 memo. The ALJ dismissed both allegations, finding that in context, those statements did not rise to the level of threatening or coercive, and thus remained within the safe harbor of permissible employer speech.

SEIU's exceptions make two new arguments regarding both statements: (1) that AHS's April 14 statement and April 22 memo—taken together and in context—constitute brinkmanship that establishes interference; and (2) that PERB should adopt a different standard for assessing interference allegations that include "racially charged" speech.[18] SEIU made neither of these arguments before the ALJ. The Board generally "decline[s] to review an exception raising an issue that was not presented to the ALJ." (*Los Angeles County Superior Court* (2018) PERB Decision No. 2566-C, p. 12; *Colusa Unified School District*, *supra*, PERB Decision No. 296, p. 4.) Furthermore, we need not address these claims in detail, because we find that the

[18] As part of urging the Board to apply a brinkmanship analysis to AHS's statements, SEIU first argues that the ALJ's analysis is overly narrow because the only form of interference he analyzed was whether those statements interfered with members' rights to choose their leaders under section 3506.5 subdivision (d), when the amended complaint alleged a violation of section 3506.5 subdivision (b). As a threshold matter, SEIU's assertions are not supported by the contents of the proposed decision. Further, SEIU does not sufficiently explain how considering all forms of potential interference would have led to a different outcome, given that the ALJ concluded that both the April 14 and April 22 communications were permissible employer speech. We therefore do not analyze this exception further.

ALJ adequately addressed each of these allegations under the employer speech standard (see *County of Santa Clara*, *supra*, PERB Decision No. 2629-M, p. 6), and therefore the alleged errors would not affect the outcome (see *City of San Ramon*, *supra*, PERB Decision No. 2571-M, p. 5). We nonetheless briefly address why SEIU's proposed new standards would not change the outcome in this case.

A. Brinkmanship

The Board has noted that parties to a collective bargaining relationship must be afforded wide latitude to engage in "uninhibited, robust, and wide-open debate," without incurring liability for every impulsive act or intemperate remark. (*Contra Costa County Fire Protection District* (2019) PERB Decision No. 2632-M, p. 31, citing *City of Oakland*, *supra*, PERB Decision No. 2387-M, p. 23.) However, "[b]ecause the employer has control over the employment relationship and knows it best, it is expected to make its views known without engaging in implied threats, brinkmanship or deliberate exaggerations likely to mislead employees" or their representatives. (*City of Oakland*, *supra*, PERB Decision No. 2387-M, p. 25, fn. 5, citing *NLRB v. Gissel Packing Co.* (1969) 395 U.S. 575, 619-20 (*Gissel*).) Beyond consistently noting that brinkmanship falls outside the safe harbor for free speech, the Board has never found interference based solely on alleged brinkmanship.[19]

[19] Federal law has addressed the concept of brinkmanship. Under *Gissel*, brinkmanship means "conscious overstatements" that an employer "has reason to believe will mislead [its] employees." (395 U.S. at p. 620; see *Kawasaki Motors Mfg. Corp.* (1986) 280 NLRB 491, 499 [finding that employer engaged in brinkmanship by "attempt[ing] to use words and pictures" to "escape a charge of intimidation yet benefit from the coercive effect on its employees"]; *Turner Shoe Co., Inc.* (1980) 249 NLRB 144, 146 [describing brinkmanship as statements that "hover on the edge of the permissible and the [im]permissible" and finding that employer's leaflet in form of

SEIU urges us to adopt and apply a dictionary definition of brinkmanship, which it provides as "[t]he practice, especially in international politics, of seeking advantage by creating the impression that one is willing and able to push a highly dangerous situation to the limit rather than concede." (American Heritage Dict., https://ahdictionary.com/word/search.html?q=brinkmanship.) Specifically, SEIU's exceptions assert: "On April 13 AHS made cryptic statements tying Pearson to [@GunterNine's] comments. The next day, AHS Trustees conferred about how the Union gave license to bigotry with the support of the Alameda County Board of Supervisors. By April 22, the AHS's CEO expressed that AHS was fighting the adverse effects of 'hate-filled speech . . . in this organization.'" According to SEIU, this sequence of events shows that because AHS was "willing and able to push a highly dangerous situation to the limit [of dishonesty, disparaging collective bargaining, promises or threats] rather than concede," it interfered with Pearson's rights under the MMBA.

We do not find any reason to adopt a more particular standard for brinkmanship in this case. Furthermore, we are unpersuaded that the facts of this case fit the definition of brinkmanship, even under the broad definition SEIU proposes. We thus do not disturb the ALJ's conclusion that neither AHS's April 14 statement, nor April 22 memo, lost free speech protection such that they constitute interference.

B. Racially Charged Speech

In challenging the ALJ's dismissal of the allegations that AHS interfered with

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obituary notice and its reference to impending disaster was brinkmanship].)

protected rights by its April 14 statement and April 22 memo, SEIU's exceptions also ask PERB to adopt a new test to assess racially charged speech in the interference context.

PERB has not adopted a unique test to assess racially charged speech. The National Labor Relations Board (NLRB) has held that certain appeals to racial prejudice may prevent reasoned choice in the context of an election campaign:

> "[A]ppeals to racial prejudice on matters unrelated to the election issues or to the union's activities are not mere 'prattle' or puffing. They have no place in Board electoral campaigns. They inject an element which is destructive of the very purpose of an election. They create conditions which make impossible a sober, informed exercise of the franchise. The Board does not intend to tolerate as 'electoral propaganda' appeals or arguments which can have no purpose except to inflame the racial feelings of voters in the election."

(*Sewell Mfg. Co.* (1962) 138 NLRB 66, 70.) But the NLRB will not set aside an election when a party merely "limits itself to *truthfully* setting forth another party's position on matters of racial interest and does not deliberately seek to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals." (*Id.* at pp. 71-72.)

SEIU urges that PERB adopt a modified version of *Sewell* by holding that racially charged speech related to a labor issue interferes with protected rights if it is either misleading or irrelevant to the labor issues in dispute. We need not resolve whether to apply the NLRB's precedent on racially charged speech, the modified test SEIU proposes, or a different standard, because we again find PERB's employer-speech doctrine, as applied by the ALJ, adequately resolves the issues here, where AHS merely responded to a third party's deeply offensive online speech.

Accordingly, the remaining interference allegations are dismissed.

ORDER

Based on the foregoing and the entire record in the case, the Public Employment Relations Board (PERB) finds that the Alameda Health System (AHS) violated the Meyers-Milias-Brown Act, Government Code section 3500 et seq. (MMBA), when it interfered with the rights of employees to participate in activities the MMBA protects and protected rights of Service Employees International Union, Local 1021 (SEIU). All other allegations are hereby DISMISSED.

Pursuant to Government Code section 3509, subdivision (b), it hereby is ORDERED that AHS, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Interfering with the rights of employees to participate in activities the MMBA protects.

2. Denying SEIU its rights guaranteed by the MMBA.

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

1. Within 10 workdays following the date this decision is no longer subject to appeal, post at all work locations where notices to SEIU-represented employees are posted, copies of the Notice attached hereto as an Appendix. An authorized agent of AHS must sign the Notice, indicating that AHS will comply with the terms of this Order. AHS shall maintain the posting for a period of 30 consecutive workdays and shall also distribute it by electronic message, intranet, internet site, and other electronic means AHS uses to communicate with employees in SEIU's bargaining units. AHS shall take reasonable steps to ensure that the Notice is not

reduced in size, altered, defaced, or covered with any other material.[20]

2. Provide PERB's General Counsel, or the General Counsel's designee, with written notification of all actions taken to comply with this Order, as well as any such further reports as the General Counsel or designee may direct; and concurrently serve SEIU with all such notifications and reports.

Chair Banks and Member Krantz joined in this Decision.

[20] 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 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 employees with whom it does not 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. SF-CE-1793-M, *Service Employees International Union, Local 1021 v. Alameda Health System*, in which all parties had the right to participate, the Public Employment Relations Board found that the Alameda Health System violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq., by interfering with employee protected rights and protected rights of Service Employees International Union, Local 1021 (SEIU).

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

A. CEASE AND DESIST FROM:

1. Interfering with the rights of employees to participate in activities the MMBA protects.

2. Denying SEIU its rights guaranteed by the MMBA.

Dated: _____ Alameda Health System

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.