STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 721, Charging Party, v. COUNTY OF RIVERSIDE, Respondent.	Case Nos. LA-CE-1168-M, LA-CE-1170-M, LA-CE-1174-M, LA-CE-1188-M, LA-CE-1191-M, LA-CE-1192-M, LA-CE-1198-M, LA-CE-1199-M, LA-CE-1207-M, LA-CE-1208-M, LA-CE-1209-M, LA-CE-1212-M, LA-CE-1213-M, LA-CE-1214-M, LA-CE-1220-M, LA-CE-1221-M, LA-CE-1222-M, LA-CE-1224-M, LA-CE-1231-M, LA-CE-1232-M, LA-CE-1233-M, LA-CE-1239-M, LA-CE-1240-M, LA-CE-1242-M, LA-CE-1306-M
COUNTY OF RIVERSIDE, Charging Party, v. SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 721, Respondent.	Case No. LA-CO-222-M PERB Order No. Ad-469-M November 14, 2018

Appearances: Liebert Cassidy Whitmore, by Frances E. Rogers, Brett A. Overby, and Kevin J. Chicas, Attorneys, for County of Riverside; Rothner, Segall & Greenstone, by Maria Keegan Myers, Attorney, for Service Employees International Union, Local 721.

Before Banks, Winslow, Shiners, and Krantz, Members.

DECISION

WINSLOW, Member: These unfair practice cases are consolidated and assigned for hearing to two administrative law judges (ALJs).[1] They are before the Public Employment Relations Board (PERB or Board) on the County of Riverside's (County) request for special permission to appeal the ALJs' orders denying the County's motions to disqualify PERB—including all Board agents, ALJs, and the Board itself—from hearing and deciding the cases. The ALJs denied the motions as to themselves but declined to rule on disqualification of the Board itself or other Board agents, finding that they lacked authority to do so.

In support of its motion for disqualification, the County argues that the Board has demonstrated bias against the County by granting a request for injunctive relief by Service Employees International Union, Local 721 (SEIU) based on the allegations in the consolidated cases, and by the statements and arguments of PERB's General Counsel while pursuing injunctive relief in court.

Having reviewed the parties' filings in this matter, including the County's request, appeal, and supporting documentation, SEIU's opposition, and the County's reply, we grant the County's request for special permission to appeal the ALJs' orders, but affirm the ALJs' rulings as to their disqualification and deny the County's motion to disqualify the Board itself and all other Board agents from deciding these consolidated cases.

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[1] Case No. LA-CE-1240-M and a retaliation allegation in Case No. LA-CE-1306-M are assigned to Chief ALJ Shawn Cloughesy. The remaining allegations in Case No. LA-CE-1306-M and all of the other captioned cases are assigned to ALJ Valerie Racho.

The County also refers in its appeal to Case No. LA-CE-1270-M, in which a proposed decision was issued on May 30, 2018 and the County filed exceptions with the Board itself on July 3, 2018.

BACKGROUND

SEIU is the exclusive representative of several County bargaining units. In September 2016, SEIU and the County began negotiations for a successor memorandum of understanding. Since then, SEIU has filed a number of unfair practice charges against the County, and the County has filed one unfair practice charge against SEIU. SEIU's charges allege that during this course of bargaining, the County has engaged in bad faith bargaining, interfered with employee and union rights, and discriminated against SEIU members, in violation of the Meyers-Milias-Brown Act (MMBA).[2]

The County's charge against SEIU arose in relation to a strike. In September 2017, SEIU announced a two-day strike to protest the County's alleged unfair practices. Pursuant to *City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597 and *County Sanitation District No. 2 v. Los Angeles County Employees Association* (1985) 38 Cal.3d 564, the County filed an unfair practice charge against SEIU and requested that PERB seek injunctive relief to prevent certain allegedly "essential" employees represented by SEIU from participating in that strike. The Board granted the County's request as to certain County employees represented by SEIU, and directed the General Counsel to seek injunctive relief against SEIU. The General Counsel sought and obtained a temporary restraining order from the Riverside County Superior Court.

In May 2018, SEIU requested injunctive relief against the County. SEIU asked PERB to seek an injunction: (1) requiring the County to refrain from terminating and/or to reinstate three SEIU-represented employees who were allegedly subject to termination for participating in the September 2017 strike; and (2) preventing the County from implementing its last, best,

[2] The MMBA is codified at Government Code section 3500 et seq. Unless otherwise noted, all further statutory references are to the Government Code.

and final offer (LBFO), which SEIU alleged was unlawful because the County had failed to bargain in good faith. The Board granted SEIU's request and directed the General Counsel to pursue the injunction in court. The Riverside County Superior Court granted a temporary restraining order enjoining implementation of the County's LBFO. The court later granted a preliminary injunction enjoining implementation and requiring the County to reinstate two terminated employees and to refrain from terminating a third.

The County has filed an appeal of the preliminary injunction, which is pending in the Court of Appeal. It has also challenged the preliminary injunction by filing a petition for writ of mandate and a petition for writ of supersedeas. The Court of Appeal denied the petition for writ of mandate but granted the petition for writ of supersedeas, staying the preliminary injunction as to the County's implementation of its LBFO.

Meanwhile, the above-captioned unfair practice charges were assigned to the ALJs and scheduled for hearing on various dates in October 2018. The County's motions to disqualify were denied on September 24 and 25, 2018, respectively. The County timely filed its request for special permission to appeal, which included briefing on the merits of its disqualification motion. SEIU filed an opposition to the motion, and the County filed a reply.

DISCUSSION

PERB Regulation 32155[3] identifies the grounds and procedure for disqualification of Board members and Board agents. As relevant here, disqualification is required "[w]hen it is made to appear probable that, by reason of prejudice of such Board member or Board agent, a fair and impartial consideration of the case cannot be had before him or her." (PERB Reg. 32155, subd. (a)(4).)

[3] PERB Regulations are codified at California Code of Regulations, title 8, section 30001 et seq.

With respect to Board agents, including ALJs, "[a]ny party may request the Board agent to disqualify himself or herself whenever it appears that it is probable that a fair and impartial hearing or investigation cannot be held by the Board agent to whom the matter is assigned." (PERB Reg. 32155, subd. (c).) If the request is not granted,

> [t]he party requesting the disqualification may, within ten days, file with the Board itself a request for special permission to appeal the ruling of the Board agent. If permission is not granted, the party requesting disqualification may file an appeal, after hearing or investigation and issuance of the decision, setting forth the grounds of the alleged disqualification along with any other exceptions to the decision on its merits.

(PERB Reg. 32155, subd. (d).)

With respect to Board members, "[a]ny party to a case before the Board may file directly with the Board member a motion for his or her recusal from the case when exceptions are filed with the Board or within ten days of discovering a disqualifying interest provided that such facts were not available at the time exceptions were filed." (PERB Reg. 32155, subd. (f).)

I. Request for Special Permission to Appeal

The first issue for us to resolve is whether to grant the County special permission to appeal the ALJs' orders. The Board has held that it may deny special permission to appeal an order denying disqualification when it would not effectuate the purposes of the applicable statute to allow the appeal. (*State of California (Department of Personnel Administration)* (2007) PERB Order No. Ad-359-S.) Here, we grant the County special permission based on the number of consolidated cases involved and the nature of the County's arguments. Under the unique circumstances of this case, it would not effectuate the purposes of the MMBA to require the parties to proceed to hearing prior to resolving the County's disqualification request.

Because the parties have already briefed the merits of the County's disqualification motion, we proceed to analyze that issue.

II. Appeal of the ALJs' Orders Denying Disqualification

As noted above, Chief ALJ Cloughesy and ALJ Racho each denied the County's motion to disqualify as to themselves, and declined to rule on the motion as to the Board itself and other Board agents. The portion of the County's appeal challenging the ALJs' refusals to disqualify themselves is properly before us pursuant to PERB Regulation 32155, subdivision (c), which concerns disqualification of the Board agent "to whom the matter is assigned."

We affirm the ALJs' orders denying their own disqualification. Disqualification is appropriate only on evidence of a fixed anticipatory prejudgment against a party by the decisionmaker. (*Coachella Valley Mosquito & Vector Control District* (2009) PERB Decision No. 2031-M, p. 24.) Here, the County acknowledges that it has no evidence that Chief ALJ Cloughesy or ALJ Racho possess a fixed anticipatory prejudgment against the County. The entirety of the County's appeal is instead based on its claim that the Board itself is biased against the County, as demonstrated by its decision to seek injunctive relief and by the General Counsel's arguments in pursuit of that relief.

While the County claims that any bias demonstrated by the Board itself or the General Counsel is imputable to the ALJs, this claim ignores that PERB's Division of Administrative Law operates independently of the Board itself and of the Office of the General Counsel. The ALJs in the Division of Administrative Law play no part in the decision to seek injunctive relief; that decision is made by the Board itself based on the General Counsel's recommendation. (PERB Regs. 32460, 32465.) Moreover, neither the Board itself nor the Office of the General Counsel has any role in the ALJs' decision-making processes. The

Office of the General Counsel's role in an unfair practice case concludes upon issuance of an unfair practice complaint. (PERB Reg. 32640.) As for the Board itself, we have no role in a case while it is pending before an ALJ, except in unusual circumstances where, as here, there is an interlocutory appeal. (PERB Regs. 32200, 32155, subd. (d).) And, consistent with the administrative adjudication provisions of the Administrative Procedures Act (APA),[4] we do not communicate with the ALJs concerning the merits of their decisions while the matter is assigned to them or while it is pending before us. (§ 11430.80.) The ALJs are expected to base their factual findings and legal conclusions on the record before them and on current PERB precedent, not on how they imagine the Board itself views the case in light of a grant of injunctive relief, nor on the General Counsel's arguments in support of injunctive relief. The County has presented no reason to suspect otherwise here.[5] Therefore, we affirm Chief ALJ Cloughesy's and ALJ Racho's orders refusing to disqualify themselves.[6]

III. Motion to Disqualify the Board Itself

Turning to the County's motion to disqualify the Board itself, we agree with Chief ALJ Cloughesy and ALJ Racho that PERB Regulation 32155 does not empower an ALJ or other

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[4] The APA's administrative adjudication provisions are codified at section 11400 et seq.

[5] Both of the ALJs were clear regarding their independence from PERB's other divisions. Chief ALJ Cloughesy explained, in the course of denying the County's motion, "I'm not going to be kowtowing to anybody in the General Counsel's Office or in that case what the Board says going on injunctive relief. I'm going to do what a judge does. I'm going to conduct a fair and impartial hearing. I've been doing it for many years." Similarly, ALJ Racho stated: "[F]rom my perspective, what happens outside of my hearing room is completely irrelevant to my decisions. Anything that happens in other divisions of PERB has no bearing on anything that I decide, and I always approach every case the same way, listening to the facts and deciding whether those facts demonstrate a violation of the law."

[6] Because the consolidated cases are not assigned to any other Board agent, it is unnecessary for us to determine whether any other Board agents should be disqualified from hearing them.

Board agent to rule on whether a Board member or the entire Board itself should be disqualified. Specifically, subdivision (g) of Regulation 32155 provides that a decision regarding Board member recusal is to be made by "the Board member alleged to be disqualified." The ALJs therefore did not err by declining to rule on the portion of the County's motion directed at the Board itself.

In addition, the County's motion to disqualify the Board itself is premature as to the cases currently pending before Chief ALJ Cloughesy and ALJ Racho. PERB Regulation 32155, subdivision (f), contemplates the filing of such a motion, at the earliest, when exceptions are filed with the Board itself. This interpretation is further buttressed by subdivision (e), which requires a Board member to declare his or her disqualification "[w]henever" he or she "ha[s] knowledge of any facts which, under the provisions of this rule, disqualify him or her to consider *any case before the Board*." (Emphasis added.) In other words, parties are not expected to request disqualification of Board members before a case reaches the Board itself, and Board members are not required to examine the hundreds of cases pending at other levels of the agency to determine if they should be disqualified.

Although the County's appeal also refers to Case No. LA-CE-1270-M, which is currently pending with the Board, its request to disqualify the Board in that case comes too late. The County was required to move for recusal at the time it filed its exceptions or within ten days of learning the grounds for recusal. (PERB Reg. 32155, subd. (f); *County of Tulare* (2016) PERB Decision No. 2461a-M, p. 4.) Here, the County filed its exceptions on July 3, 2018, well after the asserted grounds for disqualification arose (and after it originally filed its

motion to disqualify the ALJs, on June 25, 2018), but did not file the present appeal until October 5, 2018.[7]

Despite the untimely nature of the County's motion to disqualify the Board itself, we opt to address it on its merits rather than create the misleading impression that it has any potential merit. (Cf. *County of Tulare*, *supra*, PERB Decision No. 2461a-M, p. 4.) We address the County's arguments seriatim.

The County argues that by granting SEIU's injunctive relief request, we have either already adjudicated the merits of this case against the County or have inappropriately acted as a prosecutor in the case. Neither is true. Rather, in response to SEIU's request we exercised our authority under section 3541.3, subdivision (j), to petition the superior court for injunctive relief against an alleged unfair practice.[8] In doing so, we determined that SEIU's request met the two-part standard under *Public Employment Relations Board v. Modesto City Schools District* (1982) 136 Cal.App.3d 881 (*Modesto*), to wit: (1) there was reasonable cause to believe that the County has violated the MMBA; and (2) injunctive relief was just and proper. The reasonable cause determination is *not* an adjudication of the merits of the case; reasonable cause is established if the theory underlying the request "is neither *insubstantial* nor *frivolous*." (*Id.* at pp. 896-897, emphasis in original.) As we have previously explained, the Board's

[7] The County made no mention of Case No. LA-CE-1270-M in the motions it filed with the ALJs, so there is no basis for excusing the County's failure to file a motion for disqualification with the Board itself. (Cf. *City of Oakland (Oakland Fire Department)* (2015) PERB Order No. Ad-425-M, pp. 9-10.) Nor has the County suggested, much less shown, that when it filed its exceptions in Case No. LA-CE-1270-M, it did not know of the facts on which it now relies.

[8] Section 3541.3, subdivision (j), which applies to actions under the MMBA according to section 3509, subdivision (a), provides: "Upon issuance of a complaint charging that any person has engaged in or is engaging in an unfair practice, the board may petition the court for appropriate temporary relief or restraining order."

reasonable cause determinations rely "on facts developed in the General Counsel's investigation of the [injunctive relief] [r]equest and supporting unfair practice charge," but the "ultimate determination of the facts . . . must await the outcome of PERB's administrative procedures." (*City of Fremont* (2013) PERB Order No. IR-57-M, p. 19, fn. 8; see also *NLRB v. Acker Industries, Inc.* (10th Cir. 1972) 460 F.2d 649, 652 [proceeding for injunctive relief by the National Labor Relations Board (NLRB) under section 10(j) of the National Labor Relations Act "has a limited evidentiary scope and limited purpose," "is not intended to determine which litigant should ultimately prevail," and is subject to less exacting proof than in the administrative hearing on the merits].)

The courts have uniformly rejected arguments quite similar to those the County makes here. In *San Diego Teachers Association v. Superior Court* (1979) 24 Cal.3d 1 (*San Diego Teachers*), the Supreme Court rejected the argument that "PERB cannot direct [its general counsel] to seek temporary injunctive relief against an unfair practice without compromising its neutrality in subsequently hearing the merits of the unfair practice charge." (*Id.* at p. 10.)

Similarly, in *San Diego Municipal Employees Association v. Superior Court* (2012) 206 Cal.App.4th 1447 (*San Diego Municipal Employees*), the Court of Appeal refused to find that an employer against whom the Board unsuccessfully sought injunctive relief was thereafter excused from exhausting its administrative remedies. To the employer's claim that the Board had already decided the merits of the case, the Court of Appeal responded that this argument "would effectively strip PERB of its statutorily enumerated power under section 3541.3, subdivision (j), to seek temporary injunctive relief, because . . . any invocation of that power would divest PERB of any further jurisdiction under the 'futility' exception." (*Id.* at p. 1460.)

The County claims that *San Diego Municipal Employees*, *supra*, 206 Cal.App.4th 1447, is distinguishable because it was decided on the grounds of exhaustion, not disqualification. But the County's argument here and the employer's argument in that case rest on the same erroneous premise: that by deciding to seek injunctive relief, the Board necessarily decides the merits of the case. And both arguments would lead to the same result: effectively stripping the Board of its statutory authority to seek temporary injunctive relief.[9]

The County alternatively attempts to distinguish *San Diego Municipal Employees*, *supra*, 206 Cal.App.4th 1447, because that case involved disputed legal questions and not, as here, factual ones. However, the argument that an administrative agency has already resolved the merits of a case seems stronger, not weaker, when the dispositive issue is a question of law. Regardless, the reasonable cause standard applies both to disputed or novel legal theories (*Modesto*, *supra*, 136 Cal.App.3d 881) and to disputed facts (*Sharp ex rel. NLRB v. Webco Industries, Inc.* (10th Cir. 2000) 225 F.3d 1130, 1134 [to establish reasonable cause, NLRB "must only produce some evidence 'that [its] position is fairly supported by the evidence'"]).

In rejecting the argument that a decision to seek injunctive relief compromises the Board's neutrality when it later must resolve the merits of the case, *San Diego Teachers* and *San Diego Municipal Employees* are consistent with the APA. Section 11425.30, subdivision (b), allows an agency head to participate "in a determination of probable cause or other equivalent preliminary determination in an adjudicative proceeding or its preadjudicative stage," as well as at later stages of the proceeding. (See also *Administrative Adjudication by*

[9] The County suggests, without any authority or analysis, that we can disqualify ourselves and "delegate" this case to an ALJ from the California Office of Administrative Hearings or to a private arbitrator. We have some doubts about these potential alternatives, but we need not consider them further in light of our disposition of this matter.

State Agencies, 25 Cal. Law Revision Com. Rep. 55 (1995) pp. 157-158; Asimow et al., Cal. Practice Guide: Administrative Law (The Rutter Group 2017) ¶ 5.335.)

Federal authority is also in accord. In *Withrow v. Larkin* (1975) 421 U.S. 35 (*Withrow*), the United States Supreme Court held that there was no due process violation owing to the fact that an administrative board made an initial determination of probable cause, leading to the initiation of an administrative case, and then made the ultimate finding on the merits of the case. The court explained:

> The risk of bias or prejudgment in this sequence of functions has not been considered to be intolerably high or to raise a sufficiently great possibility that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position. . . . Here, if the Board now proceeded after an adversary hearing to determine that appellee's license to practice should not be temporarily suspended, it would not implicitly be admitting error in its prior finding of probable cause. Its position most probably would merely reflect the benefit of a more complete view of the evidence afforded by an adversary hearing.
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> The initial charge or determination of probable cause and the ultimate adjudication have different bases and purposes. The fact that the same agency makes them in tandem and that they relate to the same issues does not result in a procedural due process violation.

(*Id.* at pp. 57-58.)[10] And in even more closely analogous circumstances to those here, the federal courts of appeals have consistently rejected the argument that the NLRB cannot

[10] Citing *Breakzone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1236 (*Breakzone*), the County argues that "***even a tentative commitment***" to a result violates due process. (Emphasis in original.) However, that case cites *Withrow*, *supra*, 421 U.S. 35, for the proposition "that advance knowledge of adjudicative facts that are in dispute, as well as participation in the charging function, does not disqualify the members of an adjudicatory body from adjudicating a dispute; nor does the combination of such functions disqualify them from (1) determining that further investigation is warranted, (2) issuing the order to appear, and (3) making the ultimate decision after hearing on the merits. The teaching of *Withrow* is that

exercise its authority to seek temporary injunctive relief against alleged unfair practices without violating the due process rights of the respondent when later deciding the case on its merits. (*Flamingo Hilton-Laughlin v. NLRB* (D.C. Cir. 1998) 148 F.3d 1166, 1174; *Kessel Food Markets, Inc. v. NLRB* (6th Cir. 1989) 868 F.2d 881, 888; *NLRB v. Sanford Home for Adults* (2d Cir. 1981) 669 F.2d 35, 37; *Eisenberg for and on Behalf of NLRB v. Holland Rantos Co., Inc.* (3d Cir. 1978) 583 F.2d 100, 104.)[11]

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there must be more, a commitment to a result (albeit, perhaps, even a tentative commitment), before the process will be found violative of due process." (*Breakzone*, *supra*, at p. 1236.) *Breakzone* therefore does not support the view that a determination of reasonable cause necessary to seek injunctive relief requires our disqualification.

The County also cites a number of cases with facts that bear no relation to this one. In each, the decision-maker had already announced a decision or taken a firm position on the ultimate outcome. (See, e.g., *Perlman v. Shasta Joint Jr. College Dist. Bd. of Trustees* (1970) 9 Cal.App.3d 873 [before hearing on whether to expel student, college board announced that it had "unanimously decided" to do so]; *Mennig v. City Council* (1978) 86 Cal.App.3d 341 [city council members with personal animosity toward police chief unrelated to his job performance testified against him in a civil service commission hearing in which he was challenging his termination, and then voted to overturn the commission's decision reinstating him]; *Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470 [city planning commissioner wrote article indicating prejudgment of a proposed project]; *In re Adoption of Richardson* (1967) 251 Cal.App.2d 222 [before hearing any evidence, judge in child adoption proceedings wrote letter stating that adoption "should be nipped in the bud"]; *Pacific etc. Conference of United Methodist Church v. Super. Ct.* (1978) 82 Cal.App.3d 72 [before motion for preliminary injunction was pending before him, judge offered gratuitous and premature comments that plaintiffs were likely to succeed at trial].)

Here, to reiterate, the Board has only made the determinations required by section 3541.3, subdivision (j) and *Modesto*, that there is reasonable cause to believe the County has violated the MMBA, and that injunctive relief to maintain the status quo is just and proper.

[11] The County claims that the NLRB has avoided due process concerns by delegating its authority to seek injunctive relief to its general counsel, citing *Frankl v. HTH Corp.* (9th Cir. 2011) 650 F.3d 1334 (*Frankl*). This is not the basis for the federal courts' rejection of the due process arguments in the cases cited above, and *Frankl* actually explains that delegation to the NLRB general counsel is the exception rather than the rule. The case recites that the NLRB, beginning in at least 1950, required its general counsel to obtain case-specific approval before seeking injunctive relief, and that the NLRB has deviated from this practice only when, due to the expiration of members' terms, it would no longer have a three-member quorum to act. (See

The County also claims the Board itself must be disqualified because the County has appealed the preliminary injunction. The County objects to being pitted as litigation adversaries against PERB while the merits of the cases are being adjudicated by the agency. However, that adversarial posture concerns the merits of the preliminary injunction, not the unfair practice cases. Moreover, if the Board could be forced to choose between defending its injunction on appeal and keeping its jurisdiction over these cases, it would effectively strip PERB of its authority to seek injunctive relief in the first place. (*San Diego Municipal Employees*, *supra*, 206 Cal.App.4th 1447, 1460.)

The County also argues that *Agricultural Labor Relations Board v. Superior Court* (2016) 4 Cal.App.5th 675 calls into question the propriety of the Board's deciding the merits of a case after deciding to seek injunctive relief. In that case, the Agricultural Labor Relations Board (ALRB) approved an action by its general counsel seeking injunctive relief against an employer.[12] The employer then sought copies of communications between the ALRB and the general counsel, which it claimed were improper ex parte communications. The Court of Appeal held that those communications were subject to the attorney-client privilege and exempt from disclosure under the California Public Records Act. The court acknowledged, without deciding, that the communications could present a due process problem; because the ALRB's general counsel prosecutes administrative cases before the agency, the communications could be considered ex parte. But, the court held, the remedy for

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also NLRB Case Handling Manual, Part I, § 10310 ["the Board decides on a case-by-case basis whether to authorize the Regional Office to seek 10(j) relief"].)

[12] Like PERB, the ALRB has authority to seek injunctive relief against alleged unfair practices under Labor Code section 1160.4.

that problem would be to require disclosure of the communications as part of the administrative record, not through a public records act request.

Here, the County argues that this case presents a similar due process problem, owing to the Board's attorney-client relationship with the General Counsel, and the fact that the Board itself must decide whether to seek injunctive relief. But *Agricultural Labor Relations Board v. Superior Court*, *supra*, 4 Cal.App.5th 675, is entirely distinguishable because PERB's General Counsel, unlike the ALRB's, does not prosecute unfair practice complaints or advocate in cases pending before the Board. Nor does PERB's General Counsel advise the Board concerning cases pending final determination. (*County of Contra Costa* (2014) PERB Order No. Ad-410-M, pp. 15-16.) Thus, the Board's communications with the General Counsel concerning the decision to seek injunctive relief would not constitute ex parte communications even under the County's interpretation of *Agricultural Labor Relations Board v. Superior Court*.

The County further argues that statements by the General Counsel and his subordinates in seeking injunctive relief: (1) are attributable to the Board itself, and (2) disclose that the Board has prejudged the merits of this case, or harbors "hostility" toward the County.

In this regard, the County asserts that "PERB attested to the Superior Court that it reviewed the evidence and determined that the evidence established the County engaged in unfair labor practices." If the General Counsel had, in fact, characterized the matter in those terms, such a characterization would have exceeded our approval to seek injunctive relief and would have been inaccurate. As noted, we make no determination on the merits as part of our decision to grant injunctive relief. (*City of Fremont*, *supra*, PERB Order No. IR-57-M, p. 19, fn. 8.) We certainly did not authorize the General Counsel to represent that the Board itself

had resolved conflicting legal or factual contentions and concluded that the County violated the MMBA in the manner alleged.

As it turns out, however, the County has taken the General Counsel's statements completely out of context. The statements cited by the County generally fall into five categories: (1) statements that explicitly refer to *Modesto*'s "reasonable cause" prong, and which do not even imply a prejudgment of the merits[13]; (2) statements concerning SEIU's factual allegations, which do not directly refer to "reasonable cause" but which appear in a discussion of that prong of the *Modesto* test[14]; (3) arguments concerning how SEIU's

[13] For example, the County quotes one sentence of PERB's complaint for injunctive relief, which stated that "PERB contends that . . . the County has taken various actions in violation of the MMBA and that this Court should . . . enjoin and restrain the County . . . from engaging in this unlawful conduct," but does not cite the rest of the sentence: "under the standards established in [*Modesto*]." The County also ignores the very next sentence, which states, "Under the *Modesto* standards, the Board has determined that there is reasonable cause to believe the County has committed numerous unfair labor practices."

[14] For instance, the County points to the General Counsel's statement in its brief in support of the temporary restraining order that "the evidence establishes that the County interrogated at least eight Registered Nurses about their participation in a strike." This statement occurs within a larger discussion of SEIU's *allegations*, which makes clear that no determination has been made on the merits of those allegations. Two paragraphs before the disputed statement, in the same section of the brief, the General Counsel stated: "*SEIU's charge alleges* that the County interfered with employee rights by coercively interrogating a number of nurses and other healthcare employees about their participation in the September 2017 strike," and "*[a]ccording to the charge*, the County asked these employees a series of questions designed to uncover their motivation for striking, and thus, interfered with their right to engage in activities arguably protected by the MMBA." (Emphasis added.) And one paragraph after the disputed statement, the General Counsel explained, "While these allegations are of course subject to proof at trial, at this stage of the administrative process there is more than sufficient evidence to establish reasonable cause to believe that unfair practices occurred." (*Id.* at p. 9.)

The County also finds fault in the statement that "there is extensive evidence before the Court supporting PERB's theory that the County's declaration of impasse, its threatened imposition of the LBFO, and its interrogations and terminations of employees were all unlawful." Here, the County ignores the reference to "PERB's theory," itself a callback to *Modesto*'s explanation of the reasonable cause standard. (*Modesto*, *supra*, 136 Cal.App.3d

allegations would be analyzed under the appropriate legal standard[15]; (4) arguments for why injunctive relief is "just and proper"[16]; and (5) comments on the likelihood that SEIU will prevail on the merits of its charges.[17] The statements in the first four categories are clearly appropriate in the context of the *Modesto* test, while the statements in the fifth category were in response to the County's own arguments that injunctive relief should be denied because of an insufficient showing of a likelihood of success. The County also criticizes the General Counsel's prayer for reimbursement of costs in the complaint for injunctive relief, which is hardly unusual in a court complaint. In sum, although the statements cited by the County

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881, 897 ["the key question is not whether *PERB's theory* would eventually prevail, but whether it is insubstantial or frivolous" (emphasis added; original emphasis omitted)].)

[15] The County notes that PERB's brief in support of the temporary restraining order argued that some of the County's alleged conduct was "'inherently destructive' of employee rights," and that asserted business justifications by the County would be viewed with skepticism because "the County's investigative techniques bordered on the absurd."

[16] The County cites PERB's brief in support of the temporary restraining order, which argued that the County's actions "threaten to degrade, and ultimately, annihilate the ability of [SEIU] to bargain collectively," and that "[i]t is apparent that these actions have had a serious chilling effect on the bargaining unit, that disaffection has set in, and that employees and their chosen representative will suffer irreparable harm. . . ." (*Id.* at p. 13.) The County also quotes the PERB attorney who argued orally in favor of the temporary restraining order that the County had "unclean hands," and, in the context of discussing another case in which the County was found to have retaliated against an employee in violation of the MMBA, *County of Riverside* (2013) PERB Decision No. 2336-M, accused the County of having engaged in scorched earth litigation tactics, being a recidivist, and being a "very sophisticated part[y] who know[s] well how to invade the rights of [its] employees." These statements reflect not a determination of the merits of the pending cases, but argument for why injunctive relief was appropriate.

[17] At the hearing on the temporary restraining order, PERB's attorney stated, "we believe strongly" that SEIU's unfair practice charges have merit, but immediately qualified this by stating, "or at least that there are serious questions as to the merits of the County's conduct." PERB's reply brief in support of the preliminary injunction argued that "the County has very likely engaged in systematic anti-union conduct and bad faith bargaining," and that an argument rejected by the ALJ in Case No. LA-CE-1270-M "will likely also be rejected" in other pending cases.

evidence the General Counsel's zealous advocacy for an injunction, they in no way indicated that the Board had determined or prejudged the merits of the underlying unfair practice cases.[18]

The County alternatively claims that the General Counsel's statements show the County cannot receive a fair and impartial hearing because "PERB risks being viewed as having misconstrued the alleged 'evidence' in a court of law." We disagree. The reasonable cause standard is distinct from the preponderance of the evidence standard of proof that applies to the merits of the unfair practice cases. (PERB Reg. 32178; cf. *NLRB v. Acker Industries, Inc.*, *supra*, 460 F.2d 649, 652.) A finding, following an evidentiary hearing, that the evidence does not support SEIU's allegations would not be inconsistent with the finding of reasonable cause or with PERB's arguments in court. (*Withrow*, *supra*, 421 U.S. 35, 57-58.)

For similar reasons, we reject the County's argument that the General Counsel's statements revealed that the Board itself (or even the General Counsel) bears "hostility" toward the County. By vesting the Board with the power to petition a court for temporary relief, section 3541.3, subdivision (j), necessarily contemplates *argument* by the Board on behalf of its requested injunction. The General Counsel cannot be expected to pursue injunctive relief on the Board's behalf in a rhetorical straightjacket, for fear that vigorous advocacy may cause the entire agency to lose jurisdiction over the dispute. If the General Counsel's arguments misrepresented the law or the evidence, the County had every opportunity for rebuttal, and if the superior court was improperly swayed by those arguments, the County's remedy lies in its appeal of the preliminary injunction. "Hostile" arguments in the injunctive relief process,

[18] The County's appeal notes that the PERB attorney who argued in support of the temporary restraining order, Brendan White, was later appointed by the Governor to serve as the legal advisor to Board Member Banks. Under PERB's standard practice, a legal advisor or Board member who participated in a case at another level of the agency is recused from the matter when it reaches the Board. Consistent with that practice, Mr. White has recused himself from these consolidated cases, as well as from Case No. LA-CE-1270-M.

falling short of demonstrating a fixed anticipatory prejudgment, do not require this agency's disqualification.[19]

As additional grounds for inferring the Board's bias against the County, the County argues that we have singled the County out by seeking injunctive relief in this case. This argument lacks merit for several reasons. First, the Board has never held—and we are aware of no other authority suggesting—that bad faith bargaining charges are categorically inappropriate for injunctive relief. In fact, in the lead appellate precedent establishing the deferential standard for assessing PERB's applications for injunctive relief, the Board sought an injunction against an employer's alleged bad faith implementation of new terms following a bargaining impasse. (*Modesto, supra*, 136 Cal.App.3d 881.) Moreover, the NLRB and its General Counsel have recognized that injunctive relief "is often warranted" in cases involving bad faith bargaining. (See *Report on Utilization of Section 10(j) Injunction Proceedings, March 3, 1998 through January 15, 2001* (Feb. 5, 2001) 2001 WL 988354, at p. 10; see also, e.g., *Whitesell Corp.* (2011) 357 NLRB 1119, 1120 [noting that NLRB General Counsel obtained injunction against employer's implementation of its final offer].)

Second, our authority to seek injunctive relief is discretionary; section 3541.3, subdivision (j) provides that "the board *may* petition the court for appropriate temporary relief

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[19] The County's citation to *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (2018) 138 S.Ct. 1719 (*Masterpiece Cakeshop*) is not to the contrary. In that case, the Supreme Court set aside a final decision by a state agency based on what the court determined to be the agency's impermissible hostility toward the respondent's religious views. The court held that the commission "violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint." (*Id.* at p. 1731.)

The County's *Masterpiece Cakeshop* argument is missing a main ingredient. The County, as a state actor, cannot claim the protection of the First Amendment's free exercise clause. Stripped of its First Amendment foundations, *Masterpiece Cakeshop* does not support the proposition that the barest expression of hostility requires an administrative agency to be disqualified from deciding a case.

or restraining order." (Emphasis added; see also *San Diego Teachers*, *supra*, 24 Cal.3d 1, 13 [PERB has "discretion to withhold as well as pursue, the various remedies at its disposal," including injunctive relief]; *Kinney v. Pioneer Press* (7th Cir. 1989) 881 F.2d 485, 489 ["[T]he [NLRB] has discretion to disdain this remedy no matter how strong the evidence"].) There is no evidence that when requested to seek injunctive relief under substantially similar circumstances, the Board has exercised its discretion differently, and, even if the County had produced such evidence, it would be to no avail absent evidence of intentional invidious discrimination. (Cf. *Cilderman v. City of Los Angeles* (1998) 67 Cal.App.4th 1466, 1470 ["Unequal application of a statute or rule to persons entitled to be treated alike is not a denial of equal protection 'unless there is shown to be present in it an element of intentional or purposeful discrimination'"].)

The County also argues that we displayed bias by granting SEIU's injunctive relief request while "fail[ing] to see through the coordinated attempts by SEIU [and its sister locals] to subvert the good faith bargaining process by filing, at that time, over 20 frivolous unfair practice charges, same as its sister locals did in other counties." In support of this argument, the County claims that between 2016 and 2018, "[a] simple review of the same conduct by SEIU at the counties of San Diego, Ventura, and Solano reveal[s] that SEIU has a standard practice of filing dozens of meritless PERB charges in an effort to get what it wants at the bargaining table."

This argument is inappropriate for several reasons, the most important of which is that the merits of SEIU's charges against the County were not before us in our decision to grant injunctive relief (*City of Fremont*, *supra*, PERB Order No. IR-57-M, p. 19, fn. 8), and they are not before us now. They are to be resolved through the established administrative process. If

SEIU's charges are ultimately shown to have been frivolous and pursued in bad faith, the County's remedy is to pursue its attorneys' fees. (*City of Alhambra* (2009) PERB Decision No. 2036-M, p. 19.)[20] The County may not make an issue of the merits of those cases through this disqualification motion.

We therefore reject the County's arguments that we have demonstrated a fixed anticipatory prejudgment concerning the cases consolidated here.

ORDER

The County of Riverside's request for special permission to appeal the orders denying disqualification in Case Nos. LA-CO-222-M et al. is GRANTED. The County's appeal of those orders and its motion to disqualify the Board itself and all other Board agents from participating in Case Nos. LA-CO-222-M et al. are DENIED.

Members Banks, Shiners, and Krantz joined in this Decision.

[20] We also note that the County provided no evidence in support of its claim regarding the quantity or merit of the charges filed against the Counties of San Diego, Ventura, and Solano in that timespan. So even if this issue were relevant, we would decline the invitation to scour our own files for evidence supporting the County's claim.