STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

COUNTY OF SAN MATEO, Charging Party, v. AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, LOCAL 829, Respondent.	Case No. SF-CO-433-M PERB Order No. IR-61-M June 27, 2019

Appearances: Liebert Cassidy Whitmore by Richard Bolanos, Attorney, for County of San Mateo; Beeson, Tayer & Bodine by Andrew H. Baker, Attorney, for American Federation of State & Municipal Employees, Local 829.

Before Banks, Krantz, and Paulson, Members.

DECISION

KRANTZ, Member: This case came before the Public Employment Relations Board (PERB or Board) on two requests for injunctive relief that Charging Party County of San Mateo (County) filed in response to strike notices from Respondent American Federation of State, County & Municipal Employees, Local 829 (AFSCME). We granted in part and denied in part the County's first request, and denied the County's second request, as explained below.

BACKGROUND

The County is a public agency within the meaning of section 3501, subdivision (c), of the Meyers-Milias-Brown Act (MMBA).[1] AFSCME, a recognized employee organization within the meaning of MMBA section 3501, subdivision (b), exclusively represents County employees

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

in the following bargaining units: Health Services Unit, Human Services Unit, Inspection and Regulation Unit, Institutional Services Unit, Licensed Vocational Nurse Unit, Parks Unit, Planning Unit, Plant and Equipment Maintenance Unit, Clinical Laboratory Scientist Unit, Telecommunications Unit, and Communication Dispatchers Unit.

In April 2018, the parties began negotiations for a new memorandum of understanding (MOU). Negotiations continued regularly thereafter, both before and after the parties' existing MOU expired on October 6, 2018. On January 25, 2019, AFSCME declared that the parties had reached an impasse in negotiations.[2]

Section XV of the County's Employer-Employee Relations Policy governs impasse resolution procedures. It provides that if either the County or a union requests an impasse meeting, the parties shall promptly meet to "review" their positions "in a final good faith effort to reach agreement on the disputed issues." Section XV also provides that if the parties do not reach agreement at the impasse meeting, then the parties may mutually agree to further dispute resolution methods, but either party has the right to decline the other party's proposal to engage in such additional procedures.

The County asked to hold an impasse meeting, and the parties did so on January 31, but they were unable to reach an agreement. At the meeting, AFSCME notified the County that it was not interested in pursuing further dispute resolution methods, and AFSCME provided the County with 13 days' written notice of a two-day strike in all AFSCME-represented bargaining units, to be held on February 13-14.

On February 1, the County provided 24 hours' notice of its intent to ask PERB to seek injunctive relief against the scheduled AFSCME strike. On February 5, the County filed an

[2] Unless otherwise specified, all dates herein refer to 2019.

unfair practice charge alleging that AFSCME's planned strike violated the union's duty to bargain in good faith because: (1) AFSCME had called a strike prematurely, without allowing adequate time to consider or participate in dispute resolution methods; and (2) the threatened strike included employees whose absence from work for two days would imminently and substantially threaten public health or public safety. The County filed an accompanying injunctive relief request asking PERB to file suit in superior court and seek a temporary restraining order against AFSCME. The County filed more than a dozen declarations, together with other information, in support of its injunctive relief request.[3]

On February 7, AFSCME opposed the injunctive relief request and filed five declarations in support of its position. Also on February 7, PERB's Office of the General Counsel (OGC) posed written questions to the parties. Both parties responded later that day. On February 8, OGC notified the parties that the Board had granted in part and denied in part the County's injunctive relief request. The Board preliminarily determined that 61 positions were essential to the public health or safety, 56 of which should be filled for all regular working hours and five of which should be filled by on-call employees who would be available to work in the event of an emergency that could not otherwise be safely handled. OGC

[3] The record does not reveal why the County waited until February 5 to file its charge, injunctive relief request, and supporting information. Pursuant to PERB Regulation 32450, subdivision (c) (Cal. Code Regs., tit. 8, sec. 32450(c)), a party must provide 24 hours' notice before filing an injunctive relief request. While the County arguably could have given such notice on January 31, even assuming that it was reasonable to provide notice on February 1, the County could have filed its injunctive relief request on Monday, February 4. There is no notice requirement for filing an unfair practice charge, meaning that the County could have filed its charge on January 31 or February 1. Moreover, a party planning to seek injunctive relief is free to file any relevant information, via declaration or otherwise, as part of its charge. Although delay is a permissible factor for the Board to consider, the Board did not draw any adverse inference from the County's apparent delay here. As noted by way of example at several points below, our preliminary determinations may very well have been broader in some areas and narrower in others, if PERB had been given a greater amount of time to investigate.

notified the parties that it would not seek to enjoin any such positions that AFSCME agreed to exempt from the strike by 5:00 p.m. on February 9. AFSCME then timely agreed to grant exemptions matching the Board's partial grant, including both the 56 positions to be filled for all regular working hours and the five positions to be filled with on-call employees. OGC therefore notified the parties that it would not be filing an injunction action against AFSCME. The County's unfair practice charge remained pending.

The parties renewed their negotiations soon thereafter, and as a result AFSCME canceled the strike scheduled for February 13-14, thereby allowing more time for bargaining. On February 11, the parties reached a Tentative Agreement (TA) with respect to all eleven AFSCME-represented units. AFSCME held a ratification vote on February 13-14. All units except for the Human Services Unit (HSU) voted in favor of ratification. On February 26, AFSCME provided the County with 7 days' written notice of a two-day strike of HSU employees, to be held on March 5-6. On February 27, the parties met in an effort to make progress on an agreement covering HSU employees, but the parties were unable to reach an agreement. Also on February 27, the County provided 24 hours' notice of its intent to ask PERB to seek injunctive relief against the scheduled AFSCME strike.

On February 28, the County amended its pending unfair practice charge to allege that: (1) AFSCME was threatening a pre-impasse strike that the County believed was presumptively unlawful; and (2) the threatened strike included employees whose absence from work for two days would imminently and substantially threaten public health or public safety. The County filed an accompanying request for injunctive relief and five supplemental declarations. The County noted that out of the 61 positions that PERB had preliminarily determined to be essential, 26 were HSU positions. Based on its "essential employee" theory, the County asked PERB to seek injunctive relief as to those 26 positions, plus 14 additional HSU positions.

By letter dated February 28, AFSCME reiterated its willingness to exempt the 26 HSU employees that the union had exempted on February 9, and the union further exempted six of the 14 additional HSU positions that the County claimed were essential. By letter dated March 1, OGC notified the parties that the Board had denied the County's second injunctive relief request, without prejudice. OGC's letter noted that the Board, in reaching this determination, had taken into account AFSCME's exemptions.

DISCUSSION

In order for PERB to seek an injunction, it must find (1) "reasonable cause" to believe an unfair practice has been or will be committed; and (2) that injunctive relief is "just and proper." (*Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 895-896 (*Modesto*).) We apply these standards to each of the County's allegations.

I. The County's Requests to Enjoin Entirely AFSCME's Strikes

A strike that occurs prior to impasse and completion of any statutorily-required impasse resolution procedures creates a rebuttable presumption that the union has breached its duty to bargain in good faith. (*County of Trinity (United Public Employees of California, Local 792)* (2016) PERB Decision No. 2480-M, p. 3 (*Trinity*).) After bargaining parties have reached a bona fide impasse and exhausted any mandatory impasse resolution procedures, public sector strikes are governed by the same rules as apply in the private sector (*City of San Jose* (2013) PERB Decision No. 2341-M, p. 39), except that an employer's "substantial concession" post-impasse might temporarily re-institute the aforementioned rebuttable presumption, until a new impasse is reached. (*Trinity, supra*, PERB Decision No. 2480-M, p. 5.)

The County argues that AFSCME demonstrated bad faith by calling a strike on January 31, at the close of the parties' mandatory post-impasse meeting. The gravamen of this allegation is that AFSCME should have engaged in further impasse resolution procedures, even though such further procedures were not required. This claim is not colorable, as the County did not establish that it made a substantial concession sufficient to create a renewed rebuttable presumption against calling a strike. The County's argument as to AFSCME's later HSU strike fails for the same reason. While AFSCME called for the strike even as the parties were engaged in non-mandatory post-impasse negotiations, there is no evidence that the County had made a substantial concession sufficient to reinstate the rebuttable presumption against calling a strike. Because we found no reasonable cause to believe that a rebuttable presumption against pre-impasse strikes applied to either of AFSCME's strikes, we did not consider whether AFSCME could rebut such a presumption, nor did we consider whether an injunction prohibiting AFSCME from proceeding with its strikes might be just and proper.

II. The County's Requests for Partial Injunctions Covering Allegedly Essential Positions

A union violates its duty to bargain in good faith if it holds a strike by one or more employees whose absence from work imminently and substantially threatens public health or safety. (*San Mateo County Superior Court* (2019) PERB Order No. IR-60-C, p. 3 (*San Mateo Superior Court*), citing *City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 611 (*City of San Jose*) and other authorities.) This "essential employee" standard derives from *County Sanitation Dist. No. 2 v. Los Angeles County Employees Assn.* (1985) 38 Cal.3d 564 (*County Sanitation*), and we therefore refer to it herein as the *County Sanitation* standard. It "allows exceptions [to the right to strike] in certain essential areas of

public employment (e.g., the prohibition against firefighters and law enforcement personnel)." (*Id.* at p. 586.)[4]

In *City of San Jose*, *supra*, 49 Cal.4th at p. 611, the Supreme Court ruled that 72 hours' strike notice is long enough for PERB injunctive relief procedures to apply, and in such circumstances, a PERB-covered employer can only seek a strike injunction by asking PERB to seek an injunction on its behalf. When an employer asks PERB to seek an injunction against a strike that includes allegedly essential employees, we are called upon to make a preliminary determination as to whether certain positions satisfy the *County Sanitation* standard. (*San Mateo Superior Court, supra*, PERB Order No. IR-60-C, p. 4.)[5] In doing so, we assess each position on a case by case basis. (*Ibid*.) Courts generally afford PERB deference in its determinations regarding the extent to which injunctive relief may or may not be needed, because PERB is California's expert public sector labor relations agency, is experienced in assessing complex labor disputes and their impact on the public, and has a dedicated staff of attorneys to study the parties' submissions in light of previous experience, precedent, and competing interests. (*City of San Jose, supra*, 49 Cal.4th at p. 710 [Trial courts "should afford due deference to PERB" and issue injunctive relief not sought by PERB "only when it is clearly shown that PERB's remedy would be inadequate."]; *San Mateo Superior Court*, *supra*,

[4] The Court described the "firefighters and law enforcement personnel" subject to this exception as those "whose absence from their duties would clearly endanger the public health and safety." (*County Sanitation*, *supra*, 38 Cal.3d at p. 587.)

[5] *County Sanitation* initially found that courts fulfilled this function for MMBA-covered employers. However, the Supreme Court recognized in *City of San Jose* that when the California Legislature vested PERB with jurisdiction over the MMBA in 2000, it required MMBA-covered employers to use PERB injunctive relief procedures, even though those procedures had previously been inapplicable to MMBA employers and unions. (*City of San Jose*, *supra*, 49 Cal.4th at p. 605.) The Legislature thereby brought strike injunction procedures for MMBA-covered employers in line with procedures for public entities covered by labor relations statutes that the Legislature had already placed within PERB's jurisdiction.

PERB Order No. IR-60-C, pp. 2-3, citing *El Rancho Unified School Dist. v. National Educational Assn.* (1983) 33 Cal.3d 946, 958 and other authorities.)

Determining "whether a particular employee's job is so essential that the employee may not legally strike is a complex and fact-intensive matter." (*City of San Jose*, *supra*, 49 Cal.4th at p. 601.) We consider the nature of the services the alleged essential employees perform and whether the employer has clearly demonstrated that disruption of such services for the length of the strike would imminently and substantially threaten public health or safety. (*San Mateo Superior Court*, *supra*, PERB Order No. IR-60-C, p. 4.)

If we find that a lapse in the public service at issue would imminently and substantially threaten the public health or safety, we next consider whether the employer has clearly demonstrated that it requires an injunction to protect the public even after fully accounting for all possible service reductions and coverage options, including: (1) planning to use supervisors, managers, non-bargaining unit personnel, and bargaining unit employees that the union has exempted from the strike or who have affirmatively indicated that they plan to work during the strike; (2) contacting all companies or other entities potentially able to provide replacement employees or services, and contracting with such entities if they indicate they can provide replacements; and (3) documenting the extent to which each of the aforementioned options may or may not be feasible, including the available companies or agencies offering temporary replacements, their responses when contacted, and any resulting contracts. (*San Mateo Superior Court, supra*, PERB Order No. IR-60-C, p. 4, citing *San Francisco County Superior Court & Region 2 Court Interpreter Employment Relations Committee* (2018) PERB Decision No. 2609-I, p. 13.) Finally, for those employees that we preliminarily determine are essential to public health or safety based on the above-described analysis, we must consider

what arrangements will protect the public while infringing as little as possible on employees' protected rights.[6] (*San Mateo Superior Court, supra,* PERB Order No. IR-60-C, pp. 4-5.)

Under the *County Sanitation* and *Modesto* standards described above, if a union exempts from a planned strike certain employees or positions that PERB has preliminarily found to be essential, such an exemption will normally mean that (1) there is no "reasonable cause" to believe that the union is threatening an unfair practice as to those positions, and (2) injunctive relief is not "just and proper" as to those positions. (*San Mateo Superior Court, supra*, PERB Order No. IR-60-C, p. 5.) In such cases, we have directed OGC to exclude from its injunctive relief request any positions that the union agrees to exempt from the strike, even if the union's offer covers only some of the positions we preliminarily found to be essential and OGC needs to file for injunctive relief as to the others. (*Id*. at p. 7.) However, both the "reasonable cause" and "just and proper" criteria may be satisfied—notwithstanding the union's commitment to exempt certain positions from its strike—if the employer demonstrates that the union has violated or threatened to violate its commitment, or has offered an exemption that is insufficiently broad to protect public health and safety.[7] (*Id*. at p. 5.)

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[6] In some cases, the public may be sufficiently protected if the essential employees are on call, i.e., ready to cross the picket line if needed in the event of an emergency. (*San Mateo Superior Court, supra,* PERB Order No. IR-60-C, p 5, fn. 3.) In other instances, one or more employees may need to be at work for their entire shift in order to protect the public. (*Ibid*.) Like all determinations under *County Sanitation*, we resolve these issues on a case by case basis, considering declarations and other information the parties submit. (*Ibid*.) Notably, at later stages of litigation, including at an evidentiary hearing following issuance of a complaint and in subsequent proceedings thereafter, neither PERB nor the parties are bound by preliminary determinations PERB made based upon the parties' submissions at the injunctive relief stage. (*Id*. at p. 3, fn. 1.)

[7] Exemptions, which some unions refer to as "line passes," take a variety of forms. Consistent with the discussion in footnote 6, *ante*, unions have at times issued only partial exemptions, indicating that certain employees will stand ready to cross the picket line and assist in the event of an emergency. In those instances in which the exemption indicates only

After PERB preliminarily determines that certain positions are essential, there may be only a short time window available for the union to exempt some or all such positions and thereby forestall completely, or at least narrow, the need for PERB to file suit for injunctive relief. (*San Mateo Superior Court*, *supra*, PERB Order No. IR-60-C, p. 6.) We have nonetheless directed OGC to provide such an opportunity to the fullest extent possible. (*Ibid*.) A striking union need not use any particular format in notifying PERB, the employer, and the affected employees if the union decides to narrow the scope of its planned strike. (*Id*. at p. 7.) A letter from the union to PERB and the employer is often the clearest and most expeditious means to exempt from a strike certain positions that PERB has preliminarily found to be essential. (*Ibid*.)

Applying these standards to the parties' submissions during the two rounds of injunctive relief proceedings in this case, PERB reached the following preliminary determinations regarding the various areas of County services in which the County sought an injunction.

A. Public Safety Communications Department

Communications Dispatchers: Communications Dispatchers work 365 days per year, 24 hours a day, handling 9-1-1 calls and dispatching emergency services. The County clearly demonstrated that this service is essential to public health and safety, as any lapse in the service would mean that emergency services would not be dispatched in a timely manner, thereby placing the public in immediate and significant risk of serious injury or death. Because the County schedules no fewer than 18 Dispatcher II's and 3 Dispatcher I's in total each day, and there were no available options to replace either of these classifications, PERB

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that one or more employees stand ready to cross a picket line in the event of an emergency, PERB must determine if that level of exemption is sufficient to protect the public.

found that 18 Dispatcher II's and 3 Dispatcher I's should report for their full shifts each day of the strike.

B. Sheriff's Office and Probation Department

Cooks and Food Service Workers: The County asked PERB to seek an injunction against four Cooks and three Food Service Workers per day, arguing that these employees serve a critical function by preparing and serving food to detained adults and juveniles, the County cannot replace these employees on short notice due to background check requirements, and there are no available options to cover the work. The County provided only limited information regarding its ability to replace these employees or have other employees cover the work, prepare food in advance, bring in food from outside governmental or non-governmental establishments, or use a combination of these methods. Two of the County's detention facilities employ food service staff on weekends and holidays, while other facilities do not. The County did not provide sufficient information as to whether the methods it uses on weekends and holidays at certain locations might be sufficient, potentially in combination with other methods, to cover the work at all locations during the strike. Nonetheless, in the absence of any information from AFSCME, PERB determined that in this instance it would direct OGC to seek an injunction requiring one Cook to work a full shift at each of the two detention facilities that normally employs food service staff during weekends and holidays. In total, therefore, PERB found that two Cooks and no Food Service Workers should report for their full shifts each day of the strike. The County did not clearly demonstrate that a greater staffing level was necessary to prevent an imminent and substantial threat to public health or safety.

Utility Workers: The County asked PERB to seek an injunction against one Utility Worker and one Senior Utility Worker, arguing that this was the minimum staffing needed to

assist detained juveniles by doing laundry, delivering clothing, and performing other day-to-day tasks. The County did not indicate to what extent Utility Workers normally work during weekends and holidays. More generally, the County did not clearly demonstrate that the Utility Workers' absence would imminently and substantially threaten detained juveniles' health or safety. Even if the service were essential to juvenile health and safety, the County did not provide important information such as (1) to what extent the employees can perform some of their work in advance of a strike, and (2) to what extent managers, supervisors, and other unrepresented employees could cover remaining work.[8] PERB denied the County's request.

C. Coroner's Office

Forensic Autopsy Technicians: The County asked PERB to seek an injunction against one Forensic Autopsy Technician to assist a County-employed pathologist with processing decedents, collaborating with law enforcement, and releasing bodies for final disposition in a prompt manner to meet religious and emotional needs of grieving family and friends. The County did not clearly demonstrate that a lapse in their availability imminently and substantially threatens the public health or safety, particularly given that Forensic Autopsy Technicians normally work a Monday through Friday schedule.[9] The County also did not

[8] In both its declarations and briefs, the County repeatedly asserted that there were "not enough" non-striking supervisors and managers who were able enough, or in some cases had the requisite licensure, to fill in for striking workers. As noted *ante*, an employer asking for extraordinary injunctive relief is required to provide PERB with greater information, documenting the available non-striking supervisors and managers and to what extent they are able to cover for striking workers, as well as contacting outside companies and agencies and documenting their responses. This level of detail allows an employer to demonstrate clearly the extent of remaining need after accounting for all coverage options.

[9] In this and other instances in which there are one or more holidays or weekend days on which County employees in a given classification do not work, the County was unable to show that a two-day strike would threaten the public, even if that two-day lapse in a service

clearly demonstrate that one or more non-bargaining unit pathologists could not adequately cover the technicians' tasks. PERB denied the County's request.

D. Department of Public Works

Airport Operations Specialists: The County asked PERB to seek an injunction against four Airport Operations Specialists to serve as first responders for incidents at San Carlos Airport and Half Moon Bay Airport. The County did not clearly demonstrate that closing the airports would imminently and substantially threaten the public's health or safety. PERB therefore denied the County's request. For this reason, PERB did not consider availability of supervisors, contractors, or others.

Supervisory Stationary Engineers: The County asked PERB to seek an injunction against three Supervisory Stationary Engineers to supplement managerial personnel in responding emergently to issues that might arise with heating, cooling, plumbing and alarm systems at County facilities. PERB found that one Supervisory Stationary Engineer should be on call in the event of an emergency creating an unsafe condition at a detention facility. The County did not clearly demonstrate that a greater staffing level was necessary to prevent an imminent and substantial threat to public health or safety.

Boiler Watch Engineers: The County asked PERB to seek an injunction against three Boiler Watch Engineers to supplement managerial personnel in monitoring and responding emergently to issues that might arise with gas-fired hot water and steam boilers at the San Mateo Medical Center (SMMC) central plant. PERB found that one Boiler Watch Engineer

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were to be added to, and considered in context with, a proximate weekend. Moreover, even if an employer makes such a showing, PERB must also consider the extent to which the employer can lessen such impacts by authorizing weekday and weekend overtime work before and after the strike, including opening or performing certain operations during a weekend before and/or after a scheduled strike. The County's failure to address such issues represents a further lacuna in its position.

should be on call in the event of an emergency creating an unsafe condition at the SMMC central plant. The County did not clearly demonstrate that a greater staffing level was necessary to prevent an imminent and substantial threat to public health or safety.

E. Human Services Agency

Juvenile Shelter Care Counselors and Group Home Administrator: The County asked PERB to seek an injunction against 13 Juvenile Shelter Care Counselors and one Group Home Administrator, to operate the Receiving Home where Child and Family Services places dependents on a temporary basis pending placement with a family member, with a non-relative foster parent, or at a group home. The Receiving Home is a 24/7 operation, and the County clearly demonstrated that a lapse in operations would imminently and substantially threaten public health and safety. Moreover, the County submitted information showing that there are mandated staffing ratios. Although there may be supervisors and managers capable of covering some of the work, AFSCME responded to the County's request by agreeing that the staff should appear to work in the normally-required numbers. PERB granted this request as to one Group Home Administrator and seven Counselor positions per day, as the County's information indicated that these staffing levels were sufficient.[10]

Social Workers: The County asked PERB to seek an injunction against 16 Social Workers, to operate the County's 24-hour hotline for allegations of child maltreatment and to investigate such allegations as needed. The County clearly demonstrated that a lapse in the hotline's operation would imminently and substantially threaten public health and safety.

[10] The County's request for 13 Counselors was apparently intended to cover both days of the strike. If so, then PERB's order largely mirrors the County's request, and is simply expressed on a per-day basis for the sake of consistency. If the County actually sought 13 Counselors per day, then that request is denied in part, as the County's own information undercuts the need for that high a staffing level.

Although there are supervisors and managers capable of covering some of the work, PERB ordered that six Social Workers per day should supplement the supervisors and managers, thereby at least matching the County's weekend and holiday staffing level. The County did not clearly demonstrate that a greater staffing level was necessary to prevent an imminent and substantial threat to public health or safety.

Benefits Analysts: The County asked PERB to seek an injunction against 63 Benefits Analysts allegedly needed to receive, review, and determine eligibility for immediate need applications for Medi-Cal, CalFresh, and CalWORKS. The County did not clearly demonstrate that a lapse in their availability imminently and substantially threatens the public health or safety, particularly given that the analysts normally work a Monday through Friday schedule and there are four managers who can fill in. PERB therefore denied the County's request as to Benefits Analysts. In advance of the HSU unit strike on March 5-6, the County submitted a scaled-down request, asking PERB to seek an injunction against eight Benefits Analysts. However, the County still provided insufficiently persuasive information that the two-day strike would imminently and substantially threaten the public. Even if 100 percent of the Benefit Analysts were to honor a two-day strike, and even ignoring the four managers able to fill in, such a two-day closure would be for a shorter period than the County's common three-day and occasional four-day holiday weekends. The County also did not address its ability to authorize overtime work before and after the strike, both on weekends and on weekdays. Accordingly, PERB denied the County's renewed request as to benefit analysts.

F. Health System–Behavioral Health & Recovery Services (BHRS)

Access Call Center Employees–SMHCs and PSW/MFT IIs: The County asked PERB to seek an injunction against one Supervising Mental Health Clinician (SMHC) and four

Psychiatric Social Worker/Marriage Family Therapist IIs (PSW/MFT IIs) at the County's Access Call Center, which handles calls from individuals experiencing mental health distress, including some who could present a safety threat to themselves. The County clearly demonstrated that the service is essential to public health and safety, as any lapse would place members of the public in immediate and significant risk of serious injury or death. However, the County provided unclear and insufficient information about the availability of managers to perform the work. Moreover, the County indicated that the requested staff work only regular business hours Monday through Friday, and that a contractor covers the calls during other periods. The County provided unclear and insufficient information regarding contractors' ability to cover the strike. For these reasons, PERB denied the County's request.

In advance of the HSU unit strike on March 5-6, the County submitted a scaled-down request, asking that two PSW/MFT IIs be enjoined to work at the call center during the strike. The County submitted new information in support of this request. AFSCME agreed to the County's scaled-down request for two PSW/MFT IIs. PERB therefore did not consider whether the County had submitted additional information sufficient to demonstrate clearly that two PSW/MFT IIs must be enjoined in order to protect the public from an imminent and substantial health or safety threat.

Alcohol & Other Drug Treatment (AOD) Employees–AOD Supervisors, Lead BHRS Specialists, and Case Management Specialist IIs: The County asked PERB to seek an injunction against one AOD Supervisor, one Lead BHRS Specialist/Medication Assisted Treatment (MAT) Case Manager, and one Case Management Specialist II, arguing that these employees coordinate access to inpatient and outpatient care for clients with substance use disorders, including those undergoing withdrawal and those at risk of overdose. The County's

initial papers did not indicate if these employees normally work weekends and holidays, did not indicate these employees' roles relative to doctors and other staff, and also failed to consider whether one of the three positions at issue could fill in for the other two during a strike, and/or commonly does so on weekends or holidays. PERB sought further information from the County, but the County did not cure these deficiencies in the time available, and PERB denied the County's request.

In advance of the HSU unit strike on March 5-6, the County submitted a scaled-down request, asking that one BHRS Specialist/MAT Case Manager be enjoined to work during the strike, indicating that this one individual could cover all emergent work. In supporting this scaled-down request, the County provided a certain amount of the missing information noted above. It supplemented and corrected information it had previously provided, noting that the BHRS Specialist/MAT Case Manager position is filled from 7:00 a.m. to midnight, Monday through Saturday, and for eight hours on Sunday. The County also provided additional information about the lack of other options for covering the work. AFSCME thereafter agreed to the County's scaled-down request for one BHRS Specialist/MAT Case Manager. PERB therefore did not consider whether the County had submitted additional information sufficient to demonstrate clearly that one BHRS Specialist/MAT Case Manager must be enjoined in order to protect the public from an imminent and substantial health or safety threat, nor whether any such injunction would be for on-call status.

Regional Clinic Employee–SMHCs: The County asked PERB to seek an injunction against one SMHC at each of six regional clinics, in order to triage clients for emergent treatment needs and provide referrals to appropriate providers. The County did not clearly demonstrate that a lapse in their availability imminently and substantially threatens the public

health or safety, particularly given that SMHCs at the regional clinics normally work a Monday through Friday schedule. Even if the service were essential to health and safety, the County provided unclear and insufficient information about the availability of managers, supervisors, non-bargaining unit personnel, and other County and non-County services to perform the work. PERB denied the County's request.

Canyon Oaks Youth Center Employee –Residential Counselor IIs: The County asked PERB to seek an injunction against 10 Residential Counselor IIs at the County's Canyon Oaks Youth Center, a residential facility for severely emotionally disturbed youth. Residential Counselor IIs at the Center must be able to supervise and assist youth in crisis. They work in eight-hour shifts, covering 24 hours per day, seven days per week. PERB granted the County's request as to 10 Residential Counselor IIs.[11]

School-based Employees–SMHCs, Mental Health Program Specialists & PSW/MFTs: The County asked PERB to seek an injunction against three SMHCs, one Mental Health Program Specialist, and one PSW/MFT who provide mental health services to severely emotionally disturbed students in an educational setting, at the County's Therapeutic Day School (TDS) program. This program provides services to students at TDS classrooms throughout the County. TDS is an important special education program but is not available every day. The County submitted no evidence suggesting that a lapse in TDS would cause an imminent and substantial health or safety threat. In resolving injunction requests filed by school districts, PERB has found no basis to enjoin similar special education employees and

[11] PERB received conflicting information regarding the number of bargaining unit employees needed and possible coverage options for Residential Counselor IIs during a noticed strike. This conflicting information included last-minute information from AFSCME on the morning of February 8. Had PERB received such information earlier, leaving more time to investigate, it is possible that PERB might have reached a preliminary determination that involved a more narrowly tailored staffing level for Residential Counselors.

other school-based mental health professionals. The County also provided unclear information about availability of other staff to handle these tasks, asserting that there were "not enough" managers with the requisite licensing to cover all the work, but failing to provide adequate specificity for PERB to evaluate this claim. The County did not clearly demonstrate that an injunction was necessary to prevent an imminent and substantial threat to public health or safety. PERB therefore denied the County's request.

In advance of the HSU unit strike on March 5-6, the County submitted a scaled-down request, asking that one SMHC, one Mental Health Program Specialist, and one PSW/MFT perform the "school-based" work. In submitting its scaled-down request, the County no longer sought sufficient employees to provide TDS services to County students generally. Instead, the County asserted that its request was for employees to work with students at Canyon Oaks Youth Center, in conjunction with the Residential Counselors discussed *ante*. According to the County, while these employees are technically school-based, they respond to emergencies in the residential setting. AFSCME agreed to the County's scaled-down request. PERB therefore did not consider whether the County had submitted additional information sufficient to demonstrate clearly that one SMHC, one Mental Health Program Specialist, and/or one PSW/MFT must be enjoined in order to protect the public from an imminent and substantial health or safety threat, nor whether any such injunction would be for on-call status.

G. Health System–Family Health Services Office

Social Work Supervisors: The County asked PERB to seek an injunction against one Social Work Supervisor who determines financial eligibility for California Children's Services and enrolls children in the program. The County did not clearly demonstrate that a lapse in such services would imminently and substantially threaten the public health or safety,

particularly given that these services are available only Monday through Friday. PERB denied the County's request.

*Supervising Dietician*s: The County asked PERB to seek an injunction against two Supervising Dieticians to counsel participants in the Woman Infants and Children program, determine eligibility for the program, enroll participants in the program, and issue food vouchers. The County did not clearly demonstrate that a lapse in such services would imminently and substantially threaten the public health or safety, particularly given that these services are available only Monday through Friday. PERB denied the County's request.

H. Health System–Public Health Policy and Planning Office

Microbiologists: The County asked PERB to seek an injunction against one Public Health Microbiologist and one Supervising Microbiologist, to perform clinical and environmental testing. The County did not clearly demonstrate that a lapse in such services would imminently and substantially threaten the public health or safety, particularly given that these services are available only Monday through Friday. Moreover, the non-bargaining unit assistant laboratory director indicated in a declaration that he has the required qualifications to do the work, while asserting that he could not reasonably do the work of multiple striking microbiologists. PERB denied the County's request.

Community Worker IIs: The County asked PERB to seek an injunction against one Community Worker II, to drive a mobile clinic that provides medical care to people experiencing homelessness. The County did not clearly demonstrate that a brief lapse in such services would imminently and substantially threaten the public health or safety, particularly given that the County has made the decision that such services are at most available five days per week. The County also provided unclear information about the availability of other staff to

handle such work, asserting that only those with a Class B license could drive the mobile clinic, and that it would take "several days, if not weeks," to train such persons. PERB denied the County's request.

I. Health System–Environmental Health Services

Hazmat Emergency Response Team Leads: The County asked PERB to seek an injunction against one Hazmat Emergency Response Team Lead to respond if there is a hazardous materials spill or other similar emergency. Normal weekend staffing for this position is one on-call employee. PERB granted this request in part, finding that one Hazmat Emergency Response Team Lead should be on call in the event of an emergency, as it is a critical function needed to protect public health and safety, and is not replaceable by any supervisor, manager, contractor, or otherwise. The County did not clearly demonstrate that a greater staffing level was necessary to prevent an imminent and substantial threat to public health or safety.

J. Health System–Adult and Aging Services

Adult Protective Services Social Worker IIIs and Deputy Public Guardian IIIs: The County asked PERB to seek an injunction against two Adult Protective Services Social Worker IIIs and two Deputy Public Guardian IIIs, to respond to emergency reports of elder abuse, including reports made via the County's 24-hour hotline for elder abuse. PERB granted this request in part, finding that one Adult Protective Services Social Worker III and one Deputy Public Guardian III should be on call if needed to supplement unrepresented supervisors and managers capable of covering this work. The County explained that there is great variation in the number of reports received per day, and the total number is typically around 50-75 per day,

with a variable percentage requiring immediate follow-up. AFSCME did not counter this information. For this reason, PERB granted the County's request to the extent noted above.

K. Health System–San Mateo Medical Center

The County asked PERB to seek an injunction against multiple positions based at SMMC, including inpatient and outpatient pharmacists, clinical lab scientists, respiratory therapists, dietitians, physical and occupational therapists, speech pathologists, laboratory assistants, medical and dental assistants, pharmacy technicians, sterile processing technicians, surgical technicians, supply assistants, telephone operators, cooks, and food service workers, as well as radiologic technologists, imaging specialists, and electrograph technicians who conduct and process x-ray, CT, MRI, EEG, EKG, EMG, and ultrasound tests. SMMC, which operates a general acute care hospital and a network of 14 clinics, provides a full range of inpatient and outpatient primary care and specialty services, emergency services, and inpatient and emergency psychiatric services, among other types of care. SMMC's hospital is licensed to operate 69 General Acute Care beds, 34 Acute Psychiatric beds, and 32 Skilled Nursing beds. SMMC, a level II trauma center, serves patients of all ages, including incarcerated adults and juveniles.

With respect to SMMC positions that are not filled on certain holidays and weekend days, including positions at the County's clinics as well as certain positions at the hospital, the County did not submit information tending to show that the short threatened strikes at issue would imminently and substantially threaten the public health or safety. Hospital positions that are filled seven days a week pose a more complicated analysis, to which we now turn.

We begin with the Supreme Court's *County Sanitation* decision establishing that California public employees may strike unless their absence from work would imminently and

substantially threaten public health or safety. In considering the nature of the services, one relevant factor is the extent to which the employer is playing a role that is distinct from private entities providing similar services, whose employees are free to strike without any court or regulatory body considering the impact on the public. *County Sanitation* cautioned that "the presumption of essentiality of most government services is questionable at best," as the law allows private sector employees to strike in every industry, including in "many of the same areas in which government is engaged, such as transportation, *health*, education, and utilities; in many employment fields, public and private activity largely overlap." (*County Sanitation, supra*, 38 Cal.3d at p. 579, emphasis supplied.) Whether a service is public or private is often merely "historical accident, subject to future change . . . [s]ervices that were once rendered by public enterprise may be contracted out to private enterprise, and then by another administration returned to the public sector." (*Id.* at p. 580, internal quotation marks and citations omitted.) Indeed, PERB is quite familiar with the fact that medical centers frequently move back and forth between the public and private sectors. (See, e.g., *El Camino Hospital District* (2009) PERB Decision No. 2033-M, pp. 14-15 [noting significant change in public health care workers' right to strike as a result of *County Sanitation*, and further noting that El Camino Hospital privatized and then became public again]; *Regents of the University of California* (1999) PERB Order No. Ad-293-H, p. 8 [discussing legislative history of UCSF Medical Center's three-year experiment as a private medical center, which began when the University of California and Stanford University formed a private entity to merge and run their medical centers, before later abandoning the experiment and demerging].)[12]

[12] In certain cases, a public entity may be a direct market competitor to private entities. In ascertaining the extent to which certain public employees wholly or partially lose their right

PERB therefore takes into account the extent to which a public health care employer provides services that are different in nature from the private health care employers that commonly weather strikes. In practice,

> PERB has sought injunctions for greater numbers of healthcare employees in medical facilities that are primarily focused on healthcare services for incarcerated persons (including those in juvenile detention facilities) and indigent persons, as compared to public academic medical centers whose role more closely matches that of private academic medical centers.

(Zerger, ed. (2nd ed. 2018) *California Public Sector Labor Relations* § 11.03[4].)

In this case, SMMC provided information showing that its services are somewhat different from the private sector, because the vast majority of its patients are either indigent or low income. However, SMMC still must demonstrate that it has fully pursued other available means of protecting the public, such as hiring replacements, and that an injunction is necessary even after accounting for these measures. (*County Sanitation*, *supra*, 38 Cal.3d at p. 587 & fn. 35.) We explain.

Over the course of many health care injunction proceedings, PERB has gained knowledge and experience about the availability of strike replacements through both local registries and national striker replacement companies that fly in replacements from other areas of the state and the country. In many such cases, County medical centers, District medical centers, and public academic medical centers have each contracted with national striker replacement companies, and have demonstrated that such companies provide access to a far greater pool of replacement workers than is available through local registries alone.

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to strike, we do not seek to provide a competitive advantage to a market participant merely because it is a public entity.

A health care employer facing a strike may decide to forego national striker replacement companies and focus instead on other types of strike contingency plans, such as canceling elective treatments, decreasing patient census, and providing care using supervisors, managers, non-striking employees, and local registry employees. However, if it eschews available options that might wholly or partially obviate the need for an injunction, an employer undercuts its own request for injunctive relief. Particularly in light of *County Sanitation*'s instruction to assess the availability of replacement employees (*County Sanitation, supra*, 38 Cal.3d at p. 587 & fn. 35), and given that use of national striker replacement companies is pervasive in the health care industry, the County short-circuited our analysis by declining to hire replacements through national companies. We do not accept the County's justification that it did not have "fruitful discussions with striker replacement agencies, as the costs for such agencies are prohibitively expensive and can cost in excess of $1 million per day." Indeed, a union's economic strike, like an employer's decision to impose new terms after impasse, is economic pressure designed to break the parties' deadlock, and is fully consistent with good faith collective bargaining under the legislative scheme we enforce. (*County Sanitation, supra*, 38 Cal.3d at p. 588; *City & County of San Francisco* (2017) PERB Decision No. 2536-M, p. 25.) Pursuant to the *County Sanitation* standard, an employer is not entitled to an injunction merely because it would cost the employer a substantial amount of money to hire replacements.

Even as to local registry companies on whom the County did rely, the County failed to provide PERB with the County's specific requests and the company's specific responses. An employer seeking injunctive relief must provide PERB with its specific requests to local and national companies potentially capable of providing replacement employees, as well as those

companies' specific responses to such requests.[13] The County's failure to do so was another significant hole in its attempt to show the need for its requested injunction.[14]

The County had more than enough time to seek replacements in this case. Its decision not to utilize national striker replacement companies, and its failure to provide the aforementioned documents regarding its reliance on local companies, were each a sufficient basis for PERB to deny entirely the County's injunction request at SMMC. Nonetheless, PERB exercised its discretion and partially granted the County's injunctive relief request as to inpatient pharmacists and clinical laboratory scientists. In reaching this conclusion, PERB drew on knowledge and experience from prior cases, in which medical center employers have submitted unrebutted information tending to establish that (1) those classifications are not available through national striker replacement companies or local registry companies and (2) their work is only coverable by other hospital staff to the extent there may be qualified supervisors or managers. PERB therefore granted the County's request as to three inpatient pharmacists and six clinical laboratory scientists. The County did not clearly demonstrate that

[13] As with other information that the parties provide during injunctive relief proceedings, an employer must provide updates as replacement availability changes. Indeed, an employer is unlikely to have received a final and definitive response to its request by the time the employer first files its initial request for injunctive relief.

[14] A recent injunctive relief request before the Board helps to illustrate the evidentiary considerations in play. There, we sought a broad injunction based on a health care employer's representations that insufficient replacements were available. Later, we learned the employer had requested only a small number of replacements, as it was hoping PERB would obviate the need for more replacements by obtaining an injunction. The employer told a striker replacement agency that it would submit a much larger request for replacements if PERB did not obtain a broad enough injunction. This type of approach is backward; we assess the threat to the public, if any, after taking into account all available replacements. (*County Sanitation, supra*, 38 Cal.3d at p. 587 & fn. 35; *San Mateo Superior Court, supra*, PERB Order No. IR-60-C, p. 4.)

a greater staffing level was necessary to prevent an imminent and substantial threat to public health or safety.

III. Conclusion

PERB partially granted the County's initial injunctive relief request, preliminarily determining that 61 positions were essential to the public health or safety, 56 of which should be filled for all regular working hours and five of which should be filled by on-call employees who would be available to work in the event of an emergency that could not otherwise be safely handled. After OGC notified the parties of PERB's decision, AFSCME agreed to exemptions matching PERB's preliminary determinations. Therefore, there was no cause to seek an injunction. (*San Mateo Superior Court, supra*, PERB Order No. IR-60-C, p. 5.) AFSCME then called a strike of the HSU unit, which included 26 of the 61 positions included in PERB's initial determination. The County asked PERB to seek an injunction covering these 26 positions plus 14 more. AFSCME, without waiting for PERB to rule, agreed to expand its exemption to include six of the additional 14 positions the County sought, leaving only 8 benefit analyst positions in dispute. PERB again concluded that these positions did not satisfy the *County Sanitation* standard. Accordingly, PERB denied the County's second injunctive relief request.

ORDER

Based on the foregoing findings and conclusions, and the entire record in this case, the Board GRANTS IN PART AND DENIES IN PART the requests to seek injunctive relief in Case No. SF-CO-433-M.

Members Banks and Paulson joined in this Decision.