STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

BLAINE DREWES, Charging Party, v. CITY OF LIVERMORE, Respondent.	Case No. SF-CE-1177-M PERB Decision No. 2525-M May 4, 2017

Appearance: E. Kevin Young, Assistant City Attorney, for City of Livermore.

Before Gregersen, Chair; Banks and Winslow, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by the City of Livermore (City) to the proposed decision (attached) of an administrative law judge (ALJ). The complaint alleged and the proposed decision concluded that the City had violated the Meyers-Milias-Brown Act (MMBA)[1] and PERB Regulations[2] by: (1) maintaining and enforcing an unreasonable local rule providing that no unit modification petition be granted unless the proposed modification enjoys the support of at least 60 percent of affected employees; and (2) unreasonably applying the City's local rules governing unit determinations by failing to provide written findings when denying a unit modification petition

[1] The MMBA is codified at Government Code section 3500 et seq.

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

filed on November 19, 2013 by Charging Party Blaine Drewes (Drewes) and other City employees exclusively represented by the Association of Livermore Employees (ALE).[3]

The City has excepted to the ALJ's conclusion that Drewes is a proper charging party and has asserted several grounds in support of this exception. The City has also excepted to two of the ALJ's factual findings as unsupported by the record. It argues that the ALJ ignored that portion of the parties' stipulated facts indicating that the City processed the petition based on a mistaken belief that ALE supported the proposed modification. The City similarly argues that the ALJ ignored testimony from the City's Administrative Services Director Doug Alessio (Alessio) demonstrating that the City appropriately considered and applied the community of interest criteria contained in section 7 of the City's Employer-Employee Relations Resolution (EERR) when making its unit determination in this matter. Drewes has filed no exceptions, nor a response to the City's exceptions.

The Board has reviewed the City's exceptions, the proposed decision and the entire record in light of applicable law. Based on this review, we conclude that the ALJ's findings of fact are adequately supported by the record and that her conclusions of law are well-reasoned

[3] As recounted in the ALJ's factual findings, the unit modification petition proposed severing certain classifications from an existing bargaining unit of clerical, professional, technical, maintenance and operations employees represented by ALE and forming a separate bargaining unit consisting solely of employees in the Airport and Water Resources Divisions of the City's Public Works Department. Like the ALJ, we make no determination as to the appropriateness of the unit proposed by the petition signed by Drewes and other employees, nor, in the absence of findings by the City on whether Drewes and fellow City employee Shelby Anderson (Anderson) were acting as employees, or as representatives of an employee organization, do we rule on whether they had standing to file and have a unit modification petition processed under the City's local rules.

and in accordance with applicable law. We therefore adopt the proposed decision as modified[4] as the decision of the Board itself and subject to the following discussion of issues raised by the City's exceptions.

DISCUSSION

The City excepts to two factual findings as unsupported by, or contrary to, the record. It also excepts to the ALJ's legal conclusion that Drewes is a proper charging party to pursue the present unfair practice case inasmuch as he lacked standing under the City's local rules to file a unit modification petition in the first place. We first address the City's exceptions to the ALJ's factual findings and then proceed to the issue of standing.

A. Whether the ALJ Improperly Ignored Evidence that the City Processed the Unit Modification Petition on the Mistaken Belief that it was "Supported" by ALE

The City contends that the ALJ considered only that part of the parties' stipulated facts indicating that Drewes and Anderson "jointly submitted a unit modification petition" and that she disregarded that portion of the stipulated facts indicating that the City had initially processed the petition based on its mistaken belief that it was "supported" by ALE, the recognized employee organization to which both Drewes and Anderson belonged. The significance of this exception is not entirely clear. Notably, the City does not contend that it mistook Drewes and Anderson as *authorized representatives* of ALE when they filed the unit modification petition, but only that the City believed that ALE "supported" the petition, and that ALE only disavowed the proposed modification after City Manager Marc Roberts (Roberts) advised ALE and affected employees that he intended to grant the petition, as revised, and, additionally, to remove other

[4] Aside from stylistic changes, the ALJ's proposed remedy has been modified to conform to the appellate court's decision in *City of Palo Alto v. Public Employment Relations Board* (2016) 5 Cal.App.5th 1271, review denied (Mar. 15, 2017), and to the Board's electronic posting requirement announced in *City of Sacramento* (2013) PERB Decision No. 2351-M.

employees not identified in the petition from the ALE-represented unit for inclusion in the separate unit proposed by Drewes and the other Airport and Water Resources Division employees who filed the petition.

Regardless of its significance or lack thereof, the City's contention is flatly contradicted by the record, including Roberts' contemporaneous statements regarding the petition. On November 25, 2013, Roberts directed an interoffice memorandum to employees in the Airport and Water Resources Divisions of the Public Works Department and to Mike Pato, President of ALE. Roberts' memo acknowledged receipt of the unit modification petition and then explained that, "[w]hile I have met with representatives of the employee classifications on behalf of whom the petition was filed[,] I have *not met with the current representatives of the classifications*." (Joint Exhibit N, emphasis added.) From context, there can be no doubt that Roberts viewed the petitioning employees to have interests that were separate and potentially at odds with "the current representatives of the classifications," i.e., with ALE. Accordingly, Roberts' memo indicated that he would not make a decision on the unit modification petition until "after I have had an opportunity to meet with representatives of A.L.E." (*Ibid*.) The memo then invited "the leadership of A.L.E. to contact [his] office to set up a date and time to meet regarding the issues [] raised in the petition." (*Ibid*.) Roberts' memo does not explain why it would be necessary to schedule a separate and additional meeting with "the leadership of A.L.E.," if, as the City argues in its exceptions, he and other City officials were operating under the belief that ALE was "supporting" the unit modification proposed by Drewes and the other signatories of the petition.

On January 7, 2014, Roberts sent an e-mail message addressed to "All Association of Livermore Employees [sic] Affected by the Proposed Unit Modification," in which he referenced the unit modification petition request "from employees within the Water Resources and Airport

Divisions," and discussed the possible outcomes. (Responsent's Exhibit F1.) As an attachment, Roberts' message included a Draft Decision, which he characterized as "subject to further revision based upon input from the impacted employees prior to becoming a Final Decision." He then encouraged the petitioning employees, i.e., those employees who signed the unit modification petition, "to coordinate their comments through Blaine Drewes or Shelby Anderson," while non-petitioning employees were "encouraged to provide their input via the ALE leadership."

The Draft Decision attached to Roberts' January 7, 2014 message began by noting that Roberts had "met with representatives of the employee classifications on behalf of whom the petition was filed as well as representatives of ALE, the current Representation Unit of the classifications." (Joint Exhibit F2.) In addition to distinguishing clearly between the two groups, Roberts' Draft Decision reveals his understanding that these two groups had divergent interests, as the petition for unit modification would, according to Roberts' message, not only create a separate bargaining unit consisting of 50 employees in 28 job classifications, but the job classifications and employees in the newly-created unit would no longer be represented by ALE. As with his previous memo of November 25, 2013, Roberts' January 7, 2014 message to employees and the attached Draft Decision thus clearly undermine the City's contention on appeal that it processed the unit modification petition on the mistaken belief that it was somehow "supported" by ALE.

Additionally, on January 9, 2014, Nick Bagakis (Bagakis), a traffic signal technician trainee employed in the Maintenance Division of the City's Public Works Department, sent a letter to Roberts in which Bagakis and 31 other Maintenance Division employees advised Roberts of their opposition to being removed from the bargaining unit represented by ALE, as

indicated in the Draft Decision attached to Roberts' e-mail message and distributed to employees two days earlier. After explaining their concerns, Bagakis' letter stated that he and the other 31 signatories were under the impression "that ALE intends to meet with you to present its objections to your proposed unit modification." Significantly, at this point in time, the City had not yet made any final determination on the unit modification petition and, even assuming, as the City now asserts, that it had begun processing the petition on the mistaken belief that it was supported or sponsored in some manner by ALE, nothing prevented it from rejecting the petition as deficient after being clearly advised of the objections of ALE to the petition. Nevertheless, the City continued processing the petition, without objection as to Drewes and Anderson's lack of standing to request a unit modification under the City's EERR.

On January 29, 2014, Roberts received further evidence from Drewes and Anderson that they were not acting at the behest or with the support of ALE, but that they were representatives of a rival employee organization. On that date, Drewes and Anderson sent a letter to Roberts protesting the lack of clear criteria and analysis in Roberts' January 7, 2014 memo and Draft Decision and advising Roberts that they would "use appropriate legal means for testing the propriety of the proposed unit" identified in Roberts' Draft Decision, as opposed to the unit proposed by Drewes and Anderson. (Joint Exhibit P.) Under their signatures, Drewes and Anderson each identified themselves as a "Representative" of the "Airport/Water Resources Employee Organization." (*Ibid*.)

The City's assertion of a good-faith mistaken belief that ALE supported the unit modification petition is further undermined by the testimony of its own witness at the hearing in this matter. Audrey Daniels (Daniels), a human resources consultant on retainer with the City, testified that Roberts contacted him shortly after the petition was filed and, at that time,

Daniels advised Roberts that the unit modification petition "looked to me like a decertification petition by members of ALE." (Reporter's Transcript (R.T.), p. 131, lines 11-12, 26.) According to his testimony, Daniels was the primary author of the Draft Decision attached to Roberts' January 7, 2014 e-mail message, and his handwritten notes on the EERR were admitted into evidence as his contemporaneous thoughts on how he advised the City to handle what Daniels deemed to be the "decertification petition" filed by Drewes and Anderson. (R.T., p. 135, lines 16-17, 24-26; Exhibit F2; Exhibit S.)

In sum, the City presented no testimony or any other evidence explaining how or why Roberts or any other City official would believe that ALE would support a "decertification petition" aimed at removing 50 employees in 28 job classifications from its bargaining unit. In fact, the only evidence in the record that, even arguably, might support the City's contention that it processed the Drewes/Anderson petition on a mistaken belief that they were somehow acting with the support or authority of ALE was testimony that Drewes or perhaps other signatories of the unit modification petition had, at one time, been members of ALE's governing board. (R.T., p. 12, lines 23-24.) However, the City offered no testimony to suggest that Drewes or any other signatory of the unit modification petition had ever been, or, more importantly, were *at the time the petition was filed* authorized to speak for ALE, or that Roberts or any other City official honestly believed that to be the case. Accordingly, we reject this exception.

Additionally, we reject the unstated assumption apparently underlying this exception, which is that lack of standing in unfair practice proceedings may be waived or otherwise affected by the respondent's failure to assert that defect or, in this case, by the City's asserted mistake and failure to raise the objection sooner when Drewes and other employees first presented the petition. Like the other PERB-administered statutes, the MMBA, as implemented through

PERB's Regulations, confers standing upon a person and/or entity to allege a particular unfair practice, depending upon the rights conferred by the statute and whether the charging party fits the statutory definition of a "public agency" (employer), "public employee," "employee organization," or "recognized employee organization." (MMBA, § 3501, subds. (a)-(d); PERB Regs. 32603, 32604; *Los Angeles Community College District* (1994) PERB Decision No. 1060, p. 2.) As in civil procedure, lack of standing to bring a particular unfair practice allegation is a "jurisdictional" defect, meaning that it cannot be waived or otherwise affected by the respondent's failure to assert it. (A.Standing to Sue—"Real Party in Interest" Requirement, Cal. Prac. Guide Civ. Pro. Before Trial Ch. 2-A.) Because proper standing to bring an action goes to the very existence of a cause of action and the right to relief, it may be raised at any point in unfair practice proceedings, including for the first time on appeal. (*Los Angeles CCD, supra*, PERB Decision No. 1060, p. 7; see also Code Civ. Proc., § 430.80; *Killian v. Millard* (1991) 228 Cal.App.3d 1601, 1605; *Sacramento County Fire Protection Dist. v. Sacramento County Assessment Appeals Bd. II* (1999) 75 Cal.App.4th 327, 331.)

Thus, whether the City mistakenly processed the unit modification petition filed by Drewes and other City employees has no bearing on the City's right to assert lack of standing now before the Board, though, neither does it mean that the assertion is necessarily meritorious. As explained below, Drewes' lack of standing, as an employee, to file a unit modification petition under the City's local rules has no bearing on whether he may bring an unfair practice charge alleging other violations of the City's local rules or the MMBA.

B. Whether the ALJ Ignored Evidence that the City Appropriately Applied Community of Interest Criteria When Considering the Unit Modification Petition

The City's second exception similarly argues that the ALJ relied exclusively on Roberts' decision denying the proposed unit modification petition to find that the City did not correctly

apply a community of interest standard, but instead applied a "lack of community interest" standard. In support of this exception, the City argues that the ALJ ignored testimony from Alessio tending to show that the City appropriately considered and applied the community of interest criteria contained in the City's EERR, even if such consideration was not explicitly reflected in Roberts' decision itself. Like the City's mistaken belief discussed *above*, we likewise reject this exception as unsupported by the record.

Alessio testified that he assisted in drafting the January 7, 2014 Draft Decision whose purpose, according to Alessio, was to "engage the employees who would be affected in a dialogue and to gain a deeper understanding, so we could make a decision that was best for everyone." (R.T., p. 92, lines 4-6, p. 101, lines 19-27.) Alessio also reviewed and edited Roberts' final determination to ensure that the classifications were correctly identified by their current titles and "made sure there were no typos, that sort of thing." (R.T., p. 110, line 27,— p. 111, line 2.) Alessio also testified that he, along with Human Resources Technician Kaylin Larson, had selected the criteria used in preparing an eight-column spreadsheet that had been distributed at an early February 2014 meeting, and which was attached to Roberts' final decision. The spreadsheet forms the basis of the City's contention that it properly applied the community of interest criteria, even if Roberts' final determination failed to include findings or explain how these various criteria were applied. The ALJ rejected this argument, reasoning that the City's undisclosed thought process, which was only revealed later in the context of PERB unfair practice proceedings, could not justify its otherwise conclusory assertion that the proposed unit lacked a sufficient community of interest.

Alessio acknowledged that he had no special expertise or even familiarity with the community of interest criteria included in the City's EERR. After Roberts showed him the petition,

Alessio contacted Daniels, the City's human resources consultant, to explain "what it meant, basically," and how the City should proceed with it, because, by Alessio's admission, his background is in finance, and human resources. (R.T., p. 89, lines 7-15.) Alessio acknowledged that other criteria traditionally used by PERB in making unit determinations, such as common funding, common supervision or similarity in existing benefits, were not considered when making the City's determination. (R.T., p. 124, lines 8-16, p. 117, lines 15-28, p. 118, lines 18-27, p. 119, lines 12-16, p. 121, line 27,—p. 122, line 3.) Alessio also acknowledged that, while the criteria listed in the EERR were to be considered, "that maybe there's other things that aren't listed here that we might consider, too." (R.T., p. 115, lines 12-14, 18-19.)

Although the City excepts to the ALJ's apparent reliance on Roberts' final determination rather than subsequent testimony offered by other City officials about how the unit modification petition was processed, notably, it does not except to the ALJ's finding that the City offered no adequate *contemporaneous* explanation for its decision, nor to that portion of the proposed order remanding this case to the City to "[c]onduct an investigation and/or make written findings upon an investigation of the unit modification petition filed by Blaine Drewes et al., on November 19, 201[4]." To the contrary, the City attempts to use its exceptions to the proposed decision to supplement its prior decision and provide the additional information requested by the ALJ. However, PERB's Regulation governing exceptions to a proposed decision expressly state that "[r]eference shall be made in the statement of exceptions only to matters contained in the record of the case." (PERB Reg. 32300, subd. (b).)

As explained in the proposed decision, the City's determination concerning the unit modification petition was deficient on its face and the City cannot be allowed to cure these defects with post hoc rationalizations, either through the testimony of its witnesses in PERB's

unfair practice proceedings or through supplementing the record in its filings before the Board. Accordingly, we reject this exception as well.

C. Drewes' Standing to Bring the Present Unfair Practice Case

A central contention of the City before the ALJ, and one reiterated in its exceptions before the Board, is that because Drewes, in his capacity as an employee, cannot petition for a unit modification under the City's local rules, he likewise lacks standing to bring an unfair practice charge challenging the reasonableness of the City's local rules and/or their application when processing the unit modification petition filed by Drewes and other Airport and Water Resources Division employees. The City asserts several arguments in support of this exception. It argues that granting an individual employee standing to file an unfair practice charge challenging the reasonableness of a local rule regarding unit determinations is contrary to PERB precedent, which prohibits parties from using unfair practice proceedings to circumvent the unit modification process. The City also argues that it processed the unit modification petition under a mistaken belief that it was filed on behalf of ALE, a contention which we have considered and rejected *above*. Additionally, the City argues that Drewes' lack of standing was squarely addressed and decided in a separate decision by the Board, and thus, that the law of the case doctrine bars any finding of liability for the City's allegedly unreasonable application or enforcement of its local rules while processing a unit modification petition which Drewes had no right to file in the first place.

Notably, the City has not specifically excepted to the ALJ's conclusion that the City's local rule requiring 60 percent support by affected employees for a proposed unit modification interferes with employees' protected right to freely choose a representative. Nor has the City excepted to the ALJ's reasoning or legal conclusion that, in making unit determinations, it

must make findings and explain its analytical process in sufficient detail "to enable the parties to determine whether and on what basis they should seek review and, in the event of review, to apprise a reviewing court of the basis for the [City's] action." (Proposed decision at p. 48, citing *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514.) Because exceptions not specifically urged are waived (PERB Reg. 32300, subd. (c)), the City's defense in this case thus turns solely on its exception that the case must be dismissed because Drewes is not a proper charging party.

1. Employee Standing to Challenge Local Rules and their Application

We first consider the City's argument that, because the unfair practice complaint challenges the reasonableness of the City's local rules governing unit modifications, and/or their allegedly unreasonable application, Drewes' standing as a proper charging party depends on whether the City's local rules authorize employees to file a unit modification petition.

By its express language, section 8.A of the City's local rules permit only employee organizations to file and have considered petitions for unit modification. The City correctly recites PERB precedent that employees may not use unfair practice proceedings to circumvent a unit modification determination (*County of Santa Barbara* (2011) PERB Decision No. 2181-M, p. 2; *State of California (Department of Forestry & Fire Protection)* (2011) PERB Decision No. 2162-S, p. 10; *Berkeley Unified School District* (2005) PERB Decision No. 1744, p. 5), and thus, to the extent Drewes seeks an order for the City to process a unit modification petition which Drewes, in his capacity as an employee, had no right to have considered, PERB is without authority to grant such relief and must dismiss the allegation for lack of jurisdiction. (*City of Inglewood* (2015) PERB Decision No. 2424-M, pp. 7-9, 16.)

However, standing is not dispensed "in gross." Rather, it is evaluated separately for each claim and each form of relief sought. (*Davis v. Federal Election Com'n* (2008) 554 U.S. 724, 733–734.) An employee alleging several unfair practices within the same charge may, for example, have standing to allege that a public employer unlawfully discriminated in terms and conditions of employment, but not standing to allege that the employer unilaterally changed terms or conditions of employment or otherwise failed or refused to meet and confer over negotiable matters. (*Oxnard Union High School District* (2012) PERB Decision No. 2265, adopting dismissal letter at pp. 3-4; *Regents of the University of California* (2010) PERB Decision No. 2153-H, adopting warning letter at p. 7; *State of California (Department of Corrections)* (1999) PERB Decision No. 1329-S, adopting warning letter at p. 4.)

Although the amended charge does not request a specific remedy, at the hearing Counsel for Drewes, Stewart Weinberg (Weinberg), explained that Drewes "wishes to have the contract between the A-L-E and the City of Livermore declared not to be a contract bar [sic] to the petition filed by [Drewes], and therefore, an order requiring the City of Livermore to proceed on the [unit modification] petition filed by [Drewes]." (R.T., p. 8, lines 18-23.) Because there is no right under the City's local rules or the MMBA to have the City process a unit modification petition filed by employees or anyone other than an employee organization within the meaning of the MMBA,[5] Drewes has no standing to seek his requested remedy, regardless of whether the City maintained or applied unreasonable local rules while processing the unit modification petition filed by Drewes and Anderson.

[5] The definition of "employee organization," found in the City's local rules differs somewhat from the definition found in MMBA section 3501, subdivision (a). Although those differences appear to be immaterial to the issues in this case, we nonetheless rely on the statutory definition for the purpose of this decision.

However, Drewes' lack of standing to file a unit modification petition under the City's local rules does not entirely dispose of the issue. As noted in the proposed decision, the Legislature has expressly authorized employees, in their capacity as employees, to bring unfair practice charges alleging either that a public agency has acted in violation of its local rules and/or that it has enforced its local rules in a manner that is inconsistent with the provisions, policies or purposes of the MMBA. (§§ 3507, subd. (d), 3509, subd. (b).) Regardless of whether the City was required or permitted by its local rules to do so, there is no dispute that it processed the unit modification petition filed by Drewes and other Airport and Water Resources Division employees. (R.T., p. 122, line 16.)[6] The ALJ reasoned that, having chosen to process the petition, the City must do so in a manner consistent with the provisions, policies and purposes of the MMBA. We agree with the ALJ's reasoning and conclusion.

Because the protected rights allegedly abridged by the City's enforcement of its local rule are different from any rights Drewes may (or may not) have had to petition the City for a unit modification, the ALJ correctly determined that Drewes has standing to file an unfair practice charge alleging that the City's local rules, either facially or as applied, violate employee rights guaranteed by the MMBA.

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[6] While PERB Regulations and decisional law recognize no right of employees, as employees, to contest placement of their position or job classification in a particular bargaining unit (*County of Riverside* (2012) PERB Decision No. 2280-M, p. 9), nor to vindicate the collective bargaining rights of employee organizations (*Orange Unified School District* (2004) PERB Decision No. 1670, p. 2), the controlling body of law here is the City's EERR rather than PERB's Regulations and the MMBA allows for a considerable degree of local regulation. (*County of Imperial* (2007) PERB Decision No. 1916-M, p. 16.) Accordingly, while we agree with the ALJ that the City's 60 percent support requirement for approving a proposed unit modification is inconsistent with employee rights guaranteed by section 3502, in the absence of briefing on the subject, we decline to rule on the broader question raised in the proposed decision of whether the MMBA permits a public agency through its local rules to wholly or partially delegate to employees the authority to make or veto unit determination decisions. (PD at pp. 51-52, citing *Reinbold v. City of Santa Monica* (1976) 63 Cal.App.3d 433, 440; see also *Peralta Community College District* (1987) PERB Order No. Ad-164, pp. 6-7.)

The City is correct that, notwithstanding its broad remedial powers, the Board may not order as a remedy for an unfair practice charge something that Drewes would not have been entitled to in the first place. This observation ignores that the ALJ appropriately did not order the City to process the unit modification petition filed by Drewes. Rather, the proposed remedy orders the City, in relevant part, to "[c]onduct an investigation and/or make written findings upon an investigation of the unit modification petition filed by Blaine Drewes et al., on November 19, 2013. To fully dispose of the unit modification petition, the City may also need to investigate and determine whether Drewes, Anderson and the other signatories were an "employee organization" with proper standing to bring a unit modification petition, but neither the ALJ nor the Board presumes the outcome of such investigation.

However, while PERB is without authority to order the City to process a unit modification petition which Drewes, as an employee, had no right to have processed, once the City chose to process the petition, PERB may properly find liability and order that the City do so in a manner consistent with the provisions, policies and purposes of the MMBA, including the rights of public employees "to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." (MMBA, § 3502; *International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191, 198 [only the Legislature, and not a public agency acting through its local rules, can abridge rights guaranteed by the MMBA].)

2. Whether the Law of the Case Prevents Drewes From Bringing this Case

Finally, the City argues that Drewes' lack of standing was previously decided by the Board in *City of Livermore* (2015) PERB Decision No. 2435-M, in which the Board adopted the partial dismissal of Drewes' allegation that the City had enforced section 8 of its EERR in an

unreasonable manner by permitting only employee organizations to file petitions to modify an existing bargaining unit. Again, we disagree.

City of Livermore, supra, PERB Decision No. 2435-M affirmed the dismissal of Drewes' allegation that the City had maintained and/or enforced an unreasonable local rule by rejecting the unit modification petitions filed by employees, in their capacity as employees, rather than as authorized representatives of an employee organization. However, the petition was rejected, in part, because it lacked 60 percent support of affected employees. There is no dispute that the City processed the petition, regardless of whether it was required or permitted by its own local rules to do so. (R.T., p. 122, line 16.) Because there was no instance within six months of the filing of Drewes' charge in which the City had refused to process a unit modification petition filed by an employee or group of employees, rather than an employee organization, the Office of the General Counsel determined that this allegation was untimely and the Board affirmed the dismissal on that basis. (See, e.g., *County of Orange* (2006) PERB Decision No. 1868, pp. 4-5; *County of Riverside* (2011) PERB Decision No. 2176-M, pp. 6-10.)

The standing issue itself was mentioned by the Board as an alternative justification and was arguably dicta, but, more importantly, only the narrow question of whether Drewes, as an employee, has standing under the City's rules or PERB Regulations to vindicate organizational rights was discussed. Because the charge included no verified allegation that Drewes was acting as a representative of an employee organization, the Board assumed, without deciding, that Drewes was acting in his capacity as an employee and not as a representative of an employee organization. Thus, its discussion of the standing issue was limited to whether Drewes, in his capacity as an employee, had standing to petition for a unit modification. In the absence of any findings and determination by the City on whether the unit modification petition was filed by an

employee organization within the meaning of MMBA section 3501, it is unnecessary for the Board to reach the issue now, since PERB's role with respect to local rules is to "enforce and apply rules adopted by a public agency concerning unit determinations, representation, recognition, and elections," rather than to apply PERB's own Regulations or to substitute our judgment for that of the public agency. (MMBA, § 3509, subd (c); *Organization of Deputy Sheriffs v. County of San Mateo* (1975) 48 Cal.App.3d 331, 338-339; see also *County of Riverside* (2010) PERB Decision No. 2119-M, p. 13; *City of Glendale* (2007) PERB Order No. Ad-361-M, p.4; *Alameda County Assistant Public Defenders Assn. v. County of Alameda* (1973) 33 Cal.App.3d 825, 830.)[7]

CONCLUSION

For the foregoing reasons and those set forth in the proposed decision, the Board concludes that the 60 percent support requirement found in section 8 of the City's EERR is inconsistent with the provisions, policies and purposes of the MMBA, including but not limited to section 3502's guarantee of employee rights "to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations" and the statutory policy that employees be grouped in bargaining units that afford effective representation by the organization of their choosing. Accordingly, we declare as void and unenforceable the phrase "by submitting to the City manager a petition accompanied by proof of employee approval of the proposed modification

[7] In several instances, the City's exceptions erroneously rely on the language of PERB's Regulations governing representation proceedings and on PERB decisional law interpreting those Regulations. However, in the MMBA context, a public agency's local rules govern such matters as representation proceedings and PERB's Regulations become applicable, if at all, only as "gap fillers," when the public agency has not adopted a reasonable local rule on the subject. (MMBA, § 3509, subd. (b); *County of Orange* (2010) PERB Decision No. 2138-M, p. 8.) Because there is no dispute that the City has local rules governing unit determination and representation matters, the City's reliance on PERB's Regulations is therefore misplaced.

signed by not less than 60 % of those employees who, if the proposed modification should be granted, would be moved from one representation unit to another" and direct the City to cease and desist enforcing this language when considering unit modification petitions.

The Board also concludes that the City unreasonably enforced section 7 of its EERR, in violation of MMBA section 3507 and PERB Regulation 32603, subdivision (f), by failing to provide a written explanation of its findings regarding the unit modification petition filed on November 19, 2013, and that the matter is appropriately remanded to the City for further consideration in accordance with the provisions of the City's EERR, with the exception of its 60 percent majority support requirement, and to make and issue written findings regarding the evidence it considered to reach its February 5, 2014 determination to deny the petition. To the extent the City now asserts that it is not required to process a unit modification petition filed by employees, it must make and issue written findings regarding the evidence relied on to determine that Drewes and Anderson were not acting as representatives of an employee organization within the meaning of the MMBA.[8]

ORDER

Based on the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the City of Livermore (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3507, subdivision (a), by making a unit determination under the provisions of its Employer-Employee Relations Resolution (EERR) section 7 without providing an adequate, written explanation of its findings and the evidence upon which such findings are based; and by maintaining and enforcing language of its EERR section 8, which requires proof of 60 percent support among employees to be affected in a proposed unit

[8] See footnote 5 above.

modification. By this conduct, the City interfered with the right of employees to be represented by an employee organization of their own choosing, in violation of Government Code section 3506 and PERB Regulation 32603, subdivision (a). (PERB Regulations are codified at Cal. Code Regs., tit. 8, § 31001 et seq.)

Pursuant to section 3509, subdivision (b), of the Government Code, it hereby is ORDERED that the following language found in section 8, subdivision A, of the City's EERR is void and unenforceable: "accompanied by proof of employee approval … signed by not less than 60% of those employees who, if the proposed modification should be granted, would be moved from one representation unit to another."

It is further ORDERED that he City, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Making unit modification determinations (whether granting or denying a petition for such), pursuant to its EERR section 7, without providing written notice of its findings and the evidence upon which such findings are made.

2. Maintaining and/or enforcing that portion of its EERR section 8, which requires a proof of 60 percent support among affected employees for approval of a unit modification petition.

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

1. Conduct an investigation and/or make written findings upon an investigation of the unit modification petition filed by Blaine Drewes et al., on November 19, 2013, including, if applicable, whether the petition was appropriately filed by an employee organization within the meaning of MMBA section 3501, subdivision (a).

2. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the City indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the City to communicate with employees. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on BLAINE DREWES or his authorized representative.

Chair Gregersen and Member Winslow joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. SF-CE-1177-M, *Blaine Drewes v. City of Livermore*, in which all parties had the right to participate, it has been found that the City of Livermore (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3507, subdivision (a), by making a unit determination under the provisions of its Employer-Employee Relations Resolution (EERR) section 7 without providing an adequate, written explanation of its findings and the evidence upon which such findings are based; and by maintaining and enforcing language of its EERR section 8, which requires proof of 60 percent support among employees to be affected in a proposed unit modification. By this conduct, the City interfered with the right of employees to be represented by an employee organization of their own choosing, in violation of Government Code section 3506 and PERB Regulation 32603, subdivision (a). (PERB Regulations are codified at Cal. Code Regs., tit. 8, § 31001 et seq.)

Pursuant to section 3509, subdivision (b), of the Government Code, it hereby is ORDERED that the following language found in section 8, subdivision A, of the City's EERR is void and unenforceable: "accompanied by proof of employee approval … signed by not less than 60% of those employees who, if the proposed modification should be granted, would be moved from one representation unit to another."

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

A. CEASE AND DESIST FROM:

1. Making unit modification determinations (whether granting or denying a petition for such), pursuant to its EERR section 7, without providing written notice of its findings and the evidence upon which such findings are made.

2. Maintaining and/or enforcing that portion of its EERR section 8, which requires a proof of 60 percent support among affected employees for approval of a unit modification petition.

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

Conduct an investigation and/or make written findings upon an investigation of the unit modification petition filed by Blaine Drewes et al., on November 19, 2013, including, if applicable, whether the petition was appropriately filed by an employee organization within the meaning of MMBA section 3501, subdivision (a).

Dated: _____ CITY OF LIVERMORE

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

BLAINE DREWES, Charging Party, v. CITY OF LIVERMORE, Respondent.	UNFAIR PRACTICE CASE NO. SF-CE-1177-M PROPOSED DECISION (September 12, 2016)

Appearances: Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for Blaine Drewes; E. Kevin Young, Assistant City Attorney for City of Livermore.

Before Alicia Clement, Administrative Law Judge.

PROCEDURAL HISTORY

Blaine Drewes (Drewes or Charging Party) filed the above-referenced unfair practice charge on February 25, 2014, alleging that the City of Livermore (City or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act)[1] when it processed a unit modification petition filed on January 7, 2014, in a manner that is inconsistent with its Employer-Employee Relations Resolution (EERR), section 8, Modification of Representation Units. The City responded to the charge on March 27, 2014, arguing that it properly applied the City's EERR, section 8, and that the unfair practice charge process was not the proper procedure to challenge a unit modification determination. Charging Party filed a First Amended Charge (FAC) on November 19, 2014, clarifying the nature of the charge: the City's EERR, section 8 was alleged to be an unreasonable rule/regulation; while the City's application of section 7 was

[1] The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

alleged to be unreasonable. No new facts were alleged in the FAC. The City's December 9, 2014 response to the FAC, asserts that the unfair practice charge process should not be used to circumvent the unit modification regulations and raises a new objection that Drewes lacks standing to file a petition for unit modification under the EERR and PERB regulations.

On January 22, 2015, PERB's Office of the General Counsel (OGC) found that the City neither adopted section 8 nor applied it to reject Charging Party's petition within six months of the original charge, and so dismissed that allegation as untimely. Also on January 22, 2015, the OGC issued a Complaint against the City for 1) its unreasonable application of its EERR section 7 when it a) created a new bargaining unit by removing a number of classifications from within the Airport and Water Resources Divisions in the Association of Livermore Employees (ALE) -represented bargaining unit, and b) simultaneously added to the ALE-represented bargaining unit a number of different classifications from the Airport Division and Water Resources Division; and 2) its application of EERR section 8 to require proof of support of at least 60% of the affected employees. The City's February 11, 2015 Answer to the Complaint admitted to the factual allegations in the Complaint but denied any violation of the Act by its conduct.

An informal settlement conference was held on April 10, 2015, but the matter was not settled. A formal hearing was scheduled for July 28, 2015. Meanwhile, Charging Party appealed the partial dismissal. On June 10, 2015, the City filed a Motion to Dismiss the Complaint, arguing that Drewes lacked standing to file a unit modification petition as well as that the unfair practice charge process was not the proper means to challenge a unit modification decision.

On June 22, 2015, the Board issued *City of Livermore* (2015) PERB Decision No. 2435-M. The June 10, 2015 Motion to Dismiss was denied on June 26, 2015.

A formal hearing was held on September 9, 2015. At the formal hearing, the parties presented a written stipulation to many of the facts in this case. This matter was fully briefed and submitted for determination on October 22, 2015.

FINDINGS OF FACT

The parties' Agreed Statement of Facts consists of twenty numbered paragraphs and supporting documents A through M. The Agreed Statement of Facts states, verbatim:

1. The Public Employment Relations Board issued a complaint in action Blain Drewes v City of Livermore, Case SF-CE-1177-M, based upon the First Amended Charge filed by Blaine Drewes.

2. The Charging Party, Blaine Drewes ("Drewes") is an employee of the City of Livermore.

3. The City of Livermore ("City") is the Respondent in PERB Case SF-CE-1177-M.

4. The Respondent City and the Association of Livermore Employees ("ALE") are parties to a master Memorandum of Understanding covering wages, hours and working conditions of employees of the City of Livermore. ALE is exclusive representative of Drewes and all other employees who are the subject of the charge. (Attached hereto as Exhibit B is a true and correct copy of the Memorandum of Understanding)

5. Through a resolution passed on January 17, 1977, the City adopted Resolution No. 9-77, whereby creating the City's Employer-Employee Relations Resolution (hereinafter "EERR"). Attached hereto as Exhibit D is a true and correct copy of Resolution No. 9-77)

6. A section of the EERR, pertinent to this Action, reads as follows:

> Section 7 – Establishment of Representation Units
> ….
> B. The following factors, among others, are to be considered in making such determination.
> 1) Which unit will assure employees the fullest freedom in the exercise of rights set forth under this Resolution.
> 2) The history of employer-employee relations in the unit, among other employees of the City, and in similar public

employment; provided, however, that no unit shall be established solely on the basis of the extent to which employees in the proposed unit have organized.
3) The effect of the unit on the efficient operation of the City and sound employer-employee relations.
4) The extent to which employees have common skills, working conditions, and job duties.
5) Management and confidential employees shall not be included in a representation unit with non-management and non-confidential employees.
6) No classification and no employee shall be included in more than one representation unit.

(Exhibit D, p. 5)

7. Another section of the EERR, pertinent to this Action, reads as follows:
Section 8 – Modification of Representation Units
"An employee organization may request a modification of an established representation unit by submitting to the City Manager a petition accompanied by proof of employee approval of the proposed modification unit signed by not less than 60% of those employees who, if a proposed modification should be granted, would be moved from one representation unit to another.
(Exhibit D, p. 6)

8. ALE is not a party, nor associated with the unfair practice charges filed by Drewes. (Attached hereto as Exhibit I is a true and correct copy of the declaration of ALE president, Michael Pato)

9. On November 19, 2013, Drewes and Shelby Anderson ("Anderson"), employees of the City of Livermore in its Water Resources/Public Works Department, submitted a "request for modification of an established representation unit." Their request sought to separate a group of employees to be formed into a new bargaining unit from their unit of representation, ALE. This petition for unit modification was marked received by Mark Roberts ("Roberts"), City Manager of Respondent City of Livermore on November 21, 2013. With the understanding that ALE supported the petition the City processed Drewes' request. (Attached hereto as Exhibit E is a true and correct copy of Drewes/Anderson's request for modification)

10. On January 7, 2014, City Manager Mark Roberts ("Roberts") provided an initial response to Drewes' petition for unit modification in an interoffice memorandum in which he stated that there may be a sufficient lack of community of interest in the petition for unit modification for the majority of classifications presented in the petition, as also "found" that "specific classifications within the petition do not sufficiently lack a community of interest with comparable classifications represented by the Association of Livermore Employees." (Attached hereto as Exhibit F is a true and correct copy of Roberts' January 7, 2014 memorandum) In said memorandum, Roberts further stated that "it is in the interest of the City to have its bargaining units formed as

similarly as possible. As a result it is my decision that other maintenance related classifications contained in the original Public Works Unit form [*sic*] in 1977 (then represented by Operating Engineers, Local 3) is a more appropriately formed unit for purposed of Unit Modification. Additionally, the maintenance oriented classifications not included in the unit in 1977 are appropriately assigned to the requested modified Unit." (Exhibit F, page 2, ¶¶1-3)

11. On February 3, 2014, a meeting occurred between ALE and the City in which a number of events occurred: the City provided documents to ALE regarding the City's decision as to which classifications the city believed would be a best fit for the new unit; ALE expressed their desire to continue to represent all of their current members; and most importantly, the parties discussed the newly proposed unit would consist of 73 members, and 32 of those members were not in favor of the modification. Hence, since the 41 members who were in favor of the unit modification was 56 percent of the eligible voters and the City's EERR required 60% to grant the unit modification. The petition would be denied.

12. On February 5, 2014, Roberts applied and enforced Local Rule EERR, Section 8 requiring a petition for unit modification to be supported by proof of support of no less than 60% of the affected employees. Roberts held that "[I]n accordance with Section 8A of the EERR, 60 percent of the affected employees would need to sign a petition affecting the proposed unit modification." Roberts further held that, "[U]sing the 60 percent presentation rule contained in Section 8 of the EERR "Modification of Representation Units" as a guide, I now find that there is insufficient support among the classes of employees which would be included in the new bargaining unit." (Attached hereto as Exhibit G is a true and correct copy of Roberts' February 5, 2014 memorandum)

13. On February 24, 2014, Drewes filed an unfair practice charge with the Board, alleging that the City violated section the MMBA by failing to explain how and why it applied its local rules within EERR No. 9-77 when determining the composition of a bargaining unit. Drewes also alleged the City's action constituted a violation of Section 8 of the EERR.
(Attached hereto as Exhibit J is a true and correct copy of Drewes' February 24, 2014 charge)

14. On October 29, 2014, the Board ruled the charge as written, "does not state a prima facie case." (Attached hereto as Exhibit K is a true and correct copy of the Board's October 29, 2014 letter) The letter also provided Drewes with direction on how to amend his charges, if he so desired. (*Id*.)

15. On November 19, 2014, Charging Party filed a First Amended Unfair Practice Charge in Action No. SF-CE-1177-M. (Attached hereto as Exhibit H is a true and correct copy of the First Amended Unfair Practice Charge)

16. On January 22, 2015, the Public Employment Relations Board issued a partial dismissal of the First Amended Charge. The Board held the "[F]irst Amended Charge neither alleges the City adopted Section 8 or applied this rule to reject the Charging Party's petition within 6 months before the filing of the original charge, this particular challenge to the City's local rule is not timely." (Attached hereto as Exhibit A is a true and correct copy of PERB's January 22, 2015, letter) Thus, a partial dismissal was ordered for failure to adhere to the statute of limitations for filing a claim.

17. Subsequently on January 22, 2015, the Board issued a complaint against the City in which it alleged the following violations: (1) that the City violated EERR Resolution No. 9-77, Section 7, when it determined that classifications from within the City's Airport and Water Resources Division that the charging party petitioned to be removed from ALE belong in a bargaining unit with other maintenance-related classifications from different divisions. (Complaint page 3) It was also held the City violated Section 7 by determining that Accounting Technician, Division Clerk and Typist Clerk classifications from the Airport Division and Water Resources Divisions should remain with ALE, and (2) the City's application of their local rule of proof of employee support of 60% or greater to grant a petition for modification is contrary to the Meyers-Milias Brown Act, and as such violated Government Code Section 3507. (Attached hereto as Exhibit L is a true and correct copy of the Board's Complaint)

18. Drewes filed an appeal of the partial dismissal on or about February 9, 2015. (Attached hereto as Exhibit M is a true and correct copy of the appeal)

19. On June 22, 2015, the Public Employment Relations Board issued a decision affirming the partial dismissal of the First Amended Charge by applying PERB Regulation 32871 and the City's Employer-Employee Relations Resolution No. 9-77, permitting only employee organizations to file a petition to modify an existing bargaining unit (thereby effectively prohibiting individual employees from filing such petitions). (Attached hereto as Exhibit C is a true and correct copy of the Board's June 22, 2015 Decision).

20. Following the partial dismissal, the remaining issues in this case are:

    a. Is the City's application and enforcement of its EERR contrary to the Meyers-Milias Brown Act, because the EERR required a majority of 60% of the employees encompassed by the petition for unit modification to support the petition?

    b. Was the City's determination of the appropriate unit to be considered for separation from ALE inconsistent with the criteria enumerated in Section 7 of the City's EERR?

    c. Does Drewes as an individual have standing to file an unfair practice charge against the City for denying the petition for modification?

d. Is Drewes' unfair labor charge an attempt to circumvent the MMBA's unit modification procedures?

e. Does Drewes, as an individual, have standing to contest placement of the positions or job classifications in a particular bargaining unit?

The following additional facts were gleaned from the exhibits attached to the parties' stipulation and the testimony provided at the formal hearing.

The ALE is the current name of the employee organization formerly known as the Municipal Employees' Agency for Negotiations (MEAN). The City and ALE are signatories to a Memorandum of Understanding (MOU) that was valid from April 1, 2012, through March 31, 2014. As such, ALE is the recognized employee organization of a bargaining unit that consists of clerical, technical, professional, and public service employees in 104 different classifications.

The November 19, 2013 petition filed by Drewes and Anderson sought "the modification of an established representation unit by separating from the [ALE], and joining a new bargaining unit." Attached to the petition is a list of the classifications targeted by the petition. The petition does not contain a rationale or justification for the proposed modification except to state that 92 percent of the employees in those classifications support the modification and subsequent "transfer to the new representation unit."

A portion of section 7 of the EERR is quoted in paragraph 6 of the parties' stipulation, above. Both the preamble and subdivision A of that section were omitted from the stipulation. Section 7 states, in its entirety:

> Classification of employment with the City for which recognition of an employee organization might be appropriate will be assigned to representation units. Whenever a new classification is adopted by the City, the City Manager after discussion with the affected employee organization(s) may allocate it to an

appropriate representation unit or not allocate it to any representation unit.

A. An appropriate unit shall be that unit determined by the City Manager to be the broadest feasible grouping of positions that have a community of interest.

B. The following factors, among others, are to be considered in making such determination:

1. Which unit will assure employees the fullest freedom in the exercise of rights set forth under this Resolution.

2. The history of employer-employee relations in the unit, among others employees of the City, and in similar public employment; provided, however, that no unit shall be established solely on the basis of the extent to which employees in the proposed unit have organized.

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

4. The extent to which employees have common skills, working conditions, and job duties.

5. Management and confidential employees shall not be included in a representation unit with non-management and non-confidential employees.

6. No classification and no employee shall be included in more than one representation unit.

The parties have also included an excerpt of section 8 of the EERR in their stipulation.

Section 8 of the EERR states, in its entirety:

Section 8. Modification of Representation Units.

A. An employee organization may request the modification of an established representation unit by submitting to the City Manager a petition accompanied by proof of employee approval of the proposed modification signed by not less than 60 % of those employees who, if the proposed modification should be granted, would be moved from one representation unit to another. A unit modification request may not be submitted until at least 36 months have elapsed from the most

recent date of certification of the unit from which positions would be removed should the modification request be granted. No such request shall be processed unless it is filed no sooner than 150 calendar days and no later than 90 calendar days before the expiration of the then current memorandum of understanding or agreement between the City and the employee organization which is then presently certified as the representative of the unit from which one or more positions would be removed if the request were granted. All petitions for modified units shall be accompanied by a list of all classifications to be included in the modified unit, the number of employees in each classification, as well as the divisions and department to which they belong.

B. The City Manager shall give notice of the request for modification of an established representation unit to the employees who would be affected by the proposed modification, to the employee organization which is then currently certified as the representative of the unit from which one or more positions will be transferred, and to any recognized employee organization that has filed a written request for such notice. Such notice shall be given within 5 days following receipt by the City Manager of the request for modification, excluding Saturday, Sunday, and holidays.

C. The City Manager shall make the final determination on the appropriateness of all units after consultation with employee organizations who request such consultation. In making such determination, the City Manager shall not be limited to consideration of the unit or units requested.

D. Should the decision of the City Manager have the result of moving one or more employees from one representation unit to another, such employees will continue to work at the rate of pay, and under the same terms and conditions of employment which they had in the unit from which they were transferred until such time as the memorandum of understanding concerning the unit from which they were transferred which was in effect at the time of said transfer shall expire.

E. Notwithstanding any other provisions of the Resolution, the City Manager may modify any representation unit, when, in the City Manager's opinion, the present representation unit is no longer appropriate.

Attached to the EERR as Exhibit A is a document titled, "Employee Organizations." Under the heading, Public Works Unit – Operating Engineers, Local #3, the following classifications are listed: Airport Service Attendant; Equipment Maintenance Attendant; Gardener I; Gardener II; Senior Gardener; Golf Course Maintenance Mechanic; Greenskeeper I; Greenskeeper II; Senior Greenskeeper; Laboratory Technician; Maintenance Clerk; Maintenance Worker I-III; Senior Maintenance Worker; Mechanic I-II; Park & Tree Maintenance Mechanic; Tree Trimmer; W.R.P. Maintenance Mechanic; W.R.P. Operator I-II; W.R.P. Senior Operator; and W.R.P. Operator Trainee.

Under the heading Municipal Employees' Agency for Negotiations, the following classifications are listed: Account Clerk; Senior Account Clerk; Animal Control Officer; Assessment and License Clerk; Assistant Planner; Building Inspector; Chief of Party; Children's Librarian; Circulation Control Technician; Junior Civil Engineer; Assistant Civil Engineer; Associate Civil Engineer; Communications Dispatcher Clerk; Departmental Secretary; Duplicating Machine Operator; Engineering Aide; Counselor; Technician; Engineering Inspector Technician; Engineering Technician; Senior Engineering Technician; Junior Planner; Library Clerk; Police Assistant; Police Clerk; Library Processing Technician; Purchasing Clerk; Reference Librarian; Stenographer Clerk (Bldg. Dept.); Typist Clerk; Emergency Services Assistant.

On January 7, 2014, City Manager, Marc Roberts, proposed a modification of the ALE-represented unit that differed from Charging Party's proposal. In particular, the City sought to include the following additional classifications: Auto Parts Worker; Facilities Maintenance Trainee; Facilities Maintenance Worker I-II; Facilities Maintenance Worker, Senior; Facilities Maintenance Worker, Supervising; Fleet Services Worker; Groundskeeper Trainee;

Groundskeeper I-III; Groundskeeper Supervising; Landscape Maintenance Specialist; Lighting & Landscape Inspector; Maintenance Trainee; Maintenance Worker I-III; Mechanic; Mechanic, Senior; Traffic Signal Technician Trainee; Traffic Signal Technician; Wastewater Collections Systems Trainee; Wastewater Collections Systems Worker I; Wastewater Collections Systems Worker III; Water Distribution Operator Trainee; WR Division Clerk; WR Senior Clerk; and WR Typist Clerk.

Roberts' January 7, 2014 memorandum gave the following rationale:

> 1. I find that there may be sufficient lack of a "community of interest" as stated in the Petition for unit modification for the majority of classifications presented in the Petition;
>
> 2. I find that specific classifications within the Petition do not sufficiently lack a "community of interest" with comparable classifications represented by ALE. These classes are Accounting Technician, Division Clerk, Senior Clerk, and Typist Clerk;
>
> 3. I also find that it is in the interest of the City to have its bargaining units formed as similarly interested as possible. As a result it is my decision that other maintenance related classifications contained in the original Public Works Unit formed in 1977 (then represented by Operating Engineers, Local 3) is a more appropriately formed unit for purposes of Unit Modification. Additionally, other maintenance oriented classifications not included in the unit in 1977 are appropriately assigned representation to the requested modified unit.

Roberts cited section 8.C. of the EERR for authority to modify the unit beyond those modifications requested in the November 21, 2013 petition.

On January 9, 2014, Traffic Signal Technician Trainee (and former ALE Board Member), Nick Bagakis, wrote to Roberts to protest the bargaining unit proposed by the City in its January 4, 2014 memorandum. Bagakis's opposition to the proposed unit is based, at

least in part, on the parties' bargaining history. Bagakis's January 9, 2014 letter states, in relevant part:

> In 2002, after the employees of the Public Works Department voted to join the Municipal Employees' Agency for Negotiations (MEAN, which is now ALE), a determination was made that those employees shared a community of interest, as described by the city's Employer-Employee Relations Resolution, with the other positions represented by MEAN and that it was in the best interests of both the City and the employees to have all job classifications consolidated in a single bargaining unit. We are not aware of any changed circumstances since 2002 that merit your proposed action.

In his missive to Roberts, Bagakis argues that the City should grant the petition filed by Drewes rather than the unit modification proposed by Roberts on January 7, 2014. Attached to this letter is a "Petition To Remain with ALE Bargaining Group Representation," which states, "By signing below, I object to being moved to the proposed bargaining unit described in City Manager Marc Roberts' January 7, 2014 memorandum, and request to remain with my current bargaining unit represented by the Association of Livermore Employees (ALE)." Below the declaration are the signatures of 32 employees in the classifications identified by the City in its January 4, 2014 memorandum.

On February 5, 2014, Roberts issued a "Final Determination Regarding Modification of ALE Bargaining Unit." After receiving input from members of the bargaining unit, as well as additional argument from the original petitioners, ALE, and the maintenance employees who were not in the petitioning group, Roberts denied the Petition. Roberts gave his rationale as follows:

> 1. Which unit will assure employees the fullest freedom in the exercise of rights set forth under this resolution; (My decision was considerate of similarly employed classifications relative to working conditions, type of work performed, work rules, employment category, etc.)

> 2. The history of employer-employee relations in the unit, among other employees of the City, and in similar public employment; provided, however, that no unit shall be established solely on the basis of the extent to which employees in the proposed unit have organized; (My decision was also based in part on the fact that at one point all maintenance related classifications were organized as a separate unit for the purpose of labor and employment relations within the City.[)]
>
> 3. The effect of the unit on the efficient operation of the City and sound employer-employee relations; (The operational processes within the City in addressing the very similar work issues of the maintenance related employees with one unit is efficient and a sound practice).
>
> 4. To the extent to which employees have common skills, working conditions, and job duties. (This distinguishes the maintenance related classes from ALE's traditional support, technical and professional classes).

Roberts concluded that if a new unit were to be formed, the optimal unit would include the additional classifications listed in his January 7, 2014 proposal. Nevertheless, given the strong opposition from the employees in those additional classifications, Roberts determined that the unit he proposed on January 7 would not meet the 60 percent support mandated by section 8.A. of the EERR. Roberts found:

> My denial of the petition is based on the fact that the petitioners for unit modification seek to exclude employee classifications I have determined to be appropriately assigned to the proposed new bargaining unit, and once these classifications are included, there is insufficient support for the new bargaining unit.

Attached to the February 5, 2014 Final Determination is a spreadsheet which lists 24 "Petitioners" classifications as well as 21 "Affected Employees" classifications. For each of these classifications there are 8 categories, titled as follows: 24 Hr. Work Schedule; 7 days a week; Standby; Federal/State Required Certifications/Licenses; City Required Certifications/Licenses; Drivers' License Class B or A (DOT); Safety Shoe Allowance; and

Heavy Equipment Operation. This spreadsheet omits the classifications of Accounting Technician; Division Clerk; Senior Clerk; and Typist Clerk; all of which were listed in the November 21, 2013 petition.

Of the eight categories listed for each classification, only "Safety Shoe Allowance" is checked for all classifications. More than half of the classes were listed in Heavy Equipment Operation and of those, all were required to have a Class B or A Drivers' License. The vast majority of the classifications on the list are required to hold certifications or license by either the City or State/Federal. Only WR Operators work 24 hours per day, seven days per week, but at least one third of the classifications are checked in the "standby" column.

ISSUES

1. Does Charging Party have standing?

2. Was the City's application of section 7 of its EERR Unreasonable?

3. Is the City's threshold requirement of a 60% showing of interest in a unit modification petition, as required by EERR section 8.A, reasonable?

CONCLUSIONS OF LAW

I. Jurisdiction

The City is a public agency, as defined by MMBA section 3501, subdivision (c). Drewes is a Water Resources Source Control Inspector for the City and an employee as defined by MMBA section 3501, subdivision (d). Drewes is in a unit of clerical, technical, professional and public service employees, which is exclusively represented by ALE. Drewes alleges, among other things, that the City has adopted and/or enforced an unreasonable local rule. The right of employees to challenge a local rule as unreasonable is codified in MMBA section 3507, subdivision (d), which states:

> Employees and employee organizations shall be able to challenge a rule or regulation of a public agency as a violation of this chapter. This subdivision shall not be construed to restrict or expand the board's jurisdiction or authority as set forth in subdivisions (a) to (c), inclusive, of Section 3509.

MMBA section 3509, subdivision (b), provides that PERB has the initial, exclusive jurisdiction to determine whether a complaint alleging a violation of section 3507 is meritorious. Accordingly, PERB has jurisdiction over the parties as well as the claim(s) that the City has adopted or enforced an unreasonable local rule or rules.

II. Standing

The issue of "standing," (jurisdiction over the parties), is separate and distinguishable from the issue of whether the elements of a prima facie case exist. (*Los Angeles Community College District* (1994) PERB Decision No. 1060.)

> The concept of justiciability involves the intertwined criteria of ripeness and standing. Standing derives from the principle that every action must be prosecuted in the name of the real party in interest…. A party lacks standing if it does not have an actual and substantial interest in, or would not be benefited or harmed by, the ultimate outcome of an action. Standing is a function not just of a party's stake in a case, but the degree of vigor or intensity with which the party presents its arguments.

(*City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 59, internal quotations and citations omitted.)

PERB is required to dismiss a charge for lack of jurisdiction if a party (a) has no standing to file the charge, or (b) fails to make a prima facie case for the charge filed. (*Los Angeles Community College District*, *supra*, PERB Decision No. 1060.) Standing should be inquired into by the Board agent investigating an unfair practice charge prior to any inquiry into the merits of the case. (*Ibid*; see also *Municipal Court v. Superior Court (Gonzalez)* (1993) 5 Cal.4th 1126, 1132.) An employee has no standing to challenge a violation of another

employee's rights, but must be a member of the class of employees which s/he claims has been harmed. (*United Teachers of Los Angeles (Hopper)* (2001) PERB Decision No. 1441.) Standing is determined at the time of the commission of the alleged violation and at the time the charge is filed. (*State of California (Department of Transportation)* (1983) PERB Decision No. 304-S.)

The City is correct that PERB has previously held that individuals do not have standing to file unit modification petitions under PERB's Regulations. (*State Employees Trades Council-United (Chemello)* (2006) PERB Decision No. 1867-H; *Riverside Unified School District (Petrich)* (1985) PERB Order No. Ad-148a.) Likewise, when an individual employee sought a writ of mandate to compel his employer to include him in a particular bargaining unit with which he allegedly shared a community of interest, the court refused. (*Reinbold v. City of Santa Monica* (1976) 63 Cal.App.3d 433.)

In the related case, *City of Livermore*, *supra*, PERB Decision No. 2435, the Board opined that, even if the City had rejected the November 21, 2013 petition for unit modification on standing grounds, the Board would not find such rejection unreasonable. In reaching this supposition, the Board merely reaffirmed its prior holdings that there was no statutory authority under EERA for an individual to file a unit modification petition, and that PERB's regulations do not permit an individual to file a unit modification petition. The City has pointed to the Board's supposition in *City of Livermore*, *supra*, PERB Decision No. 2435 regarding the reasonableness of a rule prohibiting an individual's petition for unit modification as though it resolves the present issue. It does not.

Notably, the stipulation of facts states that Drewes and Anderson jointly submitted a unit modification petition. In *County of Orange* (2010) PERB Decision No. 2138-M, the

Board approved of the county's dismissal of a petition for unit modification that was based, in part, on a lack of standing by the petitioner. There, the county made a determination that the petitioner was not a "verified employee organization" as required by its local rules at the time when the petition was filed, and properly denied the petition based on the petitioner's failure to comply with the county's regulations. To the contrary, in this case, there are no facts demonstrating that the City ever made a determination one way or the other that Drewes and Anderson lacked standing jointly or individually, or whether they could be considered an employee organization as defined by EERR section 2.F for the purposes of filing a unit modification petition. In the event that the City of Livermore rejects a unit modification petition that was filed by an individual on the grounds that an individual lacks standing to file such a petition under its local rules, the individual may at that time test the reasonableness of the City's decision through the unfair practice process.

Unlike with *County of Orange*, *supra*, PERB Decision No. 2138-M, where the employer refused to process the petition, this dispute involves the manner in which the City actually processed Drewes's petition for unit modification. At the time that Charging Party filed the unfair practice charge, as a signatory to the unit modification petition as well as a member of the bargaining unit affected by the unit modification, Charging Party had an actual and substantial interest in the City's reasonable processing of the unit modification petition. Charging Party was a member of the class of employees whose rights would be harmed by the unreasonable application of the local rules regarding unit modifications. Charging Party has an explicit statutory right to have the City's unit determinations made reasonably, even if he has no right to be placed in a particular bargaining unit. Thus, under the circumstances presented, Charging Party has standing to file the present unfair practice charge, which tests the

reasonableness of the City's rule requiring a supermajority of 60 percent support among employees affected by the unit modification as well as the reasonableness of the City's application of the unit modification criteria in section 7 of the City's EERR. In reaching this threshold issue that Charging Party has standing to file the present unfair practice charge, I make no finding whether Charging Party has standing under the City's local rules to contest the placement of particular positions or job classifications in a particular bargaining unit.

The issue before me is established by the events that actually occurred. Thus, I am called upon to determine whether the manner in which the City actually processed the petition for unit modification was a reasonable application of section 7 of the EERR and whether the provision in section 8.A of the EERR that mandates a 60% showing of support was reasonable on its face.

III. Local Rules Under The MMBA

Section 3507 of the MMBA sets forth the authority of local agencies to adopt reasonable rules and regulations for the administration of employer-employee relations. Unit determinations and representation elections are procedures that a public agency employer is explicitly authorized to adopt under MMBA section 3507.1. Legislative action by a local government agency, like the adoption of local rules, is presumed to be reasonable in the absence of proof. (*United Clerical Employees, Local 2700 v. County of Contra Costa* (1977) 76 Cal.App.3d 119, 125.) The party challenging the application of the rule carries the burden of demonstrating that the decision was not reasonable. (*City of Glendale* (2007) PERB Order No. Ad-361-M.) Thus, a violation based on the adoption or enforcement of an unreasonable regulation requires, as a threshold matter, a showing that the local rule or regulation abridges the exercise of a fundamental right, or frustrates the fulfillment of an affirmative duty,

prescribed by the MMBA. (*County of Monterey* (2004) PERB Decision No. 1663-M.) A local rule that infringes on employee organization rights under section 3503 or employee rights under 3506 would constitute an unreasonable regulation. (*Ibid*.)

Public agencies are not required to adopt rules and regulations. Where a public agency has not adopted local rules, PERB's regulations will "fill in the gap." (*County of Orange*, *supra*, PERB Decision No. 2138-M.) However, when an employer does adopt local rules, they must (a) be preceded by 'consultation in good faith' with employee organizations; (b) be reasonable; and (c) allow professionals to be represented in a bargaining unit that consists only of similar employees. (See Gov. Code, § 3507 and *Organization of Deputy Sheriffs v. City of San Mateo* (1975) 48 Cal.App.3d 331, 337.) When a public agency has adopted public rules, they should be interpreted in accordance with National Labor Relations Board (NLRB)[2] case precedent; PERB precedent; and PERB Regulations[3] applicable to cases under Educational Employment Relations Act (EERA),[4] Higher Education Employer-Employee Relations Act (HEERA),[5] and the Ralph C. Dills Act (Dills Act).[6] (*City of Carson* (2003) PERB Order No. Ad-327-M.)

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[2] The National Labor Relations Act (NLRA) is codified at 29 U.S.C., sections 151 through 169. References to the NLRA in this Proposed Decision shall be made using a short-form citation. As such, 29 U.S.C. § 159 will be referred to as "NLRA section 9," et cetera.

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

[4] EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

[5] HEERA is codified at Government Code section 3560 et seq. The text of the HEERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

[6] The Dills Act is codified at Government Code section 3512 et seq. The text of the Dills Act and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

The importance of unit determinations in collective bargaining cannot be overstated. In 1972, the California State Assembly formed the Aaron Commission to study and evaluate the effectiveness of existing statutes pertaining to public employer-employee relations in California and other states. The Aaron Commission had this to say about unit determinations:

> One of the most important, as well as one of the most controversial, aspects of collective bargaining in the public service is unit determination. It is generally agreed that if employees with diverse interest, and different supervisors and working conditions are grouped together in too few and too large bargaining units, the bargaining process will suffer. On the other hand, it is also generally agreed that if there are too many and too small units, the process will become unwieldy and chaotic. There is frequent disagreement, however, on where to draw the line between those two extremes….
>
> Experience in public-sector bargaining, relatively short though it has been, leads us to a conclusion that a proliferation of bargaining units has constituted more of a problem and an impediment to effective collective bargaining than has the establishment of too few bargaining units.

(California Assembly Advisory Council, Final Report, p. 84 (March 15, 1973), (*The Aaron Commission Report*).

The Aaron Commission "emphatically" rejected the idea that unit determinations should be made mechanically, but encouraged "a careful weighing of all pertinent considerations," giving the appropriate relative weight to all relevant factors, as dictated by the circumstances of each case. (*The Aaron Commission Report, supra*, p. 89.) In practice, PERB has rejected a rigid application of the "appropriate unit" standard to require a finding of the "most" appropriate unit. (*Antioch Unified School District* (1977) EERB Decision No. 37.)[7]

[7] Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board (EERB).

Some of the statutes administered by PERB contain explicit directives ordering the Board to make findings on appropriate units according to specific criteria.[8] Unlike the Dills Act, EERA, HEERA, the IHSSEERA, and TEERA, the MMBA permits employers to adopt their own rules regarding unit determinations, subject only to a reasonableness standard.

Both PERB and the NLRB have stated a preference for bright line rules when resolving representation matters, because bright line rules in representation matters achieve "a finer balance between the statutory policies of stability in labor relations and the exercise of free choice in the selection or change of bargaining representatives." (*Capistrano Unified School District* (1994) PERB Order No. Ad-261, citing *Appalachian Shale Products Co*. (1958) 121 NLRB 1160, 1161.) The Board's rationale is that disputes over the application or interpretation of regulations cause delays which interfere with the employees' fundamental statutory right to freely choose an exclusive representative and severely disrupt labor relations in general. (*Id*., and *Apple Valley Unified School District* (1990) PERB Order No. Ad-209.) In contrast, bright line rules quickly resolve representational issues, avoid lengthy litigation, and

[8] The Dills Act, government code section 3521, orders the Board to consider community of interest, the effect that the projected unit will have on the meet and confer relationships, the effect of the proposed unit on efficient operations of the employer, the effect on the employer of a proliferation of units, and whether the group is made up of skilled craft employees; the EERA, government code section 3545, orders the Board to consider community of interest as well as the extent to which such employees belong to the same employee organization, and the effect of the size of the unit on the efficient operation of the school district; the HEERA, government code section 3579, orders the Board to consider the community of interest among the employees, the effect that the projected unit will have on the meet and confer relationships and on the efficient operation of the employer; the In-Home Supportive Services Employer-Employee Relations Act (IHSSEERA), government code section 110008, states that a bargaining unit consisting of all employees in the county shall be deemed an appropriate unit; and the Transit Employer-Employee Relations Act (TEERA), government code section 99565(a), orders the Board to consider the community of interest among employees, the effect that the unit will have on the meet and confer relationships and on efficient operations of the employer.

promote stable employer-employee relations, thereby effectuating the purpose of the Act. (*State of California* (1983) PERB Decision No. 348-S.)

One area in which it might be said that a bright line is drawn is the distinction between those representation cases in which a question concerning representation (QCR) has been raised, and those representation cases in which no QCR has been raised. A QCR must exist before the NLRB is empowered to direct an election in an appropriate unit. (*United States Postal Service* (1981) 256 NLRB 502, 503.) Under PERB Regulations, an election is held only after the OGC has conducted an investigation and determined that one should be held in order to resolve a QCR. (See, for example, PERB Regulations 32776, 33237.)

Typically, a unit modification petition does not give rise to a QCR and thus, no election. However, as discussed at greater length below, there are circumstances in which PERB will require proof of majority support when a unit modification seeks to add positions to an existing unit.

A. PERB's Unit Modification Regulations

PERB's unit modification regulations have undergone several revisions over the course of four decades. Prior to 1982, PERB's unit modification Regulation 33261, subdivision (f), stated:

> (f) If the petition requests the addition of classification(s) or position(s) to an established unit pursuant to section (a)(1) above, it must be accompanied by proof of majority support of persons employed in the classification(s) or position(s) to be added. Such support shall indicate desire (1) to be included in the established unit and (2) to be represented by the current exclusive representative of the established unit. [Emphasis in original.]

This rule functioned "to discourage an employee organization from petitioning for recognition only in classifications in which it enjoys employee support and then picking up

related eligible classifications after becoming exclusive representative, through a unit modification. Presumably this is why there is a new showing of interest requirement." (*Pleasanton Joint School District, Amador Valley Joint Union High School District* (1981) PERB Decision No. 169, concurring opinion.)

In *El Monte Union High School District* (1980) PERB Decision No. 142 (*El Monte I*), the union petitioned for representation of a unit that consisted of all certificated employees and submitted proof of majority support among those employees. Appropriateness of the bargaining unit was at issue. The union was granted certification of a unit consisting of classroom teachers that did not include summer school teachers and hourly teachers. The parties commenced negotiations for this smaller bargaining unit. Meanwhile, the union sought representation of two additional separate units: one unit of all summer school teachers; and one unit of hourly teachers. When the district refused to recognize either of these additional units, the petitions were consolidated before PERB for a hearing to determine the unit appropriateness issue. The parties thereafter agreed to place the matter in abeyance pending the Board's determination of a related issue in *Redwood City Elementary School District* (1979) PERB Decision No. 107 (*Redwood City*).

In *Redwood City*, the union had previously been recognized as the exclusive representative of regular full- and part-time certificated teachers and filed a petition for recognition as the exclusive representative of summer school teachers. The District refused to recognize the unit of summer school teachers and the unions sought a determination from the Regional Director as to the appropriateness of the proposed unit of summer school teachers. The Regional Director approved the unit and the district appealed the decision to the Board. While the decision was pending before the Board, the Board issued *Peralta Community*

College District (1978) PERB Decision No. 77, requiring PERB to place all instructional personnel in the same negotiating unit absent a finding that they lack a community of interest. The Board in *Redwood City* then reasoned that the union had attempted from the outset to form a single bargaining unit of all instructional personnel, had demonstrated proof of majority support in that larger unit, and had subsequently (through the hearing as to summer school teachers) demonstrated sufficient evidence of a community of interest among regular and summer school teachers. Accordingly, the Board treated the second petition for recognition as a unit modification petition and issued a decision finding one bargaining unit consisting of all regular and summer school teachers.

After the Board issued its decision in *Redwood City*, it returned to the matters raised in *El Monte I*. Based on substantially similar facts—the union had sought one unit consisting of all certificated employees and had been forced by circumstance to submit successive petitions for separate representation of fragmented units, the Board treated the two outstanding recognition petitions (one for hourly teachers, and one for summer school teachers) as a unit modification petition. Despite the fact that the proof of support submitted for the original unit was stale, the Board accepted these old representation cards as proof majority support in the unit. Citing to the recent *Redwood City* decision, the Board found the petitions to be in substantial compliance with the unit modification proceedings and certified the modified unit.

A few years later, the Board decided *El Monte Union High School District* (1982) PERB Decision No. 220 (*El Monte II*). *El Monte II* involved an alleged breach of the duty to meet and confer in good faith. As justification for its refusal to meet and confer with the union, the district asserted that there was newly discovered evidence demonstrating that the same unit that was at issue in *El Monte I*, as modified, was inappropriate. The Board rejected

the assertions that the evidence presented by the district was "newly discovered" and reasserted its holdings from *El Monte I*, stating:

> The Board's authority to define the appropriate bargaining unit is sufficiently broad to enable it to include new employees in an existing unit without holding an election when the requisite community of interest is present, and the equities dictate such a conclusion. …An election is not necessary for the following reasons. First, PERB regulations regarding unit modification provisions do not require the holding of an election before a modification in the unit can be implemented.[] In addition, the purpose of the unit modification provisions is to provide a mechanism whereby positions or classifications may be, among other things, added to the established unit when a community of interest exists. By the modification process, the employees in question are thus able to exercise their right to exclusive representation and good faith negotiation without the need for separate units which would derogate the legislative concern over potential fragmentation of employee groups and proliferation of bargaining units. To require an election every time a new position or classification is at issue would have the inevitable consequence of destabilizing existing employer-employee relationships contrary to the Act's fundamental purpose, as well as being financially prohibitive and administratively cumbersome for the Board. It is within the Board's discretion to decide under what circumstances it might consider an election appropriate. The Act itself sets forth no requirement that an election be conducted where established units are to be modified.

In February 1983, PERB Regulation 33261 was renumbered to 32781. PERB Regulation 32781 stated, in relevant part:

> Parties who wish to obtain Board approval of a unit modification may file a petition in accordance with the provisions of this section.
>
> (a) A recognized or certified employee organization may file with the regional office a petition for unit modification:
>
> (1) To add to the unit unrepresented classifications or positions which existed prior to the recognition or certification of the current exclusive representative of the unit.

> (f) If the petition requests the addition of classifications or positions to an established unit pursuant to section (a)(1) or (c) above, the Board may require proof of majority support of persons employed in the classifications or positions to be added. . . .

PERB Regulation 32781, subdivision (f), was interpreted by the Board to authorize the Regional Director to exercise his/her discretion to determine whether proof of majority support should be required. (*State of California, Department of Personnel Administration* (1989) PERB Decision No. 776-S.) The Board's rationale was that this regulation protected employees' rights by allowing the Board to exercise its special expertise in determining on a case-by-case basis whether proof of majority support should be required.

In 1989, PERB Regulation 32781 was amended with the result that the proof of support provision is now found at 32781, subdivision (e). As it is written today, proof of majority support is required if an accretion would increase the size of the established unit by ten percent or more (PERB Regulation 32781, subd. (e)(1)), or in the case where the positions sought to be accreted are the subject of a pending request for recognition the Board shall require proof of at least thirty percent support among the employees to be accreted.

In *Salinas Union High School District* (2002) PERB Order No. Ad-315, the exclusive representative of a bargaining unit of certificated employees filed a unit modification petition to add, or "accrete," substitute teachers into the existing bargaining unit. The number of positions sought to be accreted in this case was well over ten percent of the existing bargaining unit. The union had already collected signatures from a majority of those employees sought to be added to the unit, and provided those authorization cards to the Board agent investigating the petition. On the basis of these signed representation cards, the Board agent issued an administrative determination granting the petition without ordering a formal election. The district protested the lack of an election, but did not object to the appropriateness of the

proposed bargaining unit or to the form or validity of the authorization cards. Because the petition sought to accrete over one hundred employees, the district argued that the unit modification petition raised a QCR that could not be resolved through the card check procedures. The district cited to NLRB precedent holding that the NLRB may exercise its discretion to approve a unit clarification adding unrepresented positions only when the case involves small groups of employees, and especially when the employees in question could lawfully form their own unit. Under the federal precedent, circumstances like those present in *Salinas Union High School District*, *supra*, PERB Order No. Ad-315, would mandate an election be held.

In upholding the administrative determination granting the petition without an election, the Board quoted heavily from *El Monte II*, reinforcing that the purpose of unit modification provisions is "to provide a mechanism whereby positions or classifications may be, among other things, added to the established unit when a community of interest exists." The Board also quoted from *El Monte II* to reinforce its position that "[t]o require an election every time a new position or classification is at issue would have the inevitable consequence of destabilizing existing employer-employee relationships contrary to the Act's fundamental purpose…." Ultimately, the Board's rationale took the following path: employees have the right to select an exclusive representative by submitting representation cards to that effect; the newly accreted employees demonstrated their choice of the union that was already the exclusive representative of the established bargaining unit; the combined, single bargaining unit was already deemed appropriate—a matter that was uncontested; and employees' statutory rights included representation by the organization of their choice, but not necessarily in the

bargaining unit of their choice. Hence, they suffered no injury when the Board declined the employer's request to order an election.

As written today, PERB's unit modification regulations provide a mechanism whereby changes in unit composition or description can be litigated before PERB and/or approved by PERB via a Board order. Under PERB's procedures, an exclusive representative may file a unit modification petition in one of several circumstances: (1) to add unrepresented classifications or positions to the unit; (2) to divide the existing unit into two or more appropriate units; or (3) to consolidate two or more of its established units into one appropriate unit. (PERB Regulation 61450, subdivision (a).) PERB Regulations allow an exclusive representative, an employer, or both jointly, to file several types of petitions: (1) when there has been a change in circumstances, to delete classifications or positions which are no longer appropriate to the established unit; (2) to make technical changes to clarify or update the unit description; (3) to resolve a dispute over unit placement or the designation of a new classification or position or; (4) absent a showing of changed circumstances, to delete a position or classification if the petition is jointly filed by the exclusive representative and the employer, or the petition is filed by one party during the "window period" or during a period when no collective bargaining agreement is in place. (PERB Regulation 61450, subdivision (b).) Finally, two or more exclusive representatives may jointly file a petition to transfer classifications or positions from one represented established unit to another. (PERB Regulation 61450, subdivision (c).) A petition that requests the addition of classifications or positions that would increase the size of the established unit by ten percent or more must be accompanied by proof of support of a majority of the employees to be added. (PERB Regulation 61450, subdivision (e).) Within 20 days of service of the petition, PERB

Regulations permit an employer, exclusive representative or other interested party to file an answer to the petition refuting the information in the petition and/or opposing the proposed unit modification. (PERB Regulation 61460.) Finally, under PERB's unit modification procedures, an exclusive representative may not file a petition to add a position currently represented by another exclusive representative to its bargaining unit. (*Modesto City School District* (1991) PERB Decision No. 884.) The only exception to this rule is when a petition is jointly filed by the exclusive representatives of both units to transfer a position from one unit to another. (*Ibid*.)

When PERB is faced with a unit modification petition, it looks to the petition and its contents to determine the parties' intent. (*Modesto City School District, supra,* PERB Decision No. 884.) When a unit modification petition seeks to determine the placement of a new position, the only criteria for placement of that position are those set out in the statute. However, when a unit modification petition seeks to change the placement of an existing classification from one unit to another, the Board applies the rebuttable presumption test set forth in *State of California (Department of Personnel Administration)* (1990) PERB Decision No. 794-S—that the petitioning party must show that the proposed modification is more appropriate than the existing unit.

Among the criteria PERB will consider when faced with a unit modification petition arising under the MMBA, are community of interest, the history of representation among the employees, and the general field of work. (*Reinbold v. City of Santa Monica, supra*, 63 Cal.App.3d 433.) "Community of interest" includes consideration of the positions' primary duties; the education levels required of the incumbents in those positions; the compensation and funding sources for the positions; the work hours of the positions; and the line of

supervision for the positions. (*Sweetwater Union High School District* (1976) EERB Decision No. 4.) Additionally, the Board has found that EERA's grant to employees of the right to join the organization of their choice implicitly includes the right to choose an organization that is an effective representative by subordinating the efficient operations of the employer to employee practice and community of interest. (*Ibid.*) Finally, when reviewing a unit determination by a Board agent, the Board applies an abuse of discretion standard, which is exceedingly narrow in scope. (*California State University* (1988) PERB Order No. Ad-177-H.) Under such a standard, the decision maker below is given discretionary power to decide the issue and the exercise of that discretion will not be disturbed unless it is abused. The key feature of this process is that the reviewing body may not substitute its own judgment for that of the body below. (*Ibid*.) In other words, the Board will not overturn the Board agent's decision as long as the Board agent conducted a satisfactory investigation and adduced facts that reasonably support his or her decision. (*Jefferson School District* (1980) PERB Order No. Ad-82.)

B. Unit Clarification Under The NLRB's Regulations

The NLRB permits a labor organization or an employer to file a petition for clarification of a bargaining unit where there is a certified or currently recognized bargaining representative and no question concerning representation exists. (NLRA section 9(c)(1) and NLRB Rules and Regulations, Series 8, Section 10260, subd. (b).) A unit clarification petition does not seek or require a Board-certified election. The NLRB described the purpose of unit clarification proceedings in *Union Electric Co.* (1975) 217 NLRB 666, 667:

> Unit clarification, as the term itself implies, is appropriate for resolving ambiguities concerning the unit placement or, within an existing classification which has undergone recent, substantial changes in the duties and responsibilities of the employees in it so

> as to create a real doubt as to whether the individuals in such classifications continue to fall within the category—excluded or included—that they occupied in the past. Clarification is not appropriate, however, for upsetting an agreement of a union and employer or an established practice of such parties concerning the unit placement of various individuals, even if the agreement was entered into by one of the parties for what it claims to be mistaken reasons or the practice has become established by acquiescence and not express consent.

Where a unit clarification petition raises a QCR, the NLRB will dismiss the petition because affording the employees an opportunity to select their representative should be given priority over unit designations. (*Gould-National Batteries, Inc*. (1966) 157 NLRB 679; *LTV Aerospace Corp*., (1968) 170 NLRB 200.) In *Safeway Stores, Inc*. (1975) 216 NLRB 819, the NLRB stated: "It is settled that the Board will not normally entertain a petition for unit clarification during the term of a contract to modify a unit which is clearly defined in the current collective bargaining agreement." The primary consideration for the Board was the potential disruption to the bargaining relationship. (*Ibid*.)

C. PERB's Severance Regulations

PERB Regulation 61400 provides a mechanism for an employee organization to sever a group of employees from an existing bargaining unit that is represented by a recognized employee organization. A severance petition seeks to "carve out" some, but not all, positions or classifications that are already included in the incumbent's unit and replace the incumbent representative with either a different employee organization or no representation. (*Livermore Valley Joint Unified School District* (1981) PERB Decision No. 165.) A severance petition differs from both a unit modification and a petition for decertification. Whereas PERB Regulation 61450 permits only the exclusive representative or the employer to file a petition for unit modification, a severance petition may be filed by any employee organization. Unlike

a unit modification petition, however, a severance petition must be accompanied by proof of support of at least 30 percent of the employees in the unit claimed to be appropriate. Also unlike a unit modification petition, which can be filed at any time, a severance petition may only be filed during a specified window period or when no MOU is in effect.

A severance petitioner must establish that the proposed unit is an appropriate unit, but is not required to show that the proposed unit is "the ultimate unit or the most appropriate unit." Instead, what is required is that the petitioner establish that the proposed unit has a community of interest that is separate and distinct from other employees in the existing unit. (*Alameda County Assistant Public Defenders Assoc. v. County of Alameda* (1973) 33 Cal.App.3d 825; and *Santa Clara County District Attorney Investigator Assoc. v. County of Santa Clara* (1975) 51 Cal.App.3d 255.)

A severance petition can only be filed by an employee organization, (PERB Regulation 61400, subd. (a)); must be accompanied by sufficient proof of support of employees in the classifications sought to be severed (PERB Regulation 61210, subd. (b)); the public agency and the recognized employee organization of the established unit must have an opportunity to provide a written opposition to the severance (PERB Regulation 61410); and the Board shall investigate and dismiss the petition if there is a current MOU in effect between the public agency and the recognized employee organization (unless the petition was filed during the applicable window period), or if there has been another election or certification granted in the last twelve months involving the same bargaining unit or a subdivision thereof. (PERB Regulations 61400, subd. (b), and 61420.)

PERB's investigation of a severance petition includes a determination of whether the severance petition was timely filed—either during the window period or at a time when no

MOU was in effect; whether the proposed unit to be severed from the unit is appropriate; and whether the petitioning employee organization has established a majority of support among the members of the severed unit. (PERB Regulation 61420.)

D. The NLRB's Severance Regulations

Severance petitions are permitted under NLRA section 9(b) under much narrower circumstances than PERB regulations permit. Severance under the NLRA is permissible only upon a showing that the group to be severed is a traditional craft group and that the union seeking to represent the severed employees is one which traditionally represents that craft. (*American Potash & Chemical Corp*. (1954) 107 NLRB 1418, 1422.) Once a petition has been filed, the NLRB is charged with investigating the petition and, in some cases, providing a hearing on the issues presented. (See NLRA section 9(c).) In *Kalamazoo Paper Box Co*. (1962) 136 NLRB 134, the NLRB adopted a set of factors to be considered when it is faced with a severance petition:

> Factors which warranted consideration in determining the existence of substantial differences in interests and working conditions included: a difference in method of wages or compensation; different hours of work; different employment benefits; separate supervision; the degree of dissimilar qualifications, training, and skills; differences in job functions and amount of working time spent away from the employment or plant situs under State and Federal regulations; the infrequency or lack of contact with other employees; lack of integration with the work functions of other employees or interchange with them; and the history of bargaining.
>
> […]
>
> As we view our obligation under the statute, it is the mandate of congress that this Board "shall decide in each case … the unit appropriate for the purpose of collective bargaining." In performing this function, the Board must maintain the two-fold objective of insuring to employees their rights to self-organization and freedom of choice in collective bargaining and

> of fostering industrial peace and stability through collective bargaining. In determining the appropriate unit, the Board delineates the grouping of employees within which freedom of choice may be given collective expression. At the same time it creates the context within which the process of collective bargaining must function. Because the scope of the unit is basic to and permeates the whole of the collective-bargaining relationship, each unit determination, in order to further effective expression of the statutory purposes, must have a direct relevancy to the circumstances within which collective bargaining is to take place. For, if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered.
>
> To accord automatically to a subgroup of employees such as truckdrivers, severance from a larger established and stable bargaining unit merely on the basis of the existence of the traditional job classification and a request for a separate unit encompassing such classification, does not, in our opinion, adequately discharge this basic and farreaching responsibility placed upon the Board by Congress. A title or classification in common usage does not necessarily establish that separate special interests exist and are preponderant. This can be determined only by making an informed judgment based upon an analysis of the factual circumstances bearing upon the distinguishing factors present in each case.

(*Kalamazoo Paper Box Co*., *supra*, 136 NLRB 134, p. 137-138.)

IV. The City's Application of EERR Section 7 Was Unreasonable

Neither the parties' Statement of Agreed Facts nor the PERB complaint seeks a determination whether EERR section 7 is reasonable on its face. Accordingly, my analysis herein does not attempt to make findings on this issue. Nevertheless, just as PERB must interpret contract language as necessary to decide whether an unfair practice has occurred (*County of Sonoma* (2011) PERB Decision No. 2173-M), in determining whether EERR section 7 was reasonably applied, I must engage in some interpretation of the City's local rule. PERB applies the rules of statutory construction when interpreting a public agency's local rules. (*Santa Clara County Correctional Peace Officers' Assoc. v. County of Santa Clara*

(2014) 224 Cal.App.4th 1016, 1027.) It is a maxim of statutory construction that if the language of a statute is clear and unambiguous, then the intent of the Legislature is reflected in the plain meaning of the statute. (*Barstow Unified School District* (1996) PERB Decision No. 1138; *North Orange County Regional Occupational Program* (1990) PERB Decision No. 857.)

Similar language in public and private sector labor relations statutes should be interpreted similarly. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608; *Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 658; and *Capistrano Unified School District* (2015) PERB Decision No. 2440.) More specifically, the court has determined that the phrase "appropriate bargaining unit" in the MMBA, is borrowed from the federal statute, and reference to the standards of appropriateness established by NLRB decisions is warranted. (*Alameda County Assistant Public Defenders Assoc. v. County of Alameda, supra*, 33 Cal.App.3d 825; *Organization of Deputy Sheriffs of San Mateo County v. County of San Mateo, supra*, 48 Cal.App.3d 331.)

A. <u>The City's Appropriate Unit Standard Is The Same Standard Applied By PERB</u>

The City argues that its EERR was adopted prior to the creation of the MMBA, and as such, it is one of those agencies permitted under section 3500, subdivision (a), "to continue to utilize those provisions unless said provision [are] not in accordance with the MMBA." The language in the City's EERR, which is currently in effect and the subject of this dispute, was adopted on January 17, 1977. The MMBA was enacted in 1968. In fact, section 20 of the City's EERR states, at subsection C,

> The provisions of this Resolution are not intended to conflict with, nor shall they be construed in a manner inconsistent with, the provisions of Chapter 10, Division 4, Title I of the

> Government Code of the State of California (Section 3500-3510) [the MMBA] as amended.

Accordingly, where the City has adopted language in its EERR that imitates public or private sector labor statutes, I shall interpret the EERR consistent with interpretations of similar language by PERB, the NLRB, and the courts.

Subdivision A of EERR section 7 defines "an appropriate unit" as "the broadest *feasible* grouping of positions that have a community of interest." [Emphasis added.] It then lists the unit criteria that the City is required to apply when making a unit determination. These criteria are the same standards that are listed in EERA section 3545 subdivision (a): bargaining history, community of interest, and operational efficiency. The Board has held that the proper application of these criteria will reflect a balance between the harmful effects on an employer of excessive unit fragmentation and the harmful effects on employees and the organizations attempting to represent them of an insufficiently divided negotiating unit or units. (*San Diego Community College District* (2001) PERB Decision No. 1445.)

1. Community of Interest

"Community of interest" is a term of art adopted by PERB, but originating from the NLRB. (See *Los Angeles Unified School District* (1976) EERB Decision No. 5, fn. 2; and *Redwood City Elementary School District*, *supra*, PERB Decision No. 107, dissent at fn. 2). The City's adoption of the phrase "community of interest" as one of the criteria for determining the appropriateness of a proposed bargaining unit should be given the same understanding. Accordingly, the City's analysis of the proposed unit should include a consideration of the method of compensation, wages, hours, employment benefits, supervision, qualifications, training and skills, contact and interchange with other employees, and job

functions of every position in the proposed unit. (*San Diego Community College District, supra*, PERB Decision No. 1445.)

According to Roberts' January 7, 2014 determination, he found a "sufficient lack of a 'community of interest'" and/or that specific unidentified classifications within the petitioned-for unit did not "sufficiently lack a 'community of interest'" with other unidentified classifications in the petition. On its face, it is clear that Roberts did not apply a community of interest standard to the petition that was filed—he applied a lack of community interest standard. In *Pleasanton Joint School District, Amador Valley Joint Union High School District* (1981) PERB Decision No. 169, where PERB was asked to find appropriate a unit consisting of only school psychologists despite prior determinations that all certificated (pupil services) employees should be in the same bargaining unit, PERB stated that finding a separate unit is <u>not</u> tantamount to finding a lack of community of interest with the preexisting unit. In other words, the petitioning party did not need to establish that the employees in the proposed unit *lacked* a community of interest with the remaining employees in the existing unit—merely that the proposed unit should be one which satisfies the statutory criteria for "appropriate." Based on a strict reading of Roberts' determination, it is clear that he failed to apply a community of interest standard to determine whether the petitioned-for unit was appropriate, and instead applied a "lack of community of interest" standard.

2. <u>Negotiating History</u>

In *Livermore Valley Joint Unified School District*, *supra*, PERB Decision No. 165, the Board reviewed a hearing officer's proposed decision to sever an operations-support services unit from the existing wall-to-wall unit of classified employees in the district. Because the petition was a severance petition rather than an initial unit determination, the Board stressed

the importance of the parties' negotiating history when evaluating the request. Within the larger context of the unit criteria listed in EERA section 3545, subdivision (a), the Board stated,

> Negotiating history, as one of these criteria, is an important factor, and a stable negotiating relationship will not be lightly disturbed. Nonetheless, it is but one of several criteria looked to by the Board.

The Board went on to note evidence of discontent amongst blue collar employees over the quality of representation received by them and in particular, their belief that other members of the bargaining unit were receiving a higher quality of representation. The Board also noted that there had been a relatively short period of representation under the incumbent union during which only two agreements, each of short duration, had been reached. Ultimately, the Board held that severance was appropriate, stating:

> … here, the community of interest factors strongly favor the petitioned-for unit, the length of the negotiating history is relatively short, and the evidence shows disparate interests of unit members, and the overwhelming majority of employees in the petitioned-for unit do not desire to be represented by the incumbent organization….

In his February 5, 2014 Final Determination, Roberts lists "the history of employer-employee relations in the unit" as one of the factors he considered in making his determination. But the determination states findings without explaining what data was compiled or considered in reaching those findings. While a previous unit decision by the Board is an important consideration, it is binding only so long as circumstances and Board precedent remain the same. (*Regents of the University of California* (1986) PERB Decision No. 586-H.) Here, it is difficult to determine whether the City considered previous unit determinations when making

its decision on the petitioned-for unit, because it did not provide a sufficient explanation of its rationale.

3. Operational Efficiency

In *Pleasanton Joint School District, Amador Valley Joint Union High School District*, *supra*, PERB Decision No. 169, the Board noted that negotiating would always impose some burden on the employer, and this fact was undoubtedly considered by the Legislature when it imposed the current scheme of collective bargaining on the parties. Thus, in order for operational efficiency to justify a denial of a petition for a separate unit, the employer must demonstrate "convincing evidence of a detrimental impact" on its operational efficiency. Indeed, in severance cases, the party seeking severance will never be able to demonstrate that adding an additional unit will improve an employer's efficiency of operations. Therefore, PERB only requires that the additional unit not be unduly burdensome. (*Los Angeles Unified School District* (1998) PERB Decision No. 1267; *State of California (Department of Personnel Administration)*, *supra*, PERB Decision No. 794-S.)

Roberts' January 7, 2014 determination notes only that it is in the City's best interest to "have its bargaining units formed as similarly interested as possible." But the City presents no evidence that granting the unit modification petition would be unduly burdensome. The fact that the City's interest is best served by fewer, larger bargaining units (or even a single, wall-to-wall bargaining unit) cannot, alone, support its decision to deny the petition.

B. A Reasonable Application Of Unit Appropriateness Standards Requires Written Findings

A proper application of the reasonableness standard dictated by the MMBA means that where local rules have been adopted, PERB's role in representation issues is limited. (*County of Orange* (2016) PERB Decision No. 2478-M.) Where a public agency has adopted criteria

for unit determination, it should be allowed to apply those criteria to determine if the petitioned-for unit is appropriate. It is not PERB's province to apply the City's EERR section 7 to determine the contours of an appropriate unit. PERB's role is only to review the City's application of EERR section 7 to determine if it was reasonable. (*City of Glendale, supra*, PERB Order No. Ad-361-M; *Alameda County Assistant Public Defenders Assn. v. County of Alameda, supra*, 33 Cal.App.3d 825, 830.) If reasonable minds could differ over the appropriateness of the bargaining unit, PERB should not substitute its judgment for the City's. (*County of Riverside* (2010) PERB Decision No. 2119-M.) This standard does not require PERB to make its reasonableness determination in an analytical vacuum, however. Rather, PERB's determination must begin by examining the City's application of its standard to the relevant facts presented by the petition.

1. When Reviewing A Unit Appropriateness Determination, The Reviewing Tribunal May Not Exercise Its Independent Judgment

In *International Brotherhood of Electrical Workers v. Aubry* (1996) 42 Cal.App.4th 861 (*Aubry*), rival unions sought the right to represent a group of rail maintenance employees of the Los Angeles County Metropolitan Transit Authority (MTA). The Amalgamated Transit Union (ATU) sought to accrete the rail maintenance employees into an existing unit of bus maintenance employees, while the International Brotherhood of Electrical Workers (IBEW) sought a unit of just the rail maintenance employees. The section of the Public Utilities Code that covered employees of the MTA stated that disputes over whether a particular group of workers constitutes an appropriate unit should be submitted to the Director of the Department of Industrial Relations (DIR) for determination. The Director is required to apply federal labor law and federal administrative practice. After a hearing, the Director found that the rail maintenance employees were properly accreted into the existing unit represented by ATU.

After exhausting its administrative remedies, IBEW sought a peremptory writ of administrative mandate. The trial court applied the substantial evidence standard to the Director's decision and found it to be adequately supported by substantial evidence. IBEW appealed the trial court's decision, arguing that the trial court should have exercised its independent judgement in reviewing the Director's decision.

On appeal, the court gave five reasons why the trial court should not apply an independent judgment standard to its review of the Director's unit appropriateness decision. First, the court found no case law support for the independent judgement test for judicial review of an administrative determination of an appropriate bargaining unit. Second, the court noted that both PERB and the courts eschew an independent judgment test, citing *Azusa Fire Fighters Union v. City of Azusa* (1978) 81 Cal.App.3d 48, and *Reinbold v. City of Santa Monica*, *supra*, 63 Cal.App.3d 433 in which courts applied an abuse of discretion and substantial evidence test of a Board agent's determination; and citing Dills Act section 3520 for its mandate that the Board apply a substantial evidence standard to a review of a Board agent's unit determination. (*Aubry, supra*, 42 Cal.App.4th at p.869.) Third, the court noted that when NLRB determinations of appropriate-unit decisions are reviewed by federal courts, the courts apply a substantial evidence standard. (*Aubry, supra*, 42 Cal.App.4th at p. 870.) Fourth, the court noted that Director's decision was an exercise of the Department's legislatively created role in bargaining unit determinations and, as such, was deserving of the same level of deference the courts gave to other specialized labor agencies like PERB and the Agricultural Labor Relations Board (ALRB). (*Aubry, supra*, 42 Cal.App.4th at p. 870.) Finally, the court stated:

> …deference seems particularly appropriate where the matter to be decided involves a judgmental assessment of a number of

> relevant criteria, not all of which can be expected to point in the same direction, and the overall standard, community of interest, is not susceptible of mechanical application. Deference also seems appropriate because there may be more than one appropriate unit, so that the question is ordinarily not whether the agency identified the most appropriate unit, but rather whether it identified an appropriate one.

(*Aubry, supra*, 42 Cal.App.4th 861, 870, internal citation omitted.)

The present circumstances present a slightly different procedural posture than the court encountered in *Aubry*. Nevertheless, PERB's role in reviewing a public agency's application of its unit appropriateness local rule is similar to the court's review of the Director's decision in *Aubry*. The MMBA grants public agencies the right to promulgate their own rules regarding unit appropriateness determinations, and authorizes PERB to review the application of those rules for reasonableness. (See MMBA, §§ 3507, 3507.1, and 3509, respectively.) If PERB were to apply its own independent judgment to a review of a public agency's findings of an appropriate unit, that conduct would effectively usurp the public agency's statutory right to adopt and apply its own rules. Because PERB is clearly prohibited from exercising its independent judgment on unit appropriateness determinations where a public agency has adopted and applied its own local rules on the subject, PERB's reasonableness review must emulate one of the models described by the court in *Aubry*, in which the reviewing tribunal studies the findings of the agency making the decision to determine whether the decision was supported by evidence.

2. Written Findings Serve An Important Legislative Function

In *Topanga Association For A Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506 (*Topanga*), the County Board of Supervisors granted a zoning variance to permit the establishment of a mobile home park on land that had previously been zoned for light

agriculture and single family homes. When appeals to the zoning board brought no change in the decision, the petitioner sought a writ of mandamus. The writ was denied and the petitioner appealed. The Court noted that in order to apply the substantial evidence standard to the Board of Supervisors' findings, it must scrutinize the record in order to determine whether substantial evidence supported the administrative findings that the property in question met the legislative variance requirements. (*Id*., at p. 512.) After examining several cases where a local entity's alleged failure to adhere to its own ordinance was reviewed by the courts of appeal, the Supreme Court stated:

> …[W]e hold that regardless of whether the local ordinance commands that the variance board set forth findings, that body must render findings sufficient both to enable the parties to determine whether and on what basis they should seek review and, in the event of review, to apprise a reviewing court of the basis for the board's action. We hold further that a reviewing court, before sustaining the grant of a variance, must scrutinize the record and determine whether substantial evidence supports the administrative agency's findings and whether these findings support the agency's decision. In making these determinations, the reviewing court must resolve reasonable doubts in favor of the administrative findings and decision.

(*Topanga, supra,* 11 Cal.3d 506, 513-514.) The Court also noted:

> "…a findings requirement serves to conduct the administrative body to draw legally relevant subconclusions supportive of its ultimate decision, the intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions. … In addition, findings enable the reviewing court to trace and examine the agency's mode of analysis. …
>
> Moreover, properly constituted findings enable the parties to the agency proceeding to determine whether and on what basis they should seek review. …they also serve a public relations function by helping to persuade the parties that administrative decision-making is careful, reasoned, and equitable.

(*Topanga*, *supra*, 11 Cal.3d 506, 516-517.) In *Antelope Valley Community College District* (1977) EERB Order No. Ad-16, the Board sustained a Regional Director's determination that the union had met the requisite showing of support, but did so without providing any rationale. Member Cossack criticized the Board's failure to explain its findings, citing *Topanga*. (See *Id*., Concurrence at fn. 2.)

As noted in section III.A.2. of this Proposed Decision, when the Board is asked to review the unit determination of a Board agent, it applies an abuse of discretion standard. (*California State University*, *supra*, PERB Order No. Ad-177-H.) The Board's role on appeal is not to reweigh facts but to ensure that they support the administrative determination. If the OGC conducts an adequate investigation and reaches a conclusion consistent with the facts developed during the investigation, deference is due and no abuse of discretion will be found. (*Jefferson School District*, *supra*, PERB Order No. Ad-82.)

The MMBA requires that unit determinations shall be determined and processed in accordance with rules adopted by a public agency. (Gov. Code, § 3507.1.) In this manner, the City's application of its EERR section 7 is an exercise of its legislatively created role in bargaining unit determinations. Without written findings, it is not clear if the City applied Rule 7 in accordance with its own rules to find that Charging Party's petition should be denied. The City provides some insight into its rationale in its January 7, 2014 memorandum as well as the February 5, 2014 "Final Determination." However, it is not only the City's final determination on the question of whether a particular bargaining unit is appropriate that is important—it is also the process employed by the City in reaching that determination which must be evaluated for reasonableness under the statute and, by extension, its own local rules. In the fulfillment of its legislatively created role in bargaining unit determinations, the City

should make findings supportive of its ultimate decision which enable the parties to determine whether and on what basis they should seek review.[9]

3. Written Findings Serve The MMBA's Purpose Of Promoting Full Communication Between Public Employers and Their Employees

In recognition of the importance that unit determination decisions occupy in labor relations, PERB regulations authorize a Board agent to conduct a hearing as part of its investigation to resolve unit modification petitions (PERB Regulation 32168), and to render a written decision which may then be appealed to the Board. The Board's decisions are published on PERB's website. Even a cursory review of these decisions establishes that when a Board agent issues findings regarding a unit modification petition, the Board agent not only considers the factors listed in PERB's checklists, but often systematically reviews all of the classifications affected by the unit modification petition against those criteria.[10] Indeed, the Board has held that a Board agent's determination of community of interest based solely on prior decisions (without a hearing) is insufficient to support its findings. (*Castaic Union School District* (2010) PERB Order No. Ad-384.)[11]

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[9] In *County of San Joaquin* (2004) PERB Decision No. 1600-M, the union argued that the employer was required under *Topanga* to give a rationale for refusing to adopt a non-binding mediator's decision. The Board distinguished the facts of that case from *Topanga* and found that it was "unnecessary to address the *Topanga* standard proffered by SEIU or the issues resulting from application of that standard."

[10] Subject-matter-specific searches of PERB's published decisions regarding unit determinations and unit modifications may be conducted free of charge on PERB's official website at www.perb.ca.gov. See also Community of Interest Checklist, PERB-862; Efficiency of Operations Checklist, PERB-866; Representation History Checklist, PERB-874; and Skilled Crafts Checklist, PERB-878; which may be found at http://www.perb.ca.gov/Forms.aspx.

[11] In *Service Employees International Union v. City of Santa Barbara* (1981) 125 Cal.App.3d 459, the union argued that it had a property interest in its status as the exclusive representative of a particular unit of employees, and a local rule that permitted the employer to

In *Unit Determination for the State of California* (1979) PERB Decision No. 110-S, for example, PERB embarked on a massive unit appropriateness determination covering most of the employees employed by the State of California. Ultimately, the Board created 20 distinct bargaining units by applying the standards articulated in Government Code section 3521. I bring attention to this decision because it resolves the unit determinations of an incredibly diverse workforce while acknowledging that unit determination criteria cannot be viewed in isolation from one another, given the substantial interplay among the various criteria. (*Ibid*. at p. 7.) This example demonstrates the quality of decision making that is required of the City in applying a nearly identical standard of review to positions within its jurisdiction.

Written findings, when PERB is reviewing an employer's application of its own local rules regarding unit placement, are perhaps even more important here than when PERB rules on its own unit determinations. Unlike PERB, the City has an interest in the outcome of this dispute. The number of bargaining units with which the City must negotiate, and their relative bargaining strength, has a direct impact on City operations. Nowhere is this fact made more explicit than in Roberts' January 7, 2014 determination, where he states, "I also find that it is in the interest of the City to have its bargaining units formed as similarly interested as possible." But case law makes it clear that it is not only the City's interest in the efficiency of its operations that must be considered. In fact, case law makes it clear that the employer's concerns must often be subordinated to employee choice in an exclusive representative. (See *Sweetwater Union High School District, supra*, EERB Decision No. 4; *Pleasanton Joint School*

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change the unit composition without holding an administrative hearing, violated the union's due process rights. The court held that there was no property right to a particular unit composition and on that basis held that neither the MMBA nor the local rule required the employer to conduct an administrative hearing prior to modifying the existing unit. The court did not attempt to review the reasonableness of the city's unit appropriateness determination.

District, *Amador Valley Joint Union High School District*, *supra*, PERB Decision No. 169; and *Peralta Community College District* (1987) PERB Order No. Ad-164, holding that the free choice of an exclusive representative is a cornerstone to EERA, as it is in all analogous collective bargaining schemes. See also *County of Orange*, *supra*, PERB Decision No. 2478-M, where the Board declined to interpret a local rule requiring that an appropriate representation unit "shall be the largest feasible group of employees having a community of interest" to mean that avoiding fragmentation is the only criterion to be considered or that it supersedes all other criteria.) While it is not improper for the City to take its own concerns into consideration, the City's failure to detail the scope of its investigation, identify the relevant facts discovered during the course of its investigation, and provide an explanation of how the evidence was weighed against all other relevant factors, creates an appearance of unlawful bias, even if none is present.

Unfortunately, based on the dearth information provided by the City, it is not clear whether any investigation was conducted. Neither the proposed decision in January nor the Final Determination in February states what evidence Roberts compiled or how he compiled the evidence upon which he based his decision. Although Roberts attached a spreadsheet to his decision, he provides no insight into whether incumbent employees in affected positions were interviewed about the categories listed on the spreadsheet, or if he came to conclusions based on some method other than interviewing the incumbents about their work duties and responsibilities. It is likewise unclear how the categories on the spreadsheet were deemed relevant, or whether they were equally weighted. Even assuming the data on the spreadsheet were sufficient to establish that the positions did or did not share a community of interest, there is no discussion in either the January or February memos that would speak to the other

mandatory categories of bargaining history and efficiency of operations, what evidence was presented or considered on those issues, and how those other categories were weighed against any community of interest finding.

Given the importance of unit determinations to public sector labor relations, it is not sufficient for the City to simply state the standard that applies and then provide a conclusion without also including the analytical process in its decision. Clearly, there was a time in the past when the ALE-represented bargaining unit differed from its current composition. And there are clearly a group of employees who support changing the current composition of the bargaining unit. It is reasonable to infer from these facts that the positions and classifications involved in both the Charging Party's proposed unit modification and the City's proposed unit modification share similarities and differences. The City Manager's duty in determining whether to grant or deny a unit modification petition is to illuminate and prioritize those similarities and differences between and among the affected classifications. Anything less than a full explanation is unreasonable. Even assuming the City were to reach an identical conclusion after illumination and application of the standards in its EERR section 7 to each of the positions listed in the unit modification petition, the written decisions issued in January and February must be deemed unreasonable for their failure to provide the public and the parties with "findings sufficient both to enable the parties to determine whether and on what basis they should seek review and, in the event of review, to apprise a reviewing court of the basis for the [City's] action." (*Topanga*, *supra*, 11 Cal.3d at p. 514.)

C. The City Must Apply Its Analysis To The Unit Proposed By The Petitioner

In addition to the above-described concerns, it is not clear whether the City's Final Determination compared the relative appropriateness of the petitioned-for unit against the

existing unit or against the unit proposed by Roberts in his memorandum dated January 7, 2014. The Board ruled early in its history that it must in each case determine the "appropriateness" of a unit without being limited to a choice between "an" or the "most" appropriate unit, and must in each case weigh and balance the statutory criteria in order to achieve consistency of application and the general objectives of EERA. (*San Diego Community College District, supra,* PERB Decision No. 1445; citing *Antioch Unified School District, supra,* EERB Decision No. 37.) Failing to consider the unit proposed by the petition disenfranchises the petitioning employees. (*Pleasanton Joint School District, Amador Valley Joint Union High School District, supra,* PERB Decision No. 169.)

Roberts cites EERR section 8.C for authority to modify the unit in a manner that differs from the unit sought by the November 21, 2013 petition. Section 8.C states,

> The City Manager shall make the final determination on the appropriateness of all units after consultation with employee organizations who request such consultation. In making such determination, the City Manager shall not be limited to consideration of the unit or units requested.

The first sentence of section 8.C requires the City Manager to make a determination on all units; the second sentence permits him/her to make determinations beyond the unit(s) requested. Section 8.C does not appear to excuse the City Manager from ruling on the appropriateness of the unit/s sought in the petition. If the City Manager has determined that the unit/s requested is/are inappropriate, the petitioning party is entitled to an explanation of that fact. As noted above, there are insufficient facts in the record from which PERB can determine that the City Manager reasonably applied the unit modification factors to the petition filed on November 19, 2013. To the extent that the City Manager's Final Determination failed

to analyze the appropriateness of the unit sought in the petition, such determination would reflect an unreasonable application of EERR section 7.

V. The City's EERR Section 8 Is Unreasonable.

Under EERR section 8, before the City will consider a unit modification request from an employee organization, it must be "accompanied by proof of employee approval of the proposed modification signed by not less than 60% of those employees who, if the proposed modification should be granted, would be moved from one representation unit to another." Charging Party argues that the 60 percent requirement is unreasonable because it conflicts with the statutory mandate in section 3507.1 that a majority of employees in an appropriate bargaining unit shall determine the exclusive representative. Respondent argues that the 60 percent threshold operates as a "simple majority" in a bargaining unit of five employees, and is therefore, reasonable. Both arguments miss their marks.

Both parties at times appear to misconstrue the distinction between a bargaining unit and an exclusive representative. This is evident in the way the parties refer to the bargaining unit as the "ALE bargaining unit," rather than using some descriptive term related to the types of positions or classifications that populate the unit. For example, paragraph 9 of the parties' Agreed Statement of Facts, states, "Their request sought to separate a group of employees to be formed into a new bargaining unit from their unit of representation, ALE." This phrase could be interpreted as the petitioners' desire to modify the bargaining unit, or it could be interpreted as a desire to sever some of the bargaining unit from the exclusive representative. In paragraph 17, the parties state, "It was also held [that]the City violated section 7 by determining that Accounting Technician, Division Clerk and Typist Clerk classifications from the Airport Division and Water Resources Division should remain with ALE." Again, this phrase could be

misconstrued as a failed attempt to sever a portion of the bargaining unit from its exclusive representative. This ambiguity has also pervaded the language used by non-party entities who opposed the modification. In his January 9, 2014, letter to Roberts, Bagakis includes signatures of employees who "request to remain with my current bargaining unit represented by the Association of Livermore Employees (ALE)." Because the petition filed in this case did not seek a change of bargaining representative, it is not clear why the petition signed by affected employees would need to include a statement of their desire to remain represented by ALE.

In an interoffice memorandum from Roberts to the employees affected by the unit modification petition, Roberts quotes a portion of EERR section 8 and states that employees assigned to the new unit "shall retain the current compensation and benefits established for such classification under the current ALE Memorandum of Understanding (MOU) until the expiration of said MOU and until such time as a new Unit MOU or compensation and benefits plan has been determined for such assigned classifications within the newly formed Unit." Drewes testified that he understood that this meant that, should the unit modification be granted, the new unit would continue to have ALE benefits "until such time as the new unit renegotiated through our new labor union." This statement demonstrates a profound misunderstanding of what was to be accomplished by the unit modification petition that Drewes himself filed, as the petition did not seek a change in exclusive representative for the new bargaining unit in the event that the petition was granted.

The problem with this blurring of the distinction between a bargaining unit and the exclusive representative of that bargaining unit is that the statute guarantees employees the right to be represented by the employee organization of their choice; it does not give

employees the right to be in the bargaining unit of their choice. (*Reinbold v. City of Santa Monica*, *supra*, 63 Cal.App.3d at p. 440.) The effect of EERR section 8, which gives employees the right to vote on the *bargaining unit* of their choice, is not immediately clear. However, both the statute and case law make it clear that the right to determine the proper bargaining unit is reserved to the employer. (*Ibid*.) Although it would not appear to be per se unreasonable for a public agency employer to cede to employees some authority to determine appropriate unit composition, EERR section 8 is not so innocuous as simply sharing some of the decision-making authority with affected employees. In this case, the employer has taken the position that EERR section 8 effectively ties its hands when a supermajority of the affected employees haven't endorsed a particular unit modification. This circumstance presents a more serious problem.

In *San Bernardino County Sheriff's Employees' Assn. v. Board of Supervisors of San Bernardino County* (1992) 7 Cal.App.4th 602 (*San Bernardino*), the county maintained a unit modification rule that required that unit modification requests be accompanied by a

> proof of support of thirty percent (30%) or more of the employees within the proposed new representation unit, including thirty percent (30%) of the employees proposed to be removed from an existing unit and placed in the new proposed unit; which must include at least twenty percent (20%) of the employees making up the authorized employee representation unit proposed to be modified…

(*Id.*, at fn. 7.)

A union representing peace officers filed two unit modification petitions. One petition sought to move 10 deputy coroner investigators into the 776-employee safety unit comprised of non-supervisory peace officers. The other petition sought to move 6 supervising deputy coroner investigators into the 202-employee safety management and supervisory unit

comprised of supervisory and management peace officers. Both petitions were accompanied by authorization cards for all the employees who sought a change of bargaining unit.

The county's employee relations panel recommended that the petition be granted notwithstanding that the petitions did not demonstrate proof of support of 30% of the employees in the proposed new units, and the employees requesting the modification did not constitute 20% of either the units they sought to leave or the units in which they sought inclusion. Against the recommendation of its panel, the county denied the petition. The trial court granted the union a writ of mandate to modify the bargaining units as requested in the petition, and the county appealed. In reviewing the trial court's findings, the appellate court analyzed separately the 20% and 30% requirements.

As to the 20% requirement, the court found that it would frustrate the declared policy of MMBA section 3508 by eliminating the possibility of correcting a situation in which only a few peace officer employees sought transfer to a bargaining unit comprised solely of peace officers as well as by perpetuating classification mistakes because only a few employees were affected. (*San Bernardino,* supra, 7 Cal.App.4th 602, pp. 613-614.)

As to the 30% requirement, however, the court stated,

> The 30 percent requirement assures that the employees in the proposed unit support the addition of new classifications of employees. The 30 percent requirement is reasonable under section 3508. We conclude the trial court erred in granting the petition for writ of mandate absent a showing in the record of compliance with the 30 percent requirement.

(*San Bernardino, supra*, 7 Cal.App.4th 602, 615.) The court's holding noted that employees, even peace officers, did not have a right to belong to a particular bargaining unit, as well as that employee choice was an appropriate factor to consider in determining appropriate units. (*Ibid*.)

Despite the factual differences in this case, there are important lessons to be learned from the court's analysis in *San Bernardino*. Most importantly, the court focused on the effect that the rule would have on the orderly administration of the statute. As with the 20% rule in *San Bernardino*, by enforcing a rule that permits a minority of employees (in this case, 41%) to prevent the modification of a bargaining unit simply because they do not approve it, the City has adopted a rule that frustrates the declared policy of the statute. As noted in *Sweetwater Union High School District, supra*, EERB Decision No. 4, implicit in the right of employees to join and be represented by the employee organization of their choice is the notion that the employees will have the ability to choose an organization which is an effective representative. An effective representative will generally be one largely determined by the community of interest and established practices of the employees. (*Ibid*.) A local rule that subordinates these factors to the wishes of a minority of employees interferes with the ability of the majority to be represented by an effective organization of its choice and, as such, frustrates the declared policy of the statute.

Both PERB and the NLRB have rejected a formulaic application of the unit appropriateness test, preferring instead a totality of circumstances approach to the determination of each unit composition issue. By adopting and enforcing a supermajority threshold requirement, the City has elevated the choice of a minority of employees above all other considerations, in contravention of the policies adopted by PERB and the NLRB to make "an informed judgment based upon an analysis of the factual circumstances bearing upon the distinguishing factors present in each case." (*Kalamazoo Paper Box Corp., supra*, 136 NLRB 134 at p. 138.)

REMEDY

MMBA section 3509 states, in relevant part:

> 3509. Board; powers and duties; unfair practices; rules; jurisdiction over employee organization actions
>
> (a) The powers and duties of the board described in Section 3541.3 shall also apply, as appropriate, to this chapter and shall include the authority as set forth in subdivisions (b) and (c). Included among the appropriate powers of the board are the power to order elections, to conduct any election the board orders, and to adopt rules to apply in areas where a public agency has no rule.
>
> (c) The board shall enforce and apply rules adopted by a public agency concerning unit determinations, representation, recognition, and elections.

Government Code section 3541.3 vests PERB with broad remedial authority to effectuate the purpose of the Act. Accordingly, a properly designed remedial order seeks a restoration of the situation as nearly as possible to that which would have obtained but for the unfair labor practice. (*Modesto City Schools* (1983) PERB Decision No. 291.)

1. Unreasonable Application Of EERR Section 7

The City has been found to have violated PERB Regulation 32603, subdivision (f), and MMBA section 3507 by unreasonably enforcing its EERR section 7, with respect to its failure to provide a written explanation of its findings regarding the unit modification petition filed on November 19, 2013. Therefore, it is appropriate to order that the City take all reasonable steps necessary to make and issue written findings regarding the evidence it considered in order to reach its February 5, 2014 determination to deny the petition.

For the reasons stated above, I remand this matter to the City. The City has adopted the same criteria for determining an appropriate unit that PERB applies when it makes unit determinations, and it should be held to the same standard that is applied when PERB's unit

determinations are challenged. In other words, the City Manager must make findings, reduce his findings to writing, and provide sufficient analysis for PERB to determine whether the required standard was reasonably applied to the facts adduced. If the City has discovered a method for applying these unit appropriateness standards without conducting an investigation that includes a hearing where facts are presented by all parties under oath, let it reveal that method in its written explanation of its findings. If no such alternate method exists, then the City must conduct an investigation and *then* report its findings.

2. Adoption of Unreasonable EERR Section 8

The proof of support mandate in City's EERR section 8 is contradictory to the statutory policy that employees be grouped in bargaining units which afford effective representation by the organization of their choosing. Because effective representation is largely determined by community of interest and the established practices of employees, a rule which subordinates these considerations to the choice of a minority of affected employees is unreasonable.

Where a local rule has been found facially unreasonable, it is deemed invalid. (*County of Imperial* (2007) PERB Decision No. 1916-M.) In this case, the City's EERR section 8 is unreasonable because of the phrase, "by submitting to the City manager a petition accompanied by proof of employee approval of the proposed modification signed by not less than 60 % of those employees who, if the proposed modification should be granted, would be moved from one representation unit to another." The remaining portions of EERR section 8 have not been shown to be patently unreasonable. Thus, it is not necessary to invalidate the entire rule—merely the portion of it that has been deemed unreasonable. Thus, the City shall be ordered to strike the unreasonable phrase from its EERR section 8. Accordingly, EERR Section 8 should read:

> A. An employee organization may request the modification of an established representation unit. A unit modification request may not be submitted until at least 36 months have elapsed from the most recent date of certification of the unit from which positions would be removed should the modification request be granted. No such request shall be processed unless it is filed no sooner than 150 calendar days and no later than 90 calendar days before the expiration of the then current memorandum of understanding or agreement between the City and the employee organization which is then presently certified as the representative of the unit from which one or more positions would be removed if the request were granted. All petitions for modified units shall be accompanied by a list of all classifications to be included in the modified unit, the number of employees in each classification, as well as the divisions and department to which they belong.

The remainder of EERR section 8, subdivisions B-E are unchanged by this order.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the CITY OF LIVERMORE violated the Meyers-Milias-Brown Act (MMBA or Act), Government Code section 3507. The CITY OF LIVERMORE violated the Act by enforcing its EERR section 7 in an unreasonable manner by making a unit determination without providing an adequate explanation of its findings and the evidence upon which such findings are based as well as by adopting EERR section 8, which mandates proof of 60% support among employees affected in a proposed unit modification.

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

A. CEASE AND DESIST FROM:

1. Making unit modification determinations (whether granting or denying a petition for such), pursuant to its EERR section 7, without providing written notice of its findings and the evidence upon which such findings are made.

2. Maintaining its EERR section 8, which requires a proof of 60% support among affected employees prior to granting a unit modification petition.

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

1. Conduct an investigation and/or make written findings upon an investigation of the unit modification petition filed by Blaine Drewes et al., on November 19, 2013.

2. Strike the phrase, "by submitting to the City manager a petition accompanied by proof of employee approval of the proposed modification signed by not less than 60 % of those employees who, if the proposed modification should be granted, would be moved from one representation unit to another," from its EERR section 8.A.

3. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the ALE-represented bargaining unit customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the CITY OF LIVERMORE, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on BLAINE DREWES.

Right to Appeal

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960
E-FILE: PERBe-file.Appeals@perb.ca.gov

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a), and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135, subdivision (d), provided the filing party also places the original, together with the required number of copies and

proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c), and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)