STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA NURSES ASSOCIATION, Charging Party, v. COUNTY OF MONTEREY, Respondent.	Case No. SF-CE-1886-M PERB Decision No. 2821-M June 1, 2022

Appearances: Anthony J. Tucci, Attorney, for California Nurses Association; Janet L. Holmes, Assistant County Counsel, for County of Monterey.

Before Banks, Chair; Shiners and Krantz, Members.

DECISION

KRANTZ, Member: This unfair practice case is before the Public Employment Relations Board (PERB or Board) for decision based upon the evidentiary record from a hearing before an administrative law judge. The parties' dispute began after Charging Party California Nurses Association (CNA) filed a unit modification petition (Petition) with Respondent County of Monterey. Through the Petition, CNA sought to add unrepresented per diem Registered Nurses (RNs) and per diem Nurse Practitioners (NPs) to "Unit S," an existing County bargaining unit of regular RNs and NPs. The County denied CNA's Petition and instead created "Unit SPD," a new bargaining unit containing solely per diem RNs and per diem NPs. CNA filed this charge in response, alleging that, in denying the Petition, the County violated its

Employer-Employee Relations Resolution (EERR), the Meyers-Milias-Brown Act (MMBA), and PERB Regulations.[1]

We have reviewed the record and considered the parties' arguments. For the reasons explained below, we find the County violated its EERR, the MMBA, and PERB Regulations. We direct the County to add the per diem RN and per diem NP classifications to Unit S.

FACTUAL FINDINGS AND PROCEDURAL HISTORY

I. Background

The County is a public agency within the meaning of MMBA section 3501, subdivision (c) and PERB Regulation 32016, subdivision (a). CNA is an employee organization within the meaning of MMBA section 3501, subdivision (a), and the exclusive representative of Unit S within the meaning of PERB Regulation 32016, subdivision (b).

In 2010, the County adopted the EERR pursuant to its authority under MMBA section 3507, subdivision (a). EERR Sections VII, VIII, and IX, which cover, respectively, unit determination criteria, modification of established bargaining units, and appeals, include the following relevant provisions:

> "**Section VII. POLICY AND STANDARDS FOR DETERMINATION OF APPROPRIATE UNITS**

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

“The policy objectives in determining the appropriateness of units shall be the effect of a proposed unit on:

“A. The efficient operations of the County and its compatibility with the primary responsibility of the County and its employees to effectively and economically serve the public, and

“B. Effective representation based on recognized community of interest considerations.

“C. The appropriate unit shall be the broadest feasible grouping of positions that share an identifiable community of interest. Factors to be considered in community of interest analysis shall be:

“1. The unit shall include the broadest feasible groups of employees based upon internal and occupational community of interest. Fragmentation of units is to be avoided.

“2. Consistency with the organizational patterns of the County.

“3. The history of employee relations in the unit, among other employees in the County, and in similar public employment.

“4. Similarity of duties, qualifications, skills, and working conditions of employees.

“5. No County employment classification title shall be included in more than one representation unit. Supervisory employees and non-supervisory employees shall not be included in the same unit.

“6. Professional employees shall not be denied the right to be represented separately from non-professional employees by a professional employee organization consisting of such employees.

"7. Management and/or confidential employees shall not be included in any unit which includes non-management and/or non-confidential employees."

"**Section VIII. MODIFICATION OF REPRESENTATION UNITS**

"A. Employees or an employee organization may file a petition for modification of an established representation unit. The petition shall be submitted to the Employee Relations Officer,[2] accompanied by proof of employee support that the petitioner represents more than fifty percent (50%) of the employees who, if the petition were successful would be placed in a separate or another bargaining unit.

[¶] . . . [¶]

"F. If the Employee Relations Officer and the petitioners do not agree on the appropriateness of the unit and such disagreement cannot be resolved by mutual agreement, the matter will be referred to the appeal process, as provided in Section IX, for hearing and final decision. If the matter is resolved by agreement, the Employee Relations [O]fficer shall certify the modified unit and make appropriate notification."

"**Section IX. APPEALS**

"In the event agreement is not reached between the County and affected employee organizations concerning the appropriateness of a proposed representation unit or a modification thereof the employee organization may, within ten (10) days of notice thereof request the intervention of the California State Mediation and Conciliation Service pursuant to Government Code Sections 3507.1 and 3507.3,

[2] The EERR allows the County Administrative Officer to designate who shall serve as the County's Employee Relations Officer. At all relevant times, County Human Resources Program Manager Ariana Hurtado served in that role.

> or may, in lieu thereof or thereafter, appeal such determination to the County Board of Supervisors for final decision within fifteen (15) days of notice of the Employee Relations Officer's determination or the termination of proceedings pursuant to Government Code Section 3507.1 or 3507.3, whichever is later.
>
> [¶]
>
> "Appeal to the Board of Supervisors shall be filed in writing with the Clerk to the Board, and a copy thereof served on the Employee Relations Officer. The Board of Supervisors shall begin consideration of the matter within thirty (30) days of the filing of the appeal. The Board of Supervisors may, in its discretion, refer the dispute to a third party hearing process. Any decision of the Board of Supervisors on the use of such procedure, and/or any decision of the Board of Supervisors determining the substance of the dispute shall be final and binding."

II. CNA Petitions to Represent Unit S and Separately Petitions to Modify the Unit

On May 5, 2021, CNA filed two representation petitions with the County.[3] The first petition sought to replace Monterey County Registered Nurses Association (MCRNA) as the exclusive representative of Unit S, which comprises 14 classifications at Natividad Medical Center, including Staff Nurse I, II, and III, and NP I, II, and III. There are approximately 550 employees in Unit S, each of whom must hold an RN license.

CNA's second Petition sought to add to Unit S all per diem classifications requiring an RN license. At the time, the County had three classifications in this category: Staff Nurse - Per Diem, Staff Nurse - Per Diem COVID-19, and Nurse

[3] All dates refer to 2021, unless otherwise specified.

Practitioner III - Per Diem. The County had not placed these classifications into any County bargaining unit. Nor had the County placed into a bargaining unit its other per diem classifications, which did not require RN licensure.[4]

On May 7, MCRNA disclaimed interest in representing Unit S.

On May 24, the State Mediation and Conciliation Service verified CNA's proof of support and determined that CNA submitted sufficient proof of support for each of its petitions.

On June 8, Hurtado issued a written determination regarding CNA's petitions. Hurtado found that, in light of MCRNA's disclaimer of interest, CNA should be recognized as the exclusive representative of Unit S.

Hurtado then opined that per diem RNs and NPs do not belong in Unit S. She stated that the Staff Nurse - Per Diem COVID-19 classification was an emergency classification that the County would no longer use after the COVID emergency subsided, and briefly explained why she believed Unit S should not include the other two petitioned-for per diem classifications:

> "[T]he identified per diem classification [*sic*] do not share occupational community of interest with the existing Unit S classifications as they are unbenefited at-will positions. The addition of the identified per diem classifications to Unit S is also not consistent with the organizational patters [*sic*] of the County or the history of employee relations for Unit S and other employee groups."

[4] The County has approximately 13 per diem classifications in total. (See https://www.governmentjobs.com/careers/montereycounty/classspecs?keywords=per%20diem) [as of May 26, 2022].)

Hurtado found it more appropriate to establish a new unit comprised solely of the per diem RN and NP classifications—Unit SPD—and to recognize CNA as Unit SPD's exclusive representative.

As part of comparing regular and per diem RNs and NPs in our legal analysis, *post* at pp. 13-15, we make additional factual findings regarding each group's duties, qualifications, skills, and employment terms and conditions.

III. CNA Appeals to the Board of Supervisors

On June 23, CNA appealed Hurtado's determination to the County Board of Supervisors (BOS).[5] CNA argued that per diem RNs and NPs share a community of interest with Unit S members and that Hurtado improperly applied the EERR. CNA asked the BOS to grant its Petition or, in the alternative, conduct a hearing.

On July 22, CNA wrote to the BOS again, inquiring about the status of its appeal and noting that EERR Section IX requires the BOS to begin consideration of an appeal within 30 days of its filing.

On August 3, Hurtado e-mailed CNA a one-page BOS decision. The decision, dated July 20, asserted that the BOS denied CNA's appeal in a closed session that day. The County had not notified CNA that the BOS would consider its appeal on July 20. The County did not, at any stage, offer CNA the opportunity to participate in a hearing regarding its Petition.

The BOS decision analyzed unit appropriateness in a single paragraph:

[5] CNA did not appeal Hurtado's determination as to the Staff Nurse - Per Diem COVID-19 classification, and CNA has not addressed that classification in its charge. We therefore express no opinion on that classification.

> "After consideration of CNA's appeal and review of the 'unit appropriateness' standards set forth in Section VII of the EERR, the Board of Supervisors determined that adding the per diem nurses to Unit S does not meet the identified standards because, historically the per diem nursing classifications (1) have not been represented, (2) have not been eligible for benefits, leaves or special pay provisions as indicated in the Unit S Memorandum of Understanding, (3) consist entirely of 'at-will' positions and (4) receive higher base wages, and fewer benefits, than their existing Unit S counterparts. Due to the significantly different position the per diem nursing classifications have had within the County's organizational structure, adding the per diem nursing classifications would not meet the unit appropriateness standards of (1) sharing occupational community of interest with existing Unit S classifications, (2) is not consistent with organizational patterns of the County and (3) is not consistent with the history of employee relations for Unit S and other employee groups."

IV. CNA Challenges the County's Decision through this Unfair Practice Charge

CNA filed this charge on August 5. Thereafter, the Board granted CNA's unopposed request to expedite the case at all levels. After the County responded to the charge, PERB's Office of the General Counsel issued a complaint, and the County filed an answer.

On December 7, the parties participated in a virtual evidentiary hearing before a PERB administrative law judge. The parties called witnesses, presented documentary evidence, and stipulated to certain facts. After the parties filed post-hearing briefs, the Board transferred the record to the Board itself for decision pursuant to PERB Regulations 32215 and 32320, subdivision (a)(1).[6]

[6] PERB Regulation 32215 allows the Board itself to direct a Board agent to "submit the record of the case to the Board itself for decision." PERB

DISCUSSION

MMBA section 3507, subdivision (a) authorizes public agencies to "adopt reasonable rules and regulations after consultation in good faith with representatives of a recognized employee organization or organizations for the administration of employer-employee relations." Such local rules may include provisions for, among other things, determining appropriate bargaining units. (MMBA, § 3507, subds. (a)(3), (a)(4); *Covina-Azusa Fire Fighters Union v. City of Azusa* (1978) 81 Cal.App.3d 48, 60; *City of Pasadena* (2021) PERB Decision No. 2788-M, p. 8 (*Pasadena*).)

CNA mainly argues that the County unreasonably applied its EERR.[7] When challenging an MMBA employer's unit determination under its local rules, the challenging union has the burden of demonstrating the decision was not reasonable. (*Organization of Deputy Sheriffs v. County of San Mateo* (1975) 48 Cal.App.3d 331, 338 (*San Mateo*); *Pasadena*, *supra*, PERB Decision No. 2788-M, p. 8.) If reasonable minds could differ over whether the determination comports with the local rules and the MMBA, PERB should not substitute its judgment for that of the employer. (*San Mateo*, *supra*, 48 Cal.App.3d at pp. 338-339.) PERB finds no unfair practice where the employer reasonably interprets its own rules in a manner that effectuates the MMBA's purposes. (*City of Long Beach* (2021) PERB Decision No. 2771-M, p. 10, citing *City of Madera* (2016) PERB Decision No. 2506-M, p. 5.) The inverse is true if the employer

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Regulation 32320, subdivision (a)(1) allows the Board itself to "[i]ssue a decision based upon the record of hearing."

[7] While CNA also claims that the EERR contains at least one facially invalid unit criterion, we find no cause to reach that argument. (See *post* at fn. 14.)

acted inconsistently with a reasonable interpretation of the rule. (*City of Long Beach*, *supra*, PERB Decision No. 2771-M, p. 10.)

In reviewing an MMBA employer's unit determination under its local rules, PERB normally applies a rebuttable presumption that the determination is reasonable. (*Salinas Valley Memorial Hospital District* (2020) PERB Decision No. 2689-M, pp. 21-22.) But when the employer "simply state[s] the standard that applies and then provide[s] a conclusion without also including the analytical process in its decision," the presumption of reasonableness falls away. (*City of Livermore* (2017) PERB Decision No. 2525-M, adopting proposed decision at p. 48 (*Livermore*).) While PERB may consider evidence presented at the hearing about the employer's reasoning for its decision, PERB need not accept post-hoc rationalizations offered to cure defects in the determination. (*Id*. at pp. 10-11 & adopting proposed decision at p. 48.)

Here, because Hurtado and the BOS provided minimal analysis in support of their conclusions, we do not presume reasonableness. And, as the below analysis demonstrates, even were we to apply the presumption, and fully considering the additional explanations the County has provided during these unfair practice proceedings, the County's application of its local rules to CNA's unit modification petition was unreasonable. Any lawful application of the EERR requires the County to place per diem RNs and NPs in the same unit as regular RNs and NPs.[8]

[8] Since NPs must have an RN license, hereafter we refer to RNs and NPs collectively as RNs, except where context dictates otherwise.

I. The County Ignored the EERR's Preference for Broader Units

The EERR repeatedly references the need to determine the broadest feasible group based on community of interest and explicitly states that "[f]ragmentation of units is to be avoided." (EERR, § VII(C) ["The appropriate unit shall be the broadest feasible grouping of positions that share an identifiable community of interest. Factors to be considered in community of interest analysis shall be: (1) The unit shall include the broadest feasible groups of employees based upon internal and occupational community of interest. Fragmentation of units is to be avoided"].) The EERR thus tracks settled precedent. (See, e.g., *County of Santa Clara* (2019) PERB Decision No. 2670-M (*Santa Clara*), p. 19 ["[P]ublic sector bargaining units may require modification to avoid fragmentation and ensure operational efficiency"].) Indeed, because "[t]he foundation of public sector labor relations is to protect employees' right to representation and to balance those rights with public employers' interest in maintaining operational efficiency . . . we generally seek to avoid the fragmentation of employee groups and proliferation of bargaining units." (*Id*. at p. 27 & fn. 25; *Regents of the University of California* (2017) PERB Order No. Ad-453-H, pp. 23-24; *County of Orange* (2016) PERB Decision No. 2478-M, pp. 3-4; *County of Yolo* (2013) PERB Decision No. 2316-M, p. 10; *City of Glendale* (2007) PERB Order No. Ad-361-M, pp. 5-6; *El Monte Union High School District* (1982) PERB Decision No. 220, pp. 9-10; *Unit Determination for the State of California* (1979) PERB Decision No. 110-S, p. 6.)

Hurtado and the BOS failed to mention this critical factor even a single time. And their analyses contravene this factor quite significantly, as it is difficult to imagine a plainer example of unnecessary fragmentation than placing just over 50 County RNs

in a newly formed unit all their own, rather than in an existing unit comprising over 500 County RNs who perform identical work at the same hospital.[9]

II. The County Ignored the Most Critical Employment Characteristics

The EERR specifies which employment characteristics are most important in assessing community of interest: "duties, qualifications, skills, and working conditions of employees." (EERR, § VII(D).) In this respect, the EERR again tracks precedent by eschewing reliance on wages, benefits, just cause protection, and other employment terms typically established through bargaining and instead focusing on less changeable characteristics. (*San Joaquin Regional Transit District* (2019) PERB Decision No. 2650-P, p. 17 (*San Joaquin*), citing *Santa Clara County Office of Education* (1990) PERB Decision No. 839, p. 2 and adopting proposed decision at p. 12 [community of interest determination should not turn on differences in wages, benefits, and other terms and conditions of employment that are primarily controlled by the employer and may be changed through collective bargaining].)

In evaluating employee duties, qualifications, skills and working conditions, we are mindful that there is always variation between any two classifications in a bargaining unit, and such variation does not defeat community of interest if there are sufficient countervailing commonalities. (*Santa Clara*, *supra*, PERB Decision

[9] While the preference for broader units in the public sector does not warrant accreting a group of employees into a unit if the exclusive representative objects, that is not the case here. (*Salinas Valley Memorial Hospital District*, *supra*, PERB Decision No. 2689-M, p. 30, fn. 29 & p. 31, fn. 31; *County of Santa Clara*, *supra*, PERB Decision No. 2670-M, p. 31; *Santa Clara Valley Water District* (2017) PERB Decision No. 2531-M, p. 17.)

No. 2670-M, p. 30; *San Joaquin*, *supra*, PERB Decision No. 2650-P, pp. 17-18.) Indeed, if the opposite were true, each classification would be its own bargaining unit.

Here, commonalities among critical employment characteristics outweigh differences by a wide margin. The Staff Nurse – Per Diem job description includes 20 duties, and the corresponding Staff Nurse II job description includes all 20 of these duties, verbatim, plus just one more duty (serving as a charge nurse on occasion, if necessary). Similarly, the Nurse Practitioner III – Per Diem job description includes seven duties, and the corresponding regular Nurse Practitioner I/II/III job description includes the exact same duties, verbatim.

There is also total overlap in qualifications. The Staff Nurse – Per Diem job description includes one required condition of employment and 18 required qualifications that may alternatively be met via a combination of education and experience; the corresponding Staff Nurse II job description has precisely the same requirements. Similarly, the Nurse Practitioner III – Per Diem job description includes 23 required knowledge or skill items, and the corresponding regular Nurse Practitioner III description requires precisely the same skills and knowledge.

The County concedes that per diem and regular employees perform the same work under the same working conditions. Unrebutted testimony from RNs also confirms this fact. For instance, Scott Brusaschetti, who has worked at Natividad as both a per diem RN and a regular RN, testified that when he transitioned from per diem to regular, "it was simply one day I was per diem and the next day I was a staff nurse," and based on his experience, "[t]here is really no difference" between the job of a per diem nurse and that of a regular nurse. Both per diem and regular staff nurses

are primarily responsible for providing direct bedside care to patients. Per diem RNs have a high degree of interaction and interchange with regular RNs. Per diem and regular RNs work on the same shifts, collaborate at patients' bedsides, hand off patients to one another at breaks and shift changes, and regularly swap shifts with one another. All RNs have the same line of supervision; they report to the Supervising Nurse, who reports to the departmental director, and ultimately to the Chief Nursing Officer. Brusaschetti also emphasized that all RNs, no matter their employment status, rely on each other "for assistance and help taking care of our patients safely."

The commonalities are just as strong among regular and per diem NPs as they are among regular and per diem RNs. Both per diem and regular NPs are primarily responsible for examining patients, diagnosing and managing care of patients, and performing procedures. NP Sandra Mobley noted that when she moved back and forth between per diem and regular NP positions, she "was performing the exact same job." Per diem NPs share common lines of supervision with regular NPs; each NP reports to the NP Program Manager, who in turn reports to the Medical Director. Per diem and regular NPs work on the same shifts, regularly swap shifts, perform the same duties as one another, and "sign off" patients to the oncoming NP, no matter their employment status. Mobley commented that per diem and regular NPs "work as a team" to ensure continuity of patient care.

It is common for RNs and NPs to go back and forth between per diem and regular employee status during their careers, often depending on their life circumstances. This is clear based on testimony from Brusaschetti, Mobley, and Assistant Hospital Administrator Luwanda Janine Bouyea. Thus, to suggest that per

diem and regular RNs do not share a community of interest leads to the absurd conclusion that an individual RN such as Brusaschetti does not have a community of interest with himself as he transitions between the two roles.

Hurtado testified as to her belief that per diem employees would have different perspectives and interests from regular employees. The job descriptions and other evidence show that the sole characteristics distinguishing per diem and regular RNs relate to scheduling, compensation, and job protections. As noted above, such typically bargainable distinctions do not overcome commonalities in characteristics that are less likely to be subject to bargaining. That is particularly true here, where the per diem and regular classifications have the same education, skill, and licensure requirements, as well as the same duties.

Further, the record does not show that collective negotiations are incapable of addressing the potential divergence of interests between per diem and regular RNs over issues such as scheduling, compensation, and job protections. (*Pasadena*, *supra*, PERB Decision No. 2788-M, pp. 10-12; *Los Rios Community College District* (2018) PERB Decision No. 2587, pp. 4-6 (*Los Rios*).) Per diem and regular RNs complement one another in making the hospital work, giving the parties a reason to ensure that neither type of classification becomes so much more attractive that the County cannot successfully recruit or retain employees in the other classification. Negotiating employment terms for per diem and regular employees at one bargaining table, therefore, will help the parties to craft balanced incentives for each classification, while securing terms that prevent per diem use from undermining regular employment or otherwise exploiting employees. (See, e.g., *Salinas Valley*

Memorial Healthcare System (2017) PERB Decision No. 2524-M, pp. 5-6 [quoting collective bargaining provision establishing seniority and layoff rights of full-time, part-time, and per diem employees].)

Hurtado noted in her testimony that the parties could negotiate contracts for Unit S and Unit SPD at a single bargaining table. Accepting the logic of joint bargaining further undercuts the County's argument by suggesting that the County recognizes joint bargaining as an efficient approach. Indeed, denying CNA's Petition would mean that either party could reject such efficiencies at any time even if CNA were to remain the exclusive representative of both units, and it would allow employees in either unit to decertify CNA and eliminate that possibility altogether. The County apparently did not consider such inefficiencies, contrary to the EERR's requirements.

Hurtado's written determination mentioned two employment terms that are bargainable and do not appear among the list of relevant terms in the EERR: the fringe benefits and job protections afforded to regular RNs but not per diem RNs.[10] The BOS relied on a slightly broader set of employment terms. However, like Hurtado, the BOS ignored the critical employment characteristics that are more relevant under the EERR and precedent, instead focusing on other, bargainable employment terms. And as shown above, even if we were to treat fringe benefits and job protections as being on par with job duties, skills, qualifications and working conditions, the extensive

[10] We accept for the sake of argument the County's apparent assumption that per diem RNs presently have no job protections. Because this issue is not germane to the issue before us, we make no findings one way or the other on this topic.

commonalities are still far more than sufficient to require that per diem and regular RNs be in the same unit.[11]

III. County Organizational Patterns Do Not Warrant a Separate Per Diem RN Unit

Neither Hurtado nor the BOS provided any contemporaneous explanation for their conclusion that creating Unit SPD was most consistent with the County's organizational patterns. As noted above, an MMBA employer's post-hoc explanations for its application of its local rules bear little weight. (*Livermore*, *supra*, PERB Decision No. 2525-M, p. 10.) Even after the fact, during unfair practice proceedings, the County has largely failed to grapple with the fact that CNA's Petition was consistent with the County's organizational patterns because the County has long had only a single bargaining unit for non-supervisory RNs.

Hurtado testified as to her belief that organizational patterns favored the County's position in one respect. Specifically, she analogized per diem employees to temporary employees, and she noted that the County had placed temporary employees in their own unit.[12]

[11] In its brief, the County raises one employment characteristic that neither Hurtado nor the BOS mentioned in their analyses: Per diem RNs can choose when they wish to work (within limits), while regular RNs have assigned block schedules, though they may hold as little as a 20 percent part-time position. As noted above, however, bargainable topics bear less weight in community of interest analysis, and any two classifications in a bargaining unit invariably differ from one another in some respects. Also, this post-hoc explanation bears little weight. (*Livermore*, *supra*, PERB Decision No. 2525-M, p. 10.)

[12] The temporary employee unit specifically excludes per diem employees.

Temporary employees are distinct from per diem employees. One difference is that a temporary employee fills a role with a planned end date, while per diems have no such end date. But even accepting for the sake of argument that temporary employees and per diems are somewhat comparable in that neither are regular employees, the County's decision to place all temporary employees in a single unit—irrespective of their duties, qualifications, skills and working conditions—does not create a pattern supporting the County's decision to create Unit SPD. Indeed, there is no evidence of a pattern that supports splitting per diem employees into separate per diem units based on their duties, qualifications, skills and working conditions.[13]

IV. While the Per Diems' History of Being Unrepresented Does Not Support Either Party's Position, Practice at Other Public Hospitals Supports CNA's Petition

The BOS believed that because per diem employees were historically unrepresented, placing them in Unit S would be inconsistent with the County's employee relations history. However, where a union petitioning for unit modification establishes a community of interest between unrepresented employees and the existing unit, the classification's history of unrepresented status bears little weight. (See *San Joaquin*, *supra*, PERB Decision No. 2650-P, p. 12, fn. 11; *Regents of the University of California* (2010) PERB Decision No. 2107-H, pp. 18-23; *Hemet Unified School District* (1990) PERB Decision No. 820.) Employee relations history is more

[13] CNA argues that because it subpoenaed the County to produce records about the origins of the temporary employees unit, and the County failed to produce such documents, we should draw an adverse inference that the temporary employees unit does not support the County's position. There is no need to reach this issue. Even without such an inference, the temporary employees unit does not change the outcome of our decision.

important when employees have historically been in an established unit—such as when we consider a severance petition—because under those circumstances, maintaining continuity weighs against severance absent proof that collective negotiations are incapable of addressing the needs of a discrete minority within an existing unit. (*Pasadena*, *supra*, PERB Decision No. 2788-M, p. 10; *Los Rios*, *supra*, PERB Decision No. 2587, pp. 4-6.) In any event, even to the extent that one affords any weight to the history of all per diems (including RNs) being in no unit, carving out a small new unit for per diem RNs is no more consistent with employee relations history than is CNA's Petition.

Moreover, despite the EERR providing that relevant community of interest factors include "[t]he history of employee relations . . . in similar public employment" (EERR, § VII(C)(3)), the County did not consider the unit structure at comparable public hospitals. Most notably, the County did not address CNA's evidence that at Salinas Valley Memorial Hospital District, a public hospital located in the County, all RNs—including per diem RNs—are in a single unit. The BOS also did not address CNA's evidence that other northern California counties, including Marin, Sacramento, San Francisco, San Joaquin, San Mateo, and Santa Clara, include both regular and per diem RNs in unitary bargaining units.

V. No Other Factors Support the County's Approach

As discussed above, the County unreasonably applied the criteria it purported to rely on—the first four factors listed in EERR Section VII(C). While the County did not cite other factors to support its decision, we briefly discuss other potentially relevant criteria in the EERR.

EERR Section VII(A) states a policy objective of helping the County serve the public efficiently and effectively. The record includes no concrete evidence that creating Unit SPD improves County operations. (*Los Rios*, *supra*, PERB Decision No. 2587, p. 7.) Rather, if anything, the above analysis indicates that it is more efficient to combine regular and per diem RNs into one unit.

EERR Section VII(B) states a policy objective of providing "[e]ffective representation based on recognized community of interest considerations." To the extent this reference to recognized community of interest factors might allow consideration of community of interest factors beyond those listed in Section VII(C), it does not support the County's position. The record does not show that per diem RNs will receive more effective representation in their own unit.

EERR Section VII(C)(5) provides that a single classification should generally fall within a single unit. Technically, the County's decision does not contravene this factor, as the County places per diem RNs into a separate, per diem classification. Nonetheless, splitting non-supervisory RNs who perform the same work across multiple bargaining units contravenes the spirit of this criterion, which, like others discussed above, seeks to limit unit fragmentation. Similarly, while EERR Sections VII(C)(6)-(7) permit fragmentation to allow professional, managerial, and confidential employees their own units, no such factor supports separating per diems into their own unit, as both per diem and regular RNs are professional employees. Therefore, the factors the County claims are irrelevant certainly do not aid its case and at least marginally undercut it.

For the foregoing reasons, the County's unit determination was not reasonable. Applying the EERR reasonably and to comport with the MMBA requires placing per diem RNs and NPs in Unit S.[14]

ORDER

Based on the foregoing and on the entire record in this case, the Public Employment Relations Board (PERB) finds that the County of Monterey violated its Employer-Employee Relations Resolution (EERR), PERB Regulations, and the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et. seq., by unreasonably applying its EERR to deny a unit modification petition filed by California Nurses Association (CNA). These actions violated MMBA sections 3507 and 3507.1, and are unfair practices under MMBA section 3509, subdivision (b), and PERB Regulation 32603, subdivisions (f) and (g). By this conduct, the County derivatively interfered with the right of employees to participate in the activities of an employee organization of their own choosing and derivatively denied CNA its right to represent employees in their employment relations with a public agency, in violation of MMBA sections 3503, 3506, and 3506.5, subdivisions (a) and (b), and committed an unfair

[14] Because we find that reasonable minds could not differ over the appropriateness of adding per diem RNs to Unit S (*Santa Clara Valley Water District*, *supra*, PERB Decision No. 2531-M, p. 11), we need not reach CNA's alternative argument that the County should have granted CNA a hearing on its appeal. For this same reason, we decline to decide whether EERR Section VII(C)(2) is facially unreasonable, as CNA claims.

practice under MMBA section 3509, subdivision (b) and PERB Regulation 32603, subdivisions (a) and (b).

Pursuant to MMBA section 3509, subdivision (a), the County, its governing board, and its representatives shall:

A. CEASE AND DESIST from unreasonably applying its Employer-Employee Relations Resolution in making decisions regarding unit appropriateness and unit modification.

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

1. Grant CNA's petition for unit modification and recognize CNA as the exclusive representative of a modified Unit S which includes the Staff Nurse – Per Diem and Nurse Practitioner III – Per Diem classifications.

2. Meet and confer in good faith with CNA over all terms and conditions of employment for the Staff Nurse – Per Diem and Nurse Practitioner III – Per Diem classifications accreted into Unit S.

3. Within 10 workdays after this decision is no longer subject to appeal, post at all work locations in the County where notices to employees represented by CNA customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the County, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. The County shall take reasonable steps to ensure that the Notice is not altered, defaced, or covered with any other material. In addition to physically posting this Notice, the County shall post it by

electronic message, intranet, internet site, and other electronic means the County customarily uses to communicate with its CNA-represented employees.[15]

4. The County shall provide written notification of the actions it has taken to comply with this Order to the General Counsel of PERB, or the General Counsel's designee. The County shall provide reports, in writing, as directed by the General Counsel or designee, and shall concurrently serve all such reports on CNA.

Chair Banks and Member Shiners joined in this Decision.

[15] In light of the ongoing COVID-19 pandemic, the County shall notify PERB's Office of the General Counsel in writing if, due to an extraordinary circumstance such as an emergency declaration or shelter-in-place order, a majority of employees at one or more work locations are not physically reporting to their work location as of the time the physical posting would otherwise commence. If the County so notifies the General Counsel's Office, or if any party requests in writing that the General Counsel alter or extend the posting period, require additional notice methods, or otherwise adjust the manner in which employees receive notice, the General Counsel's Office shall investigate and solicit input from all parties. It shall provide amended instructions to the extent appropriate to ensure adequate publication of the Notice, such as directing the County to commence posting within 10 workdays after a majority of employees have resumed physically reporting on a regular basis; directing the County to mail the Notice to all employees who are not regularly reporting to any work location due to the extraordinary circumstance, including those who are on a short term or indefinite furlough, are on layoff subject to recall, or are working from home; or directing the County to mail the Notice to those employees with whom it does not customarily communicate through electronic means.

APPENDIX

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

After a hearing in Unfair Practice Case No. SF-CE-1886-M, *California Nurses Association v. County of Monterey*, in which all parties had the right to participate, the Public Employment Relations Board (PERB) found we violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq., by unreasonably applying our local rules regarding unit determinations and unit modifications. PERB also found that through this conduct we interfered with employee rights and the rights of California Nurses Association (CNA) protected under the MMBA.

As a result of this conduct, PERB ordered us to post this Notice, and we will:

A. CEASE AND DESIST from unreasonably applying our Employer-Employee Relations Resolution in making decisions regarding unit appropriateness and unit modification.

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

1. Grant CNA's petition for unit modification and recognize CNA as the exclusive representative of a modified Unit S which includes the Staff Nurse – Per Diem and Nurse Practitioner III – Per Diem classifications.

2. Meet and confer in good faith with CNA over all terms and conditions of employment for the Staff Nurse – Per Diem and Nurse Practitioner III – Per Diem classifications accreted into Unit S.

Dated: _____ COUNTY OF MONTEREY

By: _____
Authorized Agent

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