



**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

TEAMSTERS LOCAL 542,

Charging Party,

v.

EL CENTRO REGIONAL MEDICAL CENTER,

Respondent.

Case No. LA-CE-1566-M

PERB Decision No. 2890-M

February 21, 2024

Appearances: Smith Steiner Vanderpool by Fern M. Steiner, Attorney, for Teamsters Local 542; Sheppard Mullin Richter & Hampton by John S. Bolesta and Jason W. Kearnaghan, Attorneys, for El Centro Regional Medical Center.

Before Banks, Chair; Krantz and Paulson, Members.

DECISION

BANKS, Chair: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by Respondent El Centro Regional Medical Center (ECRMC) to a proposed decision of an administrative law judge (ALJ). The dispute concerns Certified Phlebotomist Technicians (CPTs) and other Technician classifications working in ECRMC's Laboratory (Laboratory Unit), who are represented by Charging Party Teamsters Local 542 (Teamsters). At issue is the Laboratory Unit's eligibility for a two percent merit salary increase.¹

¹ The ALJ also determined that the employer did not engage in direct dealing during a February 16, 2022 staff meeting with represented employees. As neither party filed exceptions to the ALJ's determination, the Board will not address that issue, and we leave that matter in the proposed decision undisturbed.

Until 2020, the Laboratory employees working in classifications eventually covered by the Laboratory Unit were unrepresented. In September of that year, Teamsters petitioned to represent the Laboratory Unit, and ECRMC recognized Teamsters as the exclusive representative. In 2021, the parties began negotiating an initial Memorandum of Understanding (MOU) for the new unit.

Dating back to 2016, ECRMC had a consistent practice of reviewing financial resources and the prevailing job market and then establishing the level of its across-the-board merit increase program for unrepresented employees in the next fiscal year. This practice predated, by more than four full years, Laboratory employees' September 2020 decision to become represented.

In July 2021, ECRMC announced a two percent across-the-board merit wage increase for all unrepresented employees who commenced employment prior to January 1, 2021. Per the announcement, "[a]ny pay rate increase for our bargaining unit employees shall be governed by the applicable [MOU] and/or discussed during current negotiations." ECRMC unilaterally announced to Teamsters that the Laboratory Unit was not eligible, and ECRMC never provided Laboratory Unit employees with the July 2021 two percent increase, nor offered that increase to Teamsters in bargaining for the Laboratory Unit.

MOU negotiations concluded in July 2022. The resulting MOU, effective July 27, 2022, through July 26, 2025, provides for annual salary increases, with the first increase on the effective date of the MOU. The July 2021 two percent merit increase was not addressed in the MOU.

The complaint in this matter alleges that, by excluding the Laboratory Unit from the two percent across-the-board merit increase program without bargaining to impasse or agreement, ECRMC unilaterally changed the status quo and discriminated against employees for protected activity in violation of the MMBA.² The complaint further alleges that, by not providing the July 2021 wage increase, ECRMC interfered with the rights of bargaining unit employees to be represented by Teamsters.³

The ALJ found in the union's favor as to the unilateral change, discrimination, and interference claims related to ECRMC's failure to pay the July 2021 wage increase; ECRMC seeks reversal on all counts and dismissal of the complaint.

Having considered the matter de novo, and upon review of the entire record, we find that, by failing to pay the Laboratory Unit employees the July 2021 wage increase, ECRMC unlawfully committed a unilateral change and engaged in unlawful discrimination and interference.

FACTUAL AND PROCEDURAL BACKGROUND

ECRMC is a public agency within the meaning of MMBA section 3501, subdivision (c), and PERB Regulation 32016, subdivision (a), and Teamsters is a recognized employee organization within the meaning of MMBA section 3501,

² The MMBA is codified at Government Code section 3500 et seq. All further undesignated statutory references are to the Government Code. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

³ Prior to the formal hearing in this matter, Teamsters requested that its surface bargaining allegation against ECRMC be withdrawn with prejudice from the unfair practice charge and dismissed from the complaint. PERB's Office of the General Counsel (OGC) subsequently confirmed the withdrawal.

subdivision (b), and an exclusive representative under PERB Regulation 32016, subdivision (b).

Teamsters represents several bargaining units at ECRMC.⁴ In September 2020, Teamsters petitioned to establish and represent two new bargaining units at ECRMC pursuant to ECRMC's local representation rules. The first unit consisted of CPTs and other Technician classifications working in ECRMC's Laboratory. The second unit consisted of various dietary classifications (Dietary Unit). The disputes in this case involve only the Laboratory Unit. ECRMC recognized Teamsters as the exclusive representative of both units later that month. The parties began bargaining over initial MOUs for each unit in 2021.

I. Wage Increases at ECRMC

Before 2016, ECRMC employed a "pay for performance process" whereby employees received salary increases between zero and three percent based on receiving positive ratings in their annual performance evaluations. ECRMC changed that model in 2016 because, according to Chief Operating Officer Luis Castro, it became "too tedious to do individual increases," so ECRMC instead moved to "an overall, hospital wide" approach.

For unrepresented employees, every year since 2016, ECRMC has reviewed financial resources and the prevailing job market and then established the level of its

⁴ Starting in or around 2013, Teamsters became the exclusive representative of a Nurses Unit consisting of Registered Nurses and Licensed Vocational Nurses at ECRMC. Starting in 2019, Teamsters became the exclusive representative of a Technical Unit consisting of various Technician classifications at ECRMC, including Certified Nursing Assistants, Medical Assistants, Respiratory Care Technicians, and Imaging and Ultrasound Technologists.

across-the-board merit increase program for the upcoming fiscal year.⁵ In most if not all of those years, the amount has been two percent, though the record does not show the exact amount of the increases paid in 2017 and 2018.

For represented employees, the parties agree that MOU provisions control wage adjustments once the parties agree to an MOU, but they dispute what should occur pending negotiation of a bargaining unit's first MOU after it becomes represented. This question first arose with respect to a different unit in 2019. Specifically, Teamsters became the exclusive representative of the Technical Unit in the first quarter of 2019, and thereafter the 2019-2020 wage adjustment cycle started on July 1, 2019, while the parties were negotiating their first MOU. ECRMC unilaterally declared that the Technical Unit would not participate in that year's two percent across-the-board merit program, leading Teamsters to file an unfair practice charge that PERB designated as Case No. LA-CE-1403-M. Castro's testimony and ECRMC's exceptions both admit that ECRMC ultimately agreed, as part of an eventual MOU, that ECRMC would retroactively provide the two percent increase. At that point, Teamsters withdrew Case No. LA-CE-1403-M.

II. The Laboratory Unit and the July 2021 Merit Increase

After ECRMC recognized Teamsters as the exclusive representative of the Laboratory Unit on September 18, 2020, events initially unfolded much as they had for the Technical Unit, before ultimately breaking with that past example. Teamsters began bargaining with ECRMC for the Laboratory Unit in 2021. At the outset of

⁵ ECRMC utilizes a fiscal year, which runs from July 1 to June 30 of the following year.

bargaining, Flavio Grijalva, Business Representative for Teamsters, informed ECRMC that the “status quo” would be that employees in the two new bargaining units would receive “any increases given to any other personnel in the hospital[.]” At the time, ECRMC had not announced an increase, and Grijalva was unaware of any planned increases.

On July 7, 2021, ECRMC issued a memorandum stating that unrepresented employees would receive a two percent merit increase retroactive to July 1, 2021. According to the announcement, “[a]ny pay rate increase for our bargaining unit employees shall be governed by the applicable [MOU] and/or discussed during current negotiations.” The Laboratory Unit did not receive the two percent merit increase in July 2021. After the July 7, 2021 memorandum issued, Grijalva had a telephone discussion with Castro during which Grijalva stated that he expected the status quo to be maintained and that the Laboratory employees would receive the merit increase given the other employees. Castro had a different view, which was that Laboratory employee wages must remain frozen until an MOU took effect. The ALJ asked Castro how ECRMC responded when Teamsters demanded the 2021 increase, and Castro admitted he could not recall what counteroffer ECRMC made. The parties never reached any agreement for an increase for the 2021-2022 fiscal year, and Laboratory employees accordingly never received any increase in that year or retroactive to that year.

The parties’ 2022-2025 MOU neither addresses this charge nor compensation for fiscal year 2021-2022. Article 19 of the MOU states:

“ECRMC and the Union acknowledge that during the negotiations which resulted in this MOU, each Party had

the unlimited right and opportunity to make proposals with respect to any subject or matter not removed by law from the area of the negotiations process. Therefore, ECRMC and the Union for the term of this MOU, each voluntarily and qualifiedly waive the right, and each agree that the other shall not be obligated to negotiate collectively with respect to any subject or matter whether or not referred to in this MOU, except as otherwise provided herein.”

Article 25, Section 9, provides for salary increases each year of the MOU’s term, beginning with fiscal year 2022-2023. The first increase began on the effective date of the MOU, July 27, 2022.

Teamsters filed the instant charge on February 28, 2022. OGC issued a complaint on August 9, 2022. ECRMC filed its answer on August 26, 2022. The ALJ convened a formal hearing on January 10, 2023, and the parties filed closing briefs on April 25, 2023. On June 27, 2023, the ALJ issued a proposed decision that found in the union’s favor as to the unilateral change, discrimination, and interference claims related to ECRMC’s failure to pay the July 2021 wage increase to the Laboratory Unit.

DISCUSSION

When resolving exceptions to a proposed decision, the Board applies a de novo standard of review. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 5.) However, the Board need not address alleged errors that would not affect the outcome. (*Ibid.*) Here, Part I addresses the complaint’s unilateral change claim, Part II addresses the discrimination and interference claims, Part III addresses ECRMC’s affirmative defenses, and Part IV addresses remedies.

As a threshold matter, ECRMC’s exceptions fail to mention even a single time, much less discuss, the critical unilateral change and discrimination authority on which

the ALJ relied. With respect to the unilateral change claim, there is a single dispositive issue: whether ECRMC had a sufficiently established annual wage adjustment process. The ALJ carefully analyzed that issue over seven pages, with dozens of legal citations to sixteen different decisions. Nine of these decisions were precedential authority—eight PERB decisions and one decision of the California Court of Appeal—yet ECRMC’s exceptions did not cite or discuss any of them even a single time. Seven more decisions the ALJ cited come from private sector precedent that is persuasive authority, and ECRMC’s exceptions cited only one of these seven decisions.⁶ Similarly, with respect to discrimination, the ALJ carefully analyzed precedent on facially discriminatory actions such as failing to offer or provide a pay increase to an employee group for the sole reason that they recently chose to become represented by a union. Over the course of three pages, the ALJ cited five precedential decisions—four PERB decisions and a Court of Appeal decision—but ECRMC’s

⁶ Although California public sector labor relations precedent frequently protects employee and union rights to a greater degree than does federal precedent governing private sector labor relations, PERB considers federal precedent for its potential persuasive value. (*Operating Engineers Local Union No. 3 (Wagner et al.)* (2021) PERB Decision No. 2782-M, p. 9, fn. 10; *City of Santa Monica* (2020) PERB Decision No. 2635a-M, p. 47, fn. 16; *City of Commerce* (2018) PERB Decision No. 2602-M, pp. 9-11; see also *Social Workers’ Union, Local 535 v. Alameda County Welfare Dept.* (1974) 11 Cal.3d 382, 391 [when interpreting California public sector labor relations laws, federal precedent is a “useful starting point,” but it does “not necessarily establish the limits of California public employees’ representational rights”]; *County of San Joaquin* (2021) PERB Decision No. 2761-M, pp. 24, 33, 45-48 & fn. 19 [considering private sector labor law precedent for its persuasive value while noting certain differences in California public sector labor law precedent]; *City of Bellflower* (2020) PERB Order No. Ad-480-M, p. 11 [both “statutory differences and distinct principles relevant to agencies serving the public have frequently led the Board to craft sui generis precedent”].)

exceptions fail to mention or address any of them even once. The ALJ also cited one private sector decision that is persuasive authority, and ECRMC's exceptions also do not cite or address it. We thus uphold the ALJ's analysis on defining the status quo and discrimination, first, because ECRMC has not addressed precedent cited in the proposed decision, thereby failing to preserve its arguments on these points.

However, to provide guidance to the labor management community for future cases, we exercise our discretion to summarize the ALJ's correct analysis on these issues, as supplemented by one Board decision that postdates the proposed decision.

I. Unilateral Change Analysis

To establish a prima facie case that a respondent employer made an unlawful unilateral change, a charging party union that exclusively represents a bargaining unit must prove: (1) the employer changed or deviated from the status quo; (2) the change or deviation concerned a matter within the scope of representation; (3) the change or deviation had a generalized effect or continuing impact on represented employees' terms or conditions of employment; and (4) the employer reached its decision without first providing adequate advance notice of the proposed change to the union and bargaining in good faith over the decision, at the union's request, until the parties reached an agreement or a lawful impasse. (*Bellflower Unified School District* (2021) PERB Decision No. 2796, p. 9.) Here, only the first prong is in dispute, and the outcome of the unilateral change claim hinges on correctly defining ECRMC's duty to maintain the status quo during MOU negotiations.

ECRMC claims that it would have been an unlawful change in the status quo to include Laboratory employees in the July 2021 two percent merit increase program.

However, it is categorically not an unlawful unilateral change to do exactly as the exclusive representative indicates is desired, expected, and legally required. Moreover, ECRMC ignores that the past practices that comprise the status quo are sometimes dynamic and “must take into account the regular and consistent past patterns of changes.” (*Pajaro Valley Unified School District* (1978) PERB Decision No. 51, p. 6.) Thus, “in some circumstances it will be an unfair labor practice to grant unilaterally a wage increase, but in other cases, where the status quo involves an existing wage structure calling for annual increases, it is unlawful to unilaterally deny a wage increase.” (*County of Kern* (2018) PERB Decision No. 2615-M, p. 7, fn. 8 [citations and internal quotation marks omitted].)

For a newly recognized unit such as the Laboratory Unit, there is no prior contract that defines the status quo, meaning the status quo pending negotiations “is measured by employees’ previous expectation” from the time that they were unrepresented, unless the parties agree otherwise. (*Regents of the University of California* (2023) PERB Decision No. 2884-H, p. 14, citing *Daily News of Los Angeles v. NLRB* (D.C. Cir. 1996) 73 F.3d 406, 411-414 (*Daily News*); *Liberty Telephone & Communication, Inc.* (1973) 204 NLRB 317, 318.) Employees may have an established expectation of having their wages adjusted each cycle, which must be honored pending negotiations even if they cannot know the exact wage adjustments that they are likely to receive in any given year. (*Regents of the University of California, supra*, PERB Decision No. 2884-H, p. 15, fn. 13.)

While failing to address most precedent upon which the ALJ relied, ECRMC rests its position primarily on a single decision, *Arc Bridges, Inc. v. NLRB* (D.C. Cir. 2011)

662 F.3d 1235 (*Arc Bridges*). Even had ECRMC addressed the full range of precedent the ALJ cited, *Arc Bridges* would not overcome such precedent. Indeed, in *Arc Bridges*, the appellate court noted that the employer had granted no increases whatsoever in “three of the five years immediately preceding” the alleged unilateral change. (*Id.* at p. 1239.) This means that, unlike in this case, it was simply not reasonable for employees to have a prior expectation of an annual wage increase.⁷ (See, e.g., *Pittsburg Unified School District* (2022) PERB Decision No. 2833, p. 12 [for issue that arises annually, it was appropriate to look back at the prior four years to determine if employees had a sufficient reasonable expectation to support an unwritten past practice].)

Here, there is no dispute that ECRMC established its current merit salary increase practice in 2016 and that Laboratory employees, including those who would eventually be part of the Laboratory Unit, had received annual merit increases each year from 2016 until 2021. There is no indication of significant variation in the practice from year to year, even when a worldwide pandemic arose in 2020. In these circumstances, the practice was regular and consistent enough for employees to have a reasonable expectation that the status quo would continue, meaning ECRMC had a duty to maintain that status quo unless and until it bargained to impasse or to

⁷ A longer look-back was similarly of no aid to the union in arguing for a reasonable employee expectation of an annual increase in *Arc Bridges*, *supra*, 662 F.3d 1235, as the employer had granted an annual across-the-board increase in only six of the prior fifteen years. (*Id.* at p. 1239.)

agreement with Teamsters. ECRMC therefore violated the MMBA when it changed the status quo for Laboratory Unit employees without bargaining.⁸

II. Discrimination and Interference Analysis

A. Discrimination

Under MMBA section 3506, it is unlawful to interfere with or discriminate against employees because they have exercised rights under section 3502. (See also MMBA § 3506.5, subd. (a).) The complaint in this matter alleges that refusing to provide the 2021 merit increase to Laboratory Unit employees constitutes unlawful discrimination and interference.

To prove discrimination, a charging party must prove by a preponderance of the evidence that the respondent acted with an improper motive, intent, or purpose.

(*Contra Costa Fire Protection District* (2019) PERB Decision No. 2632-M. p. 40

(*Contra Costa*).) A charging party may do so using either of two frameworks. First, under the framework set forth in *Novato Unified School District* (1982) PERB Decision No. 210 and its progeny, the charging party's prima facie case requires each of four elements: (1) one or more employees engaged in activity protected by a labor

⁸ ECRMC notes that it also excluded the Dietary Unit from its July 2021 merit increase program, yet Teamsters filed no charge for that unit. This provides no defense. Prior to 2021, the only time the issue had arisen was with respect to the Technician Unit in 2019, and Teamsters had filed a charge. Even had Teamsters not done so in 2019, acceding to a change in one case does not accede to further changes of the same type. (*County of Kern & Kern County Hospital Authority* (2019) PERB Decision No. 2659-M, p. 22, fn. 19.) Along the same lines, merely because the Laboratory and Dietary Units experienced the same unilateral change at the same time, nothing required Teamsters to include both units in its charge. We therefore affirm the ALJ's determination that Teamsters' decision not to litigate a charge for the Dietary Unit has no bearing on this case.

relations statute that PERB enforces; (2) the respondent had knowledge of such protected activity; (3) the respondent took adverse action against one or more employees; and (4) the respondent took the adverse action “because of” the protected activity, which PERB interprets to mean that the protected activity was a substantial or motivating cause of the adverse action. (*City and County of San Francisco* (2020) PERB Decision No. 2712-M, p. 15.) If the charging party establishes a prima facie case but the evidence also reveals a non-discriminatory reason for the employer’s decision, the respondent may prove, by a preponderance of the evidence as an affirmative defense, that it would have taken the exact same action even absent protected activity. (*Ibid.*) In such “mixed motive” or “dual motive” cases, the question becomes whether the adverse action would not have occurred “but for” the protected activity. (*Id.* at p. 16.)

Alternatively, if conduct facially discriminates based on protected activity, that is “discrimination in its simplest form,” and PERB may infer unlawful discrimination without further evidence of motive. (*County of San Joaquin, supra*, PERB Decision No. 2761-M, p. 27; *Los Angeles County Superior Court* (2018) PERB Decision No. 2566-C, p. 14 (*LA Superior Court*).) Common examples of facial discrimination include: (1) providing different pay, benefits, or other working conditions based explicitly on union membership or other protected activity; and (2) changing policies in response to protected activity. (*City of Yuba City* (2018) PERB Decision No. 2603-M, pp. 10-11 (*Yuba City*).) The conduct at issue may, but need not, involve disparate conduct toward different employee groups. (*Regents of the University of California*

(*Berkeley*) (2018) PERB Decision No. 2610-H, p. 81; *LA Superior Court, supra*, PERB Decision No. 2566-C, p. 15.)

If an employer extends a benefit or increase to an unrepresented employee group while withholding it from a represented employee group (or vice versa), that can establish discrimination under either or both above standards, unless the difference is legitimately based on a non-discriminatory business reason. (*Contra Costa, supra*, PERB Decision No. 2632-M, pp. 41-42.) The employer has the burden to prove that the difference is based on a non-discriminatory reason. (*Id.* at pp. 38-42 & 51-52; *Yuba City, supra*, PERB Decision No. 2603-M, pp. 11-13; *LA Superior Court, supra*, PERB Decision No. 2566-C, pp. 15-17.)

ECRMC management admitted that the sole reason the Laboratory Unit did not receive the two percent wage increase was because Teamsters became the Laboratory Unit employees' exclusive representative. Accordingly, in this case the conduct at issue is facially discriminatory. (*Contra Costa, supra*, PERB Decision No. 2632-M, pp. 40-54.) ECRMC claims that its "decision to withhold the increase in 2021 from the Laboratory unit employees was driven exclusively by its concerns in preserving the status quo." This argument is pretextual, however, and in fact establishes an unlawful motive. Had ECRMC in fact merely been concerned that granting the wage increase might be an unfair labor practice, it could have proposed the increase in bargaining. ECRMC knew, of course, that Teamsters would accept the increase, given that Teamsters had consistently demanded from the outset that Laboratory Unit employees receive the July 2021 two percent merit increase.

ECRMC's exclusive reliance on an alleged legal prohibition was thus pretextual, further demonstrating its unlawful motive.

While ECRMC has stated that its decision to withhold the increase from Laboratory Unit employees was "driven exclusively" by its alleged concerns with preserving the status quo, it has also made a post-hoc, conclusory argument that its offers in bargaining for fiscal years 2022-2023, 2023-2024, and 2024-2025 were sufficiently large that they make up for its decision to offer no wage increase in 2021-2022 based on the Laboratory Unit deciding to unionize that year. An employer making such an argument has the burden of introducing persuasive supporting evidence. (*Contra Costa, supra*, PERB Decision No. 2632-M, p. 14 & p. 15, fn. 10 [after employer declined to offer a benefit to an employee group because the group became represented, employer failed to show calculations supporting its post-hoc argument that it offered the group other compensation of equal or greater value].) Here, however, ECRMC did not show that its offers for fiscal years 2022-2023, 2023-2024, and 2024-2025 compensated for the 2021-2022 discriminatory action. Indeed, Castro was unable to provide such evidence when asked. As noted above, the ALJ asked Castro how ECRMC responded when Teamsters demanded the 2021 increase, and he admitted he could not recall what counteroffer ECRMC made. Then, ECRMC counsel unsuccessfully tried to rehabilitate Castro's testimony by asking him whether the eventual Laboratory Unit MOU took into account the 2021 increase the unit had missed. Castro, however, answered only that his "impression was yes." Such answers do not satisfy ECRMC's burden.⁹

⁹ An employer claiming that greater increases in later years make up for a

B. Interference

While both our unilateral change and discrimination findings create derivative interference liability, even were we to consider interference as an independent claim as it is alleged in the complaint, we would still find a violation. To establish a prima facie interference case, a charging party must show that an employer's conduct tends to or does result in some harm to protected union and/or employee rights. (*City of San Diego* (2020) PERB Decision No. 2747-M, p. 36 (*San Diego*).) A charging party need not establish that the employer acted because of an unlawful motive. (*Claremont Unified School District* (2019) PERB Decision No. 2654, p. 20.)

If a charging party establishes a prima facie case, the burden shifts to the employer. (*San Diego, supra*, PERB Decision No. 2747-M, p. 36.) The degree of harm dictates the employer's burden. (*Ibid.*) If the harm is "inherently destructive" of protected rights, the employer must show that the interference results from circumstances beyond its control and that no alternative course of action was available. (*Ibid.*) For conduct that is not inherently destructive, the respondent may attempt to justify its actions based on operational necessity. (*Ibid.*) In such cases,

decision not to provide one in an earlier year has an added burden in explaining a nondiscriminatory business reason for providing benefits later than it would have otherwise, and to a somewhat different group of employees due to normal staff turnover. As a result, such evidence may impact the proper remedy without providing a defense to liability. As discussed *post*, in this case the ALJ took the later wage increases into account in his decision to direct ECRMC to pay the two percent increase for only a single year rather than on an ongoing basis, and we express no opinion on that limitation given that Teamsters has filed no exception to it. Thus, while the ALJ did not accept ECRMC's argument as a defense against liability, the ALJ partially agreed with ECRMC in finding that payment of a single year's wages would effectuate the MMBA's purposes.

PERB balances the asserted business need against the tendency to harm protected rights; if the tendency to harm outweighs the necessity, PERB finds a violation. (*Ibid.*) Within the category of actions or rules that are not inherently destructive, the stronger the tendency to harm, the greater is the respondent's burden to show its business need was important and that it narrowly tailored its actions or rules to attain that purpose while limiting harm to protected rights as much as possible. (*Id.* at pp. 36-37, fn. 19.)

Here, the harm is well established. Not only did Laboratory Unit employees miss out on an entire year's pay increase, but ECRMC's action tends to chill future protected activity by sending the message that it will not honor its traditional pay practices while bargaining an initial MOU. ECRMC's claim that it was driven by alleged concerns with preserving the status quo does not constitute a legitimate and substantial business justification for failing to pay the Laboratory Unit employees the July 2021 two percent wage increase. ECRMC's admission to the harmful conduct – the failure to pay the July 2021 increase – therefore easily outweighs ECRMC's justification. This conduct interfered with Teamsters' right to represent its members, which is unlawful under MMBA section 3506.5, subdivision (b) and PERB Regulation 32603, subdivision (b). (*County of Orange* (2018) PERB Decision No. 2611-M, p. 21.)

III. Affirmative Defense Analysis

At different points in these proceedings, ECRMC asserted the six-month statute of limitations, laches, and waiver as affirmative defenses. However, we agree with the ALJ that ECRMC failed to establish any of these defenses.

ECRMC does not challenge the ALJ's rejection of the statute of limitations defense and for that reason we leave undisturbed the ALJ's determination that because ECRMC did not properly raise this affirmative defense, the merits of this defense will not be considered.

ECRMC does, however, argue in its closing brief that it "timely [pled] an affirmative defense regarding the Union's failure to timely file the Charge" because it asserted the affirmative defense of laches in its answer. ECRMC raises the laches and waiver defenses again in its exceptions. However, we agree with the ALJ and find ECRMC's position to be without merit.

To establish laches, a respondent must show that: (1) the charging party unreasonably delayed in prosecuting its case, and (2) either the charging party acquiesced in the acts about which it complains, or the respondent suffered prejudice from the charging party's unreasonable delay. (*Santa Ana Unified School District* (2017) PERB Decision No. 2514, p. 22.) ECRMC fails to establish support for either of these elements, and so the affirmative defense of laches is unfounded.

ECRMC has also filed exceptions arguing that Teamsters waived its right to bargain over the 2021 merit increase because the terms of the 2022-2025 MOU included separate (and higher percentage) wage increases. However, as discussed above, Teamsters met its burden of proving that ECRMC's decision to deny the 2021 merit increase to employees in the Laboratory Unit constituted a unilateral change without bargaining in good faith to impasse or agreement. As the ALJ found, waiver by agreement must be clear and unmistakable, and the agreement here does not come close to that standard, since it does not mention this charge, or the missed wage

increase in fiscal year 2021-2022. We similarly affirm the ALJ's conclusions that:

(1) Article 19 of the MOU could not possibly authorize ECRMC to unilaterally change wages in 2021, and (2) Teamsters could not have committed a waiver by failing to demand bargaining. Rather, Teamsters had no obligation to demand bargaining after ECRMC already made a firm decision to unilaterally change the status quo for Laboratory Unit employees. (*County of Santa Clara* (2013) PERB Decision No. 2321-M, p. 24, citing *State of California (Department of Personnel Administration)* (1999) PERB Decision No. 1313-S, pp. 6-7.) This is because "good faith bargaining is not possible when [the] employer has already 'imposed the very terms under discussion, thereby forcing the union to start from a position of having to talk the employer back to the status quo.'" (*County of Merced* (2020) PERB Decision No. 2740-M, pp. 22-23, quoting *City of San Ramon, supra*, PERB Decision No. 2571-M, p. 6.)

For these reasons, ECRMC has not established any affirmative defenses for its conduct.

IV. Remedies

We affirm the proposed remedies ordered by the ALJ, with one modification. In the proposed decision, the ALJ ordered, *inter alia*, that ECRMC compensate with backpay all current and former Laboratory Unit employees who had commenced employment before January 1, 2021, for an amount equal to two percent of any wages earned between July 4, 2021 and July 26, 2022, augmented by interest at a rate of seven percent per annum.¹⁰ Based on the following analysis, we have determined that

¹⁰ In the absence of any exceptions from the Teamsters, we express no opinion

compound daily interest, rather than the rate of simple interest at seven percent per annum, is appropriate in this case and all future cases where interest is awarded.¹¹

The MMBA grants PERB broad discretion to order remedies necessary to effectuate the policies and purposes of the Act. (*County of Lassen* (2018) PERB Decision No. 2612-M, p. 7.) “Back pay, front pay and/or other monetary awards, plus interest, are an ordinary part of Board-ordered remedies where necessary to compensate injured parties or affected employees for out-of-pocket losses caused, in whole or in part, by an unfair practice.” (*Sonoma County Superior Court* (2017) PERB Decision No. 2532-C, p. 42 [conc. & dis. opn. of Banks, M., citing *Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262 (*Fairfield-Suisun*), pp. 18-19; *Los Angeles Unified School District* (2001) PERB Decision No. 1469, pp. 5-6, 11; *San Ysidro School District* (1997) PERB Decision No. 1198, p. 5; *Fresno County Office of Education* (1996) PERB Decision No. 1171, pp. 7-8, and proposed decision at pp. 1-2].) It is well established that PERB awards interest on monetary damages ordered as part of a make whole remedy. (*State of California (Correctional Health*

on whether Teamsters had a colorable argument that the two percent wage increase should continue indefinitely unless and until lawfully changed by agreement or following an impasse, as in *Contra Costa, supra*, PERB Decision No. 2632-M. We do affirm, however, the ALJ’s correct analysis that while it is impossible to know what the parties would have bargained for 2022-2025 wages if ECRMC had complied with the law in 2021, we construe such uncertainty against the wrongdoer that created it, provided it is possible to estimate losses. (*City of Pasadena* (2014) PERB Order No. Ad-406-M, p. 27.)

¹¹ We have discretion to reverse a proposed decision or administrative determination even on issues as to which neither party appealed, and we exercise that discretion with respect to interest calculation methods. (*Oakland Unified School District* (2023) PERB Decision No. 2875, p. 9.)

Care Services) (2021) PERB Decision No. 2760-S, pp. 48-49, fn. 31.) Moreover, remedial awards should make injured parties whole and deter future interference and discrimination. (*County of San Joaquin v. PERB* (2022) 82 Cal.App.5th 1053, 1068.)

Past PERB decisions note, relying on judicial precedent, that administrative agencies like PERB are not bound by the seven percent simple interest rate specified in article XV, section 1 of the California Constitution. (*San Ysidro School District, supra*, PERB Decision No. 1198, p. 5; *Regents of the University of California* (1997) PERB Decision No. 1188-H, pp. 33-35.) PERB has typically awarded simple interest at seven percent per annum, but in two recent cases the Board has indicated it may shift to daily compound interest.

First, in *Bellflower Unified School District* (2022) PERB Decision No. 2544a (*Bellflower*), the Board addressed a variety of remedial issues on appeal from a compliance decision. Among the issues on appeal were the interest owed to several employees who had been unlawfully laid off. (*Id.* at pp. 41-44.) In considering the interest owed, the Board noted that the National Labor Relations Board (NLRB) adopted compound interest in 2010. (*Id.* at p. 41, fn. 23, citing *Kentucky River Medical Center* (2010) 356 NLRB 6 (*Kentucky River*).) The Board did not consider the issue in *Bellflower* because, during litigation, the parties in that matter stipulated to simple interest. (*Bellflower, supra*, PERB Decision No. 2544a, p. 41, fn. 23.) In a decision that followed *Bellflower*, the Board again flagged the issue while saving it for a future case because the parties reached an agreement mooted their dispute. (*Tahoe-Truckee Sanitation Agency* (2022) PERB Decision Number 2826-M, pp. 2-4.)

Bellflower, *supra*, PERB Decision No. 2544a specifically contemplates PERB's eventual adoption of the compound interest standard. To that end, *Bellflower* adopted a comprehensive set of instructions for interest calculations which include directions for compound interest.¹² For instance, *Bellflower* explained the use of an interest calculator and typical interest accrual (*id.* at pp. 41-43) and instructed that if calculating compound interest, one must input the compounding frequency into an interest calculator. (*Id.* at p. 42, fn. 25.)

It should come as no surprise, then, that today the Board adopts a policy which directs that interest on backpay and other monetary make-whole remedies is to be compounded daily. It is evident that remedial delay harms employees, but the policy we announce today, directing the augmentation of monetary awards by daily compounding interest, will reduce that harm by more accurately compensating employees for that inherent delay. When an employer wrongfully withholds wages – whether, for example, due to retaliatory discharge or failure to increase wages as required by the status quo – employees suffer actual consequences. Employees often face financial hardship as a direct result of an employer's misconduct, such as falling into debt to meet daily expenses, drawing down savings or retirement funds (and having to pay penalties to access those funds), or even missing mortgage or rent

¹² *Bellflower* includes one error which we now correct: in its discussion of interest, that decision noted that “the ending accrual date is normally the date on which an employee resumes work after accepting a reinstatement offer or declines reinstatement.” (*Bellflower*, *supra*, PERB Decision No. 2544a, p. 42.) But the date on which an employee resumes work after accepting a reinstatement offer or declines reinstatement is when new damages normally stop accruing. In contrast, interest on an amount owed stops accruing on the date of payment.

payments. The aim of including interest on monetary awards is to make affected employees whole (*California School Employees Association, Chapter 258 (Gerber)* (2001) PERB Decision No. 1472, p. 2), and daily compounding interest more closely compensates employees for their losses.

Additionally, to the extent that monetary remedies can deter employers from engaging in harmful conduct, daily compounding interest is preferable to simple interest. While our goal is to implement a policy that will more fully compensate victims of unfair practices, an additional advantage of awarding daily compounding interest is that it will, ideally, cause employers to comply with their legal obligations more carefully.

In addition to better serving the remedial policies of the Board, compound interest, not simple interest, is the norm in many sectors and forums, including credit card debt and private lending, and is used by the Internal Revenue Service and the NLRB. In 2010, the NLRB began including daily compound interest on all monetary relief. (*Kentucky River, supra*, 356 NLRB 6.) As noted above, California public sector labor relations precedent frequently protects employee and union rights to a greater degree than does federal precedent governing private sector labor relations, though we consider federal precedent for its potential persuasive value. (*Operating Engineers Local Union No. 3, AFL-CIO (Wagner, et al.)*, *supra*, PERB Decision No. 2782-M, p. 9, fn. 10.)

When the NLRB adopted daily compound interest, it reasoned that the change was in line with its “judicially-approved, evolutionary approach to remedial issues involving interest on backpay awards.” (*Kentucky River, supra*, 356 NLRB at p. 6.) The

NLRB concluded that compound interest better effectuates make-whole remedies than the traditional practice of ordering only simple interest, and that, for the same reasons, interest should be compounded on a daily basis, rather than annually or quarterly. (*Id.* at p. 8.) The NLRB further noted that daily compounding conforms to commercial practice, is used under the Internal Revenue Code and the Back Pay Act, and serves to deter the commission of unfair labor practices. (*Id.* at p. 9.)

While not all of the NLRB's reasons for embracing compound interest hold true at PERB, the NLRB's most compelling policy reason is equally applicable to PERB's enforcement of unfair practice remedies in the California public sector, that is, ensuring the completeness of make-whole relief. As the NLRB reasoned:

“The purpose of interest is to compensate the [employee] for the loss of use of his or her money.’ Money, of course, has a time value: it is more valuable today than it is tomorrow—or next year. ‘If justice were immediate, there would never be an award of . . . interest;’ instead, because justice takes time—and sometimes, as students of the Board know, a long time—‘interest is added to the original judgment to ensure that compensation is complete.’ Since 1962, the Board has recognized that an award of interest is integral to achieving the make-whole purpose of a backpay award, consistent with the Supreme Court’s characterization of backpay as ‘an indebtedness arising out of an obligation imposed by statute,’ and in the years that followed, the Board has sought to measure the time value of money more fairly and accurately by adjusting the interest rate paid on backpay awards.”

(*Kentucky River, supra*, 356 NLRB at p. 8, internal citations omitted.)

The NLRB further noted that daily compound interest “will lead to more fully compensatory awards of interest and thus come closest to achieving the make-whole purpose of the remedy.” (*Kentucky River, supra*, 356 NLRB at p. 9, citations omitted.)

PERB has also categorically determined that fully compensatory make-whole remedies are key. For instance, there is no question that where an employer does not fulfill its decision bargaining obligation, PERB's standard remedy includes rescission and make whole relief. (*Lodi Unified School District* (2020) PERB Decision No. 2723, p. 20; see also *County of Kern & Kern County Hospital Authority*, *supra*, PERB Decision No. 2659-M, pp. 16-19 & 26-27.)

For these reasons, we adopt a new policy under which interest on back compensation of all types will be compounded on a daily basis. Consistent with the Board's practice, we will apply this policy retroactively in this case and in all pending cases in whatever stage, given the absence of any manifest injustice in doing so.

ORDER

Based on the foregoing and the entire record in this case, the Public Employment Relations Board (PERB) finds that El Centro Regional Medical Center (ECRMC) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq., by unilaterally denying a 2021 two percent merit salary increase to employees in the Laboratory Unit represented by Teamsters Local 542 (Teamsters), thereby changing the status quo without notice and an opportunity to bargain, discriminating against Laboratory Unit members because they elected to become represented by Teamsters, and interfering with rights the MMBA protects.

Pursuant to MMBA section 3509, it hereby is ORDERED that ECRMC, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Unilaterally changing wages for Laboratory Unit employees.

2. Discriminating against Laboratory Unit employees because they chose to become represented by Teamsters.

3. Denying Teamsters' right to represent Laboratory Unit employees.

4. Interfering with Laboratory Unit employees' right to be represented by Teamsters.

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

1. Compensate with backpay all current and former Laboratory Unit employees who had commenced employment before January 1, 2021, with an amount equal to two percent of any wages earned between July 4, 2021 and July 26, 2022, augmented by interest accrued to the date of payment at an annual rate of seven percent, compounded daily.

2. Within 10 workdays after this decision is no longer subject to appeal, post at all ECRMC locations where notices to employees in the Laboratory Unit are posted, copies of the Notice attached hereto as an Appendix. An authorized agent of ECRMC must sign the Notice, indicating that ECRMC will comply with the terms of this Order. ECRMC shall maintain the posting for a period of 30 consecutive workdays. ECRMC shall take reasonable steps to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material. In addition to physically posting this Notice, ECRMC shall communicate it by electronic message, intranet, internet site, and other electronic means ECRMC uses to communicate with employees in the Laboratory Unit.¹³

¹³ Either party may ask PERB's Office of the General Counsel (OGC) to alter or

3. Notify OGC of the actions ECRMC has taken to follow this Order by providing written reports as directed by OGC and concurrently serving such reports on Teamsters.

Members Krantz and Paulson joined in this Decision.

extend the posting period, require further notice methods, or otherwise supplement or adjust this Order to ensure adequate notice. Upon receipt of such a request, OGC shall solicit input from all parties and, if warranted, provide amended instructions to ensure adequate notice.



**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. LA-CE-1566-M, *Teamsters Local 542 v. El Centro Regional Medical Center*, in which all parties had the right to participate, the Public Employment Relations Board found that the El Centro Regional Medical Center (ECRMC) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq.

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

A. CEASE AND DESIST FROM:

1. Unilaterally changing wages for Laboratory Unit employees.
2. Discriminating against Laboratory Unit employees because they chose to become represented by Teamsters Local 542 (Teamsters).
3. Denying Teamsters' right to represent Laboratory Unit employees.
4. Interfering with Laboratory Unit employees' right to be represented by Teamsters.

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

Compensate with backpay all current and former Laboratory Unit employees who had commenced employment before January 1, 2021, with an amount equal to two percent of any wages earned between July 4, 2021 and July 26, 2022, augmented by interest accrued to the date of payment at an annual rate of seven percent, compounded daily.

Dated: _____

El Centro Regional Medical Center

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.