STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

COMMERCE CITY EMPLOYEES ASSOCIATION, AFSCME, LOCAL 773, Charging Party, v. CITY OF COMMERCE, Respondent.	Case No. LA-CE-1098-M PERB Decision No. 2602-M December 11, 2018

Appearances: Rothner, Segall & Greenstone by Jonathan Cohen, Attorney, for Commerce City Employees Association, AFSCME, Local 773; Eduardo Olivo, City Attorney, for City of Commerce.

Before Winslow, Shiners, and Krantz, Members.

DECISION

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on the City of Commerce's (City) exceptions to the attached proposed decision of an administrative law judge (ALJ). The ALJ found that the City violated the Meyers-Milias-Brown Act (MMBA)[1] when its attorney interviewed two employees who the Commerce City Employees Association, AFSCME Local 773 (Association) had subpoenaed to testify in an arbitration hearing. Specifically, the ALJ concluded that the interviews were unlawful because the City: (1) failed to notify the employees that the interviews were voluntary and that if they chose to participate, the City would not impose any consequences based on their answers or on their refusal to answer any of the questions; and (2) used the interviews to inquire into the Association's arbitration strategy.

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

In its exceptions, the City principally claims that the ALJ erred by relying on *State of California (Department of Corrections)* (1995) PERB Decision No. 1104-S (*Corrections*), or, in the alternative, that we should overrule that case and follow certain federal case law instead. We reject these arguments and the remainder of the City's exceptions, and adopt the proposed decision, subject to our discussion below.[2]

BACKGROUND

The facts of this case are largely undisputed and fully set forth in the attached proposed decision. We provide only a brief summary here for context.

The Association filed a grievance over the City's decision to terminate a member of the Association's bargaining unit, Sergio Mejia (Mejia). The grievance proceeded to arbitration, which was scheduled for two non-consecutive days. Following the first day of hearing, the Association requested that the arbitrator issue subpoenas for two other bargaining unit members, Jose Castillo (Castillo) and Ramona Thomas (Thomas), to testify at the second day of hearing. The arbitrator granted the request. When informed of the subpoenas, Stephen Frieder (Frieder), the attorney representing the City in the arbitration, announced his intention to interview Castillo and Thomas. Pete Schnaufer (Schnaufer), the Association's representative, objected. Frieder replied that he would proceed with the interviews two days later unless Schnaufer provided authority that would prevent the City from conducting the interviews. Schnaufer never responded.

Meanwhile, Castillo and Thomas were informed of the interviews and that they would be released early from their scheduled shifts. At their interviews, both employees were

[2] We also deny the City's request for oral argument. The issues before us are sufficiently clear that oral argument is unnecessary. (See *County of Riverside* (2018) PERB Decision No. 2573-M, p. 2, fn. 2.)

represented by Association President Kevin Larsen, who did not offer any further objection. Frieder told Castillo and Thomas the purpose of the interviews, but Frieder did not assure them that the interviews were voluntary and that if they chose to participate, the City would not impose any consequences based on their answers or on their refusal to answer any of the questions. Frieder proceeded to question Castillo and Thomas regarding their knowledge of the events leading to Mejia's termination. Frieder admitted that he asked Castillo whether he knew why the Association was calling him as a witness; he also admitted that he "may have" asked the same question of Thomas. Castillo responded that he did not know.

On the second day of the arbitration hearing, Schnaufer informed the arbitrator of the City's interviews, but said the Association would be taking the issue to PERB. Schnaufer ended up not calling either Thomas or Castillo as witnesses. The arbitration concluded, and Mejia's termination was ultimately upheld.

DISCUSSION

I. The Merits

The complaint alleges interference with employee rights and denial of the Association's rights to represent its members. In such a case, the charging party must demonstrate that the employer's conduct tends to or does interfere with rights protected by the MMBA; the burden then shifts to the employer to articulate a legitimate justification for its conduct. (*County of San Bernardino (Office of the Public Defender)* (2015) PERB Decision No. 2423-M, p. 36.) Our scrutiny of the employer's justification depends on the severity of the harm to protected rights. If the harm is slight, a violation will be found unless the employer's business justification outweighs that harm. (*Stanislaus Consolidated Fire Protection District* (2012) PERB Decision No. 2231-M, pp. 22-23.) If the employer's conduct is, instead, inherently

destructive of protected rights, it "'will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available.'" (*Id.* at p. 23, quoting *Carlsbad Unified School District* (1979) PERB Decision No. 89.)

The ALJ determined that Castillo and Thomas were participating in protected activity by supporting the Association's grievance on behalf of Mejia. (Proposed decision (PD), p. 6, citing *Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M, p. 15.) The City claims that the Association's subpoenas of Castillo and Thomas indicate that their participation was compelled rather than voluntary, and so they were not actually engaged in protected activity. Notably, however, the Board has held that a prima facie case of interference may be stated without evidence that an employee has already engaged in protected activity, so long as the employer's conduct has a tendency to deter future protected activity. (See *Petaluma City Elementary School District* (2018) PERB Decision No. 2590, p. 4; see also *Los Angeles County Federation of Labor v. County of Los Angeles* (1984) 160 Cal.App.3d 905, 908.)

The ALJ likely saw fit to determine whether Castillo and Thomas had engaged in protected activity before they were interviewed by Frieder because he applied a slightly different version of the interference test, based on *Public Employees Association of Tulare County, Inc. v. Board of Supervisors of Tulare County* (1985) 167 Cal.App.3d 797 (*Tulare*). In that case, the court described the three elements "to establish an interference violation of [MMBA] section 3506": "(1) That employees were engaged in protected activity; (2) that the employer engaged in conduct which tends to interfere with, restrain or coerce employees in the exercise of those activities, and (3) that employer's conduct was not justified by legitimate business reasons." (*Id.* at p. 807.)

As we recently noted, *Tulare* can be read to suggest that "employees must have engaged in protected activity before the employer took action that 'tends to interfere with, restrain, or coerce employees in the exercise of those activities.'" (*Los Angeles County Superior Court* (2018) PERB Decision No. 2566-C, pp. 24-25, fn. 17, quoting *Tulare*, *supra*, 167 Cal.App.3d 797, 807.) But as we explained, *Tulare* does not consider, much less purport to reject, the line of authority finding interference based on conduct that tends to deter future protected activity, without a showing that employees previously engaged in protected activity. (*Ibid.*) Because we do not interpret *Tulare* to require in all cases a showing that employees have previously engaged in protected activity, it is of no consequence in this case whether Castillo and Thomas had engaged in protected activity when they were summoned for the interview with Frieder.[3]

Turning to whether the City's conduct tends to harm employee rights, the ALJ determined that Frieder's interviews of Castillo and Thomas caused at least slight harm to their rights and those of the Association "by creating a chilling effect on employee participation in the grievance process" (PD, pp. 6-7, citing *County of Merced* (2014) PERB Decision No. 2361-M, p. 11), and that this harm was not outweighed by the City's legitimate interest in preparing for the arbitration. According to the ALJ, the City went astray in two ways proscribed by *Corrections*, *supra*, PERB Decision No. 1104-S. First, the City failed to assure Castillo and Thomas that their participation was voluntary and that if they chose to participate, the City would not impose any consequences based on their answers or on their refusal to answer any of the questions. Second, the City asked Castillo and Thomas if they knew why

[3] In any event, it is commonplace for a union to subpoena employee witnesses to ensure their release from work. Thus, the mere fact that Castillo and Thomas had been subpoenaed does not mean they were not engaged in protected activity.

the Association was calling them as witnesses. The City excepts to both conclusions, and we address each in turn.

Assurances

The City primarily argues that *Corrections, supra*, PERB Decision No. 1104-S, did not require the City to offer assurances to Castillo and Thomas before the interview. The City claims the ALJ erred by reading *Corrections* as adopting those requirements from *Johnnie's Poultry Company* (1964) 146 NLRB 770, enf. den. (8th Cir. 1965) 344 F.2d 617 (*Johnnie's Poultry*).[4] The City maintains that although the proposed decision in *Corrections* applied *Johnnie's Poultry*, the Board did not adopt that portion of the proposed decision.

The ALJ rejected this argument, and so do we. As the ALJ explained, the Board in *Corrections, supra*, PERB Decision No. 1104-S, affirmed without qualification the proposed decision's conclusions of law. This necessarily included the proposed decision's conclusion that the employer failed to provide the *Johnnie's Poultry* warnings. The Board only disagreed with the proposed order, which directed the employer to cease "[i]nterfering with [the union's] right to represent employees by interviewing [union] witnesses without first advising them

[4] In *Johnnie's Poultry, supra*, 146 NLRB 770, the NLRB acknowledged that an employer may have legitimate reasons for questioning employees about their protected activity, but must observe certain safeguards to mitigate "the inherent danger of coercion":

> the employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees.

(*Id.* at pp. 774-775, footnotes omitted.)

such interview is voluntary and free from reprisal," and to "[i]nform potential [union] witnesses that any interview is voluntary on the part of the witness and shall be free from any reprisal." (*Corrections*, *supra*, proposed decision at p. 22.) The Board concurred with the employer's exception, stating: "Given the particular facts in this case, the remedy of the ALJ is overly broad and we modify it to eliminate the prerequisite that witnesses be informed that interviews are voluntary and free of reprisal." (*Id.* at p. 4.) Thus, the *Corrections* Board chose a less specific remedy based on the unique facts of the case, but did not explain its concern about the overbreadth of the proposed order. In the absence of an explanation, the revised remedy cannot be read as modifying the proposed decision's legal conclusions or its reliance on *Johnnie's Poultry*. Therefore, we conclude that *Corrections* did adopt *Johnnie's Poultry*.

That conclusion requires us to answer the City's invitation to overrule *Corrections*, *supra*, PERB Decision No. 1104-S, and follow certain federal law. We decline. The rule articulated in *Corrections*—that an employer wishing to interview exclusively represented unit members in advance of an adversarial hearing must follow the *Johnnie's Poultry* safeguards—is sound. We affirm it for the reasons explained below.

The City relies in particular on *Cook Paint & Varnish Company v. NLRB* (D.C. Cir. 1981) 648 F.2d 712 (*Cook Paint*), in which a divided panel held, contrary to the National Labor Relations Board (NLRB), that an employer is generally permitted to interview a union's arbitration witnesses under threat of discipline. The majority observed that pre-arbitration interviews "are a matter of routine practice in many sectors of industrial relations" and presumed that those interviews "are conducted by advocates in preparation for a pending arbitration without any infringement of protected employee rights." (*Id.* at p. 720.) Accordingly, the majority held, "the legality of pre-arbitration interviews is generally a

contractual matter to be determined by the parties in establishing a grievance-arbitration procedure, subject only to the normal restraints imposed by the [National Labor Relations] Act that employer conduct not be unlawfully coercive in a particular case." (*Ibid*.) The majority believed that such interviews give an employer more information with which to evaluate the strengths and weaknesses of its case, and therefore promote voluntary resolution of the dispute. (*Id.* at p. 721.)[5]

Judge J. Skelly Wright, dissenting, took a different view. He found the balance of employee rights and employer interests in pre-arbitration interviews to be "closely analogous" to that in interviews conducted before NLRB hearings—in which the *Johnnie's Poultry* safeguards apply—and would have deferred to the NLRB's judgment in balancing the employer's interests against the danger of coercion. (*Cook Paint, supra*, 648 F.2d 712, 732 (dis. opn. of Wright, J.).) In particular, Judge Wright endorsed the NLRB's view that an employer's legitimate need to investigate employee wrongdoing is diminished by the time the dispute reaches arbitration:

> [A]fter an employer has imposed disciplinary sanctions and a dispute has been submitted to arbitration, an employer who threatens his employees with suspension or dismissal for noncooperation in a discovery interview "moves into the arena of seeking to vindicate its disciplinary decision and of discovering the union's arbitration position, and moves away from the legitimate concern of maintaining an orderly business operation."

(*Id.* at p. 729.) Judge Wright also acknowledged "the difficulty of demonstrating coercive effects in a particular case" and applauded the NLRB's rule for its "simplicity and

[5] The majority also acknowledged that "[a]n employer also may be prohibited from prying into union activities, or using the interview as an excuse to discover union strategies for arbitration." (*Cook Paint, supra*, 648 F.2d 712, 722.) As explained below, the City agrees that *Corrections, supra*, PERB Decision No. 1104-S, adopted this rule, and that it remains good law.

enforceability." (*Id.* at p. 733.) He went on to criticize the majority for suggesting that "coercion is itself a proper and accepted mechanism of information procurement, which should be upheld on policy grounds as conducive, at least indirectly, to the settlement of labor grievances." (*Id.* at p. 734.) And he noted that the NLRB's rule, unlike the court majority's, "serves to place [labor and management] in positions of practical as well as theoretical equality," since "an employee has no effective means of coercing an employer to comply with its discovery requests prior to arbitration," while an employer "will, as a practical matter, frequently be able to use the threat of discipline or dismissal to extract information . . . from an unwilling employee." (*Id.* at p. 735.)

In addition to *Cook Paint,* the City claims support for its position in *Pacific Southwest Airlines, Inc.* (1979) 242 NLRB 1169 (*Pacific Southwest*). In that case, the NLRB deferred to an arbitrator's decision that an employer was permitted to discipline an employee for refusing to participate in a pre-arbitration interview. In the course of determining that the decision was "not clearly repugnant to the purposes and policies of the [National Labor Relations] Act," the NLRB rejected the argument that the *Johnnie's Poultry* safeguards applied to such an interview. (*Id.* at p. 1170, fn. 4.)

When asked to follow private-sector authority, we must determine whether the underlying reasoning is consistent with the language and policies of our statutes. (*Capistrano Unified School District* (2015) PERB Decision No. 2440, p. 35.) Here, *Cook Paint* and *Pacific Southwest* are not consistent with the language or policies of the MMBA, and we decline to follow them.

To begin with, *Cook Paint* and *Pacific Southwest* interpret a statutory scheme, the National Labor Relations Act (NLRA), that gives employee organizations weaker protections

than does the MMBA. The MMBA grants recognized employee organizations "the right to represent their members in their employment relations with public agencies." (§ 3503.) As we have recognized, this right is not included in the NLRA. (*Sonoma County Superior Court* (2015) PERB Decision No. 2409-C, pp. 10-11; *Redwoods Community College District* (1983) PERB Decision No. 293, pp 5-6.) Thus, "[f]ederal authorities are a useful starting point, but they do not establish the boundaries of public employees' representational rights." (*Rio Hondo Community College District* (1982) PERB Decision No. 272, adopting proposed decision at p. 27 (*Rio Hondo*).)

In addition to *Corrections*, *supra*, PERB Decision No. 1104-S—which is based entirely on the right to represent employees (*id.* at p. 5)—other of our cases have interpreted our statutes to give employee organizations robust rights to represent employees. This is particularly so with respect to the subject of this case: grievance procedures. The Board has recognized that "[t]he grievance procedure is perhaps the most important point at which employee organizations represent their members in their day-to-day employment relations." (*Modesto City Schools* (1983) PERB Decision No. 291, p. 28.) The right to represent includes representing employees in grievances, and it gives employees a concurrent right to be represented by the employee organization in the grievance process. (*Rio Hondo*, *supra*, PERB Decision No. 272, pp. 6-7.) The right to represent also protects an employee organization's efforts to investigate potential grievances. (*State of California (Department of Corrections & Rehabilitation)* (2012) PERB Decision No. 2285-S, pp. 9-10.) And an exclusive representative, such as the Association in this case, has a statutory right "to file grievances in its own name." (*Omnitrans* (2009) PERB Decision No. 2010-M, p. 2 & proposed decision at p. 5.) *Cook Paint* and *Pacific Southwest* did not consider these important organizational rights,

which are absent from the NLRA, and their legal conclusions are therefore not consistent with the language of the MMBA.

Nor are *Cook Paint* and *Pacific Southwest* consistent with the MMBA's purposes. The broad purposes of the MMBA include promoting: (1) "full communication between public employers and their employees"; and (2) "the improvement of personnel management and employer-employee relations within the various public agencies in the State of California." (§ 3500.)

Cook Paint rests largely on policy concerns in favor of pre-arbitration discovery, but for many of the reasons explained in Judge Wright's dissent, we do not find the majority's reasoning persuasive. While negotiated pre-arbitration discovery may be desirable for facilitating settlement (not to mention promoting efficient and expeditious arbitration hearings), this does not compel the kind of one-sided, extra-contractual default rule that *Cook Paint* endorsed: a rule under which the employer may conduct a pre-arbitration interview under threat of discipline, but the union, which cannot compel interviews of management witnesses, may not. More consistent with the MMBA's purposes is a rule requiring employers to follow the *Johnnie's Poultry* safeguards if they wish to interview exclusively represented unit members in advance of an adversarial hearing. This rule places the parties on more equal footing and encourages good faith bargaining over mutual pre-arbitration discovery rights.

We also agree with Judge Wright that *Cook Paint* gives short shrift to the inherent danger of coercion in a pre-arbitration interview. It takes courage to testify against one's employer in an arbitration hearing; allowing the employer to interview an employee concerning the matter under threat of discipline has a self-evident tendency to deter employee

participation in the arbitration process. The *Cook Paint* majority's enthusiasm for pre-arbitration discovery and settlement blinded it to that undeniable fact.

As for *Pacific Southwest, supra*, 242 NLRB 1169, that case declared without analysis that *Johnnie's Poultry* does not apply to pre-arbitration interviews. It is therefore no more persuasive than *Cook Paint*.

We further observe that federal law is not monolithic on this issue. Although the issue has apparently never been reconsidered by the NLRB,[6] the Federal Labor Relations Authority (FLRA) has not followed *Cook Paint*.[7] Rather, the FLRA has adopted the *Johnnie's Poultry* safeguards for "fact-gathering" interviews initiated by the employer in advance of a third-party proceeding, albeit without citing *Johnnie's Poultry*. (*Internal Revenue Service & Brookhaven Service Center* (1982) 9 FLRA 930, 933 (*Brookhaven*).)[8] The FLRA has also cited Judge Wright's *Cook Paint* dissent for the proposition that a pre-arbitration interview "can be

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[6] The NLRB may decide either to acquiesce to the contrary views of the federal circuit courts or to maintain its position until the disagreement is resolved by the United States Supreme Court. (*Capistrano Unified School District, supra*, PERB Decision No. 2440, p. 33.) The NLRB accepted the D.C. Circuit's remand in *Cook Paint*, "recognize[d] the court's decision as binding for the purposes of deciding [the] case," and issued a decision finding a violation on narrower grounds. (*Cook Paint & Varnish Co.* (1981) 258 NLRB 1230.) The City does not cite, and we have not discovered, any subsequent NLRB cases on point.

[7] The FLRA enforces the Federal Service Labor Management Relations Statute, 5 U.S.C. § 7101 et seq., which guarantees collective bargaining rights for certain federal government employees.

[8] The types of third-party proceedings to which this rule applies include FLRA and arbitration hearings (*Brookhaven, supra*, 9 FLRA 930, 933.), and disciplinary appeal hearings in which an employee is represented by the union (*Veterans Admin. Med. Ctr. Long Beach, California* (1991) 41 FLRA 1370, 1383, enf. (9th Cir. 1994) 16 F.3d 1526, 1528; *Gen. Services Admin.* (1995) 50 FLRA 401, 406 [*Brookhaven* safeguards not required when the disciplinary appeal hearing concerns an employee not represented by the union, and the proceeding does not otherwise concern protected activity].)

inherently coercive of employees' . . . rights." (*U.S. Dep't of Commerce Patent & Trademark Office* (1991) 41 FLRA 795, 829.)

In fact, the D.C. Circuit departed from *Cook Paint*'s reasoning just four years later, while reviewing an FLRA decision. Without citing *Cook Paint*, the court recognized the inherent danger of coercion arising in an employer-mandated interview before a disciplinary hearing, although in the slightly different context of whether the union had a right to be present: "When an employer interviews an adverse witness rather than his own or even a neutral witness, common sense suggests that the situation carries a greater potential for intimidation or coercion." (*National Treasury Employees Union v. Federal Labor Relations Authority* (D.C. Cir. 1985) 774 F.2d 1181, 1192.)[9]

[9] Though some state labor boards have, as the concurrence notes, followed *Cook Paint*, others have held that the *Johnnie's Poultry* safeguards apply to interviews related to pending grievances. The Washington Public Employment Relations Commission, for instance, has stated:

> Specifically, we find that the rights enunciated in *Johnnie's Poultry* Co., 146 NLRB 770 (1964), apply to employees covered by this state's collective bargaining laws. If an employer wishes to question a bargaining unit employee concerning subject matter that relates to the litigation of a grievance or unfair labor practice, the employer has an obligation to: 1) inform the employee of the purpose of the questioning; 2) assure the employee that no reprisal will take place regardless of whether or not they choose to participate in the questioning; and 3) inform the employee that participation in questioning is voluntary.

(*City of Seattle*, 2009 WL 311506, p. 1.)

Likewise, the Oklahoma Public Employees Relations Board has held:

> In a relationship between an employer and a member of a collective bargaining unit when the employer wishes to interview an employee about a grievance, the employer must (1) inform the employee about the scope, nature, and purpose of the questioning, (2) provide assurance that no reprisal will be taken against the

We have previously viewed FLRA precedent as persuasive authority regarding the parameters of employee, union, and employer rights and duties. (See, e.g., *City of Davis* (2016) PERB Decision No. 2494-M, p. 43, fn. 28; *County of Sacramento* (2014) PERB Decision No. 2393-M, p. 22.) Here, this precedent, along with the statutory differences between the NLRA and the MMBA and Judge Wright's *Cook Paint* dissent, persuades us to reject *Cook Paint*, which understated the danger of coercion in a pre-arbitration interview and overstated the benefits. We therefore reaffirm and clarify our longstanding decision in *Corrections*, *supra*, PERB Decision No. 1104-S. That case recognizes and is fully consistent with our case law on an employee organization's independent right to represent employees, and strikes the right balance between employee and organizational rights, on the one hand, and employers' legitimate interests, on the other.

The City makes one more argument on this point. It claims it cannot be faulted for failing to administer the *Corrections*/*Johnnie's Poultry* assurances, because, the Association objected to the City's interviews with Castillo and Thomas but did not respond to the City's request for authority that would prohibit the interviews. We recently rejected the notion that an exclusive representative must educate an employer on its legal obligations. (*Children of Promise Preparatory Academy* (2018) PERB Decision No. 2558, p. 24.) We do so here as well. Therefore, we affirm the ALJ's conclusion that the City interfered with employee rights by failing to assure Castillo and Thomas that their participation was voluntary and that if they

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> employee, and (3) obtain the employee's permission to engage in the interview on a voluntary basis.
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> . . . Failing to give this three-part warning during a grievance investigation is an unfair labor practice.

(*City of Del City*, 2001 WL 37111079, p. 3.)

chose to participate, the City would not impose any consequences based on their answers or their refusal to answer any of the questions.

Inquiry into Union Strategy

The ALJ also relied on *Corrections, supra*, PERB Decision No. 1104-S, when he concluded that the City impermissibly used the interviews to inquire into the Association's arbitration strategy. The City acknowledges the holding in *Corrections* that "'[a]n employer also may be prohibited from prying into union activities, or using the interview as an excuse to discover the union strategies for arbitration.'" (*Corrections, supra*, proposed decision at p. 17, quoting *Cook Paint, supra*, 648 F.2d 712, 722; see also *County of Merced, supra*, PERB Decision No. 2361-M, p. 11 [inquiry into matters discussed among union members and representatives has "chilling effect . . . on employees' discussions with their union representative about matters protected under the MMBA"].) It disputes only that its conduct—to wit, asking Castillo and Thomas if they knew why the Association was calling them to testify—met this standard.[10]

The City argues that Frieder was not prying into union strategy because the question to Castillo and Thomas was "innocuous" and brief, and it claims the ALJ improperly interpreted the question "to be with a conniving and underhanded purpose." We disagree that the ALJ made any finding as to Frieder's purpose for asking the question. In any event, no such finding was necessary to establish interference with protected rights. (*County of San Bernardino* (2018) PERB Decision No. 2556-M, p. 22.) It was sufficient to find, as the ALJ did, that

[10] The City excepts to the ALJ's finding that Frieder asked Thomas if she knew why she was being called to testify. There is no dispute that Frieder asked this question of Castillo, and Frieder admitted that he "may have" asked it of Thomas as well. We agree with the ALJ's finding that based on the preponderance of the evidence, it is more likely than not that Frieder asked the question of Thomas. (See PERB Reg. 32178 [PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.].)

asking a union's arbitration witnesses if they know why they are being called necessarily inquires into the union's strategy. As for the brevity of the question, it appears it was brief only because neither employee knew the answer.

The City also points out that its conduct was significantly less egregious than the employer's conduct in *Corrections*, *supra*, PERB Decision No. 1104-S. In that case, the employer used the interview to determine the employee's intended testimony and then threatened him with discipline if he testified as planned. The City contrasts what it terms the "imaginary interference" in this case with the "actual, egregious interference" in *Corrections*. This argument misconstrues the standard for finding interference. The standard is not whether Castillo or Thomas subjectively felt threatened or intimidated, or whether the City succeeded in deterring them from testifying. (*City & County of San Francisco* (2017) PERB Decision No. 2536-M, p. 28.) Rather, it is whether the employer's conduct "tends to or does result in harm to employees' rights." (*Stanislaus Consolidated Fire Protection District*, *supra*, PERB Decision No. 2231-M, p. 18.) Thus, the fact that the employer's conduct in *Corrections* was more destructive than the City's in this case does not absolve the City.

We therefore affirm the ALJ's conclusion that the City interfered with protected rights by using the interviews with Castillo and Thomas to inquire into the Association's arbitration strategy.

II. The Remedy

Finally, the City argues that the proposed remedy is "inequitable" and "harsher" than the remedy in *Corrections*, *supra*, PERB Decision No. 1104-S, and that it "should be drastically reduced, perhaps to a written warning." We reject this exception.

The City does not explain how the proposed remedy in this case is harsher than the one ordered in *Corrections*, *supra*, PERB Decision No. 1104-S. We do acknowledge that it is *broader* in two ways. First, the proposed cease-and-desist order directs the City to cease and desist interfering with employee rights and denying the Association its right to represent employees, whereas the *Corrections* order concerned only the union's rights. (*Corrections*, *supra*, at p. 5.) Second, the proposed notice-posting order directs the posting of a physical notice and the distribution of an electronic notice, if appropriate, whereas *Corrections* only ordered a physical notice. (*Id.* at p. 6.) These differences result from differences in the underlying complaints—the complaint in *Corrections* did not allege interference with employee rights (*id.* at proposed decision, p. 1)—and a long overdue update to our remedial practices (*City of Sacramento* (2013) PERB Decision No. 2351-M, p. 45 [updating "PERB's traditional posting requirement to better conform to the realities of the 21st-century workplace"]). They do not make the remedy in this case harsher, nor do they reflect any judgment that the City's conduct here was more destructive than the employer's in *Corrections*.

The City also provides no authority for its suggested "written warning" remedy, and we are aware of no case where the Board has declined, because of the relative lack of severity of the respondent's unlawful conduct, to impose the usual remedies of ordering the respondent to cease and desist its conduct and post a notice of its violation. The only case we have found where the Board did not order a posting was *Office of the Santa Clara County Superintendent of Schools* (1982) PERB Decision No. 233, vacated (1982) PERB Decision No. 233a, in which the Board issued an interim order directing the parties to negotiate over a make-whole remedy. The Board determined not to order a posting "so that settlement discussions may proceed in the

most favorable climate." (*Id.* at p. 9.) By contrast, the Board has rejected an argument that a posting was not necessary given the passage of time and the potentially disruptive effect a posting would have on "the atmosphere that now exists" at the workplace. (*Belridge School District* (1980) PERB Decision No. 157, p. 13.) In light of this precedent, we see no basis for departing from our traditional remedy here.

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 Commerce (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3506, and 3506.5, subdivisions (a) and (b), and Public Employment Relations Board (PERB) Regulation 32603, subdivisions (a) and (b), when it interviewed two employees exclusively represented by Commerce City Employees Association, AFSCME Local 773 (Association) in advance of an upcoming adversarial hearing, without notifying them that the interviews were voluntary and that if they chose to participate, the City would not impose any consequences based on their answers or on their refusal to answer any questions.

Pursuant to section 3509, subdivision (b), of the Government Code, it hereby is ORDERED that the City, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Interfering with the rights of employees guaranteed by the MMBA.

2. Denying the Association its right to represent bargaining unit members in their employment relations with the City.

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

1. Within ten (10) workdays of the date this decision is no longer subject to appeal, post at all work locations where notices to City employees in the bargaining units represented by the Association are customarily 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. The Notice shall also be posted by electronic message, intranet, internet site, and other electronic means customarily used by the City to communicate with employees in the bargaining units represented by the Association. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

2. Written notification of the actions taken to comply with this Order shall be made to PERB's General Counsel, 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 the Association.

Member Krantz joined in this Decision.

Member Shiners' concurrence begins on p. 20.

SHINERS, Member, concurring: I agree with my colleagues that Respondent City of Commerce (City) violated the Meyers-Milias-Brown Act (MMBA)[11] by interfering with employee rights, as well as Charging Party Commerce City Employees Association, AFSCME Local 773's (Association) right to represent employees, when the City's attorney questioned two City employees as to why the Association had subpoenaed them to testify at an arbitration hearing. I write separately because I disagree with the broad prophylactic rule adopted by the majority. In my view, this case can be resolved under our existing decisional law without the need to impose a new, blanket obligation on employers.

1. The Appropriate Legal Standard for Assessing Employer Coercion in Pre-Arbitration Employee Interviews

The majority today imposes on all California public employers the obligation to provide certain safeguards when interviewing an employee in preparation for an arbitration hearing. Specifically, the majority requires that the interviewer provide the employee with the assurances set forth in *Johnnie's Poultry Company* (1964) 146 NLRB 770, enf. den. (8th Cir. 1965) 344 F.2d 617 (*Johnnie's Poultry*). Failure to provide those assurances, holds the majority, automatically renders the interview coercive, thereby constituting per se interference with employee and employee organization rights.

In *Johnnie's Poultry*, the National Labor Relations Board (NLRB) recognized that "where an employer has a legitimate cause to inquire, he may exercise the privilege of interrogating employees on matters involving their Section 7 rights without incurring

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

Section 8(a)(1) liability."[12] (*Id*. at pp. 774-775.) The NLRB recognized two situations where such questioning is permissible: "the verification of a union's claimed majority status to determine whether recognition should be extended, . . . and the investigation of facts concerning issues raised in a complaint where such interrogation is necessary in preparing the employer's defense for trial of the case." (*Id*. at p. 775.) To remove the coercive nature of the questioning:

> the employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees.

(*Id.* at p. 775.)

Notably, *Johnnie's Poultry* does not apply to every interview of an employee in preparation for an NLRB hearing. Rather, it only applies when the employee is questioned about Section 7 protected activity; in those circumstances, the employer's failure to provide the safeguards constitutes a per se violation of Section 8(a)(1).[13] (*In Re Freeman Decorating Co.* (2001) 335 NLRB 103, pp. 1, 14; *Standard-Coosa-Thatcher, Carpet Yarn Div. Inc.* (1981)

[12] Section 7 of the National Labor Relations Act (NLRA) guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." (29 U.S.C. § 157.) Section 8(a)(1) of the NLRA makes it "an unfair labor practice for an employer [¶] to interfere with, restrain, or coerce employees in the exercise of the rights granted in section 157." (29 U.S.C. § 158, subd. (a)(1).)

[13] Federal courts have not followed the NLRB's per se approach. Instead, they apply a totality of the circumstances analysis in which the *Johnnie's Poultry* safeguards are one factor to be considered in determining whether the employer's questioning was coercive. (E.g., *A&R*

257 NLRB 304.) On the other hand, *Johnnie's Poultry* safeguards are not required when the employer's questioning is solely about factual matters unrelated to an employee's Section 7 protected activity. (*Drug Plastics & Glass Co.* (1992) 309 NLRB 1306, 1311; *Delta Gas, Inc.* (1987) 282 NLRB 1315, 1325.) Thus, "the starting point for any *Johnnie's Poultry* analysis must be determining whether asking a particular question ordinarily would constitute unlawful interrogation. If the question doesn't constitute unlawful interrogation, the whole *Johnnie's Poultry* analysis is unnecessary." (*Armstrong Machine Co.* (2004) 343 NLRB 1149, 1172.)

In *Cook* Paint *& Varnish Co.* (1979) 246 NLRB 646, the NLRB adopted a per se rule that an employer cannot compel employees to submit to questioning as part of the employer's preparation for an arbitration hearing.[14] (*Id*. at p. 646.) On appeal, the United States Court of Appeals for the District of Columbia Circuit refused to enforce the NLRB's decision, finding the per se rule impermissibly interfered with the parties' ability to structure the arbitration process. (*Cook Paint & Varnish Co. v. National Labor Relations Bd.* (D.C. Cir. 1981) 648 F.2d 712, 720 (*Cook Paint*).) The court nevertheless recognized that employers do not have free reign to question employees when preparing for an arbitration hearing:

> An employer may in certain cases be forbidden from inquiring into matters that are not job-related. An employer also may be prohibited from prying into union activities, or using the interview as an excuse to discover the union strategies for arbitration. In short, we do not [] suggest that employers have a carte blanche license to interrogate employees prior to arbitration; the limits provided by Section 8(a)(1) remain available to prohibit coercive employer conduct in an individual case.

Transport, Inc. v. NLRB (7th Cir. 1979) 601 F.2d 311, 312-313; *NLRB v. Neuhoff Bros.* (5th Cir. 1967) 375 F.2d 372, 377-378.)

[14] Concurring in the result, Member Truesdale rejected the majority's per se rule in favor of a case-by-case balancing of employee and employer interests. (*Cook Paint*, *supra*, 246 NLRB 646 at p. 647.)

(*Id.* at p. 722.) The court thus approved a totality of circumstances test where the facts of each case must be considered when determining whether an employer's questioning was coercive in violation of the NLRA. In dissent, Judge J. Skelly Wright endorsed the NLRB's per se rule that *Johnnie's Poultry* safeguards must be provided when an employer questions an employee in preparation for an arbitration hearing. (*Id*. at p. 734.)

As the majority notes, the Federal Labor Relations Authority (FLRA) has followed Judge Wright's rationale in requiring that an employer provide safeguards similar to those in *Johnnie's Poultry* whenever it interviews an employee in preparation for a proceeding before a third party, which includes both unfair labor practice and arbitration hearings. (*U.S. Dep't of Commerce Patent & Trademark Office* (1991) 41 FLRA 795, 829; *Internal Revenue Service & Brookhaven Service Center* (1982) 9 FLRA 930, 933-934.) But the FLRA stands alone on this issue.[15] After *Cook Paint* the NLRB abandoned its per se application of *Johnnie's Poultry* to pre-arbitration employee interviews. Indeed, the NLRB recently affirmed that it follows the totality of circumstances test endorsed by the *Cook Paint* majority. (*Management & Training Corp.* (2018) 366 NLRB No. 134, p. 8, fn. 19.) State labor boards in Washington and Florida have also rejected a per se application of *Johnnie's Poultry* to pre-arbitration employee interviews in favor of a totality of circumstances test. (*City of Seattle*, 2009 WL 311506, pp. 1-2;[16] *City of Margate* (1990) 16 FPER ¶ 21148.)

[15] The majority cites an Oklahoma Public Employees Relations Board decision, *City of Del City*, 2001 WL 37111079, as also applying a per se rule. But that case applied the rule to questioning that took place as part of a grievance investigation, not in preparation for an adversarial hearing. It thus does not support the majority's imposition of a per se requirement to give *Johnnie's Poultry* assurances when interviewing an employee in preparation for a hearing.

[16] As the majority notes, this decision incorporates *Johnnie's Poultry* assurances into Washington's state collective bargaining laws. It does so, however, as just one factor to consider in determining whether the employer interfered with employee rights. Specifically,

Prophylactic rules such as the majority adopts today are attractive because they provide a bright line rule for employers, employee organizations, and employees to follow, as well as simplifying PERB's task of determining whether employer questioning was coercive. But, in my view, the majority's per se rule creates liability where the employer's questioning was not in fact coercive. Because the proper balance of employer and employee interests may vary by case, I would follow the majority of jurisdictions and apply a totality of circumstances test that examines whether the employer's questioning was coercive in the particular factual context in which it took place, with the provision or absence of *Johnnie's Poultry* assurances as one factor to be considered.

2. *State of California (Department of Corrections)* (1995) PERB Decision No. 1104-S

In its exceptions, the City claims the administrative law judge (ALJ) erred in applying *State of California (Department of Corrections)* (1995) PERB Decision No. 1104-S (*Corrections*) to find that the City was required to provide City employees Jose Castillo (Castillo) and Ramona Thomas (Thomas) with *Johnnie's Poultry* assurances when they were questioned by the City's attorney, Stephen Frieder (Frieder), in preparation for the arbitration hearing over Sergio Mejia's (Mejia) termination. The City argues that *Corrections* did not adopt the *Johnnie's Poultry* safeguards as a requirement for pre-hearing questioning of employees. Unlike my colleagues, I find merit in the City's argument.

Corrections involved a disciplinary appeal hearing before the State Personnel Board. (*Corrections*, *supra*, PERB Decision No. 1104-S, adopting proposed decision at p. 2.) Four days before the hearing, the employee's representative phoned the employee relations officer

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the decision states: "In determining whether or not an employer has committed an interference violation the Commission also looks to the content of the employer's questions." (2009 WL 311506 at p. 2.) Washington's state labor board thus follows the same totality of circumstances test as all federal jurisdictions except the FLRA.

who would be representing the employer in the hearing, Cathleen Catti (Catti). (*Id*., adopting proposed decision at p. 5.) During this conversation the employee's representative said she would be calling a particular employee, Rubin Garcia (Garcia), to testify about the standard practice with respect to the policy the employee was charged with violating. (*Ibid*.) The following day, Garcia's supervisor ordered him to meet with Catti. (*Ibid*.) During the meeting, Catti asked Garcia what he would say at the hearing. (*Id*., adopting proposed decision at p. 6.) When he told her, Catti said that such testimony could lead to adverse actions being taken against other employees. (*Ibid*.) Garcia then told the employee's representative that he would not testify about the practice because he did not want to get other employees in trouble. (*Ibid*.)

In finding Catti's questioning coercive, the ALJ relied on both *Johnnie's Poultry* and *Cook Paint.* (*Corrections*, *supra*, PERB Decision No. 1104-S, adopting proposed decision at pp. 16-17.) In doing so, he discussed the relevant facts of the meeting that he found established coercion as well as noted that Garcia was not provided *Johnnie's Poultry* assurances. (*Id*., adopting proposed decision at pp. 18-19.) On exceptions, the Board affirmed the ALJ's conclusions of law but revised the proposed remedy "[g]iven the particular facts [of] this case . . . to eliminate the prerequisite that witnesses be informed that interviews are voluntary and free of reprisal." (*Id*. at p. 4.)

Contrary to my colleagues, I do not read *Corrections* as adopting a per se rule that an employer must provide *Johnnie's Poultry* assurances whenever it questions an employee in preparation for an upcoming adversarial hearing. Such a reading might be appropriate if *Corrections* relied solely on the lack of *Johnnie's Poultry* assurances to find interference. But it instead relied on both *Johnnie's Poultry* and *Cook Paint.* This is the exact same totality of

circumstances approach the NLRB, federal courts, and other state labor boards use in deciding whether employer questioning is coercive. (E.g., *A&R Transport, Inc. v. NLRB, supra,* 601 F.2d at pp. 312-313; *NLRB v. Neuhoff Bros., supra*, 375 F.2d at pp. 377-378; *Management & Training Corp., supra*, 366 NLRB No. 134, p. 8, fn. 19; *City of Seattle, supra*, 2009 WL 311506, pp. 1-2; *City of Margate, supra*, 16 FPER ¶ 21148.) Thus, in *Corrections*, the ALJ—and by extension the Board—was not applying a per se *Johnnie's Poultry* rule.[17]

Moreover, the Board modified the ALJ's proposed remedy to remove the requirement that the employer give employees *Johnnie's Poultry* assurances before questioning them in the future. Had the Board adopted a per se *Johnnie's Poultry* rule, it is inconceivable that the Board would have intentionally struck that very requirement from the remedy. Accordingly, the majority's reading of *Corrections* is irreconcilable with the actual language of the decision.

In sum, I read *Corrections* as applying a totality of circumstances analysis to find coercion on the facts of that case, not as adopting a per se rule that *Johnnie's Poultry* assurances must be given whenever an employer questions an employee in preparation for an upcoming adversarial hearing. Nonetheless, applying my reading of *Corrections* leads to the same result in this case.

3. Application of *Corrections* to the Facts of This Case

As discussed above, an employer may question an employee in preparation for an upcoming arbitration hearing provided the questioning is not coercive. (*Corrections, supra*, PERB Decision No. 1104-S, adopting proposed decision at p. 17.) An employer may not, however, "pry[] into union activities, or us[e] the interview as an excuse to discover the union strategies for arbitration." (*Ibid*., quoting *Cook Paint, supra*, 648 F.2d at p. 722.) In

[17] Indeed, had the Board adopted such a rule one would expect it to be applied in subsequent cases. Yet in the 23 years since *Corrections* was decided, this Board has not once applied a per se *Johnnie's Poultry* rule.

Corrections, the Board found coercion under this standard where the employer's representative questioned an employee without providing *Johnnie's Poultry* assurances: (1) after she learned the employee was a potential witness for the union in an upcoming adversarial hearing and (2) asked the witness about his intended testimony at the hearing. (*Corrections*, *supra*, PERB Decision No. 1104-S, adopting proposed decision at p. 18-19.)

Although not as egregious as those in *Corrections,* the facts here are similar. One week before the arbitration hearing was to resume, Frieder, the City's attorney, learned that the Association had subpoenaed Castillo and Thomas to testify. Frieder then had the City's Director of Transportation notify Castillo and Thomas that they would be meeting with Frieder. Frieder testified that he decided to interview both employees because he wanted to learn about their intended testimony to see if it "was relevant to the proceeding." His purpose in questioning Castillo and Thomas thus was not to gather facts he could use in preparing the City's defense but to learn what they might say in favor of the Association's case.[18]

Despite his reason for interviewing Castillo and Thomas, most of Frieder's questions were about the facts leading up to Mejia's termination. Had he only asked those questions, the interviews may not have been coercive and the failure to give *Johnnie's Poultry* assurances would be of no consequence. (*Armstrong Machine Co.*, *supra*, 343 NLRB at p. 1172; *Drug Plastics & Glass Co.*, *supra*, 309 NLRB at p. 1311; *Delta Gas, Inc*. *supra*, 282 NLRB at p. 1325.) But Frieder also asked Castillo and Thomas whether they knew why the Association

[18] Although such a motive is not necessary to find interference, I nonetheless believe it is relevant to demonstrate the coercive nature of Frieder's questioning. (See *Corrections*, *supra*, PERB Decision No. 1104-S, adopting proposed decision at p. 18 [finding the purpose for the questioning relevant in determining coercion].)

had subpoenaed them to testify at the hearing.[19] This question is problematic in two ways. First, it could have elicited an answer that revealed the Association's arbitration strategy, an impermissible subject for an employer to explore in a pre-hearing employee interview. (*Corrections, supra*, PERB Decision No. 1104-S, adopting proposed decision at p. 17; *Cook Paint*, *supra*, 648 F.2d at p. 722.) Second, it could have elicited an answer that revealed the employees' communications with their union representative, also a prohibited subject of employer inquiry. (*William S. Hart Union High School District* (2018) PERB Decision No. 2595, pp. 6-7; *Cook Paint & Varnish Co.* (1981) 258 NLRB 1230, 1232.) Either way, the question constituted "prying into union activities," which was coercive in the absence of *Johnnie's Poultry* assurances. Additionally, that neither Castillo nor Thomas had an answer to this question does not prevent it from being coercive because a finding of unlawful interference does not require proof that the employee actually was coerced. (*Cabrillo Community College District* (2015) PERB Decision No. 2453, p. 13; *Clovis Unified School District* (1984) PERB Decision No. 389, p. 14.)

In sum, because the purpose of Frieder's interviews of Castillo and Thomas was to find out how they would testify in favor of the Association, and he asked questions to elicit that information without first providing *Johnnie's Poultry* assurances, his questioning was unlawfully coercive. Accordingly, I concur in the majority's conclusion that the City unlawfully interfered with both Castillo's and Thomas's rights to participate in the activities of the Association, and with the Association's right to represent Castillo and Thomas.

[19] I agree with the majority that the record adequately supports the ALJ's finding that Frieder asked Thomas this question during the December 9, 2015 interview.

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. LA-CE-1098-M, *Commerce City Employees Association, AFSCME, Local 773 v. City of Commerce*, in which all parties had the right to participate, it has been found that the City of Commerce (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq., when it interviewed two employees exclusively represented by Commerce City Employees Association, AFSCME Local 773 (Association) in advance of an adversarial hearing, without notifying them that the interviews were voluntary and that if they chose to participate, the City would not impose any consequences based on their answers or on their refusal to answer any questions.

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

A. CEASE AND DESIST FROM:

1. Interfering with the rights of employees guaranteed by the MMBA.

2. Denying the Association its right to represent bargaining unit members in their employment relations with the City.

Dated: _____ CITY OF COMMERCE

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

COMMERCE CITY EMPLOYEES ASSOCIATION (AFSCME, LOCAL 773), Charging Party, v. CITY OF COMMERCE, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-1098-M PROPOSED DECISION (February 28, 2017)

Appearances: Rothner, Segall & Greenstone by Jonathan Cohen, Attorney, for Commerce City Employees Association (AFSCME, Local 773); Eduardo Olivo, City Attorney, for City of Commerce.

Before Kent Morizawa, Administrative Law Judge.

This case concerns allegations that a public employer violated the Meyers-Milias-Brown Act (MMBA) and Public Employment Relations Board (PERB or Board) Regulations[1] by interfering with employee rights and the right of the exclusive representative to represent employees. The public employer denies any violation.

PROCEDURAL HISTORY

On May 24, 2016, the Commerce City Employees Association, American Federation of State, County and Municipal Employees, Local 773 (Local 773 or the Union) filed the instant unfair practice charge against the City of Commerce (City). On July 7, 2016, PERB's Office of the General Counsel issued a complaint alleging that the City violated MMBA sections 3503; 3506; and 3506.5, subdivisions (a) and (b); and PERB Regulation 32603, subdivisions (a) and

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

(b); when it interviewed two employees who Local 773 had subpoenaed to testify in an upcoming arbitration hearing.

On August 12, 2016, the City filed an answer to the complaint, denying any violation of the MMBA or PERB Regulations and setting forth its affirmative defenses.

On August 18, 2016, an informal conference was held, but the matter was not resolved.

Formal hearing was held on November 16, 2016, and the matter was submitted for proposed decision with the filing of post-hearing briefs on January 17, 2017.

FINDINGS OF FACT

Parties

Local 773 is an exclusive representative within the meaning of PERB Regulation 32016, subdivision (b), and represents employees in the City's full-time non-management, mid-management, and part-time bargaining units.

The City is a public agency within the meaning of MMBA section 3501, subdivision (c), and PERB Regulation 32016, subdivision (a).

Local 773 and the City are parties to a memorandum of understanding (MOU) that was in effect at all relevant times. The MOU contains a grievance procedure that provides for binding arbitration.

Sergio Mejia arbitration

In February 2014, the City terminated bus operator Sergio Mejia, a bargaining unit employee, for alleged misconduct. Local 773 challenged the termination under the terms of the MOU's grievance procedure, and the matter proceeded to arbitration. Pete Schnaufer, a business representative for the American Federation of State, County, and Municipal Employees, District Council 36, represented Local 773 in the arbitration proceedings, and

attorney Stephen Frieder represented the City. Prior to the first day of arbitration on September 9, 2015, Frieder met with Schnaufer and gave him copies of the City's witness list and exhibits. He also sat with Schnaufer and Mejia to review video evidence that the City intended to use against Mejia. Frieder asked Schnaufer to provide a witness list and the exhibits he intended to rely on at hearing, but Schnaufer declined. Frieder reiterated his request at the first day of arbitration, but Schnaufer again declined.

The City did not conclude its case-in-chief during the first day of arbitration, and a second day of hearing was set for December 14, 2015.

On December 1, 2015, Frieder emailed Schnaufer asking him to provide a witness list and any exhibits that he intended to rely on. Schnaufer replied the next day declining Frieder's request and stating he was unaware of any rule that required him to produce this information to the City.

On December 3, 2015, Schnaufer emailed the arbitrator asking him to sign subpoenas for two City bus operators, Jose Castillo and Ramona Thomas. Both are in a bargaining unit represented by Local 773. On December 5, 2015, the arbitrator wrote back authorizing Schnaufer to sign the subpoenas on his behalf and directing him to notify the City that the subpoenas would be served on Castillo and Thomas.

On December 7, 2015, Schnaufer telephoned Frieder to inform him that he was serving subpoenas on Castillo and Thomas. Frieder inquired why Schnaufer was calling them as witnesses. While Frieder believed Thomas could offer relevant testimony, it was unclear what evidence Castillo could offer. Schnaufer did not disclose why he intended to call the two as witnesses. Frieder then stated he would interview them both. Up to that point, the City had not interviewed either employee in connection with Mejia's termination, and Frieder testified he

had not planned on interviewing them prior to Schnaufer informing him that the Union had subpoenaed them to testify at the hearing.

Schnaufer objected to Frieder interviewing Castillo and Thomas. Frieder stated he would provide Schnaufer two days to come up with authority that would prevent the City from conducting the interviews. In the meantime, Frieder contacted Claude McFerguson, the City's Director of Transportation, and asked him to set up the interviews for December 9, 2015. Both Castillo and Thomas were notified that they would be pulled off their routes early that day so they could speak to the City's attorney and that another driver would take over the rest of their shift. Castillo testified that his supervisor did not state what the meeting was for or whether his attendance was voluntary.[2]

On the morning of December 9, 2015, Frieder replied to Schnaufer's December 2 email and stated he would object to the use of any evidence that Schnaufer failed to disclose prior to the second day of arbitration and cited to the rules of the American Arbitration Association for support. Schnaufer did not respond to this email or to Frieder's earlier request that he provide authority that would prevent him from interviewing Castillo or Thomas. Frieder interpreted Schnaufer's silence as Local 773 not having any objection to the interviews, and they proceeded as scheduled on the afternoon of December 9.

Both employees were represented by Local 773 President Kevin Larsen, who took notes during the interviews. Frieder had no objection to Larsen's presence. Frieder informed both employees that the interviews were with regard to Mejia's termination. He did not state that the interviews were voluntary nor did he state the employees would not face reprisals for participating in the interview. Most of his questions related to any firsthand knowledge the

[2] Thomas did not testify at the hearing.

employees had about the events leadings up to Mejia's termination. Castillo had no personal knowledge while Thomas had information that supported the City's evidence and contradicted Mejia's version of events. Frieder asked Castillo and Thomas for their opinions regarding Mejia. He also inquired as to whether the employees knew why Local 773 had subpoenaed them to testify at the hearing.[3] Both stated that they did not. The interviews lasted about 20 minutes.

At the second day of the arbitration, Schnaufer complained to the arbitrator about Frieder's interviews with Castillo and Thomas, but did not ask the arbitrator to take any action. Instead, he stated the Union would bring the matter before PERB. The City rested its case-in-chief, and Schnaufer began the Union's case-in-chief. He rested without calling Castillo or Thomas to testify. Frieder intended to call Thomas as a rebuttal witness, but she had already been sent home. Frieder waived his right to call her, and the arbitration concluded.

[3] Larsen's notes from Castillo's interview indicate that Frieder asked Castillo, "Any idea why [you're] being called?" To which Castillo responded, "Not really. Maybe to go over procedures for drivers." Frieder confirmed in his testimony that he asked Castillo if he knew why he would be called as a witness. Larsen's notes from Thomas's interview do not specifically indicate whether Frieder asked Thomas why she was being called as a witness. There is one question fragment—"Any idea"—that may or may not refer to such a question, but the record does not contain sufficient information to draw any conclusions from that notation. Notably, Larsen did not offer any testimony regarding the specific nature of the question and any response from Thomas. However, Frieder did testify that he may have asked Thomas a question about whether she knew why the union was calling her as a witness. Taking into consideration this testimony and Frieder's thorough preparation for the arbitration hearing, I find it more likely than not that, like Castillo, he asked Thomas whether she knew why the union intended to call her as a witness.

ISSUE

Did the City's interviews with Castillo and Thomas constitute unlawful interference?

CONCLUSIONS OF LAW

The test for whether a respondent has interfered with the rights of employees under the MMBA does not require that unlawful motive be established, but only that at least slight harm to employee rights results from the conduct. The courts have described the standard as follows:

> All [a charging party] must prove to establish an interference violation of section 3506 is: (1) That employees were engaged in protected activity; (2) that the employer engaged in conduct which tends to interfere with, restrain or coerce employees in the exercise of those activities, and (3) that employer's conduct was not justified by legitimate business reasons.

(*Public Employees Association of Tulare County, Inc. v. Board of Supervisors of Tulare County* (1985) 167 Cal.App.3d 797, 807.) A finding of interference does not require evidence that any employee subjectively felt threatened or intimidated or was in fact discouraged from participating in protected activity; rather the inquiry is an objective on which asks whether, under the circumstances, an employee would reasonably be discouraged from engaging in protected activity. (*Cabrillo Community College District* (2015) PERB Decision No. 2453, p. 13, citing *Clovis Unified School District* (1984) PERB Decision No. 389.)

Castillo and Thomas were participating in protected activity by engaging with Local 773 to support Mejia's grievance. (See *Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M, p. 15, citing *City of Long Beach* (2008) PERB Decision No. 1977-M and *Bay Area Air Quality Management District* (2006) PERB Decision No. 1807-M [participating in the collectively-bargained grievance procedure is protected employee conduct under the MMBA].) In addition, Frieder's interviews caused at least slight harm to employee rights by creating a chilling effect on employee participation in the grievance process. (See

County of Merced (2014) PERB Decision No. 2361-M, p. 11 [employer conduct that tends to chill protected employee activity interferes with employee rights].)

The crux of this case is whether the interviews were justified by a legitimate business reason. In *Johnnie's Poultry Company* (1964) 146 NLRB 770, enforcement denied by *NLRB v. Johnnie's Poultry Company* (8th Cir. 1965) 344 F.2d 617 (*Johnnie's Poultry*), the National Labor Relations Board (NLRB) stated that despite the inherent danger of coercion, where an employer has a legitimate cause to inquire, he may exercise the privilege of interrogating employees on matters involving their Section 7 rights without incurring Section 8(a)(1) liability.[4] (*Id.* at 774-775.) Legitimate purposes include verification of a union's claimed majority status to determine whether recognition should be extended or the investigation of facts concerning issues raised in an unfair practice complaint where such interrogation is necessary in preparing the employer's defense for trial of the case. (*Id.* at 775.) However, in conducting such interviews, the employer must abide by certain safeguards:

> [T]he employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate

[4] Section 7 refers to the provisions of the National Labor Relations Act, which commence at 29 United States Code section 141. Section 7 provides in pertinent part:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . .

(29 U.S.C. § 157.) Section 8(a)(1) makes it an unfair labor practice for the employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]." (29 U.S.C. § 158, subdivision (a)(1).)

> purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees.[footnote omitted] When an employer transgresses the boundaries of these safeguards, he loses the benefits of the privilege.[footnote omitted]

These safeguards are necessary to ensure that employers' legitimate interest in obtaining relevant evidence does not encroach on employees' right to protection under Section 7. (*Freeman Decorating Co.* (2001) 336 NLRB 1, 14, enforcement denied on other grounds by *Internat. Alliance of Theatrical and Stage Employees v. NLRB* (D.C. Cir. 2003) 334 F.3d 27.) Accordingly, the NLRB takes a bright-line approach in enforcing the requirements of *Johnnie's Poultry*. (*Ibid.*)

In *Cook Paint & Varnish Company v. NLRB* (D.C. Cir. 1981) 648 F.2d 712 (*Cook Paint & Varnish*), the Court of Appeals denied enforcement of an NLRB decision that prohibited employers from interviewing employees in preparation for its defense at an arbitration hearing. (*Id.* at 713.) The Court held:

> the legality of pre-arbitration interviews is generally a contractual matter to be determined by the parties in establishing a grievance-arbitration procedure, subject only to the normal restraints imposed by the Act that employer conduct not be unlawfully coercive in a particular case.

(*Id.* at 720.) The Court went on to state:

> we do not suggest that limits do not exist on the permissible scope of a legitimate pre-arbitration interview. An employer may in certain cases be forbidden from inquiring into matters that are not job-related. An employer also may be prohibited from prying into union activities, or using the interview as an excuse to discover the union strategies for arbitration. In short, we do not suggest that employers have a carte blanche license to interrogate employees prior to arbitration; the limits provided by Section 8(a)(1) remain available to prohibit coercive employer conduct in an individual case.

(*Id.* at 722.)

In *State of California (Department of Corrections)* (1995) PERB Decision No. 1104-S (*Department of Corrections*), the Board upheld the proposed decision of an administrative law judge (ALJ) that relied on *Johnnie's Poultry*, *supra*, 146 NLRB 770, and *Cook Paint & Varnish, supra*, 648 F.2d 712, to find that an employer's investigatory interview constituted unlawful interference. There, a correctional officer was suspended for leaving the yard without notifying his supervisor. (*Id.* at proposed decision pp. 2-3.) The officer appealed his suspension to the State Personnel Board. (*Id.* at proposed decision p. 4.) The attorney representing the officer intended to call another correctional officer who would testify that it was practice for officers to leave the yard without notifying their supervisor. (*Ibid.*) Upon learning of the officer's intended testimony, the State's attorney interviewed the officer and showed him an order stating officers were not permitted to leave their post without their supervisor's permission. (*Id.* at proposed decision p. 6.) The attorney further stated if the officer testified as he said he would, there could be more adverse actions against other officers. (*Ibid.*) As a result of the interview, the officer changed his testimony to state that officers could only leave the yard without a supervisor's permission in the event of an emergency or if an inmate was suspected of carrying contraband. (*Ibid.*) The ALJ found the State's attorney's conduct constituted unlawful interference because she failed to provide the *Johnnie's Poultry* safeguards—such as assuring the officer that his participation in the interview was voluntary and that no reprisals would follow from his participation—and because the questioning went beyond the scope of a legitimate interview by prying into the union's strategy. (*Id.* at proposed decision pp 19-20.) As part of the remedy, the ALJ ordered the State to give notice to any witnesses that an interview was voluntary and free from reprisal. (*Id.* at proposed decision p. 21.) On appeal, the Board affirmed the ALJ's conclusions of law without any additional

discussion. (*Id.* at p. 2.) However, it eliminated the portion of the remedy requiring notice to witnesses, finding it to be overly broad given the particular facts of the case. (*Id.* at p. 4.)

Here, the City did not comply with the required *Johnnie's Poultry* safeguards adopted by the Board in *Department of Corrections*, *supra*, PERB Decision No. 1104-S, when it interviewed Castillo and Thomas. Namely, Frieder did not tell the employees that their participation was voluntary nor did he assure them there would be no reprisals from their participation. Furthermore, his questioning went beyond the bounds of permissible information gathering and veered into inappropriate prying into the Union's strategy when he asked Castillo and Thomas whether they knew why Schnaufer intended to call them as witnesses. The City asserts no violation should be found because Frieder's conduct was not as egregious as that of the attorney in *Department of Corrections*. This is true. Frieder was not hostile to union organization, nor did he create a coercive environment or actively attempt to alter Castillo and Thomas's testimony. However, his failure to comply with the minimum requirements in *Johnnie's Poultry* and his questions regarding union strategy were sufficient by themselves to constitute a violation.

The City argues Frieder was not required to inform Castillo and Thomas that the interviews were voluntary and that no reprisals would follow because the Board did not adopt those portions of the *Johnnie's Poultry* safeguards in *Department of Corrections*, *supra*, PERB Decision No. 1104-S. In support of its argument, the City notes that the Board in that decision struck the portion of the ALJ's remedy requiring the State to notify all witnesses that their participation was voluntary and no reprisals would follow. I do not read the Board's revision of the ALJ's proposed remedy as disagreement with his conclusions of law. To the contrary, the Board specifically stated it affirmed the ALJ's conclusions of law, which incorporated all of

the *Johnnie's Poultry* safeguards as well as the Court of Appeals' limitations on witness interviews stated in *Cook Paint & Varnish, supra*, 648 F.2d 712. The Board's only criticism of the ALJ's proposed decision was that the remedy was overbroad given the circumstances. It did not take issue with any of the legal analysis supporting the ALJ's conclusions of law.[5]

The City also argues the NLRB has held that *Johnnie's Poultry, supra*, 146 NLRB 770, does not apply to interviews in preparation for arbitration. (See *Pacific Southwest Airlines, Inc.* (1979) 242 NLRB 1169 [*Johnnie's Poultry* safeguards do not apply when the employer questions employees in preparation for arbitration].) However, by choosing to follow federal authority on a particular issue, the Board is not automatically bound by subsequent developments in federal law on that point. (*Capistrano Unified School District* (2015) PERB Decision No. 2440, p. 28.) The determinative issue is whether the cases are consistent with the language and purposes of the PERB-administered statues. (*Id.* at pp. 28-29.) In *Department of Corrections, supra,* PERB Decision No. 1104-S, the Board determined that it would extend the *Johnnie's Poultry* safeguards to any interview implicating protected employee activity, not just those in preparation for an unfair practice hearing. As set forth above, the pre-arbitration interviews of Castillo and Thomas implicated protected activity. Accordingly, I find that applying the *Johnnie's Poultry* safeguards to those interviews is consistent with Board precedent and the purposes of the MMBA.

[5] I do recognize there is a tension between *Johnnie's Poultry, supra*, 146 NLRB 770, and *Cook Paint & Varnish, supra*, 648 F.2d 712. The former states employee interviews implicating protected rights must be voluntary whereas the latter states an employer has the right to compel participation in such circumstances. Neither the ALJ nor the Board addressed this tension in *Department of Corrections, supra,* PERB Decision No. 1104-S. To harmonize this tension, I read *Department of Corrections* as relying on *Cook Paint & Varnish* only to the extent it supports the language from *Johnnie's Poultry* regarding the prohibition against using employee interviews to pry into union activities or litigation strategy.

The MOU does not prohibit the City from interviewing employees in preparation for its defense in arbitration hearings. However, any such interview must comply with certain minimum requirements so as to minimize their coercive impact on protected activity. The City did not comply with these requirements when it interviewed Castillo and Thomas. Accordingly, its conduct constituted unlawful interference with employee rights in violation of MMBA sections 3506 and 3506.5, subdivision (a), and PERB Regulation 32603, subdivision (a). This conduct also constituted a derivative violation of MMBA sections 3503 and 3506.5, subdivision (b), and PERB Regulation 32603, subdivision (b). (See *State of California (Department of Corrections & Rehabilitation)* (2012) PERB Decision No. 2285-S, p. 17 [employer's interference with employee rights under the Ralph C. Dills Act, codified at Government Code 3512 and following, supported a derivative violation of the union's right to represent employees].)

REMEDY

MMBA section 3509, subdivision (b), states in part:

> The initial determination as to whether the charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board.

It has been found that the City interfered with employee and employee organization rights in violation of MMBA sections 3503; 3506; and 3506.5, subdivisions (a) and (b); and PERB Regulation 32603, subdivisions (a) and (b); when it interviewed Castillo and Thomas regarding their testimony at an upcoming arbitration hearing without notifying them that the interviews were voluntary and that no reprisals would follow. It is appropriate to order the City to cease and desist from such conduct. (*County of Merced*, *supra*, PERB Decision No. 2361-M, p. 12.) It is also appropriate to order the City to post a notice signed by an authorized representative

and incorporating the terms of the order below. (*City of Sacramento* (2013) PERB Decision No. 2351-M, at pp. 47-48.) The notice posting order effectuates the purposes of the MMBA by informing employees that the controversy over this matter has been resolved and that the employer will comply with the ordered remedy. (*Ibid.*) The notice posting shall include both a physical posting of paper notices at all places where employees in the bargaining units represented by Local 773 are customarily placed, as well as a posting by electronic message, intranet, internet site, and other electronic means customarily used by the City to communicate with employees in the bargaining units represented by Local 773. (*Ibid*.)

Local 773 also requests as a remedy an order requiring a live reading by the City of the terms of the order to assembled employees. The NLRB has held that the reading of a notice by a respondent is an "extraordinary" or "special" remedy that will be imposed only where required by the particular circumstances of a case. (*Ishikawa Gasket America, Inc.* (2001) 337 NLRB 175, 176, enforced by *Ishikawa Gasket America, Inc. v. NLRB* (6th Cir. 2004) 354 F.3d 534.) In cases where the NLRB has granted the remedy of notice-reading by a respondent or its representative, the conduct has been egregious. (*Ibid.*) For example, in one case where the remedy was granted, the employer, during multiple election campaigns, created the impression of surveillance, threatened employees with discharge, told employees the plant would close if a union came in, and had the mayor suggest to employees that unionization would cause the plant to close. (*Wallace International de Puerto Rico, Inc.* (1999) 328 NLRB 29, 29-30.) Here, the City's conduct is not so egregious as to warrant a remedy of a notice-reading. Therefore, I decline to grant Local 773's requested remedy of a live reading.

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 Commerce (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3506, and 3506.5, subdivisions (a) and (b), and Public Employment Relations Board (PERB) Regulation 32603, subdivisions (a) and (b), when it interviewed two employees regarding their testimony at an upcoming arbitration hearing without notifying them that the interviews were voluntary and that no reprisals would follow.

Pursuant to section 3509, subdivision (b), of the Government Code, it hereby is ORDERED that the City, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Interfering with the rights of employees guaranteed by the MMBA.

2. Denying the Commerce City Employees Association, American Federation of State, County and Municipal Employees, Local 773 (Local 773) its right to represent bargaining unit members in their employment relations with the City.

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

1. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to City employees in the bargaining units represented by Local 773 are customarily 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. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material. The Notice shall also be posted by

electronic message, intranet, internet site, and other electronic means customarily used by the City to communicate with employees in the bargaining units represented by Local 773.

2. Written notification of the actions taken to comply with this Order shall be made to PERB's General Counsel, 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 Local 773.

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(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).)