



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

CALIFORNIA NURSES ASSOCIATION,

and

CAREGIVERS & HEALTHCARE
EMPLOYEES UNION,

Charging Parties,

v.

PALOMAR HEALTH,

Respondent.

Case No. LA-CE-1581-M

PERB Decision No. 2895-M

March 15, 2024

Appearances: Nicole J. Daro and Anthony J. Tucci, Attorneys, for California Nurses Association and Caregivers & Healthcare Employees Union; Daniel J. Kanter, Associate General Counsel, for Palomar Health.

Before Krantz, Paulson, and Nazarian, Members.

DECISION

PAULSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by Charging Parties California Nurses Association (CNA) and Caregivers & Healthcare Employees Union (CHEU) (collectively, Unions) and cross-exceptions by Respondent Palomar Health (Palomar) to the proposed decision of an administrative law judge (ALJ). The underlying unfair practice charge and complaint, as amended, primarily allege that Palomar violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq., by (1) maintaining and enforcing an unreasonable access rule, (2) engaging in unlawful

surveillance, (3) unilaterally changing its past policy or practice to disallow the Unions access to certain non-patient care areas by filing a lawsuit¹ to enjoin the Unions from being present in these areas, and (4) interfering with protected rights by filing that Lawsuit.² The ALJ found that Palomar maintained and enforced an unreasonable access rule, engaged in unlawful surveillance, and interfered with protected rights by pursuing some parts of the Lawsuit, but dismissed the unilateral change allegation, as well as the allegation that Palomar interfered with protected rights via the trespass cause of action in its Lawsuit.

Both the Unions and Palomar filed exceptions to the proposed decision. The Unions except primarily to the ALJ's dismissal of the unilateral change allegation, his conclusion that only part of the Lawsuit constituted interference under *Bill Johnson's Restaurants, Inc. v. NLRB* (1983) 461 U.S. 731 (*Bill Johnson's*), and perceived omissions in the remedy. Palomar excepts primarily to the ALJ's legal conclusions that Palomar violated the MMBA, including that it maintained an unreasonable access rule, engaged in unlawful surveillance, and interfered with protected activity by pursuing any portion of its Lawsuit. Palomar also excepts to one evidentiary determination and several aspects of the ALJ's remedial order. After the proposed decision issued and while the parties' exceptions were pending, the Court of Appeal issued a published decision, remanding the Lawsuit to the trial court with an order to dismiss it for lack of

¹ *Palomar Health v. National Nurses United et al.* (Super. Ct. San Diego County, 2022, No. 37-2022-00017624-CU-MC-NC), hereinafter "Lawsuit."

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

jurisdiction, as the Lawsuit is preempted by the MMBA and subject to PERB's exclusive jurisdiction. (*Palomar Health v. National Nurses United* (2023) 97 Cal.App.5th 1189, 1212.)

Based on our review of the proposed decision, the entire record, and relevant legal authority, we find the record supports the proposed decision's factual findings. We affirm in part and reverse in part the proposed decision's legal conclusions, sustaining each claim in the complaint.

FACTUAL AND PROCEDURAL BACKGROUND³

A. The Parties, Their Collective Bargaining Agreements, and Palomar's Solicitation & Distribution Policy

Palomar is a public agency within the meaning of MMBA section 3501, subdivision (c), and PERB Regulation 32016, subdivision (a). Palomar operates two acute care hospitals, or medical centers, one on Citracado Parkway in Escondido (Escondido Medical Center) and one on Pomerado Road in Poway (Poway Medical Center), as well as a number of other, smaller facilities.⁴ CNA is the exclusive

³ Palomar challenges the ALJ's decision to exclude certain evidence at the formal hearing but does not otherwise except to any specific finding of fact. This factual background is drawn from the proposed decision, condensed for relevance to the issues on exceptions, and supplemented by the record to provide additional context for the discussion below.

On several points, witnesses provided slightly different accounts which the ALJ did not explicitly resolve. After a thorough review of the record, we find any slight differences in the testimony immaterial, except where otherwise noted, and no conclusion relies on unresolved disputed testimony.

⁴ Prior to 2020, Palomar operated an acute care hospital on East Valley Parkway. At some point in 2020, Palomar closed the East Valley Parkway facility and replaced it with Escondido Medical Center, though there was some unspecified period

representative within the meaning of PERB Regulation 32016, subdivision (b), of a bargaining unit of approximately 1,250 registered nurses (RNs) employed by Palomar. CHEU is the exclusive representative within the meaning of PERB Regulation 32016, subdivision (b), of a bargaining unit of approximately 1,600 non-RN caregivers employed by Palomar.

As of the hearing in this matter, the following personnel held positions within Palomar and the Unions, respectively. Angela Thill was Palomar's Labor Relations Manager. She began working for Palomar as a human resources business partner in February 2019, and became the Labor Relations Manager in June 2020. Bill Kirby was Palomar's Director of Security. He started in that role in March 2022, and began working for Palomar sometime in 2021. Ginger Faustino was a CNA Labor Representative at Palomar since June 2018. Sara Gurling was a CHEU Labor Representative since 2008, except for an eight-month period in 2014. Gurling was assigned to Palomar several times since 2009. Her most recent assignment to Palomar started in 2018.

From June 1, 2017, through May 31, 2021, Palomar and CNA were parties to a collective bargaining agreement (CNA CBA). Article 28, "Association Access," provides:

"CNA shall designate up to two (2) authorized representatives who shall be granted access to Palomar Health facilities during hours of operation for the purposes of ensuring compliance with the collective bargaining agreement, adjusting grievances, and updating Association bulletin boards. CNA's designated representatives shall at

of time during which both facilities were open.

all times wear Palomar Health-provided identification and shall not at any time interfere with the employees' duties or Palomar Health operations, or meet with any Registered Nurses during their working time or in patient care areas. Upon arrival at any Palomar Health facility, the CNA representative shall notify the Security Department. CNA may request access for additional individuals, such as CNA officers, from the Chief Human Resources Officer or designee for the same purposes as listed above, but such access will be granted at the sole discretion of Palomar Health."

Similarly, Palomar and CHEU were parties to a collective bargaining agreement covering the same time period (CHEU CBA). Article 6 of the CHEU CBA, "Union Access," is identical to the above-quoted portion of CNA CBA Article 28, except that "CHEU" replaces "CNA" throughout.

Palomar maintains a "Resolution . . . Relating to Employee Relations for Palomar [] Health" (Employee Relations Resolution), which Palomar adopted February 10, 2003. Section 11 of the Employee Relations Resolution is titled "Solicitation and Distribution of Written Material on [Palomar] Premises" and provides in pertinent part that:

"[s]olicitation and the distribution of literature on [Palomar] premises, including the grounds, premises and parking areas, shall conform to the guidelines established by the Employee Relations Office or other appropriate [Palomar] official."

Palomar's "Procedure: Solicitation and Distribution of Literature" (Solicitation & Distribution Policy) provides in relevant part:

"E. Persons not employed by the Palomar Health may not solicit or distribute literature or written material on Palomar Health property at any time for any purpose.

“1. Human Resources and Security must be contacted with regard to any solicitation and Security will escort any non-employees off of the Palomar Health property.

“2. If after business hours, Security shall be contacted directly.”

The Solicitation & Distribution Policy in the record shows that it was last revised November 30, 2020.

B. The Unions’ Activities and Access to Palomar’s Facilities Prior to Spring 2022

1. Union Activity in Conference Rooms, Cafeterias, Patios & Break Areas

From June 2018 until March 2020, Faustino visited the Escondido Medical Center campus in her role as a CNA representative at least three times a week. She would usually include a visit to the East Valley Parkway campus at least once a week when it was still open, i.e., until sometime in 2020. In addition, Faustino would visit the Poway Medical Center at least twice a week. Faustino estimated that, in total, she visited Palomar facilities four to five times a week. She did so for a variety of reasons: to attend *Weingarten* meetings,⁵ meet-and-confer sessions, or grievance meetings; to communicate with nurses, update bulletin boards, and hold unit meetings; to table at the facilities; and to hold education sessions as well as monthly Professional Practice

⁵ In *NLRB v. J. Weingarten, Inc.* (1975) 420 U.S. 251 (*Weingarten*), the United States Supreme Court affirmed the decision of the National Labor Relations Board to afford employees the right, upon request, to union representation during investigatory interviews. (*Id.* at p. 256.)

Committee meetings.⁶ Unit meetings, at which safety, scheduling, and other issues were discussed, took place in the cafeterias or in a conference room. CNA would request in advance to use conference rooms. Faustino conducted unit meetings once every other week at the medical centers and once a month at the East Valley Parkway facility when it was still open. From 2018 to 2020, Faustino would “round” at least once a week per facility.⁷ Faustino would typically encounter at least one manager per rounding session at each facility, but more often at Escondido Medical Center because of its size.

Faustino described tabling between June 2018 and 2020 in the cafeteria at the Escondido Medical Center, at the East Valley Parkway campus, and in a conference room next to the cafeteria at the Poway campus. Faustino conducted separate tabling sessions for the day shift and the night shift, each of which lasted for at least two hours. Faustino tabled approximately once every three weeks at each facility and for each shift. While tabling at Escondido Medical Center, she would encounter members of management frequently during the day shift and infrequently during the night shift. At the East Valley Parkway campus, Faustino would encounter about one manager during the day shift, but none at night. And at Poway Medical Center, Faustino encountered “maybe about a handful during the day shift but really none at night.”

⁶ “Tabling” refers to the practice of a union representative sitting at a table with literature or leaflets, where bargaining unit members may approach and obtain information or education.

⁷ “Rounding” refers to the practice of union representatives traveling throughout a facility to visit breakrooms, update bulletin boards, discuss issues with unit members on their breaks, and give them written materials.

Per Faustino, more than once, and up to five times, management had offered the Unions use of the conference room in the cafeteria at Escondido Medical Center, and the Unions used that conference room with prior approval with no restrictions on their activities. Thill confirmed that the Unions used the conference room on a regular basis, such as for monthly union meetings.

During Gurling's most recent CHEU assignment to Palomar, beginning in 2018, she performed rounds, tabled in the cafeteria, and conducted unit meetings in a break room, in the cafeteria, or outside in the patio area behind the cafeteria. She would try to visit all the Escondido facilities on one day and go to the Poway facility on another day. The Escondido facility on East Valley Parkway was her busiest shop, which she would visit several times a week, during both day and night shifts. She would visit the Poway facility once or twice a week to round and meet with members outside or in the cafeteria or lunchroom. On some of these occasions, she handed out union flyers to nurses on their break and left some on the lunch table. She would inform members in advance when she was tabling in the cafeteria. She would perform such activities at Escondido Medical Center frequently, on both the day and night shifts. Sometimes, on the night shift, she would have trays with enchiladas set up in the cafeteria, and union members would come, have enchiladas, and then sit and talk. She also performed similar activities at Poway Medical Center, which was smaller than Escondido Medical Center and required less frequent attention. From 2018 until 2020, Gurling tabled approximately once a month or once every couple of months at each of these two facilities and conducted unit meetings at least once every couple weeks at one of the hospitals.

2. Leafletting Outside the Escondido Medical Center Entrance

From 2018 through early 2020, Gurling leafletted a few times a year. Gurling specifically recalled one occasion where union representatives leafletted at the front entrances of both medical centers to turn out members for an upcoming action protesting case manager layoffs. Gurling did this leafletting two or three days before the action during the times when workers were coming and going, i.e., between 6:00 and 8:00 a.m., 2:00 and 4:00 p.m., and 6:00 and 8:00 p.m. She leafletted at Escondido Medical Center approximately 20 to 25 feet from the door that serves as the main entrance to the facility.

The front door at Escondido Medical Center consists of two automatic sliding halves. The combined door is approximately eight feet wide. A wide walkway leads straight from this entrance, with another walkway along the left side when exiting the building. Patients, visitors, and staff use these walkways to enter the building. Usually, two people would leaflet at two locations on either side of the portion of the walkway leading straight from the entrance, approximately 20 to 25 feet from the entrance. At a maximum, five or six people would leaflet in this location.

Before March 2020, Faustino leafletted outside the main entrance of a Palomar facility approximately once every three or four months. Prior to an informational picket conducted outside of Escondido Medical Center, she leafletted two or three times to notify nurses of the upcoming picketing. The leafletting took place about 30-35 feet from the main entrance doors to Escondido Medical Center. Faustino also leafletted at the Poway Medical Center for the same purpose, but not at the East Valley Parkway campus. Each leafletting session typically lasted for about two hours. Each time,

Gurling accompanied Faustino. They would leaflet in the morning from 6:00 to 8:00 a.m. and again in the evening from 6:00 to 8:00 p.m. Faustino described this leafletting as follows:

“[F]rom six a.m. to seven a.m. [¶] [w]e would focus on our members who are coming into work and using the front entrance as a means to enter into the facility. And what I would do is have the stack of leaflets in one arm and hand them one copy as they are walking past me before they hit the front entrance. . . . Similar fashion during the six p.m. to seven p.m. hour as well. [¶] Then between the hours of seven a.m. to eight a.m., I would be facing towards the front entrance waiting for our members who are leaving that shift on their way out to exit the facility to their cars or transportation. And I would do the same. I would wait for them to walk past me. I would have the stack of leaflets on one arm and hand one copy of the leaflet to the outgoing member. . . . And then for the evening shift, it would be between seven p.m. to eight p.m.”

Faustino identified the nurses to whom she handed the leaflet by assessing whether they were wearing scrubs, and whether they had an RN name badge. Faustino's interactions with the nurses during leafletting were typically less than 30 seconds. On occasion, however, incoming staff would stop and chat with her for “about five minutes . . . if they were early enough before their shift” and outgoing staff would do so for “between five to eight minutes.” When a member wanted to have a more in-depth conversation, Faustino and the member would move to the side. While leafletting during that pre-March 2020 time period, she would occasionally see management employees entering or exiting Escondido Medical Center through the main entrance. To Faustino's knowledge, Palomar never raised any concerns to the Unions regarding

their leafletting at, or more generally their access to, Palomar facilities during the 2018-2020 time period.

Gurling described the leafletting process at Escondido Medical Center similarly to Faustino. Gurling's interactions with people going in and out of the facility during leafletting were "[v]ery brief, seconds, mostly salutations," with conversations lasting "on occasion . . . 30 seconds" and "very rare[ly] . . . minutes." For longer interactions, those leafletting would usually move off to the side. Gurling was able to identify CHEU members by their badges, which state their job classification.⁸

Faustino and Gurling distributed a flyer together at the front and back entrances of Escondido and Poway Medical Centers, respectively, around Halloween 2021. The flyer asked "“WHAT'S SCARY TO NURSES AND CAREGIVERS?” and answered, “UNSAFE STAFFING.” (Capitalization in original.) Some managers took the flyer and the bag of mixed candy that came with it. None raised any issues with the Unions

⁸ After the declaration of a health emergency in March 2020 due to the outbreak of the COVID-19 pandemic, union representatives did not access any of the facilities for a while. CNA and CHEU conducted meetings with bargaining unit members and management online. However, within weeks, the Unions' representatives began to go to the campuses again, to the peripheral exterior open areas to hold actions and other concerted activities with union members. The Unions held approximately 9 to 12 actions in the 9 to 16-week period after the declaration of the health emergency, including actions like rallies, press conferences, and car caravans. The first such action occurred in April 2020; until the end of 2021, leafletting occurred approximately once every two months, primarily at the Escondido and Poway Medical Centers. However, union representatives did not table during the early days of the pandemic. When the Unions did table at Escondido Medical Center after the outbreak of the COVID-19 pandemic, they did so in the outside patio area behind the Starbucks café at the far side of the first floor of the facility from the main entrance, typically during shift changes.

distributing the flyer at these locations. The same is true of a Christmas card that had a candy cane attached to it that Faustino and Gurling distributed at the entrances to the medical centers in December 2021, wishing RNs and caregivers happy holidays, and asking them to “Save the Date” for a January 13, 2022 action.⁹

C. Successor CBA Bargaining

Bargaining about successors to the 2017-2021 CBAs commenced in mid-April 2021. From the beginning, the parties conducted successor bargaining jointly for both units. The union access provisions in the 2017-2021 CBAs—i.e., CNA CBA Article 28, “Association Access,” and CHEU CBA Article 6, “Union Access”—were not “opened,” meaning that neither the Unions nor Palomar sought to make any changes to these provisions. After the predecessor CBAs expired on May 31, 2021, the parties agreed to a number of extensions on a month-by-month basis, through which the expired CBAs remained in effect without interruption until the end of February 2022. Thereafter, Palomar would not agree to any further extensions. Palomar presented the Unions with its last, best, and final offer and declared impasse in March or April 2022.¹⁰ The Unions conducted a strike authorization vote in May. The parties reached agreement on successors to the 2017-2021 CBAs around June 21.

⁹ The ALJ did not credit claims by Palomar that it was unaware of tabling and leafletting prior to March 2022 in light of extensive testimony by the Unions’ witnesses to the contrary coupled with the fact that these activities occurred often enough and were, by their nature, so visible that they must have come to the attention of management, either through direct observation or through reports from others. Having reviewed the record de novo, we agree.

¹⁰ All further dates are in 2022 unless otherwise noted.

D. The Unions' Activities and Access to Palomar in Spring 2022

Around the time that Palomar presented its last, best, and final offer, union leafletting at Palomar facilities increased to multiple times a week. Starting in mid to late March, Faustino planned to leaflet at Escondido Medical Center and Poway Medical Center around three times per week at each location, coinciding with each of Palomar's three daily shifts. Faustino did not give Palomar prior notice of these leafletting sessions. She tabled relatively frequently at Escondido Medical Center, and tabled on occasion at Poway Medical Center, from the end of March until the beginning of June. During the latter period, she would table at Escondido Medical Center at least once or twice every week, with frequency increasing over time. Faustino did not give Palomar prior notice of these tabling sessions.

The Unions introduced more than a dozen flyers that Gurling, Faustino, and/or other representatives of the Unions distributed at Palomar facilities between February and May. On exceptions, no party challenges the ALJ's summary of the flyers' content, which include subjects such as "KNOW YOUR RIGHTS: BARGAINING & STRIKES"; "Nurses & Caregivers – The Heart of Patient Care – Palomar Health Be Fair!"; "Palomar Warned to Stop Union Busting and Withholding Information!"; "Palomar Health RNs & Caregivers Tell Palomar: Stop Impeding Progress in Bargaining, Negotiate in Good Faith!"; dates for strike education; and "I'LL STRIKE FOR MY PATIENTS & PROFESSION." (All formatting in originals.)¹¹

¹¹ While an e-mail from Palomar Chief Human Resources Officer Geoffrey Washburn refers to some set of flyers from this time period as intending to disparage or demean Palomar, union or employee speech on an employment issue is protected even if it is intemperate, disparaging, inaccurate, or engenders ill feelings, unless such

1. Union Activity in Conference Rooms, Cafeterias, Patios & Break Areas

During the daytime on April 5, Faustino, Gurling, CHEU organizer Chris Novoa, and two RN representatives and bargaining team members were tabling in the outside patio area behind the Starbucks café on the first floor of Escondido Medical Center.¹² The tabling involved education about strike rights. During the outside patio tabling on April 5, Thill and Kirby approached union representatives including Gurling and Faustino and told them they were violating Palomar's Solicitation & Distribution Policy and needed to leave. At some point that day, Gurling received a telephone call from Maria Vivanco, the public sector lead for both Unions, who informed her that Palomar had "some sort of no solicitation [policy] and that they might call the police." Thill, whose office is located in a different Palomar facility and who did not visit Escondido Medical Center daily, had never seen or heard of union representatives tabling there before.

By e-mail message to Thill dated April 25, Faustino requested to use the conference room in the cafeteria at Escondido Medical Center to talk to the Unions'

speech is maliciously dishonest or so insubordinate or flagrant as to cause substantial disruption in the workplace. (*Mt. San Jacinto Community College District* (2023) PERB Decision No. 2865, pp. 21-22.) Palomar made no argument at hearing or on exceptions that the content of the flyers lost protection under these standards. We therefore find that the Unions' efforts to communicate with their bargaining unit members through these flyers about bargaining and disputes with the employer were protected activity.

¹² Sometime during the first two years of the COVID-19 pandemic, Gurling mislaid her Palomar-issued ID badge. The ALJ found that Gurling was not wearing a Palomar-issued ID badge during the April 5 incident, but that there was no basis to conclude she was not wearing such a badge on any subsequent occasion.

bargaining unit members on four days between April 29 and May 5, for between two and four and one-half hours per day. She further requested to use the conference room on the third floor next to the cafeteria at Poway Medical Center for the same purpose for three hours on April 28 and two hours on May 6. Via e-mail reply on April 26, Thill asked Faustino, "can you help us understand the planned use of the rooms for 17.5 hours over the course of 6 days?" After several e-mails between Faustino and Thill, Thill ultimately denied Faustino's request to use the conference rooms on the requested days.

On April 29, Faustino was sitting at a long table in the Escondido Medical Center cafeteria, with flyers on the table. Faustino had just finished talking to some bargaining unit members, who had gone back to work, when Palomar Chief Security Officer Anis Trabelsi approached her and told Faustino she was not allowed to be there. Faustino also noticed that one or two security officers were walking around in the cafeteria without having their lunch with them, something she had not noticed in the past when she met with members there.

Via e-mail message dated May 1, Washburn provided Vivanco with Palomar's Solicitation & Distribution Policy and "respectfully ask[ed] that union representatives honor our policy." Washburn also wrote that "[t]he Association Access article clearly states the purposes for which access can be used," to wit, "[e]nsuring compliance with the collective bargaining agreement," "[g]rievance representation," and "[u]pdating Association bulletin boards." Washburn's e-mail added: "Distributing literature on Palomar Health premises with intent to demean Palomar Health and its leadership and elevate disruption violates both our policy and union contract."

On May 3, Gurling was in the roof-top patio area on the third floor of Escondido Medical Center outside the cafeteria, sitting by herself and eating lunch. Immediately prior, she had been sitting in the cafeteria talking with Faustino and some nurses. She had with her a clipboard and some strike vote pledge cards. She was planning to leaflet the afternoon shift change at the front entrance to Escondido Medical Center together with Novoa, who was going to bring the flyers. Thill approached Gurling and told her that she had no right to be there and was violating Palomar policy and the CHEU CBA. When Thill exited the facility on the ground floor later, she saw Gurling sitting on a bench. Thill went back in and returned with Kirby; Thill and Kirby both approached Gurling. Thill asked Gurling to leave and told her that she had no right to be there. After some period of time, Gurling moved away from Thill and Kirby. By then, Novoa had arrived and Gurling briefed him. They began leafletting once bargaining unit employees started to arrive.¹³

On the morning of May 5, Gurling, Faustino, Novoa, and RNs and caregivers participated in an hour-long Facility Bargaining Committee meeting in the cafeteria of Escondido Medical Center. Within the first ten or fifteen minutes of the meeting, two security officers arrived and stood at first five and later three feet from the meeting.

¹³ Kirby's declaration in support of Palomar's Lawsuit attached photographs of the bench area that Kirby took at the time of this incident. The photos show the bench in question with tall, dense vegetation growing immediately behind it and Thill standing approximately three feet in front of the bench. On the bench are Gurling's handbag with a clipboard next to it and a bag of red union bracelets on top of the clipboard. Photographs of the immediate vicinity of the front entrance to Escondido Medical Center, including the leafletting area, do not show the bench in question, suggesting it was some distance away from the entrance.

One or the other security officer was present for the entire meeting. Upon their initial arrival, Gurling approached them and told them that it was a union meeting and protected activity, that “they should not be surveilling and listening in on it and watching,” and that “they should move away and leave.” The security officers first moved away, but one of them came back to a table three and one-half feet away from the meeting, where he sat down and placed a two-way radio on the corner of the table and pointed it at the meeting. When Gurling approached the security officer and told him to leave or move away from the meeting, he read to her from a piece of paper, “if you don’t like being watched, then you can take your meeting outside of the hospital.” The security officer stayed there for the duration of the meeting.

Also on May 5, Ricky Liuchan, who had worked as a security officer at Escondido Medical Center since March 30, 2022, e-mailed Kirby that he and another security employee had observed Novoa walk past the Emergency Room (ER) main entrance in the direction of the ambulance bay. The two security employees followed Novoa and “[w]hen we came around the corner of the building we observed [Novoa] talking to a[n] ER nurse . . . with his back facing us directly outside the sleep rooms patio exit in the ER.” The security employees stopped approximately 18 to 20 feet away from where Novoa and the ER nurse were conversing. Once Novoa finished his conversation, Novoa approached the security employees and claimed they were taking away his right to talk with hospital employees. He walked back to the ER and left the hospital facilities. Liuchan and Kirby both testified that there are tables and a seating area in the patio area to which Liuchan’s e-mail message refers. Liuchan has observed nurses taking their breaks in this patio area, which is “a good 38 feet” away

from the first parking spot in the ambulance bay. He confirmed that on the day in question, he observed Novoa and the nurse in this patio area.

Kirby received two or three reports about union representatives being present in the Escondido Medical Center cafeteria on various unspecified dates in Spring 2022. On one such occasion, he responded to the cafeteria and asked the union representatives to leave, which they refused to do. On several occasions, others responded to the cafeteria for him.

2. Leafletting Outside the Escondido Medical Center Entrance

The proposed decision analyzed the evidence regarding the distance between the front entrance of Escondido Medical Center and the various union representatives who leafletted there, finding that they usually stayed approximately 20-25 feet away from the entrance, only occasionally coming as close as four or five feet to that entrance. We concur with this finding, and summarize the evidence as follows.

Kirby directed his staff to take photographs of union representatives leafletting outside the main entrance to Escondido Medical Center in April and May. There are also cameras permanently installed at the main entrance to Escondido Medical Center, but these cameras do not work. In addition to the photographs already discussed in footnote 13, Palomar introduced four photographs that show union representatives on other occasions in front of the main entrance to Escondido Medical Center.

Wolfgang Heller was Lead Security Officer at Escondido Medical Center at the time, and in that position performed an exterior patrol of the facility about once every hour. Heller testified that the first of these photographs, taken from the outside, shows

a male union representative standing approximately ten feet directly in front of the sliding doors within the main entrance to that facility talking to “a medical staff member,” who is standing at a similar distance from the side of the entrance.

However, the person identified by Heller as “a medical staff member” in this picture appears to be the same person whom he identified as a female union representative in the next picture described below. Identical shadows in these pictures show that they were taken at the same time of, presumably, the same day.

The second photograph, also taken from the outside, shows the same union representative standing to the side of the entrance speaking to another medical staff member, who according to Heller is standing approximately five feet from the entrance, closer to it than the former, and like him, to its side. Based on Heller’s testimony and features on the photograph such as shadows, the union representative appears to be standing perhaps a foot or two closer to the entrance than in the first photograph but is farther away from the sliding doors because he is standing to the side. The same photograph also shows a person whom Heller identified as a female union representative “a little bit more than five feet, maybe eight feet or so” from the entrance, to the side of the sliding doors, walking across the entrance towards the first two individuals with a piece of paper in her outstretched hand.

The third and fourth photographs, taken from the inside, show a female union representative approximately ten feet—according to Heller—from the entrance, approaching it from the side and walking on a path that would have taken her parallel across or slightly away from the entrance, again with a piece of paper in her hand. Asked during direct examination, “how close did you observe union representatives in

relation to the front entrance,” Heller answered, “anywhere from five feet and even closer,” such that “if they had taken an additional step or two [they] would have been inside the hospital.” Asked subsequently by the ALJ, “what is the closest you personally observed a union representative approach the door while interacting with hospital staff,” Heller answered, “around five feet if not less,” without mentioning that they could have entered the facility by taking one or two more steps.

In April and May, Liuchan observed union representatives anywhere from 4 or 5 feet to 40 to 50 feet from the main door to that facility handing out flyers and conversing with medical staff who were entering. Liuchan estimated the distance between the union representative and the main entrance to Escondido Medical Center in the last two of the four pictures described above as eight to ten feet. He found the distance between the female union representative and the entrance in the second picture hard to judge but estimated it to be four or five feet, based on other objects in the picture. Liuchan identified the individual in the same picture whom Heller identified as a medical staff member as a union representative. He estimated this individual to be standing within two feet of the entrance and the individual identified by Heller as a union representative to be standing between three to four feet from the entrance, commenting that “it’s a picture, so it’s hard to judge and make a true judgment.” Liuchan’s “best estimate” of how close he saw union representatives passing out flyers to the front entrance of Escondido Medical Center in April or May 2002 was “within five feet.”

The four photographs of front-entrance leafletting introduced by Palomar duplicate four of a total of 39 photographs that Palomar provided in response to a

records subpoena and which the Unions introduced at hearing. No photograph in the record shows any union representative closer to the entrance than the four to five feet described by Heller and Liuchan and shown in the four photographs described just above.

When Kirby observed union representatives leafletting at the main entrance to Escondido Medical Center in April and May, “they would move forward and backwards from the front door to about 30 to 40 feet from the door depending upon who they were talking or walking with,” in constant motion. Gurling typically stood near a rock located approximately 30 feet from the door, while Faustino would stand by an employee shuttle sign a little closer to the door but off to the left. Novoa, when not talking or walking with anybody or making contact with employees, would stand about the same distance from the entrance as Gurling and Faustino, on the right side. We do not credit Kirby’s conclusory statement that the union representatives at times “were blocking the entrance of the hospital,” as his more specific testimony described observing that people might have to slow down and move around the representatives as they entered or exited the hospital. This caused people to stop for “five seconds, 15-20 seconds.” On one occasion, Kirby experienced this himself. On that occasion, the union representative was standing about four feet in front of the right half of the sliding door.

Prior to April, Thill received no reports of union representatives leafletting in front of the main entrance to Escondido Medical Center. In Thill’s opinion, leafletting within 30 feet of the main entrance to Escondido Medical Center was “a distraction for those that are coming into the community to seek services and allowing us to offer a

healing environment for our patients and their family members.”¹⁴ However, beyond Thill’s opinion, she provided no concrete evidence of such “distraction,” let alone any information to support the claim that these activities interfered with patient care.

On May 5, Gurling leafletted in front of the main entrance to Escondido Medical Center. Security officers were present, but Gurling had minimal interaction with them and they did not stay for long. However, according to an e-mail from Kirby on that day, he observed Gurling and Novoa standing outside the main entrance to the hospital and asked them to leave, to which Gurling replied they had a right to be on the property. Further, according to the report contained in Kirby’s e-mail, “[n]o photographs were taken due to the very low volume of pedestrian traffic in the area.”

RN Joanne Meza recounted that right before the strike vote in May, she and two other bargaining unit members leafletted for CNA in front of the main entrance to Escondido Medical Center, approximately 20 feet from that entrance. Two security

¹⁴ Palomar attempted to introduce only two pieces of evidence related to Thill’s “distraction” claim, namely, two May 10, 2022 e-mail messages from an administrator at Poway Medical Center, who did not testify, detailing a single alleged complaint by a patient’s family member. Because Palomar failed to authenticate these e-mail messages, the ALJ did not admit them into evidence. However, the ALJ received related testimony, including from Washburn that he recalled a report by the administrators at Poway Medical Center “from a patient’s family member that was concerned about their mother being able to get care, stated that they’d been, in their terms, aggressively approached in regards to a potential for a strike.” Such reports involved at least two levels of uncorroborated hearsay and therefore cannot by themselves support a finding. (PERB Reg. 32176.) Aside from this evidentiary infirmity, union activity does not lose protection merely because it “distracts” patients or their families on their way into a health care facility, and a single incident of such distraction has even less relevance. It also appears that the single hearsay report was primarily about concerns that a strike itself would disrupt patient care, a contention which has no bearing on the matter at hand.

employees approached Meza and her colleagues and told them that what they were doing was illegal and they could get in trouble with human resources. In April and May, security employees on more than one occasion told union representatives that they had to move as they could only leaflet “at the employee parking lot down the hill.”

During Spring 2022, the employee parking lot was approximately half a mile from the front entrance to Escondido Medical Center. Kirby confirmed that each time he encountered union representatives at the main entrance to Escondido Medical Center, he would advise them that they were welcome to go to the employee parking lot to engage with employees. Palomar has since closed that parking lot and employees now park in a new parking structure approximately 35-80 feet away from the ER entrance and 1,000 to 1,500 feet from the main entrance to Escondido Medical Center. While per Kirby, Palomar has imposed no restrictions on the Unions’ ability to communicate with their members at this new parking structure, on cross-examination, he confirmed that Palomar’s Solicitation & Distribution Policy prohibits distribution of union flyers by non-employee union representatives in that parking structure as well.

E. Palomar’s Lawsuit Against the Unions

On May 10, Palomar filed a Verified Complaint for Injunctive Relief (Verified Complaint) against the Unions and Faustino, Gurling, Novoa, and Vivanco (Defendants) in San Diego County Superior Court. The Verified Complaint alleges two causes of action: (1) for “trespass,” i.e., that “defendants, their agents or assigns, have occupied or entered the property of Palomar without right or consent, and with the intent to injure Palomar”; and (2) for “unlawful picketing,” i.e., that “defendants have engaged in unlawful disruptive activity on the property belonging to Palomar at

[Escondido Medical Center]” and that “defendants’ picketing has caused obstruction to the ingress and egress to the [Escondido Medical Center] in violation of state law.” (Capitalization and boldface omitted.) In its prayer for relief, the Verified Complaint asks, among other things, “[t]hat Defendants . . . be permanently enjoined and restrained from [¶] [p]icketing, parading, marching, standing, sitting, walking, or otherwise being present inside or outside” Escondido Medical Center.

On May 11, Palomar filed an Ex Parte Application for Temporary Restraining Order and Motion for Order to Show Cause Why Preliminary Injunction Should not Issue (Application for TRO and Motion for OSC). The temporary restraining order and preliminary injunction sought by Palomar’s Application for TRO and Motion for OSC, respectively, are identical to the permanent injunction sought by the Verified Complaint. On May 12, the superior court declined to order a TRO and scheduled a preliminary injunction hearing for May 23. On May 19, PERB moved for leave to intervene in the Lawsuit, seeking to have the Lawsuit dismissed for lack of jurisdiction because the MMBA preempts the Lawsuit and PERB therefore has exclusive jurisdiction over the matters alleged in the Lawsuit. On May 23 and June 13, the superior court conducted an evidentiary hearing regarding the requested preliminary injunction. During the hearing, the superior court judge directed Palomar to return to court with security camera video recordings of the Unions blocking the entrance to Escondido Medical Center. When Palomar’s attorney expressed concern that the Unions and PERB could object to videotaping as surveillance violating the MMBA, the judge stated that “just because somebody says that you can’t video, for a – a legal proceeding in the judicial system, videotaping, video’ing [*sic*], recording evidence is a

protected activity.” On June 13, the superior court denied Palomar’s requested preliminary injunction without prejudice.

On June 10, and June 23, respectively, the Defendants filed a demurrer and a special motion to strike. Also on June 10, the superior court granted PERB’s motion to intervene. On August 12, the superior court overruled the Defendants’ demurrer and denied their special motion to strike. In overruling the demurrer, the trial court recognized that “PERB has exclusive jurisdiction over conduct that is ‘arguably protected or prohibited’ by the statutes administered by PERB,” but concluded that “the Court here will not be adjudicating any alleged unfair practices” and that, therefore, “it has jurisdiction over the claims set forth in the plaintiff’s complaint.” In addition, the superior court found that “plaintiff has set forth sufficient facts constituting causes of action for trespass and unlawful picketing” and that “[t]he Court is unable to determine on this limited record that the defendants have not improperly blocked access to the hospital and/or trespassed on some portion(s) of plaintiff’s property.” The trial court therefore overruled the demurrer, but added: “Of course, defendants may continue to assert these same defenses as the case progresses and [a] more complete record is developed.”

On September 13, the Defendants filed a Notice of Appeal with the Court of Appeal, Fourth Appellate District (Court of Appeal), from the superior court’s orders overruling their demurrer and denying their special motion to strike. On December 18, 2023, the Court of Appeal issued a published decision, finding that Palomar’s claims in the Lawsuit are preempted and, therefore, the trial court lacks jurisdiction over the dispute. (*Palomar Health v. National Nurses United*, *supra*, 97 Cal.App.5th 1189, 1212.)

The Court of Appeal reversed the trial court's order overruling the demurrer and remanded the Lawsuit to the trial court with directions to enter an order sustaining the demurrer without leave to amend, and to dismiss the case on the grounds that it is subject to the exclusive jurisdiction of PERB. (*Ibid.*) The Court of Appeal awarded costs of appeal to appellants. (*Ibid.*)

F. Relevant PERB Procedural History

On May 11, CNA filed an unfair practice charge with PERB alleging that Palomar's Lawsuit "seeks to deny employee and non-employee representatives of [CNA] access to [Palomar]'s facilities" and that by initiating the Lawsuit, Palomar "has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed by the MMBA." On May 12, PERB's Office of the General Counsel (OGC) issued an Order to Expedite Processing at the OGC level. On May 17, the Unions amended their charge to add CHEU as a charging party and to allege theories of unilateral change, unreasonable and overbroad restriction of access, surveillance, and discrimination. On May 31, Palomar filed a position statement.

On June 1, OGC issued a complaint. On June 3, the Unions filed a Request to Expedite at All Levels. On June 9, OGC conducted an informal settlement conference, but the parties were unable to settle their dispute, and the matter was assigned to an ALJ to conduct a formal hearing. On June 15, the Board granted in part the Unions' June 3 request to expedite processing, granting the request only at the OGC level, thereby effectively reiterating OGC's May 12 Order to Expedite Processing. On June 20, Palomar timely answered the complaint, admitting the identity of the parties and the existence of collective bargaining agreements between them but denying the

substantive allegations, and raising several affirmative defenses, including waiver. On July 5, the ALJ scheduled the case for a formal hearing by video conference on August 11, 26, and 31 and September 16 and 30.

On July 28, the ALJ issued a first amended complaint, which remains the operative complaint in this matter and includes the four primary claims described *ante*, at pages 1-2. On August 12, the Unions filed a Second Request to Expedite at All Levels. The Unions also requested “that PERB modify the scheduling order for formal hearing and order that Days 2, 3, and 4 of the formal hearing begin on August 31 and run for consecutive days through September 2.” On August 24, the Board itself granted the Unions’ Second Request to Expedite at All Levels, with the exception of the request to modify the scheduling order for formal hearing, which the Board denied.

The ALJ conducted the formal hearing via video conference on August 26 and 31, September 16 and 30, October 7 and 13, and November 8.¹⁵ On January 13, 2023, the parties submitted post-hearing briefs.¹⁶ The ALJ issued the proposed decision on May 12, 2023. After receiving an extension of time, the Unions filed timely exceptions, and Palomar filed both a response to the Unions’ exceptions and separate

¹⁵ At 8:50 p.m. on August 25, the night before the first day of formal hearing in this case, Palomar moved to strike certain allegations in the first amended complaint based on the superior court’s August 12 orders overruling the Unions’ demurrer and denying their special motion to strike. On the first day of hearing, the ALJ orally denied Palomar’s motion as untimely.

¹⁶ On January 25, 2023, the Unions filed a request for a decision from the Board itself. On February 10, 2023, Palomar opposed the request. On February 16, 2023, the Board denied the request.

exceptions of its own. The Unions filed a timely response to Palomar's exceptions and the matter was placed on the Board's docket for resolution.

DISCUSSION

The Board enjoys broad discretion in its review of an ALJ's proposed decision. (PERB Reg. 32320; *Oakland Unified School District* (2007) PERB Decision No. 1880, p. 2.) 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, if a proposed decision has adequately addressed issues raised by certain exceptions, the Board need not further analyze those exceptions. (*Ibid.*) The Board also need not address alleged errors that would not affect the outcome. (*Ibid.*)

I. Unreasonable Access Rule

A. Prima Facie Case

Palomar challenges the ALJ's finding that it maintained and enforced an unreasonable rule, on its face and as applied, via its Solicitation & Distribution Policy. We agree that Palomar's Solicitation & Distribution Policy was unreasonable both facially and as applied.

MMBA section 3507, subdivisions (a)(6) and (7), provide that "[a] public agency may adopt reasonable rules and regulations after consultation in good faith with representatives of a recognized employee organization or organizations for the administration of employer-employee relations under this chapter" and that "[t]he[se] rules and regulations may include provisions for [¶] . . . [¶] [a]ccess of employee organization officers and representatives to work locations" and "[u]se of official bulletin boards and other means of communication by employee organizations." PERB

Regulation 32603, subdivision (f), makes it an unfair practice for a public agency to “[a]dopt or enforce a local rule that is not in conformance with the MMBA.”

A facial challenge to a local rule is based solely on the text of the rule. (*City and County of San Francisco* (2020) PERB Decision No. 2691-M, p. 21 (CCSF), citing *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.) “Even where there is a plausibly valid interpretation of an employer rule, a facial challenge will still succeed if the rule has a chilling effect on employees or unions or otherwise interferes with or impinges on protected rights even before being applied.” (CCSF, *supra*, PERB Decision No. 2691-M, p. 49.)

An employer must allow an exclusive representative reasonable access to employer property to communicate with bargaining unit employees, distribute literature, investigate workplace conditions, and assess contractual and statutory compliance. (*County of San Joaquin* (2021) PERB Decision No. 2775-M, pp. 26-39 (*San Joaquin*).) An employer bears the burden of proving that a restriction on access to its premises is: (1) necessary to safe or efficient operations; and (2) narrowly drawn to avoid overbroad, unnecessary interference with protected rights. (*Id.* at p. 27.) These principles apply irrespective of whether the person seeking access is a bargaining unit member or a union representative who does not work for the employer. (*Ibid.*)

An employer generally does not afford reasonable access if it infringes on an employee’s ability to engage in protected activity either in a nonwork area or during a nonwork time. (*County of Tulare* (2020) PERB Decision No. 2697-M, pp. 19-20; *Petaluma City Elementary School District/Joint Union High School District* (2016)

PERB Decision No. 2485, pp. 45-47 (*Petaluma*).) For this reason, any employer rule must clearly allow protected activity in nonwork areas and nonwork time. (*County of Tulare, supra*, PERB Decision No. 2697-M, p. 20 [employers must refrain from overbroad restrictions such as those that apply “during the workday,” without differentiating between times an employee is working and times an employee is taking a break]; see also *Superior Court v. Public Employment Relations Bd.* (2018) 30 Cal.App.5th 158, 195-197 [rule prohibiting protected activities in “working areas” was unlawfully overbroad because it could be interpreted as categorical ban on all such activities anywhere on employer’s premises].)

Even if a workplace includes sensitive areas focused on national defense, acute patient care, or social services, the employer must narrowly tailor its rules and afford access to the fullest degree possible given its unique constraints. (*San Joaquin, supra*, PERB Decision No. 2775-M, pp. 28, 33-34, 38-39 [employer could have escorted union representative through sensitive area during work time]; see also *County of Riverside* (2012) PERB Decision No. 2233-M p. 9 (*Riverside*); *Regents of the University of California, University of California at Los Angeles Medical Center* (1983) PERB Decision No. 329-H, p. 10 (*UCLA*); *Regents of the University of California, Lawrence Livermore National Laboratory* (1982) PERB Decision No. 212-H, pp. 13-17.) In assessing an employer’s claim that it has narrowly tailored its rule to a particularized operational need, PERB considers whether the rule allows access to alternative venues that are a reasonable substitute for the restricted venue. (*San Joaquin, supra*, PERB Decision No. 2775-M, p. 29.)

Foundational labor law principles under each PERB-administered labor relations statute protect nondisruptive picketing (*San Marcos Unified School District* (2003) PERB Decision No. 1508, p. 27 (*San Marcos USD*)), as well as “leafleting to advertise a labor dispute” (*Regents of the University of California* (2012) PERB Decision No. 2300-H, pp. 3 & 16). As summarized in *Petaluma, supra*, PERB Decision No. 2485, both unions and employees engage in protected activity when they conduct “peaceful picketing” or “distribution of leaflets or other materials to advertise grievances or solicit support from employees and the public.” (*Id.* at p. 43.)

A hospital’s non-discriminatory restriction on non-business solicitation and distribution is presumptively valid if it is limited to immediate patient care areas. (*Regents of the University of California* (2018) PERB Decision No. 2616-H, p. 11; *Riverside, supra*, PERB Decision No. 2233-M, p. 9.) But a hospital must normally allow both employee and non-employee union representatives to traverse patient care areas if necessary to reach areas where non-business activities are permitted. (*Riverside, supra*, PERB Decision No. 2233-M, pp. 9 & 11; *UCLA, supra*, PERB Decision No. 329-H, pp. 9-10, 14, 16-17.)

Palomar’s Solicitation & Distribution Policy specifies that “[p]ersons not employed by the Palomar Health may not solicit or distribute literature or written material on Palomar Health property at any time for any purpose.” The relevant portion of Palomar’s policy appears to be a neutral rule in that it bans all solicitation and distribution, whether union or otherwise.¹⁷ But it is unlawful, first, because it is not

¹⁷ While we note that other portions of the Solicitation & Distribution Policy cover Palomar employees, and include some allowed solicitation and distribution,

limited to patient care areas and indeed prohibits union representatives from engaging in solicitation and distribution in nonwork areas and during nonwork times.

Palomar has not even attempted to justify its patently overbroad policy. Indeed, Palomar's arguments do not substantively address its written Solicitation & Distribution Policy. Palomar thus asserts no arguments that this total prohibition is reasonable. We find Palomar's Solicitation & Distribution Policy violates the MMBA on its face, because it fails to allow peaceful picketing and leafletting to communicate with employees and the public outside of Escondido Medical Center, and because it fails to afford the Unions reasonable access to communicate with bargaining unit employees, distribute literature, investigate workplace conditions, and assess contractual and statutory compliance. (See *San Joaquin, supra*, PERB Decision No. 2775-M, pp. 26-39.)

Palomar's arguments instead focus on its access rules as applied. Palomar specifically seeks to defend its efforts to prevent two activities at Escondido Medical Center: (1) leafletting in front of the main entrance; and (2) tabling in the third-floor cafeteria and the patio area behind the first-floor Starbucks café. Palomar argues that the ALJ failed to balance the Unions' access rights with Palomar's role as a healthcare employer. According to Palomar, it was reasonable for it to prohibit leafletting in front of the main entrance and tabling in the third-floor cafeteria and the patio area behind the first-floor Starbucks café at Escondido Medical Center, "to avoid interference or disruption with its operation and mission to heal, comfort, and promote health in the

none of these sections modify the language at issue here, and neither party presented arguments related to those portions of the policy.

communities it serves.” To support its arguments, Palomar cites to PERB precedent for a number of propositions, including, for example, *Riverside, supra*, PERB Decision No. 2233-M, p. 7 [access by non-employee union representatives is subject to reasonable regulation upon the employer’s showing that a particular regulation is: (1) necessary to the efficient operation of the employer’s business and/or the safety of its employees and others; and (2) narrowly drawn to avoid overbroad, unnecessary interference with the exercise of statutory rights]; and *Salinas Valley Memorial Healthcare System* (2010) PERB Order No. Ad-387-M, p. 22 [access to employee work locations is subject to reasonable restrictions “particularly in the hospital setting, where considerations of patient care, privacy and security have primacy”].

But none of the cases Palomar cites supports its attempts to bar the Unions from distributing written materials directly to their bargaining unit members in indisputably nonwork areas of Palomar’s facilities, and from communicating with employees and the public outside the main entrance of Escondido Medical Center. Palomar fails to establish any evidence to support its conclusory claims that the presence of union representatives leafletting and tabling in non-immediate patient care areas disrupted its mission; thus its alleged “justifiable concerns” find no evidentiary support. Nor does it offer any argument that its broad attempts to prevent the Unions from distributing literature were narrowly drawn. None of the cases Palomar cites alter the conclusion that its Solicitation & Distribution Policy, on its face and as applied, is unreasonable and in conflict with the MMBA. For these reasons, we affirm the ALJ’s findings that this is not a close case, both because Palomar has not remotely shown that its rules are necessary for safe or efficient operations, and because the record

overwhelmingly disproves any possibility that its rules are narrowly drawn to avoid overbroad, unnecessary interference with protected rights.¹⁸ We also affirm the ALJ's finding that the employee parking lot option that Palomar offered did not at that time qualify as a reasonable alternative, and it would not so qualify were it still available today.

B. Palomar's Waiver Defense

As a defense to its decision to limit access rights, Palomar argues that when the Unions agreed in their respective CBAs that each of them "shall designate up to two (2) authorized representatives who shall be granted access to Palomar Health facilities during hours of operation for the purposes of ensuring compliance with the [CBA], adjusting grievances, and updating [union] bulletin boards," they waived their statutory right to leaflet or table in front of the main entrance and in the third-floor cafeteria and the first-floor patio area at Escondido Medical Center.

Although PERB does not resolve contract disputes, PERB may interpret contractual provisions as necessary to resolve unfair practice allegations. (*Modoc County Office of Education* (2019) PERB Decision No. 2684, p. 15; *San Joaquin*, *supra*, PERB Decision No. 2775-M, pp. 39-40 [interpreting contract to address

¹⁸ While we find no cause to quote Kirby's testimony at length as the ALJ did, we affirm the ALJ's finding that his testimony did not aid Palomar. This is because having to "slow down and move around" one or two leafletting union representatives when entering a facility is not categorically different from what occurs naturally during high traffic times and in any event is to be expected, because protected activity causes patients and their families to walk more slowly, typically as they decide whether to accept a leaflet about an ongoing labor dispute. That type of interaction is the essence of communication the MMBA protects.

respondent's waiver defense].) "A union and employer may agree to restrict union activity during paid, non-working time, as long as the restriction does not seriously impair employees' right to communicate about union matters." (*Omnitrans* (2009) PERB Decision No. 2030-M, p. 21.) However, a "waiver of statutory rights must be 'clear and unmistakable,' and the evidence must demonstrate an 'intentional relinquishment' of a given right." (*Modoc County Office of Education, supra*, PERB Decision No. 2684, p. 11, quoting *Grossmont Union High School District* (1983) PERB Decision No. 313, p. 4.) The party asserting waiver carries "the burdens of production and persuasion." (*Bellflower Unified School District* (2017) PERB Decision No. 2544, p. 7.) "[A]ny doubts must be resolved against the party asserting waiver." (*County of Merced* (2020) PERB Decision No. 2740-M, p. 10, quoting *Placentia Unified School District* (1986) PERB Decision No. 595, p. 8.)

First, Palomar's waiver defense fails because it ignores that a waiver of statutory access rights may only apply "as long as the restriction does not seriously impair employees' right to communicate about union matters." (*Omnitrans, supra*, PERB Decision No. 2030-M, p. 21.) Here, a blanket prohibition against solicitation and distribution of literature anywhere on Palomar's property, without any demonstrated reasonable alternatives, seriously impairs employees' rights to communicate about union matters and would be unlawful even if Palomar otherwise could establish waiver via the CBAs. (See *San Marcos USD, supra*, PERB Decision No. 1508, p. 30 [no waiver where provision impaired protected rights including because it potentially affected employee rights to engage in non-disruptive informational picketing and participate in union activities].) Palomar's inconsistent assertions that it offered the

employee parking lot as an alternative fail for multiple reasons, including because a parking lot a half-mile away is not a reasonable alternative, such alternative was admittedly barred by the written policy, and that parking lot was defunct at the time of hearing.

Further, even if Palomar's restriction did not so seriously impair protected rights to communicate that the Unions could not waive them, Palomar fails to establish a "clear and unmistakable" waiver of the Unions' statutory right to access for purposes of solicitation and distribution. Palomar claims that by agreeing that access to Palomar facilities "shall be granted . . . for the purposes of ensuring compliance with the [CBA], adjusting grievances, and updating bulletin boards," the Unions waived their statutory right to access Palomar facilities for any other purposes. But the plain language of this section does not clearly and unmistakably waive the Unions' access rights. (See *San Joaquin, supra*, PERB Decision No. 2775-M, p. 42.) An agreement that access shall be granted to a specific number of representatives for specific reasons does not clearly indicate that the Unions waived access for other representatives or for other reasons protected by the MMBA.

Indeed, even if we were to consider the CBAs' language ambiguous, we would not find it to be a clear and unmistakable waiver of the Unions' rights to access non-patient care areas to communicate with their bargaining unit members. For one, ambiguous language is by its nature not clear and unmistakable.¹⁹ For this reason, public policy disfavors finding waiver by inference. (*Rio Hondo Community College*

¹⁹ The "clear and unmistakable," standard means the same thing as "clear and unambiguous." (*County of Merced, supra*, PERB Decision No. 2740-M, p. 10, fn. 7.)

District (2013) PERB Decision No. 2313, p. 5.) Moreover, where contract terms are ambiguous, the Board may look to bargaining history and past practice to discern the parties' intent. (*Lodi Unified School District* (2020) PERB Decision No 2723, p. 13.) In those circumstances, the parties' past practice under the contract before the dispute arose, i.e., "[t]he parties' practical construction of a contract," provides "important evidence of their intent." (*Antelope Valley Community College District* (2018) PERB Decision No. 2618, p. 19.) The ample record evidence of the parties' practices under CNA CBA Article 28 and CHEU CBA Article 6, which included regular leafletting and tabling in the areas Palomar now insists such activities are not allowed, further confirms that the Unions did not clearly and unmistakably waive their statutory access rights.

In sum, Palomar has not met its burden to demonstrate a waiver as a defense to its unreasonable and unlawful Solicitation & Distribution Policy. (See *San Joaquin, supra*, PERB Decision No. 2775-M, p. 43.) By maintaining and enforcing an unreasonable access rule, Palomar violated MMBA section 3507. By this conduct, Palomar also derivatively violated sections 3506, and 3506.5, subdivisions (a) and (b).

II. Unilateral Change

A unilateral change to a matter within the scope of representation is a per se violation of the respondent's duty to bargain in good faith. (*Stockton Unified School District* (1980) PERB Decision No. 143, p. 22.) Because a unilateral change has an inherently destabilizing and detrimental effect upon the parties' bargaining relationship, it is unlawful irrespective of intent. (*City of Montebello* (2016) PERB

Decision No. 2491-M, p. 10; *County of Riverside* (2014) PERB Decision No. 2360-M, p.18.)

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.)

We focus on the first of the above elements—change in or deviation from the status quo—as the ALJ noted it is the only one that Palomar seriously disputes, and Palomar did not except to that finding. The Unions except to the ALJ's dismissal of the allegation that Palomar made an unlawful unilateral change by seeking an order from the superior court to deny union representatives access to picket, parade, march, stand, sit, walk, or otherwise be present in areas inside or outside of Palomar's facilities, other than the employee parking lot. Specifically, the Unions allege that the proposed decision erred by finding an employer does not commit a unilateral change when it seeks to make such a change through the courts. There are three primary means of establishing that an employer changed or deviated from the status quo: (1) a deviation from a written agreement or written policy; (2) a change in established past practice;

or (3) a newly created policy or application or enforcement of existing policy in a new way. (*Bellflower Unified School District, supra*, PERB Decision No. 2796, p. 10.)

The record establishes a unilateral change under both the second and third categories. As noted *ante*, in the past the Unions regularly engaged in protected conduct in the very areas Palomar now insists such activities are disallowed. This past practice was sufficiently “regular and consistent” (or alternately “historic and accepted”) to constitute an established practice. (See *Oakland Unified School District* (2023) PERB Decision No. 2875, p. 13; *Pittsburg Unified School District* (2022) PERB Decision No. 2833, p. 12.) Moreover, even assuming for the sake of argument that the record did not establish such a past practice, Palomar created a new policy or applied or enforced policy in a new way when it for the first time sought to block the Unions from non-patient areas. (*Regents of the University of California, supra*, PERB Decision No. 2300-H, pp. 25-26 [employer previously had no rule against leafletting on sidewalk alongside driveway immediately outside of acute care hospital]; *Regents of the University of California* (2004) PERB Decision No. 1700-H, adopting proposed decision at p. 62 [employer previously had no policy banning demonstrations inside university building].)

Notably, a unilateral change does not occur at the point the change takes effect but at the point when the employer decides to make a change, regardless of whether the employer falls short of implementation. (*City of Sacramento* (2013) PERB Decision No. 2351-M, p. 27.) The triggering event for notice and an opportunity to bargain is therefore the employer’s firm decision to make a change. Palomar is not excused from a

finding that it made a unilateral change because one of its means of asserting that change was to seek enforcement of its policy via the Lawsuit.

In this respect, *Sacramento City Unified School District* (2020) PERB Decision No. 2749 (*SCUSD*) is instructive. There, the underlying complaint alleged that the employer unilaterally changed the parties' grievance arbitration procedure. (*Id.* at p. 1.) The parties disagreed about the meaning of a salary schedule provision, and the union filed a grievance alleging that the employer violated that provision, and subsequently moved the salary schedule grievance to arbitration. (*Id.* at p. 4.) After the parties selected an arbitrator and began scheduling a hearing, the employer filed suit against the union in Sacramento County Superior Court, seeking a judicial declaration that the salary schedule agreement did not constitute a valid contract and that the union therefore had no right to arbitrate an alleged violation thereof. (*Ibid.*) The union subsequently filed its own motion in the Sacramento County Superior Court litigation, seeking an order compelling the employer to arbitrate the parties' salary schedule grievance. The court granted the union's motion.

The employer contended that it did not implement a policy change, because it did not explicitly indicate any intent as to whether or not it would follow a similar course with respect to future grievances, and that its conduct therefore amounted to at most an isolated contract breach. (*SCUSD, supra*, PERB Decision No. 2749, p. 8.) The Board disagreed, concluding that the employer deviated from the status quo, changed established past practice, and/or enforced existing policy in a new way, "because it asserted a non-existent legal right to decide for itself whether the salary schedule agreement was a binding contract and whether related disputes were arbitrable." (*Id.* at

p. 9.) The Board reached this conclusion under facts where the employer deviated from the contract's grievance arbitration process, in part, by pursuing a suit in Sacramento County Superior Court. While *SCUSD* differs from this matter in that there the employer defended itself by arguing that the contract breach was isolated rather than a broadly applicable change in policy, we do not find these differences sufficient to diminish its import for the proposition that an employer may evidence a change in policy by seeking enforcement of its policy change via the courts.

Just as the employer in *SCUSD* evidenced its decision to change policy by refusing to arbitrate a grievance and initiating related litigation, Palomar evidenced its change in policy by confronting union representatives engaged in protected activity, evicting them from locations they had previously been permitted to access, and pursuing related litigation. The Unions therefore established that Palomar deviated from the status quo by changing past practice and/or by enforcing an existing policy in a new way. Because no party excepted to the ALJ's conclusion that the Unions met all other elements of a unilateral change, the Unions established Palomar made an unlawful unilateral change to its access policies, in violation of MMBA sections 3505 and 3506.5, subdivision (c). By the same conduct Palomar also derivatively violated MMBA sections 3503, 3506, and 3506.5, subdivisions (a) and (b).

III. Interference

To establish a prima facie interference case, a charging party must show that a respondent'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).²⁰ A charging party need not show that the respondent acted because of an unlawful motive. (*San Joaquin, supra*, PERB Decision No. 2775-M, p. 24.)

If a charging party establishes a prima facie case, the burden shifts to the respondent. (*San Diego, supra*, PERB Decision No. 2747-M, p. 36.) The degree of harm dictates the respondent's burden. (*Ibid.*) If the harm is "inherently destructive" of protected rights, the respondent 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, 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. (*San Joaquin, supra*, PERB Decision No. 2775-M, p. 25.)

A. Surveillance

The Board has cited with approval case law on surveillance developed under the National Labor Relations Act when assessing the lawfulness of employer

²⁰ Charging party need only show that the employer engaged in conduct that tends to or does result in at least slight harm to rights guaranteed by statute. (*San Joaquin, supra*, PERB Decision No. 2775-M, p. 24.)

surveillance of protected activity.²¹ (*County of San Bernardino* (2018) PERB Decision No. 2556-M, p. 20 (*San Bernardino*); *Lake Tahoe Unified School District* (1999) PERB Decision No. 1361, adopting warning letter at p. 2.)

“The National Labor Relations Board (NLRB) has generally found that an employer has engaged in unlawful surveillance when the employer photographs or videotapes employees or openly engages in recordkeeping of employees participating in union activities. (*F.W. Woolworth Co.* (1993) 310 NLRB 1197.) The mere observation of open, public union activity on or near the employer’s property, however, does not constitute unlawful surveillance. (*National Steel & Shipbuilding Co.* (1997) 324 NLRB 499.)”

(*Lake Tahoe Unified School District*, *supra*, PERB Decision No. 1361, adopting warning letter at p. 2.) “Photographing and recordkeeping are proscribed because of their ‘tendency to intimidate.’” (*San Bernardino*, *supra*, PERB Decision No. 2556-M, p. 20, quoting *F.W. Woolworth Co.*, *supra*, 310 NLRB at p. 1197.)

Palomar excepts to the ALJ’s finding that it engaged in unlawful surveillance when it photographed union representatives interacting with bargaining unit employees in front of the main entrance to Escondido Medical Center and when, during a May 5 meeting of union representatives and bargaining unit members in the third-floor cafeteria at Escondido Medical Center, it created the impression that it was

²¹ 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, AFL-CIO (Wagner et al.)* (2021) PERB Decision No. 2782-M, p. 9, fn. 10 (OE3); *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.)

transmitting, and possibly recording, audio. We address each of Palomar's arguments in turn.

i. Photographs of Leafletting

Palomar contends that it could not have engaged in unlawful surveillance by photographing the leafletting outside Escondido Medical Center, because it believed the union representatives were engaged in misconduct, and because the superior court judge directed Palomar to record these activities as part of the Lawsuit. Neither argument succeeds.

In *San Bernardino, supra*, PERB Decision No. 2556-M, union organizers entered non-working, non-public areas of the employer's facilities. (*Id.* at p. 4.) The Board rejected the employer's argument that because a manager deleted a single photograph she had taken of the organizers speaking with employees, employees could not have reasonably believed that the manager would use the photograph to enact reprisals on them, as the fact "that she deleted the photograph only after the SEIU organizers objected establishes that she was observed taking the photograph and that enough time passed for a reasonable employee to have been intimidated by her action." (*Id.* at pp. 20-21.) The Board in *San Bernardino* concluded that "there was at least slight harm" created by the manager's actions in that case. (*Id.* at p. 22.) Because the union there demonstrated slight harm to employee rights and the employer failed to introduce a legitimate business justification, the Board held that the employer interfered with employee rights by engaging in surveillance. (*Id.* at p. 23.)

Here, the record contains 39 photographs taken by Palomar security employees, on specific orders by Palomar, of union representatives leafletting in front

of the main entrance to Escondido Medical Center. Several of these photographs show union representatives interacting with individuals who appear based on their attire to be bargaining unit employees. In light of *San Bernardino*—where the Board found interference where the employer took only one photo that it quickly deleted, versus here where the employer took and preserved multiple photographs—Palomar taking these photographs tended to cause at least slight harm to employee rights and therefore, absent a legitimate business justification, interfered with employee rights under the MMBA.

Palomar argues that it had a legitimate operational need to photograph union representatives engaged in protected leafletting, in light of its belief such activity was unprotected, and because the superior court judge presiding over a portion of its Lawsuit requested evidence of the leafletting. The ALJ properly considered and rejected Palomar's first argument. Palomar attempts to rely on the statement in *San Bernardino* that "[p]hotographic or video surveillance may be justified as necessary to gather evidence when the employer reasonably believes that union organizers or employees are engaging in misconduct." (*San Bernardino, supra*, PERB Decision No. 2556-M, p. 22, citing *Rahn Sonoma Ltd.* (1997) 322 NLRB 898, 902; *Roadway Express* (1984) 271 NLRB 1238, 1244.) But the Board rejected this defense in *San Bernardino, supra*, PERB Decision No. 2556-M because the access policy that union representatives allegedly violated was unlawful, and "[d]ocumenting a violation of an unlawful policy cannot be a cognizable justification for engaging in surveillance." (*Id.* at p. 23.) Having found *ante* at pages 28-37 that Palomar's Solicitation & Distribution

Policy was unlawful, we similarly find that Palomar cannot use it as a shield to justify its surveillance.

Palomar contends that the superior court judge's direction justified its photographs. During the preliminary injunction hearing, the superior court judge directed Palomar to return to court with security video of the Unions blocking the entrance to Escondido Medical Center. When Palomar's representative expressed concern that both the Unions and PERB itself could object to that conduct or assert that such conduct ran afoul of PERB-administered statutes, the judge assured that such activities would be protected. Complying with a judge's request could arguably support an employer's claimed operational need.

But Palomar's defense fails for multiple reasons. First, Palomar failed to raise to the ALJ that it believed its photographs were justified by the trial court judge's direction, and thus waived any such argument. (See *Colusa Unified School District* (1983) PERB Decision No. 296, p. 4 ["It is a well-established rule of administrative appellate procedure that a matter never raised before the trial judge is not properly reviewed by the appellate tribunal on appeal"].)

Even if Palomar had not waived the argument, it fails on the merits. Palomar failed to establish when its security employees took the photographs of leafletting. However, per Kirby, he directed security employees to photograph union representatives leafletting in April and May. The trial court judge did not make the request until June 13; the record does not support Palomar's contention that it took the photographs because of the judge's request. Furthermore, the record does not support Palomar's claims about what the judge requested. The superior court judge

specifically contemplated that Palomar had existing or ongoing security camera footage, not photographs taken by security officers. Had Palomar produced security camera footage from the entrance to Escondido Medical Center recorded after the judge's request, its defense might be a closer call. But the security cameras at the entrance were not functioning, and there is no evidence that Palomar took any actions to fix or replace them in order to comply with the superior court's request. And Palomar's production of undated still photographs taken by security officers is sufficiently distinct from the superior court judge's request that such substitution cannot justify Palomar directing security officers to take still photographs of employees engaged in protected activities.

Finally, even if we accepted that the superior court judge's request gave Palomar some reason to photograph protected activity, we would next balance the asserted business need against the tendency to harm protected rights. (*San Diego, supra*, PERB Decision No. 2747-M, p. 36.) Security officers actively photographing protected activity holds a greater potential for harm than a 24-hour security camera, and that elevated harm, paired with the distinction in the superior court judge's request, tips the balance in favor of finding the harm outweighs Palomar's justification.

ii. Radio at May 5 Meeting

Palomar also excepts to the ALJ's finding that a security officer placing a two-way radio on a table in the cafeteria during a May 5 union meeting constituted unlawful surveillance. Palomar reasons that because the Unions did not prove the radio was recording or transmitting, the finding was in error. But precedent does not require proof of actual surveillance to sustain a violation. Rather, "an employer violates

an employee's right to engage in protected activity if it creates the impression among employees that it is engaged in surveillance." (*San Bernardino, supra*, PERB Decision No. 2556-M, adopting proposed decision at p. 21, citing *NLRB v. Simplex Time Recorder Co.* (1968) 401 F.2d 547.) By placing a two-way radio visibly near to where union representatives and employees were meeting, Palomar's security officer at least created the impression that the radio was recording the meeting and/or transmitting it to someone unseen. The appearance of and/or the actual surveillance engaged in at the May 5 meeting harmed protected rights and had great potential to chill protected activity by CNA and CHEU bargaining unit members. Palomar offers no business need for this conduct. Accordingly, the record supports that Palomar engaged in unlawful surveillance during the May 5 meeting, or at least unlawfully created the appearance of such surveillance.

By its unlawful surveillance, Palomar interfered with protected rights in violation of MMBA sections 3506, and 3506.5, subdivisions (a) and (b).

B. Palomar's Lawsuit

Where a charging party alleges that a respondent has interfered with or retaliated against protected activities via litigation-related conduct, PERB applies the principles articulated in *Bill Johnson's, supra*, 461 U.S. 731, thereby following "a qualified litigation privilege that preserves parties' ability to litigate colorable legal rights while disallowing baseless, bad faith conduct that tends to harm protected labor rights." (*Victor Valley Union High School District* (2022) PERB Decision No. 2822, p. 10 (*Victor Valley*), citing *OE3, supra*, PERB Decision No. 2782-M, p. 11.) Under these principles, the charging

party must prove that the respondent acted without any reasonable basis and for an unlawful purpose. (*OE3, supra*, PERB Decision No. 2782-M, p. 8.)²²

The Unions make several related arguments for why the entirety of Palomar's lawsuit constitutes unlawful interference, and thus the ALJ erred in only finding part of Palomar's lawsuit violated the MMBA. The Unions primarily argue that the proposed decision erred by (1) failing to expand PERB's *Bill Johnson's* interpretation, and (2) finding that Palomar's trespass claim did not lack a reasonable basis. Palomar, in turn, argues the ALJ erred in finding that any part of Palomar's lawsuit lacked a reasonable basis, and urges us to reverse the proposed decision and find no violation. We analyze the underlying facts and the parties' arguments under the traditional *Bill Johnson's* analysis as previously adopted by the Board, and supplement the proposed decision's analysis to affirm in part and reverse in part, concluding that the entirety of Palomar's Lawsuit was without a reasonable basis and for an unlawful purpose, and thus constituted interference under PERB precedent.

i. Reasonable Basis

A party acts without any reasonable basis if it either takes a position that is plainly foreclosed as a matter of law or has not presented evidence raising genuine issues of material fact, or mixed questions of law and fact, that could allow it to prevail. (*Bill Johnson's, supra*, 461 U.S. at pp. 745-747; *Rim of the World Unified School District* (1986) PERB Order No. Ad-161, p. 17.) In analyzing whether Palomar "acted without

²² The absolute litigation privilege in Civil Code section 47, subdivision (b) does not apply in PERB proceedings. (*Victor Valley, supra*, PERB Decision No. 2822, pp. 10-11, fn. 7; *OE3, supra*, PERB Decision No. 2782-M, p. 10.)

any reasonable basis” when it filed and prosecuted the Lawsuit (*OE3, supra*, PERB Decision No. 2782-M, p. 8), the ALJ distinguished between the Lawsuit’s cause of action for trespass, the cause of action for unlawful picketing, and the prayer for relief.

The Lawsuit’s cause of action for trespass turns on the allegation that the Unions or their agents “occupied or entered” Palomar’s property “without right or consent, and with the intent to injure” Palomar. As established *ante*, the Unions at all relevant times “occupied or entered” Palomar premises by right of access under the MMBA, if not with Palomar’s consent. While the ALJ found that Palomar had presented evidence raising genuine issues of material fact, or mixed questions of law and fact, thereby giving it a colorable trespass claim, we disagree.

Palomar states that it had a reasonable belief it could prevail in its trespass claim based on CNA CBA Article 28, “Association Access,” and CHEU CBA Article 6, “Union Access,” each of which provides that the respective union “shall designate up to two (2) authorized representatives who shall be granted access to Palomar Health facilities during hours of operation for the purposes of ensuring compliance with the collective bargaining agreement, adjusting grievances, and updating [union] bulletin boards.” But, as discussed *ante*, this alleged belief is contrary to foundational rights guaranteed by the MMBA, the plain language of the CBAs, and Palomar’s long history of allowing tabling and leafletting outside and in the non-patient care areas of its facilities. That the access rights Palomar seeks to label as “trespass” are so fundamental, and that Palomar did not interpret the CBAs to exclude leafletting and tabling at any point before Spring 2022, cements that it had no colorable trespass claim.

Central to the Lawsuit's cause of action for unlawful picketing are the allegations that the Unions "have engaged in unlawful disruptive activity" at Escondido Medical Center, and that the Unions' alleged picketing "caused obstruction to the ingress and egress to the [Escondido Medical Center] in violation of state law." However, no documentary evidence or witness account supports that any of the activities the Unions engaged in were "unlawful[ly] disruptive" or "caused obstruction to the ingress and egress to [Escondido Medical Center] in violation of state law."²³

Testimony established that union representatives usually leafletted approximately 20-25 feet away from the main entrance of Escondido Medical Center and only occasionally came within five feet of that entrance. Although Palomar security was under orders to document such leafletting, none of the numerous photographs that Palomar attached to their filings in the Lawsuit, submitted into evidence in the present case, or produced to the Unions in response to a records subpoena, show any union representative closer than five feet to the front doors. Those doors are eight feet wide, and consist of two sliding halves, meaning they cannot be easily blocked even if a person were to stand immediately in front of them. Palomar did not point to a single concrete incident in which the leafletting would have interfered with employee or patient

²³ For this same reason—a total lack of evidence that the Unions or their representatives blocked ingress or egress on any occasion—we do not consider Palomar's exception that the ALJ erred by failing to discuss the Centers for Medicare and Medicaid Services Life Safety Code section 02.01.20. Said code requires that hospitals maintain means of egress that are clear and unobstructed; because there was no credible evidence that the Unions blocked ingress or egress on any occasion, considering this exception could have no impact on the outcome. (See *City of San Ramon*, *supra*, PERB Decision No. 2571-M, p. 5.)

access to the facility, nor did a single one of the aforementioned photographs show such interference. We affirm the proposed decision's finding that Palomar's cause of action for unlawful picketing lacked a reasonable basis.

The Lawsuit was even more frivolous in its requested remedy, which included an order preventing the Unions and their representatives from being present for any purpose inside or outside Escondido Medical Center, other than in the employee parking lot. Palomar's prayer for relief is egregiously overbroad in that it would totally ban the Unions from Escondido Medical Center, even for contractually enumerated and statutorily protected purposes. This prayer for relief has no reasonable basis and grossly infringes on MMBA-protected rights.

Palomar did not have any reasonable basis to believe that the Unions had trespassed or engaged in unlawful picketing, or to seek a total ban of the Unions from Escondido Medical Center for any and all purposes. The Unions thus have proven the first element for interference via litigation under *Bill Johnson's*.²⁴

²⁴ The Unions also argue that the ALJ erred in failing to address whether the MMBA preempts Palomar's Lawsuit as part of assessing whether the Lawsuit had a reasonable basis. The proposed decision noted that "as the Unions do not argue that the Lawsuit lacks any reasonable basis or was filed for an unlawful purpose *because it is preempted by the MMBA*, the preemption issue need not be addressed further and is therefore ignored below." (Emphasis in original.) On exceptions, the Unions assert that their post-hearing brief did indeed raise this argument. We agree that the Unions raised this issue clearly enough that we are not excused from addressing it for that reason. However, having found *ante* that the Unions established that each part of Palomar's Lawsuit lacked a reasonable basis for other reasons, we decline to address this argument further as it could have no impact on the outcome. (See *City of San Ramon*, *supra*, PERB Decision No. 2571-M, p. 5.)

ii. Unlawful Purpose

The Unions also established that Palomar filed its Lawsuit for an “unlawful purpose” (*OE3, supra*, PERB Decision No, 2782-M, p. 8) or with a “[r]etaliatory motive” (*Bill Johnson’s, supra*, 461 U.S. at pp. 748-749). Palomar’s Memorandum of Points and Authorities in Support of Application for TRO and Motion for OSC described the Unions’ alleged conduct at issue in the Lawsuit in part as follows:

“Defendants, through their agents, have initiated picketing activity on PCME property. The activity started around April 5, 2022. . . . Defendant employees have stood outside [Escondido Medical Center]’s main entrance handing out flyers to individuals entering and exiting the facility, which disparage Palomar Health. . . . [Escondido Medical Center] security has observed these union representatives on the [Escondido Medical Center] premises outside the main lobby entrance on multiple occasions, including but not limited to April 15, 2022, April 18, 2022, April 19, 2022, April 20, 2022, April 29, 2022, and May 2, 2022. . . . These union representatives are impeding the entrance and exit of everyone seeking to ingress or egress from [Escondido Medical Center]. . . .”

(Citations omitted.)

But at hearing in this matter, Palomar marshaled no credible evidence that “union representatives [were] impeding the entrance and exit of everyone”—or, indeed, anyone—“seeking to ingress or egress from [Escondido Medical Center].” Palomar’s witnesses could not point to any example where this was the case and instead repeated the conclusory allegations Palomar made in the Lawsuit. Palomar also fails to identify any photograph that shows union representatives impeding such ingress or egress, despite its orders to security to photograph leafletting union representatives and despite 39 photographs taken by security of leafletting union representatives. None of these

photos show any union representative impeding ingress or egress. We concur with the ALJ's conclusion that given the record evidence, preventing union representatives from impeding the entrance and exit was not Palomar's motive, or at least not its main motive, for pursuing the Lawsuit.

Palomar also contends it was motivated to file the Lawsuit because "Defendant employees have stood outside [Escondido Medical Center]'s main entrance handing out flyers to individuals entering and exiting the facility, which disparage Palomar Health." That asserted justification echoes Washburn's May 1 e-mail message to Vivanco that "[d]istributing literature on Palomar Health premises with intent to demean Palomar Health and its leadership and elevate disruption violates both our policy and union contract." In the absence of any other stated purpose or motivation for which there would be a reasonable basis, Palomar's remaining justification for pursuing the Lawsuit is because union representatives handed out flyers to individuals entering and exiting Escondido Medical Center that, in its view, "disparage[d]" or "demean[ed]" Palomar and its leadership. But because, as we found *ante* at pages 13-14 and footnote 11, Palomar failed to prove or even argue that these flyers lost the protection of the MMBA, we conclude that Palomar filed the Lawsuit for the unlawful purpose of preventing the Unions from distributing MMBA-protected flyers.

This conclusion finds further support in the fact that Palomar never objected to the Unions' leafletting and tabling before Spring 2022. While the prior actions were more sporadic, the salient difference between the Unions' tabling and leafletting that occurred before March 2022 and that which occurred after and became the target of Palomar's Lawsuit, is that the Spring 2022 tabling and leafletting were specifically related to a

potential strike; one of the Unions' main goals was to provide employees with "strike education" and urge them to pledge to vote yes for a strike, if a strike vote was called. The ALJ concluded that this difference explains why Palomar did not act to prevent leafletting and tabling in the past but did so once the Unions were gearing up for a strike and were reaching out to their members to secure support. Palomar did not except to the ALJ's conclusion that Palomar filed the Lawsuit for the unlawful purpose of interfering with the Unions' MMBA-protected strike preparation, and we find ample support in the record for this inference.

The Unions met their burden of showing that Palomar's Lawsuit was without any reasonable basis and for an unlawful purpose. (See *OE3, supra*, PERB Decision No. 2782-M, p. 8.) Palomar's Lawsuit thus tended to or did result in harm to employee and union rights under the MMBA. The injunction sought by the Lawsuit, which would prohibit union representatives from being present anywhere, and for any purpose, inside and outside of Escondido Medical Center, except for the remote and now-defunct employee parking lot, would severely hamper in-person communication between bargaining unit members and the Unions, including the receipt and distribution of union-related information via leafletting and tabling, and additionally infringe on the purposes for union presence on Palomar property expressly enumerated in the CBAs, i.e., ensuring compliance with the CBAs, adjusting grievances, and updating union bulletin boards. In addition, the sought injunction would prevent the Unions from engaging in the myriad other activities that they historically have engaged in at Escondido Medical Center, without objection from Palomar, such as rounding, attending *Weingarten* and grievance meetings, and attending Professional Practice Committee meetings.

Moreover, pursuing trespass and unlawful picketing claims in superior court to obtain such an injunction tends to discourage union members and union representatives from engaging in protected activities. Regardless of the level of harm threatened or incurred, Palomar has mounted no viable affirmative defense.

For all the foregoing reasons, we conclude that by pursuing the Lawsuit, Palomar interfered with protected rights guaranteed by the MMBA, in violation of MMBA sections 3506, and 3506.5, subdivisions (a) and (b).

iii. Preemption

The Unions' exceptions also urge us to find that Palomar's Lawsuit interfered with MMBA-protected rights because it was preempted. The Unions argue that we should adopt two related aspects of federal law to reach the following conclusions: (1) Palomar's lawsuit was preempted as of the moment OGC issued a complaint, because the complaint assured that PERB would resolve the legality of Palomar's access restrictions, whether they constituted a unilateral change, and whether the MMBA protected all or part of the Unions' activities; and (2) continuing to pursue a preempted lawsuit for more than seven days after OGC has issued a complaint (rather than dismissing it or agreeing to have it stayed) is conduct that falls outside the *Bill Johnson's* framework and automatically constitutes interference.²⁵ (See 2 Higgins, *The Developing Labor Law* (8th ed. 2022) sec. 6.II.B.3.d.(2), citing *Can-Am Plumbing v. National Labor Relations Bd.* (D.C. Cir. 2003) 321 F.3d 145, 151 and *Loehmann's*

²⁵ In *Loehmann's Plaza* (1991) 305 NLRB 663, the NLRB required an employer to prove it had taken affirmative action to stay a state court proceeding and/or to have an injunction withdrawn within seven days from when the NLRB's administrative complaint issued. (*Id.* at p. 671.)

Plaza, supra, 305 NLRB 663, 669, aff'd in part and rev'd in part on other grounds by *Loehmann's Plaza* (1995) 316 NLRB 109.)

The Unions thereby claim Palomar must reimburse their litigation expenses in defending the Lawsuit beginning on the eighth day after OGC issued a complaint in this matter. But as discussed below, the Unions are in fact entitled to reimbursement of litigation expenses from the outset of the Lawsuit, because the entirety of Palomar's Lawsuit meets the standard for interference under the traditional *Bill Johnson's* analysis. Accordingly, the Unions' arguments regarding preemption would have no impact on the outcome and we need not resolve them. (See *City of San Ramon, supra*, PERB Decision No. 2571-M, p. 5.) However, we briefly review the preemption doctrine, including the Court of Appeal decision finding the Lawsuit to be preempted, to explain the current state of the law relative to determining the point in time at which a lawsuit is preempted.

PERB's jurisdiction preempts a court's jurisdiction if the conduct at issue is "arguably protected" or "arguably prohibited" by a labor relations statute administered by PERB and the controversy presented to the state court "may fairly be termed the same" as that presented to PERB. (*El Rancho Unified School Dist. v. National Education Assn.* (1983) 33 Cal.3d 946, 953-960 (*El Rancho*); accord *Pittsburg Unified School Dist. v. California School Employees Assn.* (1985) 166 Cal.App.3d 875, 887.) Preemption prevents and avoids "conflicting adjudications which may interfere with [a labor] board's ability to carry out its statutory role." (*El Rancho, supra*, 33 Cal.3d at pp. 960-961, citing *Kaplan's Fruit & Produce Co. v. Superior Court* (1979) 26 Cal.3d 60, 75.) "In deciding whether something is an unfair labor practice, and whether PERB

consequently has exclusive jurisdiction to hear a matter (Gov. Code, § 3563.2), [the courts] consider the underlying conduct on which the suit is based rather than a superficial reading of the pleadings.” (*Teamsters Local 2010 v. Regents of University of California* (2019) 40 Cal.App.5th 659, 669.)

In its recent decision, the Court of Appeal articulated its reasons for finding that Palomar’s Lawsuit is preempted by the MMBA, and properly adjudicated at PERB:

“[t]he conduct at issue, i.e. the alleged trespass by CNA and CHEU representatives within [Escondido Medical Center] and leafletting at the hospital’s entrance, will be adjudicated by PERB as either protected or unprotected by the parties’ agreement and the MMBA. This is the identical question presented before the trial court in this litigation. There is unquestionably a risk of conflicting decisions in these two competing forums. Because the questions are the same, we agree with the unions that PERB has exclusive jurisdiction of this dispute.”

(*Palomar Health v. National Nurses United et al.*, *supra*, 97 Cal.App.5th 1189, 1208.)

The Unions argue that PERB should clarify that the point at which preemption occurs coincides with OGC’s issuance of a complaint. As the NLRB has explained, the United States Supreme Court in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters* (1978) 436 U.S. 180 (*Sears*) issued a split decision on how to determine when preemption occurs under the “arguably protected” preemption prong in private sector labor relations cases:

“In a concurrence, Justice Blackmun asserted the view that preemption operates when an unfair labor practice charge has been filed. In a separate concurrence, Justice Powell dated preemption at the time the General Counsel issues a complaint. The three dissenting justices, Justices Brennan, Stewart, and Marshall, found preemption even in the absence of a charge. In sum, reading the majority opinion

with Justice Powell's concurrence, *Sears* seems to indicate that the state suit is preempted at least by the time the General Counsel has acted to place the issue before the Board by issuing a complaint."

(*Loehmann's Plaza*, *supra*, 305 NLRB at pp. 669-670.)

Two years after *Loehmann's Plaza*, the D.C. Circuit held that under the "arguably protected" prong, "preemption is triggered by the issuance of a complaint by the General Counsel, if not earlier." (*Davis Supermarkets v. NLRB* (D.C. Cir. 1993) 2 F.3d 1162, 1179.) California precedent generally interprets *Sears* in the same manner as the D.C. Circuit. (*Hillhaven Oakland Nursing etc. Center v. Health Care Workers Union, Local 250* (1996) 41 Cal.App.4th 846, 859 & fn. 9; accord *Wal-Mart Stores, Inc. v. United Food & Commercial Workers Internat. Union* (2016) 4 Cal.App.5th 194, 215-217; *Service by Medallion, Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1815.) In contrast, under the "arguably prohibited" preemption prong, it may be the employer's decision whether to file an unfair practice charge, and precedent is clear that the employer cannot avoid the preclusive effect of PERB jurisdiction by deciding to file in court rather than at PERB. (*City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 604-611 [reaffirming that PERB jurisdiction preempts conduct that is either arguably protected or arguably prohibited, and requiring employer faced with threatened strike by essential employees to pursue an injunction strictly through PERB processes in cases where union provides at least 72 hours' notice of strike].)

In *Palomar Health v. National Nurses United*, *supra*, 97 Cal.App.5th 1189, the court found it relevant that PERB had issued a complaint in this matter, but the court did not decide the earliest point at which the Lawsuit was preempted. (*Id.* at pp. 1206-1210.) It is unclear if the court left that issue open because it would not impact the

ultimate order of dismissal, because the court accounted for the possibility that Justices Brennan, Stewart, and Marshall (or alternatively Justice Blackmun) were correct in *Sears*, or because the “arguably prohibited” prong applies given that Palomar could have filed a PERB charge alleging that the Unions committed a unilateral change by allegedly violating contractual access provisions. In these circumstances, we decline the Unions’ invitation to decide what the Court left open, especially as it would not impact the remedy given that the entire Lawsuit falls within the traditional *Bill Johnson’s* principles. (See *ante* at pp. 48-56.)

V. Remedy

The Legislature has vested PERB with broad authority to decide what remedies are necessary to effectuate the purposes and policies of the MMBA and the other acts we enforce. (MMBA, § 3509, subd. (b); *Mt. San Antonio Community College Dist. v. Public Employment Relations Bd.* (1989) 210 Cal.App.3d 178, 189.) PERB remedies must serve the dual purposes of compensating for the harm a violation causes and deterring further violations. (*County of San Joaquin v. Public Employment Relations Bd.* (2022) 82 Cal.App.5th 1053, 1068; *Bellflower Unified School District* (2022) PERB Decision No. 2544a, p. 26.) While remedial orders must rely to a degree on estimates, that is preferable to allowing uncertainty caused by unlawful conduct to leave an unfair practice without any effective remedy. (*Bellflower Unified School District, supra*, PERB Decision No. 2796, p. 20; *Lodi Unified School District, supra*, PERB Decision No. 2723, p. 21, fn. 13; *City of Pasadena* (2014) PERB Order No. Ad-406-M, pp. 8, 13-14, 26-27.)

The ALJ's proposed remedy contained three main components. First, that Palomar cease and desist from its unlawful conduct, including: (1) maintaining and enforcing the relevant section of its Solicitation & Distribution Policy against the Unions and their bargaining unit members; (2) engaging in unlawful surveillance, and (3) prosecuting the cause of action for unlawful picketing and seeking to have the Unions and their representatives enjoined from being present anywhere inside or outside Escondido Medical Center other than the employee parking lot. Next, that Palomar make the Unions whole for its unlawful conduct, including but not limited to: (1) reasonable legal expenses incurred in defending against the cause of action for unlawful picketing in the Lawsuit, and that part of the prayer for relief therein seeking to have the Unions and their representatives enjoined from being present anywhere inside or outside Escondido Medical Center other than the employee parking lot; and (2) reasonable legal expenses, if any, incurred in establishing the value of this award in compliance proceedings following the Unions' initial papers documenting their estimate of reimbursable legal expenses. And finally, that Palomar post a notice of its violations.

Both the Unions and Palomar except to aspects of the remedy. The Unions seek a remedial order consistent with its arguments for additional violations, clarification that the order's make-whole provisions include bargaining costs and other identified losses in addition to legal fees and costs related to Palomar's Lawsuit, and litigation sanctions for Palomar's misleading conduct. Palomar asserts that the ALJ's remedy violates the separation of powers, improperly awarded attorney fees and

costs, is overly punitive because it employs the lodestar method, and improperly prevents Palomar from objecting to the Unions' fee calculations.

While herein we adjust the remedial order to account for the additional violations we sustain and the Court of Appeal's resolution of the Lawsuit, to clarify the scope of the make-whole remedy, and to conform to standard Board practice, we otherwise affirm the ALJ's proposed remedies.²⁶

A. Remedies for Additional Violations

In addition to tailoring the cease-and-desist order and make-whole remedy to encompass the entire Lawsuit and account for subsequent developments in the litigation, we order standard remedies to rectify the unilateral change claim substantiated *ante*. PERB's standard remedy for an employer's unlawful unilateral change is a cease-and-desist order, a notice posting, restoration of the status quo ante, and appropriate make-whole relief including back pay and benefits with interest. (*Pasadena Area Community College District* (2015) PERB Decision No. 2444, pp. 23-24.) We order Palomar to cease and desist from (1) unilaterally modifying its access policies without providing the Unions with notice or an opportunity to meet and confer in good faith, and (2) failing or refusing to bargain in good faith with the Unions as required under the MMBA. We also order Palomar, upon the request of CNA,

²⁶ We decline to address in detail Palomar's exception that the proposed decision's order violates the separation of powers by requiring Palomar to rescind an approved policy, because it rests on a faulty premise. The proposed decision's order only requires that Palomar cease and desist enforcing the relevant portion of Palomar's Solicitation & Distribution policy against the Unions and their bargaining unit members, and the Unions have not sought via exceptions to modify this portion of the order to include rescission.

CHEU, or both, to bargain in good faith with the requesting Union(s) over changes to Palomar's access policies. As we explain below, the Unions shall have the opportunity to prove and recover in compliance proceedings any losses which flow from Palomar's unfair conduct. Such recovery shall include interest compounded on a daily basis. (*El Centro Regional Medical Center* (2024) PERB Decision No. 2890-M, p. 25.)

B. Make-Whole Relief and Legal Expenses

PERB employs two separate standards for determining whether to award legal expenses. (*SCUSD, supra*, PERB Decision No. 2749, p. 11.) One applies when PERB must determine whether to award a party legal expenses because of the opposing party's sanctionable conduct in litigating the same case before PERB. (*Ibid.*) That standard, which is akin to Rule 11 of the Federal Rules of Civil Procedure, provides that PERB should make such an award if the offending party maintained a claim, defense or motion, or engaged in another action or tactic, which was without arguable merit and pursued in bad faith. (*Ibid.*, citing *Bellflower Unified School District* (2019) PERB Order No. Ad-475a, p. 4; *City of Palo Alto* (2019) PERB Decision No. 2664-M, p. 7 (*Palo Alto*); *Lake Elsinore Unified School District* (2018) PERB Order No. Ad-446a, p. 5; *City of Alhambra* (2009) PERB Decision No. 2036-M, p. 19; *City of Alhambra* (2009) PERB Decision No. 2037-M, p. 2.) But a different standard applies when a party seeks to be made whole for legal expenses it reasonably incurred in a separate proceeding to remedy, lessen, or stave off the impacts of the other party's unfair practice. The Board has not required a Rule 11-type showing in such cases and has instead treated legal expenses the same as medical expenses, lost pay, lost staff

time, or any other loss. (*SCUSD, supra*, PERB Decision No. 2749, p. 11-12, citing *Omnitrans, supra*, PERB Decision No. 2030-M, p. 30.)

The ALJ properly concluded that a make-whole award for the Unions must include legal expenses under the second standard, because the Unions would not have incurred the costs of defending against the Lawsuit absent Palomar's unlawful conduct, viz. interfering with protected rights by pursuing the Lawsuit.²⁷ Palomar's arguments that the ALJ's proposed remedy is overly punitive because it clarifies that legal expenses should be calculated by the lodestar rate are not well taken. As the Board articulated in *SCUSD*, "in general, the most appropriate methodology [for calculating legal expenses] will be a lodestar approach that focuses on hours reasonably incurred and does not automatically reduce hourly market rates for attorneys who work in a nonprofit, government agency, or in-house legal department and/or who were paid a flat salary, charged discounted rates, or never billed their client." (*SCUSD, supra*, PERB Decision No. 2749, p. 18.) The use of in-house legal services to defend against Palomar's Lawsuit does not alter the fact that the lodestar method remains the most accepted approach—though modifications to the lodestar figure can be ordered as warranted in particular cases—for all the reasons set forth in *SCUSD, supra*, PERB Decision No. 2749, pages 16-19 & footnotes 9-10.²⁸ To the

²⁷ As the Court of Appeal has ordered Palomar to reimburse Defendants for certain costs on appeal, our make-whole order for legal expenses covers the Unions' legal expenses not already reimbursed by Palomar.

²⁸ Likewise, the ALJ's proposed order that legal expenses include those "incurred in establishing the value of [the] award in compliance proceedings following the [Unions'] initial papers documenting [their] estimate of reimbursable legal expenses" is consistent with Board precedent. (*SCUSD, supra*, PERB Decision

extent that the Unions can show in compliance proceedings that these legal expenses included the work of non-attorneys, they may do so. (*Id.* at pp. 14-15.)

The ALJ's broad make-whole relief proposes that Palomar shall make the Unions whole "for losses they suffered as a result of Palomar Health's unlawful conduct, including but not limited to" the specified legal expenses. An unfair practice finding creates a presumption that employees suffered some financial loss as a result of the employer's unlawful conduct. (*Mt. San Jacinto Community College District* (2023) PERB Decision No. 2865, p. 40, citing *Bellflower Unified School District* (2019) PERB Order No. Ad-475, p. 10; *Desert Sands Unified School District* (2010) PERB Decision No. 2092, pp. 31-32.) Consistent with the presumption, it is appropriate to give the Unions an opportunity to establish in compliance proceedings that they suffered losses from Palomar's proven unlawful conduct, that is, Palomar's maintaining an unreasonable access rule against the Unions, making an unlawful unilateral change, and unlawfully surveilling the Unions and their bargaining unit members, in addition to its Lawsuit.

To establish compensable harm, a party need only show by a preponderance of the evidence that the offending party's conduct caused a harm and that it is reasonably feasible to estimate the financial impact. (*City and County of San Francisco* (2023) PERB Decision No. 2858-M, pp. 15-16, citing *Alliance Judy Ivie Burton Technology Academy High School et al.* (2022) PERB Decision No. 2809,

No. 2749, p. 21.) Normally, "compliance proceedings to establish estimated reasonable legal expenses should involve review of sworn declarations and should not lead to protracted litigation." (*Id.* at pp. 19-20; *Bellflower Unified School District, supra*, PERB Decision No. 2544a, p. 51 & fn. 32.)

pp. 14, 31-32; *Oxnard Union High School District* (2022) PERB Decision No. 2803, p. 3; *County of Santa Clara* (2021) PERB Decision No. 2799-M, p. 28, fn. 14; *Regents of the University of California* (2021) PERB Decision No. 2755-H, p. 56; *SCUSD*, *supra*, PERB Decision No. 2749, p. 15; *CCSF*, *supra*, PERB Decision No. 2691-M, p. 51, fn. 32; *Palo Alto*, *supra*, PERB Decision No. 2664-M, p. 8, fn. 6.) However, unlike in *City and County of San Francisco*, *supra*, PERB Decision No. 2858-M, here Palomar's proven violations do not suggest that its unlawful conduct contributed to a quantifiable delay in bargaining; indeed, the parties here settled their contract disputes in June 2022, only a short period of time after the events giving rise to the underlying unfair practice charge. To the extent the Unions now request bargaining flowing from the unilateral change allegations, such bargaining is merely a stand-in for bargaining that could or should have occurred prior to Palomar deviating from the status quo. On these facts, we do not find a cognizable harm suggesting bargaining was prolonged or impacted specifically by Palomar's unlawful conduct in this case, and thus the broad make-whole relief ordered to remedy the identified violations does not include any set period of bargaining costs. On the other hand, if the Unions establish by a preponderance of the evidence that they incurred extra costs to reach the public or bargaining unit members due to Palomar's violations, or otherwise had to use more staff or incur extra costs because of those violations, that shall be compensable.

We do not sustain the Unions' exception that it is appropriate to award legal expenses the Unions incurred during the course of this PERB proceeding as a litigation sanction for Palomar's conduct prosecuting this matter. To obtain reimbursement of attorney fees or other expenses as a litigation sanction, the moving

party must demonstrate that the opposing party's claim, defense, motion, or other action or tactic was "without arguable merit" and pursued in "bad faith." (*Palo Alto, supra*, PERB Decision No. 2664-M, p. 7.) To determine whether a claim, defense, motion, or other action is frivolous, we examine whether it is so manifestly erroneous that no prudent representative would have filed or maintained it. (*Ibid.*, citing *Lake Elsinore Unified School District, supra*, PERB Order No. Ad-446a, p. 5, and cases cited therein.) To determine whether a party acted with subjective bad faith, we examine whether the party's conduct was dilatory, vexatious, or otherwise an abuse of process, and we may infer such intent from circumstantial evidence. (*Ibid.*, citing *City of Alhambra, supra*, PERB Decision No. 2036-M, p. 19.) The Unions argue for litigation sanctions on the basis that the proposed decision found Palomar's issue-preclusion argument, made in its Motions to Strike and again in its post-hearing brief, were misleading. Palomar does not repeat its issue preclusion arguments, or their misleading foundations, in its exceptions. Setting aside whether Palomar's issue preclusion argument before the ALJ was without arguable merit, we find insufficient evidence to conclude its conduct meets the criteria for bad faith, including because Palomar did not repeat its issue preclusion argument on exceptions to the Board.

ORDER

Based upon the foregoing factual findings and legal analysis, and the entire record, the Public Employment Relations Board (PERB) finds that Palomar Health (Palomar) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq. via the following conduct. First, Palomar maintained and enforced an unreasonable access rule against California Nurses Association (CNA) and

Caregivers & Healthcare Employees Union (CHEU) (collectively, Unions). Second, Palomar unilaterally changed established past practices on access, adopted a newly created access policy, and/or applied or enforced existing policy in a new way, without affording the Unions notice and an opportunity to meet and confer in good faith to impasse or agreement. Third, Palomar interfered with protected union and employee rights by surveilling protected activity and pursuing a lawsuit in San Diego County Superior Court (Lawsuit) that inter alia charged the Unions with trespassing and unlawful picketing and sought to have the Unions and their representatives enjoined from being present anywhere inside or outside its facility located at 2185 Citracado Parkway, Escondido, California 92029 (Escondido Medical Center), other than the employee parking lot.

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

A. CEASE AND DESIST FROM:

1. Maintaining and enforcing against the Unions Section III.E of Palomar's "Procedure: Solicitation and Distribution of Literature."
2. Unilaterally modifying established past practices on access, adopting a newly created access policy, or enforcing existing policy in a new way, without providing the Unions with notice and an opportunity to meet and confer in good faith.
3. Failing or refusing to bargain in good faith with the Unions as required under the MMBA.
4. Unlawful surveillance of union activities.

5. Prosecuting the cause of actions for trespass and unlawful picketing in *Palomar Health v. National Nurses United et al.*, San Diego County Superior Court Case No. 37-2022-00017624-CU-MC-NC (Lawsuit), seeking to have the Unions and their representatives enjoined from being present anywhere inside or outside Escondido Medical Center other than the employee parking lot, or otherwise pursuing court claims that interfere with MMBA-protected rights.

6. Interfering with the exercise of employee rights guaranteed by the MMBA.

7. Denying the Unions the rights guaranteed to them by the MMBA.

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

1. Upon request by CNA and/or CHEU, bargain in good faith with the requesting Union(s) over changes to Palomar's access policies.

2. Make the Unions whole for losses they suffered as a result of Palomar's unlawful conduct, including but not limited to: (a) reasonable legal expenses incurred in defending against the Lawsuit, less any legal expenses already reimbursed by Palomar; and (b) reasonable legal expenses, if any, incurred in establishing the value of this award in compliance proceedings following the Unions' initial papers documenting their estimate of reimbursable legal expenses. This award shall include interest accrued to the date of payment at an annual rate of seven percent, compounded daily.

3. Within 10 workdays after this decision is no longer subject to appeal, post at all work locations where notices to employees in the bargaining units

represented by the Unions at Palomar are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of Palomar, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. Palomar shall take reasonable steps to ensure that the Notice is not altered, defaced, or covered with any other material. In addition to physically posting the Notice, Palomar shall communicate it by electronic message, intranet, internet site, and other electronic means Palomar uses to communicate with employees.²⁹

4. Notify OGC of the actions Palomar has taken to follow this Order by providing written reports as directed by OGC and concurrently serving such reports on CNA and CHEU.

Members Krantz and Nazarian joined in this Decision.

²⁹ Either party may ask PERB's Office of the General Counsel (OGC) to alter or 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-1581-M, *California Nurses Association and Caregivers & Healthcare Employees Union v. Palomar Health*, in which all parties had the right to participate, the Public Employment Relations Board found that the Palomar Health (Palomar) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq by: (1) maintaining and enforcing an unreasonable access rule; (2) unilaterally changing established past practices on access, adopting a newly created access policy, and/or applying or enforcing existing policy in a new way, without affording the Unions notice and an opportunity to meet and confer in good faith to impasse or agreement; (3) unlawfully surveilling protected activity; and (4) pursuing a lawsuit that charged California Nurses Association (CNA) and Caregivers & Healthcare Employees Union (CHEU) (collectively, Unions) with trespassing and unlawful picketing and sought to have the Unions and their representatives enjoined from being present anywhere inside or outside its facility located at 2185 Citracado Parkway, Escondido, California 92029 (Escondido Medical Center).

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

A. CEASE AND DESIST FROM:

1. Maintaining and enforcing against the Unions Section III.E of Palomar's "Procedure: Solicitation and Distribution of Literature."

2. Unilaterally modifying established past practices on access, adopting a newly created access policy, or enforcing existing policy in a new way, without providing the Unions with notice and an opportunity to meet and confer in good faith.

3. Failing or refusing to bargain in good faith with the Unions as required under the MMBA.

4. Unlawful surveillance of union activities.

5. Prosecuting the causes of action for trespass and unlawful picketing in *Palomar Health v. National Nurses United et al.*, San Diego County Superior Court Case No. 37-2022-00017624-CU-MC-NC (Lawsuit), seeking to have the Unions and their representatives enjoined from being present anywhere inside or

outside Escondido Medical Center other than the employee parking lot, or otherwise pursuing court claims that interfere with MMBA-protected rights.

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

1. Upon request by CNA and/or CHEU, bargain in good faith with the requesting Union(s) over changes to Palomar's access policies.

2. Make the Unions whole for losses they suffered as a result of Palomar's unlawful conduct, including but not limited to: (a) reasonable legal expenses incurred in defending against the Lawsuit, less any legal expenses already reimbursed by Palomar; and (b) reasonable legal expenses, if any, incurred in establishing the value of this award in compliance proceedings following the Unions' initial papers documenting their estimate of reimbursable legal expenses. This award shall include interest accrued to the date of payment at an annual rate of seven percent, compounded daily.

Dated: _____ Palomar Health

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.