



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

SERVICE EMPLOYEES INTERNATIONAL
UNION LOCAL 521,

Charging Party,

v.

COUNTY OF KERN and KERN COUNTY
CIVIL SERVICE COMMISSION,

Respondents.

CONSTITUTIONALLY MANDATED
EMPLOYEES' UNION, LOCAL 148,

Joined Party.

Case No. LA-CE-1718-M

PERB Decision No. 2975-M

July 31, 2025

Appearances: Weinberg, Roger & Rosenfeld by Kerianne R. Steele and Jon S. Ezell, Attorneys, for Service Employees International Union Local 521; Liebert Cassidy Whitmore by Steven M. Berliner and Nathaniel J. Price, Attorneys, for County of Kern; Atkinson, Andelson, Loya, Ruud & Romo by Jay G. Trinnaman and Eric T. Riss, Attorneys, for Kern County Civil Service Commission; Jacob M. Evans, Union Representative, for Constitutionally Mandated Employees' Union, Local 148.

Before Banks, Chair; Krantz and Paulson, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by Charging Party Service Employees International Union Local 521 (SEIU) to a proposed decision of an administrative law judge (ALJ). The dispute arose when Joined Party Constitutionally Mandated Employees' Union, Local 148 (CMEU) submitted a petition to Respondent County of Kern seeking to:

sever Deputy Public Defenders from the County's Professional Unit (Unit 2); sever Public Defender Investigators from the County's Technical Services Unit (Unit 3); form a new proposed unit consisting only of these two classifications; and become the exclusive representative of the proposed new unit. SEIU, which is the exclusive representative of Unit 2 and Unit 3, opposes CMEU's petition (Petition).¹

The County initially referred the Petition to Respondent Kern County Civil Service Commission, and the Commission placed the matter on the agenda for its February 2024 meeting. The County then reversed course, concluding that its Employer-Employee Relations Resolution (EERR) did not provide for severance. The County therefore removed the matter from the Commission's agenda, but then it reversed course again and restored its original decision to refer the matter to the Commission. When the Commission and the County processed the Petition and moved toward holding a representation election, SEIU initiated this charge, alleging that the County and the Commission had violated the EERR, the Meyers-Milias-Brown Act (MMBA), the Prohibition on Public Employers Deterring or Discouraging Union Membership (PEDD), and PERB Regulations.²

¹ For the sake of brevity, in this decision we refer to Deputy Public Defenders as "public defenders" and Public Defender Investigators as "investigators." Moreover, we use "investigators" to include the lowest level classification, which is Public Defender's Investigative Aide.

² The MMBA is codified at Government Code section 3500 et seq. The PEDD is codified at Government Code section 3550 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. Unless otherwise specified, all further statutory references are to the Government Code.

PERB's Office of the General Counsel (OGC) issued a complaint primarily alleging that Respondents violated or unreasonably applied the EERR, failed and refused to bargain in good faith, interfered with protected rights, and by the same conduct violated the PEDD. The ALJ, after twice amending the complaint and holding a formal hearing, issued a proposed decision finding that the Commission violated the MMBA by interfering with protected rights. However, the ALJ dismissed the complaint's other allegations. SEIU filed exceptions regarding the claims the ALJ dismissed and regarding the ALJ's proposed remedy. The County, the Commission, and CMEU responded by urging us to affirm the proposed decision, but they filed no exceptions of their own.

We have reviewed the record and the parties' arguments. We conclude that CMEU's proposed severance is inconsistent with the MMBA and the EERR, and we order the County to dismiss the Petition. Because that remedy sufficiently resolves the matter, we exercise our discretion not to address the remainder of SEIU's exceptions. (See, e.g., *The Accelerated Schools* (2023) PERB Decision No. 2855, p. 3 [citing other authority].)³

FACTUAL AND PROCEDURAL BACKGROUND

The County and the Commission are public agencies within the meaning of MMBA section 3501(c). SEIU is a "recognized employee organization" within the

³ Because no party excepted to the violations the ALJ found, those allegations are not before us. We express no opinion on such issues, and we incorporate the ALJ's corresponding remedy into our remedial order. (*Hacienda La Puente Unified School District* (2024) PERB Decision No. 2930, pp. 2-3, fn. 2; *Antelope Valley Community College District* (2023) PERB Decision No. 2854, p. 2, fn. 2.)

meaning of MMBA section 3501(b), and CMEU is an “employee organization” within the meaning of MMBA section 3501(a).

SEIU exclusively represents approximately 5,750 County workers in multiple bargaining units, including 605 professional employees in Unit 2 and 1,360 technical employees in Unit 3. Public defenders fall within Unit 2, while investigators fall within Unit 3.

The County and SEIU negotiated a Memorandum of Understanding (MOU) effective from December 14, 2021, through June 30, 2024, which covered both Unit 2 and Unit 3, among other bargaining units. During the formal hearing in this matter, the parties were engaged in negotiations for a new MOU.

I. The EERR

The County adopted the EERR in 1984. EERR Section 2 includes the following provisions that are most pertinent to this case:

“X. CRITERION FOR REPRESENTATION UNITS

“1. An employee organization may seek formal recognition as the majority representative for an established or proposed representation unit. The principal criterion which will be used in determining an appropriate unit shall be whether the unit proposed contains the largest feasible group with a community of interest among such employees. The following factors, among others, are to be considered in making such determination:

“(a) Which unit will assure employees the fullest freedom in the exercise of rights set forth under this resolution?

“(b) The history of employee relations: (1) in the unit; (2) among other employees of the County; and (3) in similar public employment.

“(c) The effect of the unit on the efficient operation of the County, and sound employer-employee relations.

“(d) The extent to which employees have common skills, working conditions, job duties, or similar educational requirements.

[¶]. . . [¶]

“XI. REVOCATION/DECERTIFICATION OF RECOGNITION

[¶]. . . [¶]

“The status of an organization as the recognized representative may be contested by employees of the unit after the initial one (1) year period, but no more than one hundred eighty (180) or less than one hundred fifty (150) day prior to the expiration of any MOU between a recognized employee organization and the County.

“A petition for decertification of a recognized employee organization in an appropriate employee unit may be submitted by employees included in the unit. Such decertification petition shall be submitted to the Personnel Director, and shall be accompanied by evidence of authorization from at least thirty percent (30%) of the employees in the appropriate employee unit which the petitioners request be decertified. If the employees are requesting decertification to be followed by recognition of a new employee organization not recognized, the information in Article VIII(a) through (g) must also accompany the petition. After investigation, the Personnel Director shall refer the petition, with a recommendation to the Civil Service Commission, for a hearing and a determination. If the Commission finds the unit appropriate, it may then make a recommendation to the Board of Supervisors. The Board of Supervisors shall then set the election for a date not exceeding thirty (30) days following the receipt of the certification. Election procedures shall be established by

the Board of Supervisors but cost of any election shall be borne by the petitioners.

[¶] . . . [¶]

“The unit to be decertified need not be coterminous with the certified unit, but it cannot exceed in scope the certified unit, and the unit to be decertified must be an appropriate unit standing alone.”

II. CMEU’s Petition

On January 9, 2024, CMEU submitted its Petition to the County, seeking to become the exclusive representative of a new unit comprised of only public defenders and investigators.⁴ When CMEU filed the Petition, there were 9 investigators and either 53 or 54 public defenders in the classifications at issue. Together with its Petition, CMEU submitted proof of support from 7 investigators and 26 public defenders.

On January 23, the Commission notified SEIU counsel Kerianne Steele that the County had referred the Petition to the Commission and that the Commission had scheduled the matter for its February 12 meeting. SEIU responded by submitting to the County a document titled “Application for Certification and Challenging Petition.” This document challenged the appropriateness of CMEU’s proposed unit and sought to preserve the current composition of Unit 2 and Unit 3. The Challenging Petition thus amounted to an argument against CMEU’s Petition, and the parties therefore never treated it as a separate matter in need of separate adjudication. We follow the parties’ lead and treat the Challenging Petition as an opposition to CMEU’s Petition.

⁴ All further dates refer to 2024, except where otherwise noted.

On February 7 and 8, the County informed CMEU and SEIU that the County had removed CMEU's Petition from the Commission's February 12 agenda and, because the EERR did not provide for severance petitions, the County was referring the matter to PERB for processing. CMEU objected, and on March 25, the County notified CMEU and SEIU that it had restored its original decision to refer the Petition to the Commission.

III. The Parties' Presentations to the Commission

On June 19, the Commission convened a special meeting to evaluate CMEU's Petition and SEIU's response. At the outset, Commission President Jeremy Price explained that the meeting would proceed using "the same procedure that they do at the board of supervisors." We infer that Price meant the Commission would follow procedures that the County's Board of Supervisors uses to address agenda items at its public meetings. Responding to a comment from a speaker noting that she had "never done one of these hearings before," Price stated: "We haven't either."

Thus, while EERR Section XI required the Commission to hold a "hearing," and the parties have often referred to the June 19 Special Meeting as a "hearing," the Commission did not follow procedures commonly associated with an evidentiary hearing. For instance, the Commission neither asked presenters to testify under oath nor permitted cross examination. Rather, the Commission allowed unsworn presenters to speak in narrative form, as at a typical public meeting in which a local legislative body affords attendees an opportunity to public comment. County Human Resources representatives responded tersely to narrow questions from Commissioners but were

not subject to questioning under oath by the parties. The County did not provide documents to support any of its representatives' answers to such questions.

The Commission did accept exhibits from the parties. The ALJ accepted these exhibits into evidence at the formal hearing in this matter, together with a transcript of the June 19 special meeting. Our legal discussion (*post* at pages 18-65) analyzes all aspects of this record. Here, we provide context for that analysis by summarizing four areas the speakers addressed: (a) similarities and differences between investigators and public defenders; (b) whether these classifications' interests are adequately represented in the current unit structure; (c) how other counties have structured their bargaining units; and (d) competing views of public defenders' right to strike.

A. Similarities and Differences Between Investigators and Public Defenders

Samantha Bone was the sole investigator to speak on June 19. Bone stated that investigators have little in common with certain other Unit 3 classifications—such as surgical technicians—but she also noted certain differences between investigators and public defenders. For instance, Bone explained that investigators need not have a four-year college degree, and that training or experience may substitute for education. In fact, the lowest level position—Investigative Aide—requires only a high school diploma and six months of experience. Bone also acknowledged that investigators are FLSA non-exempt employees who earn hourly wages, unlike public defenders, who are FLSA-exempt and salaried. Investigators normally work a standard workday from 8:00 to 5:00, although on occasion attorneys ask them to work outside normal business hours. Bone noted that investigators cannot interpret the law, so attorneys do that for them. Public defenders give investigators assignments and tell them what

they need to prepare for trial. For this reason, Bone described investigators as “sidekicks” to the public defenders, or more colorfully, as Robin to the attorneys’ Batman. While the two classifications share office space and are “constantly interacting,” they have different skill sets. Thus, the two classifications may attend the same conferences, but they are placed in different conference tracks because of their distinct roles. Bone also stated that “almost all of our training comes directly from the attorneys that we’re working with, and they are considered our supervisors.”

Multiple public defenders spoke on June 19 regarding their close working relationship with investigators. Certain speakers noted differences between the two classifications, such as the fact that public defenders must go to law school and pass the bar exam to obtain their positions. One public defender, Clint Pierce, recounted that there are times when he may be in trial until 4:30 p.m., visit incarcerated clients until 8:00 p.m., and then wake up at 3:00 a.m. thinking about what he will be doing in court that day.

B. Extent to Which Unit 2 and Unit 3 Can Provide Adequate Representation

Public defender Rob Owen stated that employees in the Public Defender’s Office believe that their “interests are diluted” and they are “overshadowed” by larger County employee groups such as social workers. Pierce similarly opined as follows: “As attorneys, we have a very specific set of duties to our clients, and we have a very specific set of needs in order to do our job appropriately. And I think our representation needs to reflect that.” Pierce explained that public defenders and investigators face “challenging situations dealing with mental health, homelessness, going to high crime areas and gang-related area[s],” and “come into contact with

hostile people.” Pierce then offered his belief that no other members of either Unit 2 or 3 “shares anything like that,” but he offered no foundation or factual basis for his opinion. Pierce stated that he wishes to be in a separate unit so that his “voice can be heard,” as he does not believe his interests align with other professionals in Unit 2.

SEIU rebutted the notion that public defenders’ representation via Unit 2 is inadequate. Yvonne Davila, SEIU’s Area Director and chief spokesperson in the union’s contract negotiations with the County, first explained to the Commission that members of SEIU’s Kern County Chapter elected two public defenders, Lyndsi Andreas and Ajaib Gill, as Secretary and Vice-President. Both serve on the union’s bargaining team in ongoing negotiations with the County. Davila further noted that a third public defender, Robin Walters, serves on the bargaining team as the representative for all of Unit 2.⁵

As discussed further at pages 33-34, *post*, SEIU’s current bargaining team worked with Andreas, Gill, and Walters to craft specific proposals to address investigators and public defenders’ needs. And the negotiations that were ongoing during the formal hearing were not the first time that public defenders negotiated for improvements through SEIU representation. Indeed, though public defender Jacob Evans eventually quit his role as an SEIU shop steward and now serves as CMEU’s representative, he testified at the PERB formal hearing about his work within SEIU beginning in 2018 or 2019. Among other things, Evans led efforts “to create and implement workload standards” for the public defender’s office, and “was involved in

⁵ Investigators are eligible to run for bargaining team positions, but none ran in the last election.

the class and comp bargaining negotiating team for deputy public defenders.” Evans added that he was also involved in “[l]ots of other significant achievements during that time up until about 2023 when [he] stepped back from the shop steward.”

C. Comparators in Other Counties

Public defender Sunny Gallo told the Commission that she and her colleagues had “done some research which shows a trend in other counties for investigators and public defenders to be regrouped together.” However, Gallo did not provide a single such example, and the extensive examples in the record do not show any county that has ever created a bargaining unit that includes both public defenders and investigators. Gallo did list 12 counties where “attorneys” (not necessarily limited to public defenders) are in their own bargaining unit.

In response to Gallo’s presentation, SEIU’s counsel asked SEIU Researcher Sydney Galusha to explain her findings about other counties with a public defender’s office and whether they have placed public defenders and public defender investigators in the same bargaining unit or separate units. Out of California’s 58 counties, 32 have a public defender’s office. Galusha was able to find publicly available information on unit structure in 29 of these 32 counties, and none include public defenders and investigators in a single unit.⁶

D. The Right to Strike

Gallo concluded her remarks by stating her view that public defenders and investigators cannot strike:

⁶ Galusha could not determine these classifications’ unit placement in the remaining three counties.

“One last point that I want to highlight, and I think this is the most important point, is what it looks like if we’re going on strike, which is basically the cornerstone remedy for labor disputes. . . .

“We have to cross the picket lines when somebody else in our bargaining unit goes on strike. And so, just by that fact, we are at odds with everybody in our unit and we would not be able to back them on their ideals. We have an ethical obligation to our clients, and if we do not, that’s an ineffective assistance of counsel [IAC] claim, which we talked about before. While it’s not technically prohibited, we cannot ethically abandon the clients we currently have, and then we would not be able to bring on new clients. And basically what that looks like is, obviously all cases would go to IDP [Indigent Defense Panel] at that point.

“What happens if all cases go to IDP? It affects clients, victims, caseload, the court, everything gets impacted. And I think at a previous meeting somebody was already complaining about IDP and their ability to provide services. It also affects the cost for County money. If – if, let’s say at a point a new attorney is appointed midway through a representation of a client, then that attorney has to start over. They have to do their own investigation. It starts the clock all over, which not only affects cost-wise for the court, both cost-wise for the IDP panel and their investigators as well.

“And also it comes back to us, as a result in State Bar actions, licenses, we can’t strike because of potential litigation against the County for IAC claims. And this also involves our investigators. If we – if we’re not taking on new cases, then that would impair their ability and obligations, as well. As so if we would have to conflict off of cases, which is enormous set back, that would be a huge expense. The most important thing, like I said before, this does not happen for any other job in Bargaining Unit 2 or Bargaining Unit 3. Any job can go on strike and it will not affect us, but

we cannot cross – we have to cross that line, and therefore our interests not aligned with anybody else.”

The public defenders’ primary spokesperson at the Commission meeting, Autumn Paine, used even starker language to offer a similar opinion:

“We don’t have similar interest, and we are unable – I will lose my Bar card if I go on strike, which would be bad because I still have a lot of student loans. I cannot go on strike with other people in my bargaining unit.”

IV. The Commissioners’ Questions and Explanation of Their Votes

Four Commissioners attended the June 19 meeting, with one Commissioner absent. At the close of the meeting, all four who were present voted to find that CMEU had proposed an appropriate unit. Each had the opportunity to ask questions, and certain Commissioners expressed the reasons for their vote.

Commissioner Brian Holt asked Michael Goulart, the County’s Assistant Chief Human Resources Officer, whether there are other County bargaining units that include both professional and technical classifications. Although the record reveals no such units, Goulart correctly stated that there are MOUs that cover both professional and technical units. Indeed, SEIU’s MOU with the County covers multiple units, including Unit 2 and Unit 3. Goulart stated that, therefore, the County did not think it would be a problem to mix professional and technical employees in one unit. Goulart also said a small unit would not be a problem, as the County already has a unit with just a single classification. However, Goulart did note that the County already has 15 units, the County was in negotiations with 6 separate units at once, and it takes considerable time to bargain with that number of units.

Commissioner Romeo Agbalog asked about labor relations history in the County. County Counsel Kate Zimmerman responded that district attorneys and child support attorneys had successfully severed themselves into a stand-alone unit in the 1990s, but district attorney investigators did not join the unit because they are peace officers entitled to representation in a unit that only contains peace officers.

Agbalog also asked SEIU representatives present at the hearing: “Why would you want . . . people who don’t want you [to] represent them to still stay in your unit?” In response, Steele noted that is not a relevant factor for the Commissioners to consider, but Agbalog disagreed.

Price then indicated why he thought all four of the subordinate factors in the EERR support CMEU’s position, explaining his thinking as follows:

“I looked at . . . four criterion A, B, C, and D. . . .

“A, which unit will assure [employees] the fullest freedom and the exercise of rights set forth under this resolution. Mr. Owen directly addressed that, saying that they had requested resolutions that were not considered, that he didn’t care for how it worked, that he couldn’t work. They had an open-door policy. It didn’t work. The union was standing in the way. Also, Mr. Pierce addressed that, saying he didn’t fear that his voice is heard in the SEIU’s. His interests are not aligned with the SEIU.

“I’ll move to Item B. The history of employee relations in the unit among other employees in the county and in similar public employment. Ms. Gallo, who I interpreted when she said that other counties are moving to this, what she meant was the public defenders were no longer part of SEIU, not that they were all moving to a combined public [defender and] public investigator. I may have misunderstood, but that’s how I interpreted it and the counties she gave me and I checked some of them against SEIU’s own exhibit, Santa Clara, [Orange], Alameda, San Joaquin, Shasta, Yolo, San

Francisco, San Diego. Obviously, a lot of count[ies'] public defenders do not think they belong in an SEIU bargaining unit. It's not just one. That's a lot. So that's item B. That's similar public employment.

"Item C, the effect of the unit on the efficient operation of the County and sound employer employee relations. I think [Owen] touched on that again. I thought Mr. Pierce touched on that as saying that they can't keep talent in the department. I thought Ms. Gallo touched on that again, the term community of interests.

"And item D, the extent to which employees have common skills, working conditions, job duties, or similar educational requirements. What struck me by both Ms. Paine, Ms. Gallo and others was the mention of the concept of strike. Anybody who has just a cursory knowledge of unions knows that it starts with a strike, right? That's the ultimate sort of damage, so to speak, hanging over the head of any negotiation. You've got a bargaining unit that has people in it that can strike, and people in that bargaining unit who cannot, they'll be disbarred. A judge will hold them in contempt if they just dump their client right in the middle of a case and they're thrown together in the same bargaining unit with the ultimate bargaining power that they don't have.

So, when I look at these things, I looked at the totality of them, I think that the public defenders have made a very compelling argument for why they don't want to be a part of a bargaining unit full of people with disparate interest and an ability that they do not possess to strike. Furthermore, when I look back to number B, the history of employee relations, [Paine's] testimony, she can never find a record of the fact that public defenders ever even voted to join SEIU.

"So now, Ms. Steele, this is a comment, not a question. I've heard your very skillful arguments about procedure. I didn't hear one word about how the SEIU worked in the interest of their employees, which is shocking for employer/employee relations, didn't hear one word. But meanwhile, what I'm being asked to do is say, no, you have to stay part of a club

to represent you. That by the way, you never even voted to get into in the first place, as a group. Shocking to me that – that argument is even being made. So those are my thoughts. I'll return it to the commission at this point for any other questions, follow-up if they'd like comments or actions. But those were my thoughts as I listened to each of the witnesses."

Steele responded, disagreeing with the assertion that public defenders do not have the right to strike. Steele acknowledged attorneys' ethical obligations, but she explained that SEIU would address this circumstance via a practice the union frequently uses for other employee classifications that need to perform certain work obligations during a strike to protect the public. Specifically, SEIU negotiates over such issues with management and issues strike exemptions, known as "line passes," to a limited number of employees to cover critical work that cannot wait until after the strike. Price responded that even if Steele is right that public defenders can strike, the fact that they are unaware of that right is relevant to whether they have "full freedom" to exercise their rights.

Commissioner Michael Bowers then explained why he was voting in favor of the new unit, explaining that "this seems like a divorce court almost to a degree. Look, they don't want to be in the relationship anymore," making the proper outcome "pretty obvious." Thereafter, Bowers made a motion to approve the proposed new unit and recommend that the Board of Supervisors schedule an election to determine which organization will represent the new unit. The motion passed unanimously.

Following the June 19 special meeting, the Commission wrote to the Board of Supervisors to: (1) notify the Board of Supervisors that the Commission found CMEU's requested unit to be appropriate; and (2) request that the Board of Supervisors set an

election to be held by the State Mediation and Conciliation Service (SMCS) to determine which organization will represent the new unit. Neither in this letter nor in any other document did the Commission provide any further explanation for its finding that CMEU's petitioned-for unit is appropriate.

On July 16, the Board of Supervisors approved the Commission's request.

V. Litigation History

SEIU initiated this case on June 26, after the Commission found CMEU's proposed unit to be appropriate but before the Board of Supervisors approved the Commission's request. On June 27, SEIU asked OGC to stay the soon-to-be scheduled severance election pursuant to PERB Regulation 33002. On July 23, OGC issued a complaint, alleging, inter alia, violations of or unreasonable application of local rules. On July 26, OGC issued an administrative determination staying the severance election and adding CMEU as a joined party in this case.

The ALJ twice amended the complaint at SEIU's request and held a virtual hearing. Thereafter, the ALJ granted SEIU's request for administrative notice of PERB's case file in *County of Sacramento v. Sacramento County Attorneys' Association*, Case No. SA-CO-168-M, in which Sacramento County filed a request for injunctive relief seeking to prevent its public defenders from striking.

After the parties submitted post-hearing briefs, the ALJ issued a proposed decision finding that the County interfered with protected rights, while dismissing all other allegations. SEIU appealed.

DISCUSSION

MMBA section 3507(a) authorizes public agencies to “adopt reasonable rules and regulations after consultation in good faith with representatives of a recognized employee organization or organizations for the administration of employer-employee relations.” Such local rules may include provisions for recognizing employee organizations and determining appropriate bargaining units. (MMBA, § 3507(a)(3) & (a)(4); *County of Monterey* (2022) PERB Decision No. 2821-M, p. 9 (*Monterey*).)

As noted above, the County followed a winding path in processing the Petition. At one point, the County opined that its EERR did not provide for severance and that CMEU would therefore need to file a severance petition with PERB. (See *City and County of San Francisco* (2022) PERB Order No. Ad-497-M, pp. 15-22 [where local rules have no reasonable means of accomplishing severance, then PERB Regulations fill the gap and a severance petition at PERB is appropriate].) The County soon changed its mind, however. We agree with the County’s ultimate position on that question, as the decertification process in the EERR sufficiently addresses severance using other words: “The unit to be decertified need not be coterminous with the certified unit, but it cannot exceed in scope the certified unit, and the unit to be decertified must be an appropriate unit standing alone.” Thus, while the EERR allows severance, it requires a severance petitioner to show that unit determination criteria support the petition.

Challenges to an MMBA employer’s unit determination normally allege that the employer either maintained a facially unlawful local rule, violated one or more of its rules, or applied its rules in an unreasonable or unlawful manner. (MMBA, §§ 3507(d)

& 3509(b) (c); PERB Reg. 32603(f) & (g); *Monterey, supra*, PERB Decision No. 2821-M, p. 21; *County of Orange* (2016) PERB Decision No. 2478-M, p.16 (*Orange*)). Here, there is no allegation of a facially unlawful rule. Accordingly, we consider whether the Commission's severance determination violated the EERR or applied the EERR in an unreasonable or unlawful manner.⁷

A charging party has the burden of proof to the extent it claims that an MMBA employer's unit determination violated the employer's local rules or was unreasonable, and we do not substitute our judgment for that of the employer if reasonable minds could differ as to how applicable standards apply to the record. (*Monterey, supra*, PERB Decision No. 2821-M, p. 9.) Notably, however, there is considerable variation in the amount of deference we afford an MMBA employer's unit determination. For instance, if the MMBA employer provides a sufficient explanation of its unit determination, we apply a rebuttable presumption that the determination is reasonable. (*Id.* at p. 10.) In contrast, if the employer merely states the applicable standard and then provides "a conclusion without also including the analytical process in its decision," the presumption of reasonableness falls away. (*Ibid.*) Here, we consider the following factors in determining the amount of deference due to the Commission's decision.

⁷ The second amended complaint alleged that the Commission's unit determination was unreasonable and unlawful. Yet in the proposed decision, the ALJ did not address this critical issue. Rather, the ALJ opined that SEIU's post-hearing brief allegedly had addressed the unit factors only in a single lengthy paragraph. As we explain at pages 62-64, *post*, that would not constitute a waiver if true, and in any event the ALJ overlooked other parts of SEIU's brief dealing with the unit factors.

First, there is no written decision, even though Price closed the June 19 special meeting by requesting the County Counsel to draft such a written decision. The Commission asks us to excuse the lack of a written decision because the EERR is “silent as to any requirements (including any deadline) for the issuance of a written decision to supplement the Commission’s verbal decision issued at the close of the hearing.” We agree to the extent that the Commission did not violate its local rules by failing to explain its decision in writing. This argument only goes so far, however. As noted above, failure to sufficiently explain the decisionmaker’s analysis opens the decision to a greater degree of scrutiny.

The Commission also suggests that the absence of a written decision could be due to SEIU’s successful stay request. But this argument fails. OGC did not grant the stay until July 26, which was more than 5 weeks after the June 19 special meeting and 10 days after Board of Supervisors approved the Commission’s request. Moreover, OGC only stayed “proceedings in the pending SMCS case.” Thus, in preventing SMCS from moving forward with an election, OGC did not prevent Respondents from completing any written decision that was in the works. There is no evidence that such a decision was in the works, and no one has claimed that there was. In any event, the absence of a written decision is not a legal violation, but rather a factor supporting greater scrutiny of the Commission’s determination.

Absent a written decision, what remains to explain the Commissioners’ reasoning is their comments at the special meeting. As discussed throughout our analysis below, these comments show that the Commissioners erred in ways large and small on point after point, demonstrating more carelessness, misinterpretation,

internal inconsistency, and ignorance of applicable principles than decisionmakers in cases where we have found an employer's unit determination to be lawful. (See, e.g., *City of Glendale* (2021) PERB Decision No. 2773-M, pp. 27-37 [although hearing officer's unit determination analysis was more extensive on certain points than on others, overall reasoning showed sufficient explanation and consistency with the MMBA, local rules, and precedent] (*Glendale*); *City of Pasadena* (2021) PERB Decision No. 2788-M, pp. 9-17 [same] (*Pasadena*).)

Finally, as noted above, the Commission did not hold an evidentiary hearing or otherwise use procedures that would tend to facilitate accurate factual and legal determinations worthy of deference. Indeed, by allowing unsworn speakers to present without establishing the basis for their statements or being subject to cross-examination, the Commission ended up with a record replete with statements that were vague, unclear as to their basis and accuracy, and/or little more than opinion and rhetorical argument. This reliance on untested opinions is ill suited to determining units, as unit determinations are highly fact-specific and require a sound process for separating rhetoric from fact. Moreover, although the June 19 special meeting was the first of its kind that the Commission had held in modern memory, the Commission did not specify or explain in advance of June 19 what procedures it anticipated using, despite SEIU asking about that topic.

We proceed to analyze CMEU's proposed unit based on the MMBA, the EERR, and precedent. This analysis does more than confirm that the Commission's decision warrants little deference; it also shows that, even were we to grant full deference by

applying a rebuttable presumption in the Commission's favor, the record here would overwhelmingly rebut any such a presumption.⁸

I. Applicable Principles

A. The EERR

The County's EERR provides that the "principal criterion" for unit determination is "whether the unit proposed contains the largest feasible group with a community of interest among such employees." The EERR then identifies four non-exclusive subordinate factors, as follows:

"(a) Which unit will assure employees the fullest freedom in the exercise of rights set forth under this resolution?

"(b) The history of employee relations: (1) in the unit; (2) among other employees of the County; and (3) in similar public employment.

"(c) The effect of the unit on the efficient operation of the County, and sound employer-employee relations.

"(d) The extent to which employees have common skills, working conditions, job duties, or similar educational requirements."

These criteria are pervasive in local rules adopted by MMBA employers. (See, e.g., *Monterey, supra*, PERB Decision No. 2821-M, pp. 3 & 11 [local rules state that unit determinations must reflect "the broadest feasible grouping of positions that share

⁸ We focus on the unit of public defenders and investigators that CMEU seeks. Notably, the below discussion indicates that certain issues regarding CMEU's proposal would disappear if public defenders were to seek severance on their own, while other issues would remain. We express no opinion whether a severance petitioner could meet its burden were it to petition solely to sever public defenders from Unit 2.

an identifiable community of interest” and identify subordinate factors substantially overlapping with those in the EERR in this case]; *Pasadena, supra*, PERB Decision No. 2788-M, p. 4 [local rules state that “principal criterion” is “whether there is a community of interest” and identify five subordinate factors including the same four factors in the EERR in this case]; *City of Livermore* (2017) PERB Decision No. 2525-M, adopting proposed decision at pp. 8 & 36 (*Livermore*) [local rules state that unit determinations must reflect “the broadest feasible grouping of positions that have a community of interest” and identify subordinate factors substantially the same as those in the EERR in this case]; *Orange, supra*, PERB Decision No. 2478-M, p. 3 [local rules state: “To minimize the fragmentation of units, the principal criterion for determining an appropriate representation unit shall be the largest feasible group of employees having a community of interest” and identify subordinate factors substantially overlapping with those in the EERR in this case]; *County of Riverside* (2010) PERB Decision No. 2119-M [local rules state that each unit “should be the largest feasible group of employees having an identifiable common or related interest”]; *Westlands Water District* (2004) PERB Decision No. 1622-M, p. 4 [local rules establish the principal unit determination criterion is that a unit must “be the broadest feasible group of employees having an identifiable community of interest,” while identifying the same four subordinate factors listed in the EERR in this case].)

Because so many local agencies have analogous local rules, there is extensive precedent interpreting the unit criteria at issue in this case. For instance, in *Livermore, supra*, PERB Decision No. 2525-M, the employer had adopted unit criteria almost identical to those at issue here. We held that these criteria are akin to the statutory

criteria under section 3545(a) of the Educational Employment Relations Act (EERA), and we further held that it is proper to rely on PERB precedent interpreting EERA and other PERB-administered acts when interpreting an MMBA employer's local rules. (*Livermore, supra*, adopting proposed decision at pp. 19 & 36.)

And *Monterey, supra*, PERB Decision No. 2821-M notes that a local rule requiring the broadest feasible grouping "tracks settled precedent" in favoring larger units, thereby preventing undue unit proliferation and fragmentation. (*Id.* at p. 11; see also, e.g., *Regents of the University of California* (2025) PERB Order No. Ad-525-H, p. 20 [larger units promote both employer efficiency and union efficiency, while ensuring that employees have sufficient bargaining strength].) This preference for larger units in the California public sector is, in fact, a critical principle distinguishing public sector and private sector labor law. (*County of Santa Clara* (2019) PERB Decision No. 2670-M, p. 27.)

B. Severance Principles

Preferencing the largest feasible unit with a community of interest, as reflected in the EERR's principal unit determination criterion, means that a severance petition fails unless the history of collective bargaining shows that the employees at issue in the severance petition no longer have a community of interest with their colleagues in the broader unit(s). Furthermore, a severance petitioner's burden is significant not only because of the preference for larger units, but also based on an equally important preference for stability in labor relations. (*Los Rios Community College District* (2018) PERB Decision No. 2587, p. 4 [noting that "a stable negotiating relationship will not be

lightly disturbed”] (*Los Rios*); *Livermore, supra*, PERB Decision No. 2525-M, adopting proposed decision at p. 38 [same].)

These principles interact to define what a severance petitioner must show. First, severance is not appropriate merely because a small group of employees performing similar duties or related work have a community of interest with one another that is stronger than their community of interest with other employees in a larger, established unit. (See, e.g., *Los Rios, supra*, PERB Decision No. 2587, pp. 4-7 [rejecting severance petition seeking to remove police officers, police detectives, and college safety officers from established, larger unit of maintenance, operations, and public safety employees]; *Los Angeles Unified School District* (1998) PERB Decision No. 1267, adopting proposed decision at p. 49 [rejecting severance petition seeking to remove bus drivers from established, larger unit of operations and support personnel] (*LAUSD*).) Indeed, if a severance petitioner only needed to show that a small group had a stronger community of interest with one another than with the larger unit, that would be an easy standard to meet and would accordingly lead to unit proliferation. (*Regents of the University of California* (2010) PERB Decision No. 2107-H pp. 28-29.)

Rather, a severance petitioner must show that its proposed new unit has a community of interest that is separate and distinct from the established unit to such an extent that collective bargaining is “incapable of addressing the needs of a discrete minority within the existing unit.” (*Pasadena, supra*, PERB Decision No. 2788-M, p. 10; accord *Los Rios, supra*, PERB Decision No. 2587, pp. 4-6 & adopting proposed decision at p. 13; *Orange, supra*, PERB Decision No. 2478-M, pp. 6 & 10; *LAUSD, supra*, PERB Decision No. 1267, adopting proposed decision at pp. 49-50 & 58; see

also *Regents of the University of California, supra*, PERB Order No. Ad-525, p. 25, fn. 12; *Monterey, supra*, PERB Decision No. 2821-M, pp. 15 & 19.) Absent such proof, we presume that effective representation is possible even when a “pluralistic bargaining unit” includes a “diverse set of occupational groupings.” (*Regents of the University of California, supra*, p. 26.)

We must keep this burden in mind when analyzing the four subordinate factors that the EERR identifies as relevant in finding the largest feasible unit with a community of interest. It is more straightforward to analyze those factors in an initial unit determination context, and in fact those factors supported finding Units 2 and 3 appropriate when the County initially established its units. While the subordinate factors remain salient in a severance context, their relevance is for determining whether CMEU has satisfied its burden to establish that public defenders and investigators have such a distinct community of interest that collective bargaining can no longer address their interests within Unit 2 and Unit 3. Accordingly, in Part II, *post*, we analyze each subordinate factor to assess whether severance is proper or whether Unit 2 and Unit 3 remain feasible groupings with a sufficient community of interest.

C. MMBA Section 3507.3

The preference for larger units is subject to special unit determination rules that the MMBA establishes for certain types of employees. One such provision is relevant here: MMBA section 3507.3 affords professional employees the right to be represented separately from non-professionals. Specifically, section 3507.3 provides as follows:

“Professional employees shall not be denied the right to be represented separately from nonprofessional employees by

a professional employee organization consisting of those professional employees. In the event of a dispute on the appropriateness of a unit of representation for professional employees, upon request of any of the parties, the dispute shall be submitted to the California State Mediation and Conciliation Service for mediation or for recommendation for resolving the dispute.

“‘Professional employees,’ for the purposes of this section, means employees engaged in work requiring specialized knowledge and skills attained through completion of a recognized course of instruction, including, but not limited to, attorneys, physicians, registered nurses, engineers, architects, teachers, and the various types of physical, chemical, and biological scientists.”

Public defenders meet the definition of professional employees in section 3507.3, but investigators do not meet that definition. While the Commission erred in failing to consider section 3507.3 and its impact, we do so below.

Before turning to the substance of section 3507.3, we briefly note that the provision includes a unique procedural option. In a unit dispute involving professional employees, any party has the right to insist on a referral to SMCS, and at that point the employer must pause all proceedings under its local rules to allow SMCS to mediate and/or issue a recommendation. (*International Federation of Prof. & Technical Engineers v. City and County of San Francisco* (2000) 79 Cal.App.4th 1300, 1309-1310 [“the procedure of section 3507.3 is meant to be free of local variation” and “the subject covered by section 3507.3 is not subject to local regulation”].) For MMBA unit disputes that go to OGC in the first instance (because the employer has no applicable local rule), if the dispute involves professional employees and any party asks for a referral to SMCS, then OGC must similarly honor that request and pause

proceedings. Here, however, no party availed itself of this procedural right, and SMCS therefore played no role.

Substantively, section 3507.3 does not necessarily prohibit a mixed unit of professionals and non-professionals, but provides that professional employees placed into such a unit have the right to severance if a union seeks to represent them in a professionals-only unit and demonstrates sufficient proof of support in an initial petition and eventual election. (*Santa Clara Valley Water District* (2017) PERB Decision No. 2531-M, p. 14.) The right that section 3507.3 affords to professional employees is stronger than the comparable right in three other PERB-administered labor relations statutes, where there is merely a rebuttable presumption against mixing professionals in the same unit with non-professionals. (See § 3521(c) [covering state employees]; § 3524.77(c) [covering Judicial Council employees]; § 3579(b) [covering University of California and California State University employees].)

Section 3507.3 does not afford every group of professionals a right to its own unit. Accordingly, an “all professionals” grouping—such as Unit 3 in this case—fully protects the right set forth in section 3507.3. (*Orange, supra*, PERB Decision No. 2478-M, pp.13-14.) However, traditional community of interest criteria can merit narrower professional units, depending on the circumstances. Indeed, in *Alameda County Assistant Public Defenders Assn. v. County of Alameda* (1973) 33 Cal.App.3d 825, 832 (*Alameda*), an appellate court reviewed Alameda County’s initial division of employees into units and overturned its decision to place public defenders in a unit with all other non-healthcare professionals. The court ordered the employer to place the public defenders in their own unit, finding that they were “*Sui generis*” (meaning

unique) and had little in common with auditors, planners, and rodent inspectors. (*Id.* at p. 832.)

Notably, because *Alameda* involved an initial unit determination rather than public defenders seeking severance after decades of stable labor relations in a broader unit, it does not stand for the proposition that public defenders always have a right to sever themselves from a broader professional unit. Thus, in California counties where public defenders are part of a broad professional unit, they may seek to sever themselves into a stand-alone public defenders' unit, but they bear the burden of showing that the larger, established unit cannot adequately address their interests.

In *Santa Clara County District Attorney Investigators Assn. v. County of Santa Clara* (1975) 51 Cal.App.3d 255, the appellate court addressed an analogous MMBA provision—section 3508—which affords peace officers the right to participate in unions composed solely of peace officers. The court noted the similarity between sections 3507.3 and 3508 and construed *Alameda* narrowly, explaining that just as section 3507.3 permits an “all professionals” unit, MMBA section 3508 permits an “all peace officer” unit absent proof that such a broader unit “is unable to effectively represent” a particular subset of employees. (*Id.* at p. 265.)

In this case, the primary relevance of section 3507.3 is that CMEU proposes to remove public defenders from an “all professionals” unit that protects their statutory right to be represented separately from non-professionals, moving them instead to a mixed unit with non-professionals. Such a move creates a long-term instability and potential for additional fragmentation later, since the public defenders would always retain the right to seek a further severance from the mixed unit. (See *City of Lodi*

(2010) PERB Decision No. 2142-M, adopting proposed decision at p. 12 [efficiency of operations warrants rejecting severance petition that would create small, mixed unit of professionals and non-professionals, as professionals could later file for severance from that unit] (*Lodi*.) Thus, as discussed in Part II(C), *post*, CMEU's Petition is inconsistent with notions of efficiency and sound labor relations. And while severance petitions always have a near-term destabilizing potential, in this case the Petition would have both a near-term and long-term destabilizing impact.

II. Analysis of CMEU's Petition

CMEU's attempt to move public defenders from an all-professionals unit to a mixed unit is one unusual aspect of its Petition, but there is another abnormality as well: CMEU seeks to sever employees from two different units and combine them into a new unit. This violates the EERR, which provides that the "unit to be decertified need not be coterminous with the certified unit," but it "cannot exceed in scope the certified unit." By mixing and matching employees from two different units, CMEU exceeds the scope of either Unit 2 or Unit 3. While this EERR violation independently required dismissal of CMEU's Petition, in the alternative, we proceed to analyze the petition as if the EERR contained no such limitation.

Even if the EERR permitted a mix-and-match severance petition from two units simultaneously, at a minimum CMEU would have to show both that Unit 2 is incapable of addressing public defenders' interests and that Unit 3 is incapable of addressing investigators' interests. As we proceed to discuss, CMEU did not satisfy either (much less both) of these burdens. The below discussion also shows that the Commission

failed to follow the EERR's principal criterion, while wrongly interpreting each of the following subordinate unit determination factors.

A. Fullest Freedom to Exercise Rights

The first factor dovetails with longstanding policy developed under PERB-administered statutes, providing employees "the ability to choose an organization which is an effective representative." (*Sweetwater Union High School District* (1976) EERB Decision No. 4, p. 9.)⁹ Effective representation is "largely determined by the community of interest and established practices of the employees." (*Ibid.*) Importantly, this factor has never assumed that smaller units, while having perhaps a greater internal community of interest, will result in more effective representation for employees. (*Los Rios, supra*, PERB Decision No. 2587, pp. 4-5.) Rather, in severance matters we have concluded that a stable negotiating relationship promotes effective representation, and considered whether under the existing unit structure, the incumbent representative is capable of effectively addressing competing bargaining interests. (*Id.* at p. 5.) To address this question, we have examined the parties' negotiating history to determine whether the incumbent representative has historically neglected or ignored a minority's interests. (*Id.* at pp. 5-6.) We have applied the same analysis in prior cases where the "fullest freedom" factor was present in a local agency's unit determination rules. (See *Pasadena, supra*, PERB Decision No. 2788-M, pp. 11-13; see also *Glendale, supra*, PERB Decision No. 2773-M, pp. 29-30.) We now examine the three primary contentions that CMEU

⁹ Prior to 1977, PERB was known as the Educational Employment Relations Board.

argued, and Commission President Price cited, as reasons CMEU's proposed severance is allegedly needed.

1. Alleged Neglect of Employee Interests

As noted above, CMEU has the burden to show that the current unit structure is incapable of addressing unique interests of public defenders and investigators. Stated differently, a "readily identifiable minority of unit members is not required to relinquish its issues regularly to the more powerful majority." (*LAUSD, supra*, PERB Decision No. 1267, adopting proposed decision at pp. 55-56.)

But CMEU cannot come close to meeting this burden. Public defenders, far from being a powerless minority, in fact wield disproportionate power within Unit 2 and within SEIU's overall structure as well. Unit 2 includes dozens of professional classifications.¹⁰ But among these many classifications, it is public defenders that hold three critical elected union offices. First, public defender Walters serves as the Unit 2 representative on SEIU's bargaining team. Second, public defender Gill serves as SEIU's Vice President for Kern County. Finally, public defender Andreas serves in another critical role, Secretary for SEIU's Kern County Chapter. Gill and Andreas, as chapter-wide officers, also serve on the bargaining team, giving public defenders three representatives on the team. The record does not indicate that any other classification wields even close to this much influence. Given this disproportionate influence, we cannot find that public defenders and investigators have had to relinquish their

¹⁰ Unit 2 includes well over 100 separate titles. Examples include behavioral health nurses and therapists, clinical psychologists, criminalists, epidemiologists, hazardous materials specialists, librarians, mental health physicians, microbiologists, nurse practitioners, psychiatrists, public health nurses, and social service workers.

interests to a more powerful majority. (See *Glendale, supra*, PERB Decision No. 2773-M, pp. 29-30 [finding one representative of employee group on union's board of directors to be reasonable evidence that existing structure sufficiently ensures the fullest freedom of employee rights].)

Nor does the record show that public defenders' employment terms have suffered from neglect. At the Commission's meeting regarding the severance petition, Pierce recounted how retention of public defenders has "been an issue in the past with Kern County" because once attorneys in Kern obtain experience, they want to "go elsewhere." To address this retention issue, Pierce explained that Kern affords public defenders better promotion rights than comparable public defenders elsewhere. Pierce noted that he had promoted "up from I to IV" in just six years and that his "colleagues [in] other counties" cannot promote so quickly. And for investigators, Evans admitted that "turnover is not [a] significant concern," as investigators choose to stay in their jobs for "a very long time."

The MOU between SEIU and the County provides longevity pay increases at 10, 15, 20, 25, and 30 years of service, over and above regular annual cost-of-living increases. Also relevant is MOU section V(7), which requires the County to meet with SEIU to address recruitment and retention difficulties the County has faced with respect to 14 specific employee groups, including public defenders. As part of that provision, the County must perform a total compensation study comparing Kern County public defenders to those in comparable counties.

In the latest round of bargaining that was ongoing during the formal hearing in this matter, the three public defenders on SEIU's bargaining team wielded strong

influence over the union's proposals. Specifically, SEIU sought to establish four additional enhancements targeted at public defenders and investigators. The first was to add special assignment pay premiums (ranging from 5 percent to 10 percent) for public defenders who work in outlying branch courts, supervise permanent units, or complete a variety of continuing education certifications, including in areas such as juvenile representation, death penalty representation, or probate law. The second was to add a retention bonus of \$3,000 per year for the first five years following a public defender's hiring. The third was to create a \$1,000 annual professional development allowance for legal education and membership in legal associations, over and above the benefits already afforded in MOU section VI(4) (providing \$500 annual reimbursement for professional fees such as bar dues) and MOU section VI(11) (providing \$500 annual reimbursement for approved education or continuing education training required to maintain bar membership). The fourth was a hazard pay proposal that SEIU was specifically designing, in consultation with employees in the Public Defender's Office, to benefit investigators.

Moreover, these ongoing efforts by SEIU are on top of the earlier work that Evans described to create and implement workload standards for public defenders and to represent public defenders in class and compensation bargaining, among "[l]ots of other significant achievements." Indeed, while Evans did not go into further detail regarding these achievements, his testimony makes it hardly surprising that Kern public defenders enjoy better promotion rights than their colleagues in other counties.

Thus, not only do SEIU and the County have a "stable and productive" collective bargaining relationship, but SEIU's representation includes highly involved

participation by “members of the petitioned-for classifications.” (*Pasadena, supra*, PERB Decision No. 2788-M, pp. 11-12.) While an incumbent union need not show such participation to defeat severance, here such evidence leaves CMEU no plausible case, completely disproving Owen’s claim to the Commission that public defenders’ interests are “diluted” and “overshadowed” by social workers or other unspecified employee groups.

Owen, choosing to ignore public defenders’ disproportionate influence on the bargaining team, asserted that public defenders had unsuccessfully sought to include the Public Defender’s Office in MOU section III(12), which requires the County to meet with SEIU to discuss workload issues in certain departments. But Owen’s presentation left unanswered nearly every salient question, such as: If certain public defenders wished to amend the mandatory discussion provisions in MOU section III(12), did they do so by approaching the three public defenders on the bargaining team? What, specifically, happened that prevented such an MOU amendment? For instance, did the bargaining team believe a different approach would better address workload, or did the bargaining team make the proposal but run into opposition from management? Furthermore, did public defenders, through their elected representatives, attempt to raise workload through the labor-management committee established in MOU section III(10), which is open to all departments?

Owen also stated his belief that because the head of the Public Defender’s Office, Peter Kang, has an “open-door policy,” if public defenders could create their own unit, they would be able to “directly access Mr. Kang.” According to Owen, that is not possible within the current unit structure “because SEIU requires us to set up

meetings with them,” yet often “they don’t appear or don’t respond to those requests for meetings with Mr. Kang on generally pretty minor things, but important things.” But Owen misunderstands labor law if he believes public defenders cannot avail themselves of Kang’s open-door policy without the consent of their union. (See § 3502 [MMBA-covered employees “shall have the right to represent themselves individually in their employment relations with the public agency”]; § 3503 [MMBA does not “prohibit any employee from appearing in his own behalf in his employment relations with the public agency”]; *Alameda County Medical Center* (2004) PERB Decision No. 1620a-M, p. 3 [MMBA section 3502 protects unionized employees’ right “to represent themselves in their employment relations with the public agency employer” but does not authorize employer to bypass union and negotiate separate employment terms with individual employees]; *Alameda County Medical Center* (2004) PERB Decision No. 1620-M, p. 2 [MMBA section 3503 protects unionized employees’ right “to meet with the employer without the employee organization” but does not authorize the employer to bypass the union and negotiate separate employment terms with individual employees].) Owen also failed to specify whether the public defenders hoping to meet with Kang sought to work with the three elected public defender union representatives (Walters, Gill, and Andreas), and what, specifically, happened each time.

Owen also claimed that SEIU confuses “who we work for, suggesting that we should talk to our boss, the District Attorney.” Since it is inconceivable that the three public defenders who serve as elected SEIU representatives could make that mistake, and Owen provided no details, we infer that it must have been an SEIU representative

from outside the Public Defender's Office who misspoke in that manner. While that is unfortunate, it does not come close to overcoming other evidence against severance. And, in fact, if an SEIU representative told employees to talk to their boss (even while misidentifying for whom they work), this undercuts Owen's claim that SEIU blocks employees from accessing their boss's open-door policy. In any event, given that Gill and Andreas are SEIU officials quite familiar with the Public Defender's Office, investigators and public defenders have support from representatives who are well-versed in the issues at stake in their office. Owen may believe that SEIU representatives from outside the Public Defender's Office should accompany them to meet with Kang over what Owen described as the "pretty minor things, but important things" that come up in the workplace, but such an approach would be less common in labor relations, if more knowledgeable representatives from the department are available.

After Owen offered his views, Price specifically repeated and relied on them to justify severance, while failing to recognize any of the above flaws in Owen's opinions. Price, in fact, went further. He said he found it "shocking" that he "didn't hear one word about how the SEIU worked in the interest of their employees." But his memory was poor on that score. Price received all the oral and written information discussed above but did not give SEIU credit for its multiple successes and its further efforts in ongoing bargaining to convince management to further enhance employment terms and conditions for public defenders and investigators. We cannot subscribe to this approach of blaming SEIU (rather than management) for challenges that remain while refusing to credit SEIU for successes and ongoing efforts.

The record thus does not remotely support the notion that a “readily identifiable minority of unit members” has been “required to relinquish its issues regularly to the more powerful majority.” (*LAUSD, supra*, PERB Decision No. 1267, adopting proposed decision at pp. 55-56.) Precedent dictates that employees cannot meet this standard merely by showing a “history of dissension and lack of alternatives to mediate legitimate conflicts” marked by “two or three issues” that their union has “failed to address to [their] satisfaction.” (*Id.*, adopting proposed decision at p. 58.) CMEU’s much less impressive showing, which SEIU’s evidence easily outweighs, does not come close. Indeed, even if one were inclined to set aside CMEU’s burden and instead view CMEU’s assertions in the light most favorable to them, while affording CMEU the benefit of the doubt as to why it ignored SEIU’s bargaining efforts on behalf of public defenders and investigators, CMEU’s complaints still would not amount to more than “general dissatisfaction with bargaining results that commonly exists within a bargaining unit.” (*Pasadena, supra*, PERB Decision No. 2788-M, p. 12; accord *Los Rios, supra*, PERB Decision No. 2587, p. 5 [“police employees’ unanimous opposition to a recently-approved collective bargaining agreement” were “not materially different from the garden variety differences that commonly exist within a bargaining unit”].)

Another flaw also permeates CMEU’s argument. Even where there is evidence that an incumbent union has provided poor representation, that does not indicate that the established unit structure neglects the needs of one sub-group, unless the evidence shows that representational efforts skew against the group in question and/or in favor of other groups. (*Pasadena, supra*, PERB Decision No. 2788-M, p. 12 [although incumbent union “did not achieve bargaining success in every area of

concern” to the group seeking severance, this did not necessarily result from disparate representation favoring other classifications].) Thus, even overall poor representation does not favor severance but rather suggests that employees may wish to consider petitioning to decertify the union representing the entire unit (with or without replacing it with a different union), or, in extreme cases, filing a charge alleging breach of the duty of fair representation. The current record, however, simply does not establish a history of poor representation, much less a history skewed against investigators and public defenders.

2. Alleged Impact of Employee Free Choice

Paine told the Commission that the employees supporting severance “have done a ton of research on the history of labor relations for our department. And what they have found is that apparently no majority has ever voted for the current structure or more importantly, for SEIU representation.” Later, Paine framed the result of the research differently: “We have not found any solid information about how all of this came to be . . . no one seems to know.”

Price relied on Paine’s vague assertions, noting that employees could not “find a record of the fact that public defenders ever even voted to join SEIU.” Price stated that “what I’m being asked to do is say, no, you have to stay part of a club to represent you. That by the way, you never even voted to get into in the first place, as a group. Shocking to me that – that argument is even being made.” Commissioner Bowers also saw the matter as one of employee free choice, stating that he saw the Commission’s role as akin to “divorce court,” because “they don’t want to be in the relationship

anymore and it's pretty obvious." A third commissioner echoed this view, stating: "you've got a group of folks who work at the public defender's office" who "want out."

CMEU and the Commission once again misunderstand fundamental labor relations principles. First, "while employees have the right to choose which employee organization, if any, they want to represent them, they have no right to choose the bargaining unit in which their classification or position is placed." (*Pasadena, supra*, PERB Decision No. 2788-M, p. 11; accord *Regents of University of California v. Public Employment Relations Bd.* (2020) 51 Cal.App.5th 159, 190 [affirming that employees have no "right to choose the bargaining unit in which their classification or position is placed"].) Rather, unit determinations flow from the EERR criteria discussed throughout this decision, including the principal criterion of finding the largest feasible group with a community of interest. Unit determinations therefore are based on objective facts rather than on employees' subjective sentiments, which may change from year to year or decade to decade. Otherwise, changing employee sentiments over time would lead to constantly shifting unit structures. Instead, changing employee sentiments can lead to decertification and/or change in which union represents a given unit.

Second, while the record does not include the full history of labor relations in Kern County, there is no mystery as to how, under the EERR, public defenders and investigators ended up represented by SEIU in Unit 2 and Unit 3. We do not know when, but Units 2 and 3 were determined appropriate, SEIU gathered sufficient proof of support in each unit to trigger an election, and employees in each unit voted in an election. Such elections use secret ballots, meaning it is impossible to know whether

the public defenders or investigators who voted ended up favoring SEIU. What is indisputable is that a majority of voting employees in the full set of classifications chose SEIU, both within Unit 2 and, separately, within Unit 3. CMEU claims this history shows we do not know if a majority of public defenders and/or investigators ever supported SEIU. But because union elections are unit-wide and use secret ballots, it is no exaggeration to say that the lack a classification-specific vote is just as true for every classification in every unit—not only throughout Kern County but at all public and private employers in the United States with unionized bargaining units containing at least two classifications.

Finally, the Commission’s approach ignores that, at any given time, it is unsurprising if employees in one or more classifications in a unit may desire a new union. If that dissatisfaction grows to more than half the unit, then decertification becomes possible. But the severance inquiry, as described above, does not turn on employee dissatisfaction. If it did, severance and unit proliferation would be pervasive. The Commission’s approach would thus create a chaotic number of meritorious severance petitions. Even aside from the other flaws in the Commission’s analysis, this error independently requires us to reverse the Commission’s determination.

3. Alleged Inability to Strike

As noted above, Paine starkly told the Commission: “I will lose my Bar card if I go on strike,” and as a result “I cannot go on strike with other people in my bargaining unit.” A second public defender, Gallo, stated that public defenders are unlike “any other job in Bargaining Unit 2 or Bargaining Unit 3. Any job can go on strike . . . but we

cannot cross—we have to cross that [picket] line, and therefore our interests are not aligned with anybody else.”

Price accepted these opinions, stating: “Anybody who has a just a cursory knowledge of unions knows that it starts with a strike, right? That’s the ultimate sort of damage, so to speak, hanging over the head of any negotiation. You’ve got a bargaining unit that has people in it that can strike, and people in that bargaining unit who cannot, they’ll be disbarred . . . and they’re thrown together in the same bargaining unit with the ultimate power that they don’t have.”

Steele corrected these exaggerations, explaining that: (1) their premise is not right; and (2) just as SEIU works with other critical classifications to ensure that a minimum number needed receive line passes to perform essential work during any strike and thereby allow many of their colleagues to strike, SEIU would go through the same process with public defenders. Price refused to relent and instead pivoted, saying that even if Steele is right, public defenders “are under the impression” that they cannot strike, so CMEU’s argument is still persuasive as to what unit will afford them the “full freedom of the exercise of their rights.” As we proceed to explain, Steele was correct in her representations and Price was wrong to rely on strike rights as a factor supporting severance.

Determining “whether a particular employee’s job is so essential that the employee may not legally strike is a complex and fact-intensive matter.” (*City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 601.) The starting point is “the nature of the services the alleged essential employees perform and whether the employer has clearly demonstrated that disruption of such services

for the length of the strike would imminently and substantially threaten public health or safety.” (*County of San Mateo* (2019) PERB Order No. IR-61-M, p. 8.)

In *Santa Clara County Counsel Attorneys Assn. v. Woodside* (1994) 7 Cal.4th 525, the California Supreme Court noted that the American Bar Association Committee on Ethics and Professional Responsibility (ABA Committee) had “considered the propriety of strikes by attorneys who are employed by a single employer in public or private practice.” (*Id.* at p. 551.) The Court summarized the ABA Committee’s resulting opinion as adopting “what may be called a pragmatic approach to the question of strikes.” (*Ibid.*) “If the attorney’s strike leads to the neglect or intentional sabotage of the employer/client’s affairs, then the attorney would have violated his or her professional obligations.” (*Ibid.*) However, the ABA Committee found that “in some situations participation in a strike might be no more disruptive of the performance of legal work than taking a two week[s] vacation might be.” (*Ibid.*) While the Court expressly found no need to approve or disapprove of the ABA Committee’s position on strikes, the Court recognized that the Committee had adopted “a realistic accommodation between an attorney’s professional obligations and the rights he or she may have as an employee.” (*Ibid.*) Accordingly, the Court expressly adopted the ABA Committee’s approach vis-à-vis an attorney’s assertion of such rights in general, finding that an attorney only “oversteps ethical boundaries” if the attorney “violates actual disciplinary rules, most particularly rules pertaining to the attorney’s duty to represent the client faithfully, competently, and confidentially.” (*Id.* at p. 552; accord *County of San Bernardino (Office of the Public Defender)* (2015) PERB

Decision No. 2423-M, p. 35 [public defenders have full MMBA rights, provided they do not violate the California Rules of Professional Conduct].)

Thus, strikes by attorneys share an important characteristic with strikes by physicians.¹¹ Each attorney or physician must use professional judgment to assure compliance with professional codes. Such consideration may lead to a range of actions to protect clients or patients. This may include making alternate arrangements, and indeed Gallo's presentation identified one possibility the County has for new clients arraigned during a strike: the Indigent Defense Program (IDP), which has a contract with the County to represent clients "when the Public Defender's office has a conflict or otherwise cannot represent a client." (<https://kernbar.org/programs/idp/> [last accessed July 30, 2025].) While Gallo lamented that IDP costs the County money, this ignores that a fundamental purpose of a strike is to exert economic pressure by imposing extra costs on the employer. (*County of San Mateo, supra*, PERB Order No. IR-61-M, p. 25.)

¹¹ We take administrative notice of our determination dated October 26, 2022, in Case No. SF-CO-513-M. There, we partially granted and partially denied Santa Clara County's request for injunctive relief against a threatened strike by Valley Physicians Group (VPG), a union representing physicians at the County's three public hospitals. Our determination included orders that: (1) VPG-represented physicians could strike to the extent they had determined, and communicated to the County, that rescheduling a patient's appointment, surgery, or other procedure would not create a substantial and imminent risk to the patient's health or safety; while for those who could not be safely rescheduled, the County had to make reasonable efforts to find a replacement physician, but if the County was unsuccessful, the physician would provide the care despite the strike; and (2) for inpatient services other than scheduled procedures and surgeries, VPG would provide line passes to physicians at a sufficient level that, when added to available replacements, staffing would be at the level customarily assigned on Thanksgiving weekend.

In certain instances, an attorney (or a physician in a hospital strike) must choose other options to protect ongoing clients or patients in the event of a strike. This can include reasonable delays that will not harm the client or patient more than standard delays in the industry might. In still other instances, where a delay would pose an undue risk or burden, an attorney or physician may need to start their strike late, end it early, come into work for a period in the middle, or forego striking altogether.

Most importantly, the need for narrowly tailored line passes is not unique to attorneys and physicians. For example, strikes by a variety of personnel who play important roles in the criminal justice system (including district attorneys, public defenders, court clerks, and court reporters) must protect the public in the sense of allowing the justice system to comply with mandatory deadlines. Sometimes, this requires one or more employees to refrain from striking in certain classifications, depending on the availability of supervisors, managers, replacement employees, other non-bargaining unit personnel, and bargaining unit employees that the union has exempted from the strike or who have affirmatively indicated that they plan to work during the strike. (See, e.g., *San Mateo County Superior Court* (2019) PERB Order No. IR-60-C, p. 8 [no injunction warranted where union representing court personnel voluntarily agreed to exempt from the strike sufficient personnel to protect the public]; *Sacramento County Superior Court (United Public Employees Local 1)* (2015) PERB Order No. IR-59-C, pp. 3-4 [declining to seek injunction against strike by court clerks and court reporters where employer did not show that managers, supervisors, and replacement court reporters were unable to cover essential work].)

Accordingly, while not every public defender can fully participate in every strike for its entire duration, there is substantial leeway to strike to the extent that it is possible to seek an appropriate continuance (as an attorney might do for vacations, illnesses, or other reasons), and/or possible for management to avail itself of coverage options including: use of supervisors, managers, overflow/conflict attorney panels, and public defenders who the union has exempted from the strike or who have indicated they will not strike. (See *County of San Mateo, supra*, PERB Order No. IR-61-M, p. 8 [discussing interplay between nature of services provided and availability of contingency options].)

For instance, after the Sacramento County Attorneys' Association (SCAA) called a strike, Sacramento County public defenders struck from late August through early September 2024.¹² SCAA represents over 100 public defenders and supervisory public defenders, but SCAA indicated to PERB that it had exempted from the strike more than a dozen public defenders to whom it granted line passes to participate in trials during the strike, as well to handle arraignments and preliminary hearings with upcoming deadlines. Based on these line passes, as well as information indicating that management had four non-striking management attorneys and could potentially ask for assistance from the Conflict Criminal Defender panel if needed, the Board denied the employer's request for injunctive relief against the strike.

¹² As noted at page 17, *ante*, the record includes filings in the injunctive relief request that Sacramento County filed in Case No. SA-CO-168-M. That case remains open, and the parties may still litigate it on the merits. We caution that we make no conclusive findings regarding the facts of that case.

SEIU counsel specifically told the Commission about such options at the June 19 special meeting. Steele explained that in the event of a strike, SEIU would grant line passes to certain attorneys so that others could strike without endangering client interests or the public, just as SEIU does for a variety of classifications all over California. Indeed, public defenders are akin to other county employees whose right to strike is not absolute due to the critical work they do. This can include not only physicians and certain court personnel, but multiple other county classifications whose incumbents protect the public 24 hours per day, 365 days per year. (See *County of San Mateo, supra*, PERB Order No. IR-61-M, pp. 10-21 & 26 [noting essential functions requiring line passes to be issued to certain emergency dispatchers, prison cooks, on-call hazardous materials and public works employees, group home administrators, juvenile residential counselors, and child abuse and elder abuse responders, while noting that employer could not obtain injunction against hospital classifications that could have been replaced if employer had contracted with a national striker replacement company].)

Unit 2 includes professionals whose work relates to critical areas such as behavioral health, hazardous materials, and children and elder services. In the event of a strike, line passes would be an issue for multiple Unit 2 classifications. Far from separating public defenders' interests from Unit 2, the issue ties them together.

In contrast, line passes would be unlikely to be an issue for investigators, unless one of them had to testify or play another critical role in an ongoing trial during a strike, and that role could not be performed by a supervisor or moved to a trial day

outside the strike period. Yet the Commission not only assumed that public defenders cannot strike, it also apparently extended that assumption to investigators as well.

B. History of Employee Relations

The EERR separates this criterion into three sub-parts. We address each in turn.

1. History in the Unit

No party contends that public defenders have ever been in any unit other than Unit 2 or that investigators have ever been in any unit other than Unit 3. This structure has facilitated stable collective bargaining for decades. Indeed, as discussed above, employees in the Public Defender's Office have successfully elected members to high level union offices; those union officials have strongly advocated for their interests through the existing unit structure, achieving numerous bargaining gains; and to the extent there are further employment terms that could stand to be improved, that is common for any classification and most often results from management resisting based on cost or operational reasons.

Such history "is more important when employees have historically been in an established unit—such as when we consider a severance petition—because under those circumstances, maintaining continuity weighs against severance absent proof that collective negotiations are incapable of addressing the needs of a discrete minority within an existing unit." (*Monterey, supra*, PERB Decision No. 2821-M, pp. 18-19; see also *Pasadena, supra*, PERB Decision No. 2788-M, p. 10 [same]; *Los Rios, supra*, PERB Decision No. 2587, p. 4, citing *Livermore Valley Joint Unified School District* (1981) PERB Decision No. 165, p. 6 ["Negotiating history is of

particular importance when considering a severance request, as ‘a stable negotiating relationship will not be lightly disturbed’”].) Here, then, the history of SEIU representing public defenders and investigators in separate units—Unit 2 and Unit 3, respectively—strongly favors SEIU’s position and undercuts CMEU’s Petition.

Yet, the Commission turned this basic precept upside down by putting the burden on SEIU to show that public defenders and investigators at some point voted in favor of SEIU representation. As discussed at pages 40-41, *ante*, that would be impossible for virtually any American union at any public or private employer, as union elections are unit-wide and individual ballots are entirely confidential.

2. History Among Other Employees of the County

As discussed above, district attorneys and child support attorneys together make up a small bargaining unit (Unit P) that severed from Unit 2 in the 1990s. This would be a better comparator for CMEU if it had petitioned for a unit of only public defenders rather than a unit combining public defenders with investigators.

Recognizing that Unit P is not a strong comparator because it does not include district attorney investigators, CMEU notes that district attorney investigators are peace officers (unlike public defender investigators). CMEU then explains that this is why they are in the Law Enforcement Unit together with other peace officers—to comply with MMBA section 3508, which affords peace officers the right to be represented in a unit consisting only of peace officers. However, CMEU ignores that separating district attorneys from district attorney investigators is also consistent with MMBA section 3507.3, which affords professionals the right to be represented in a unit

consisting only of professionals. Because Unit P protects this right while CMEU's proposed unit would not, Unit P is a problematic comparator for CMEU's Petition.

The same is true of the County's unit structure viewed more broadly, since its present structure protects professional employees' right under MMBA section 3507.3, unlike CMEU's proposal. As noted above, Goulart told the Commissioners that mixing professional and technical employees is feasible, as there are MOUs that cover both professional and technical units. But the record does not reflect any unit that contains both professional and non-professional County employees. Such units are lawful but inherently unstable (see *ante* at pp. 28-30), which helps to explain why the County has no such units.

3. History in Similar Public Employment

The record reflects 29 counties with a public defender's office, not one of which combines public defenders and investigators into a single unit. This fact further undercuts CMEU's Petition. While Gallo cited 12 counties where public defenders are in a unit that is not a county-wide professional unit, none of these units include investigators, and some are broad attorney units that include other attorneys working for the County. (See, e.g., *City and County of San Francisco* (2025) PERB Decision No. 2958-M, p. 4 [bargaining unit comprised attorneys working in City Attorney's Office, the District Attorney's Office, and the Public Defender's Office] (judicial appeal pending on other grounds].)

Moreover, Price expressed a view of these facts that is at odds with the record. Specifically, he stated his interpretation that "other counties are moving" to public defenders being "no longer part of SEIU." Thus, he claimed, "a lot of count[ies]' public

defenders do not think they belong in an SEIU bargaining unit. It's not just one. That's a lot." However, for the 12 out of 29 counties that Price seems to be referencing, the record does not show whether there are any in which public defenders severed themselves from a broader unit. Thus, far from other counties moving in a particular direction, those 12 counties may have all established separate attorney units from the outset. Even were there a hypothetical county in which public defenders severed themselves from a broader unit, such severance certainly did not involve investigators, and there is no support for the notion that such hypothetical movement involved public defenders rejecting SEIU. Rather, just as there is no evidence of any public defenders voting to sever themselves from a broader unit, there is no evidence as to what union may have represented such a broader unit. Thus, the record does not remotely support Price's conclusion that the record shows "a lot" of public defenders moving away from SEIU; the record in fact shows no movement by public defenders away from any broader units, whether represented by SEIU or any other union.¹³

C. Efficient Operation of the County and Sound Employer-Employee Relations

The third subordinate factor—efficient operation of the County and sound employer-employee relations—is the one most closely aligned with the principal criterion of finding the largest unit with a community of interest. As noted *ante* at pages 24-33, efficiency and sound labor relations generally favor larger units, subject

¹³ Price's misconception was rooted in Paine's presentation to the Commission. Paine said there is a "trend" of public defenders severing themselves from broader units, but there is no such evidence. The only example Paine provided was the 1975 decision in *Alameda, supra*, 33 Cal.App.3d 825, but that decision involved initial unit placement rather than a severance petition after decades of stable labor relations.

to certain statutory requirements such as affording professionals a right to be represented separately from non-professionals.

In this case, the County currently has 15 bargaining units. Responding to a commissioner's question, Goulart confirmed that dealing with the existing number of units already takes considerable time and effort. Creating a new, small unit for public defenders and investigators would not only cause inefficiency by bringing the number of units up to 16, but it would promote inefficient, unstable, and unsound labor relations by virtue of two types of downstream effects.

First, granting CMEU's Petition would establish an unprecedented new standard for severance petitions, and would therefore lead to further successful severance petitions from employees in other County departments that are just as discrete, unique, and integrated as the Public Defender's office.¹⁴

Second, while the County's current unit structure protects professional employees' statutory right to be represented separately from non-professionals,

¹⁴ The County's administrative structure includes dozens of departments. (See <https://www.kerncounty.com/government/departments> [last accessed July 30, 2025].) Taking just one as an example, what would prevent librarians (professional employees who are in Unit 2, together with public defenders and other professionals) from seeking to create a library unit that includes not only themselves but also library associates, who are not in the professional unit? It can hardly be questioned that a library department in virtually any county faces unique issues, including the fact that today's libraries often serve as de facto day shelters for unhoused individuals, requiring library staff to regularly assist patrons in need of social services and sometimes experiencing a crisis rooted in mental health disability, substance use disorder, or other issues associated with homelessness. Giesler, "A Place to Call Home?: A Qualitative Exploration of Public Librarians' Response to Homelessness" (2017) *Journal of Access Services*, Vol. 14, No. 4 [libraries "have been characterized as de facto daytime shelters for the nation's homeless"].)

granting the Petition would create instability by creating a mixed unit. As discussed at pages 28-30, *ante*, such a unit is legal but creates an ongoing instability because public defenders could file a future severance petition, invoking MMBA section 3507.3. Precedent disfavors carving out such a smaller mixed unit even from another mixed unit (*Lodi, supra*, PERB Decision No. 2142-M, adopting proposed decision at p. 12), meaning it is even more disfavored to sever professionals from an “all professionals” unit and place them in a new, small, unstable mixed unit.

Notably, section 3507.3 would tend to disfavor CMEU’s proposed small, mixed unit even if more than half the public defenders had signed authorization cards, thereby indicating they wished to give up for now their current representation in a unit separate from non-professionals. This is true since the EERR would allow 30 percent of the public defenders to file a new severance petition based on section 3507.3, meaning such a petition could follow shortly after a vote in favor of CMEU’s severance petition, even without any change in employee sentiment. And if there were even slight changes in sentiment or employee turnover, this could easily mean a majority favoring the CMEU unit could soon after vote to be separately represented.

Here, the issue is even more pressing, as a majority of public defenders did not sign authorization cards. At the formal hearing before the ALJ, CMEU admitted that only 26 public defenders signed authorization cards, out of 53 or 54 who would be in the proposed unit. Thus, CMEU seeks a mixed unit election involving 9 investigators and 53 or 54 public defenders, meaning that a majority of these 62 or 63 employees could vote in favor of severance even while a majority of the public defenders wish to continue availing themselves of their statutory right to maintain representation in a

professionals unit, as they have in Unit 2. In other words, CMEU's Petition could cause the County to violate section 3507.3, or at the very least would create instability given the legal right set forth in that provision.

Price mentioned efficiency and sound labor relations in explaining his vote, but he did not mention any of the above legal or factual considerations, failing to even acknowledge that this factor and the EERR as a whole favor larger units. Instead, Price said this factor favors severance in his view, because under the current structure, the County "can't keep talent in the department." Not only does this badly misinterpret the EERR, but it also has a very questionable prediction at its heart. Specifically, Price assumed that a small unit of public defenders and investigators would have better luck pressing management to accept the sort of proposals favoring retention that SEIU has been pressing with the input of three elected public defenders on the bargaining team. Price's problematic assumption is irrelevant to this factor, but the question of whether the current structure adequately represents public defenders is relevant under the first factor—fullest freedom to exercise rights. As noted in our discussion of that factor, there is no sound reason to believe that a smaller unit automatically results in more effective representation for employees. As we also noted, nothing in the record suggests that public defenders and investigators have been "required to relinquish [their] issues regularly" to others represented in Unit 2 and Unit 3. (*LAUSD, supra*, PERB Decision No. 1267, adopting proposed decision at pp. 55-56.)

D. Duties, Skills, Educational Requirements, and Working Conditions

The EERR's final subordinate factor, which comprises employee duties, skills, educational requirements, and working conditions, matches established precedent in that it focuses on inherent aspects of a position rather than employment terms and conditions that are changeable through collective bargaining. (*Monterey, supra*, PERB Decision No. 2821-M, p. 12.) We consider each aspect of this factor.¹⁵

1. Duties

Public defenders' main duties are to: (1) represent clients in adult criminal and juvenile delinquency and/or dependency matters, as well as in conservatorship, mental health matters, mentally disordered offender matters, and sexually violent predator matters; (2) interview and counsel clients; (3) prepare cases for pre-trial hearings and trial by initiating and directing appropriate investigations, working to engage necessary experts, and researching legal issues; (4) prepare for, brief, and litigate pre-trial motions and hearings; (5) litigate jury trials; (6) perform interlocutory appellate and limited post-conviction work, including motions to modify probation; (7) prepare and litigate writs and habeas petitions; and (8) represent clients at parole revocation hearings.

¹⁵ Because the EERR and precedent afford less weight to conditions that are subject to bargaining, it matters little that Unit 2 and Unit 3 are presently subject to the same MOU. To the extent this fact is relevant, it further undercuts CMEU's position. While CMEU finds it important that public defenders and investigators already work under a common MOU, the same is true for all employees in Unit 2, Unit 3, and four other SEIU-represented units. That circumstance thus does not show a narrow community of interest that is so distinct and unique as to warrant disturbing stable labor relations.

Investigators' main duties are to: (1) locate prospective witnesses; (2) interview clients, relatives, and prospective witnesses; (3) obtain witness statements and recordings; (4) gather physical evidence and records, including from public and private entities; (5) prepare reports, diagrams, charts, and scale drawings; (6) photograph crime scenes and other items of evidence; (7) assist public defenders in arranging appearances of witnesses at trial and other court hearings; (8) serve subpoenas; and (9) testify in court.

These are substantial distinctions. CMEU counters that public defenders and investigators perform symbiotic functions toward common goals, in that they are the main classifications serving indigent criminal defendants. As part of this argument, CMEU asserts that public defenders and investigators share a "constitutionally mandated" status based on their purpose, their ability to sign subpoenas, their coverage under the attorney-client privilege, and their ability to meet with clients confidentially in jail.

CMEU's argument, if accepted, would prove too much. While investigators and public defenders play their respective roles in close coordination and toward a common purpose, the same is true in other departments featuring classifications that collaborate closely with one another. (See, e.g., page 52, fn.13 *ante* [discussing librarians and library associates].) CMEU's mix-and-match severance petition cannot be appropriate merely because two classifications collaborate more closely with one another than they do with other classifications in their units.

At the June 19 special meeting, Bone attempted to make such an argument, pointing out that investigators lack a common interest with surgical technicians. Even

setting aside that Bone ignored closer comparators in Unit 3 such as crime scene technicians and investigative technicians, and further setting aside that Kern County Medical Center became a separate employer from the County more than 10 years ago (*County of Kern & Kern County Hospital Authority* (2019) PERB Decision No. 2659-M, p. 3), Bone's example illustrates the larger problem with CMEU's argument. By the same logic, for instance, veterinarians and veterinary assistants would have the right to sever themselves from Unit 2 and Unit 3, respectively, to form a new unit composed only of veterinary employees.

CMEU's position in this case would thus destabilize public sector labor relations by fragmenting public entities' labor force into far more bargaining units than currently exist. This argument is contrary to the principles explained at pages 23-24, *ante*. Accordingly, while it is relevant that public defenders and investigators have quite distinct duties, and it is also relevant that these duties are interdependent and mutually reinforce one another, neither of these countervailing considerations is determinative. Rather, weighing all relevant record evidence, we do not find that the two classifications' community of interest is so separate and distinct from the employees' established units that collective bargaining is incapable of addressing the needs of a discrete minority within the existing unit.

2. Skills

Public defenders must know and understand: (1) all operative legal principles and practices relevant to criminal law and procedure, as well as significant aspects of constitutional, civil, and administrative law; (2) trial procedures and rules of evidence; and (3) legal research, writing, oral argument, and witness examination techniques.

They must also be able to: (1) clearly, logically, and persuasively advocate both orally and in writing; (2) prepare clients and witnesses for trial; (3) examine and cross examine witnesses; (4) advise clients regarding options to plea or go to trial, as well as regarding pretrial incarceration issues, sentencing issues, and multiple civil, criminal, immigration-related, and practical consequences of all choice in these areas; and (5) effectively and efficiently represent a high volume of clients under intense time-pressure based on multiple overlapping deadlines that are not within their control.

Investigators must know and understand: (1) investigative principles, procedures, and methods in criminal cases, including how to secure and prepare exhibits; (2) certain aspects of arrested suspects' rights and related rules of evidence; and (3) procedures and methods for handling, examining, and testing items of evidence. They must also be able to: (1) observe, recall, and relate details from alleged crime scenes and witness interviews; (2) prepare and present written and oral reports; (3) accurately gather evidence and assist attorneys in analyzing evidence and the overall case; and (4) operate cameras, recording devices, and other equipment. Lastly, they must possess effective interpersonal communication skills and sound judgment in investigative situations.

As was the case with respect to duties, public defenders and investigators primarily have different skills. While their skills are complementary and allow them to work toward a common purpose, that is akin to professional and technical employees in other departments and is not a basis for finding a community of interest that is so separate and distinct from the employees' established units that collective bargaining is incapable of addressing the needs of a discrete minority within the existing unit.

Indeed, the list of other Unit 3 titles includes multiple classifications that show why investigators are logically placed in Unit 3, including: child support officers, crime scene technicians, investigative technicians, law clerks, patient rights advocates, probation program specialists, probation technicians, paralegals, various sheriff's office titles, substance use disorder specialists, and victim/witness services specialists. Moreover, because public defenders are the highly trained professionals who are responsible for protecting their clients' welfare based on professional codes of ethics, their role is akin to that of various titles in Unit 2, including psychiatrists, social workers, and therapists.

3. Educational Requirements

Public defenders must obtain a license to practice law from the California State Bar. In most instances, this requires not only passing the California bar exam and associated application requirements, but also obtaining a bachelor's degree followed by a juris doctor degree from an accredited law school. In contrast, investigators may have only a bachelor's degree, or need not even have that level of education, if they have criminal investigative experience. The only license they must hold is a driver's license. Accordingly, the educational requirements for the two classifications are quite different and strongly undercut CMEU's proposed unit.

4. Working Conditions

Whereas public defenders and investigators are more different than similar in their duties, skills, and educational requirements, working conditions tilts in the opposite direction. However, this unsurprising fact is a reality in public agency departments, where professional and non-professional employees working in the

same locations, under common management, often experience comparable conditions. Such common conditions do not undercut the preference for the largest feasible unit with a community of interest, as it does not show that collective bargaining is incapable of adequately serving public defenders within Unit 2 and investigators within Unit 3. (See, e.g., *Pasadena*, *supra*, PERB Decision No. 2788-M, pp. 13-14 [severance petitioner did not meet burden despite showing that non-sworn police department employees “share a common, unique work environment,” including “a 24/7 operation,” a “common chain of command within a para-military organization,” and “uniquely demanding working conditions” that involves emotional trauma from handling dispatch calls, physical risks of certain law enforcement tasks, and work on nights, weekends, and holidays].)

Moreover, CMEU failed to support significant aspects of its argument regarding working conditions. For instance, Pierce argued to the Commission that public defenders and investigators are unique because they experience “challenging situations dealing with mental health, homelessness, going into high crime areas and gang-related areas,” “can come into contact with hostile people,” and have their lives “essentially put into danger,” while other Unit 2 and Unit 3 employees do not experience “anything like that.” But Pierce failed to go through the bargaining unit classifications and provide evidence supporting his belief. For instance, he provided no comment on Unit 2 and Unit 3 employees in other classifications working with clients experiencing homelessness and mental health issues, or those who perform house visits or otherwise work in the community or other potentially dangerous circumstances. This may include Unit 2 professionals such as behavioral health

nurses and therapists, clinical psychologists, mental health physicians, nurse practitioners, psychiatrists, public health nurses, and social service workers, as well as Unit 3 technical employees such as building and housing inspectors, code compliance officers, correctional staff nurses, crime scene technicians, fire plan inspectors, fire prevention inspectors, mental health technicians, and other health and human services employees.

Pierce also stated that public defenders' hours can be lengthy, especially during a jury trial. While Pierce claimed this distinguishes public defenders from other professionals, he failed to adequately support this point. Attorneys and other professionals (unlike investigators) are exempt from overtime and normally must work until their tasks are complete without extra pay, no matter the number of hours. CMEU attempted neither to quantify public defenders' hours nor to compare such work hours with those of other Unit 2 professionals and prove that public defenders' hours are unique. Moreover, even assuming for the sake of argument that public defenders work far more hours than all other Unit 2 professionals, such a fact would not support a community of interest between public defenders and investigators.

Price claimed that recruitment and retention issues support CMEU's Petition, asserting that the Public Defender's Office "can't keep talent in the department." But this issue in fact undercuts CMEU's community of interest argument because CMEU admitted at the June 19 special meeting that the County only experiences retention challenges for public defenders, not investigators. And the retention issue ties public defenders to other Unit 2 professionals. Indeed, the MOU between SEIU and the County showed a concerted effort to overcome recruitment and retention issues

among public defenders and other Unit 2 titles such as Behavioral Health Nurses, Public Health Nurses, and Social Service Workers.

For the foregoing reasons, the EERR and MMBA do not permit the severance that CMEU seeks.

III. The Commission's Waiver Defense

The Commission asks us to find that SEIU waived any argument against the unit determination. The Commission does not claim this waiver occurred on appeal, instead acknowledging that SEIU's exceptions specifically assert that the ALJ erred in failing to find the Commission's unit determination unreasonably applied the EERR and violated the MMBA. Rather, the Commission points to the proposed decision, where the ALJ claimed that SEIU only addressed the applicable unit criteria in a single lengthy paragraph on pages 34-35 of its post-hearing brief, as part of arguing that the Commission violated the PEDD.¹⁶

PERB favors hearing cases on their merits (*County of San Joaquin* (2021) PERB Decision No. 2761-M, p. 21), and here SEIU did not waive its challenge to the Commission's unit determination. First, even had the ALJ correctly identified the extent to which SEIU addressed the unit determination factors, that lengthy paragraph

¹⁶ The ALJ did not address the unit criteria in the PEDD context, either, instead concluding that the Commission only qualifies as an employer under the MMBA but not under the PEDD. To the contrary, however, any entity that constitutes an MMBA employer is automatically a PEDD employer. (PEDD, § 3522(c); *El Camino Healthcare District, et al.* (2023) PERB Decision No. 2868-M, p. 4, fn. 5.) The ALJ thus erred in finding that the PEDD does not cover the Commission. But as discussed *ante* at page 3, we exercise our discretion not to resolve the PEDD claim.

was sufficient to preserve the issue. In any event, SEIU addressed the unit determination in its opening argument as well as in two earlier segments of its brief.

In its opening statement, SEIU asserted that the Commission applied all the unit factors improperly, provided examples from the transcript of the Commission's June 19 special meeting, and noted that the transcript contains further similar examples. Moreover, the sections of SEIU's post-hearing brief dealing with unit criteria amounted to approximately five pages. In one such section, about 18 pages before the paragraph the ALJ identified as constituting SEIU's sole argument regarding unit criteria, SEIU specifically addressed Price's misapplication of the EERR's subordinate factors, arguing that Price mischaracterized each factor. Among the examples SEIU addressed there was the fact that Paine and Gallo "presented a distorted picture" of the right to strike, which Price improperly accepted. Indeed, SEIU noted that County Counsel was present, but the Commission never asked for a legal opinion. SEIU further noted that when Steele tried to correct Price's misapprehension, he blithely pivoted and said that if public defenders and investigators misapprehended their right to strike, that still warranted severance under the first subordinate factor (full freedom to exercise rights).

In the next paragraph, SEIU's brief raised another example, challenging Price's approach to the second subordinate factor (history of employee relations). Specifically, SEIU noted that Price should not have accepted the "unsubstantiated claim that employees never selected SEIU Local 521." As a third example, SEIU's brief explained how the Commissioners missed key evidence regarding "the ability of the Public Defender's Office employees to participate in Chapter leadership and on the

bargaining team, meaningfully participate in contract negotiations, and have their concerns heard.”

Furthermore, in an earlier section of the post-hearing brief, SEIU noted an even broader array of unit determination facts that weigh against severance, including: (1) public defenders and investigators have very different duties, hours of work, skills, education, and training; (2) Pierce had no personal knowledge when he claimed that no other Unit 2 or Unit 3 employees deal with mental health issues, homelessness, and working in high-crime areas; (3) Gallo’s evidence about other counties failed to show that there has ever been even a single employer, anywhere, that has grouped public defenders and investigators into one bargaining unit; (4) Gallo, Paine, and the Commissioners were wrong in their assumptions about the right to strike; (5) it misunderstands labor law to expect there to be evidence that public defenders and investigators at some point voted in favor of SEIU representation on a classification-by-classification basis; and (6) employees in the Public Defender’s Office have successfully elected three members to high level union offices, and those union officials have strongly advocated for their interests through the existing unit structure.

Accordingly, we cannot find that SEIU waived its challenge to the Commission’s unit determination. While testimony at the formal hearing focused on other allegations in the complaint, that was because the record already contained not only the transcript of the Commission’s special meeting but also all the documents submitted to the Commission during that meeting. This record already overwhelmingly proved that

CMEU's proposed severance violates the MMBA and EERR, which explains why the formal hearing focused on other issues.

IV. Remedy

The Legislature has vested PERB with broad authority to decide what remedies are necessary to effectuate the MMBA and other acts we enforce. (MMBA, § 3509(b); *Mt. San Antonio Comm. College Dist. v. Public Employment Relations Bd.* (1989) 210 Cal.App.3d 178, 189.) When a charging party successfully challenges an MMBA employer's representation decision, we must direct the employer to cease applying its unlawful decision and to instead act consistently with our decision. (*Monterey, supra*, PERB Decision No. 2821-M, p. 22 [directing county to grant unit modification petition and cease and desist from unreasonably applying local rules]; *City of Long Beach* (2021) PERB Decision No. 2771-M, p. 20 [directing city to process decertification petition in a manner consistent with PERB's decision]; *Salinas Valley Memorial Hospital District* (2020) PERB Decision No. 2689-M, p. 39 [directing hospital district to grant petition for recognition and cease and desist from unreasonably applying local rules].)

Here, CMEU's Petition sought an outcome that is inconsistent with the EERR, the MMBA, and precedent. Accordingly, beyond the cease-and-desist order that the ALJ ordered (which no party challenged), we direct the County to dismiss the Petition and the Commission to cease and desist from finding CMEU's proposed new unit to be appropriate.¹⁷

¹⁷ After the County dismisses the Petition, SMCS shall close its pending representation proceedings in this matter without holding an election.

ORDER

Based upon the foregoing and the entire record in this case, the Public Employment Relations Board (PERB) finds that in determining that Constitutionally Mandated Employees' Union Local 148 (CMEU) sought an appropriate unit in its severance petition (Petition), and in determining to schedule a severance election based on the Petition, the County of Kern and Kern County Civil Service Commission violated the County's Employer-Employee Relations Resolution (EERR), PERB Regulation 32603(a), (b) and (g), and sections 3509(b) and 3506.5(a)-(b) of the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq.

Pursuant to MMBA section 3509(b), it is hereby ordered that:

- A. The Kern County Civil Service Commission, its governing body, and its representatives shall cease and desist from:
1. Interpreting the EERR as warranting a new bargaining unit consisting of Deputy Public Defenders and Public Defender Investigators.
 2. Interfering with the employee rights that the MMBA protects.
 3. Denying Service Employees International Union Local 521 (SEIU) rights guaranteed to it by the MMBA.
- B. The County of Kern, its governing body, and its representatives shall:
1. Within 10 workdays after this decision is no longer subject to appeal, dismiss CMEU's Petition seeking to sever Deputy Public Defenders from the County's Professional Unit, sever Public Defender Investigators from the County's Technical Services Unit, form a new unit comprising the severed classifications, and become the exclusive representative of the proposed new unit.

2. Within 10 workdays after this decision is no longer subject to appeal, post at all work locations where notices to employees in Unit 2 and Unit 3 are posted, copies of the Notice attached hereto as an Appendix. An authorized agent of the County must sign the Notice, indicating that the County will comply with the terms of this Order. The County shall maintain the posting for a period of 30 consecutive workdays. The County shall take reasonable steps to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material. In addition to physically posting this Notice, the County shall communicate it by electronic message, intranet, internet site, and other electronic means it uses to communicate with employees in Unit 2 and Unit 3.

3. Notify OGC of the actions the County has taken to follow this Order by providing written reports as directed by OGC and serving such reports on SEIU, the Commission, and CMEU.

Chair Banks and Member Paulson joined in this Decision.

**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-1718-M, *Service Employees International Union Local 521 v. County of Kern and Kern County Civil Service Commission*, in which all parties had the right to participate, the Public Employment Relations Board (PERB) found that in determining that Constitutionally Mandated Employees' Union Local 148 (CMEU) sought an appropriate unit in its severance petition (Petition), and in determining to schedule a severance election based on the Petition, the County of Kern and Kern County Civil Service Commission violated the County's Employer-Employee Relations Resolution, PERB Regulations, and the Meyers-Milias-Brown Act, Government Code section 3500 et seq.

As a result of this finding, PERB has directed us, and we will, dismiss CMEU's Petition.

Dated: _____ County of Kern

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.