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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

COUNTY OF SANTA CLARA, Petitioner, v. PUBLIC EMPLOYMENT RELATIONS BOARD, Respondent, SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 521 Real Party in Interest.	H052154 (Public Employment Relations Board Decision No. 2900-M (Service Employees International Union Local 521 v. County of Santa Clara, PERB Case No. SF-CE-1859-M))

In this writ proceeding, we consider whether the County of Santa Clara (County) was required to bargain in good faith with the Service Employees International Union Local 521 (SEIU) before the County's board of supervisors approved revised medical staff bylaws at the County's hospitals.

Business and Professions Code section 2282.5, subdivision (a)(6), provides that a medical staff's right of self-governance includes developing and adopting medical staff bylaws, subject to the approval of the hospital's governing board—here, the County's board of supervisors—which approval "shall not be unreasonably withheld." Consistent with that authority, the medical staff at the County's hospitals adopted revisions to its

bylaws in November 2020, and the County's board of supervisors approved them the following month. Among other things, the revised bylaws changed certain requirements for SEIU-represented physician assistants, newly requiring them to maintain both a license and a certificate or other credential to maintain practice privileges at the hospitals.

However, the County did not bargain with SEIU regarding the board's decision to approve the revised bylaws. As a result, SEIU filed an unfair practice charge with the Public Employment Relations Board (PERB), arguing that the County had violated Government Code section 3505—part of the Meyers-Milias-Brown Act (MMBA)—which requires the governing body of a public agency to "meet and confer in good faith regarding wages, hours, and other terms and conditions of employment" with representatives of recognized employee organizations, before "arriving at a determination of policy or course of action."

In a decision issued in April 2024, PERB ruled in favor of SEIU. Analogizing to its own precedent, PERB concluded that practice privileges are sufficiently similar to job qualifications, which fall within the "scope of representation," and that—notwithstanding the board of supervisors' "limited role" in approving the revised bylaws under Business and Professions Code section 2282.5—the board nevertheless retained a "certain discretion" in not unreasonably withholding its approval, so the County was required to negotiate with SEIU "to the extent of that discretion" prior to approving the bylaws.

Alternatively, PERB concluded, applying the test articulated by the California Supreme Court in *International Assn. of Fire Fighters, Local 188, AFL-CIO v. Public Employment Relations Bd.* (2011) 51 Cal.4th 259 (*International Fire Fighters*) produced the same result, because the revised bylaws had a significant and adverse effect on the physician assistants, and the County did not have a need for unencumbered decision-making that outweighed the benefit to employer-employee relations of bargaining.

The County petitioned this Court for a writ of extraordinary relief pursuant to Government Code section 3509.5 and California Rules of Court, rule 8.728. We issued

an initial writ of review, and we now hold that PERB's decision was clearly erroneous because it did not properly apply the appropriate test—or analogize to precedent which had properly applied that test—for determining whether a managerial decision falls within the scope of representation, as articulated by the California Supreme Court in *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 638 (*Claremont*).

Accordingly, we will annul the decision and remand for further proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. County hospital system and medical staff

Hospitals in California "have a dual structure, consisting of an administrative governing body, which oversees the operations of the hospital, and a medical staff, which provides medical services and is generally responsible for ensuring that its members provide adequate medical care to patients at the hospital." (*El-Attar v. Hollywood Presbyterian Medical Center* (2013) 56 Cal.4th 976, 983.)

The County owns and operates the Santa Clara Valley Health System, a healthcare organization consisting of three general acute care hospitals: Santa Clara Valley Medical Center (SCVMC), O'Connor Hospital, and Saint Louise Regional Hospital (hospitals).[1] The County's board of supervisors functions as the governing board for the hospitals, including for purposes of Business and Professions Code section 2282.5, subdivision (a)(6).

[1] A "general acute care hospital" is "a health facility having a duly constituted governing body with overall administrative and professional responsibility and an organized medical staff that provides 24-hour inpatient care, including the following basic services: medical, nursing, surgical, anesthesia, laboratory, radiology, pharmacy, and dietary services." (Health & Saf. Code, § 1250, subd. (a).)

After the County acquired O'Connor and Saint Louise Regional hospitals in March 2019, it elected to operate the three hospitals together under a single consolidated license pursuant to Health and Safety Code section 1250.8.

As licensed medical facilities, the hospitals are required to have an "organized medical staff responsible to the [hospital's] governing body for the adequacy and quality of the care rendered to patients." (Cal. Code Regs., tit. 22, § 70703, subd. (a).) The medical staff is a separate legal entity from the hospitals themselves, and "is required to be self-governing and independently responsible from the hospital for its own duties and for policing its member physicians." (*Hongsathavij v. Queen of Angels etc. Medical Center* (1998) 62 Cal.App.4th 1123, 1130, fn. 2 (*Hongsathavij*); see also Bus. & Prof. Code § 2282, subd. (c) ["medical staff shall be self-governing with respect to the professional work performed in the hospital"].)

All physicians practicing at a hospital are required to be members of the medical staff. (Health & Saf. Code, § 1275, subd. (f); Cal. Code Regs., tit. 22, § 70703, subd. (b).) By law, membership on a hospital medical staff is restricted to physicians, surgeons, "and other licensed practitioners competent in their respective fields and worthy in professional ethics." (Bus. & Prof. Code § 2282, subd. (a); Cal. Code Regs. tit. 22, § 70703 ["medical staff shall be composed of physicians and, where dental or podiatric services are provided, dentists or podiatrists"].) Physician assistants and other non-physician medical professionals, such as certified nurse anesthetists and nurse practitioners, are not members of a medical staff although, as discussed below, they are nevertheless subject to the medical staff bylaws.[2]

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[2] Chapter 7.7 of Division 2 of the Business and Professions Code is devoted to "physician assistants." (See, e.g., Bus. & Prof. Code § 3500 ["In its concern with the growing shortage and geographic maldistribution of health care services in California, the Legislature intends to establish in this chapter a framework for another category of health manpower—the physician assistant."].) The term "physician assistant" is defined in the Business and Professions Code as: "a person who meets the requirements of this chapter (continued)

As consolidated facilities, the hospitals must also maintain a consolidated medical staff. (Health & Saf. Code, § 1250.8, subdivision (b)(3).) Consistent with that requirement, the County's board of supervisors established a single consolidated medical staff at the time it acquired O'Connor and Saint Louise Regional (medical staff) in the spring of 2019 (medical staff).

B. Medical staff bylaws and proposed revisions

State law also requires a hospital's medical staff to adopt a single set of bylaws which, among other things, must "provide formal procedures for the evaluation of staff applications and credentials, appointments, reappointments, assignment of clinical privileges, appeals mechanisms and such other subjects or conditions which the medical staff and governing body deem appropriate." (Health & Saf. Code, § 1250.8, subd. (b)(3); Cal. Code Regs., tit. 22, § 70703, subd. (b); see also, Bus. & Prof. Code § 2282.5, subd. (a) [medical staff's right of self-governance includes establishing criteria in bylaws for medical staff membership and privileges].)

When the County acquired O'Connor and Saint Louise hospitals in 2019, the board of supervisors established that the existing bylaws at SVCMC in 2017 (2017 bylaws) would temporarily apply to all three hospitals until the medical staff could

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and is licensed by the [Physician Assistant Board]." (Bus. & Prof. Code § 3501, subd. (d).)

Under the terms of the 2017 bylaws and the revised bylaws, "physician assistants" are a sub-category of "allied health professionals," the latter of which are defined as individuals, "other than a licensed physician, dentist, clinical psychologist or podiatrist, who [exercise] independent judgment within the areas of [their] professional competence and the limits established by the Governing Body, the Medical Staff, and the applicable State Practice Act, who [are] qualified to render direct or indirect medical, dental, or podiatric care under the supervision or direction of a Medical Staff member possessing privileges to provide such care in the hospital, and who may be eligible to exercise privileges and prerogatives in conformity with the policies adopted by the Medical Staff and Governing Body, these Bylaws and the Rules."

adopt—and the board could subsequently approve—revised bylaws, in part to ensure compliance with Health and Safety Code section 1250.8, subdivision (b)(3).

The medical staff then began developing proposed revisions to the 2017 bylaws to reflect the consolidated medical staff structure. The proposed revisions updated language to reflect that structure, as well as various regulatory changes, best practices, and process modifications and improvements.

As relevant to this writ proceeding, the proposed revisions also changed the requirements for physician assistants to receive or maintain practice privileges at the hospitals—that is, the right to practice at the hospitals. The 2017 bylaws had provided that physician assistants could be granted practice privileges "if they hold a license, certificate or other credentials in a category of [allied health professionals] that the Governing Body … has identified as eligible, and only if the [allied health professionals] are professionally competent and continuously meet the qualifications, standards and requirements set forth in the Medical Staff Bylaws and Rules."

The proposed revisions would change these requirements by granting practice privileges only if physician assistants hold "a license and certificate, or other legal credential in a category of [allied health professionals] which the Governing Body has identified as eligible to apply for Practice Privileges as stated in these Bylaws. …"

In other words, the proposed revisions would require physician assistants to hold both a license and a certificate or other credential, whereas the 2017 bylaws required only a license or a certificate or other credential.

C. Approvals and communications with SEIU

The medical staff's executive committee preliminarily approved the proposed revisions to the bylaws on August 27, 2020. A few days later, the County's labor relations director provided SEIU representatives with a copy of the proposed revisions and informed them that the bylaws would be discussed with the medical staff at the three

hospitals in the coming month before being submitted to the full medical staff members for a vote.[3]

SEIU responded the next day with a demand to meet and confer. The County agreed to meet with SEIU "to explain how the medical staff side of the hospital works," and "what the medical staff role and function is in the hospital." The County also stated that "[m]edical staff are self-governing and are solely directed to patient care." The parties subsequently met on September 21, 2020. The parties also exchanged additional information, after which SEIU requested additional meetings with the County, although none occurred.[4]

The medical staff voted to approve the proposed revised bylaws on November 15, 2020. The proposed revised bylaws were then presented to the County's board of supervisors, which officially approved them on December 15, 2020 (revised bylaws).

D. Unfair practice charge

SEIU brought an unfair practice charge against the County on February 25, 2021, Case No. SF-CE-1859-M (unfair practice charge), pursuant to Government Code section 3505 and PERB regulation 32603, subdivision (c).[5] (Cal. Code Regs., tit. 8, § 32603, subd. (c).) SEIU alleged that the County had failed to give it an opportunity to bargain

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[3] SEIU is the exclusive representative of a bargaining unit that includes the physician assistants at the hospitals, pursuant to PERB regulation 32016(b), as recognized by a 2020 memorandum of agreement between SEIU and the County. PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. (*Regents of the University of California v. Public Employment Relations Bd.* (2020) 51 Cal.App.5th 159, 168.)

[4] The County's labor relations director later testified at the hearing before the administrative law judge, as part of SEIU's subsequent unfair practice charge, that the September 21, 2020, meeting was not a "meet and confer" and that there was no obligation for the County to meet and confer over anything having to do with the bylaws.

[5] SEIU brought the unfair practice charge against the medical staff as well, "in an abundance of caution" because the County had asserted that the medical staff is a separate entity: "Therefore, if the Medical Staff Office is found to be a separate entity, then it too has a duty to bargain in good faith with the Union."

over the decision to revise the bylaws, or over the effects of implementing them. Further, SEIU alleged that the changes to the bylaws concerned matters "within the scope of representation—including discipline and new certification requirements—and are required to be negotiated."[6]

Accordingly, SEIU argued, the County had violated Government Code sections 3502, 3503, and 3505 "through its failure to provide an opportunity to bargain over mandatory subjects of bargaining."

SEIU asked PERB to issue a complaint against the County alleging that it had committed an unfair practice by failing to provide SEIU an opportunity to meet and confer over the decision to approve the revised bylaws and by "unilaterally implementing the changes in violation of Government Code sections 3502, 3503, 3504, 3504.5, 3505, and 3506.5 and PERB Regulation 32603(a), (b), (c) and (g)."

E. PERB complaint and ALJ process

In April 2021, the County submitted a position statement in response to SEIU's unfair practice charge, in which it chiefly argued that the County had no duty under the MMBA to bargain over the medical staff's revisions to the bylaws.

Notwithstanding those arguments, PERB issued a formal complaint in January 2022 through its office of general counsel (complaint). The complaint alleged that, by approving the revised bylaws without having negotiated with SEIU regarding the decision to implement the change or the effects of the change, the County "failed and refused to meet and confer in good faith in violation of Government Code sections 3505

[6] As discussed further below, the "scope of representation" is defined in the MMBA as including "all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." (Gov. Code, § 3504.)

and 3506.5(c), and committed an unfair practice under Government Code section 3509(b) and PERB Regulation 32603(c)."

After the County answered the complaint and denied the allegations therein, the matter proceeded to a four-day hearing before an administrative law judge (ALJ) in July 2022. Following the hearing, the parties submitted additional briefing through January 2023, and the ALJ issued a proposed decision on August 31, 2023 (proposed decision).

The proposed decision first examined the legislative history behind Business and Professions Code section 2282.5 and concluded that a governing board's exercise of final authority "must only occur if and when the board reasonably and in good faith believes that the medical staff failed to fulfill its duty to protect the quality of patient care." It then concluded that "the narrow scope of discretion" afforded to the County board of supervisors under that statute "cannot be harmonized with the expansive MMBA bargaining obligations of the County-employer and SEIU-exclusive representative." Stated differently, the "broad authority of medical staff to regulate their affairs and set standards for hospital patient care quality under [that statute] cannot be accommodated with SEIU bargaining rights over terms and conditions of employment."

The proposed decision thus concluded that the board of supervisors' decision to approve the revised bylaws was not within the scope of representation and was non-negotiable, so SEIU had failed to meet its burden of proof that the County violated the MMBA.

However, the proposed decision also concluded that even where a decision is not within the scope of representation and not subject to bargaining, "the employer must still provide the exclusive representative with notice and the opportunity to meet and confer over any reasonably foreseeable effects on matters within the scope of representation that may result from implementation of that decision." Further, the County was on sufficient notice that SEIU believed the revised bylaws would affect matters within the scope of representation, and that it had demanded bargaining over the effects of the proposed

revisions. Therefore, the County's approval of the revised bylaws without negotiating with SEIU over the effects of that approval constituted a violation of the MMBA duty to bargain in good faith.

F. PERB Decision

SEIU submitted a statement of exception to the proposed decision, pursuant to PERB regulation 32300, and the County submitted a response and cross-exceptions. After the parties' filings were completed, the matter was placed on PERB's docket in December 2023.

PERB issued its decision on April 23, 2024 (PERB decision). The PERB decision addressed multiple issues, three of which we address herein, as relevant to this writ proceeding: (1) whether the County had a duty under the MMBA to bargain with SEIU regarding its decision to approve the revised bylaws; (2) whether the County had a duty to meet with SEIU in good faith and seek to clarify its decisional bargaining obligation; and (3) the appropriate remedy.

1. Decision bargaining analysis

The PERB decision first set forth the elements required for a union representing a bargaining unit to establish a prima facie case that an employer made an unlawful unilateral change: (1) the employer changed or deviated from the status quo; (2) the change or deviation concerned a matter within the scope of representation; (3) the change or deviation had a generalized effect or continuing impact on represented employees' terms or conditions of employment; and (4) the employer reached its decision without first providing adequate advance notice of the proposed change to the union and bargaining in good faith over the decision, at the union's request, until the parties reached an agreement or a lawful impasse.

In this instance, PERB determined that only the first two elements were at issue, and that both were satisfied.[7] PERB first analyzed whether the board's decision to approve the bylaw revisions, thereby changing the practice privilege requirements for physician assistants, fell within the scope of representation.[8]

The PERB decision purported to summarize the applicable standard for determining whether a decision falls within the scope of representation, as articulated by the California Supreme Court in *International Fire Fighters*.[9] As PERB explained it, the first step is to determine which of three categories a decision fits within: (1) decisions that have only an indirect and attenuated impact on the employment relationship, such as advertising, product design, or financing; (2) decisions that directly define the employment relationship, such as wages, workplace rules, or the order of succession of layoffs and recalls; or (3) decisions that directly affect employment, such as eliminating jobs. (*International Fire Fighters, supra*, 51 Cal.4th at pp. 272–273.)

PERB explained that decisions in the first category are not subject to mandatory bargaining, while decisions in the second category always are. Decisions in the third category, meanwhile, may or may not be subject to bargaining. For decisions that fall into the third category, PERB first determines whether they have a "significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees" that "arises from the implementation of a fundamental managerial or policy decision," citing *Claremont, supra,* 39 Cal.4th at p. 638. If there is a significant and adverse effect, the remaining question is whether "the employer's need for unencumbered

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[7] We summarize only PERB's determinations regarding the scope of representation, as the County does not challenge PERB's findings regarding a change from the status quo in its petition for extraordinary writ.

[8] The PERB decision stated that "[t]here is no reason to analyze whether any other part of the bylaw revisions fell within the scope of representation, as the complaint does not challenge any of the other revisions."

[9] PERB and the other parties refer to *International Fire Fighters* as "*Richmond Firefighters*."

decision-making in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question."

Despite articulating this standard, PERB declined to apply it in the first instance, stating that, "[f]or most types of decisions, we need not 'reinvent the wheel' by applying the [*International Fire Fighters*] framework from scratch, because precedent establishes subject-specific standards that show how the framework applies to a given topic."

PERB instead analogized to its own precedent for decisions regarding job qualifications. Although it acknowledged that qualifications for practice privileges are not identical to job qualifications, the two topics were "closely related."

PERB relied on two case-specific facts to support the analogy. First, it cited a recent arbitration between the County and a physician assistant, Susan Irizarry. In that case, when the medical staff had first granted Irizarry surgery practice privileges in 2015, she had held both a license from the Physician Assistant Board and a certificate from the National Commission on Certification of Physician Assistants (NCCPA). At the time, the renewal criteria for surgery practice privileges required a physician assistant either to maintain NCCPA certification or to complete 50 continuing education credits in a two-year renewal cycle. Although Irizarry maintained her license and completed at least 50 continuing education credits in the 2017–2019 renewal cycle, she was unable to maintain her NCCPA certification at that time. As a result, the County placed her on unpaid leave. SEIU then filed a grievance on Irizarry's behalf in 2019. Although the County had contended that the physician assistant job description and the medical staff bylaws required Irizarry to maintain her NCCPA certification, the arbitrator rejected that argument and ruled in Irizarry's favor.

Second, PERB cited the County's efforts—after losing the Irizarry grievance—to change the job description to require physician assistants to maintain NCCPA certification. At the time PERB issued the complaint in this case, the County and SEIU

were bargaining over the County's proposed changes to the job description for physician assistants.

According to PERB, that factual background demonstrated that the practice privileges at issue in this case were sufficiently similar to job specifications to rely on existing PERB precedent regarding the latter for purposes of determining whether the County's decision to approve the revised bylaws fell within the scope of representation.

It therefore applied a standard it had used in a 2020 decision, which states that job qualifications fall within the scope of representation unless the employer does no more than comply with an externally imposed change. That standard provides that " '[W]hen external law establishes immutable provisions in an area otherwise within the scope of representation, matters are negotiable only to the extent of the employer's discretion, that is, to the extent that the external law does not 'set an inflexible standard or [e]nsure immutable provisions.' "

PERB rejected the County's argument that "external law leaves the County no relevant discretion." It concluded that the fact the board of supervisors had a limited role in changing the bylaws "does not equate to the existence of an immutable, externally imposed mandate." In PERB's view, the board retained certain discretion—which was that it could not unreasonably withhold approval of the revised bylaws—and the County "had to negotiate to the extent of that discretion," citing Business and Professions Code section 2282.5, subdivision (a)(6).

PERB concluded, "while the County might lawfully tell SEIU in negotiations that its [board] had little choice absent clear problems with the proposed revisions, that is not what the County did. Indeed, at a minimum, the County had a duty to continue meeting with SEIU to clarify the extent of any decision bargaining obligation and to bargain effects. Instead, it flatly refused to bargain."[10]

[10] The County does not challenge PERB's determination that it had a duty to bargain with SEIU regarding the negotiable effects of approving the revised bylaws.

After reaching this conclusion by applying its existing precedent, PERB nevertheless proceeded to apply the *International Fire Fighters* test anew, "as an alternative conclusion." Under that framework, PERB first assumed "for the sake of argument that the County's changes fall within the third [*International Fire Fighters* category]"—decisions that directly affect employment, such as eliminating jobs. PERB then concluded that the board's decision to approve the revised bylaws had a significant and adverse impact because the changes made it more difficult for employees to earn and maintain practice privileges, including potentially causing them to lose their employment altogether. Additionally, it concluded, the County did not have a need for unencumbered decision-making that outweighed the benefit to employer-employee relations of bargaining. PERB cited the arbitrator in the Irizarry matter, who had noted that "the relaxed pace of proposed changes in this area belies any argument that patient safety would be at risk if the County had to slow down enough to bargain before its [board] voted on bylaws that changed practice privilege standards."

In sum, PERB concluded, the County had a duty to bargain with SEIU to the extent of its discretion in deciding whether to approve the medical staff's revised bylaws.

2. Duty to meet and clarify

The PERB decision also determined that, even if the County did not have a duty to bargain over its decision to approve the revised bylaws, it "at least had a duty to meet with SEIU in good faith and seek to clarify." PERB ultimately concluded that SEIU had established "that the County violated its duty to bargain in good faith, and its duty to clarify its decision bargaining obligation, before its [board] decided whether to approve the bylaw revisions."

3. Remedy

Rather than invalidating the decision to approve the revised bylaws—which it labeled the standard remedy for violating the duty to bargain—PERB required the County to hold SEIU-represented physician assistants harmless until good faith negotiations are

complete. It explained that the remedy was warranted, given the "unusual circumstances" of the case, including that the SEIU-represented physician assistants were just a "small fraction" of those covered by the revised bylaws, and the complaint targeted only one paragraph of the bylaws.

G. Petition for extraordinary writ of relief

The County filed a petition for extraordinary writ of relief in this court on May 23, 2024, pursuant to Government Code section 3509.5, and Rules of Court, rule 8.728.[11]

Following the completion of briefing—including respondents briefs from both PERB and real party in interest SEIU—we granted a writ of review on November 25, 2025, and granted the application for leave to file an amicus curiae brief by the California State Association of Counties (CSAC) in support of the County.

II. DISCUSSION

The County presents three main arguments in its petition: (1) the board of supervisors' decision to approve the revised bylaws was outside the scope of representation because external law—specified sections of the Business and Professions Code and Health and Safety Code that are not part of the MMBA—left the County no relevant discretion; (2) the board's decision was also outside the scope of representation under the *International Fire Fighters* test, which PERB improperly applied; and (3) PERB's imposition of an ongoing duty to seek clarification with SEIU was clearly erroneous.

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[11] "The MMBA provides for judicial review of PERB decisions in subdivision (a) of Government Code section 3509.5, which states: 'Any charging party, respondent, or intervenor aggrieved by a final decision or order of the board in an unfair practice case, *except a decision of the board not to issue a complaint in such a case,* ... may petition for a writ of extraordinary relief from that decision or order.' (Italics added.) Subdivision (b) of that section states that the 'petition for a writ of extraordinary relief shall be filed in the district court of appeal having jurisdiction over the county where the events giving rise to the decision or order occurred.' " (*International Fire Fighters, supra*, 51 Cal.4th at p. 267, italics in original.)

Both PERB and real party in interest SEIU argue that (1) neither the Business and Professions Code nor the Health and Safety Code absolved the County of its discretion and therefore its obligation to bargain before approving the revised bylaws that changed the terms and conditions of employment for physician assistants; (2) PERB did not clearly err in applying the *International Fire Fighters* test; and (3) PERB did not clearly err by finding that the County had a duty to meet with SEIU in good faith to clarify if the decision whether to approve the revised bylaws was subject to bargaining.

A. Standard of review

The Legislature has empowered PERB with the authority "to adjudicate unfair labor practice claims under the MMBA and six other public employment relations statutes." (*Boling v. Public Employment Relations Bd.* (2018) 5 Cal.5th 898, 911 (*Boling*), citing *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1077 (*Coachella Valley*).) Reviewing courts " 'generally defer to PERB's construction of labor law provisions within its jurisdiction.' " (*Boling, supra*, at p. 911, citations omitted.) PERB is " 'one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect.' " (*Id.* at pp. 911–912, citations omitted.)

We follow PERB's interpretation of such law, unless it is clearly erroneous. (*Boling, supra*, 5 Cal.5th at p. 912, citations omitted; see also, *Cumero v. Public Employment Relations Bd.* (1989) 49 Cal.3d 575, 586 (*Cumero*) [interpretation of a public employee labor relations statute " 'falls squarely within PERB's legislatively designated field of expertise' "].)

Notwithstanding that deference, though, courts retain the final authority to " ' "state the true meaning of the statute." ' " (*Boling, supra*, 5 Cal.5th at p. 912, quoting *Cumero, supra*, 49 Cal.3d at p. 587.) "A hybrid approach to review in this narrow area

maintains the court's ultimate interpretive authority while acknowledging the agency's administrative expertise." (*Boling, supra*, at p. 912.)

By contrast, PERB's factual findings are established by statute as conclusive, if supported by substantial evidence. (*Boling, supra*, 5 Cal.5th at p. 912; Gov. Code, § 3509.5, subd. (b) ["The findings of the board with respect to questions of fact, including ultimate facts, if supported by substantial evidence on the record considered as a whole, shall be conclusive."].) "As we have long recognized, the Legislature is free to specify that certain administrative determinations are subject to substantial evidence review instead of independent review." (*Boling, supra*, at p. 912, citing *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 824, fn. 17.)

PERB decisions are "persuasive authority on legal matters that are within its expertise." (*City of Palo Alto v. Public Employee Relations Bd.* (2016) 5 Cal.App.5th 1271, 1288 (*City of Palo Alto*), citing *San Lorenzo Education Assn. v. Wilson* (1982) 32 Cal.3d 841, 850.) Still, "one of the issues we consider on review is whether PERB followed its own precedents in reaching its decision." (*City of Palo Alto, supra*, at p. 1307, citing *California Teachers Assn. v. Public Employment Relations Bd.* (2009) 169 Cal.App.4th at p. 1087.)

B. Applicable law

We begin with a brief overview of the applicable law relevant to this writ proceeding, including (1) the MMBA, (2) relevant law external to the MMBA, and (3) the applicable test for determining whether a decision falls within the scope of representation, as set forth by the California Supreme Court.

1. MMBA

The MMBA was initially enacted in 1968, "authorizing collective bargaining for employees of most local governments." (*County of Los Angeles v. Los Angeles County Employee Relations Com.* (2013) 56 Cal.4th 905, 915 (*County of Los Angeles*); Gov. Code, § 3500 et seq., added by Stats.1968, ch. 1390, pp. 2725–2729.) Its purpose "is to

promote full communication between public employers and their employees, as well as to improve personnel management and employer-employee relations in public agencies." (*County of Sonoma v. Public Employment Relations Bd.* (2022) 80 Cal.App.5th 167, 178 (*County of Sonoma*).)

" 'The centerpiece of the MMBA is [Government Code] section 3505, which requires the governing body of a local public agency, or its designated representative, to 'meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of ... recognized employee organizations.' " (*Boling, supra,* 5 Cal.5th at p. 913.)[12] The MMBA "represented an evolution from the earlier George Brown Act, which 'provided only that management representatives should listen to and discuss the demands of the unions.' In its present form, the MMBA mandates that the governing body undertake negotiations with employee representatives not merely to listen to their grievances, but also 'with the objective of reaching "agreement on matters within the scope of representation prior to the adoption by the public agency of its final

[12] Government Code section 3505 provides in full: "The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.

'Meet and confer in good faith' means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent."

budget for the ensuing year." ' " (*Id*., quoting *Glendale City Employees' Assn, Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 336.)

Government Code section 3504 defines the scope of representation as including "all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order."

"The obligation to bargain 'in good faith' means that the parties must genuinely seek to reach agreement, but the MMBA does not require that an agreement actually result in every instance, and it recognizes that a public employer has the ultimate power to reject employee proposals on any particular issue." (*International Fire Fighters, supra*, 51 Cal.4th at p. 271.)

"The MMBA is administered by PERB, a quasi-judicial administrative agency modeled after the [National Labor Relations Board]." (*County of Los Angeles, supra*, 56 Cal.4th at p. 917.) Although PERB was initially created in 1975 to enforce a different employment relations statute, its jurisdiction "has expanded as the Legislature passed new laws addressing specific realms of public employment." (*Ibid*., citing *Coachella Valley, supra,* 35 Cal.4th at p. 1085.) The Legislature brought the MMBA within PERB's authority in 2000. (*County of Los Angeles, supra,* at p. 917, citing Stats.2000, ch. 901, § 8, p. 6607 [enacting Gov. Code, § 3509].)

2. External law

As set forth above, PERB applies a particular standard for determining when a decision by a governing body falls within the scope of representation: "[W]hen external law establishes immutable provisions in an area otherwise within the scope of representation, matters are negotiable only to the extent of the employer's discretion, that is, to the extent that the external law does not 'set an inflexible standard or [e]nsure

immutable provisions.' " (*County of Sacramento* (2020) PERB Dec. No. 2745-M [45 PERC ¶ 39, p. 18] (*County of Sacramento*).)

The external law at issue here consists of specific statutes and regulations in the Business and Professions Code and Health and Safety Code, which address, among other things, requirements for medical staffs at acute general care hospitals and the respective duties of a medical staff and its governing body. (See, e.g., Health & Saf. Code, § 1250.8 [licensing requirements for general acute care hospitals, including medical staff and its bylaws]; Bus. & Prof. Code, § 2282.5, subd. (a)(6) [part of Medical Practice Act, establishing medical staff's right of self-governance, including "[i]nitiating, developing, and adopting medical staff bylaws, rules, and regulations, and amendments thereto, subject to the approval of the hospital governing board, which approval shall not be unreasonably withheld"]; Cal. Code Regs., tit. 22, § 70005(a) [defining "general acute care hospital" as "having a duly constituted governing body with overall administrative and professional responsibility and an organized medical staff which provides 24-hour inpatient care, including the following basic services: medical, nursing, surgical, anesthesia, laboratory, radiology, pharmacy, and dietary services"].)

3. Claremont *and* International Fire Fighters *tests*

As the California Supreme Court has explained, the definition of "scope of representation" in Government Code section 3504 uses " 'two vague, seemingly overlapping phrases.' " (*International Fire Fighters, supra,* 51 Cal.4th at p. 272, citing *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 615 (*Vallejo*), *Claremont, supra,* 39 Cal.4th at p. 631.) "The first phrase—'wages, hours, and other terms and conditions of employment'—if broadly read 'could encompass practically any conceivable bargaining proposal,' while the second phrase—'merits, necessity, or organization of any service'—could, if expansively interpreted, 'swallow the whole provision for collective negotiation and relegate determination of all labor issues to the

city's discretion.' " (*International Fire Fighters, supra*, at p. 272, citing *Vallejo, supra*, at p. 615.)

To resolve the ambiguity, the California Supreme Court articulated a three-part test, based on existing precedent, for determining whether a decision falls within the scope of representation: "First, we ask whether the management action has 'a significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees.' [Citation.] If not, there is no duty to meet and confer. [Citations.] Second, we ask whether the significant and adverse effect arises from the implementation of a fundamental managerial or policy decision. If not, then, as in *Building Material* [*& Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 659–664], the meet-and-confer requirement applies. [Citation.] Third, if both factors are present—if an action taken to implement a fundamental managerial or policy decision has a significant and adverse effect on the wages, hours, or working conditions of the employees—we apply a balancing test. The action 'is within the scope of representation only if the employer's need for unencumbered decisionmaking in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question.' [Citation.] In balancing the interests to determine whether parties must meet and confer over a certain matter [Gov. Code, § 3505], a court may also consider whether the 'transactional cost of the bargaining process outweighs its value.' " (*Claremont, supra*, 39 Cal.4th at p. 638.)

Five years after *Claremont*, the California Supreme Court decided *International Fire Fighters*, in which it considered whether the City of Richmond's decision to lay off 18 firefighters for fiscal reasons was subject to collective bargaining. (*International Fire Fighters, supra,* 51 Cal.4th at p. 259.) In doing so, the Court noted that federal precedent interpreting the National Labor Relations Act has articulated three distinct categories of management decisions in relation to mandatory subjects of bargaining: (1) those that have only an indirect and attenuated impact on the employment relationship and thus are

not mandatory subjects of bargaining, such as choice of advertising and promotion, product type and design, and financing arrangements; (2) those that directly define the employment relationship and are always mandatory subjects of bargaining, such as wages, workplace rules, and the order of succession of layoffs and recalls; and (3) those that directly affect employment, such as eliminating jobs, "but nonetheless may not be mandatory subjects of bargaining because they involve 'a change in the scope and direction of the enterprise' or, in other words, the employer's 'retained freedom to manage its affairs unrelated to employment.' " (*International Fire Fighters, supra*, at pp. 272–273, citing *First National Maintenance Corp. v. NLRB* (1981) 452 U.S. 666, 677 (*First National*).)

The Court then analyzed federal case law that had applied a balancing test in layoff cases in particular: " 'in view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.' " (*International Fire Fighters, supra*, 51 Cal.4th at p. 273, quoting *First National, supra*, 452 U.S. at p. 679.)

It noted that California courts construing the MMBA have generally followed the federal authority, applying a similar balancing test in layoff cases: "Under the MMBA, the scope of a public employer's duty to bargain in regard to a layoff decision is generally determined by application of a balancing test that requires a local public entity employer to meet and confer 'only if the employer's need for unencumbered decisionmaking in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question.' " (*International Fire Fighters, supra*, 51 Cal.4th at p. 274, quoting *Building Material & Construction Teamsters' Union v. Farrell, supra*, 41 Cal.3d at p. 660.)

As discussed in further detail below, *International Fire Fighters* did not change or modify the *Claremont* test in any way, which remains the applicable test for determining whether a managerial decision falls within the scope of representation under the MMBA. Rather, *International Fire Fighters* applied a particular approach appropriate in certain circumstances for layoff cases, which typically satisfy the first two steps of the *Claremont* test, thereby proceeding directly to the third-step balancing test.

Thus, while the parties in this case refer to the *International Fire Fighters* test as the applicable test, we will focus on the three-part test articulated by the California Supreme Court in *Claremont*.

C. Analysis

PERB reached its conclusion—that the board of supervisors' decision to approve the revised bylaws fell within the scope of representation—via two separate approaches. First, it analogized to its existing precedent regarding job qualifications, thereby obviating the need to " 'reinvent the wheel' by applying the [*International Fire Fighters*] framework from scratch."

Second, "as an alternative conclusion," PERB purported to apply the *International Fire Fighters* framework "afresh," assumed for the sake of argument that the County's changes fell within the third *International Fire Fighters* category, and concluded that the County had a decision bargaining duty.

As we explain in the discussion that follows, we hold that those decisions were clearly erroneous.[13]

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[13] The County argues at length that the board's decision to approve the revised bylaws was outside the scope of representation because external law left the County no relevant discretion. We need not address that as a separate argument, though, because the issue is subsumed within our consideration of whether PERB properly followed its own precedent or properly applied the *Claremont* test, which includes consideration of that external law—in the event that application of the test reaches the third-step—to determine whether the employer had a need for unencumbered decision-making.

1. PERB's reliance on its cited precedent was clearly erroneous

PERB stated that "subject-specific standards" can show "how the [*International Fire Fighters*] framework applies to a given topic," and that one such standard is: "job qualifications fall within the scope of representation unless the employer does no more than comply with an externally imposed change." Citing *County of Sacramento, supra,* PERB Decision No. 2745-M, p. 14, which addressed a county's bargaining duty over revisions to an airport operations dispatcher class specification, PERB utilized the following standard: "[W]hen external law establishes immutable provisions in an area otherwise within the scope of representation, matters are negotiable only to the extent of the employer's discretion, that is, to the extent that the external law does not 'set an inflexible standard or [e]nsure immutable provisions.' "

PERB acknowledged that "there is no PERB precedent specific to practice privileges," and that "[p]ractice privilege qualifications are not identical to job qualifications," but nevertheless determined that "the two topics are closely related." In reaching that determination, PERB relied on the Irizarry arbitration and the County's subsequent efforts to change the job description to require physician assistants to maintain NCCPA certification.

We find that PERB's reliance on this precedent here was clearly erroneous. First, the cited decision—*County of Sacramento*—did not apply or cite the *Claremont* test at all. Rather, the decision considered whether the County had negotiated in good faith with the employees' representative over proposed revisions to the airport operations dispatcher class specification. (*County of Sacramento, supra*, PERB Dec. No. 2745-M, p. 17.) It then applied the standard that "changes to job specifications, including certification requirements and other qualifications, are within the scope of representation unless the changes at issue do no more than is required to comply with an externally-imposed change in the law," and addressed the County of Sacramento's argument that "it was not required to negotiate over the [revisions] because it is an external requirement imposed

by the state," specifically the Emergency Medical Services System and Prehospital Emergency Care Personnel Act, set forth at Health and Safety Code section 1797 et seq. (*County of Sacramento, supra*, p. 17.) PERB analyzed the cited external law and concluded that it "does not set an inflexible standard or [e]nsure immutable provisions that would negate the County's duty to bargain with [the representative] over the [changes]." (*Ibid*.)

But the decision did not apply the *Claremont* test, or even discuss *Claremont* or *International Fire Fighters*. Accordingly, *County of Sacramento* does not "show how the [*International Fire Fighters*] framework applies," as the PERB decision claimed, and therefore cannot operate as a substitute for the framework that is required by the California Supreme Court for determining whether a decision is subject to bargaining under the MMBA.

Second, *County of Sacramento* did not consider the external law at issue here—namely, Health and Safety Code section 1250.8, Business and Professions Code section 2282.5, subdivision (a)(6), and the scope of the County board of supervisors' discretion in deciding whether to approve the revised bylaws. The decision cannot constitute precedent for addressing and resolving whether that particular external law establishes immutable provisions or the extent to which it sets an inflexible standard.

Third, even if *County of Sacramento* or other PERB precedent had applied the *Claremont* test to its particular facts regarding changes to job qualifications, it would not necessarily follow that the authority would be analogous to changes to practice privileges. Although PERB relied on the Irizarry arbitration and the County's subsequent efforts to change the job description as bases for the analogy to changes to practice privileges, the PERB decision does not meaningfully explain how those facts support the analogy.

PERB reasoned as follows: "SEIU raised with the County that the [board] was preparing to vote on bylaw revisions that would change qualifications for [physician

assistants] to hold practice privileges. SEIU specifically pointed out to the County a proposed revision that would change disjunctive language to conjunctive language, requiring [physician assistants] to earn and maintain both a license and a certificate or other credential to have practice privileges. SEIU asked whether [physician assistants] who do not qualify for practice privileges under the revised bylaws could work for the County, and the County stated that they could not. In these circumstances, we find the standard set forth in [*County of*] *Sacramento*, *supra*, PERB Decision No. 2745-M, p. 18, applies equally to practice privileges."

PERB's proffered explanation does not support the analogy. Job qualifications and practice privileges are not the same—the former is a matter of employment established by the County, while the latter is a matter of the right to practice at the hospitals, established by the medical staff. Whatever similarities they may have, PERB's decision did not articulate them in a manner that takes into account how the *Claremont* test would apply equally to the two categories.

In sum, PERB's reliance on its cited precedent here was clearly erroneous.

2. PERB failed to apply the **Claremont** *test properly*

a. Waiver or forfeiture

As a threshold matter, PERB argues that the County "waived" any argument "that practice privileges are outside the scope of representation under [*International Fire Fighters*]," because it failed to raise the issue during the administrative proceedings. As authority for that assertion, PERB cites *Carian v. Agricultural Labor Relations Bd.* (1984) 36 Cal.3d 654 (*Carian*) and *Butte View Farms v. Agricultural Labor Relations Bd.* (1979) 95 Cal.App.3d 961, 969 (*Butte View Farms*).

However, the cited cases do not support PERB's argument, even assuming PERB is correct that the County did not raise the issue. In *Butte View Farms*, for instance, the petitioner sought a writ vacating a decision by the Agricultural Labor Relations Board

(ALRB) that had set the amount of back pay and damages due to certain employees found to have been wrongfully discharged in an earlier decision. (*Butte View Farms*, *supra*, 95 Cal.App.3d at p. 965.) Among other arguments, the petitioner also sought to challenge an aspect of the ALRB's decision—refusing to enforce a subpoena duces tecum submitted to another state agency—which aspect the petitioner had failed to raise and object to during the administrative proceedings before the ALRB. (*Id*. at p. 971.) The court of appeal held that the petitioner had failed to comply with Labor Code section 1160.3, which requires that a party file an exception to the administrative law officer's decision within 20 days after service of the proposed decision to properly raise a matter before the board. (*Ibid*.) According to the court, the petitioner's failure to do so "precludes judicial review since petitioner failed thereby to exhaust its administrative remedies." (*Ibid*.)

Similarly, in *Carian*, the petitioners sought review of decisions by the ALRB finding that they had committed certain unfair labor practices. (*Carian, supra*, 36 Cal.3d at p. 660.) Among other things, petitioner Carian argued that a judgment in a prior proceeding between it and the ALRB had a res judicata effect that precluded the board from adopting the administrative labor officer's recommendation. (*Id*. at p. 668, fn. 6.) However, relying on *Butte View Farms*, the court held that the matter was not properly before it because Carian had not raised those arguments in the administrative proceedings before the ALRB, so "the point is deemed waived." (*Carian,* at p. 668, fn. 6.)

We are not dealing with Labor Code section 1160.3, though, and we find the cases inapposite.

In any event, to the extent PERB means to argue that the County forfeited the issue by failing to raise it below—independent of Labor Code section 1160.3—we would decline to find forfeiture. (See, e.g., *In re S.B.* (2004) 32 Cal.4th 1287, 1293 [forfeiture of claim for failure to timely assert it].) Here, PERB addressed application of the *International Fire Fighters* test in its decision, and it has had a full opportunity to present

its arguments in this writ proceeding. (See, e.g., *Liu v. Miniso Depot CA, Inc.* (2024) 105 Cal.App.5th 791, 800 [declining to find forfeiture where trial court addressed issue and respondent briefed it on appeal]; *JRS Products, Inc. v. Matsushita Electric Corp. of America* (2004) 115 Cal.App.4th 168, 179 [court of appeal "is at liberty to reject a waiver claim and consider the issue on the merits"].)

b. First step of* Claremont *test

As stated above, the first step of the *Claremont* test is whether the management action has a significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees. (*Claremont, supra,* 39 Cal.4th at p. 638.) The County argues that PERB failed to address or apply this prong altogether—that is, whether the board of supervisors' approval of the revised bylaws had a significant and adverse effect on wages, hours, or working conditions of the physician assistants. Instead, the County contends, PERB "skipped over this question entirely," which not only constituted error, but which was the exact same "clear error" that necessitated reversal of a PERB decision in *County of Sonoma*.

We agree. In *County of Sonoma*, two sheriff and law enforcement associations filed an unfair practice complaint against the County of Sonoma, alleging it violated the MMBA by placing a measure on the ballot which amended the County Code to enhance investigative and oversight authority over the sheriff's office without bargaining first. (*County of Sonoma, supra*, 80 Cal.App.5th at p. 173.) PERB agreed and declared the measure's provisions void and unenforceable against any employees represented by the associations. (*Ibid*.)

In its decision, PERB first determined that the ballot measure directly affected the disciplinary procedures and standards of the sheriff's office and noted that " 'discipline is a traditionally bargainable area.' " (*County of Sonoma, supra*, 80 Cal.App.5th at p. 181.) It proceeded directly to apply " 'the balancing test for changes in the third category' " of the *International Fire Fighters* test. (*Ibid*.)

On writ review, the court of appeal noted that PERB conceded it had not first ascertained whether the decision to place the measure on the ballot "had a 'significant and adverse effect' on the wages, hours, or working conditions of the bargaining-unit employees—the first prong of the *Claremont* test." (*County of Sonoma, supra*, 80 Cal.App.5th at p. 182.) PERB's failure to do so, held the court, "was clear error" and "its reliance on *International Fire Fighters* was not appropriate."[14] (*Ibid*.)

As the court explained, in *International Fire Fighters*, there had been no dispute that the layoff decision at issue was managerial and directly affected employment. (*County of Sonoma, supra*, 80 Cal.App.5th at p. 182, citing *International Fire Fighters*, *supra*, 51 Cal.4th at p. 274.) For that reason, the California Supreme Court had proceeded directly to the third-step balancing test because " 'the scope of a public employer's duty to bargain in regard to a *layoff decision* is generally determined by application of a balancing test.' " (*Ibid.*, italics added.) Further, "case law establishes employers must bargain with employees when implementing a layoff decision motivated by reducing labor costs," so that in *International Fire Fighters*, "determining whether the decision to lay off the firefighters for budgetary purposes had a significant, adverse effect on working conditions was thus unnecessary." (*County of Sonoma*, *supra*, at p. 182, citing *Claremont, supra*, 39 Cal.4th at p. 638.)

In *County of Sonoma*, though, the court of appeal held that "application of the full *Claremont* test was required to resolve whether the decision to place [the measure] on the ballot—a measure expanding civilian investigative authority and oversight of the Sheriff, not layoffs—was within the scope of representation." (*County of Sonoma, supra*, 80 Cal.App.5th at p. 182.)

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[14] There was no dispute in *County of Sonoma* that the decision to place the measure on the ballot constituted a fundamental managerial or policy decision. (*County of Sonoma, supra,* 80 Cal.App.5th at p. 181.)

The court also rejected PERB's argument that its error was harmless "because the balancing test in *International Fire Fighters* is 'largely the same [as *Claremont's*] when a decision involves both a fundamental managerial decision and has a direct effect on employment conditions.' " (*County of Sonoma, supra*, 80 Cal.App.5th at p. 185.) While PERB had suggested that relying on either *Claremont* or *International Fire Fighters* would reach the same result, the court of appeal held that the argument ignored the importance of *Claremont*'s first prong and attempted to conflate a "*significant and adverse effect*" with a "*direct* effect." (*County of Sonoma, supra*, at p. 185)

In sum, the court held, "PERB's reliance on *International Fire Fighters*—skipping an assessment of the first prong of *Claremont*—when deciding whether the County's decision to place [the measure] on the ballot was within the scope of representation was clearly erroneous." (*County of Sonoma, supra*, 80 Cal.App.5th at p. 185.)

Similarly here, PERB did not first determine whether the decision to approve the revised bylaws "had a 'significant and adverse effect' on the wages, hours, or working conditions of the bargaining-unit employees—the first prong of the *Claremont* test." (*County of Sonoma, supra*, 80 Cal.App.5th at p. 182.) PERB merely "assum[ed] for the sake of argument that the County's changes fall within the third [*International Fire Fighters* category]. …" As in *County of Sonoma*, PERB appears to concede that it skipped the first step and merely assumed it had been satisfied, as it states in its briefing in this court that a "decision falls under the third [*International Fire Fighters*] category if it had 'a significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees' that 'arises from the implementation of a fundamental managerial or policy decision.' "

However, PERB's decision never made that required threshold determination, which *Claremont* requires. As in *County of Sonoma*, the failure to have done so was clearly erroneous. (*County of Sonoma, supra*, 80 Cal.App.5th at p. 185.)

We note that later in its decision—in the context of purporting to apply the third-step balancing test—PERB stated that, where a managerial action falls into the third *International Fire Fighters* category, "PERB first determines whether the decision has 'a significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees" that "arises from the implementation of a fundamental managerial or policy decision," quoting *Claremont, supra*, 39 Cal.4th at. p. 638. Thus, PERB appears to have considered the first step of the *Claremont* test, albeit at a different stage of the analysis.

However, even if PERB's belated consideration of the first step of the *Claremont* test were sufficiently compliant—a question we need not decide here—PERB conducted no actual analysis of whether the board of supervisors' decision had a significant and adverse effect. It merely made the conclusory statement that "changes that make it more difficult to earn and maintain practice privileges have a significant and adverse impact, potentially even causing them to lose their employment altogether." The conclusory nature of PERB's statement and the complete absence of analysis or explanation suggests that PERB did not actually conduct the first step analysis required by *Claremont*, or make a factual determination through logical reasoning from the evidence. (See, e.g., *Boling, supra*, 5 Cal.5th at p. 912.)

PERB argues that the County "fails to directly address whether the [board's] decision to approve the bylaws had a significant and adverse effect on terms and conditions of employment, and instead focuses only on the balancing test set forth in the third category." But, as we have stated, the County directly contended in its petition for writ of extraordinary relief that PERB failed to address or apply the first prong of the *Claremont* test, and "skipped over this question entirely," which not only constituted error, but which was the exact same "clear error" that necessitated reversal of a PERB decision in *County of Sonoma*.

PERB does not argue that its decision did address the first step in the *Claremont* test. It argues instead that "an analysis of the third category [of *International Fire Fighters*] logically addresses the first category. If an analysis of the third category finds that the decision directly affected terms and conditions of employment, then it follows that the decision cannot fall under the first category, which requires that it 'have only an indirect and attenuated impact on the employment relationship.' "

That is precisely the argument that our colleagues in the First District Court of Appeal rejected in *County of Sonoma*: "[T]his argument ignores the importance of *Claremont*'s first prong—attempting to conflate a *significant and adverse* effect and a *direct* effect." (*County of Sonoma, supra*, 80 Cal.App.5th at p. 185 [practically every managerial decision has some impact on wages, hours, or other conditions of employment; but " '[f]or an action by an employer to fall within the scope of representation, and thus be subject to the mandatory bargaining requirements of the MMBA, it must have a *significant* effect on the "wages, hours, and other terms and conditions of employment." ' "].) We agree with the First District in this regard and similarly conclude that PERB's failure to apply the first step of the *Claremont* test was clearly erroneous.

c. Balancing tests

Next we address the adequacy of PERB's subsequent application of the *International Fire Fighters* balancing test.

First, we reiterate that *Claremont* articulates the three-step analytic process for determining whether a decision falls within the scope of representation within the MMBA. *International Fire Fighters*, meanwhile, identified an approach appropriate for certain layoff cases in particular, which approach does not begin with the threshold step of ascertaining whether the management action has a significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees. (*Claremont, supra,* 39 Cal.4th at p. 638.)

The third-step balancing test articulated in *International Fire Fighters* reflects its limitation to layoff cases. Whereas under *Claremont*, the test evaluates whether "the employer's need for unencumbered decisionmaking in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question," under *International Firefighters* and the federal NLRB precedent it followed, the test evaluates whether, " 'in view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact *on the continued availability of employment* should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.' " (*International Fire Fighters, supra*, 51 Cal.4th at p. 273 [emphasis added], quoting *First National, supra,* 452 U.S. at p. 679.)

In its decision, PERB concluded that "the County does not have a need for unencumbered decision-making that outweighs the benefit to employer-employee relations of bargaining." Although PERB purported to apply the balancing test from *International Fire Fighters*, the language it used tracks the test articulated in *Claremont* more closely, so we conclude that PERB at least identified the correct balancing test.

However, PERB did not apply it properly. In short, PERB appears to have given no consideration at all to the County's need for unencumbered decision-making in managing its operations. Instead, the entirety of PERB's discussion of that side of the balancing test was its conclusory statement quoted above—that the County does not have such a need.

After that conclusion, PERB stated: "In fact, as the arbitrator in the Irizarry matter aptly noted, the relaxed pace of proposed changes in this area belies any argument that patient safety would be at risk if the County had to slow down enough to bargain before its BOS voted on bylaws that changed practice privilege standards." Again, though—putting aside the validity of the assertion—that statement does not address the County's need for unencumbered decision-making in managing its operations.

Earlier in its decision, PERB summarized the statutory framework governing the County's hospital system, the medical staff, and development and approval of the medical staff bylaws. For instance, the medical staff is responsible to the hospital's governing body for the adequacy and quality of the care rendered to patients. (Cal. Code Regs., tit. 22, § 70703, subd. (a).) The medical staff is also a separate legal entity from the hospitals themselves, and "is required to be self-governing and independently responsible from the hospital for its own duties and for policing its member physicians." (*Hongsathavij, supra,* 62 Cal.App.4th at p. 1130, fn. 2; see also Bus. & Prof. Code § 2282, subd. (c) ["medical staff shall be self-governing with respect to the professional work performed in the hospital"].)

In addition, Business and Professions Code section 2282.5, subdivision (a)(6), provides that the governing board's approval of the medical staff's bylaws "shall not be unreasonably withheld." And, as the County noted in the proceedings below, the legislative history of Business and Professions Code section 2282.5 states that "[t]he final authority of the hospital governing board may be exercised for the responsible governance of the hospital or for the conduct of the business affairs of the hospital; however, that final authority may only be exercised with a reasonable and good faith belief that the medical staff has failed to fulfill a substantive duty or responsibility in matters pertaining to the quality of patient care." (2004 Cal. Legis. Serv. Ch. 699 (S.B. 1325).)[15]

Yet, PERB did not consider any of this statutory framework and legislative history in the context of applying the balancing test, or the extent to which it may demonstrate the County's need for unencumbered decision-making.

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[15] In its proposed decision, the ALJ noted that the statute "does not provide examples in which a hospital governing board's withholding of final approval of medical staff bylaws, rules, or regulations was unreasonable under subdivision (a)(6). Therefore, it is appropriate to consider the legislative history of the section. (*Central Contra Costa Transit Authority* (2012) PERB Decision No. 2263-M, pp. 8–9.)"

In its briefing in this court, PERB argues that "there is no record evidence of a need to change practice privileges and job qualifications in an expeditious manner." According to PERB, "the slow pace of efforts to add a certification requirement undermines any argument that operation of the hospital and patient safety would be at risk if the County needed to bargain before its BOS voted on the bylaws that changed practice privilege standards."

PERB's emphasis on the pace of efforts to add a certification requirement is misplaced, though. First, PERB appears to conflate or equate the County's efforts to change the job specifications with the medical staff's efforts to change the practice privileges—but the two are not the same. Second, PERB appears to conflate the medical staff's efforts to change the practice privileges with the County board's decision to approve the revised bylaws—also different actions subject to different legal and policy considerations. And third, the pace at which an entity makes a decision does not necessarily shed any light on its need for unencumbered decision-making in the context of a *Claremont* balancing test—certainly, PERB has not identified any authority for that proposition.

Without having considered the County board's need for unencumbered decision-making in managing its operations, PERB could not properly assess whether that need is outweighed by the benefit to employer-employee relations of bargaining about the action in question. (*Claremont, supra*, 39 Cal.4th at p. 638.)

We caution here that we do not hold that the *Claremont* balancing test tips in the County's favor. We hold only that PERB failed to apply the test properly.

As we have stated, the Legislature empowered PERB with the authority "to adjudicate unfair labor practice claims under the MMBA and six other public employment relations statutes." (*Boling, supra,* 5 Cal.5th at p. 911.) And reviewing courts generally defer to PERB's construction of labor law provisions within its jurisdiction, and PERB is an agency "presumably equipped or informed by experience to

deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." (*Id.* at pp. 911–912.) Accordingly, rather than determine in the first instance which way the balancing test tips, we will remand to PERB to exercise its legislatively designated authority.

3. Duty to meet and confer to clarify

PERB's decision also separately stated that, "where it is unclear whether the employer has a duty to bargain, it must meet with the exclusive representative in good faith to clarify the extent to which all or part of its contemplated change is subject to bargaining." Pursuant to that requirement, PERB explained, "the County had a duty to continue meeting with SEIU to clarify the extent of any decision bargaining obligation and to bargain effects."

We need not resolve this issue here because we annul the PERB decision and remand for further proceedings. We also note that the complaint issued by PERB in this case made no allegation that the County had violated its duty to meet and clarify—not surprisingly, then, the parties do not appear to have briefed this issue at any stage of the proceedings below. On remand, the parties will have the opportunity to address the issue, including whether it is properly before PERB despite not having been alleged in the complaint.

4. Remedy

Because PERB's decision was clearly erroneous as described above, we will annul the decision and return the matter to PERB to permit it to enter a new decision and order free from the errors identified here, or for other further proceedings consistent with this opinion. (See, e.g., Gov. Code, § 3509.5, subd. (b) [authorizing appellate courts entertaining petitions for a writ of extraordinary relief to set aside the decision or order of the board]; *San Mateo School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 867.)

III. DISPOSITION

PERB decision No. 2900-M is annulled. The matter is remanded to PERB to determine whether the County board of supervisors' decision to approve the medical staff's revised bylaws was within the scope of representation under the MMBA as analyzed under *Claremont*, *supra*, 39 Cal.4th 623, and for further proceedings consistent with this opinion. PERB may then order any other appropriate relief consistent with the views expressed herein. The parties shall bear their own costs in this writ proceeding.

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Wilson, J.

WE CONCUR:

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Greenwood, P. J.

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Grover, J.

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H052154