

1 DAVID A. ROSENFELD, Bar No. 58163  
2 KERIANNE R. STEELE, Bar No. 250897  
3 ARDALAN RAGHIAN, Bar No. 339171  
4 WEINBERG, ROGER & ROSENFELD  
5 A Professional Corporation  
6 1375 55th Street  
7 Emeryville, California 94608  
8 Telephone (510) 337-1001  
9 Fax (510) 337-1023  
10 E-Mail: [perb@unioncounsel.net](mailto:perb@unioncounsel.net)  
11 [drosenfeld@unioncounsel.net](mailto:drosenfeld@unioncounsel.net)  
12 [ksteele@unioncounsel.net](mailto:ksteele@unioncounsel.net)  
13 [araghian@unioncounsel.net](mailto:araghian@unioncounsel.net)

14 Attorneys for UNION OF AMERICAN  
15 PHYSICIANS AND DENTISTS

16 LOS ANGELES COUNTY  
17 EMPLOYEE RELATIONS COMMISSION

18 COUNTY OF LOS ANGELES,

19 Charging Party,

20 v.

21 UNION OF AMERICAN PHYSICIANS AND  
22 DENTISTS,

23 Respondent.

**UNION OF AMERICAN PHYSICIANS  
& DENTISTS' BRIEF IN RESPONSE  
TO CHARGE; SECOND MOTION TO  
CONSOLIDATE**

Case No. 018-23

24 UNION OF AMERICAN PHYSICIANS AND  
25 DENTISTS,

26 Charging Party,

27 v.

28 COUNTY OF LOS ANGELES,

Respondent.

Case No. 019-23

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1 The Union of American Physicians & Dentists (“UAPD”) hereby submits to the Los  
2 Angeles County Employee Relations Commission (“ERCOM”) its brief in response to the County  
3 of Los Angeles’ (“County”) Unfair Employee Relations Practice Charge No. 018-23.  
4 Concurrently herewith, UAPD (again) submits its motion to consolidate Unfair Employee  
5 Relations Practice Charge Nos. 018-23 and 019-23 for hearing and determination and asks the  
6 Commission to rule on the motion at its December 21, 2023 meeting.

## 7 I. INTRODUCTION

8 The County has failed to state a *prima facie* case. UAPD is not calling an unlawful pre-  
9 impasse strike or taking “essential employees” out on strike. The Commission should dismiss the  
10 charge for failure to state a *prima facie* violation of the Meyers-Milias-Brown Act (“MMBA”) or  
11 the Employee Relations Ordinance (“Ordinance”).

12 If, however, the Commission determines the County has stated a claim, it should conclude  
13 the same with regard to UAPD’s Unfair Employee Relations Practice Charge against the County,  
14 Case No. 019-23, and consolidate both parties’ charges for hearing and decision.

## 15 II. ARGUMENT IN RESPONSE TO CHARGE

### 16 A. **UAPD’S THREATENED STRIKE IS A PROTECTED UNFAIR LABOR 17 PRACTICE STRIKE, NOT AN UNLAWFUL PRE-IMPASSE STRIKE**

18 The County’s claim that UAPD’s threatened strike is an unlawful pre-impasse strike is  
19 baseless. UAPD bargaining unit members are preparing to strike in protest of the County’s unfair  
20 practices. The County caused this scheduled strike by failing to take its bargaining obligation  
21 seriously. Instead of exchanging proposals, listening to the concerns of these healthcare  
22 professionals, and working together to improve the healthcare system, the County has taken a  
23 dismissive approach that negatively impacts members of the community who rely on the services  
24 that UAPD bargaining unit employees provide. The County has been performing a prolonged and  
25 frustrating two-year charade, engaging in bad faith conduct and wasting UAPD’s time and  
26 patience. By withholding their labor, the UAPD bargaining unit employees are prepared to say to  
27 the County they have had enough with obstructionist tactics, ignoring proposals, rejecting  
28 proposals by simply saying “we’re not interested in it” with no explanation, renegeing on tentative

1 agreements, and the condescending attitude toward the serious healthcare issues that they are  
2 raising.

3 **1. The presumption that a pre-impasse strike is unlawful is rebuttable**

4 Indeed, the Public Employment Relations Board (“PERB”) has consistently held that there  
5 is a rebuttable presumption that strikes conducted before the completion of impasse procedures  
6 are unfair practices. (*Sweetwater USD* (2014) PERB Order No. IR-58, p. 9.) However, the  
7 employee organization can rebut the presumption by showing that the strike was provoked by the  
8 employer’s unfair practice(s), which is a mixed question of law and fact. (*Id.*, p. 9, citing  
9 *Sacramento USD* (1987) PERB Order No. IR-49; *Modesto City Schools/Modesto City Schools, et*  
10 *al.* (1980) PERB Order No. IR-12; *Santa Maria Joint USD* (1989) PERB Order No. IR-53.)

11 On December 19, 2023, UAPD filed and served its Answer to the Charge, which includes  
12 the affirmative defense that UAPD’s threatened strike is not an unlawful pre-impasse strike  
13 because it is an unfair labor practice strike. If the County’s charge proceeds to hearing, UAPD  
14 will demonstrate that its threatened strike was provoked by the County’s unfair practices in  
15 successor negotiations, thereby rebutting any presumption that its strike is unlawful.

16 **2. The PERB case law relating to pre-impasse striking is far more**  
17 **favorable to employee organizations than the County suggests**

18 The County cited out of context the PERB decision *University of California* (2010) PERB  
19 Decision No. 2094-H (*Regents*) to support its claim that UAPD is calling an unlawful pre-impasse  
20 strike. In *Regents*, PERB announced the following test: to constitute an unfair practice, pre-  
21 impasse strike threats and preparation must be:

- 22 (1) in furtherance of an unlawful strike; and  
23 (2) sufficiently substantial to create a reasonable belief in the employer that the strike  
24 will occur.

25 (*Sweetwater USD, supra*, PERB Order No. IR-58, p. 17, citing *Regents, supra*, PERB Decision  
26 No. 2094-H, p., 31.)

27 In *Regents*, the union was unable to prove the employer had engaged in any unfair  
28 practices. Because the union could not prove the employer had engaged in any unfair practices, it

1 could not prove any unfair practices provoked the union’s strike. Therefore, the union failed to  
2 rebut the presumption that its threatened pre-impasse strike was an unfair practice strike.  
3 (*Sweetwater USD, supra*, PERB Order No. IR-58, p. 18, citing *Regents, supra*, PERB Decision  
4 No. 2094-H, pp., 33-34.) In *Regents*, the PERB Board reserved for another day the question of  
5 whether preparations for a lawful strike undertaken before the exhaustion of impasse procedures  
6 would constitute an unfair practice. (*Sweetwater USD, supra*, PERB Order No. IR-58, p. 18  
7 (emphasis in original), citing *Regents, supra*, PERB Decision No. 2094-H, p., 34, fn. 14.) In  
8 *Sweetwater USD*, PERB held that “it would not.” In other words, PERB confirmed that a lawful  
9 strike undertaken before the exhaustion of impasse procedures would not constitute an unfair  
10 practice.

11 In contrast to the *Regents* case, here, UAPD will be able to demonstrate the County has  
12 engaged in unfair practices and that its strike is provoked by the County’s conduct.

13 **3. UAPD’s strike is provoked by the County’s unfair practices**

14 Even if UAPD’s threatened strike occurs prior to exhaustion of impasse procedures, it will  
15 be a lawful strike, not an unfair practice.

16 In the charge UAPD filed on December 18, 2023, Christopher Ige, UAPD Regional  
17 Administrator, attested under penalty of perjury that the County has engaged in the following bad  
18 faith bargaining conduct:

19 ...

20 3. The County has consistently engaged in delay tactics since  
21 UAPD first requested bargaining. Numerous bargaining meetings  
22 have been cancelled by the County – earlier this year alone, the  
23 County cancelled three scheduled bargaining meetings in or around  
24 May of 2023 and cancelled nearly one dozen meetings that were  
25 scheduled between October of 2023 and the date of this letter.  
26 UAPD has oftentimes had to wait several weeks for promised  
27 proposals from the County. Moreover, the County utterly ignored,  
28 for more than three (3) months, a UAPD proposal on relief  
physiatrists that UAPD provided to the County on September 14,  
2023, where the County did not respond to said proposal until  
December 5, 2023.

4. The County has repeatedly failed and refused to provide  
counterproposals to UAPD. Instead of explaining its inflexible  
positions, the County has continually rejected UAPD proposals by  
simply stating “we’re not interested in that.”

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5. On December 5, 2023, the County showed up to a scheduled BU 324 bargaining meeting with a proposal to BU 325. The bargaining team members of BU 325 were not present, because the meeting was scheduled, and clearly communicated to UAPD, as a BU 324 meeting.

6. Between the first week of October of 2023 and December 5, 2023, the County refused to continue meeting and bargaining regarding BU 325’s successor MOU until BU 324 bargaining is completed, thereby conditioning continued negotiations with BU 325 on the completion of negotiations with BU 324.

7. On November 21, 2023, a scheduled bargaining session, the County cancelled it that same day after BU 324 showed up ready to bargain. BU 324 was expecting a counterproposal from the County that day, but the County did not provide one. Instead, when cancelling the meeting, the County told BU 324 that they were going to provide BU 324 with a counterproposal on the following scheduled bargaining day, November 29, 2023. However, on November 29, 2023, the County showed up to the meeting unprepared, postponed the meeting for later that day, and when the meeting was set to resume, the County once again postponed the meeting for the following bargaining session, on December 5, 2023.

8. On August 14, 2023, UAPD sent a BU 325 proposal to the County related to Psychiatry staffing. Since then, the County has neither provided any response to said proposal nor met with UAPD to discuss it. The County has refused to do so until it reaches an agreement on BU 324’s successor MOU.

9. On April 20, 2022, the parties tentatively agreed to Cost of Living Adjustments (“COLA”) to the salaries of BU 325 members for the years 2022, 2023, and 2024. On December 15, 2023, the County provided the Union with its “Last Best and Final Offer” for BU 325. That offer excludes the previously agreed-to COLA for 2024.

10. After more than two (2) years of engaging in negotiations with the County and enduring bad faith conduct from the County, on December 12, 2023, UAPD informed the County that members of BU 324 and 325 will be engaging in a strike from December 27, 2023, through January 1, 2024, as a result of the County’s bad faith conduct throughout the bargaining process. Since then, the parties have been meeting to negotiate line-pass agreements for each affected County facility.

11. On December 15, 2023, the Interim Chair of the Department of Anesthesiology at Harbor-UCLA Medical Center [footnote omitted] cornered several BU 324 members, separately, to ask whether they are members of UAPD and whether they are going to strike. The Interim Chair did not provide assurances to the members that they need to respond to their inquiry and that they will not face adverse consequences based on their answer, or by refusing to answer. By interrogating these members with such questions, the County pressured members to reveal their sympathies toward UAPD and the scheduled strike.

1 Notably, in Paragraph 10 of UAPD’s charge, which Mr. Ige verified under oath, UAPD  
2 also alleges the strike is “a result of the County’s bad faith conduct throughout the bargaining  
3 process,” in other words that, the County provoked the strike and the strike is UAPD’s last resort.

4 Documentary evidence and witness testimony can prove this at hearing.

5 **4. There is no legal obligation to file unfair practice charges before**  
6 **holding a strike authorization vote or announcing a strike**

7 The County introduces a novel theory that UAPD’s strike is not a protected unfair labor  
8 practice strike because it conducted a strike authorization vote and announced strike dates before  
9 filing an Unfair Employee Relations Practice Charge against the County. It cites no legal  
10 precedent for this theory. None exists. A strike does not lose its protection as an unfair labor  
11 practice strike simply because no Unfair Employee Relations Practice Charges are on file as of  
12 the date the union holds a strike vote, publishes strike dates (or even as of the date it strikes).  
13 What is legally relevant is that UAPD prove at hearing the County committed unfair practices and  
14 those unfair practices provoked the strike.

15 **5. Strike preparations prior to exhausting impasse procedures are not**  
16 **unlawful, even if a union’s strike is not a ULP strike**

17 Importantly, in *Sweetwater USD*, the PERB Board distinguished an “actual work  
18 stoppage” from mere preparation for a strike. (*Sweetwater USD, supra*, PERB Order No. IR-58,  
19 p. 10.) It observed that preparing for a strike is more akin to speech protected by the collective  
20 bargaining statutes. (*Id.*, p. 10.) PERB acknowledged it is possible the employee organization’s  
21 strike preparation activities will be effective in pressuring the employer into making concessions.  
22 The fact that its strike preparation activities successfully cause the employer to feel coerced or  
23 pressured into conceding to the union’s bargaining demands does not mean the activities lose  
24 their protection. (*Sweetwater USD, supra*, PERB Order No. IR-58, p. 13.) PERB summarized its  
25 holding – that PERB is unwilling to prohibit the protected conduct of engaging in strike  
26 preparations “where there has been no work stoppage and where there is no evidence the  
27 [employee organization] lacked the genuine intent to reach agreement on the CBA.” (*Id.*)



1 The PERB Board also took the occasion to “disavow” its decision *South Bay USD* (1990)  
2 PERB Decision No. 815 to the extent that decision stood for the proposition that a union’s strike  
3 preparations undertaken prior to the completion of impasse procedures in anticipation of a lawful  
4 post-impasse economic strike demonstrates surface bargaining. (*Sweetwater USD, supra*, PERB  
5 Order No. IR-58, pp. 15-16.)

6 Here, the County has alleged only that UAPD held a strike authorization vote and  
7 announced strike dates, not that its members have actually engaged in a work stoppage. The strike  
8 preparation activities recited in the County’s Charge, even if true, do not constitute a violation of  
9 the MMBA or Ordinance.

10 **6. UAPD has consistently demonstrated an intent to reach an agreement**  
11 **with the County regarding the successor MOUs**

12 Even after holding a successful strike authorization vote and scheduling strike dates,  
13 UAPD has approached successor negotiations in good faith. The parties are scheduled for in-  
14 person mediated negotiations on December 19, 20 and 21, 2023, under the auspices of Mediator  
15 Gregory Lim who served as a Federal Mediation and Conciliation Service mediator for many  
16 decades. The County cannot credibly claim UAPD lacks genuine intent to reach a successor  
17 MOU. The point of three (3) scheduled dates of mediation is to resolve the parties’ disputes.

18 **B. UAPD IS NOT TAKING “ESSENTIAL EMPLOYEES” ON STRIKE, AS IT**  
19 **IS AGREEING TO LINE PASSES FOR ANY EMPLOYEES WHO MEET**  
20 **THE DEFINITION OF “ESSENTIAL EMPLOYEE”**

21 In *County Sanitation Dist. No. 2 v. Los Angeles County Employees’ Ass’n* (1985) 38  
22 Cal.3d 564 (“*County Sanitation*”), the California Supreme Court promulgated what has come to  
23 be known as the “essential employee” standard. The Court held that “the right to strike is  
24 fundamental to the viability of a labor union,” and that “strikes by public employees are not  
25 unlawful at common law unless or until it is clearly demonstrated that such a strike creates a  
26 substantial and imminent threat to the health or safety of the public.” (*Id.*, at 586 and 589.) This  
27 standard, the Court continued, “allows exceptions in certain essential areas of public employment  
28 (e.g., the prohibition against firefighters and law enforcement personnel) and also requires the  
courts to determine on a case-by-case basis whether the public interest overrides the basic right to

1 strike.” (*Id.*, at 586, emphasis supplied.) (Accord *City of San Jose v. Operating Engineers Local*  
2 *Union No. 3* (2010) 49 Cal.4th 597, 605 (“*City of San Jose*”) (citing *County Sanitation* vested the  
3 courts with jurisdiction to decide whether to allow or to prohibit a particular public employee  
4 strike.”).) In summary, a court may enjoin a public employee from striking only if it is clearly  
5 demonstrated that their absence from work creates a substantial and imminent threat to the health  
6 or safety of the public.

7 PERB has rejected an employer’s argument that any strikes at a health care institution  
8 pose an imminent threat to public health or safety. PERB instead held that whether a strike at a  
9 health care institution poses an imminent threat to public health or safety is to be determined on a  
10 case-by-case basis. (*Regents, supra*, Decision No. 2094-H, pp. 30-31.)

11 In *County of San Mateo* (2019) PERB Order No. IR-61-M, which also involved a public  
12 sector health care institution, PERB directed employers that seek to enjoin striking to implement  
13 “all possible service reductions and coverage options, including: (1) planning to use supervisors,  
14 managers, non-bargaining unit personnel, and bargaining unit employees that the union has  
15 exempted from the strike or who have affirmatively indicated that they plan to work during the  
16 strike; (2) contacting all companies or other entities potentially able to provide replacement  
17 employees or services, and contracting with such entities if they indicate they can provide  
18 replacements...” (*County of San Mateo* (2019) PERB Order No. IR-61-M, p. 8.)

19 UAPD provided the County fifteen (15) days advance notice of its unfair practice strike.  
20 This is five (5) days more advance notice than private sector health care employers are afforded  
21 under the National Labor Relations Act. The County had time to call its numerous retained  
22 private sector contractors to ask that they provide services during the strike. (*Id.*, p. 24.) The cost  
23 of the replacement services (contractors) the County will be required to use during the strike is  
24 irrelevant. “Pursuant to the *County Sanitation* standard, an employer is not entitled to an  
25 injunction merely because it would cost the employer a substantial amount of money to hire  
26 replacements.” (*Id.*, p. 25.) The County also had plenty of time to cancel non-emergency  
27 appointments and other County services (i.e., “canceling elective treatments, [and] decreasing  
28 patient census” during a strike). (*Id.*, p. 25.) Additionally, the County had time to “lessen []

1 impacts [of the strike] by authorizing weekday and weekend overtime work before and after the  
2 strike, including opening or performing certain operations during a weekend before and/or after a  
3 scheduled strike...” (*Id.*, p. 13, fn. 9.) Fifteen (15) days is more than enough time for the County  
4 to take all of these steps. ERCOM must demand the County present concrete proof it has  
5 exhausted each of the above-outlined alternatives prior to depriving UAPD members of their right  
6 to strike.

7           Additionally, ERCOM must consider that the parties have engaged in countless hours of  
8 line pass negotiations via Zoom continuously since December 14, 2023. UAPD is considering the  
9 County’s claims of essentiality in good faith and considering what bargaining unit employees to  
10 exempt from the strike.

11           The legal question for ERCOM is not whether UAPD called a strike in its bargaining  
12 units, which may include some employees who could be considered “essential,” but whether  
13 UAPD actually takes such employees out on strike. The line pass negotiations are proceeding  
14 productively and may result in a comprehensive agreement regarding line passes. If the parties  
15 agree to a comprehensive line pass agreement that addresses all employees in positions who meet  
16 the “essential employee” standard, there is no reasonable cause to believe UAPD is threatening an  
17 unfair practice with respect to those positions. (*San Mateo County Superior Court (2019) PERB*  
18 *Order No. 60-C, p. 5.*)

19           **C.       UAPD’S CHARGE SHOULD BE CONSOLIDATED WITH THE**  
20           **COUNTY’S CHARGE FOR PURPOSES OF HEARING AND DECISION**

21           UAPD submits this motion as the Respondent in Unfair Practice Case No. 018-23 and as  
22 the Charging Party in Unfair Practice Case No. 019-23. This is the second time UAPD has filed  
23 this motion.

24           In Unfair Practice Case No. 018-23, as an affirmative defense to the County’s pre-impasse  
25 strike cause of action, UAPD asserted its strike is not an unlawful pre-impasse strike but rather an  
26 unfair labor practice strike provoked by the County. (See Answer, filed December 19, 2023.)  
27 UAPD will be able to rebut any presumption that the strike is an unlawful pre-impasse strike.  
28

1 UAPD will offer extensive proof of the County's unfair practices and that those unfair practices  
2 provoked the UAPD unfair practice strike.

3 It would be repetitive and inefficient for the parties to litigate in two separate proceedings  
4 the issue of whether the UAPD strike was motivated in whole or in part by the County of Los  
5 Angeles's unfair practices. Likewise, it would be repetitive and inefficient for the parties to  
6 litigate in two separate proceedings the issue of whether the County of Los Angeles committed  
7 unfair practices that motivated the strike. Consolidated proceedings will help avoid unnecessary  
8 costs, delays and serve the interest of judicial economy and convenience.

9 **III. CONCLUSION**

10 For the foregoing reasons, UAPD requests that ERCOM find that the County has failed to  
11 state a *prima facie* violation of the MMBA or the Ordinance; and in the alternative, UAPD  
12 requests that the Commission consolidate the aforementioned unfair practice charges into one  
13 proceeding.

14 Dated: December 19, 2023

WEINBERG, ROGER & ROSENFELD  
A Professional Corporation

16   
17 \_\_\_\_\_  
KERIANNE R. STEELE

By:

Attorneys for Charging Party UNION OF  
AMERICAN PHYSICIANS AND DENTISTS

19 157588\1427464

1 **PROOF OF SERVICE**

2 I am a citizen of the United States and resident of the State of California. I am employed  
3 in the County of Alameda, State of California, in the office of a member of the bar of this Court,  
4 at whose direction the service was made. I am over the age of eighteen years and not a party to  
5 the within action.

6 On December 19, 2023, I served the following documents in the manner described below:

7 **UNION OF AMERICAN PHYSICIANS & DENTISTS’ BRIEF IN RESPONSE TO**  
8 **CHARGE; SECOND MOTION TO CONSOLIDATE**

- 9  (BY U.S. MAIL) I am personally and readily familiar with the business practice of  
10 Weinberg, Roger & Rosenfeld for collection and processing of correspondence for  
11 mailing with the United States Postal Service, and I caused such envelope(s) with  
12 postage thereon fully prepaid to be placed in the United States Postal Service at  
13 Emeryville, California.
- 14  (BY MESSENGER SERVICE) by consigning the document(s) to an authorized  
15 courier and/or process server for hand delivery on this date.
- 16  (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy  
17 through Weinberg, Roger & Rosenfeld’s electronic mail system from  
18 smizuhara@unioncounsel.net to the email addresses set forth below.
- 19  (BY PERSONAL DELIVERY) I caused such envelope to be delivered by hand to the  
20 offices of each addressee below.

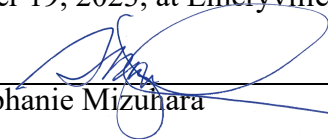
21 On the following part(ies) in this action:

22 Alexander Volberding  
23 Millicent Usoro  
24 Liebert Cassidy Whitmore  
25 6033 W. Century Blvd., 5th Floor  
26 Los Angeles, CA 90045  
27 avolberding@lcwlegal.com  
28 musoro@lcwlegal.com

Joshua Goodman  
Office of County Counsel  
500 West Temple Street, Suite 648  
Los Angeles, CA 90012  
JGoodman@counsel.lacounty.gov

Fesia Davenport, CEO  
County of Los Angeles  
500 West Temple Street, Room 358  
Los Angeles, CA 90012  
fdavenport@ceo.lacounty.gov

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 19, 2023, at Emeryville, California.

  
\_\_\_\_\_  
Stephanie Mizuhara