STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CARLOS E. PEREZ, Charging Party, v. LOS ANGELES COMMUNITY COLLEGE DISTRICT, Respondent.	Case No. LA-CE-5839-E PERB Decision No. 2404 December 24, 2014

Appearance: Orbach, Huff, Suarez & Henderson by Enrique M. Vassallo, Attorney, for Los Angeles Community College District.

Before Martinez, Chair; Huguenin and Banks, Members.

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Los Angeles Community College District (District) to a proposed decision (attached) by a PERB administrative law judge (ALJ). Charging Party Carlos E. Perez (Perez) filed an unfair practice charge on August 13, 2013, alleging that the District violated the Educational Employment Relations Act (EERA)[1] by:

(1) retaliating/discriminating against Perez because of his protected conduct; and

(2) interfering with the exercise of his protected rights.

By issuance of a partial dismissal letter on October 23, 2013, the Office of the General Counsel dismissed the retaliation/discrimination allegations. Perez did not appeal the partial dismissal. Also on October 23, 2013, the Office of the General Counsel issued an unfair practice complaint on the interference allegations. The complaint alleges that on

[1] EERA is codified at Government Code section 3540 et seq. All statutory references are to the Government Code unless otherwise stated.

February 18, 2013, the District issued Perez a letter, stamped "Confidential," advising him that effective February 19, 2013, Perez would be placed on paid administrative leave while the District initiated a fitness-for-duty examination. The letter advised Perez that: "You are hereby directed not to contact any members of the faculty, staff or students." The unfair practice complaint alleges that by this conduct, the District interfered with employee rights guaranteed by EERA section 3543.5, subdivision (a).[2]

An informal settlement conference was held on December 6, 2013, but the matter was not resolved. A formal hearing was held on March 18, 2014. The parties submitted closing briefs on May 19, 2014, at which point the record was closed and the matter submitted for decision. On June 16, 2014, the ALJ issued a proposed decision, concluding that the District's directive to Perez not to contact any members of the faculty, staff or students constituted unlawful interference with protected rights. On July 10, 2014, the District timely filed a statement of exceptions to the proposed decision. Perez did not file a response.

The Board has reviewed the pleadings and formal hearing record in its consideration of the issues raised on appeal by the District's statement of exceptions. Based on the Board's review, the Board has determined that the ALJ's findings of fact are adequately supported by the record as a whole. The Board also has determined that the ALJ's conclusions of law are

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[2] Section 3543.5, subdivision (a), provides:

> It is unlawful for a public school employer to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

well reasoned and in accordance with applicable law. Accordingly, the Board hereby affirms the proposed decision and adopts it as the decision of the Board itself, as supplemented by the Board's discussion of the District's exceptions herein.

PROPOSED DECISION

In response to Perez's argument in his closing brief that the District assigned him an incorrect number of classes, the ALJ determined that the allegations previously dismissed by the Office of the General Counsel could not be litigated at the formal hearing and that the criteria for considering unalleged violations had not been met.

The ALJ analyzed the two possible bases for an interference violation: (1) the District's placement of Perez on paid administrative leave pending completion of a fitness-for-duty examination; and (2) the District's directive that Perez not contact faculty, staff or students.

Regarding the District's directive not to contact faculty, staff or students, the ALJ found that the directive could reasonably be construed to prohibit a variety of protected activities such as contacting members of the union, initiating a grievance or otherwise enlisting the support of fellow employees. As found by the ALJ, the directive closely resembles the type of overbroad blanket employer rules prohibiting the discussion of employment conditions, which under both PERB precedent and private sector cases decided under the National Labor Relations Act (NLRA)[3] have been found to violate protected rights. As the ALJ concluded, the directive constitutes at least "slight harm."

Regarding the District's affirmative defense of operational necessity, the ALJ focused on the testimony of District Vice-President of Academic Affairs Dr. Dan Walden (Walden). Walden testified that Perez's conduct, i.e., his inappropriate communications with faculty and

[3] The NLRA is codified at 29 U.S.C. section 151 et seq.

students, played no role in the issuance of the directive. The ALJ rejected the District's argument that the directive, which the District admitted was boilerplate language used whenever an employee is placed on administrative leave, was necessary to prevent employees from tainting evidence gathered while an employee is on leave. As the ALJ stated, the District presented no evidence about its investigation. Nor did the District explain how the integrity of such an investigation could be jeopardized by Perez's participation in protected activities. Therefore, according to the ALJ, the "slight harm" to protected rights is not outweighed by the District's interest in using an overbroad directive without attempting to clarify its scope. Accordingly, the ALJ concluded that the District interfered with protected rights in violation of EERA section 3543.5, subdivision (a), by directing Perez not to contact faculty, staff or students.

Regarding the District's placement of Perez on paid administrative leave pending completion of a fitness-for-duty examination, the ALJ found no evidence supporting the conclusion that the order constituted "slight harm" to protected rights. Moreover, the ALJ concluded that the District had substantial justification for placing Perez on administrative leave and requiring a fitness for-duty-examination. As the ALJ stated, "it is concluded that [the District's] interest in protecting its educational program was a legitimate operational reason for removing [Perez] from the classroom and taking steps to evaluate his fitness to teach" notwithstanding any "slight harm" to protected rights. Accordingly, the ALJ concluded that the District did not interfere with protected rights in violation of EERA, section 3543.5, subdivision (a), by placing Perez on administrative leave pending completion of a fitness-for-duty examination.

DISCUSSSION

The District excepts to pages 12-16 of the proposed decision containing the ALJ's conclusions of law regarding whether the District interfered with protected rights by directing Perez not to contact faculty, staff or students while on administrative leave. Neither party excepted to the ALJ's factual findings; the ALJ's determination of the applicable legal standard ("slight harm") for analyzing Perez's interference claims; the ALJ's legal conclusions regarding class assignment allegations raised in Perez's closing brief, which had been previously dismissed by the Office of the General Counsel; the ALJ's legal conclusions regarding the issue whether the District interfered with protected rights by placing Perez on administrative leave pending completion of a fitness-for-duty evaluation; or the ALJ's remedy ordering the District to rescind the directive not to contact faculty, staff or students, and cease and desist from interfering with protected rights in the future.

Before turning to the District's exceptions, a brief review of the applicable legal principles follows. EERA section 3543 protects public school employees' right to "form, join, and participate in the activities of employee organizations" in matters concerning employer-employee relations. PERB's interference test does not require evidence of unlawful motive, only that at least "slight harm" to employee rights results. (*Simi Valley Unified School District* (2004) PERB Decision No. 1714, p. 17.) To establish a prima facie case, the charging party must demonstrate that the employer's conduct tends to *or* does result in harm to employee rights. (*Carlsbad Unified School District* (1979) PERB Decision No. 89 (*Carlsbad*).) If the prima facie case is established, PERB balances the degree of harm to protected rights against any legitimate business interest asserted by the employer. (*Hilmar Unified School District* (2004) PERB Decision No. 1725, p. 16, citing *Carlsbad, supra,* at pp. 10-11.) "Where the harm is slight, the Board will entertain a defense of operational necessity and then balance the competing

interests." (*Ibid.*) "Where the harm is inherently destructive [of protected rights], the employer must show the interference was caused by circumstances beyond its control." (*Ibid.*)

In the area of employer rules and directives, PERB does not look favorably on broad, vague directives that might chill lawful speech or other protected conduct. (*State of California (Employment Development Department)* (2001) PERB Decision No. 1365a-S, p. 10 (*EDD*).) For example, in *EDD*, an employer's memorandum prohibiting organizational activity "during state time or inside the building" (in which the EDD office was located) was found to be overbroad in that it appeared to prohibit communication among employees during non-work times and/or in non-work areas.

Similar to PERB's analysis, in determining whether a work rule violates section 8(a)(1) of the NLRA, the National Labor Relations Board (NLRB) asks whether the employer rule would tend to chill employees in the exercise of their section 7 rights. (*Lafayette Park Hotel* (1998) 326 NLRB 824, 825, enfd. (D.C. Cir. 1999) 203 F.3d 52.) If the rule explicitly restricts section 7 rights, it is unlawful. (*Lutheran Heritage Village-Livonia* (2004) 343 NLRB 646, 646.) If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." (*Id.* at p. 647.) In any of these circumstances, the employer rule will be found unlawful unless the employer establishes a legitimate and substantial business justification for the rule that outweighs the infringement on protected rights.

Cases decided under the NLRA have similarly found that blanket rules prohibiting discussion of employment conditions violate protected rights. (*Flex Frac Logistics, LLC and Silver Eagle Logistics, LLC, Joint Employers and Kathy Lopez* (2012) 358 NLRB No. 127 [employer interfered with protected rights by maintaining an overly broad confidentiality

rule].) "[E]mployees should not have to decide at their own peril what information is not lawfully subject to such a prohibition." (*Hyundai America Shipping Agency, Inc.* (2011) 357 NLRB No. 80, slip op. at p. 12; *Flex Frac Logistics, LLC and Silver Eagle Logistics, LLC, Joint Employers and Kathy Lopez, supra,* 358 NLRB No. 127 [nothing about the employer rule would reasonably indicate to employees that its prohibitions are limited].) As the NLRB stated, "Board law is settled that ambiguous employer rules – rules that reasonably could be read to have a coercive meaning – are construed against the employer." (*Id.,* slip op. at p. 2.) The NLRB goes on to explain:

> This principle follows from the Act's goal of preventing employees from being chilled in the exercise of their Section 7 rights – whether or not that is the intent of the employer – instead of waiting until that chill is manifest, when the Board must undertake the difficult task of dispelling it.

(*Ibid.*)

Relevant to the facts here, the NLRB specifically addressed employer prohibitions on employee discussion of ongoing investigations. In *Banner Health System* (2012) 358 NLRB No. 93, slip op. at p. 2, the NLRB held:

> To justify a prohibition on employee discussion of ongoing investigations, an employer must show that it has a legitimate business justification that outweighs employees' Section 7 rights. See *Hyundai America Shipping Agency*, 357 NLRB No. 80, slip op. at 15 (2011) (no legitimate and substantial justification where employer routinely prohibited employees from discussing matters under investigation). In this case, the judge found that the Respondent's prohibition was justified by its concern with protecting the integrity of its investigations. Contrary to the judge, we find that the Respondent's generalized concern with protecting the integrity of its investigations is insufficient to outweigh employees' Section 7 rights. Rather, in order to minimize the impact on Section 7 rights, it was the Respondent's burden "to first determine whether in any give[n] investigation witnesses need[ed] protection, evidence [was] in danger of being destroyed, testimony [was] in danger of being fabricated, or there [was] a need to prevent a cover up." *Id.* The Respondent's blanket approach

> clearly failed to meet those requirements. Accordingly, we find that the Respondent, by maintaining and applying a rule prohibiting employees from discussing ongoing investigations of employee misconduct, violated Section 8(a)(1) of the Act.

The law does not require that a rule contain a direct or specific threat of discipline in order to be found unlawful. (*Banner Health System, supra,* 358 NLRB No. 93, slip op. at p. 2 [manager's request that employee making a complaint not discuss matter with coworkers while the employer's investigation was ongoing interfered with protected rights even though request contained no express threat of discipline for violation of the rule]; *Westside Community Health Center* (1999) 327 NLRB 661, 666 [supervisor's instruction to employees not to discuss their discipline found unlawful restraint on protected rights even though the instruction contained no explicit threat of a penalty].)

Cases decided under the NLRA consistently emphasize that central to the section 7 protections under the NLRA is the employee's right to communicate with coworkers about wages, hours and other terms and conditions of employment. And, an employer rule prohibiting section 7 activity violates the law even if it never has been enforced. (*Franklin Iron & Medal Corp.* (1994) 315 NLRB 819, 820.) EERA section 3543 protects public school employees' right to "form, join, and participate in the activities of employee organizations" in matters concerning employer-employee relations. If employees are prohibited from discussing wages, hours and working conditions at the workplace, they are less equipped to make a free and informed choice about whether to exercise their right under EERA section 3543 to form, join or participate in a union.

The District makes a variety of arguments in support of its exception to the ALJ's conclusion that its directive to Perez not to contact faculty, staff or students interfered with protected rights. The District asserts that the directive would not reasonably be construed to

encompass protected activities because the directive was not given in response to any protected activity in which Perez had previously engaged. To prove interference, a charging party need not establish that the rule was promulgated in response to protected activity. The relevant question is whether the employer rule *would tend to chill* employees in the exercise of their protected rights. (*Lutheran Heritage Village-Livonia, supra,* 343 NLRB 646.) Here, as the ALJ determined, the directive not to contact faculty, staff or students would reasonably be construed to prohibit Perez from participating in a variety of protected activities including discussing his working conditions with his coworkers or union, or initiating a grievance. The District asserts that Perez was not precluded from contacting his union and that in fact, his union was copied on the letter containing the directive. That the union was copied on the letter, however, does not convey a sufficiently clear message that the District, in issuing the directive, did not intend to intrude on protected rights. The letter was stamped "confidential," which reasonably would be construed to prohibit *any* discussion of the matter. Any ambiguity in the directive's meaning is construed against the District as the promulgator of the directive.

The District argues that the directive could not constitute the basis for an interference violation because it was given in a non-disciplinary context and did not threaten any discipline or other consequence for failure to comply. We agree with cases decided under the NLRA that reject the notion that an employer rule must contain a direct or specific threat of discipline in order to be found unlawful. First, employees need not be specifically instructed that failure to follow orders may have consequences affecting the employer-employee relationship. Insubordination is a commonly understood ground for discipline. Moreover, the law does not differentiate between disciplinary and non-disciplinary matters in requiring that employer rules not intrude on protected employee rights. As this case illustrates, non-disciplinary actions taken by an employer, such as initiating a fitness-for-duty examination, may have significant

potential for affecting, and possibly terminating, an employment relationship, depending on the outcome of that process.

The District next argues that nothing in the directive precluded Perez from engaging in "specific" protected activities. The District's point is well-taken. If the directive had explicitly restricted employee rights, it would have been unlawful on its face. (*Lutheran Heritage Village-Livonia, supra,* 343 NLRB 646, 646.) That, however, is not the end of the inquiry. A violation may also be found if employees would reasonably construe the language to prohibit protected activity. (*Id.* at p. 647.) As stated above, we agree with the ALJ's conclusion on this issue. The directive was overbroad and would reasonably be construed to prohibit protected activity. Employees such as Perez should not have to decide at their peril what conduct is not lawfully subject to the broad prohibition contained in the directive.

The District argues that the ALJ's own conclusions of law do not support a violation. The District cites to the ALJ's conclusion that the District proved that it had a substantial justification for placing Perez on administrative leave and requiring that he undergo a fitness-for-duty examination process. The District also cites to the ALJ's statements in support of this conclusion that there was no evidence that Perez lacked access to the union or other opportunities for engaging in protected activities after the directive was given or that Perez's ability to pursue claims against the District was harmed. These statements in the proposed decision were made in support of the conclusion on the issue of whether the District interfered with protected rights by placing Perez on administrative leave and requiring him to undergo a fitness-for-duty examination. The ALJ analyzed this question separately from the question of whether the District interfered with protected rights by prohibiting contact with faculty, staff or students. That the ALJ concluded that the District's placement of Perez on administrative leave pending a fitness-for-duty examination did not constitute interference does not disturb

the different conclusion reached by the ALJ regarding the District's directive prohibiting contact with others. Given that the District's placement of Perez on administrative leave pending completion of a fitness-for-duty examination and the District's directive to Perez not to contact faculty, staff or students are contained in the same letter, the proposed decision makes clear that the interference violation is found only in the directive, and not in the actions taken by the District in connection with the directive.

The District argues that the cases relied on by the ALJ, such as *EDD, supra,* PERB Decision No. 1365a-S and *Medeco Sec. Locks v. NLRB* (4th Cir. 1998) 142 F.3d 733 (*Medeco*),[4] are inapposite[5] because the directives in those cases, unlike the directive here, expressly restricted protected activities, expressly threatened discipline, were issued in

[4] In distinguishing *Medeco*, the District argues that unlike the employee in that case, Perez understood the directive not to preclude him from communicating with his union. That, however, is not what the ALJ found. The ALJ found that Perez continued to contact the union. The two are not equivalent. As the Board stated in *Clovis Unified School District* (1984) PERB Decision No. 389, "the finding that Fugman's comments reasonably tended to coerce Klein does not require evidence that Klein actually felt threatened or intimidated, or was in fact discouraged from participating in Association activities as a result of the meeting." Moreover, as the proposed decision states, "[e]ven if one assumed that he or she could still contact AFT, the directive would still prohibit other protected activities not involving AFT." (Proposed decision, p. 14.)

[5] *Sierra Joint Community College District* (1983) PERB Decision No. 345 (*Sierra*), also cited in the proposed decision, concerned a college district bylaw containing a blanket reservation of the right to consider organizational submissions either through the collective bargaining process or at a regular public meeting. The Board held that the blanket bylaw exceeded the college district's authority to regulate presentations. The District argues that, by contrast, the instant case does not "even remotely" involve the number of rights interfered with by the college district in *Sierra*, does not concern organizational submissions or public presentations, and does not involve an excess in the exercise of authority by the District. The first two distinctions are not material to the outcome of this case, as the underlying legal principles are applicable notwithstanding these factual distinctions. Moreover, there is no more fundamental right afforded employees under the statutory scheme than the right to communicate with others about working conditions. The third distinction begs the question. By this decision, the Board has determined that issuance of the directive not to contact faculty, staff or students exceeded the District's authority under EERA.

response to a protected activity previously engaged in or were not issued in the context of a non-disciplinary setting. For all the reasons previously stated, an interference violation based on an overbroad and ambiguous employer rule that is not justified by a legitimate operational necessity may be found to exist notwithstanding the absence of any or all of these factors. When evaluating whether a blanket prohibition on communicating with others during an investigation interferes with protected employee rights, consideration of context is important and a fair reading of the language is required. Here, the language is absolute and broad, and contains no clarifiers. It was issued in the context of a process that could have serious consequences for the employer-employee relationship. Giving the directive a reasonable meaning, considering it in the context in which it was given, and construing any ambiguity against the employer as the promulgator of the rule, the directive would reasonably be construed to bar Perez from discussing his concerns about working conditions, which would thereby cause him to refrain from engaging in protected conduct.

CONCLUSION

It is fundamental that employees have the right to discuss their working conditions amongst themselves. The District's directive infringes on employees' protected rights by prohibiting Perez from contacting faculty, staff or students in connection with the actions taken by the District against Perez and its ongoing investigation. The scope of the directive is overbroad and vague in that the directive fails to define the specific conduct it sought to prohibit in a clear manner. And, at no time did the District clarify that protected communications were excluded from its scope.[6] By failing to delineate which communications

[6] In *Family Foods, Inc.* (1990) 300 NLRB 649, the NLRB found that an employer rule prohibiting in-house solicitations during "company time" was impermissibly overbroad, but concluded that there was no interference violation because the company later clarified what it meant.

are lawful or unlawful, the directive would reasonably be construed to mean that all communications, including those made while engaging in protected activity, are prohibited.

In circumstances not present here, the employer may have the right to demand confidentiality of its investigation. (See *Caesar's Palace* (2001) 336 NLRB 271 [confidentiality rule prohibiting employees from discussing ongoing drug investigation constituted legitimate business justification for intruding on employees' exercise of protected rights]; but see *Phoenix Transit Systems* (2002) 337 NLRB 510 [confidentiality rule prohibiting employees from discussing sexual harassment complaints after investigation concluded did not constitute legitimate business justification].) The burden, however, is squarely on the employer to demonstrate that a legitimate justification exists for a rule that adversely impacts employees' protected rights. Here, it is undisputed that employees placed on administrative leave routinely are directed not to talk to others about the substance of the investigation without any determination by the District whether such confidentiality is necessary. The District offers no explanation as to why the directive was necessary to preserve the integrity of the District's investigation. Under these facts, the District has not established its affirmative defense based on operational necessity.

ORDER

Based on the findings of fact and conclusions of law, and the entire record in this case, it is found that the Los Angeles Community College District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5, subdivision (a), by issuing Carlos E. Perez (Perez) a directive to not "contact any members of the faculty, staff or students."

Pursuant to Government Code section 3541.5, subdivision (c), it hereby is ORDERED that the District, its governing board, administrators and representatives shall:

A. CEASE AND DESIST FROM:

1. Interfering with Perez's protected rights.

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

1. Rescind or remove the directive contained in the District's February 18, 2013, letter that Perez not "contact any members of the faculty, staff or students."

2. Within ten (10) workdays following the date this decision, post at all work locations where notices to faculty employees in the District customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on Perez.

Members Huguenin and Banks joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. LA-CE-5839-E, *Carlos E. Perez v. Los Angeles Community College District*, in which all parties had the right to participate, it has been found that the Los Angeles Community College District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq. by issuing Carlos E. Perez (Perez) a directive to not "contact any members of the faculty, staff or students."

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

A. CEASE AND DESIST FROM:

Interfering with Perez's protected rights.

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

Rescind or remove the directive contained in the District's February 18, 2013, letter that Perez not "contact any members of the faculty, staff or students."

Dated: _____

LOS ANGELES COMMUNITY COLLEGE DISTRICT

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CARLOS E. PEREZ, Charging Party, v. LOS ANGELES COMMUNITY COLLEGE DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-5839-E PROPOSED DECISION (06/16/2014)

Appearances: Carlos E. Perez, on his own behalf; Orbach, Huff, Suarez & Henderson, LLP, by Enrique M. Vassallo, for Los Angeles Community College District.

Before Eric J. Cu, Administrative Law Judge.

PROCEDURAL HISTORY

In this case a public school employee alleges that his public school employer interfered with rights protected under the Educational Employment Relations Act (EERA).[1] The employer denies any violation.

On August 13, 2013, Carlos E. Perez filed the instant unfair practice charge with Public Employment Relations Board (PERB or Board), alleging that the Los Angeles Community College District (LACCD) committed multiple violations, including conduct occurring before February 13, 2013, breach of contract claims, and violations of different statutes that PERB does not enforce. On October 23, 2013, the PERB Office of the General Counsel issued a complaint alleging that LACCD interfered with Perez's EERA rights by issuing him a letter on February 18, 2013, placing him on paid administrative leave, requiring a fitness for duty examination, and including the statement: "You are hereby directed not to contact any members of the faculty, staff or students." All other allegations were dismissed by separate

[1] EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all other statutory references are to the Government Code.

letter on the same date. Perez did not timely appeal the partial dismissal. LACCD filed an answer to the PERB complaint on November 12, 2013, admitting that it sent the February 18, 2013 letter, but denying that it violated EERA.

An informal settlement conference was held on December 6, 2013, but the matter did not settle. A formal hearing was held on March 18, 2014. At the end of Perez's case in chief, LACCD made a motion for non-suit claiming that Perez failed to establish a prima facie case. That motion was taken under submission and is now denied partly because it is moot and partly because it is unpersuasive on the merits based on the conclusions in this proposed decision.

The parties submitted closing briefs on May 19, 2014. At that point, the record was closed and the matter was submitted for decision.

FINDINGS OF FACT

The Parties

LACCD is a public school employer within the meaning of EERA section 3540.1(k). LACCD has nine campuses, including Los Angeles City College (L.A. City College). At all times relevant to this case, Perez was a public school employee within the meaning of EERA section 3540.1(j), and worked at L.A. City College as an adjunct faculty member. That position, among others, is part of a bargaining unit whose interests are represented by American Federation of Teachers, Chapter 1521 (AFT).

The Agreement Between LACCD and AFT

At all times relevant to this case, LACCD and AFT were parties to a negotiated agreement (Agreement) covering certain terms and conditions of employment for LACCD faculty. That Agreement contained provisions covering adjunct faculty seniority and an employee grievance procedure.

Perez's Employment With LACCD

Perez began working for LACCD as an adjunct electronics instructor at L.A. City College in 2008. He was initially assigned to teach one three-hour class. In or around 2010, LACCD assigned him a second three-hour class. That year, Vice Chair of the Computer Technology and Electronics Department Mike Yazdanian[2] wrote Perez a letter of recommendation, praising his teaching and work ethic.

Starting in 2011, LACCD assigned Perez only one three-hour class over Perez's objection. It appears from the record that Yazdanian played some role in that decision. Perez believed that this change violated the Agreement, but he did not file a grievance over the matter. Instead, on or around July 2011, Perez met with L.A. City College Dean of Academic Affairs Dr. Thelma Day in what she described as "a good meeting." Day did not agree to assign Perez an additional class but told him that she was there to support him.

Perez's Communications With Yazdanian

In around February 2012 Perez began sending Yazdanian e-mail messages with provocative language. Examples of Perez's comments to Yazdanian included: (1) "Your financial strangulation on me has greatly contributed to deteriorate[ing] my health." ; and (2) "Tell me Mike when you decided (as you claim) to reduce[] my salary by 47%, did you do it with the purpose of deteriorating my health?" Yazdanian reported the matter to Day who unsuccessfully tried to meet with Perez.

The July 2012 Directives

On or around July 10, 2012, Perez sent an e-mail message to then L.A. City College President Dr. Jamillah Moore as well as several LACCD faculty members and administrators. According to Day, Perez sent the same e-mail message to those recipients several times during

[2] Yazdanian was sometimes referred to in the record as Mahmood Yazdanian.

the course of a single day. In the message, Perez accused Yazdanian and Computer Technology and Electronics Department Chair Roger Wolf of intentionally harming him financially. Perez also listed some aspects of his personal economic situation, including deteriorated health, needing to search through trashcans, defaulting on certain accounts, and general pain and suffering.

On July 16, 2012, Day and L.A. City College Vice President of Academic Affairs Dr. Dan Walden jointly authored a letter expressing concern about the tone of Perez's e-mail messages and directing him to communicate with Day over the issue of his class assignments. The letter was delivered to Perez during a meeting with both Walden and Day. An AFT representative also attended on Perez's behalf.

Perez's February 2013 Course Materials

Perez was again assigned only one class for the Spring 2013 semester which started in early February 2013. Perez's class related to electronics theory. During the class session, on or around February 12, 2013, Perez wrote comments about his personnel issues with LACCD on his classroom whiteboard, including: (1) "Reduced Perez's salary by 50%;" (2) "A lot of Pain & Suffering in Perez's family;" (3) "Perez can't provide for his family;" and (4) "You got a 3rd World Country education."

Perez also distributed a take-home exam to his students with multiple choice questions relating to his personnel dispute and other critical commentary about LACCD. The following is a representative sample of those questions:

> 3. The educated minds of Roger Wolf and Mike Yazdanian have contributed $____ of your tax dollars to your Science of Electronics 101 course book. He couldn't care less about you the student.
>
> a. 0
> b. -1

[¶ . . . ¶]

7. The educated minds of Roger Wolf and Mike Yazdanian have reduced your Science of Electronics 101 professor by fifty percent[.]

a. true
b. false

[¶ . . . ¶]

8. The educated minds of Roger Wolf and Mike Yazdanian have been economically strangulating your Science of Electronics 101 professor for two and a half years to make sure

a. Professor's cannot provide food, cloth and shelter to his family
b. All Professor's accounts are in default
c. Professor stands in line for a bag of food
d. All of the above

[¶ . . . ¶]

18. The educated minds of Thelma Day, Dan Walden and Paul Carlson[3] violated ____ your Science of Electronics 101 professor when he asked for help.

a. Federal Law title VII of the Civil Rights Act of 1964
b. California Law Education code Section 87160-87164 and California labor code section 232.5
c. Article 5 of the 2011-2014 contract agreement between LACCD and AFT
d. First Amendment of the U.S. Constitution – Censorship
e. All of the above

Perez admitted during the hearing that the first 21 questions of his exam did not pertain to the curriculum of his assigned course. Day, who approves curriculum for Perez's department, concurred that neither the material from the whiteboard nor the first 21 questions from Perez's exam pertained to Perez's electronics class. The remaining 79 questions appear to be more germane to his class. Each question on the exam was worth one point.

[3] Carlson was never identified for the record.

Day said that students complained about Perez's conduct. Copies of the exam were given to LACCD administration. According to Day, students also claimed that Perez distributed copies of a document on legal pleading paper accusing LACCD of violating the Agreement, and various laws (other than EERA). Perez denied presenting the pleading document to his students. None of Perez's students testified.

The February 18, 2013 Letter

Day and Walden discussed Perez's conduct with L.A. City College Interim President Dr. Renee Martinez.[4] Day and Walden testified that they were concerned with Perez's behaviors. Walden said he "wanted to make sure he was of sound mind" and to "give him a chance to see if perhaps he needed some help." The three decided that Perez should be required to take a fitness-for-duty examination based on his 2012 e-mail conduct, meetings held with Perez, and his recent conduct in the classroom. LACCD has a policy concerning "Special Health Examinations." That policy states:

> An employee may be required to report for a health examination when, in the judgment of his/her College President, there is evidence that such an examination is warranted.

That policy applies to all LACCD personnel. There are no provisions in the Agreement covering fitness-for-duty examinations.

Day, Martinez, and Walden collaborated on a letter placing Perez on paid-administrative leave and informing him of the need for a fitness-for-duty examination. The final version of the letter was dated February 18, 2013 and issued under Martinez's signature. The letter also stated that the LACCD would work "in collaboration with AFT and the appropriate Los Angeles City College personnel [to] conduct the fitness for duty examination."

[4] Although not clear from the record, it appears as though Martinez replaced Moore in her role as president of L.A. City College during the Spring 2013 semester.

Neither administrative leave nor fitness-for-duty exams are considered part of LACCD's formal discipline process. The final paragraph of the letter stated:

> You are hereby directed not to contact any members of the faculty, staff or students. If you have any questions during the time that you are on leave, please contact Dr. Dan Walden[.]

Both Walden and Day described the final paragraph of the letter as "boilerplate" in the sense that LACCD used the same language when placing other employees on administrative leave. Walden said that the purpose of the directive was to prevent employees from tainting evidence gathered while the employee is on leave. Walden unequivocally said that the only reason for the directive was because it was the "standard process" in all administrative leave orders. He also said that the "instruction had to do with him being put on administrative leave, not by his behavior." No one from AFT ever complained about LACCD's use of the that directive.

On February 19, 2013, Day and another administrator went to Perez's classroom around 5:30 p.m., shortly before the start of his class. They found Perez alone in the room with all the lights off. Perez was informed of the decision to place him on paid administrative leave as well as the need for fitness-for-duty examination. Perez was also given a copy of the February 18, 2013 letter. Perez then left the campus, followed by campus police. A copy of the letter was subsequently given to AFT.

Perez did not seek clarification of any portion of the letter. Perez testified that he continued to contact representatives from AFT after receiving the letter. He also said he continued to file contract-based grievances and other types of complaints against LACCD. No one from LACCD clarified or explained any of the directives contained in the letter.

Day said that LACCD deactivates the district e-mail account of any employee on administrative leave. She said she believed Perez's account was deactivated in February 2013, but did not know the specific date.[5]

ISSUES

1. Should PERB consider Perez's claims not alleged in the PERB complaint?

2. Did LACCD interfere with Perez's EERA-protected rights?

CONCLUSIONS OF LAW

1. Perez's Unalleged Violations

Paragraph 3 of the PERB complaint states:

> On or about February 18, 2013, Respondent's agent, Interim President Renee Martinez, issued Charging party a "confidential" letter advising that effective February 19, 2013, Charging Party would be placed on administrative leave while the Respondent initiated "a request [for] fitness for duty examination" and that "*You are hereby directed not to contact any members of the faculty, staff* or students." [italics added.]

The PERB complaint alleges that the issuance of that letter interfered with Perez's protected rights in violation of EERA section 3543.5(a). In addition to that claim, Perez also alleges in his closing brief that LACCD assigned him the incorrect number of classes starting as early as 2010 and continuing into the Spring 2013 semester, which started in early February.[6]

PERB's General Counsel's Office informed Perez in letters dated October 8 and 23, 2013, that EERA claims generally have a six-month statute of limitations period. The General Counsel's Office calculated that statute of limitations period using the date Perez filed his unfair practice charge, August 13, 2013, and concluded that "any allegations of conduct that

[5] Perez suggested through his questions during his cross-examination of Day that his district e-mail account was disabled in 2012. However, he was not testifying as a witness at the time and no witness confirmed that his account was inactive at any point in 2012.

[6] The exact start date of the Spring 2013 semester was not disclosed for the record, but it is undisputed that Perez conducted at least one class by February 12, 2013.

occurred before February 13, 2013, are untimely. The allegations of improprieties that occurred before February 13, 2013 must, therefore, be dismissed as untimely." The General Counsel's Office explained to Perez that he had the right to appeal that determination to the PERB Board in accordance with PERB Regulation 32635(a).[7] To date, Perez has not filed any timely appeal of the General Counsel's determinations and has not provided any basis for considering these allegations again at this stage notwithstanding his failure to appeal. Under similar circumstances, PERB found that it would prejudice the respondent to allow a charging party to litigate at hearing claims that were previously dismissed by the General Counsel's Office and not appealed. (*Los Angeles Unified School District* (1988) PERB Decision No. 659, pp. 3-4 (*LAUSD*).)

Moreover, because the issues relating to Perez's class assignments were not described in the PERB complaint, PERB may only consider these "unalleged violations" when the following criteria are met:

> (1) [A]dequate notice and opportunity to defend has been provided the respondent; (2) the acts are intimately related to the subject matter of the complaint and are part of the same course of conduct; (3) the unalleged violation has been fully litigated; and (4) the parties have had the opportunity to examine and be cross-examined on the issue.

(*Lake Elsinore Unified School District* (2012) PERB Decision No. 2241, p. 8 (*Lake Elsinore USD*), citing *County of Riverside* (2010) PERB Decision No. 2097-M; *Fresno County Superior Court* (2008) PERB Decision No. 1942-C; *Tahoe-Truckee Unified School District* (1988) PERB Decision No. 668.) The unalleged violation must also have occurred within the applicable statute of limitations period. (*Lake Elsinore USD, supra*, at p. 9, citing *Fresno County Superior Court*.)

[7] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

In *Lake Elsinore USD, supra*, PERB Decision No. 2241, the Board declined to consider whether an employer took adverse action against an employee for protected conduct not described in the PERB complaint. (*Id.* at pp. 9-10.) The Board concluded that the employer had insufficient notice of the new allegations and therefore lacked the opportunity to mount a proper defense. (*Ibid.*) In contrast, in *County of Riverside, supra*, PERB Decision No. 2097-M, the Board found it appropriate to consider claims based on a theory not articulated in the PERB complaint where both parties clearly understood the actual issues in the case and litigated the case accordingly. (*Id.* at pp. 6-7.)

In this case, the standards for considering Perez's previously unalleged violations are not met. LACCD was not given sufficient prior notice that Perez would be litigating the class assignment issue. Those assignments are only tangentially related to the issuance of the February 18, 2013 letter described in the PERB complaint. Neither party called any witnesses involved in making those allegedly erroneous assignments. The thrust of Perez's class assignment claims appears to be that LACCD violated the Agreement. However, PERB lacks jurisdiction to enforce agreements or adjudicate contract disputes unless that same conduct also violates EERA. (*United Teachers of Los Angeles (DePace)* (2008) PERB Decision No. 1964, warning letter, p. 4.) Perez has not alleged or established how LACCD's class assignments violated EERA. Furthermore, claims relating to those assignments are untimely. For all these reasons, Perez's previously unalleged violations will not be considered further.[8]

[8] Perez's assignment claims are also based, in part, on facts that are not part of the evidentiary record in this case.

2. Interference Claim

The PERB complaint alleges that the issuance of the February 18, 2013 letter interfered with Perez's protected rights. EERA section 3543 protects public school employees' right to "form, join, and participate in the activities of employee organizations" in matters concerning employer-employee relations. PERB's interference test does not require evidence of unlawful motive, only that at least "slight harm" to employee rights results. (*Simi Valley Unified School District* (2004) PERB Decision No. 1714, p. 17 (*Simi Valley USD*).) The Board described the prima facie standard as follows:

> [I]n order to establish a prima facie case of unlawful interference, the charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under EERA.

(*Ibid.*, quoting *State of California (Department of Developmental Services)* (1983) PERB Decision No. 344-S; *Carlsbad Unified School District* (1979) PERB Decision No. 89, p. 10 (*Carlsbad USD*).) PERB examines whether the respondent's actions "'reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.'" (*Clovis Unified School District* (1984) PERB Decision No. 389, pp. 14-15 (*Clovis USD*), quoting *NLRB v. Triangle Publications* (3d Cir. 1974) 500 F.2d 597, p. 598.) That "'no one was in fact coerced or intimidated is of no relevance.'" (*Ibid.*) PERB considers the totality of the circumstances when making these determinations. (*Los Angeles Community College District* (1989) PERB Decision No. 748, proposed decision, p. 16.)

If a prima facie case is established, then PERB balances the degree of harm to protected rights against the employer's asserted interests. (*Hilmar Unified School District* (2004) PERB Decision No. 1725, pp. 16, citing *Carlsbad USD, supra*, PERB Decision No. 89 at pp. 10-11.) "Where the harm is slight, the Board will entertain a defense of operational necessity and then balance the competing interests." (*Ibid.*) On the other hand, "[w]here the harm is inherently

destructive [of protected rights], the employer must show the interference was caused by circumstances beyond its control." (*Ibid.*) The employer bears the burden of proving the necessity of its actions. (*Simi Valley USD, supra*, PERB Decision No. 1714, pp. 17-18, citing *Carlsbad USD.*)

In the present case, the PERB complaint emphasizes the directive in the February 18, 2013 letter that Perez not contact any faculty, staff, or students. The PERB complaint also references LACCD's order placing Perez on administrative leave until he completed a fitness for duty examination. This proposed decision will address each of those issues separately.

A. Directive Not to Contact Faculty and Staff

In general, PERB does not look favorably upon broad, vague, directives that might chill lawful speech or other protected conduct. In *State of California (Employment Development Department)* (2001) PERB Decision No. 1365a-S (*EDD*), PERB held that an office manager's memorandum prohibiting organizational activity "during state time or inside the building" interfered with protected rights because the terms used were ambiguous and overbroad. (*Id.* at p. 10.) The Board concluded that a reasonable interpretation of the memorandum could preclude lawful types of union activity such as meetings or demonstrations during employee breaks in non-work areas of the building. (*Ibid.*)

In *Sierra Joint Community College District* (1983) PERB Decision No. 345, the Board reviewed a school district's public meeting bylaw giving the district sole discretion to decide whether the union could discuss negotiable subjects either at the bargaining table or during a public governing board meeting. (*Id.* at p. 9.) The Board found that the broad rule harmed the charging party union's right to decide for itself the manner in which it raised issues within the scope of representation. (*Id.* at pp. 16-17.)

Cases decided under the National Labor Relations Act have similarly found that "blanket rules prohibiting the discussion of employment conditions" violated protected rights. (*Medeco Security Locks, Inc. v. NLRB* (4th Cir. 1998) 142 F.3d 733 (*Medeco*), p. 746, citations omitted.) For example, an employer's "confidentiality statement" preventing an employee from discussing orders to retake an engineering exam and transfer to a different work location interfered with employees' rights. (*Ibid.*; see also *Kinder-Care Learning Centers, Inc.* (1990) 299 NLRB 1171, p. 1172 [holding that a rule prohibiting employees from discussing "terms and conditions of employment" with parents interfered with employee rights].)

An employer may clarify an otherwise problematic directive and cure any unlawful interference. For example, in *Family Foods, Inc.* 300 NLRB 649, the National Labor Relations Board found that a store manager's instruction prohibiting a union organizer from soliciting union support "on company time" was not unlawful because the manager shortly afterwards clarified that the directive only applied when both the organizer and the employees she spoke with were supposed to be working. (*Id.* at p. 663.)

The directive in this case closely resembles the cases involving broad restrictions on protected activity. As in *EDD*, *supra*, PERB Decision No. 1365a-S and *Medeco*, *supra*, 142 F.3d 733, LACCD's directive prohibiting Perez from contacting faculty, staff, or students could reasonably encompass a variety of protected activities, including contacting employee members of AFT, initiating a grievance, and otherwise enlisting the support of fellow employees. As in those cases, the directive in this case did not include any qualifiers or exceptions for protected activity. Unlike in *Family Foods, Inc.*, *supra*, 300 NLRB 649, no one from LACCD later clarified or affirmed Perez's right to engage in protected activities in the face of the February 18, 2013 directive. Walden contended during the hearing that he did not view the directive as precluding Perez from contacting AFT because any AFT representatives Perez met with would

not be acting as "employees" at the time. But no one from LACCD ever conveyed that interpretation of the directive to Perez.

It is true, as LACCD points out, that the February 18, 2013 letter states that AFT will play some unspecified role in Perez's fitness-for-duty examination. LACCD appears to contend that no reasonable person would conclude under the circumstances that the directive to not contact others also applied to AFT representatives. As a corollary argument, LACCD contends that Perez was not actually deterred from contacting AFT or exercising other protected rights. Both these positions are unpersuasive. As explained above, nothing in the letter affirms Perez's protected right to contact employee members of AFT or communicate with other employees on protected subjects. The reference to AFT in the letter, at best, creates ambiguity as to the limits on Perez's right to contact others. Such ambiguity, without clarification, causes at least "slight harm" to Perez's exercise of protected rights. In addition, even if one assumed that he or she could still contact AFT, the directive would still inhibit other protected activities not directly involving AFT. The fact that Perez may not have actually felt intimidated from engaging in protected activity is irrelevant. (*Clovis USD, supra,* PERB Decision No. 389, p. 14.). Once again, this causes at least "slight harm" a reasonable employee's exercise of protected rights.

LACCD also asserts that AFT was aware of LACCD's use of the directive in question and never complained about it. However, neither the LACCD's willingness to openly promulgate this directive nor AFT's apparent unwillingness to challenge it changes the conclusion that the directive caused at least "slight harm" to employee rights. This argument is unpersuasive.

LACCD also argues that Perez failed to demonstrate any unlawful intent behind the directive. This argument is rejected because evidence of ill-motive is not required in cases alleging interference with protected rights. (See *Simi Valley USD, supra,* PERB Decision

No. 1714, p. 17.) LACCD appears to conflate PERB's *interference* analysis with its *retaliation* analysis, which does require direct or circumstantial evidence of the employer's intent to establish a prima facie case. (See *State of California (Department of Personnel Administration)* (2011) PERB Decision No. 2106a-S.)

To the extent that LACCD argues that the directive was justified because of Perez's inappropriate communications with faculty and students, this position would be unpersuasive based on the record. PERB frequently reviews the context of an employer's directives when determining any interference with protected rights. For example, in *County of Santa Clara* (2012) PERB Decision No. 2267-M, the Board reviewed the lawfulness of a manager's instructions for an employee to "follow the chain of command" and to raise his workplace concerns with his immediate supervisor, not his coworkers. (*Id.* at proposed decision, p. 6.) The Board recognized that the directive suggested disapproval of concerted activity, but found no unlawful interference based on the employee's conduct. (*Id.* at proposed decision, p. 18.) The employee in that case had been publicly complaining that his coworkers were "too stupid" to do their jobs, and the Board found that the manager's directive was a reasonable attempt to stave off this behavior. (*Id.* at pp. 18-19.) The manager also expressly affirmed the employee's right to file and pursue grievances. (*Id.* at proposed decision, p. 7; see also *LAUSD*, *supra*, PERB Decision No. 659, pp. 11-12.)

In this case, any attempt by LACCD to justify its directive based on Perez's behavior is undercut by Walden's testimony. He said that he did not consider any of Perez's conduct when deciding to include the directive in the February 18, 2013 letter. No one else involved in the creation of the February 18, 2013 letter testified that the directive was made to address Perez's conduct. Similarly rejected is the argument that the directive was needed to prevent Perez from tainting evidence gathered while he was on leave. LACCD presented no evidence about the

investigation it conducted. It also did not explain how the integrity of such an investigation could be jeopardized by Perez's participation in protected activities.

On balance, LACCD's interest in using boilerplate language without clarification does not outweigh the interference caused by its overbroad directive. Thus, LACCD failed to meet its burden of proving that the directive not to contact others was justified. Its conduct therefore violates EERA section 3543.5(a).

B. Placement on Administrative Leave

The next issue is whether— independent from the directive discussed above— placing Perez on administrative leave until he completed a fitness-for-duty examination also interfered with his EERA rights. Perez does not address this issue in his closing brief and the record is unclear as to how these actions impacted Perez's EERA rights. There is no evidence, for example, that Perez lacked access to AFT or other opportunities for engaging in protected activity. Although LACCD deactivated Perez's district-based e-mail account while on administrative leave, there was no evidence that Perez communicated with others over protected subjects via e-mail. There was also no showing that Perez's ability to pursue claims against LACCD was harmed.

Moreover, even if Perez had demonstrated "slight harm" to protected rights, the LACCD proved that it had a substantial justification for both placing Perez on administrative leave and requiring a fitness-for-duty examination. When the dispute first arose over Perez's class assignments in 2011, he and Day had what she described as "a good meeting." Subsequently, however, Perez became increasingly more unpredictable. He sent e-mail messages to multiple LACCD personnel accusing department Vice Chair Yazdanian of "financial strangulation." On or around July 10, 2012, multiple people at LACCD complained to Day that they received numerous similar e-mail messages from Perez within the course of a

single day. Both Day and Walden expressed concern over the tenor and frequency of Perez's e-mail messages.

The following semester, Spring 2013, Perez admitted to issuing a take-home exam where more than 20 percent of the questions had nothing to do with the curriculum of the class. Instead, those 21 questions relayed Perez's accusations against LACCD management and criticized the quality of LACCD's education programs. Perez wrote similar comments on the whiteboard in his classroom. Walden felt immediate action was needed at that point because Perez's behavior was starting to adversely affect student instruction. Day concurred with this assessment. Both said that students and other faculty had complained about Perez's conduct. Based on this evidence, largely undisputed by Perez, it is concluded that LACCD's interest in protecting its educational program was a legitimate operational reason for removing him from the classroom and taking steps to evaluate his fitness to teach.

LACCD has further demonstrated that it took a balanced approach to addressing these concerns. It is clear from the record that Perez was deeply concerned about his financial security. Paid administrative leave, though not ideal from Perez's perspective, allowed LACCD to meet its goals while still fully compensating Perez for the class he was assigned that semester. Similarly, because Perez's unusual behaviors gave rise to reasonable concerns over whether his personal hardships were affecting his ability to follow his course curriculum, a fitness-for-duty examination appears to be a proportionate response. The record shows that LACCD followed existing protocol for ordering the examination. Under these circumstances, it is concluded that LACCD's actions were warranted, notwithstanding any "slight harm" to Perez's protected rights.[9]

[9] These conclusions are not intended to diminish in any way the personal financial distress Perez may have felt during the semesters that he was assigned one, rather than two,

Perez asserted during the hearing that he had the protected right to communicate with both staff and students about his personnel issues. Employees' critical comments about their employer "is protected to the extent that the 'purpose is to advance the employees' interest in working conditions.'" (*Oakland Unified School District* (2007) PERB Decision No. 1880, p. 21 (*Oakland USD*), quoting *Trustees of the California State University (Sonoma)* (2005) PERB Decision No. 1755.) On the other hand, personal attacks making only "passing" reference to issues of general concern to others will not receive protection. (*Oakland USD*, pp. 20-21.) The key question is the extent to which the employee is addressing issues that "impact employees generally" as opposed to merely advocating for the employee's own personal interests. (*City & County of San Francisco* (2011) PERB Decision No. 2207-M, dismissal letter, p. 4.)

In *Oakland USD, supra*, PERB Decision No. 1880, the Board found that an employee's memorandum was unprotected even though it referred to a committee focused on improving working conditions. The Board reviewed the "overall tone and content" of the memo and concluded that it was primarily about the employee's own personal grudge with his supervisor, not the activities or concerns of the committee. The Board concluded that the employee had "transgressed the realm of protected activity in order to wage his own personal attacks on [his supervisor]." (*Id.* at pp. 20-21.)

In *National Labor Relations Board v. International Brotherhood of Electrical Workers, Local 122* (1953) 346 U.S. 464, the U.S. Supreme Court found that technical employees were not engaged in protected activity when they criticized the broadcasting quality of their employer in a leaflet. (*Id.* at pp. 476-477.) The court found relevant that the leaflet did not mention the employer's ongoing labor dispute with the technicians or even, in general terms,

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classes. Nor does any part of this proposed decision reach the issue of whose interpretation of the Agreement was correct. Both these issues are beyond the scope of this proposed decision.

seek to generate sympathy for the employees. The court compared the employee's conduct to "physical sabotage" that should be treated "solely as [an attack] by the company's technical experts upon the quality of the company's product." (*Id.* at pp. 476-477.)

In *Mt. San Antonio Community College District* (1982) PERB Decision No. 224 (*Mt. San Antonio CCD*), the Board reviewed the protected status of flyers handed out by teachers just prior to a student graduation ceremony. The flyers mentioned the teachers' ongoing negotiations with the employer briefly but focused on how the employer's financial mismanagement could affect the district's ability to maintain its reputation for high quality education. (*Id.* at pp. 6-7.) The Board found that those issues raised in the flyers were of legitimate concern to other teachers as employees and were therefore protected. (*Id.* at p. 7; see also *California Teachers Assn v. PERB* (2009) 169 Cal.App.4th 1076, p. 1092.)

In the present case, Perez's e-mail messages refer only minimally to protected subjects. Although Perez may have had the protected right to communicate with others about his disagreement with LACCD over the Agreement, nothing in his e-mails refer to either the Agreement or the nature of his dispute with LACCD. Nor can it be easily inferred that Perez was trying to resolve a contractual dispute or otherwise speak broadly about working conditions in a way that concerned other employees. Rather, Perez's e-mail messages focused largely on his personal hardships without ever explaining what happened. Perez's provocative language strongly suggests that Yazdanian and other LACCD managers purposefully inflicted economic harm on Perez, again, for unexplained reasons. Based on these facts, it is concluded that his e-mail messages to other personnel were not a protected effort to enforce the Agreement or otherwise address matters of public concern among employees. Instead, they

were merely Perez's effort to voice his frustration about his personal circumstances and to publicly blame the people he held responsible for those circumstances.[10]

Perez's communications with his students also make only limited reference to any protected subjects. Almost all of the 21 exam questions LACCD identified as problematic repeat Perez's accusations that LACCD management has been "strangulating" him financially and that those same people "couldn't care less" about students. He also said that LACCD spent only minimal funds on students. Unlike in *Mt. San Antonio CCD*, *supra*, PERB Decision No. 224, nothing in Perez's communications to students identifies the nature of his dispute with LACCD or advocates for a resolution. His critical comments about the quality of LACCD's education programs bear little discernible relationship to Perez's dispute with LACCD or any other matter of common interest to other faculty. Only one question mentions the Agreement. Under these circumstances, it is concluded that the clear focus of Perez's communications were to criticize LACCD management and academic programs and to publicize his personal financial state. Perez's "passing" reference to the Agreement is insufficient to make his communications with students protected under EERA.

Moreover, even if the content of Perez's communications was protected, for speech activity conducted during work time and in work locations, the employer "must be given some leeway to restrict the activities in order to maintain order, production, or discipline." (*EDD*, *supra*, PERB Decision No. 1365a-S, p. 9.) To that end, in *Konocti Unified School District* (1982) PERB Decision No. 217 (*Konocti USD*), the Board held that a bus driver was not engaged in protected activity when he stopped his bus mid-route to tell the students on board

[10] Some of Perez's e-mails make reference to non-specific "harassment" or "retaliation," which under certain circumstances may constitute protected activity. (See *State of California (Department of General Services)* (1994) PERB Decision No. 1063-S, proposed decision, p. 25.) However, under the facts presented here, too little context was provided in Perez's communications. For these reasons, there is insufficient evidence in the record to conclude that these comments were protected.

about an ongoing labor dispute and to encourage them to stay home from school as a means to support the union. (*Id.* at pp. 3, 7.) The Board found that those actions were taken in an "indefensible manner" to an impressionable audience who lacked the opportunity to leave. (*Id.* at pp. 7-8.)

The present case is similar to *Konocti USD, supra*, PERB Decision No. 217. As in that case, Perez's midterm exam and whiteboard statements were made to students during on-duty time. Because Perez's comments were made as part of a graded exam, his students could not simply ignore them and focus on other course materials. In fact, because Perez assigned equal value to all of the questions on the exam, student grades depended partly on adopting Perez's specific point of view. Based on these facts, even if the content of Perez's communications to students was protected, Perez's actions lost that protection when he decided to incorporate that message into instructional materials. LACCD took reasonable, balanced, steps to prevent this conduct. Perez's claim that his placement on administrative leave until he completed the fitness for duty exam interfered with protected rights is therefore dismissed.

REMEDY

It has been found that LACCD violated EERA by giving Perez a broad directive against communicating with faculty, staff, and students. PERB has broad remedial powers under EERA section 3541.5(c), including:

> The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

In cases where an employer's instructions to employees were found to interfere with protected rights, PERB has ordered the employer to cease and desist from future interference, rescind or destroy reference to that instruction, and post a notice concerning the violation.

(*EDD, supra*, PERB Decision No. 1365a-S, pp. 11-12.) These are all appropriate remedies here. Accordingly, LACCD is ORDERED to cease and desist from interfering with Perez's protected rights, to rescind and/or remove any reference to the unlawful directive issued to Perez, and to post a notice of this violation in all work areas were notices to faculty employees are customarily placed. This ORDER does not impact LACCD's February 2013 decision to place Perez on paid-administrative leave or require a fitness-for-duty examination.

Perez argues that he should be compensated $26,811 for lost wages plus benefits and interest. Although PERB has the authority to order that employees be compensated for financial losses arising out of an employer's violation (see EERA, § 3541.5(c); *Desert Sands Unified School District* (2010) PERB Decision No. 2092, pp. 30-31), in this case, Perez has not established that he lost any wages or benefits as a result of LACCD's unlawful directive. Thus, there is no basis for concluding that financial remedies are appropriate here and such remedies will not be ordered.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Los Angeles Community College District (LACCD) violated Educational Employment Relations Act, Government Code section 3543.5(a). LACCD violated EERA by issuing Perez a directive to not "contact any members of the faculty, staff or students."

Pursuant to Government Code section 3541.5(c), it hereby is ORDERED that LACCD, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

Interfering with Perez's protected rights.

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

1. Rescind or remove the directive that Perez not "contact any members of the faculty, staff or students."

2. Within 10 workdays of the service of a final decision in this matter, post at all work locations where notices to faculty employees in LACCD customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of LACCD, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.

4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on Perez.

Right to Appeal

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960
E-FILE: PERBe-file.Appeals@perb.ca.gov

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. LA-CE-5839-E, Carlos E. Perez v. Los Angeles Community College District (LACCD), in which all parties had the right to participate, it has been found that LACCD violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq. by issuing Perez a directive not "contact any members of the faculty, staff or students."

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

A. CEASE AND DESIST FROM:

Interfering with Perez's protected rights.

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

Rescind or remove the directive that Perez to not "contact any members of the faculty, staff or students."

Dated: _____ Los Angeles Community College District

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST 30 CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.