STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

PETALUMA FEDERATION OF TEACHERS, LOCAL 1881, Charging Party, v. PETALUMA CITY ELEMENTARY SCHOOL DISTRICT/JOINT UNION HIGH SCHOOL DISTRICT, Respondent.	Case No. SF-CE-3091-E PERB Decision No. 2485 June 30, 2016

Appearances: Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for Petaluma Federation of Teachers, Local 1881; School & College Legal Services of California by Margaret M. Merchat, Senior Associate General Counsel, for Petaluma City Elementary School District/Joint Union High School District.

Before Winslow, Banks and Gregersen, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Petaluma Federation of Teachers, Local 1881 (Federation) from the Office of the General Counsel's dismissal of an unfair practice charge. The charge, as amended, alleged that the Petaluma City Elementary School District/Joint Union High School District (District) violated the Educational Employment Relations Act (EERA),[1] by: (1) providing the Federation with inaccurate information about the District's financial resources; (2) failing to provide the Federation with requested information that was necessary and relevant for contract negotiations; (3) conditioning negotiations on the Federation's agreement to prohibit bargaining unit employees from observing negotiations; (4) unilaterally

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

changing a past practice of allowing bargaining unit employees to observe negotiations; (5) unilaterally changing the Hours of Employment provisions of the parties' collective bargaining agreement (CBA); (6) interfering with employee rights by prohibiting distribution of union leaflets during the 30 minutes before the start of the school day; and (7) engaging in surface bargaining.[2] In addition to an order for the District to cease and desist from unlawful conduct and to bargain in good faith with bargaining-unit employees present, the Federation has requested that PERB order the District to pay the Federation's litigation costs.

The Office of the General Counsel dismissed the charge for failure to state a prima facie case for any of the above allegations. We affirm in part and reverse in part.

PROCEDURAL HISTORY

On August 1, 2014, the Federation filed an unfair practice charge alleging multiple violations of EERA.

On September 3, 2014, the District filed a position statement in which it admitted some of the factual allegations in the Federation's charge, denied others and denied any wrongdoing.

On October 23, 2014, the Federation amended its charge to include additional information and exhibits in support of the allegations in the original charge. The first amended charge also included information and exhibits in support of new allegations.

[2] The first amended charge had also alleged that the District had bypassed the Federation and interfered with employee and organizational rights, when one or more of the District's governing board members allegedly solicited a third party to publicly criticize a petition posted by the Federation on the website change.org. As noted in the dismissal letter, this allegation was not included in the second amended charge. The Federation's appeal concedes that this allegation was not included in the operative second amended charge, and we therefore disregard the allegation as abandoned and warranting no further consideration by the Board. (PERB Reg. 32635, subd. (a); *Trustees of California State University* (2014) PERB Decision No. 2384-H (*Trustees of CSU*), pp. 45-46; *Los Angeles Community College District* (2000) PERB Decision No. 1377, adopting dismissal letter at p. 2, fn. 3. PERB regulations are codified at Cal. Code Regs., tit. 8, § 31001 et seq.)

On November 10, 2014, the District submitted a second position statement, which provided additional information in response to the new allegations in the Federation's first amended charge and which again denied any wrongdoing.

On December 12, 2014, the Office of the General Counsel advised the Federation in a warning letter that the charge, as amended, failed to state a prima facie case of any violation of EERA, and that, unless the charge was further amended or withdrawn, it would be dismissed.

After obtaining an extension of time, on January 23, 2015, the Federation filed a second amended charge. On March 6, 2015, the District submitted a third position statement which largely reiterated its previously-asserted allegations and defenses and admitted some additional facts as alleged in the second amended charge, but otherwise denied any wrongdoing.

On April 7, 2015, the Office of the General Counsel dismissed the charge.

On April 29, 2015, the Federation filed the present appeal and on May 15, 2015, the District filed its opposition to the appeal.

FACTUAL ALLEGATIONS

On review of a dismissal/refusal to issue a complaint, we assume the truth of the charging party's factual allegations (*San Juan Unified School District* (1977) EERB[3] Decision No. 12, p. 5; *Golden Plains Unified School District* (2002) PERB Decision No. 1489, p. 6) and accept that version of the facts most favorable to the charging party's case. (*California School Employees Association & its Chapter 244 (Gutierrez)* (2004) PERB Decision No. 1606, pp. 3-4.) We are not concerned with making findings of fact or weighing the parties' conflicting allegations. When the investigation of a charge "results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that

[3] Before January 1978, PERB was known as the Educational Employment Relations Board or EERB.

a complaint be issued and the matter be sent to formal hearing." (*Eastside Union School District* (1984) PERB Decision No. 466, p. 7.) In addition to the charging party's factual allegations, we may also consider information provided by the respondent, when such information is submitted under oath, complements without contradicting the facts alleged in the charge, and is not disputed by the charging party. (PERB Reg. 32620(c); *Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M; *Lake Tahoe Unified School District* (1993) PERB Decision No. 994; *Riverside Unified School District* (1986) PERB Decision No. 562a.)

The Parties' Agreement and Bargaining History

The Federation is the exclusive representative of the District's certificated employees. At all times relevant to this appeal, the Federation and the District were parties to a CBA which expired on June 30, 2015.

Article IV, Employee Rights, of the CBA includes language substantially identical to that found in EERA. That is, unit members "shall have the right to form, join and participate in the activities of employee organizations of their own choosing" as well as the right to refuse to join or participate in such activities.

Article VI, Hours of Employment, defines the number of work days in a work year, the weekly teaching load and number of preparation periods, and the expectations for attendance of certificated personnel at weekly staff meetings, parent conferences, staff development days, open house and back to school events, and extra-curricular activities occurring outside regular working hours, but includes no language identifying the start time of the work day or specifying any duties or expectations of certificated personnel before the start of instructional class time.

The CBA also included provisions for reopener negotiations, which were the context for most of the allegations of the underlying unfair practice charge and the present appeal. The

parties' representatives also meet monthly for an Employer/Employee Relations Committee (EERC), a body established by the CBA for issues that are not subject to negotiation. When they are in negotiations, the parties conduct EERC meetings immediately before negotiations.

The parties have no ground rules or other written agreement governing the attendance of bargaining unit employees, who are not part of the Federation's bargaining team, at negotiations. The District has no objection to making EERC meetings "open to the public," including to District employees who are not part of the Federation's bargaining team. The parties disagree, however, over whether there exists an established practice of permitting or prohibiting employee observers at their negotiations. The Federation alleges that such observers have "often" attended previous negotiations without objection by the District. The Federation alleges, by way of example, that on July 12, 2013, approximately 30 bargaining unit employee observers attended a mediated bargaining session without comment or objection by the District. The Federation's charge also includes what purports to be the District's minutes of a bargaining meeting on June 21, 2013, at which two Federation members were "sitting in" for regular negotiating team members. According to the minutes, "Steve," i.e., the District's Superintendent and Chief Negotiator Steve Bolman (Bolman), "noted that the visitors here today are for observation purposes only." (Unfair Practice Charge (UPC), Attachment R.)

The District generally admits, as alleged by the Federation, that on July 12, 2013, "multiple individuals," who were not part of the Federation's negotiating team, attended the first bargaining session after the Federation's membership had rejected a tentative agreement. However, according to Bolman, the District had no notice that employee observers would attend this meeting and, while the District agreed to meet with the employee observers present on this one occasion, it has otherwise never agreed or acquiesced to anyone other than bargaining team

members attending negotiations. (District Third Position Statement, Declaration of Steve Bolman, ¶ 6.)

The District also admits that, because of turnover among the Federation's negotiators, Suzanne Garcia (Garcia), a bargaining-unit employee, was permitted to attend negotiations on February 14 and March 7, 2014 "as an observer," because she was considering joining and did in fact join the Federation's negotiating team. (District Third Position Statement, Declaration of Steve Bolman, ¶¶ 5, 7.)

Reopener Negotiations

On February 14, 2014, the parties' representatives met for their monthly EERC meeting and to begin reopener negotiations. Representing the District were Bolman and five other officials or employees of the District. The Federation's representatives consisted of Chief Negotiator Sandra Larsen (Larsen), Local President Kim Sharp (Sharp), six employee representatives and two staff persons provided by the California Federation of Teachers. In addition, Sharp introduced Garcia as "an observer" from one of the schools in the District. (Second Amended UPC, Attachment B.) The charge and supporting materials allege that after concluding their EERC meeting, the parties exchanged reopener proposals and discussed reopener subjects, including early retirement and a reduced workload program. (*Ibid.*; see also District Position Statement, Ex. 2.)

The Federation alleges that the District raised no objection to Garcia's attendance as an employee observer at the February 14, 2014 meeting. Various exhibits to the charge, including the Federation's bargaining notes and the District's minutes of bargaining meetings, indicate that Garcia also attended subsequent bargaining sessions. At some point, Garcia became a member of the Federation's bargaining team, though neither the charge and supporting materials, nor the

District's various position statements indicate how many bargaining sessions Garcia attended as an observer before joining the Federation's bargaining team.

On March 7, 2014, the parties met again for EERC discussions and reopener negotiations. The Federation presented amended proposals, including a proposal for a 7 percent wage increase. The parties had a detailed discussion regarding the District's budget projections.

On April 10, 2014, the parties met again for EERC discussions and reopener negotiations. They again discussed the District's budget, and the cost of the District's proposals for a 2 percent wage increase and for hiring additional teachers to reduce class sizes.

On April 25, 2014, the parties met again for EERC discussions and reopener negotiations. The Federation stated that it was not against class size reductions, but that its membership would not accept the District's proposal for a 2 percent wage increase.

On May 9, 2014, the parties met again. The District now proposed a 2.5 percent wage increase, but reduced the amount it proposed to spend on class size reductions. Bolman stated that the District "we are going to impasse way before 4.5 [percent] is considered." He also suggested that "we may need help to settle this contract" through the impasse process.

On May 27, 2014, the parties met again. The Federation requested information regarding what it viewed as the District's regressive economic proposal. The District acknowledged that its second proposal would cost the District approximately $366,000 less than its previous proposal. Bolman allegedly stated that, "until [the Federation] makes more movement, it's in reserve. But it's not all available." The District's position statement alleges, and the Federation does not dispute, that Bolman explained at this meeting, that the funds intended for class size reductions were "restricted," meaning they could not be used for salaries. However, Bolman also explained that, in response to the Federation's previously expressed preference for a larger salary increase, the District had shifted restricted funds from class size reductions to other

permissible purposes in order to make other, unrestricted funds available for salaries. Although the District's second economic proposal would provide for a 2.5 percent salary increase, which was 0.5 percent more than the amount included in the District's initial proposal, because of the shift in funds for class size reductions, the overall cost to the District of its second proposal was approximately $366,00 *less* than its initial proposal.

Also during the May 27, 2014 meeting, Bolman allegedly suggested that, from the District's standpoint, two successive annual salary increases of 2.5 percent were preferable over one 5 percent increase because there would be no additional money for a wage increase in successive years and employees would not remember an increase from the previous year. Later, during the same meeting, the District responded to a Federation demand by proposing an additional one-time payment of $500 to each employee. The District also presented three versions of its cost projections, which the Federation's bargaining team characterized as "confusing" and "difficult ... to understand or accept."

On June 9, 2014, the parties met and reached a tentative agreement on stipends.

Information Request

On July 2, 2014, Larsen requested information regarding the cost of step and column increases for the 2014-2015 school year, new hires, retirees, and the District's beginning balance for the 2014-2015 fiscal year.[4] She also requested a list of certificated employees who had retired in the 2013-2014 school year. Her letter requested responses at the parties' next

[4] The Federation initially alleged that the District had also failed to respond to a June 24, 2014 request for information pertaining to management compensation. The Office of the General Counsel's December 12, 2014 warning letter advised the Federation that this allegation was contradicted by correspondence attached to the charge, and, after the Federation provided no additional information, the Office of the General Counsel dismissed this allegation. Because the Federation's appeal appears to concern only its subsequent July 2, 2014 request, we regard the allegation regarding the June 24, 2014 request for information as abandoned and warranting no further consideration. (*Trustees of CSU, supra,* PERB Decision No. 2384-H, pp. 45-46.)

negotiating session, which was scheduled for July 7, 2014.[5] The District raised no objection to the substance or scope of the request, nor advised the Federation that any of the requested information was unavailable or that providing it at the July 7, 2014 meeting would be unduly burdensome, costly or time-consuming.

On August 13, 2014, the District provided information responsive to the Federation's July 2 request. Other than their abortive July 7 meeting, the parties had not met since Larsen had requested information on July 2, though they exchanged correspondence on several occasions in an attempt to resolve the dispute over employee observers at negotiations.

Employee Observers at Negotiations

On July 7, 2014, the parties met, as previously scheduled, for EERC discussions and reopener negotiations. About 65 bargaining unit members were present to observe the negotiations. (Second Amended UPC, Attachment T.) The Federation circulated a document called "Ground Rules for Observing Negotiations" to the employees present. The document, which was included with the charge, directs the employees to remain silent, to be mindful of what messages might be conveyed by their body language, and to reserve any questions or concerns they may have for the Federation's private caucus. (*Id.*, Attachments V and W.)

The District's negotiators refused to meet for either the EERC meeting or contract negotiations with observers in the room. The District's negotiators suggested that the observers move to another room where the Federation could report to them periodically on the progress of negotiations, or that the parties schedule another meeting when the observers would not be present. Bolman asserted that, by law, negotiations are closed to "the public," unless the parties agree otherwise. According to the Federation's bargaining notes, Bolman defined the "the

[5] As described more fully below, the parties met as scheduled on July 7, 2014, but engaged in no substantive discussions because of their dispute over the attendance of employee observers at negotiations.

public" as anyone who was not a designated member of one of the bargaining teams. (Second Amended UPC, Attachment V, pp. 3-4.) Bolman allegedly also said he "would be ok with one or two" observers present, but not "where 40-plus people are observing." (*Ibid.*)

The Federation's negotiators argued that having unit members present did not make the negotiations "public," as the Federation has never invited the general public to attend negotiations. (Second Amended UPC, Attachment V, p. 4.) The Federation refused to continue negotiations without the observers present. The meeting ended with the District's negotiators declaring impasse and leaving. (*Id.* at pp. 4-5.)

On July 21, 2014, Bolman sent a memo to Larsen and Sharp in which Bolman reiterated the District's positon that it would only meet with the Federation's representative and without employee observers present. In this memo and in subsequent communications, Bolman expressed the District's willingness to permit employee observers at EERC meetings, but not negotiations.

In the following months, the parties exchanged written communications regarding the status of negotiations and to reiterate or clarify their respective positions regarding the presence of employee observers at negotiations. (UPC, Attachments X, Y, A.1, B.1, C.1.) On August 13, 2014, Bolman announced that the District would await PERB's decision on the Federation's unfair practice charge allegations before it returned to the table. (Attachment C.1.) However, on August 25, and again on September 26, 2014, the District proposed to hold EERC meetings open to all unit employees and/or to allow as many as five unit employees to observe negotiations.

On October 13, 2014, the District's Board sent a memo to unit employees which stated, "The District desires to get back to the negotiation table, but [the Federation] continues to insist on a change in conditions … to the process," by allowing any interested unit employees to attend

negotiations. The District alleges, and the Federation does not deny, that the Federation has not responded to District's compromise proposals of August 25 and September 26.

On October 20, 2014, Bolman invited Sharp and Larsen to reconvene negotiations on a non-precedent setting basis to allow the two teams to negotiate "how we are going to negotiate going forward." The Federation has not responded to these proposals, pending resolution of its charge and the present appeal.

The District's Prohibitions on Union Solicitation

On September 5, 2014, Christy Defanti (Defanti), who is Bolman's executive assistant and a member of the District's bargaining team, sent an e-mail message to teachers throughout the District. The e-mail was also distributed to teachers at their site mailboxes. The message indicated that Bolman had asked Defanti to send the message to "defin[e] the rules for staff handing out flyers." (Second Amended UPC, Attachment D.1.) According to the message, teachers are not allowed to pass out flyers before school starts, "as they are to be in their classroom[s] 30 minutes prior to school starting." Teachers may hand out flyers after school, "when they finish their work obligations," but they "must be off school property when they hand out flyers," i.e., "not in a driveway or walkway on school campus." According to Defanti's e-mail, because the sidewalk in front of a school is public property, teachers may hand out flyers there. However, teachers "cannot hand out flyers of a political or union nature." (Second Amended UPC, Attachments D.1, E.1.)

On September 8, 2014, the Federation initiated a grievance, alleging that Defanti's directive violated Article IV – Employee Rights and Article VI – Hours of Work of the CBA.

On September 13, 2014, Bolman sent an e-mail message to Federation representative Terry Elverum in which Bolman explained that the September 5, 2014 e-mail message from his

assistant was not intended to be distributed to employees. The District has denied the Federation's grievance on procedural grounds. (Second Amended UPC, Attachments H.1.) [6]

On October 10, 2014, unit employees distributed union information to parents as they dropped off students before school. Catina Haugen (Haugen), the principal of the District's Grant Elementary School, sent an e-mail message advising teachers that "handing out pamphlets can only happen outside of your work day." Haugen's message acknowledged that teachers work long hours and "that an official 'work day' is not defined," but suggested that, "[s]ince an official teacher duty begins at 7:55 [a.m.], we can safely call that the start of your work day," while "the final teacher duty ends around 2:45 [p.m.,] so that can be considered the end of your work day." Haugen's message ended by reiterating her request that teachers "[p]lease hand out pamphlets outside of your work day." (Second Amended UPC, Attachment I.1.)

Surface Bargaining Allegation

The Federation's surface bargaining allegation relied primarily on the District's "difficult to comprehend" or unconvincing explanation that class size is a "supplemental issue" while salary is a "base issue," and on the fact that the District's second economic proposal was regressive, in that it had a total cost of $366,400.00 less than the District's initial proposal. The Federation also alleged that the cumulative effect of the District's other unlawful conduct further supported an inference of the District's bad faith in negotiations.

THE DISMISSAL/REFUSAL TO ISSUE A COMPLAINT

The Office of the General Counsel dismissed the allegation that the District provided the Federation with inaccurate financial information because, while the information about the

[6] The Federation has not alleged or included information in the charge to support an allegation that, by refusing to process the grievance, the District unilaterally departed from the parties' collectively-bargained grievance procedures or otherwise violated its duty to bargain.

District's finances may have been confusing or difficult to understand, the charge had not specifically alleged how it was inaccurate. The Office of the General Counsel likewise dismissed the Federation's failure/refusal to provide information allegation because, according to the dismissal letter, the Federation had not demonstrated that a six-week delay in providing information was unreasonable under the circumstances or that the Federation had been prejudiced by this delay, since the parties were not meeting in any case until they resolved their dispute over the status of employee observers at negotiations.

The Office of the General Counsel rejected each of the Federation's legal theories concerning employee observers at negotiations. According to the warning letter, the charge did not allege that the District unlawfully conditioned negotiations on a waiver of statutory rights because, other than the right *of employee organizations* to reasonable released time *for their employee representatives*, EERA provides no independent right to employees, *as employees*, to attend or observe negotiations. Absent a statutory right, the Office of the General Counsel reasoned that the presence of employees at negotiations falls within the ambit of ground rules for negotiations, a mandatory subject of bargaining. Because parties are not required to make concessions on mandatory subjects, the warning letter explained that the District was legally privileged to refuse to agree to the Federation's demand to permit employees to attend negotiations. The Office of the General Counsel also determined that the Federation had not alleged sufficient facts to show a change to an established practice of allowing employee observers at negotiations because, according to the dismissal letter, "a single instance in which bargaining unit members were present for negotiations does not establish a binding past practice."

The Office of the General Counsel dismissed the Federation's allegations that the District had unilaterally changed the Hours of Employment provisions of the parties' CBA or

interfered with employee rights to distribute union literature during non-work time because the second amended charge did not sufficiently allege the existence of a negotiated policy or established practice regarding the start time of the workday. The Office of the General Counsel also determined that the charge failed to allege that the 30 minutes before the start of the workday was non-working time during which employees may solicit support for the Federation or engage in other concerted activities.

With respect to the surface bargaining allegation, the dismissal letter noted that the information in the second amended charge did not conflict with the District's explanation that it had shifted restricted funds from class size reductions to other permissible purposes in order to make available unrestricted funds for salary increases. Although the District's second proposal was regressive in that it would cost the District less than its previous proposal, according to the dismissal letter, this shift in funds did not demonstrate bad faith because it corresponded to the Federation's own demand to prioritize salary increases over class size reductions. Having rejected each of the above allegations, the Office of the General Counsel concluded that the second amended charge included insufficient information to infer that the District negotiated in bad faith or that its conduct was aimed at frustrating negotiations. Accordingly, the surface bargaining allegation was also dismissed.

THE PARTIES' CONENTIONS IN THE PRESENT APPEAL

The Federation argues that its factual allegations were sufficient to state a prima facie case for each of the alleged violations included in the second amended charge. The issues on appeal are:

(1) Whether the Federation stated a prima facie case that the District knowingly provided inaccurate financial information in derogation of its duty to bargain;

(2) Whether the Office of the General Counsel improperly required the Federation to demonstrate prejudice or that six weeks was an unreasonable delay for the District to provide certain information;

(3) Whether the Federation stated a prima facie case that the District unlawfully conditioned negotiations on the exclusion of employee observers from in person meetings;

(4) Whether the Federation stated a prima facie case that the District unilaterally altered a policy or established practice by refusing to meet for contract negotiations in the presence of employee observers;

(5) Whether the Federation stated a prima facie case that the District unilaterally altered a policy or established practice by prohibiting employees from distributing union literature during the 30 minutes immediately before the start of the school day, where the Federation alleged that the established practice was that the school day did not begin 30 minutes before the start of instructional time;

(6) Whether the Federation stated a prima facie case that the District interfered with protected rights by prohibiting employees from distributing union literature during the 30 minutes immediately before the start of the school day; and

(7) Whether the Federation stated a prima facie case that the District bargained in bad faith by the above allegations and by making a regressive economic proposal regarding class size reductions and teachers' salaries.

The District's opposition argues that the appeal fails to comply with the requirements of PERB regulations and/or to address any of the deficiencies identified in the warning and dismissal letters and urges the Board to affirm the dismissal and refusal to issue a complaint.

DISCUSSION

1. Knowing Provision of Inaccurate Financial Information

To obtain Board review of a dismissal/refusal to issue a complaint, the charging party's appeal must: (1) state the specific issues of procedure, fact, law or rationale to which the appeal is taken; (2) identify the page or part of the dismissal to which each appeal is taken; and (3) state the grounds for each issue stated. (PERB Reg. 32635; *United Teachers – Los Angeles* (1989) PERB Decision No. 738, p. 2.) To satisfy the requirements of the regulation, the appeal must sufficiently place the Board and the respondent "on notice of the issues raised on appeal." (*State Employees Trades Council United (Ventura, et al.)* (2009) PERB Decision No. 2069-H (*SETC United (Ventura)*), p. 6; *City & County of San Francisco* (2009) PERB Decision

No. 2075-M, p. 4.) An appeal that simply repeats the allegations of the charge, does not reference the substance of the dismissal, the page or part of the dismissal to which the appeal is taken, or the grounds for each issue, or otherwise fails to identify the specific issues of procedure, fact, law or rationale to which the appeal is taken is subject to dismissal on that basis alone. (PERB Reg. 32635, subd. (a); *Beaumont Teachers Association/CTA (Grace)* (2012) PERB Decision No. 2260, pp. 2-3; *State of California (Department of Mental Health, Department of Developmental Services)* (2012) PERB Decision No. 2305-S, p. 4.)

The District correctly points out that the appeal's discussion of this allegation does little more than reiterate the factual allegations of the charge and that the appeal advances no new argument or authority that was not already considered and addressed by the Office of the General Counsel's investigation of the charge. However, in arguing that the Office of the General Counsel reached the wrong conclusion based on the factual allegations, i.e., incorrectly applied the law to the factual allegations included in the charge, the appeal does substantially comply with the requirement that the appeal place the Board and the respondent on notice of the issues, by identifying the substance of the dismissal and the specific issue(s) of fact, law, or application of law to fact, from which appeal is taken. (*SETC United (Ventura), supra,* PERB Decision No. 2069-H, p. 6.) A contrary rule would preclude the Board from reviewing a dismissal, even when the decision was manifestly incorrect.

Although we conclude that this portion of the appeal complies with the procedural requirements of PERB regulations, the Board affirms the dismissal of this allegation for the reasons explained in the warning and dismissal letters. EERA makes it unlawful for a public school employer to "[k]nowingly provid[e] an exclusive representative with inaccurate information, whether or not in response to a request for information, regarding the financial resources of the public school employer." (EERA, § 3543.5, subd. (c).) The charge allegations

and the undisputed information in the District's position statements indicate that the District provided three different financial scenarios based on different budgetary assumptions. The information provided by the District may have been confusing or unpersuasive, but the charge does not allege specific facts to show either that any difficulty or confusion was deliberate (as alleged in the charge), or that the information was necessarily *inaccurate*. We therefore affirm dismissal of this allegation.

2. Whether the Office of the General Counsel improperly required the Federation to demonstrate prejudice or that six weeks was an unreasonable delay for the District to provide presumptively relevant information requested by the Federation

The exclusive representative is entitled to all information that is necessary and relevant to discharge its representational duty. (*Stockton Unified School District* (1980) PERB Decision No. 143 *(Stockton)*, p. 13; *NLRB v. Truitt Mfg. Co.* (1956) 351 U.S. 149, 152-153.) PERB uses a liberal, discovery-type standard, similar to that used by the courts, to determine the relevance of an information request. (*Regents of the University of California (Davis)* (2010) PERB Decision No. 2101-H (*Regents of UC (Davis)*), p. 32; *Trustees of the California State University* (1987) PERB Decision No. 613-H (*Trustees*), adopting proposed decision, p. 13; *NLRB v. Acme Industrial Co.* (1967) 385 U.S. 432, 438, fn. 6.) The requested information need not itself be admissible or dispositive of the issues in dispute. Rather, it is considered relevant if reasonably calculated to lead to the discovery of such information. (*Trustees, supra*, PERB Decision No. 613-H, adopting proposed dec. at p. 13; see also Code Civ. Proc., § 2017.010; *Volkswagen of America, Inc. v. Superior Court* (2006) 139 Cal.App.4th 1481, 1490-1491; 2 Witkin, Cal. Evid. 5th (2012) Discovery, § 9, p. 979.)

Information pertaining to unit employees' wages, hours, or working conditions is "so intrinsic to the core of the employer-employee relationship that it is considered presumptively relevant and must be disclosed unless the employer can establish that the information is plainly

irrelevant or can provide adequate reasons why it cannot furnish the information." (*Stockton, supra*, PERB Decision No. 143, p. 13; *Chula Vista City School District* (1990) PERB Decision No. 834 (*Chula Vista*), p. 53; *Teleprompter Corp. v. NLRB* (1st Cir. 1977) 570 F.2d 4, 8; *State of California (Departments of Personnel Administration and Transportation)* (1997) PERB Decision No. 1227-S.) Thus, the representative need not justify its request for such information, unless the employer first rebuts the presumption of relevance. (*Regents of the University of California* (2010) PERB Decision No. 2094-H, pp. 25-26; *City of Burbank* (2008) PERB Decision No. 1988-M, p. 15, citing *In Re Ralphs Grocery Co.* (2008) 352 NLRB No. 18, p. *31.)

Presumptively relevant information need not relate to any particular or existing controversy (*NLRB v. Item Company* (5th Cir. 1955) 220 F.2d 956, 958) and the representative is not required to show the precise relevance of the information or how it will be used, unless the employer has rebutted the presumption of relevance. (*Trustees, supra*, PERB Decision No. 613-H, adopting proposed dec. at p. 13; *The Trustees of the Masonic Hall* (1982) 261 NLRB 436, 437; *Postal Serv.* (1985) 276 NLRB 1282, 1286.) Requiring a union to detail the nature of a complaint in its request for information, would place it in the impossible position of committing to a particular theory before it has the information necessary to support or rule out any theory. (*NLRB v. Acme Industrial Co., supra,* 385 U.S. 432, 438, fn. 6; *Hawkins Constr. Co.* (1987) 285 NLRB 1313, 1315; *Chula Vista, supra*, PERB Decision No. 834, p. 50.)

Similarly, the fact that a particular form of compensation or benefit is not currently in dispute does not make information about it irrelevant or relieve the employer from supplying information on the subject. (*Chula Vista, supra*, PERB Decision No. 834, pp. 46-47, 54.) Because economic items are generally fungible, all wages and benefits are potentially in play during negotiations on economic matters. Because the representative may wish to evaluate the cost of a particular economic item to prioritize its bargaining demands (*Stockton, supra,* PERB

Decision No. 143, p. 15; *NLRB v. John S. Swift Company* (7th Cir. 1960) 277 F.2d 641, 645), information related to unit employees' compensation should be made available "without regard to its immediate relationship to the negotiation or administration of the agreement" (*Whitin Mach. Works* (1954) 108 NLRB 1537, enforced (4th Cir. 1954) 217 F.2d 593), or to its precise relevance to particular bargaining issues. (*Town of Paradise* (2007) PERB Decision No. 1906-M, adopting proposed dec. at pp. 5-6; *Dyncorp/Dynair Services, Inc.* (1996) 322 NLRB 602.) A more stringent standard would impede negotiations because, in most circumstances, "it is virtually impossible to tell in advance whether the requested data will be relevant." (*NLRB v. Yawman & Erbe Mfg. Co.* (2d Cir. 1951) 187 F.2d 947, 949.)

The duty to supply information thus turns upon the circumstances of the particular case, though generally it requires the same diligence and thoroughness as is exercised in other business affairs of importance. (*Compton Community College District* (1990) PERB Decision No. 790 (*Compton*), adopting proposed dec. at p. 29; *NLRB v. Truitt Mfg. Co., supra,* 351 U.S. 149, 153-154.) Once relevant information has been requested, the employer must either supply the information or timely and adequately explain its reasons for not complying with the request. (*Chula Vista, supra*, PERB Decision No. 834, p. 52, citing *The Kroger Co.* (1976) 226 NLRB 512, 513-514.) Even where a request is arguably ambiguous or overly broad, the employer may not simply ignore it. It must seek clarification and/or comply to the extent the request seeks relevant information. (*Keauhou Beach Hotel* (1990) 298 NLRB 702; *Postal Serv., supra,* 276 NLRB 1282, 1287; *Regents of UC (Davis), supra*, PERB Decision No. 2101-H, pp. 35-36.)

Failure to provide such information is a per se violation of the duty to negotiate in good faith and may support an independent allegation of surface bargaining. (*Los Angeles Superior Court* (2010) PERB Decision No. 2112-I, adopting dismissal letter at p. 6; *The Regents of the*

University of California (1998) PERB Decision No. 1255-H, proposed dec. at p. 43.) An unreasonable delay in providing necessary and relevant information is as much a per se violation of the duty to bargain as is an outright refusal to provide the information. (*Regents of UC, supra,* PERB Decision No. 1255-H, proposed dec. at p. 44.) The fact that an employer ultimately furnishes the requested information will not excuse an unreasonable delay. (*Compton, supra,* PERB Decision No. 790, p. 5; *Chula Vista, supra*, PERB Decision No. 834, p. 51, citing *K & K Transp. Corp. Inc.* (1981) 254 NLRB 722.)

According to the charge allegations, on July 2, 2014, the Federation requested information pertaining to the cost of step and column increases for certificated employees. Shortly thereafter, the parties suspended all meetings because of their dispute over employee observers at negotiations and, without explanation, the District did not provide the information until approximately six weeks later on August 13, 2014. The Office of the General Counsel reasoned that the Federation had failed to demonstrate that it was prejudiced by this delay, because no meetings occurred during the six weeks it took for the District to respond. The Federation contends that requiring it to demonstrate how it was prejudiced by the District's six-week response time improperly shifts the burden of proof established by PERB and private-sector decisional law and effectively disregards the exclusive representative's presumptive right to necessary and relevant information pertaining to bargaining unit employees. On this point, we agree with the Federation.

The Federation alleges that on or about July 2, 2014, its chief negotiator requested information about the wages and benefits of bargaining unit members and historical data about the bargaining unit, including the identity and circumstances of bargaining unit members who had left the unit. Each of the requested categories of information pertains immediately to

mandatory subjects of bargaining and is therefore presumptively relevant. (*Regents of UC (Davis), supra*, PERB Decision No. 2101-H, p. 32.)

Although our cases generally state that the exclusive representative is entitled to information that is necessary *and* relevant (see. e.g., *Stockton, supra*, PERB Decision No. 143, p.13), PERB has repeatedly held that the exclusive representative is entitled to information it needs "to understand and intelligently discuss the issues raised in bargaining." (*Town of Paradise* (2007) PERB Decision No. 1906-M, adopting proposed dec. at p. 5, citing *Trustees, supra,* PERB Decision No. 613-H.) The Board has never articulated a *separate* test for showing how, *in addition to* its relevance, requested information is *also necessary* to fulfilling the union's representative functions. (See, e.g., *Regents of UC, supra*, PERB Decision No. 1255-H, proposed dec. at pp. 43-44 [using the terms "necessary" and "relevant" interchangeably]; see also *Trustees, supra*, PERB Decision No. 613-H, adopting proposed dec. at p. 14.) Nor is it necessary to do so here, as the requested information was not only presumptively relevant, but presumptively *necessary* for the Federation to evaluate the District's position, prepare counter-proposals and intelligently discuss the issues in dispute in the parties' reopener negotiations. (*Town of Paradise, supra,* PERB Decision No. 1906-M, proposed dec. at p. 5; *ADT, LLC* (Nov. 5, 2015) 363 NLRB No. 36, slip op. at pp. 3-4.)

Although the parties exchanged correspondence several times in the weeks after the Federation made its request, the District asserted no objection or privilege to the subject or scope of the request nor advised the Federation that the requested information was unavailable or that its production would be unduly burdensome, costly or time-consuming. In its September 3, 2014 position statement to PERB, the District asserted — apparently for the first time — that some of the requested information was not immediately available at the time of the Federation's request, though the District has not identified what information was unavailable nor when it became

available. The District asserts that it intended to discuss the Federation's requests and the unavailability of some of the requested information at the parties' next bargaining meeting, which was scheduled for July 7, 2014, but that, because of their dispute over the presence of employee observers at negotiations, that meeting was cancelled. Approximately 6 weeks after the July 2 request, the District provided the requested information.

As noted above, the right to information is not absolute and will turn on the circumstances of the particular case, including the kinds and amounts of information requested, the purpose for which it is requested and the timing of the request. (*Regents of UC (Davis), supra*, PERB Decision No. 2101-H, p. 33; *Trustees, supra,* PERB Decision No. 613-H, p. 2.) Just as a union's mere "suspicion or surmise" that it needs information does not, by itself, oblige the employer to supply all of the information in the particular manner requested (*Detroit Edison Co. v. NLRB* (1979) 440 U.S. 301, 314-315; *San Diego Newspaper Guild, Local No. 95 of Newspaper Guild, AFL-CIO, CLC v. NLRB* (9th Cir. 1977) 548 F.2d 863, 868), neither will an employer's bare assertion that a request is unduly burdensome or otherwise not subject to disclosure automatically relieve it of any responsibility to furnish the information or some portion of it. (*Regents of UC (Davis), supra*, at pp. 33-34.) Even where an employer is not required to provide information because it is equally available to the requesting party, it must, at minimum advise the union of its reasons for non-disclosure and, if known, the location or source of the equally available information. (*Id.* at pp. 35-36.)

Although an employer need not comply with an information request if the requested information does not exist or is otherwise unavailable, our cases are clear that it must nonetheless affirmatively and diligently communicate the reason(s) for its refusal or delay in providing such information. (*Chula Vista, supra*, PERB Decision No. 834, p. 53; *Stockton, supra*, PERB Decision No. 143, p. 15; *Los Angeles Superior Court, supra,* PERB Decision No. 2112-I,

adopting dismissal letter at p. 6.) The party asserting a defense, limitation or condition to disclosure of presumptively relevant information bears the burden of proof as to that question (*Regents of UC (Davis), supra,* PERB Decision No. 2101-H, pp. 32-33; *Washington Gas Light Co.* (1984) 273 NLRB 116, 117; *Boise Cascade Co.* (1986) 279 NLRB 422, 431; *McDonnell Douglas Corp.* (1976) 224 NLRB 881, 890) and the failure to assert a timely argument against disclosure waives that issue on appeal. (*Cardinal Distributing Co. v. Agricultural Labor Relations Bd.* (1984) 159 Cal.App.3d 758, 767-768 *(Cardinal v. ALRB).*)

Contrary to the implication of the warning and dismissal letter, we do not read *Regents of the University of California* (1999) PERB Decision No. 1314-H as requiring a charging party to show harm or prejudice as an element of its prima facie case when it has already alleged sufficient facts to show that the employer, without justification or excuse, has denied or unreasonably delayed providing presumptively necessary and relevant information. As discussed in *Regents*, the representative failed to demonstrate that ten days was an unreasonable delay for providing a laid-off employee's personnel file. Because the employer rescinded the layoff after receiving the union's request, the failure to demonstrate harm or prejudice was a factor to consider in whether the employer's 10-day response time was unreasonable under the circumstances, not an additional element of the prima facie case for failure and refusal or unreasonable delay in providing information. It would make little sense to say, as many cases do, that information pertaining to mandatory subjects of bargaining is presumptively relevant, if the representative is then required to make an *additional* showing of prejudice, even in the absence of any assertion by the employer that the requested information was unavailable or not subject to disclosure. If the District could not provide the requested information, it was obligated to advise the Federation of the reason(s) for its inability to do so. In the absence of *any* contemporaneous explanation by the District for its delay in providing presumptively relevant

and necessary information, the only issue is whether the Federation has alleged sufficient facts to indicate that six weeks constituted unreasonable delay under the circumstances. (*The Colonial Press, Inc.* (1973) 204 NLRB 852, 861.) We conclude that it has. In *Bundy Corp.* (1989) 292 NLRB 671, the parties were in the midst of negotiations, when the union requested information pertaining to employee classifications, pay rates, seniority, retirement, and fringe benefits. Because the requested information was presumptively relevant and necessary to the union's ongoing bargaining obligation and because the employer failed to rebut the presumption of relevance, the National Labor Relations Board (NLRB) concluded that a six-week delay in providing the information was unreasonable. (*Ibid.*)[7]

As in *Bundy*, here, negotiations have neither resulted in agreement nor impasse. While in-person meetings were suspended because of a dispute over who may attend negotiations, the parties have not reached a settlement and, in the absence of information to the contrary, we presume that the underlying issues motivating the Federation's request for information remain in dispute. During the hiatus, the Federation could have evaluated the District's positon and been preparing counterproposals in the event the "observer" issue was resolved and the parties resumed meeting. Even when they were not meeting in person, the parties continued to exchange correspondence on other matters, yet the District never asserted that the requested information was unavailable or particularly voluminous or difficult to identify and produce.

By alleging that the District failed to say *anything* on the subject for six weeks, the Federation has stated a prima facie case that the District has not exercised the same diligence and thoroughness as would in other business affairs of importance. (*Compton, supra,* PERB Decision No. 790, adopting proposed dec. at p. 29; *NLRB v. Truitt Mfg. Co., supra,*

[7] See also *Gonzales Union High School District* (1985) PERB Decision No. 480 (*Gonzales*), adopting proposed dec. at pp. 38-40, where PERB determined that six weeks was an unreasonable period to delay meeting for negotiations.

351 U.S. 149, 153-154.) The Office of the General Counsel erred by requiring the Federation to show prejudice for information whose relevance and necessity to ongoing negotiations had never been challenged. We reverse the dismissal of this allegation.

3. Whether the Federation has stated a prima facie case that the District unilaterally altered a policy or established practice of permitting employees to attend negotiations or that it otherwise failed or refused to bargain by conditioning negotiations on the exclusion of employee observers

The Federation alleges that, by refusing to negotiate in the presence of employee observers, the District has unilaterally altered an established practice, conditioned negotiations on a waiver of statutory rights and/or otherwise refused to bargain over negotiable subjects. On appeal, the Federation reiterates these contentions and further argues that the Office of the General Counsel has not explained why the District could refuse to negotiate with 65 employee observers present when it had previously acquiesced to negotiations with 30 employee observers present. For the reasons set forth below, we conclude that the Federation has not alleged sufficient facts to state a prima case either that the District unilaterally altered an established practice or that its insistence on excluding employee observers imposed an unlawful condition on negotiations.

We consider first the Federation's unilateral change theory.

A. Unilateral Change Theories

To prove up a unilateral change, the charging party must establish that:

> (1) the employer took action to change policy; (2) the change in policy concerns a matter within the scope of representation; (3) the action was taken without giving the exclusive representative notice or opportunity to bargain over the change; (4) the action had a generalized effect or continuing impact on terms and conditions of employment.

(*County of Santa Clara* (2013) PERB Decision No. 2321-M, pp. 12-13, citing *Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262.) An established policy may be

embodied in the terms of a collective bargaining agreement (*Grant Joint Union High School District* (1982) PERB Decision No. 196 (*Grant*), pp.7-8) or, where a contract is silent or ambiguous, it may be determined from past practice or bargaining history. (*County of Riverside* (2013) PERB Decision No. 2307-M, p. 20.) The change in policy may entail altering or eliminating an existing policy or creating an entirely new policy where previously none existed. (*Ibid.*; *Regents of the University of California* (2012) PERB Decision No. 2300-H *(UC Regents)*, pp. 20-22, 25; *Pasadena Area Community College District* (2015) PERB Decision No. 2444, p. 12, fn. 6 *(Pasadena Area CCD)*.)

A.1. Change in Past Practice or Creation of a New Policy

Here, the parties have no agreement concerning ground rules. Thus, to state a prima facie case of a unilateral change, the Federation may allege that the District has unilaterally altered or abrogated an established practice of permitting employee observers to attend negotiations, or that the District has established a new policy of prohibiting employee observers at negotiations, where previously there was no clearly established practice. (*County of Riverside, supra*, PERB Decision No. 2307-M, p. 20; *Grant, supra,* PERB Decision No. 196, pp. 7-8; *UC Regents, supra,* PERB Decision No. 2300-H, pp. 20-22, 25.) We consider each of these theories.

The Federation generally alleges that employee observers have "often" attended previous negotiations without objection by the District. By way of example, it alleges that on July 12, 2013, approximately 30 bargaining unit employees attended a mediated bargaining session as observers with no objection by the District's negotiators. (Second Amended UPC, ¶ 17, and Attachment B; see also District Third Position Statement, Declaration of Steve Bolman, ¶ 6.) Additionally, the Federation alleges that Garcia, an employee who was not initially a member of the Federation's bargaining team, was permitted to attend negotiations on February 14 and

March 7, 2014. According to the District, Garcia was allowed to attend negotiations because there had been considerable turnover among the Federation's negotiators and because she had expressed interest in joining the Federation's team, which she eventually did. (District Third Position Statement, Declaration of Steve Bolman, ¶¶ 5, 7.)

The Federation thus alleges that, on at least three occasions before July 2014, the District had permitted employees, who were not part of the Federation's bargaining team, to attend negotiations as observers. Despite this relatively small sample size, the Federation contends that, at least until July 2, 2014, the District had acquiesced to the attendance of employee observers in 100 percent of the instances in which the issue arose. However, the facts, as alleged by the Federation, indicate that these three prior instances involved at least two different sets of circumstances, only one of which is arguably applicable to the factual allegations in the charge and the issues on appeal. Garcia was not a member of the Federation's bargaining team and attended the February 14 and March 7, 2014 meetings not as an independent employee observer but at the request of the Federation. Thus, there is only one instance, the mediated bargaining session occurring a year earlier, in which employees attended negotiations, *as employees*, and *not* at the Federation's request as current or prospective Federation representatives. Because a "one-time occurrence is not enough to show an established practice" (*Victor Valley Union High School District* (1985) PERB Decision No. 487, adopting proposed dec. at p. 32), we conclude that the Federation's allegations are insufficient to demonstrate the existence of an established practice and thus, do not state a prima facie case that the District altered an existing practice.

A.2. Whether the District's Alleged Conduct Departed from the Status Quo

Although the Federation has not sufficiently alleged the existence of regular and consistent practice, its charge may still state a prima facie case of a unilateral change by

alleging that the District has created a new policy of prohibiting employee observers, where no policy or practice previously existed. (*UC Regents, supra*, PERB Decision No. 2300-H, pp. 20-22, 25; *Pasadena Area CCD, supra*, PERB Decision No. 2444, p. 12, fn. 6.) Whether an employer must continue a given term of employment depends on whether discontinuing the practice would disturb the status quo during negotiations. (*California State Employees' Assn. v. Public Employment Relations Bd.* (1996) 51 Cal.App.4th 923, 937.) However, we conclude that the Federation has not sufficiently alleged that the District has made a firm decision or taken concrete steps to change policy here because it appears that the Legislature intended that negotiations under EERA would be attended only by the parties' representatives, absent an agreement or established practice to the contrary. To the extent the District sought to enforce a policy of excluding employee observers from negotiations, it was simply following the default rule for negotiations, as expressed in the language of EERA as determined by judicial and administrative precedent. We explain.

EERA section 3549.1 provides in relevant part that negotiations between a public school employer and the exclusive representative of its employees are not subject to California's open meetings laws, "unless the parties mutually agree otherwise." Although this language suggests that the presence of observers at negotiations is negotiable, it also indicates a legislative preference or *default rule* that, in the absence of agreement to the contrary, negotiations will occur solely between the parties' representatives.

Citing *Ross School District Board of Trustees* (1978) PERB Decision No. 48 (*Ross*) and *San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, the District argues that PERB has followed the same default rule by treating negotiations as "non-public," *unless otherwise agreed by the parties.* Thus, according to the District, "neither party can insist on negotiations that are open beyond attendance by the specified negotiation teams."

Appellate authority and opinions of the California Attorney General are in accord. (*Californians Aware v. Joint Labor/Management Benefits Com.* (2011) 200 Cal.App.4th 972, 980, as modified on denial of rehearing (Nov. 28, 2011), citing 92 Ops.Cal.Atty.Gen. 102 (2009) and 61 Ops.Cal.Atty.Gen. 1 (1978).) When examining the similar language and statutory scheme for collective bargaining established by the Meyer-Milias-Brown Act (MMBA),[8] the Attorney General concluded that, because of the need to caucus and bargain in private, the Legislature did not intend to require "local agencies to do their labor bargaining in a fish bowl." (61 Ops.Cal.Atty.Gen. 1, 5-6.) The Attorney General and the Court of Appeals relied on the same reasoning and reached the same result when considering negotiations under EERA between a community college district and the representatives of its employees. (92 Ops.Cal.Atty.Gen. 102, at pp. 3-4; *Californians Aware v. JLMBC, supra*, 200 Cal.App.4th at p. 980.)

The Federation argues that, inasmuch as bargaining unit employees are directly affected by such negotiations, they are not simply part of the "public," and that the statutory right of employees to "form, join, and participate in the activities of employee organizations" includes an independent right of employees to attend and observe negotiations affecting their employment. (EERA, § 3543, subd. (a).)[9] While we acknowledge that the statutory language, when read in isolation, is susceptible to this interpretation, we must nonetheless reject recognition of an independent right of employees to attend negotiations as inconsistent with the policies and purposes of EERA and with long-standing Board precedent.

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[8] The MMBA is codified at section 3500 et seq.

[9] EERA section 3543, subdivision (a), provides in part: "Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations."

EERA's legislatively-declared purpose is to improve employer-employee relations within the public school systems by providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice, to be represented by the organizations in their professional and employment relationships with public school employers, to select one employee organization as the exclusive representative of the employees in an appropriate unit, and to afford certificated employees a voice in the formulation of educational policy. Thus, as a general proposition, we agree with the Federation that this purpose is not served by employer policies that deter employees from participating in the collective bargaining process. (*County of Riverside, supra*, PERB Decision No. 2307-M, p. 33.)

However, the statute also provides that "once the employees in an appropriate unit have selected an exclusive representative" and it has been "recognized or certified ... *only* that employee organization may represent [employees of] that unit in their employment relations with the public school employer." (EERA, §§ 3543, 3543.1, subd. (a), emphasis added.) Moreover, "an employee in that unit shall not meet and negotiate with the public school employer." (EERA, § 3543.) As we recently observed in *Hartnell Community College District* (2015) PERB Decision No. 2452 (*Hartnell*), employees necessarily surrender some of their statutory rights when they accept the benefits of exclusive representation, which is "the cornerstone of the Act." (*Id.* at p. 37, citing *Lake Elsinore School District* (1986) PERB Decision No. 563 (*Lake Elsinore*), p. 4; see also *Clovis Unified School District* (2002) PERB Decision No. 1504 (*Clovis*), pp. 22-25; *J.I. Case Co. v. NLRB* (1944) 321 U.S. 332, 338.) The statute's declared purpose recognizes that some employee rights may not be exercised in a manner that undermines the authority of the bargaining agent or abridges the principle of exclusivity. (*Pleasant Valley School District* (1988) PERB Decision No. 708, p. 15, fn. 5; *Santa Ana Unified School District* (1978) PERB Decision No. 73 (*Santa Ana*), p. 2; *Mount Diablo Unified School District, et al.*

(1977) EERB Decision No. 44, pp. 8-9; *Chaffey Joint Union High School District* (1982) PERB Decision No. 202, pp. 6-7.) In particular, employee rights to self-representation and to select representatives other than those designated by the majority organization may be curtailed to the extent necessary to accommodate the statutory scheme for collective bargaining *through exclusive representation*. (*Hartnell, supra*, PERB Decision No. 2452, pp. 34-38; *Santa Ana, supra*, PERB Decision No. 73, p. 2; *Modesto City Schools* (1983) PERB Decision No. 291 (*Modesto*), pp. 28-29; *Lillebo v. Davis* (1990) 222 Cal.App.3d 1421, 1443-1446.)

Following federal authority, our cases have long recognized a bright line rule that representatives may not bypass their counterparts by making proposals directly to the other party's principals. (*California State University* (1987) PERB Decision No. 621-H, pp. 3-4, vacated on other grounds by *California State University* (1987) PERB Decision No. 621a-H; *County of Inyo* (2005) PERB Decision No. 1783-M, pp. 2-3; *Westminster School District* (1982) PERB Decision No. 277 (*Westminster*), p. 7.) The duty to bargain encompasses a "concomitant obligation to meet and confer with no others, including the employees themselves." (*California State University* (1989) PERB Decision No. 777-H, p. 7, citing *Medo Photo Supply Corp. v. NLRB* (1944) 321 U.S. 678, 684-687.) Depending upon the circumstances, employer actions that bypass the representative or undermine its authority with employees may be analyzed either as evidence of bad faith in negotiations or as an outright or per se violation of the employer's bargaining obligation. (*Muroc Unified School District* (1978) PERB Decision No. 80 (*Muroc*), p. 19; *State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2078-S (*State of CA (DPA)*), pp. 10-11; *General Electric Co.* (1964) 150 NLRB 192, 195, enforced (2d Cir. 1969) 418 F.2d 736, cert. denied (1970) 397 U.S. 965; *Safeway Trails* (1977) 233 NLRB 1078, 1079, 1081-1082.) The touchstone for determining the propriety of an employer's direct communication with employees is the effect on the authority of the exclusive

representative. (*California State University, supra*, PERB Decision No. 777-H, p. 9, citing *Muroc, supra,* PERB Decision No. 80, pp. 19-20.)

Although an employer is free to communicate with exclusively-represented employees about negotiations, it may not use direct communications to establish a new policy affecting negotiable matters, to alter or waive existing rights, or to otherwise undermine the authority of the employees' representative. (*Muroc, supra*, PERB Decision No. 80, pp. 19-21; *Lake Elsinore, supra,* PERB Decision No. 563, p. 4; *Clovis Unified School District* (2002) PERB Decision No. 1504, pp. 22-23; *Omnitrans* (2010) PERB Decision No. 2143-M, p. 6; *City of San Diego (Office of the City Attorney)* (2010) PERB Decision No. 2103-M, pp. 7-14, disapproved on other grounds by *City of Sacramento* (2013) PERB Decision No. 2351-M, p. 27.) Thus, an employer may, consistent with a good faith bargaining, inform employees of the status of negotiations, or of proposals *previously made* to the union, or of its version of a breakdown in negotiations, as long as the employer's speech does not threaten reprisal or promise benefit; does not seek to induce employees to withdraw their support from the union; does not offer to employees proposals not made at the bargaining table or over which there has been no meaningful negotiation; and does not seek to determine the degree of support for the union's bargaining demands. (*Westminster, supra*, PERB Decision No. 277, pp. 9-10, fn. 6; see also *Firch Baking Co.* (1972) 199 NLRB 414, 419, enforced (2d Cir. 1973) 479 F.2d 732.)

In the present case, the employee observers are not designated or even prospective representatives or officers of the Federation and, consequently, the Federation exercises no authority over them. If employees could assert an independent statutory right to attend negotiations, even against the wishes of their bargaining representative, then much of the decisional law prohibiting direct dealing and bad-faith bargaining would need to be rewritten. Granting employees unfettered access to negotiations would permit the employer to comment

directly to the employees on the bargaining proposals and conduct of their representatives. Indeed, employers would be *required* to present proposals simultaneously to employees and the representative anytime employees were present. Even if employees remained silent observers, their mere presence at negotiations could "substantially modif[y] the collective-bargaining system ... by weakening the independence of the 'representative' chosen by the employees," because it would "enable[] the employer, in effect, to deal with its employees rather than with their statutory representative." (*NLRB v. Wooster Div. of Borg-Warner Corp.* (1958) 356 U.S. 342, 350; see also *Modesto, supra*, PERB Decision No. 291, p. 50.)

As explained in the private-sector authorities discussed in *Ross, supra*, PERB Decision No. 48, an *employer's* insistence on conducting negotiations in the presence of rank-and-file employees is objectionable not only because it is "contrary to uniform industrial practice and ... not conducive to the orderly, informal, and frank discussion of the issues" confronting the negotiators. It also interferes with the principles of exclusivity and employee choice, including the rights of employees to designate *and bargain through* their chosen representative. (*Clovis, supra,* PERB Decision No. 1504, pp. 22-23; *Everist, L. G., Inc.* (1953) 103 NLRB 308, 309; see also *J.I. Case Co. v. NLRB, supra,* 321 U.S. 332, 336; *Medo Photo Supply Corp. v. NLRB, supra,* 321 U.S. 678, 684-687.) The give-and-take of negotiations could easily be subsumed, or at least overshadowed, by grandstanding or other kinds of direct communications between employers and employees which well-settled law condemns as coercive and contrary to the purposes of the statute. (*City of San Diego (Office of the City Attorney), supra,* PERB Decision No. 2103-M, pp. 7-14; *Omnitrans, supra,* PERB Decision No. 2143-M, p. 6; *Safeway Trails, supra,* 233 NLRB 1078, 1079, 1081-1082; *General Electric Co., supra,* 150 NLRB 192, 195.) Given the unknown and potentially far-reaching consequences for the collective bargaining process, and the long-standing limitations on employers' direct communications with employees to subvert

good-faith bargaining, we agree with the Office of the General Counsel that an independent statutory right of employees to attend negotiations was not contemplated by the Legislature.

Even assuming, without deciding, that the presence of employee observers is negotiable, in the absence of an agreement to the contrary, the default rule established by EERA section 3549.1 is that negotiations will occur only between the designated representatives of the employer and the bargaining agent. This default rule serves not only as a baseline from which to begin negotiations but also serves as a limitation on what terms may be imposed by the employer at impasse. If the Federation wishes to permit employee observers to attend negotiations, it must bargain with the District for a contractual right of employees to do so.

B. Conditional Bargaining Allegations

The Federation has also alleged that the District's refusal to meet with employees present placed an unlawful condition on negotiations. Historically, our cases have recognized different theories of liability under the single heading *conditional bargaining*. Following federal precedent, PERB has long held that conditioning agreement over one mandatory subject of bargaining on prior agreement over others is not itself unlawful, but may indicate an absence of good faith under the totality of circumstances analysis. (*San Bernardino City Unified School District* (1998) PERB Decision No. 1270, proposed dec. at pp. 85-86; *The Adrian Daily Telegram* (1974) 214 NLRB 1103, 1111; *NLRB v. General Electric Co.* (2nd Cir. 1969) 418 F.2d 736, 756-757.) Because the ultimate question in a surface bargaining case is whether the respondent's conduct, when viewed in its totality, was sufficiently egregious to frustrate negotiations, bargaining proposals which link agreement over mandatory subjects are generally analyzed, along with any other evidence of bad faith, for their cumulative effect on negotiations or the representative's authority. (*Adrian Daily Telegram, supra,* 214 NLRB 1103, 1111; *Fresno County In-Home Supportive Services Public Authority*

(2015) PERB Decision No. 2418-M (*Fresno Co. IHSS Public Authority*), p. 14; *State of California (DPA), supra,* PERB Decision No. 2078-S, pp. 10-11.)

By contrast, where agreement on mandatory subjects is conditioned on agreement over non-mandatory subjects, such as a waiver of statutory rights, PERB analyzes the allegation as a per se violation of the duty to bargain. (*Modesto, supra*, PERB Decision No. 291, pp. 27-30; *Fresno Co. IHSS Public Authority, supra*, PERB Decision No. 2418-M, p. 18.)[10] Insistence to impasse or post-impasse imposition of a proposal containing a waiver of statutory rights "is a violation of the duty to bargain *as to that item*" and may *also* constitute evidence of bad faith in support of a separate surface bargaining allegation. (*Modesto, supra*, at p. 30, emphasis added.) For this category of conditional bargaining allegations, the Board uses a per se analysis because, unlike conditional bargaining affecting only mandatory subjects, conditioning agreement on a waiver of statutory rights or on agreement over non-mandatory subjects of bargaining is, in effect, a refusal to bargain over subjects that are within the scope of mandatory bargaining. (*Fresno Co. IHSS Public Authority, supra*, at p. 18, 63; *San Mateo County Community College District* (1993) PERB Decision No. 1030 (*San Mateo*), p. 18, fn. 11; *NLRB v. Borg-Warner, supra*, 356 U.S. 342, 349.)

In *City of San Jose, supra*, PERB Decision No. 2341-M, we recognized a third category of conditional bargaining allegations, one in which a party's willingness *to discuss* mandatory subjects is conditioned on prior agreement over other mandatory subjects. While a party may

[10] Examples have included conditioning agreement on a waiver of the representative's right to prosecute grievances in its own name (*Chula Vista, supra,* PERB Decision No. 834, pp. 19-23); conditioning agreement on the withdrawal of grievances or unfair practice charges (*Lake Elsinore School District* (1986) PERB Decision No. 603, pp. 2-3); imposing limits on the number of subjects that may be negotiated if impasse is broken (*Rowland Unified School District* (1994) PERB Decision No. 1053, p. 7, fn. 5); and conditioning agreement on a waiver of Labor Code paycheck protection provisions (*Berkeley Unified School District* (2012) PERB Decision No. 2268, pp. 3-9, esp. fn. 3).

lawfully condition its *agreement* over a mandatory subject on agreement over others (*San Mateo, supra*, PERB Decision No. 1030, pp. 18-19), it may not condition its willingness even to *discuss* or *consider* a proposal concerning a mandatory subject on prior agreement over others or insist on unilateral control over which mandatory subjects will be discussed or the order in which they will be discussed. (*City of San Jose, supra*, at p. 31; *City of Santa Rosa* (2013) PERB Decision No. 2308-M, p. 5.) Such conduct is a rejection of bilateral negotiations because it allows one party to dictate what compromises the other side may propose for consideration. (*City of San Jose, supra*, PERB Decision No. 2341-M, pp. 31-32.) It may therefore be analyzed as a per se refusal to bargain and as evidence of bad faith in negotiations. (*San Ysidro School District* (1980) PERB Decision No. 134, pp. 13-14; *Eastern Maine Medical Center v. NLRB* (1st Cir. 1981) 658 F.2d 1, 11-12.)

Here, the District is alleged to have refused even to negotiate without prior agreement over the presence of employees at negotiations. We need not decide whether the presence of employees is a mandatory or permissive subject of bargaining because, in either event, the Federation did not simply seek to bargain around the default rule set forth in EERA section 3549.1. Instead, it refused to conduct further negotiations unless the District acquiesced to this demand. If the subject were deemed permissive, the Federation could not continue to insist on its proposal to alter the default rule after the District clearly indicated that it was not interested in further discussion of the issue. (*Chula Vista, supra,* PERB Decision No. 834, pp. 19-23; *City of San Jose, supra,* PERB Decision No. 2341-M, pp. 43-44, 46, 49-50.) Alternatively, even assuming the presence of employee observers at negotiations is within the scope of mandatory subjects for bargaining, EERA also establishes a default rule which governs the parties' meetings until they have agreed otherwise. Because the District is alleged to have done no more than insist on the statutory default rule, the charge does not state

a prima facie case that the District placed unlawful conditions on negotiations. We therefore affirm the dismissal of the Federation's conditional bargaining allegation as well.

4. Whether the Federation sufficiently alleged that the District unilaterally altered its policy and/or interfered with protected rights by prohibiting employees from distributing union literature during the 30 minutes before the start of the workday

According to the second amended charge and supporting materials, on or about September 5, 2014, and on behalf of the District's superintendent and chief negotiator, his executive assistant distributed to teachers at all sites within the District an e-mail "defining the rules for staff handing out flyers." Among other things, the e-mail states that teachers may not hand out flyers before school, "as they are to be in their classroom 30 minutes prior to school starting." (Second Amended UPC, Attachments D.1 and E.1.)

The Federation also alleges that, on or about October 10, 2014, Haugen informed the school's teachers that, pursuant to the District's September 5, 2014 e-mail, employees were not allowed to distribute "union" information during the 30 minutes before the start of the regular work day. (Second Amended UPC, ¶27; Attachment I.1.) Haugen's October 10, 2014 e-mail acknowledges that "an official 'work day' is not defined," but suggests that, because "official teacher duty begins at 7:55 [a.m.], we can safely call that the start of your work day." (Second Amended UPC, Attachment I.1.)

The Federation alleges that the District's September 5, 2014 e-mail to teachers and Haugen's October 10, 2014 enforcement of the prohibition against distributing "union information" before the start of the school day unilaterally changed the Employee Rights and Hours of Employment articles of the parties' CBA and/or the District's established practice. According to the Federation, the District's policies did not previously prohibit distribution of such materials before the start of the workday and "did not provide that the professional day began 30 minutes prior to the start of the bell schedules for each school site" within the

District. (Second Amended UPC, ¶ 27.) The Federation also alleges that the District's promulgation and/or enforcement of these restrictions on employee leafleting interfered with employee and organizational rights guaranteed by EERA.

The Office of the General Counsel dismissed both the unilateral change and interference allegations. Central to the Office of the General Counsel's analysis was language in the California Code of Regulations, which states, in relevant part, that, "Unless otherwise provided by rule of the governing board of the school district, teachers are required to be present at their respective rooms, and to open them for admission of the pupils, not less than 30 minutes before the time prescribed for commencing school." (Cal. Code Regs., tit. 5, § 5570.) PERB recognizes that the start of the workday falls within the statutorily-enumerated subject "hours of employment." Consequently, while not specifically mentioned in the regulation, as noted in the dismissal letter, both the 30-minute period before the start of school and the requirement that teachers be present *in their classrooms* may be altered through collective bargaining. (*Healdsburg Union Elementary School District* (1994) PERB Decision No. 1033, pp. 7-9.)

In this case, however, the Office of the General Counsel determined that the Federation had not alleged sufficient facts to establish that the regulatory default rule had been altered either by the parties' CBA or by established practice. As noted in the dismissal letter, no language in the Hours of Employment article of the parties' CBA specifically identifies the start of the workday and the Federation's bare allegation of an existing practice does not sufficiently allege an unequivocal, clearly enunciated and acted upon, and readily ascertainable practice accepted by both parties over a reasonable period of time. (*County of Riverside, supra,* PERB Decision No. 2307-M, p. 20; *Riverside Sheriff's Assn. v. County of Riverside* (2003) 106 Cal.App.4th 1285, 1291.) While we agree with the Office of the General Counsel's analysis insofar as it goes, we do not consider it dispositive of the Federation's interference allegations.

A. Unilateral Change

As noted above, to state a prima facie case of a unilateral change, the charging party must allege facts demonstrating that:

> (1) the employer took action to change policy; (2) the change in policy concerns a matter within the scope of representation; (3) the action was taken without giving the exclusive representative notice or opportunity to bargain over the change; (4) the action had a generalized effect or continuing impact on terms and conditions of employment.

(*County of Santa Clara, supra,* PERB Decision No. 2321-M, pp. 12-13.) The change in policy may entail altering or eliminating an existing policy established by a collective bargaining agreement or past practice, or creating an entirely new policy where previously none existed. (*County of Riverside, supra,* PERB Decision No. 2307-M; *Pasadena Area CCD, supra,* PERB Decision No. 2444, p. 12.)

The matters in dispute involve negotiable subjects. Hours of work are among the statutorily-enumerated subjects for bargaining (EERA, § 3543.2, subd. (a)(1).) Under PERB decisional law, that phrase has been interpreted broadly to include the start and end time of the work day as well as the length and amount of employees' duty-free time at work. (*Cloverdale Unified School District* (1991) PERB Decision No. 911, pp. 16-17; *Imperial Unified School District* (1990) PERB Decision No. 825, p. 16; *Sutter Union High School District* (1981) PERB Decision No. 175, pp. 5-6; *Modesto City Schools and High School District* (1984) PERB Decision No. 414, pp. 10-11.)

Similar to union access and released time for employee representatives, PERB regards employee rights to communicate, solicit and distribute information at work as encompassing both statutory rights and negotiable matters. (*Long Beach Unified School District* (1987) PERB Decision No. 608, p. 18; *San Mateo, supra,* PERB Decision No. 1030, pp. 14-17.) A contract provision may waive employee rights, provided it does so clearly and unmistakably and does not

violate public policy. (*Fresno Co. IHSS Public Authority, supra*, PERB Decision No. 2418-M, p. 41; *Metropolitan Edison Co. v. NLRB* (1983) 460 U.S. 693, 708.)[11]

The dual *statutory* and *contractual* nature of these employee rights creates potential difficulty for determining the status quo once the parties' agreement has expired. Does a contractual waiver of employee rights continue as the status quo terms and conditions of employment after expiration of the agreement, similar to the negotiated standard for reasonable released time, or does a partial waiver of employee solicitation and distribution rights expire *entirely* with the contract along the lines of a "no strikes" clause? However, we need not decide this issue here, as the employee rights set forth in Article IV of the CBA are identical to those found in EERA, including the rights to join, form and participate in the activities of employee organizations as well as the right to refuse to join or participate in such activities. Thus, the Federation has not waived the statutory rights of employees to solicit or distribute literature and has therefore sufficiently alleged that the District's September 5, 2014 e-mail to teachers and Haugen's alleged enforcement of the rule stated therein affect negotiable subjects, including hours of work and employee solicitation and distribution rights.

Less certain is whether the Federation has alleged sufficient facts either to demonstrate the existence of an established policy or practice regarding the 30 minutes before the start of class time or that the District has changed a policy or practice. The status quo against which an employer's conduct is evaluated must take into account the regular and consistent past patterns of changes in the conditions of employment. (*Pajaro Valley Unified School District* (1978)

[11] Relying on *NLRB v. United Technologies Corporation* (2d Cir. 1983) 706 F.2d 1254, in *Long Beach, supra*, PERB Decision No. 608, the Board concluded that an exclusive representative and public school employer may agree to a limited waiver of employee rights to solicit or distribute literature during non-work time and in non-work areas. (*Long Beach, supra*, at pp. 15-17; cf. *NLRB v. Magnavox Co. of Tennessee* (1974) 415 U.S. 322 [representative cannot waive substantially all employee rights to communicate with one another in the workplace].)

PERB Decision No. 51 (*Parajo Valley*), p. 6.) The Hours of Employment article includes no language identifying the start time of the work day or specifying any duties or expectations of certificated personnel before the start of instructional class time. However, where a contract is silent or ambiguous, an employer policy can take the form of an established practice. (*County of Riverside, supra*, PERB Decision No. 2307-M, p. 20.)

Haugen's October 10, 2014 e-mail confirms that "an official 'work day' is not defined" though she suggests 7:55 a.m. as the start of the work day. Elsewhere in the second amended charge, the Federation alleges that principles at other District schools have identified 7:40 a.m. as "when the day starts," which is apparently thirty minutes before the start of the instructional day for at least some teachers. (Second Amended UPC, ¶¶ 29-30; Attachment L.1.) Because there is scant and conflicting information in the charge and supporting materials regarding the District's policy before September 5, 2014, we conclude that the Federation has not alleged sufficient facts to show that the District's September 5, 2014 e-mail either altered or eliminated an existing policy or practice. (*Pajaro Valley, supra*, PERB Decision No. 51, pp. 6, 9-10.)

The Federation may also allege that the District sought to establish a new policy affecting negotiable matters, where previously no clear policy or practice existed. Although the warning and dismissal letters do not explicitly discuss this theory, they do note that the California Code of Regulations establishes a default rule that "teachers are required to be present at their respective rooms, and to open them for admission of the pupils, not less than 30 minutes before the time prescribed for commencing school," unless otherwise authorized by the school district's governing board and/or by a collective bargaining agreement. (Cal. Code Regs., tit. 5, § 5570.) Thus, in this case, it is not sufficient to allege that the District established a new policy where none previously existed without specifically alleging that the regulatory default rule has been altered. Although the charge contains a bare allegation that the practice was otherwise, it has

provided no specific factual allegations to support this claim. We therefore affirm the dismissal of the Federation's allegation that the District's September 5 and October 10, 2014 e-mail messages to employees and/or their enforcement changed existing policy or established a new policy where none previously existed.

B. Interference with Protected Rights to Distribute Union Information

We next turn to the Federation's allegation that the District's promulgation or enforcement of the September 5, 2014 e-mail interfered with employee rights. A prima facie case of interference exists where an employer is alleged to have engaged in conduct that tends to or does result in at least slight harm to rights guaranteed by EERA. (*Carlsbad Unified School District* (1979) PERB Decision No. 89 (*Carlsbad*), pp. 10-11; *County of Riverside* (2010) PERB Decision No. 2119-M, pp. 16-23; *Jurupa Unified School District* (2012) PERB Decision No. 2283 (*Jurupa*), p. 29.) Unlike PERB's test for discrimination, no showing of unlawful motive, purpose or intent is required. (*Sacramento City Unified School District* (1982) PERB Decision No. 214, p. 7, fn. 5; *Simi Valley Unified School District* (2004) PERB Decision No. 1714 *(Simi Valley)*, p. 17.) Moreover, a finding of unlawful employer interference, coercion or restraint does not require evidence that any employee or union official subjectively felt threatened or intimidated or was actually discouraged from participating in protected activity; rather the inquiry is an objective one which asks whether, under the circumstances, the employer's conduct would reasonably discourage protected activity. (*Clovis Unified School District (*1984) PERB Decision No. 389, pp. 14-15; *County of Riverside, supra,* PERB Decision No. 2119-M, pp. 17, 19-20; *Coachella Valley Mosquito & Vector Control District* (2009) PERB Decision No. 2031-M, pp. 20-21; *John Swett Unified School District* (1981) PERB Decision No. 188 (*John Swett*), pp. 5-8, adopting proposed dec. at pp. 27-28.)

If the harm to protected rights is slight and the employer offers justification based on operational necessity, the competing interests are balanced. (*Carlsbad, supra,* PERB Decision No. 89, p. 10; *John Swett, supra,* PERB Decision No. 188, pp. 6-7; see also S*tate of California (Department of Personnel Administration)* (2011) PERB Decision No. 2106a-S.) If the harm to protected rights outweighs the asserted business justification, a violation will be found. (*Omnitrans* (2009) PERB Decision No. 2030-M, pp. 22-24.) Where the employer's conduct is inherently destructive of protected rights, it will be excused only on proof that it was caused by circumstances beyond the employer's control and that no alternative course of action was available. (*Santa Monica Community College District* (1979) PERB Decision No. 103, pp. 19-20, affirmed by (1980) 2 Cal.App.3d 684; *Carlsbad, supra*, PERB Decision No. 89, pp. 10-11.) Irrespective of the foregoing, a charge will be sustained where it is shown that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent. (*Monterey Peninsula Unified School District* (2014) PERB Decision No. 2381, p. 42; *Carlsbad, supra*, PERB Decision No. 89, pp. 10-11.)

Under the above test, a violation may only be found if EERA provides the claimed rights. (*Simi Valley, supra,* PERB Decision No. 1714, p. 17.) In this regard, PERB has consistently held that peaceful picketing, including distribution of leaflets or other materials to advertise grievances or solicit support from employees and the public are among the statutorily-guaranteed rights of employees and employee organizations. (EERA, §§ 3543, subd.(a), 3543.1, subds. (a), (b); *UC Regents, supra,* PERB Decision No. 2300-H, p. 16; *Modesto, supra,* PERB Decision No. 291, p. 62; *San Marcos Unified School District* (2003) PERB Decision No. 1508, p. 18; *Mt. San Antonio Community College District* (1982) PERB Decision No. 224 (*Mt. San Antonio*), p. 3). Full freedom of employee and organizational speech and expressive activity is particularly important in labor negotiations and grievance proceedings because the

Legislature has designated these procedures as the preferred alternatives to economic warfare for resolving disputes over wages, hours and working conditions. (*San Francisco Unified School District* (1979) PERB Order No. IR-10, p. 3; *Anaheim Union High School District* (1981) PERB Decision No. 177, p. 7; *Rancho Santiago Community College District* (1986) PERB Decision No. 602 *(Rancho Santiago)*, pp. 12-14; *Rio Hondo Community College District* (1982) PERB Decision No. 260, pp. 10-12; *Mt. San Antonio, supra,* PERB Decision No. 224, pp. 5-7; *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1, 8; see also *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies* (1941) 312 U.S. 287, 293.)

Of particular significance to the present charge and appeal are PERB and persuasive private-sector precedent holding that a categorical prohibition against distributing literature or other means of communication interferes with fundamental rights of employee organizations to represent and communicate with employees and of employees to self-organize and communicate with one another *in the workplace*. (*Mt. San Antonio, supra*, PERB Decision No. 224, p. 7; *Los Angeles Community College District* (2014) PERB Decision No. 2404 (*Los Angeles CCD*), p. 6; *Sweetwater Union High School District* (2014) PERB Order No. IR-58 *(Sweetwater)*, pp. 11-12; *Republic Aviation Corp. v. NLRB* (1945) 324 U.S. 793, 804-805; *Stoddard-Quirk Mfg. Co.* (1962) 138 NLRB 615, 621; see also *County of Sacramento* (2014) PERB Decision No. 2393-M, pp. 16-17, 19, 24; *Regents of the University of California, Lawrence Livermore National Laboratory* (1982) PERB Decision No. 212-H (*Regents of UC (LLNL)*).) Employee organizations have rights of reasonable access to areas where employees work, to use institutional bulletin boards, mailboxes, and other means of communication, subject to reasonable regulation, and to use institutional facilities at reasonable times for the purpose of meeting with employees. (EERA, § 3543.1, subd. (b); *San Ramon Valley Unified*

School District (1982) PERB Decision No. 230, pp. 12-13.) Similarly, the statutory right of employees to be represented by employee organizations includes the right to communicate with one another about working conditions, to show allegiance to the organizations of their choice and to express solidarity with other employees for the purpose of representation or for other mutual aid or protection. (*State of California (Department of Parks and Recreation)* (1993) PERB Decision No. 1026-S, adopting proposed dec. at pp. 20-21; *Modesto, supra*, PERB Decision No. 291, p. 62.) Unless employees and employee organizations can effectively communicate with one another about these matters *in the workplace*, the statutorily-guaranteed right to participate in employee organizational activities would be largely empty. (*Richmond Unified School District/Simi Valley Unified School District* (1979) PERB Decision No. 99 (*Richmond/Simi Valley*), pp. 10, 15; *Sweetwater, supra*, at pp. 12-13; see also *Beth Israel Hosp. v. NLRB* (1978) 437 U.S. 483, 491.)

Notwithstanding the Office of the General Counsel's analysis, the leafletting rules set forth in Exhibit D.1 to the second amended charge are problematic in several respects. First, the District's directive appears to establish a blanket temporal restriction on distributing flyers at any time during the workday. It states that teachers may hand out flyers "*after school* when they finish their work obligations" (emphasis original), but they may not do so "before school as they are to be in their classroom 30 minutes prior to school starting." The directive makes no mention and presumably does not permit distribution of flyers during off-duty time, such as the 30-minute, duty-free lunch period guaranteed by Article VI of the CBA.

However, our precedents are clear that a rule prohibiting distribution of literature anywhere on the employer's premises is presumptively unlawful because it applies even when employees are not on duty or are in non-working areas. (*State of California (Employment Development Department)* (2001) PERB Decision No. 1365a-S, p. 2; *Richmond/Simi Valley,*

supra, PERB Decision No. 99, pp. 17-18; see also *Delano Union Elementary School District* (2007) PERB Decision No. 1908, p. 17; *Republic Aviation Corp. v. NLRB, supra,* 324 U.S. 793, 801-03.) Although worktime is for work, "time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he [or she] wishes without unreasonable restraint, although the employee is on company property." (*Peyton Packing Co., Inc.* (1943) 49 NLRB 828, 843, enforced (5th Cir. 1944) 142 F.2d 1009, cert. denied (1944) 323 U.S. 730; *Delano, supra*, at p. 17.) Thus, restrictions on employee solicitation, including the distribution of union literature, during non-work time and in non-work areas are invalid, unless the employer shows that special circumstances make such rules necessary to maintain production or discipline. (*State of California (EDD), supra,* at p. 2; *Long Beach Unified School District* (1980) PERB Decision No. 130 (*Long Beach*), pp. 7-8; *Eastex, Inc. v. NLRB* (1978) 437 U.S. 556, 574; *Beth Israel Hosp. v. NLRB* (1978) 437 U.S. 483, 492-493; cf. *Baylor University Medical Center v. NLRB* (D.C. Cir. 1981) 662 F.2d 56, 65.)

The Federation's charge and supporting materials allege that the District has prohibited employees from distributing flyers 30 minutes before work but that they may hand out flyers "*after school* when they finish their work obligations." (Second Amended UPC, Attachment D.1, original emphasis.) The District's directive makes no mention of other permissible times when employees may distribute flyers, such as meal or rest periods, and a reasonable interpretation is that there are none. (*Los Angeles CCD, supra*, PERB Decision No. 2404, p. 12; *Long Beach, supra*, PERB Decision No. 130, p. 10.) Thus, even accepting the District's contention that employees are on duty 30 minutes before the start of school and may lawfully be prohibited from distributing flyers at that time, on its face, the District's blanket restriction on union or other concerted activities *at any time during the workday* constitutes a prima facie case of interference with protected employee rights. (*Long Beach, supra*, at p. 9.)

In addition, the District's September 5, 2014 e-mail advises teachers that they "must be off school property when they hand out flyers," including "not in a driveway or walkway on school campus." Because the District's e-mail does not qualify this geographic restriction by distinguishing between off-duty and on-duty time, a reasonable interpretation is that employees are not free to distribute flyers at any time or under any circumstances while *anywhere* on the District's property, including non-working areas. This blanket geographic prohibition is also overly broad in that, like the above temporal restriction, it fails to account for the fact that not all time spent on the employer's premises is "on duty" or otherwise subject to employer restrictions on union or other concerted employee activity. (*UC Regents, supra,* PERB Decision No. 2300-H, pp. 16, citing *Mt. San Antonio, supra,* PERB Decision No. 224; *Long Beach, supra*, at p. 13.) Legitimate employer concerns of ensuring order, production or discipline in work areas are inapplicable in parking lots, breakrooms, staff lounges or other non-work areas. (*State of California (EDD), supra,* PERB Decision No. 1365a-S, pp. 2, 10-11; *Long Beach, supra*, PERB Decision No. 130, p. 22; *Stoddard-Quirk Mfg. Co., supra,* 138 NLRB 615, 618.)

Recognizing this distinction, PERB has repeatedly held that concerted employee activities and union access rights are subject to *reasonable* time, place and manner standards, but may not be banished altogether, even in the most sensitive work environments. (*County of Riverside* (2012) PERB Decision No. 2233-M, p. 7; *Regents of UC (LLNL), supra,* PERB Decision No. 212-H, pp. 12-13; see also *The Regents of the University of California, University of California at Los Angeles Medical Center* (1983) PERB Decision No. 329-H, pp. 4-6.) Consequently, even if employees are on duty 30 minutes before classes start, the charge nonetheless states a prima facie case of interference by alleging that the District has

promulgated, maintained or enforced an unqualified rule that employees "must be off school property when they hand out flyers."

In addition to temporal and geographic restrictions, the Federation's charge and supporting materials also allege a *content-based* restriction. According to Attachment D.1, staff "cannot hand out flyers of a political or union nature." (Second Amended UPC, Ex. D.1.) Thus, the charge alleges that even after school when employees have finished their duties and are on the public sidewalk in front of the school, they may still not distribute flyers of "a political or union nature."

Our case law substantially limits an employer's ability to censor or impose prior restraints on the content of union communications. (*Desert Community College District* (2007) PERB Decision No. 1921 *(Desert CCD)*, p. 10; *County of Sacramento* (2014) PERB Decision No. 2393-M, pp. 16-17.)[12] Content-based restrictions are highly disfavored, in part, because there are so few circumstances in which they are based on legitimate justification. (*Carey v. Brown* (1980) 447 U.S. 455, 455; *Police Dept. of City of Chicago v. Mosley* (1972) 408 U.S. 92, 92-93; cf. *Ralphs Grocery Co. v. United Food and Commercial Workers Union Local 8* (2012) 55 Cal.4th 1083, 1102 [upholding content-based *protection* of speech occurring in non-public fora].) Because the degree of intrusion into an employer's property or managerial interests does not vary with the content of the material distributed, an employer's only legitimate interest in regulating such conduct is in preventing employees from bringing literature onto its premises and distributing it there — not in choosing which messages to suppress.

[12] Because the issues on appeal concern only the District's ban on distributing "union" literature, we do not consider the extent to which a public school employer may regulate or prohibit "political" speech or activities on its premises. (Educ. Code, § 7050 et seq.; *San Leandro Teachers Assn v. Governing Bd. of San Leandro Unified School Dist.* (2009) 46 Cal.4th 822, 834-835; *Desert CCD, supra,* PERB Decision No. 1921, pp. 11, fn. 11, 12-14; see also *Wilmar Union Elementary School District* (2000) PERB Decision No. 1371.)

(*Richmond/Simi Valley, supra,* PERB Decision No. 99, p. 19; *Eastex, Inc. v. NLRB* (1978) 437 U.S. 556, 573; *State of California, California Department of Transportation* (1981) PERB Decision No. 159b-S, pp. 16-17.) In addition to non-work areas, once the employer has opened up other parts of the workplace as a forum for some forms of non-work related speech or expressive conduct, it is not free to ban other non-disruptive speech or conduct based solely on its content, unless otherwise authorized or required by law. (Ed. Code, § 7052; *San Leandro, supra*, 46 Cal.4th 822; *The Regents of the University of California* (1985) PERB Decision No. 504-H, p. 4, adopting proposed dec. at p. 24, overruled on other grounds *sub nom. Regents of University of California v. Public Employment Relations Bd.* (1986) 177 Cal.App.3d 648; *Desert CCD, supra,* PERB Decision No. 1921, p. 10; *Sierra Sands Unified School District* (1993) PERB Decision No. 977, adopting proposed dec. at p. 12; *San Ramon Valley Unified School District* (1982) PERB Decision No. 254, p. 9.)

Most cases involving content-based restrictions concern facially neutral policies which are alleged to have been promulgated in response to protected activity or enforced in an arbitrary or discriminatory manner. (See, e.g., *Long Beach, supra*, PERB Decision No. 130, pp. 8-9 and 16; *Richmond/Simi Valley, supra*, PERB Decision No. 99, pp. 15-26, and administrative and judicial decisions cited therein.)[13] An employer policy which permits some outside individuals or organizations access to the employer's facilities to promote political

[13] Though facially content neutral, laws are considered content-based regulations of speech if they cannot be justified without reference to the content of the regulated speech or were adopted "because of disagreement with the message [the speech] conveys." (*Reed v. Town of Gilbert, Ariz.* (2015) 135 S.Ct. 2218, 2227, citing *Ward v. Rock Against Racism* (1989) 491 U.S. 781, 791.) Similarly, under PERB and NLRB precedent, an employer rule that does not explicitly restrict protected rights may nonetheless be unlawful, if the rule was promulgated in response to union activity or if it has been applied to restrict the exercise of protected rights. (*Marin Community College District* (1980) PERB Decision No. 145 (*Marin*), p. 19; *Martin Luther Memorial Home, Inc. d/b/a/Lutheran Heritage Village-Livonia* (2004) 343 NLRB 646, 647.)

causes or commercial interests but denies access to employee organizations or only grants union access under more onerous conditions is unreasonable and violates the organization's right of access. (*Regents of the UC, supra,* PERB Decision No. 504-H, p. 4, adopting proposed dec. at pp. 11-12, 19-20; *Long Beach, supra*, PERB Decision No. 130, p. 16; *Marin, supra,* PERB Decision No. 145, p. 19; see also *Wm. H. Block Co.* (1964) 150 NLRB 341.)

The non-discrimination principle governing PERB's access cases is equally applicable to the exercise of employee rights. (*Richmond/Simi Valley, supra*, PERB Decision No. 99, p. 16; *Long Beach, supra,* PERB Decision No. 130, pp. 6-7.) A public school employer may not enforce a facially-neutral workplace policy in a manner that permits some forms of employee solicitation for (or against) employee organizations, while denying other, equally or less intrusive forms. (EERA, § 3543, subd. (a); *Modesto, supra,* PERB Decision No. 291, p. 62.) Thus, in addition to the distinction between on-duty and off-duty time discussed in the warning and dismissal letters, our cases effectively recognize a third category of employee "down time," in which management authorizes or condones some non-work-related solicitation during work time. Examples may include selling candy bars to raise money for high school band uniforms, establishing an office pool on the outcome of the Super Bowl, or selling raffle tickets for social or a political cause. Whatever the occasion or cause, if the limited intrusion into worktime and work areas is permitted, it cannot be denied for other, equally or less intrusive solicitation or concerted employee activities. (*Regents of the University of California, supra,* PERB Decision No. 504-H, p. 4, adopting proposed dec. at pp. 11-12, 19-20; *Marin, supra*, PERB Decision No. 145, pp. 7, 19.)

Given the vast differences between workplaces, employee duties and employer expectations, it would be difficult, if not impossible, for the Board to advance a single, bright line rule as to when such down time exists, and what sorts of union or other concerted employee

activity are permissible during such time. We therefore affirm our long-standing decisional law concerning union access rights and hold that its non-discrimination principle is equally applicable in cases involving the promulgation, maintenance or enforcement of rules affecting employee speech and associational activity in the workplace.

What distinguishes the Federation's allegations from many of the content-based restriction cases cited above is that, according to the charge and supporting materials, the District has not simply promulgated a facially-neutral policy in response to protected conduct or enforced a facially-neutral policy in a discriminatory fashion. Rather, it has allegedly advised employees of a policy that *singles out only* "political or union" content for prohibition anywhere in the workplace. Under the circumstances alleged by the Federation, the *inherently destructive* prong of *Carlsbad* is the appropriate standard. When an employer policy expressly bans "union" activity, requiring it to show operational *necessity* or that *no alternative* was available is consistent with well-settled constitutional and labor law principles governing content-based restrictions. (*Long Beach, supra*, PERB Decision No. 130, p. 23; *Lafayette Park Hotel* (1998) 326 NLRB 824, 825 and *Lutheran Heritage Village, supra,* 343 NLRB No. 75, slip op. at p. 2 [employer rule that explicitly restricts protected activity is per se unlawful].) While unlawful intent is not required for proving employer interference, the natural and probable consequence of an employer rule that singles out for prohibition "union" materials is the denial of employee rights attributable to an unlawful motivation, purpose or intent. (*Carlsbad, supra*, PERB Decision No. 89, pp. 10-11.)

The District's position statements have pointed to no operational necessity or circumstances beyond its control nor even articulated any compelling interest for imposing a blanket ban on leafletting during non-work time in non-work areas or for banning leaflets of a "union nature." Nor has the District offered any information to suggest that these prohibitions

are the least restrictive means available, as is required under the constitutional *strict scrutiny* standard applied to content-based restriction. (*International Society for Krishna Consciousness of California, Inc. v. City of Los Angeles* (2010) 48 Cal.4th 446, 456-457.)

Although the charge indicates that the District's superintendent later "clarified" to a Federation representative that the e-mail "was sent to Principals to address their questions regarding flyers that were being handed out to parents" and "was not intended to be shared with staff," the District has never publicly and unequivocally disavowed either any inadvertent distribution of the message to teachers (see *Jurupa Unified School District* (2015) PERB Decision No. 2458, pp. 12-13, adopting NLRB standards in *Passavant Memorial Area Hospital* (1978) 237 NLRB 138, 138-139) or its enforcement by Haugen. Moreover, because this case comes before the Board on appeal from a dismissal, we are precluded from affirming the dismissal on the basis of an affirmative defense not raised during the investigation of the charge. (*County of Santa Clara* (2015) PERB Decision No. 2431-M, pp. 20-21.)

Accordingly, we reverse the dismissal of the Federation's interference allegation and direct the Office of the General Counsel to issue a complaint alleging that, by distributing its September 5 and October 10, 2014 e-mail messages to employees, the District promulgated, maintained and/or enforced a policy that interfered with employee and employee organization rights in violation of EERA section 3543.5, subdivisions (a) and (b).

5. Whether the Federation has alleged a prima facie case of surface bargaining

The charge alleges that the District violated EERA section 3543.5, subdivision (c), by engaging in bad faith or "surface" bargaining. Bargaining in good faith is a "subjective attitude and requires a genuine desire to reach agreement." (*Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9, 25.) Surface bargaining has been described as "going through the motions of negotiations," with no real intent to resolve differences or reach

agreement. (*Muroc, supra*, PERB Decision No. 80, p. 13; *Davis Unified School District, et al.* (1980) PERB Decision No. 116, pp. 17-19, 28.) The question of good or bad faith is a factual determination based on the totality of the circumstances, including the parties' conduct at and away from the table. (*City of Placentia, supra*, 57 Cal.App.3d 9, 25; *City of San Jose, supra,* PERB Decision No. 2341-M, p. 22; *University of California, Lawrence Livermore National Laboratory* (1995) PERB Decision No. 1119-H, p. 3; *NLRB v. A-1 King Size Sandwiches, Inc.* (11th Cir. 1984) 732 F.2d 872, 873.) Although various kinds of conduct may be evidence of bad faith in negotiations, the ultimate question raised in a surface bargaining case is whether the respondent's conduct, when viewed in its totality, was sufficiently egregious to frustrate negotiations. (*City of San Jose, supra*, PERB Decision No. 2341-M, pp. 19, 41.)

As evidence of the District's bad faith in negotiations, the Federation alleges that the District made regressive bargaining proposals by making a proposal concerning teachers' salaries and class size reductions whose cost to the District was approximately $366,400 less than the District's initial proposal on these subjects. The Federation also re-alleges its other allegations of separate unfair practices, including its allegations that the District gave confusing and incomprehensible explanations and financial data in support of its bargaining proposals, that it unreasonably delayed the provision of financial information to the Federation, that it conditioned further negotiations on the exclusion of employee observers when it had previously permitted employees to attend negotiations, and that it unlawfully prohibited employees from distributing union literature to parents before the start of school.

Although the Federation has alleged several recognized "indicia" of bad faith, the totality of circumstances in a surface bargaining case may include the extent to which the charging party's own conduct frustrated or contributed to a breakdown in negotiations. (*Fresno Co. IHSS Public Authority, supra,* PERB Decision No. 2418-M, p, 52; *Gonzales*,

supra, PERB Decision No. 480, proposed dec. at pp. 61-62; *Romo Paper Products* (1974) 208 NLRB 644, 650.) In *Gonzales*, *supra*, PERB Decision No. 480, the Board concluded that a charging party's own conduct, including its "casual and even lethargic" approach to negotiations, precluded a situation in which the respondent's good faith could be tested. (*Id.*, proposed dec. at pp. 50-53, 61-62.) Similarly, because the allegations in the present case indicate that the Federation's insistence on having employees attend bargaining meetings caused the breakdown in negotiations, the Federation has not stated a prima facie case that the District engaged in surface bargaining. We affirm the dismissal of this allegation.

ORDER

It is hereby ORDERED that the dismissal of the unfair practice charge, as amended, in Case No. SF-CE-3091-E is REVERSED and REMANDED to the Office of the General Counsel for issuance of a complaint alleging that the Petaluma City Elementary School District/Joint Union High School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq., by:

(1) unreasonably delaying the provision of presumptively necessary and relevant information requested by the Petaluma Federation of Teachers, Local 1881 for contract negotiations, in violation of EERA section 3543.5, subdivisions (a), (b) and (c); and

(2) interfering with employee and organizational rights by promulgating, maintaining and/or enforcing an overly broad and discriminatory rule prohibiting the distribution of union literature, in violation of EERA section 3543.5, subdivisions (a) and (b).

All other allegations in Case No. SF-CE-3091-E are DISMISSED WITHOUT LEAVE TO AMEND.

Members Winslow and Gregersen joined in this Decision.