STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MANUEL FAUSTINO YVELLEZ, Charging Party, v. CHULA VISTA ELEMENTARY SCHOOL DISTRICT, Respondent.	Case No. LA-CE-5732-E PERB Decision No. 2586 September 28, 2018

Appearances: Manuel Faustino Yvellez, on his own behalf; Fagen Friedman & Fulfrost, LLP, by Dean T. Adams and Jordan I. Bilbeisi, Attorneys, for Chula Vista Elementary School District.

Before Winslow, Shiners, and Krantz, Members.

DECISION

SHINERS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by Manuel Faustino Yvellez (Yvellez) to the proposed decision of an administrative law judge (ALJ). The complaint, as amended, alleged that Yvellez's employer, the Chula Vista Elementary School District (District), retaliated against him and interfered with his protected rights in violation of the Educational Employment Relations Act (EERA or Act)[1] by threatening him with discipline and investigating him for sending to all District teachers an e-mail expressing concerns about the conduct of the District's Human Resources Director. The proposed decision dismissed the complaint on the ground that the e-mail was not protected activity under EERA.

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

Based on our review of the proposed decision, the entire record, and relevant legal authority in light of the parties' submissions, we conclude that Yvellez's e-mail was protected and that the District retaliated against Yvellez and interfered with his protected rights by threatening him with discipline and investigating him for sending the e-mail. We accordingly reverse the proposed decision.

FACTUAL BACKGROUND

Yvellez is a kindergarten teacher at the District's Greg Rogers Elementary School and a public school employee pursuant to EERA section 3540.1, subdivision (j). The District is a public school employer pursuant to EERA section 3540.1, subdivision (k). Chula Vista Educators (CVE) is the exclusive representative of the District's certificated employees, including Yvellez.

The District consists of 44 elementary schools, five of which are charter schools. The elementary schools teach students from kindergarten through sixth grade and the charter schools teach students from kindergarten through eighth grade. The District employs 1,200 teachers in its non-charter schools and 200 teachers in its charter schools. The non-charter school teachers are represented by CVE while the charter school teachers are unrepresented.

At all relevant times, Francisco Escobedo (Escobedo) was the District's Superintendent and Sandra Villegas-Zuniga (Villegas-Zuniga) was the Assistant Superintendent of Human Resources. Sherrill Stogsdill (Stogsdill) was the Principal of Rogers Elementary.

During the 2011-2012 school year, Peg Myers (Myers) was the CVE President and Jennefer Porch (Porch) was the CVE Vice-President. At all relevant times, Yvellez was not a CVE officer, site representative, or job steward.

The District's E-mail System

Each district employee has an e-mail address. The teachers have individual e-mail addresses which are published on the District's website so that parents can e-mail teachers. Within the District e-mail system, an employee can send an e-mail to other employee(s) either by listing the individual e-mail addresses or by sending an e-mail to a "distribution group" of employees. These distribution groups include all teachers of a specific grade level or at an individual school.[2] When a distribution group of all teachers in a specific grade level is designated, the e-mail is sent both to the CVE-represented teachers at the non-charter schools and the unrepresented teachers at the charter schools.

At the time of the events underlying this case, the District did not have a written policy regarding employee use of its e-mail system. According to Villegas-Zuniga, the District's practice was that its e-mail system was to be used for "employment-purposes." The District did not monitor compliance with the practice and normally did not become aware of any violation of the practice unless an inappropriate e-mail was brought to the attention of District management. When it received notice of an alleged misuse of the e-mail system in the past, the District investigated whether the action constituted misconduct.

Superintendent Escobedo testified that the District e-mail system was to be used for communicating information related to the schools. According to Escobedo, the District's e-mail system had never been used to express a conflict between management and the teachers, or for any type of union activity.

As evidence of the District's e-mail practice, the record contains two e-mails from Principal Stogsdill to all Rogers Elementary employees. One is an announcement soliciting

[2] For example, "All Kindergarten Distribution Group" is the group address for all District kindergarten teachers and "Rogers Distribution Group" is the group address for employees at Rogers Elementary.

contributions for the United Way campaign. The other is a forward of an e-mail from District Communication Officer Anthony Millican notifying employees of a memorial service for a District employee who had passed away. Additionally, there was testimony that teachers would notify other teachers by e-mail regarding the sale of their resource books and instructional materials. All of these e-mails were brief and informational. Villegas-Zuniga was unaware of these e-mails.

The collective bargaining agreement between CVE and the District was silent as to CVE's right to use the District's e-mail system. CVE historically has not used the District's e-mail system to communicate with its members, but instead sent e-mails to its members' private e-mail accounts. CVE used this manner of dissemination because it did not believe the District's e-mail system to be confidential.

Myers Appointed as Human Resources Director

Near the end of the 2011-2012 school year, the District advertised to fill a vacancy for the Human Resources Director. The position was to report directly to Villegas-Zuniga. CVE President Myers told Escobedo that she wished to compete for the position.

The selection process for the Human Resources Director consisted of three separate interviews. A panel of teachers, parents, principals, and other District personnel conducted the first level of interviews. The superintendent and assistant superintendents then interviewed the top two to three finalists from those earlier interviews. The school board then interviewed the finalist recommended by the Superintendent. Escobedo estimated that Myers was offered the position approximately two to three weeks after the District advertised to fill the vacancy.

Yvellez's E-mails to District Teachers

On May 24, 2012, Myers sent an e-mail from her CVE president e-mail account to the CVE teachers' private e-mail accounts, including Yvellez's, notifying them that she was

resigning as the CVE President because she had accepted the Human Resources Director position. Myers added that Vice-President Porch would be assuming the job of CVE President.

On May 25, 2012, Porch sent an e-mail from her CVE President e-mail account to the CVE teachers' private e-mail accounts, including Yvellez's, notifying them that Myers had resigned as CVE President on May 23, 2012, and she was assuming the President's office pursuant to CVE's bylaws. Porch explained that she would be finishing the school year teaching, but would be working hard in the summer to assume her duties as the CVE President.

On Sunday, May 27, 2012, Yvellez replied to Porch's e-mail from his private e-mail account:

> I am deeply dismayed by your letter describing your ascendency to President of CVE. It does not appear in any way to convey the offense the union should take at what I believe is a clear case of a breach of fiduciary duty by our past President Ms. Myers. A fiduciary duty is just a fancy legal term used to describe a heightened duty owed when one is acting on behalf of another in a relationship of trust and confidence (e.g., your attorney, your real estate agent, your union officer). This duty requires the fiduciary, here the union officers, including Ms. Myers, to act with an obligation of undivided loyalty. Such a fiduciary has the highest duty not to put herself in a conflict of interest, not to personally benefit from the fiduciary position, and to immediately disclose all material facts to the principal party, namely CVE and its members. Here it appears Ms. Myers was in a classic case of conflict of interest. She was supposed to be representing and negotiating benefits for the members of CVE. But at this same time she put herself in consideration for a position with the district that would personally benefit her with an increased salary and retirement base. Furthermore, she failed to disclose this fact, possibly for months. Temporary teachers should be particularly offended. I am not aware of what efforts Ms. Myers made to preserve their jobs or set up a fair system of how they would be called back to work. But we see now that Ms. Myers was successful in using her fiduciary position to secure herself a more financially lucrative job.
>
> I do not understand your decision to continue working as a second grade teacher next week. We need a strong President now more than ever to take strong immediate steps. We need to have

CVE get the best legal advice on this matter. The breach is clear. But we need a remedy. I believe our position should be to try to enjoin Ms. Myers from keeping her position with the district. Enjoin is just a fancy legal word for prevent. It is used when describing an injunctive remedy where a court is telling someone you have to do something or you can't do something (e.g., you can't keep that plum job you received for yourself arising out of your fiduciary relationship). Ms. Myers was our President, our principal representative, who formed our strategy and took our confidences. We cannot accept that this person is now in a position to work against us. Perhaps, more importantly, to let this stand would mean that we would constantly have to wonder whether future Presidents were really working in our interests with undivided loyalty or were actually secretly positioning themselves for a lucrative position with the district.

Unfortunately, I must also inform you that it has come to my attention that you yourself may have known for some time that Ms. Myers was seeking or in consideration for a position with the district. I hope that this is not true. If it were true, then this would also be a breach of fiduciary duty to not disclose all material facts relevant to the fiduciary relationship, and the Presidency itself might qualify as an ill[-]gotten gain. If it were true, then I am afraid that it would be clear that you are not the person to lead us in rectifying the situation with Ms. Myers. As I said, I hope this is not true. I ask you now to clear up the matter by clearly communicating with us or our site representatives all facts that you know and when you knew them regarding this matter. Additionally, if you are still the person to lead us, we need to know what immediate actions you will be taking to address this matter. Time is of the essence to prevent Ms. Myers from revealing confidential information to the district. I would suggest we need an immediate meeting with site representatives and immediate inquiries for legal advice and counsel retention.

Finally, I would ask you to please forward this letter to all members of CVE as I do not have all their email addresses. Whether you agree with me or not, I hope that you will resepect [*sic*] that all members are entitled to become aware of this view. I hope that you will also respect that this letter is confidential and only to be shared with CVE members. For example, it would be a breach of the fiduciary duty to share this information with Ms. Myers. Thank you for your cooperation in this regard.

Sincerely,

Manuel Yvellez
Kindergarten Teacher, Rogers Elementary

P.S. To all the teachers I have CC'd, whether you agree with me or not, I ask you to forward a copy to all CVE members for whom you may have email addresses. I hope that we can all at least agree that we are entitled to [receive] relevant information on this matter and to share our views. Currently, we don't have an effective way to communicate with all other members. The Facebook page is up, but it is not clear how many members know about it or look at it because it does not have friends. Also, it is not confidential. It is open to the public. To all CVE members that this letter reaches, I ask that you either send me your personal email address so that I can confidentially send out any information I have . . . or even better friend me (Manuel Yvellez) on Facebook. I have set up a separate group for Chula Vista Educators so that way every member would be able to view or participate in a virtual discussion of the matter.

For those of you who don't know me, I have been with CVESD for 14 years. Somewhat prior to that I was an attorney for five years. I am still a member in good standing with the Californai [*sic*] State Bar, but I am "inactive" with eligibility to be active upon paying active status dues. . . . But we now find our union in a very crippled state, with failed leadership and [an] apathetic base just at a time when big issues such as layoffs, seniority, evaluations supposedly based student performance with cryptic algorythms [*sic*] we cannot trust, curriculum changes without our input, etc., are upon us or on the near horizon. I know your fears and your desires to live peacefully, teaching to the best of your ability and enjoying life with your families. But we face serious threats to that very way of life. I am not a disgruntled crusader. I do not have personal animosity toward any party. I dislike confrontation probably as much as the average teacher does and that is a big reason I left the law. I also worry about retaliation from the district. But some steps you know are right and you know you will just not feel right about yourself if you do not take them. I ask you to take this step with me, to at least join me on Facebook and listen and consider a discussion. I would like you to allow for the possibility that together step by step we can improve our situation.

On Tuesday, May 29, 2012, at 6:55 a.m.,[3] Yvellez used his District e-mail account to send an e-mail to all of the District's teacher distribution groups for kindergarten through sixth grade, attaching his May 27, 2012 response to Porch. In the subject line of the e-mail Yvellez wrote, "Confidential CVE Message." The e-mail stated:

> On Sunday May 27, I wrote a letter to Ms. Jenefer [*sic*] Porch, our new CVE President, regarding recent leadership issues and the action needed to be taken. I asked Ms. Porch to immediately send out a copy of that letter to all CVE membership so that you could be made aware of my views. It would just take a second to forward the letter to all membership. Because she has not done this, I present the letter attached here. It is confidential to CVE membership. If you are not a CVE member, this memo has reached you by mistake and I would ask you please to [delete] it. To my fellow CVE members, I would ask you to take the time to read the letter and consider the statements. We must not be afraid to exchange ideas. We must act as the learners and critical thinkers that we try to have our students become. I would argue the first step to such character is to be willing to listen to ideas.
>
> Please email me your personal email address (my address is in the letter) and/or friend me on Facebook so that we have a means of communicating with each other. We cannot have a union that lacks communication.

Yvellez testified that he sent this e-mail and attachment because he wanted to offer his legal opinion to the CVE membership as to Myers' conflict of interest.

A number of teachers in one of the District's non-represented charter schools, Chula Vista Learning Community Charter School (CVLCCS), received Yvellez's e-mail and wondered why it was sent to them as they were not represented by CVE. One of these teachers forwarded the e-mail to the CVLCCS Director Jorge Ramirez (Ramirez).

[3] Yvellez testified without contradiction that his work day begins at 8:00 a.m.

May 30, 2012 E-mails between Yvellez and Superintendent Escobedo

On May 30, 2012 at 7:15 a.m., Yvellez sent an e-mail to Escobedo, copied to the teacher distribution groups for kindergarten through eighth grade, which stated in pertinent part:

> Recently, there has arisen a particular need for CVE members to communicate with each other on union matters. Having no other effective communication system currently in place, I have utilized the district email system for such communications. Some members have claimed that this email system can never be used for union communications and have even implied that a member could face severe discipline for such use. I have asked for the basis of such pronouncement, but have received none. In my 14 years with CVESD, I do not recall the district ever putting out a statement or adopting limiting regulations of the email system. I also do not find any support for such a position in the law. I ask if you will please clear up this matter by stating now any official position the district has on [this] matter.

At 8:19 a.m. that morning, Ramirez forwarded Yvellez's May 29, 2012 e-mail to Escobedo. Escobedo reviewed the e-mail and its attachment and was concerned that Yvellez was attacking Myers' integrity by asserting that she used her position as CVE President to attain her position as Human Resources Director. Escobedo testified that he viewed the e-mail as defamatory because he believed Myers did not use her CVE office to obtain the position, and was concerned that Yvellez was impugning Myers' reputation for trust and integrity.

Escobedo then contacted Porch and asked her whether Yvellez's e-mail was CVE's position. Porch replied that it was not, and that Yvellez was acting independently. At 8:40 a.m., Escobedo sent Yvellez an e-mail, which provided:

> It has come to my attention that you are inappropriately using our [e-mail] service to share derogatory information that can be construed as slanderous and litigious. This case is being reviewed by our district attorney and will be recommending possible disciplinary action. I would suggest that you contact [your] union representative or personal attorney.

Yvellez responded later in the day and requested that Escobedo provide him with any rule, policy, or authority that he violated. Escobedo did not respond to Yvellez's e-mail.

Initiation of the Investigation

Shortly after his e-mail correspondence with Yvellez, Escobedo directed Villegas-Zuniga to conduct an investigation into whether Yvellez engaged in any wrongdoing by sending the May 29, 2012 e-mail. On Friday, June 1, 2012,[4] Villegas-Zuniga e-mailed Yvellez notifying him that she would be holding June 6, 11, and 14, 2012, as possible dates for the District to interview him. Yvellez responded that he would contact his attorney and arrange a time for the meeting. Yvellez added that he had reviewed District policies and did not find any policy covering e-mail communications. Yvellez asked that he be provided the factual and legal basis for the interview.

Villegas-Zuniga responded to Yvellez on the same day:

> I believe I have provided to you the information related to the nature of our meeting scheduled for this morning on my electronic message dated June 1, 2012 sent at 10:43 [a.m.] It cites the district's desire to investigate the electronic communication sent by you on May 29, 2012 to all CVESD teachers via the District's email service.
>
> You may present whatever information you desire at our meeting. I am unable to predict what outcome will transpire as a result of our future meeting. One of the District's attorney[s] will also be present and be able to address any inquiries or concerns from you or your attorney.

June 14, 2012 Investigatory Interview

Yvellez agreed to be interviewed at the District's Human Resources office on June 14, 2012. On that day, Villegas-Zuniga, Principal Stogsdill, District Counsel Dean Adams (Adams), Yvellez, and his attorney Gary Connors III (Connors), met at the District office.

[4] According to Yvellez, this was the last day of classes for the school year.

Connors and Yvellez saw two policies laid out on the office table: Board Policy 6162.7 "USE OF TECHNOLOGY IN INSTRUCTION" (Board Policy) and an "EMPLOYEE INTERNET USE GUIDELINES/AGREEMENT" (Employee Agreement). The Board Policy primarily concerned the instructional use of technology with students, and in that context mentioned the e-mail system.[5] The Employee Agreement requires employees to use District internet access and e-mail services in compliance with the Children's Internet Protection Act.[6] After Connors

[5] The Board Policy provided in pertinent part:

> The Board recognizes that special considerations apply when using the Internet and directs District staff to:
>
> [¶ . . . ¶]
>
> - Establish and implement rules and regulations designed to restrict students' access to harmful and inappropriate matter on the Internet and that address the safety and security of students and student information when using electronic mail, chat rooms, and other forms of direct electronic communications.
>
> - Ensure proper use of the system, which may include monitoring the District's technological resources including e-mail, social media, web-based applications, and voice mail systems, at any time without advance notice or consent.
>
> (Emphasis added.)

[6] The Employee Agreement provided in pertinent part:

> The Employee Internet Use Guidelines/Agreement is a legally binding agreement. Use of the District's Internet access and e-mail services are privileges made available to District staff who comply with the terms of this Agreement. Rules that commonly apply to school conduct are in force in connection with Internet communication and use of any telecommunications technology. . . .
>
> In compliance with the Children's Internet Protection Act (CIPA):

and Yvellez reviewed the Board Policy and the Employee Agreement, Connors stated that they did not apply to Yvellez's e-mail.

When Yvellez was asked why he sent the May 29, 2012 e-mail, he answered that he believed the District had created a "public forum" by making District teachers' e-mail addresses available to the public through the District's website and encouraging members of the "public" to e-mail the teachers. Yvellez was also asked whether he had written the e-mail during work time. He denied having done so.

At the end of the interview, Yvellez asked when the District would be making a decision as to what action they would take regarding his e-mail. Adams replied that it was "difficult to say," but such decisions typically were made within two to three weeks.

Villegas-Zuniga concluded that Yvellez did not send the e-mails during instructional time, but that the May 29, 2012 e-mail and its attachment were inappropriate because they were personal, not school business. She communicated these findings to Escobedo. He decided not to take disciplinary action against Yvellez for the e-mail, but that decision was not communicated to Yvellez at the time.

On August 7, 2012, Yvellez e-mailed Villegas-Zuniga that it had been more than two to three weeks since the investigatory interview and he had not received a response as to how the District would be proceeding. Yvellez expressed his concern that the District was delaying in responding to him in order to keep him in doubt and curb his e-mail speech. Yvellez requested

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> Individuals shall not access, post, submit, publish, or display harmful or inappropriate matter.
>
> [¶ . . . ¶]
>
> I understand and will abide by the terms and conditions outlined in the Employee Internet Use Guidelines/Agreement and will assume responsibility for appropriate use of the Internet.

to be provided with the District's decision and a statement as to the District's e-mail policy by the end of the week. No response was provided.

Yvellez testified that he did not send any further e-mails to the CVE membership after Escobedo's May 30, 2012 e-mail and the June 14, 2012 interview because he was afraid that further actions would be taken against him if he did, especially since the District did not provide him with an e-mail policy. Nevertheless, on May 7, 2013, Yvellez sent from his District e-mail account an e-mail to other CVE members at their District e-mail addresses announcing his candidacy for CVE President and outlining his campaign platform.

Negotiations with CVE over New E-mail Policy

As other recent employee e-mails had caused the District concern, Villegas-Zuniga decided that the District should meet with CVE to develop a policy governing acceptable use of District e-mail. On November 1, 2012, CVE and the District began negotiations over such a policy. As of the May 21, 2013 hearing, those negotiations were still ongoing.

DISCUSSION

The complaint alleged that the District violated EERA section 3543.5, subdivision (a), by telling Yvellez that it was considering taking disciplinary action against him for his May 29, 2012 e-mail to other District teachers expressing his concerns over Myers' appointment as the District's Human Resources Director, and conducting an investigative interview regarding the e-mail. The complaint alleged only that this conduct interfered with Yvellez's exercise of protected rights. At the hearing, the ALJ permitted Yvellez to amend the complaint to allege retaliation based on these same factual allegations.[7]

[7] Although the District objected to this motion at the hearing, it did not except to the ALJ's ruling. As a result, the issue of whether the motion to amend was properly granted is not before us. (PERB Regulation 32300, subd. (c).)

Following a one-day hearing and submission of briefs, the ALJ dismissed the amended complaint on two grounds. First, he concluded that Yvellez's May 29, 2012 e-mail was not protected under EERA because it was insulting to Myers and substantially disrupted her ability to engage in discussions with CVE. Second, he concluded the e-mail was not protected because it was longer and sent to more individuals than the District's e-mail practice allowed. Finding no protected activity, the ALJ concluded that the District did not retaliate against Yvellez or interfere with his exercise of protected rights. For the following reasons, we disagree with the ALJ on each of these points.

1. Protected Activity

The amended complaint alleged two legal theories: discrimination/retaliation and interference. To prove that an employer discriminated or retaliated against an employee in violation of EERA section 3543.5, subdivision (a), the charging party must show that: (1) the employee exercised rights protected by EERA; (2) the employer knew of the employee's exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the adverse action because of the exercise of those protected rights. (*Novato Unified School District* (1982) PERB Decision No. 210.) "[I]n order to establish a prima facie case of unlawful interference, the charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under EERA." (*State of California (Department of Developmental Services)* (1983) PERB Decision No. 344-S (*Department of Developmental Services*); *Carlsbad Unified School District* (1979) PERB Decision No. 89.) Both legal theories require the charging party to establish that a particular activity—either the activity that allegedly caused the adverse action(s) to be taken or the activity that allegedly would be harmed by the employer's conduct—is protected under EERA.

Here, Yvellez's claims rest on whether his May 29, 2012 e-mail was protected by EERA. For the following reasons, we conclude that it was.

a. Yvellez's May 29, 2012 E-mail Did Not Lose Statutory Protection Because of the Nature of Its Statements about Myers

To have statutory protection, an employee's "speech must be related to matters of legitimate concern to the employees as employees so as to come within the right to participate in the activities of an employee organization for the purpose of representation on matters of employer-employee relations." (*Rancho Santiago Community College District* (1986) PERB Decision No. 602, p. 12 (*Rancho Santiago*).) "[A]n individual employee's criticism of management or working conditions is protected when its purpose is to advance other employees' interests or when it is a logical extension of group activity." (*Trustees of the California State University* (2017) PERB Decision No. 2522-H, p. 16.) Additionally, speech that concerns the "autonomy and effectiveness of the exclusive representative" falls into the category of protected speech. (*Rancho Santiago*, *supra*, PERB Decision No. 602, p. 12.) Thus, critical statements about union leadership typically are protected. (*Rio School District* (2015) PERB Decision No. 2449, adopting proposed decision at p. 24.)

Yvellez's May 29, 2012 e-mail was addressed to District teachers and raised concerns about their former union president becoming the District's Human Resources Director, as well as her successor's ability to effectively lead the union. It also urged teachers to join him in addressing these concerns with union leadership. Because the e-mail addressed "matters of legitimate concern to the employees as employees," (*Rancho Santiago, supra*, PERB Decision No. 602, p. 12) its content generally falls under the protection of EERA section 3543, subdivision (a).

Nonetheless, under our precedent "[e]mployee speech and conduct may lose statutory protection [when] found to be sufficiently opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice as to cause substantial disruption of or material interference in the workplace." (*State of California (Department of Corrections & Rehabilitation)* (2012) PERB Decision No. 2282-S, p. 7; *Rancho Santiago, supra,* PERB Decision No. 602, p. 13.) Relying on this precedent, the ALJ found Yvellez's May 29, 2012 e-mail lost its statutory protection because it implied that Myers was untrustworthy, which, the ALJ found, necessarily would disrupt her ability to productively engage with CVE in the future. We disagree that Yvellez's e-mail lost its statutory protection.

"In considering the limits of employee speech protected by EERA, PERB has adopted the standard applied by the National Labor Relations Board (NLRB), consistent with that articulated by both the California and United States Supreme Courts in First Amendment cases." (*Rancho Santiago, supra,* PERB Decision No. 602, p. 12 & fn. 6.) To lose protection under the National Labor Relations Act (NLRA), an employee's speech must be "maliciously untrue." (*North West Rural Electric Cooperative* (2018) 366 NLRB No. 132, *5; *Triple Play Sports Bar and Grille* (2014) 361 NLRB 308, 312 (*Triple Play Sports Bar and Grille*); *Mastec Advanced Technologies* (2011) 357 NLRB 103, 107 (*Mastec*); accord *Linn v. United Plant Guard Workers of America, Local 114* (1966) 383 U.S. 53, 55; *Jolliff v. National Labor Relations Bd.* (6th Cir. 2008) 513 F.3d 600, 610; *Sutter Health v. UNITE HERE* (2010) 186 Cal.App.4th 1193, 1206 (*Sutter Health*).) A party claiming employee speech is unprotected therefore must prove that (1) the employee's statement was false and (2) the employee made the statement "with knowledge of its falsity, or with reckless disregard of whether it was true or false." (*Sutter Health, supra,* 186 Cal.App.4th at p. 1209; *Triple Play Sports Bar and Grille, supra,* 361 NLRB at p. 312.) This standard focuses on the employee's subjective state

of mind, not on whether a reasonable person would have investigated before making the statement. (*Sutter Health, supra,* 186 Cal.App.4th at pp. 1210-1211.) Even gross or extreme negligence as to the statement's truth is insufficient to prove the actual malice necessary to strip employee speech of statutory protection. (*Id*. at p. 1211.)[8]

Although the Board's decisions have not always articulated the standard in this precise way, they have followed it in practice. For instance, *Rancho Santiago, supra*, PERB Decision No. 602, involved an instructor who was disciplined for writing and publishing in a faculty union newsletter articles that compared district administrators to Nazis and Soviet KGB agents, accused the district of reneging on her sabbatical contract, and generally criticized how faculty was treated by district administration. (*Id*. at pp. 6-11.) The Board held these statements did not lose their protected status because, although they were made in "exaggerated and overstated" language, they had "some basis in fact." (*Id*. at p. 13.) The Board also noted that the events described in the articles were widely known at the college, and were described in enough detail that "the sophisticated audience of college instructors and administrators [was] quite capable of drawing its own judgments about both the articles and events." (*Id*. at p. 14.)

Similarly, the Board in *Pomona Unified School District* (2000) PERB Decision No. 1375, held that a teacher's letters to district management threatening them with a subpoena, grievance, or IRS inquiry did not lose their protection. The Board found the letters "uncomplimentary," but the language used was "forceful but not abusive" and the threatened actions were "topics which labor relations personnel are likely to encounter at least occasionally in the routine course of business." (*Id*. at p. 16.)

[8] Any party alleging that another party acted with "actual malice" must satisfy a heightened standard of proof by coming forward with "clear and convincing" evidence. (*Sutter Health, supra,* 186 Cal.App.4th at p. 1206.)

Conversely, in *Pittsburg Unified School District* (1978) PERB Decision No. 47, the Board found unprotected an employee's written communication that, among other accusations, stated that a union representative witnessed a deputy superintendent "engaged in intercourse with more than one woman concurrently." (*Id*. at p. 7.) The communicator knew this allegation to be false, as shown by his attempted defense that the word "intercourse" could also mean conversation. (*Id*. at p. 8.) More recently, the Board found an employee's e-mail to a television news organization in which he called his former supervisor a "sexual predator" to be unprotected because it "was made with reckless disregard for the truth." (*Anaheim Union High School District* (2015) PERB Decision No. 2434, adopting proposed decision, p. 81.)

Although we have consistently applied the *Rancho Santiago* standard over the years, the language we have used to articulate that standard, i.e., "opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice," may nonetheless fail to protect speech that is not maliciously false.[9] For example, in this case the ALJ based his conclusion that Yvellez's e-mail was unprotected on a finding that its accusations against Myers were "flagrant and insulting." To avoid potential misapplication of the standard in cases where the content of employee speech is at issue, we clarify that speech related to matters of legitimate concern to employees as employees so as to come within the right to participate in the activities of an employee organization for the purpose of representation on matters of employer-employee

[9] The *Rancho Santiago* standard appears to encompass two different tests the NLRB uses to determine whether employee communications are protected. The first test, as articulated and applied in decisions such as *Mastec, supra*, 357 NLRB 103, is content-based and looks to whether the speech is maliciously false. (*Id*. at p. 107.) The second, as articulated in *Atlantic Steel Co.* (1979) 245 NLRB 814, is conduct-based and analyzes whether the manner in which an employee engaged in face-to-face communications with a manager or supervisor was so opprobrious or disruptive to operations that it lost statutory protection. (*Triple Play Sports Bar and Grille*, *supra*, 361 NLRB at p. 311.) Because Yvellez's face-to-face communications with management are not at issue in this case, we need not address that second aspect of the *Rancho Santiago* standard.

relations is protected unless the speech (1) is demonstrably false and (2) the employee knew the speech was false or acted with reckless disregard for whether it was false.

Here, Yvellez's May 29, 2012 e-mail contained a mixture of opinions and factual statements. But the record contains no evidence that his statements were in fact false, much less that Yvellez knew they were false or was reckless as to their potential falsity. Accordingly, Yvellez's e-mail did not lose the protection of EERA. And because we find the e-mail's content was not maliciously false, we need not consider whether it "cause[d] 'substantial disruption of or material interference [in the workplace]'," as *Rancho Santiago* also requires for employee speech to lose its statutory protection. (*Rancho Santiago*, *supra*, PERB Decision No. 602, p. 13, quoting *Richmond Unified School District/Simi Valley Unified School District* (1979) PERB Decision No. 99, p. 19.)

Yvellez's May 29, 2012 E-mail Was Protected Because It Did Not Violate a Permissible E-Mail Use Policy

As an alternative ground for finding Yvellez's May 29, 2012 e-mail unprotected, the ALJ concluded that the e-mail violated the District's practice of allowing employees to send only short informational e-mails via its e-mail system. In reaching this conclusion, the ALJ applied the rule from *Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C (*Los Angeles*), under which an employee's e-mail about union matters is protected only if the e-mail falls within the bounds of permissible non-business e-mail use under the employer's e-mail use policy.

When analyzing this issue, the ALJ did not have the benefit of our recent decision in *Napa Valley Community College District* (2018) PERB Decision No. 2563 (*Napa Valley CCD*). In that decision, we disapproved of *Los Angeles* to the extent it held that the prohibition of non-business e-mail use is permissible as long as it is not done in a manner that

discriminates against statutorily protected communications. (*Id.* at p. 19.) We then adopted the following framework regarding protected employee use of the employer's e-mail system:

> Recognizing that e-mail is a fundamental forum for employee communication in the present day, serving the same function as faculty lunch rooms and employee lounges did when EERA was written, we conclude the better rule which reflects this change in the contemporary workplace, presumes that employees who have rightful access to their employer's e-mail system in the course of their work have a right to use the e-mail system to engage in EERA[-]protected communications on nonworking time. An employer may rebut the presumption by demonstrating that special circumstances necessary to maintain production or discipline justify restricting its employees' rights.

(*Id.* at pp. 19-20.)

This framework is taken directly from the NLRB's decision in *Purple Communications, Inc.* (2014) 361 NLRB 1050 (*Purple Communications*). At our request, the parties filed supplemental briefs addressing whether the Board should adopt *Purple Communications* and, if so, how it would apply to this case. In its supplemental brief, the District presented several arguments as to why the Board should not follow *Purple Communications* that were not raised in *Napa Valley CCD, supra,* PERB Decision No. 2563. We briefly address those arguments.

First, the District points out that, unlike the NLRA, EERA section 3543.1, subdivision (b), explicitly grants employee organizations a right of access to the employer's "means of communication." From this statutory difference, the District argues that the Legislature intended to grant such access rights only to employee organizations, not to individual employees.

We do not read EERA to contain such a limitation, especially since doing so would abridge the rights granted to employees elsewhere in the Act. EERA section 3543, subdivision (a), gives employees "the right to form, join, and participate in the activities of employee organizations" and, alternatively, "the right to represent themselves individually in

their employment relations with the public school employer." Under the District's proffered reading of EERA, an employee who is a union representative would be able to use the District's e-mail system for union-related communications, but an employee who holds no union position could not. Also under the District's interpretation, employees who do not hold a union position would not be allowed to respond to an e-mail from their union representative. Nor could an employee who wishes to discuss working conditions with co-workers outside the umbrella of the union use the e-mail system for that purpose. Because each of these scenarios would restrict rights granted by EERA to individual employees, we cannot glean from EERA's statutory language that the Legislature intended for the exercise of employee rights under EERA section 3543, subdivision (a), to turn on whether the employee holds a position with an employee organization. (See *Trustees of the California State University*, *supra*, PERB Decision No. 2522-H, p. 16 [individual employees must be free to act together informally and spontaneously for mutual aid or protection regarding employer-employee relations so that they may exercise their right to form, join and participate in the activities of an employee organization]; see also *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1392 ["Statutes are to be given a reasonable and commonsense interpretation consistent with the apparent legislative purpose and intent and which, when applied, will result in wise policy rather than mischief or absurdity"], internal quotation marks omitted.)

Turning to *Purple Communications* itself, the District argues that we should not follow the NLRB's decision because, in contrast to private employers' systems, school district e-mail systems are "paid for and maintained by public funds." We disagree that the taxpayer-financed nature of a school district's e-mail system is a sufficient basis to depart from *Purple Communications* or our holding in *Napa Valley CCD*. As we explained in *Napa Valley CCD*, "in terms of the employee rights at issue, there is no material distinction between employee

rights under section 7 of the NLRA and employee rights under section 3543 of EERA." (*Napa Valley CCD, supra*, PERB Decision No. 2563, p. 16.) We decline to interpret these rights more narrowly simply because they are granted to public employees.

Finally, the District asserts that allowing employees to send EERA-protected e-mails via the District's e-mail system could give the recipient the false impression that the District endorses the e-mail's content. The NLRB rejected this same argument in *Purple Communications*:

> We are simply unpersuaded that an email message, sent using the employer's email system but not from the employer, could reasonably be perceived as speech by, or speech endorsed by, the employer—particularly a message reflecting a view different from the employer's. Email users typically understand that an email message conveys the views of the *sender* (emphasis added), not those of the e-mail account provider. They would no more think that an email message sent from a coworker via a work e-mail account speaks for the employer (unless the message was sent by the employer's supervisor or agent) than they would think that a message they receive from a friend on their personal Gmail account speaks for Google.

(361 NLRB at p. 1065.)

Citing cases involving political speech by teachers, the District claims that it may be difficult for students, parents, and community members to disassociate a teacher's message from that of the school district. Although this concern may justify limitations to political speech, such as a ban on teachers wearing buttons in their classrooms that urge a particular vote on a statewide ballot initiative (*California Teachers Association v. Governing Board of the San Diego Unified School District* (1996) 45 Cal.App.4th 1383), it is not necessarily persuasive to support a ban on speech among employees about union activity or working conditions. Indeed, it is unlikely that speech by teachers about their union or their working conditions—especially speech that is critical of the District—would be perceived as

representing the District's viewpoint. (Cf. *Eagle Point Education Association/SOBC/OEA v. Jackson County School District No. 9* (9th Cir. 2018) 880 F.3d 1097, 1105 [picketing by teachers union on school district property would be reasonably recognized as speech by the union, not the district].) Thus, like the NLRB, we do not believe recipients of e-mails about union matters or working conditions sent from an employee's District e-mail address would be confused about the identity of the sender.

Applying the *Napa Valley CCD/Purple Communications* framework to the facts before us, we find Yvellez's May 29, 2012 e-mail was protected activity under EERA. It is undisputed that the District had given Yvellez access to its e-mail system as an employee, and that the May 29, 2012 e-mail was sent during his nonworking time. Consequently, Yvellez has established a presumption that his e-mail was protected.

The District has failed to rebut that presumption. The evidence in the record does not establish that the District's restrictions on employees' non-business use of its e-mail system were justified by "special circumstances" and therefore necessary to maintain production or discipline. In fact, the record shows that the District did not have a policy governing employees' non-business e-mail use *at all*. The two policies in the record, the Board Policy and the Employee Agreement—which Superintendent Escobedo admitted were not the basis for potential discipline of Yvellez—speak of e-mail use solely in the context of preventing students from accessing harmful or inappropriate material, and safeguarding student information. Neither policy speaks to the permissible extent of employee use of the District's e-mail system for non-business communications. Further, the District did not introduce evidence of any other written e-mail use policy, or even of an established, coherent practice of regulating employees' non-business e-mail use. The District has not proven that Yvellez's

May 29, 2012 e-mail violated an e-mail use policy that was justified by "special circumstances" and therefore necessary to maintain production or discipline within the District.

Finding Yvellez's e-mail protected does not end our inquiry as we still must determine whether the District retaliated against Yvellez because he sent the May 29, 2012 e-mail or interfered with his right to send protected communications via its e-mail system.[10]

2. Retaliation

a. Prima Facie Case

To establish a prima facie case that an employer retaliated against an employee in violation of EERA section 3543.5, subdivision (a), the charging party must show that: (1) the employee exercised rights protected by EERA; (2) the employer knew of the employee's exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the adverse action because of the employee's exercise of those protected rights. (*Novato Unified School District*, *supra*, PERB Decision No. 210.) Having found Yvellez's May 29, 2012 e-mail to be protected activity under EERA, we turn to the remaining elements of the prima facie case.

The amended complaint alleged the District took two adverse actions against Yvellez: (1) Superintendent Escobedo's May 30, 2012 e-mail, which informed Yvellez that the District was considering disciplining him for his May 29 e-mail, and (2) the June 14, 2012 investigatory interview with Assistant Superintendent of Human Resources Villegas-Zuniga about the May 29 e-mail. In determining whether an employer's action is adverse, the Board

[10] Because no additional evidence is necessary to decide these remaining issues, in the interest of administrative economy and in order to expedite a final decision we shall decide these issues instead of remanding this case to the Division of Administrative Law. (*Regents of the University of California* (2012) PERB Decision No. 2300-H, p. 19, fn. 7; see PERB Regulation 32320(a)(1) [authorizing the Board itself to "[i]ssue a decision based upon the record of hearing"].)

uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689, p. 12.) "The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment." (*Newark Unified School District* (1991) PERB Decision No. 864, pp. 11-12.)

The reasonable person test guides us equally when the alleged adverse action is a threat. (*San Diego Unified School District* (2017) PERB Decision No. 2538, pp. 11-14.) PERB precedent has distinguished cases in which an employer gives unequivocal notice of likely discipline from those in which an employer makes an isolated, equivocal comment. (*Id*. at p. 12.) However, such characteristics of an employer statement are merely one type of evidence that may be relevant in determining whether a reasonable employee would feel objectively threatened. We examine all relevant evidence, particularly where, as here, the alleged threat is not merely an isolated comment but also does not rise to the level of unequivocal notice.

Escobedo's May 30, 2012 e-mail began by stating: "It has come to my attention that *you are inappropriately using our [e-mail] service* to share derogatory information that can be construed as slanderous and litigious." (Emphasis added.) It then informed Yvellez: "This case is being reviewed by our district attorney and will be recommending possible disciplinary action." It concluded with a suggestion that Yvellez contact a union representative or attorney. Although it did not explicitly state that the District had made a firm decision to impose discipline, a reasonable person in Yvellez's situation would conclude from this e-mail, and in particular its definitive opening sentence, that misconduct had already been found and discipline would be forthcoming. We accordingly find that Escobedo's May 30, 2012 e-mail was sufficiently unequivocal about future discipline to constitute an adverse action.

Turning to the second alleged adverse action, an investigation into alleged employee misconduct may constitute an adverse action against the investigated employee, regardless of whether disciplinary action ultimately results. (See *Service Employees International Union, Local 221 (Gutierrez)* (2012) PERB Decision No. 2277-M, p. 9 (*SEIU-Gutierrez*); *City of Torrance* (2008) PERB Decision No. 1971-M, pp. 16-17.) Accordingly, the determination of whether an investigation is an adverse action is made on a case-by-case basis on the facts presented. (*SEIU-Gutierrez*, *supra*, PERB Decision No. 2277-M, p. 9.)

Here, shortly after sending the May 30, 2012 e-mail accusing Yvellez of misconduct and threatening him with discipline, Superintendent Escobedo directed Villegas-Zuniga to conduct an investigation into Yvellez's May 29, 2012 e-mail. On June 14, 2012, Villegas-Zuniga met with Yvellez and his attorney, and questioned Yvellez about when and why he sent the May 29, 2012 e-mail. At the end of the meeting, the District's attorney told Yvellez the District would let him know in two to three weeks whether it would take action based on the interview. A reasonable employee would consider an investigatory interview that occurred *after* the employer indicated misconduct had already been found and *after* the employer had notified the employee it was considering imposing discipline, to be adverse to his or her employment. We therefore conclude that the June 14, 2012 investigative interview was an adverse action. These facts also establish that Escobedo and Villegas-Zuniga had knowledge of Yvellez's protected May 29, 2012 e-mail.

The final step in establishing a prima facie case of retaliation is showing a causal connection between the protected activity and the adverse action. Where the employer's words or actions reveal that the adverse action was taken in response to the employee's protected activity, such conduct serves as direct evidence of unlawful motive. (*Omnitrans* (2010) PERB Decision No. 2121-M, p. 10; *Regents of the University of California (Davis)* (2004) PERB

Decision No. 1590-H, pp. 7-8; *Alisal Union Elementary School District* (1998) PERB Decision No. 1248, p. 6.) Here, it is undisputed that the District investigated Yvellez and threatened him with discipline for sending the May 29, 2012 e-mail. Accordingly, Yvellez has established a prima facie case of retaliation.

b. Employer's Affirmative Defense

Once the charging party establishes a prima facie case of retaliation, the burden shifts to the employer to prove it would have taken the same adverse action even if the employee had not engaged in protected activity. (*Novato Unified School District*, *supra*, PERB Decision No. 210; *Martori Bros. Distributors v. Agricultural Labor Relations Bd*. (1981) 29 Cal. 721, 729-730 (*Martori Bros. Distributors*); *Wright Line* (1980) 251 NLRB 1083.) When it appears that the adverse action was motivated by both lawful and unlawful reasons, "the question becomes whether the [adverse action] would not have occurred 'but for' the protected activity." (*Martori Bros. Distributors*, *supra*, 29 Cal. 721, 729-730.) The "but for" test is "an affirmative defense which the employer must establish by a preponderance of the evidence." (*McPherson v. Public Employment Relations Bd*. (1987) 189 Cal.App.3d 293, 304.) To prove this affirmative defense, the evidence must establish that the employer had an alternative non-discriminatory reason for the adverse action, and that it, in fact, acted because of this alternative non-discriminatory reason and not because of the employee's protected activity. (*Palo Verde Unified School District* (2013) PERB Decision No. 2337, p. 31.)

The District has not met its burden. Villegas-Zuniga testified that she held the June 14, 2012 meeting with Yvellez to find out whether he drafted and sent the May 29, 2012 e-mail during his instructional time and to obtain more information about his purpose in sending it. But the District did not need to do any factual investigation to determine whether the e-mail was protected activity, as the e-mail's purpose was clear on its face and it was sent at 6:55

a.m.—over one hour before the start of Yvellez's instructional time. Moreover, the District had already told Yvellez that his use of the District's e-mail was "inappropriate," even before the investigation began. Because the evidence does not support the District's proffered reasons for investigating Yvellez, the District has failed to prove its affirmative defense. (*Chula Vista Elementary School District* (2011) PERB Decision No. 2221, pp. 21-23.) Moreover, the District provided no alternative, non-discriminatory reason for Escobedo's May 30, 2012 threat of discipline. Consequently, the District did not prove that it would have investigated Yvellez and threatened him with discipline even if he had not sent the protected e-mail.

3. Interference

"[I]n order to establish a prima facie case of unlawful interference, the charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under EERA." (*State of California (Department of Developmental Services), supra*, PERB Decision No. 344-S; *Carlsbad Unified School District, supra*, PERB Decision No. 89.) In analyzing alleged interference, unlike in our *Novato* analysis above, we need not find that any employee suffered a demonstrable or objectively adverse effect on employment conditions. (*Clovis Unified School District* (1984) PERB Decision No. 389, pp. 14-15.) Where employer conduct would reasonably tend to discourage protected activity, this likely chilling effect may, itself, constitute unlawful interference. (*San Diego Unified School District* (1980) PERB Decision No. 137, p. 18.)

As discussed above, Yvellez has a protected right to use the District's e-mail system to send e-mails to other employees about "matters of legitimate concern to the employees as employees." Both threatening to discipline and investigating employees for sending such e-mails would tend to discourage employees from sending them, thereby causing some harm to employee rights.

Because a prima facie case of interference has been established, we examine the District's justifications for threatening to discipline and investigating Yvellez, and balance those justifications against the potential harm to employee rights.[11] (*State of California (Department of Personnel Administration)* (2011) PERB Decision No. 2106a-S, p. 14; *Carlsbad Unified School District, supra*, PERB Decision No. 89, p. 10.)

On May 30, 2012, Superintendent Escobedo notified Yvellez by e-mail that his May 29, 2012 e-mail regarding Myers was improper as it could be "construed as slanderous and litigious" and that the District's attorney was reviewing the situation for "possible disciplinary action." Escobedo testified that he sent the e-mail because he felt Yvellez's e-mail was defamatory toward Myers and because the District's e-mail system typically was used only for informational purposes, not for union matters or the expression of conflict between teachers. As found above, the content of Yvellez's e-mail was protected and the District's practice of limiting e-mail communications to informational matters was not justified by "special circumstances" that made the limitation necessary to maintain production or discipline. Thus, the justifications for Escobedo's May 30, 2012, e-mail threatening Yvellez with discipline do not outweigh the potential harm to employee rights that stems from such a threat.

As for the June 14, 2012 investigatory interview, we note that, under NLRB precedent, an employer does not commit an unfair labor practice by investigating an employee based on a facially valid complaint of misconduct, even if the alleged misconduct occurred during an employee's exercise of protected rights. (*Bridgestone Firestone South Carolina* (2007)

[11] Because we find the District's conduct was not justified under the less stringent test applied to conduct that causes comparatively slight harm to employee rights, we need not determine whether the potential harm is comparatively slight or inherently destructive. (*Texaco, Inc.* (1988) 291 NLRB 508, 510.)

350 NLRB 526, 528-529.)[12] But once the employer has sufficient information to determine that the employee's conduct did not lose its protected status, continuing the investigation is an unfair labor practice. (*Consolidated Diesel* (2000) 332 NLRB 1019, 1020 (*Consolidated Diesel*).)

Such a rule is necessary to protect the employer's legitimate interest in investigating and preventing employee misconduct, especially where the employer has an affirmative duty under federal or state civil rights statutes to investigate alleged discrimination or harassment. (*Fresenius USA Mfg. Co.* (2015) 362 NLRB No. 130, *2.) At the same time, this rule also adequately protects employee rights by preventing employers from using baseless investigations to punish or discourage protected activity. (*Consolidated Diesel, supra*, 332 NLRB at p. 1020 ["The [NLRB] has long held that legitimate managerial concerns to prevent harassment do not justify policies that discourage the free exercise of Section 7 rights by subjecting employees to investigation and possible discipline on the basis of the subjective reactions of others to their protected activity"].)

We take into account NLRB authority to the extent we find it to be persuasive and consistent with the language and purposes of the PERB-administered statutes. (*Napa Valley CCD, supra*, PERB Decision No. 2563, p. 13; *Capistrano Unified School District* (2015) PERB Decision No. 2440, p. 15.) Accordingly, we hold that an employer does not interfere with employee rights when it conducts an initial investigation of arguably protected activity based on a facially valid complaint, provided that (i) the nature of the complaint legitimately calls into question whether the employee conduct was protected, and (ii) if the employer

[12] But see *Cook Paint & Varnish Co.* (1981) 258 NLRB 1230, 1232 [compelled disclosure of employee-shop steward communications interferes with protected rights]; *County of Merced* (2014) PERB Decision No. 2361-M. p. 10 [employer inquiry into discussions between employees and union representatives under the guise of investigation of workplace complaints may unlawfully chill protected activity].

acquires information indicating that the alleged conduct was protected, the employer immediately ceases the investigation and notifies all affected employees regarding its outcome.

Consolidated Diesel, *supra*, 332 NLRB 1019 is instructive. In that case, the employer received harassment complaints from employees against two of their co-workers for conduct that occurred while the co-workers were distributing union materials. (*Ibid*.) Pursuant to the first step of the employer's harassment policy, an employee relations representative met with the two employees, who told her that they felt harassed by the manner in which their co-workers distributed union materials. (*Id*. at pp. 1019-1020, 1025-1026.) The representative then elevated the matter to the employer's Performance Management Process Committee, which conducted hearings to obtain further information about the alleged misconduct. (*Ibid*.)

The NLRB found the initial interview by the employee relations representative did not violate the NLRA because it was done in response to a facially valid complaint and the employer at that time did not have sufficient knowledge of the underlying facts to know whether the alleged misconduct actually was protected activity. (*Consolidated Diesel*, *supra*, 332 NLRB at p. 1020.) Escalation of the investigation to the Committee, however, was an unfair labor practice because the initial interview had disclosed that the two employees were distributing union materials in such a way that their conduct did not lose statutory protection. (*Ibid*.)[13]

This case law does not provide the District safe harbor on the facts before us. Unlike in *Consolidated Diesel*, the District's investigation was not triggered by a facially valid complaint from employees that Yvellez potentially was engaged in misconduct. Rather, Yvellez's e-mail

[13] The NLRB found that the employer interfered with the employees' statutory rights by subjecting employees to investigation and possible discipline on the basis of the subjective reactions of others to their protected activity where the conduct complained of was not of the nature that would remove it from statutory protection. (*Consolidated Diesel*, *supra*, 332 NLRB at p. 1020.)

itself provided the sole impetus for management's investigation and corresponding threat of discipline. Further, as discussed above, the District did not need to do any factual investigation to determine whether the e-mail was protected. Under these circumstances, an appropriate action would have been to seek legal advice regarding the protected status of the e-mail, and not to demand that Yvellez appear in person for questioning. The District compounded its error by never informing Yvellez that it had concluded its investigation and would not be imposing discipline, leaving him in a perpetual cloud of uncertainty about whether he would face discipline for this or future speech, thus chilling his protected conduct. (See *Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, p. 52 [to avoid chilling employee rights, employer clarification should be sent to all employees affected by the wrongful conduct]; *Regents of the University of California, supra*, PERB Decision No. 2300-H, pp. 30-32 [same].) Consequently, we conclude that the District's justifications for investigating Yvellez do not outweigh the potential harm to employee rights that arises from such an investigation.

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the Chula Vista Elementary School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5, subdivision (a), by retaliating against Yvellez for sending an EERA-protected e-mail to other District teachers and interfering with his protected right to use the District's e-mail system to send e-mails to other employees about matters of legitimate concern to them in their employment.

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

A. CEASE AND DESIST FROM:

1. Investigating employees and threatening them with discipline in retaliation for their protected activities.

2. Interfering with employees' right to send protected communications.

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

1. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all work locations where notices to employees represented by Chula Vista Educators (CVE) are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the District to communicate with its employees in the bargaining unit represented by CVE. (*City of Sacramento* (2013) PERB Decision No. 2351-M.)

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

Members Winslow and Krantz joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. LA-CE-5732-E, *Manuel Faustino Yvellez v. Chula Vista Elementary School District*, in which all parties had the right to participate, it has been found that the Chula Vista Elementary School District violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq., by retaliating against Yvellez for sending, and interfering with Yvellez's protected right to send, via the District's e-mail system, e-mails regarding legitimate employment-related concern.

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

A. CEASE AND DESIST FROM:

1. Investigating employees and threatening them with discipline in retaliation for their protected activities.

2. Interfering with employees' right to send protected communications.

Dated: _____

CHULA VISTA ELEMENTARY SCHOOL DISTRICT

By: _____
Authorized Agent

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