STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ANTHONY G. VASEK, Charging Party, v. MOUNT SAN JACINTO COMMUNITY COLLEGE DISTRICT, Respondent.	Case No. LA-CE-5921-E PERB Decision No. 2605 December 12, 2018

Appearances: Anthony G. Vasek, on his own behalf; Atkinson, Andelson, Loya, Ruud & Romo, by William A. Diedrich and Paul Z. McGlocklin, Attorneys, for Mount San Jacinto Community College District.

Before Banks, Winslow, and Krantz, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by Mount San Jacinto Community College District (District) to the attached proposed decision of an administrative law judge (ALJ). The ALJ found that the District retaliated against charging party Anthony G. Vasek (Vasek) in violation of the Educational Employment Relations Act (EERA)[1] by issuing him a "final formal warning" on November 7, 2013, for sending an e-mail on November 4, 2013 (November 4 e-mail). The District asserts that Vasek's e-mail was not protected by EERA, and that the e-mail in any event lost its protection because it included threatening language. The District further argues that its final warning to Vasek concerned only the threating speech contained in his e-mail, was not directed at the remainder of the text, and accordingly was not issued in retaliation for

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

Vasek's protected speech. The District also contends the warning was not an adverse action. Vasek contends that each of the District's arguments is without merit and urges the Board to affirm the proposed decision.

We have reviewed the entire record in this matter and considered the parties' arguments in light of applicable law. We conclude that the ALJ's findings of fact are supported by the record, and we adopt them as the findings of the Board itself. The ALJ's legal conclusions are generally well reasoned and in accordance with applicable law, and we affirm the proposed decision, supplemented by the following discussion. In that discussion, we clarify the appropriate test applicable in cases involving allegedly threatening speech.

BACKGROUND

There is no need to repeat here the ALJ's factual and procedural history. We summarize the material background for context.

Vasek, a long-time professor of mathematics and engineering at the District, is a member of the full-time faculty unit represented by the Mount San Jacinto College Faculty Association (Association). The proposed decision in this case is not the first time an ALJ has resolved unfair practice charges that Vasek has filed pertaining to alleged retaliation and interference for protected e-mails. Vasek's earlier charges, in summary, involved the following events. In 2009, Vasek used the District's e-mail system to communicate with the District's 150 faculty members and 600 classified employees to express his opinions regarding the District's Human Resources Department (HR), working conditions at the District, the Association, and negotiations between the Association and the District. On November 9, 2009, the District issued Vasek a letter stating that his e-mail activity violated its acceptable use

policies.[2] Later, the District hired an independent investigator to address Association President Karen Cranney's (Cranney) "Bullying Complaint," which she filed with the District in response to Vasek's October 20, 2012 e-mail that was highly critical of her and other Association leaders. Vasek filed unfair practice charges against the District and the Association. In separate decisions that are now final and binding as to the parties, the ALJ found that the District interfered with and the Association retaliated against Vasek for his protected use of the District's e-mail system.[3]

As the hearing dates before the ALJ were approaching, Vasek sent the November 4 e-mail which is the subject of the instant matter. Vasek sent the e-mail to members of the Association leadership as well as to the Faculty and Classified distribution lists, in response to earlier faculty messages about unresolved salary issues and other matters pertaining to a recent tentative agreement between the District and the Association. Vasek attached to the November 4 e-mail a three-page, single spaced letter with ten sub-parts numbered by Roman numerals. The majority of Vasek's message focused on his criticism of Association leaders and how their alleged failure as negotiators led to the unresolved salary issues. He also

[2] District Administrative Procedure (AP) 6505, which governs acceptable uses for District computer and communications technology generally, prohibits use of District computing systems "including electronic communications such as electronic mail, to harass or make defamatory remarks[.]" The policy further specifies that "[f]ailure to abide by these conditions may result in denial of access to all [District] information systems and may subject users to formal disciplinary action up to and including dismissal." AP 6505 prohibits various e-mail activity including, as relevant to this case "[e]mail that contains threatening, harassing or menacing language[.]"

[3] No exceptions were taken to the proposed decision in case number LA-CE-5789-E, and it became final and binding on the District and Vasek on May 20, 2015. (PERB Decision No. HO-U-1168.) Initial exceptions were filed by the prevailing party (Vasek) in case number LA-CO-1567-E. In an accompanying decision today, we dismiss Vasek's exceptions; the ALJ's decision is now final and binding on Vasek and the Association. (PERB Decision No. HO-U-1607.)

commented on the number of faculty who declined to join the Association and raised the idea of decertifying the Association and replacing it with a new organization.

The parties' dispute in this case centers on Section IX of the attachment to Vasek's November 4 e-mail. Section IX read in its entirety as follows:

> To the few of you who are formally involved in [Association] matters and who are sincere in your efforts to rectify problems that exist, please be advised that, at some point in the next several months, some nasty stuff is going to hit the fan, and some of it is likely going to splatter on you if you're not careful. So, I suggest that you take great care to distan[ce] yourself from the [Association] lest you also suffer untoward consequences; for, ignorance of the law, or of the facts upon which the law relies, is not a valid defense in the eyes of the law.
>
> To employ another metaphor, I am warning you, in advance of the coming judicial proceedings, that I will be taking aim and pulling the trigger on certain individuals. Your failure to heed the warning I am now giving you will not dissuade me from pulling the trigger when the time comes. In essence, I am calling out for you to crouch down out of the line of fire lest you yourself become a casualty.

Vasek later testified that the "judicial proceedings" mentioned in his message referred to the two PERB cases that were then scheduled to be heard in front of the ALJ. Vasek was not involved in any other legal proceedings at the time.

Shortly after Vasek sent the November 4 e-mail, the District contacted the local police department and police officers came to Vasek's home and spoke to him about his e-mail. There was no evidence that any police report was filed or that the police took any other action with regard to the e-mail. Association President Cranney testified that she felt fearful after receiving Vasek's e-mail. Cranney stated that other employees expressed similar fears, but none were identified and none testified. District Vice-President of Human Resources Irma Ramos (Ramos) corroborated that Cranney registered a complaint, and said that other

employees complained to Human Resources, but none were identified. Vasek testified that he spoke with several employees who felt that the District overreacted to his e-mail, but Vasek did not identify any of these employees.

On November 7, 2013, District Interim Associate Dean of Human Resources Victor Collins (Collins) sent Vasek a letter purporting to be "a final formal warning concerning your repeated violations [of District policy]." While Collins' letter referenced Vasek's 2009 and 2012 e-mails and described them as violations of District policy, the letter focused mainly on Vasek's November 4 e-mail. Collins quoted extensively from Section IX of Vasek's message, describing the quoted passages as "threatening comments." Collins stated that "[s]uch emails constitute a blatant violation of the District's acceptable use and email policies," noting that AP 6506 prohibits e-mails containing "threatening, harassing, or menacing language," and that AP 6505 prohibits sending messages to harass or defame others.

In the letter, Collins directed Vasek to:

> cease and desist any improper use of [the District]'s computer and email system to send messages making any threatening, harassing, or otherwise unprofessional statements. Please be advised [that], further violation of these policies and/or [the District's e-mail policies] will result in the immediate suspension or revocation of your District computer and email privileges.

Collins closed the final warning letter by stating that the letter and any written response to the letter would be included in Vasek's personnel file. Ramos testified that she and Collins were particularly concerned about Vasek's "taking aim" and "pulling the trigger" comments. Ramos stated her belief that the District was required to take any shooting reference seriously. Ramos was aware that the police paid a call to Vasek, but she never asked for or received a written report of that visit. She did learn, eventually, that Vasek had not been arrested. The District did not follow up with the police, investigate Vasek, or even contact Vasek to discuss

the e-mail or confirm that his use of gun imagery was solely metaphorical. The District took no action to prevent Vasek, even temporarily, from coming onto campus, teaching his students, or interacting with faculty and staff.

On or around December 2, 2013, Vasek responded to the final warning letter. In his response, Vasek stated that the November 4 e-mail was legally protected speech and that the District's response violated his rights. He also described his "taking aim" and "pulling the trigger" statements as "common metaphors" and explained that he was simply trying to warn others of "potentially embarrassing situations" that might arise if they testified in the PERB hearings before the ALJ. Vasek filed a second response on January 21, 2015, in which he requested that the District rescind the final warning letter. The District placed both responses in Vasek's personnel file along with the final warning letter. Vasek's e-mail and computer privileges remained intact.

DISCUSSION

Although the Board reviews exceptions to a proposed decision de novo, to the extent that a proposed decision adequately addresses issues raised by certain exceptions, the Board need not further analyze those exceptions. (*City of Calexico* (2017) PERB Decision No. 2541-M, pp. 1-2.) The Board also need not address alleged errors that would not impact the outcome. (*Los Angeles Unified School District* (2015) PERB Decision No. 2432, p. 2; *Regents of the University of California* (1991) PERB Decision No. 891-H, p. 4.)

To demonstrate that an employer has 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 under EERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer

took the action *because of* the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210, pp. 6-8.) Here, the primary disputed issues are whether EERA protects Vasek's e-mail and whether the District took adverse action against him. We undertake those inquiries below.

A. The Protected Activity Inquiry

Vasek's claim rests on whether his November 4 e-mail was protected by EERA or lost its protection because of his comments about "taking aim" and "pulling the trigger." For the following reasons, we agree with the ALJ that the November 4 e-mail did not lose its protection because of the nature of its statements.

1. The Subject Matter Test for Determining if Speech is Protected

EERA section 3543, subdivision (a), protects employees' right to form, join, and participate in employee organization activities on matters concerning employer-employee relations. EERA protects employee speech if it is "'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.'" (*Chula Vista Elementary School District* (2018) PERB Decision No. 2586, p. 15 (*Chula Vista*), quoting *Rancho Santiago Community College District* (1986) PERB Decision No. 602, p. 12 (*Rancho Santiago*).) An individual employee's criticism of management or working conditions is protected activity when its purpose is to advance other employees' interests or when it is a logical extension of group activity. (*Chula Vista*, *supra*, at p. 15, citing *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. (*Chula Vista*, *supra*, at p. 15,

citing *Rancho Santiago*, *supra*, at p. 12.) Thus, critical statements about union leadership typically are protected. (*Chula Vista*, *supra*, at p. 16; *Rio School District* (2015) PERB Decision No. 2449, adopting proposed decision at p. 24.)

We agree with the ALJ that Vasek's November 4 e-mail qualifies as protected speech. The majority of his e-mail relates to matters common to all faculty members, including the ramifications of the recent tentative agreement, salary parity, the effectiveness of the Association's leadership, and the possibility of decertifying the Association as the faculty representative. In addition, Vasek's e-mail was his response to other faculty who were similarly discussing the tentative agreement and salary matters. Vasek's e-mail fit into an ongoing e-mail conversation among faculty about issues affecting them all. (*Napa Valley Community College District* (2018) PERB Decision No. 2563, p. 12 (*Napa Valley CCD*).)

We also agree with the ALJ's conclusion that even Section IX of Vasek's e-mail, at its core, concerns protected subjects. Although the District argues in its exceptions that its final warning letter was not intended to address any legitimate union or bargaining-related speech and was narrowly targeted at allegedly threatening language, the language in question must be read in context. In Section IX itself, Vasek discusses his intent to address his disputes with both the District and the Association through upcoming legal proceedings, i.e., the formal hearings before the ALJ, in PERB case numbers LA-CE-5789-E and LA-CO-1567-E. Filing and pursuing unfair practice charges with PERB are expressly protected under EERA. (EERA, § 3541.5, subd. (a); *Los Angeles Community College District* (2004) PERB Decision No. 1667, adopting warning letter at p. 3 [filing unfair practice charge deemed protected activity]; *Fullerton Elementary School District* (2004) PERB Decision No. 1671, p. 5 [participating in informal settlement conference in unfair practice case protected activity]; *Fresno County*

Office of Education (2004) PERB Decision No. 1674, p. 13.)[4] The closer question is whether Vasek's speech, when viewed by an objective observer, veered sufficiently into an actual threat of physical harm and thereby lost its statutory protection. We turn now to that analysis.

2. Framework for Assessing Whether Speech on a Protected Subject Loses Protection

Because disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses, the parties are afforded wide latitude to engage in "uninhibited, robust, and wide-open debate" in the course of those disputes. (*City of Oakland* (2014) PERB Decision No. 2387-M, p. 23 (*City of Oakland*); *State of California (Department of Transportation*) (1983) PERB Decision No. 304-S (*Caltrans*), adopting proposed decision at pp. 22-28; *Old Dominion Branch No. 496, National Assoc. of Letter Carriers AFL-CIO v. Austin* (1974) 418 U.S. 264, 273; *Linn v. United Plant Guard Workers of America, Local 114* (1966) 383 U.S. 53, 69.) The Board has recognized that public employees' right "to engage in concerted activities permits 'some leeway for impulsive behavior,' 'intemperate, abusive and inaccurate statements,' or 'moment[s] of animal

[4] The District also argued that Vasek's November 4 e-mail was not protected because it did not fall within the range of permissible uses for District e-mail, citing *Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C (*Los Angeles*), and the District excepts to the ALJ's finding that *Los Angeles* does not apply. Under *Los Angeles*, an employee's e-mail about union matters is protected only if the e-mail falls within the bounds of permissible non-business use under an employer's nondiscriminatory e-mail use policy. The ALJ, in finding *Los Angeles* inapposite, determined that Vasek's e-mail in this case concerned similar subjects to other e-mail activity already permitted by the District, and that *Los Angeles* did not permit the District to restrict Vasek's e-mail because of its content. (Proposed decision, p. 16.)

In *Napa Valley CCD*, *supra*, PERB Decision No. 2563, we overruled *Los Angeles* to the extent it held that an employer's prohibition on non-business e-mail use is permissible as long as it is not promulgated or enforced in a manner that discriminates against statutorily protected communications. (*Id*. at p. 19.) We held, instead, that an employer that provides its employees access to its e-mail system cannot ban e-mails pertaining to protected topics on nonworking time, absent a showing of "special circumstances necessary to maintain production or discipline." (*Id*. at p. 19.) The District has not shown such special circumstances here.

exuberance.'" (*City of Oakland*, *supra*, PERB Decision No. 2387-M, p. 23, quoting *Caltrans*, *supra*, PERB Decision No. 304-S, proposed decision at p. 25; *Rancho Santiago*, *supra*, PERB Decision No. 602, pp. 12-14; see also *Kiewit Power Constructors Co. v. NLRB* (D.C. Cir. 2011) 652 F.3d 22, 26, enfg. (2010) 355 NLRB 708 (*Kiewit Power*); *Prescott Industrial Products Co.* (1973) 205 NLRB 51, 51-52 [types of conduct which lose protection are those "flagrant cases in which the misconduct is so violent or of such character as to render the employee unfit for further service"].)

Because "not every impropriety committed during [otherwise protected] activity places [an] employee beyond the protective shield of the [A]ct" (*City of Oakland*, *supra*, PERB Decision No. 2387-M, pp. 23-24), employee speech that is related to employer-employee relations will generally not lose its statutory protection unless it is so "opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice as to cause substantial disruption of or material interference" with the employer's operations. (*Chula Vista*, *supra*, PERB Decision No. 2586, p. 16 (internal quotation marks omitted); *City of Oakland*, *supra*, PERB Decision No. 2387-M, p. 24; *Rancho Santiago*, *supra*, PERB Decision No. 602, p. 13; *Pomona Unified School District* (2000) PERB Decision No. 1345, p. 16 (*Pomona*).) Since PERB first announced this standard in *Rancho Santiago*, *supra*, PERB Decision No. 602, PERB has adapted the standard to track principles articulated by both the California and United States Supreme Courts in First Amendment cases, as well as the National Labor Relations Board (NLRB) in cases interpreting federal labor law. (*Rancho Santiago*, *supra*, PERB Decision No. 602, p. 12 & fn. 6.)

In *Chula Vista*, we clarified several important principles in interpreting the *Rancho Santiago* standard. First, we noted that the standard encompasses two different tests that the

NLRB uses to determine whether employee communications are protected. (*Chula Vista*, *supra*, PERB Decision No. 2586, p. 19, fn. 9.) The first test is content-based and looks to whether the speech is maliciously false. (*Ibid*., citing *Mastec Advanced Technologies* (2011) 357 NLRB 103, 107.) This test, in which we apply the "actual malice" standard, normally applies when an employer or union claims that an employee's speech has lost protection because it criticizes the employer, union, or one or more individuals.

The second test that is incorporated into the *Rancho Santiago* standard, as articulated in *Atlantic Steel Co.* (1979) 245 NLRB 814 (*Atlantic Steel*), is conduct-based and analyzes whether the manner in which an employee engaged in face-to-face communications with a manager or supervisor is so "opprobrious" and disruptive to operations that it loses statutory protection. (*Chula Vista*, *supra*, PERB Decision No. 2586, p. 18, fn. 9, citing *Triple Play Sports Bar and Grille* (2014) 361 NLRB 308, 311.)[5] To determine whether an employee's otherwise-protected communication loses protection under *Atlantic Steel,* the NLRB balances four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. (*Atlantic Steel*, *supra*, 245 NLRB 814; see *Kiewit Power*, *supra*, 652 F.3d at p. 26; *Plaza Auto Center, Inc. v. NLRB* (9th Cir. 2011) 664 F.3d 286, 292, enfg. in part (2010) 355 NLRB 493 (*Plaza I*).)

Typically, the NLRB has applied the *Atlantic Steel* factors to analyze whether face-to-face communication in the workplace, between an employee and a manager or supervisor,

[5] In *Chula Vista*, we applied the first test to determine whether the employee's speech lost its protection because it was maliciously false. (*Chula Vista*, *supra*, PERB Decision No. 2586, p. 18 & fn. 9.) Because the employee's face-to-face communications with management were not at issue in *Chula Vista*, we did not address *Atlantic Steel,* the second aspect of the *Rancho Santiago* standard. (*Ibid*.)

constitutes conduct so opprobrious that the employee loses the protection of the Act. (*Triple Play Sports Bar and Grille*, *supra*, 361 NLRB at p. 311.) The NLRB has declined to apply the multifactor *Atlantic Steel* analysis to employees' off-duty, offsite use of social media, noting that the clear inapplicability of *Atlantic Steel*'s "place of the discussion" factor demonstrates that the *Atlantic Steel* framework is tailored to workplace confrontations with the employer. (*Triple Play Sports Bar and Grille, supra*, at p. 311 & fn. 14.)

Here, Vasek's alleged threat was communicated in an e-mail directed at the Association and his co-workers, rather than a face-to-face meeting. In that circumstance, we join the NLRB in declining to strictly apply the multipart *Atlantic Steel* analysis.[6] Rather, as discussed below, we adapt the third *Atlantic Steel* factor—the nature of the employee's outburst—in considering whether an alleged threat of physical harm loses EERA's protection.

3. Analysis of an Alleged Threat of Physical Harm

In *Kiewit Power*, after an employer warned its electricians that their morning and afternoon breaks were too long, two of them responded that things would "get ugly" if they were disciplined, and one said that the supervisor had "better bring [his] boxing gloves." (*Kiewit Power*, *supra*, 652 F.3d at p. 24.) The NLRB found this speech protected, finding that in context their statements were not physical threats, but merely figures of speech made in the course of a protected labor dispute. (*Ibid*.) The District of Columbia Circuit Court of Appeals enforced the NLRB's order. The court framed the question as whether the outburst "was so unreasonable as to warrant denying protections that the Act would otherwise afford," or, stated another way, "whether the conduct is so egregious as to take it outside the protection of the

[6] We considered such off-site, written conduct in *Pomona*, *supra*, PERB Decision No. 1375. There we found that a teacher's letters to district management threatening them with a subpoena, grievance, or IRS inquiry did not lose protection where the language used was "forceful but not abusive." (*Id*. at p. 16.)

Act, or of such a character as to render the employee unfit for further service." (*Id*. at pp. 27-28 (internal quotation marks omitted).) "[T]hat only happens when the employee's actions are not simply bad, but 'opprobrious.'" (*Id*. at p. 28, quoting *Felix Industries, Inc. v. NLRB* (D.C. Cir. 2001) 251 F.3d 1051, 1053.) The court found that the employees' statements were more likely to have been a figure of speech, and that they used this language to emphasize their opposition to a disputed employer policy, rather than literally threatening physical combat. (*Ibid*.)

Significantly, the NLRB's test is not based on a listener's subjective reaction, but rather on whether an objective observer would more likely believe that there is a real threat of violence or that the speech was strong and intemperate but not a legitimate threat. (*Kiewit Power*, *supra*, 652 F.3d at pp. 28-29 & fn. 2; *Plaza Auto Center, Inc.* (2014) 360 NLRB 972, 974 (*Plaza II*).) If employees are speaking in metaphor, the meaning of the words is not objectively threatening. (*Kiewit Power*, *supra*, 652 F.3d at pp. 28-29 & fn. 2; *Plaza II, supra*, 360 NLRB at p. 975 [discussing *Kiewit Power*].)

We adopt this objective test for determining whether an alleged threat is so "opprobrious" that it loses statutory protection. In applying the objective test, we are mindful of First Amendment jurisprudence adopting the following objective standard regarding what constitutes a "true threat:"

> Whether a particular statement may properly be considered to be a threat is governed by an objective standard—whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault.

(*Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists* (9th Cir. 2002) 290 F.3d 1058, 1074, citation omitted (*Planned Parenthood*).)[7] "Alleged threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners." (*Id*. at p. 1075, internal quotation marks omitted.) Under First Amendment precedent, a "true threat" is one "where a reasonable person would foresee that the listener will believe he will be subjected to physical violence upon his person." (*Ibid.* (internal quotation marks omitted).) Such speech is unprotected by the First Amendment. (*Ibid*.)

Although we do not enforce the First Amendment, our task in this instance is similar, in that we must examine all relevant circumstances to distinguish between intemperate remarks and actual threats of physical harm. This is a fact-specific inquiry. (Compare *Leasco, Inc.* (1988) 289 NLRB 549, 549, fn. 1 [employee who told his supervisor that he was going to "kick [his] ass" was using a "colloquialism that standing alone does not convey a threat of actual physical harm"]; *Plaza II*, *supra*, 360 NLRB at pp. 974-976 [employee's statement that if he were fired, employer "would regret it" was not objectively "menacing" behavior and in context was an ambiguous statement "threatening legal consequences," rather than physical harm); *Alpha Resins Corp*. (1992) 307 NLRB 1219, 1234 [employee's impersonal reference to a mass shooting tragedy was "more symbolistic than threatening and was not accompanied by any physical manifestations of intent"] with *Town and Country Supermarkets* (2004) 340 NLRB 1410, 1413 [employee's repeated statement "next time I see you I'm going to kick your ass,"

[7] In *Planned Parenthood*, *supra*, 290 F.3d at p. 1074, after publication of a poster containing the name, address and photograph of an abortion provider, and after the subsequent murder of the doctor shown on the poster, a pro-life group lost First Amendment protection under the "true threat" doctrine when it issued a new poster showing the names of murdered doctors crossed out and the names of wounded doctors greyed out, alongside names and addresses of additional living doctors.

arguably followed by a physical challenge, amounted to actual threat]; *Omni International Hotel* (1979) 242 NLRB 248, 250 [employees' speech was unprotected when they told security guards, among other things, that they would be back and would kill any security guards they found on the street].)

4. Applying the Objective Test to Vasek's November 4 E-mail

The District's final warning letter focused on Vasek's references to "taking aim" and "pulling the trigger." However, Vasek's words were more clearly metaphorical than the language used in the above-noted cases, because he "contemporaneously qualified" them by expressly stating that he was "employ[ing] another metaphor." (Cf. *Plaza II*, *supra*, 360 NLRB at p. 976 [ambiguous employee statements often are not contemporaneously qualified, but even then do not necessarily constitute physical threats].)

Thus, we find that, in context, Vasek's words were not objectively physical threats. Rather, the two paragraphs that constitute Section IX were metaphorical speech. The first paragraph warned those involved in Association matters that "at some point in the next several months, some nasty stuff is going to hit the fan." The second paragraph followed with what Vasek described as "another metaphor," this one warning "in advance of the coming judicial proceedings, that I will be taking aim and pulling the trigger on certain individuals." Not only were Vasek's words expressly metaphorical, they were not accompanied by any physical conduct or other facts indicating that the words were a physical threat rather than a metaphor.[8]

Association President Cranney testified that she felt fearful after receiving Vasek's

[8] We do not hold that Vasek's words were shielded because they were unaccompanied by physical gestures; only that the absence of such gestures is relevant evidence that, in these circumstances, further points toward the overall conclusion that Vasek was not making a physical threat. (*Kiewit Power*, *supra*, 652 F.3d at p. 29 & fn. 2.)

e-mail. Human Resources Vice-President Ramos corroborated that Cranney registered a complaint with her. However, the subjective perception of an employee's statement is not dispositive where the comments were objectively not a threat. (*Kiewit Power*, *supra*, 652 F.3d at p. 29, fn. 2, citing *Shell Oil Co.* (1979) 226 NLRB 1193, 1196.) Here, the record reflects that Vasek was using intemperate language in expressing his intent to aggressively litigate his unfair practice charges. (Cf. *Plaza II*, *supra*, 360 NLRB at p. 976 [even where employee was otherwise belligerent, he was plausibly threatening only legal consequences—not physical harm—in telling manager he would "regret" it if he terminated the employee].) The police questioned Vasek at his home in the immediate aftermath of the e-mail, and there is no evidence that the police investigation went further. Vasek was not taken into custody. The District's response to the e-mail signals that it understood that Vasek was speaking metaphorically; it did not alert campus police or take steps to limit Vasek's presence on campus or contact with students, faculty, or staff. (*County of Riverside* (2009) PERB Decision No. 2090-M, p. 33 (*Riverside*) [employer that truly believed that employee had made credible threats of violence would not have permitted him to continue working].) Indeed, the District did not even contact Vasek to conduct an investigation or discuss his language.

We find that in these circumstances the employer would have had a legitimate basis to investigate Vasek to double check his meaning and to ascertain all surrounding circumstances. (*Chula Vista*, *supra*, PERB Decision No. 2586, pp. 30-31 [holding 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 acquires information indicating that the alleged conduct was protected, the employer

immediately ceases the investigation and notifies all affected employees regarding its outcome."].)[9] However, for all the reasons discussed above, an objective reader would more likely than not take Vasek's language at face value as a metaphor, as Vasek himself urged in his message.

We deplore the toll that gun violence is taking in workplaces, schools, and society at large, and we acknowledge an employer's duty to investigate an allegedly threatening remark after receiving a colorable complaint. We similarly acknowledge an employer's right to respond to threats of violence with significant consequences. However, when an alleged threat comes in the context of protected activity, the employer may go forward with adverse action following an investigation only if the facts satisfy the objective test set forth above. We join the ALJ in finding that, objectively viewed, Vasek did not actually threaten violence.

B. The Adverse Action Inquiry

The District issued Vasek "a final formal warning" concerning alleged repeated violations of District policy. The letter (1) directs Vasek to cease and desist "any improper use" of the District's computer and e-mail system to "send messages making any threatening, harassing, or otherwise unprofessional statements," and (2) advises him that further violation of the District's e-mail and computer policies "will result in the immediate suspension or revocation" of his computer and e-mail privileges. The letter and Vasek's written response were included in Vasek's personnel file. The District's exceptions assert the letter was not an adverse action.

In determining whether an employer's action is adverse, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Chula Vista*, *supra*,

[9] Not before us are any allegations regarding any investigation the District may have done or regarding whether the District was warranted in calling the police.

PERB Decision No. 2586, pp. 24-25.) "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 of the employee's employment." (*Id*. at p. 25, quoting *Newark Unified School District* (1991) PERB Decision No. 864, pp. 11-12.) The reasonable person test guides us equally when the employer's alleged adverse action is a warning of a possible future action. (*Chula Vista*, *supra*, at p. 25.) While the District concedes that a threat of future discipline may be considered an adverse employment action, the District contends that a threat to revoke Vasek's computer and e-mail privileges cannot constitute an adverse employment action.

While the November 7, 2013 letter does not expressly threaten future discipline, it is undisputed that the letter was Vasek's "final formal warning" that he had violated both AP 6505 and AP 6506. The text of AP 6505 states that violations could result in "formal disciplinary action, up to and including termination." It is also undisputed that the letter was placed in Vasek's personnel file.[10] Under these facts, a reasonable person under the circumstances would believe that the District could use the letter to initiate future discipline. (*San Diego Unified School District* (2017) PERB Decision No. 2538, pp. 11-14.) Moreover, in this day and age, prohibiting a college professor from accessing workplace computer and e-mail systems would surely adversely impact his ability to do his job.

[10] Moreover, when an employer places a document in an employee's personnel file that impugns the employee's reputation or otherwise potentially impedes the employee's professional advancement, such action can constitute adverse action even absent any threat of discipline. (*Riverside*, *supra*, PERB Decision No. 2090-M, p. 28, 30 [action need not specifically threaten discipline if it otherwise has an adverse impact on the employee's employment]; *State of California (Department of Youth Authority)* (2000) PERB Decision No. 1403-S, pp. 32-33 [adverse action found where employer demeaned employee by issuing a substandard rating for "relationships with people," and by imposing a documented requirement that a fellow employee had to review budget requests].)

Finally, *San Francisco Unified School District* (2009) PERB Decision No. 2057 (*San Francisco USD*), cited by the District, is inapposite. In *San Francisco USD*, the Board upheld the dismissal of a complaint for failure to state a prima facie claim of retaliation, finding that the bare allegation that the employer made disparaging remarks about an employee, in the absence of facts showing the impact of such statements on the employee's employment, does not constitute an adverse action. (*Id*. at p. 9; see also *Los Rios Community College District* (1994) PERB Decision No. 1048, adopting warning letter at p. 3 [no showing that employer's disparaging remarks made about employee in presence of another employee "caused harm" or had impact on employee's employment].) Here, on the other hand, the "final formal warning" disparaged Vasek by implying that he made a physical threat, and served as notice that he might lose access to the District's e-mail and computer systems, or face formal disciplinary action, including termination, if he further violated the District's e-mail and computer use policies.

This is not to say that the District was required to cast aside Cranney's complaint. As discussed above, in these circumstances, the District had a legitimate basis to investigate the alleged threat. It is puzzling that the District did not do so to determine whether it was an unprotected actual threat, nor even have a conversation with him about the fact that his unfortunate metaphor had caused concern among his co-workers. While an employer has a duty to investigate a colorable complaint about an alleged physical threat, here the District acted unlawfully when it dispensed with any investigation and came to an incorrect conclusion that Vasek had made a physical threat.

C. The Motivation Inquiry

District Human Resources Vice-President Ramos verified what is plain from the face of the November 7, 2013 letter: Section IX of Vasek's November 4 e-mail was the impetus for the District's final formal warning. Thus, there is no dispute that Collins and Ramos had knowledge of Vasek's protected November 4 e-mail. Moreover, because the District concedes that its action was taken in response to Vasek's e-mail, and we find that the November 4, 2013 e-mail, including Section IX, was protected under EERA, such conduct constitutes direct evidence of unlawful motive. (*Chula Vista*, *supra*, PERB Decision No. 2586, p. 26 [employer's words or actions that reveal the adverse action was taken in response to the employee's protected activity serves as direct evidence of unlawful motive].)

Because Vasek has established a prima facie case of retaliation, the burden shifts to the District to prove that it would have taken the same action in the absence of Vasek's protected activity. (*Chula Vista*, *supra*, PERB Decision No. 2586, p. 27.) In light of Ramos's testimony that Section IX of Vasek's November 4 e-mail was the impetus for the District's final warning letter, we conclude that the District has not met this burden. (See *State of California (Department of Corrections & Rehabilitation)* (2012) PERB Decision No. 2282-S, p. 14 [employer failed to sustain its burden where it admitted to disciplining an employee for conduct later determined to be protected].)

REMEDY

If an employer unlawfully places documents into an employee's personnel file, the proper remedy is to order the employer to rescind those documents, remove them from the personnel file, and destroy them. (*Alisal Union Elementary School District* (2000) PERB Decision No. 1412, pp. 35-37; *Yolo County Superintendent of Schools* (1990) PERB Decision

No. 838, pp. 12-14.) In such cases, the Board also typically issues a cease and desist order and directs the employer to post a notice of the violation. (*Ibid*.) The ALJ's proposed order includes these remedies, and the District did not except to any of them.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Mount San Jacinto Community College District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5, subdivision (a). The District violated EERA by issuing Anthony G. Vasek (Vasek) a November 7, 2013 letter, described as a "final formal warning," in retaliation for Vasek's protected communications.

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

A. CEASE AND DESIST FROM:

1. Retaliating against Vasek for engaging in protected activity.

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

1. Rescind the November 7, 2013 letter, remove it from Vasek's personnel file, and destroy it.

2. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all work locations where notices to District faculty customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. The District shall also post the Notice by electronic message, intranet, internet site, and other

electronic means customarily used by the District to communicate with faculty members. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

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

Members Banks and Winslow 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-5921-E, Anthony G. Vasek v. Mount San Jacinto Community College District (District), in which all parties had the right to participate, it has been found that the District violated the Educational Employment Relations Act (EERA), Government Code section 3541.5, subdivision (a), by issuing Anthony G. Vasek (Vasek) a November 7, 2013 letter, described as a "final formal warning," in retaliation for Vasek's protected communications.

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

A. CEASE AND DESIST FROM:

1. Retaliating against Vasek for engaging in protected activity.

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

1. Rescind the November 7, 2013 letter, remove it from Vasek's personnel file, and destroy it.

Dated: _____

MOUNT SAN JACINTO COMMUNITY COLLEGE DISTRICT

By: _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

ANTHONY G. VASEK, Charging Party, v. MOUNT SAN JACINTO COMMUNITY COLLEGE DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-5921-E PROPOSED DECISION (August 18, 2015)

Appearances: Anthony G. Vasek, on his own behalf; Atkinson, Loya, Ruud & Romo, by William A. Diedrich and Paul Z. McGlocklin, Attorneys, for Mount San Jacinto Community College District.

Before Eric J. Cu, Administrative Law Judge.

In this case, a public school employee claims that his public school employer issued him a written warning because he engaged in activity protected under Educational Employment Relations Act (EERA).[1] The employer denies any unlawful retaliation.

PROCEDURAL HISTORY

Anthony G. Vasek filed this unfair practice charge with Public Employment Relations Board (PERB or Board), accusing Mount San Jacinto Community College District (District or MSJC) of issuing him a "threatening letter" because of his protected e-mail activity. In an earlier unfair practice charge, case number LA-CE-5789-E, Vasek similarly accused the District of retaliating against him for his e-mail activity and interfering with his right to communicate with others. At the times relevant to this case, case number LA-CE-5789-E was assigned to Administrative Law Judge (ALJ) Valerie Pike Racho for hearing and decision.

[1] EERA is codified at Government Code section 3540 et seq.

The PERB Office of the General Counsel issued a complaint in the present case on September 24, 2014, alleging that the District issued Vasek a written warning because of his protected e-mail communications on November 4, 2013. On October 13, 2014, the District filed its answer to the complaint denying that Vasek engaged in protected activity and also denying any retaliation. No informal settlement conference was held. Instead, a formal hearing was scheduled for February 2015.

On January 23, 2015, Vasek requested to place this case in abeyance until case number LA-CE-5789-E was decided. Vasek asserted that this case overlapped significantly with case number LA-CE-5789-E, and that he intended on re-litigating issues from the earlier case in the present matter unless PERB granted his abeyance request. The abeyance request was denied, but the matter was continued with the parties' agreement.

On April 23, 2015, ALJ Racho issued her proposed decision in case number LA-CE-5789-E, dismissing Vasek's retaliation claim, but sustaining a violation in his interference claim.

The hearing in the present case began on May 1, 2015, and concluded after a second day on May 20, 2015. Coincidentally, May 20, 2015, was also the date that ALJ Racho's proposed decision in case number LA-CE-5789-E became final pursuant to PERB Regulation 32305, subdivision (a).[2] (See PERB Decision No. HO-U-1168-E.) Once that decision became final, the parties acknowledged and agreed that ALJ Racho's factual and legal determinations had collateral estoppel effect, meaning that ALJ Racho's conclusions in PERB Decision No. HO-U-1168-E, were binding on both sides.

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

The parties filed closing briefs on July 31, 2015. At that point, the record was closed and the matter was considered submitted for decision.

FINDINGS OF FACT

The Parties

The District and is a public school employer within the meaning of EERA section 3540.1, subdivision (k). The District employs roughly 150 faculty members and 600 classified employees. Vasek is a public school employee within the meaning of EERA section 3540.1, subdivision (j), and has been a full-time faculty member at the District for 28 years. District faculty are in a bargaining unit represented by the Mount San Jacinto College Faculty Association (Association or MSJCFA).

The District's E-Mail System and Technology Usage Policies

The District operates an e-mail system for all of its employees. Each employee is assigned an e-mail account and can e-mail any other employee. The District also maintains distribution lists for collective e-mails. As relevant to this case, the District has "Faculty" and "Classified" distribution lists for sending messages to all employees in those categories.

The District also maintains Administrative Procedures (APs) concerning employees' use of technology. AP 6505 governs acceptable uses for District computer and communications technology generally. Among other restrictions, AP 6505 prohibits use of District computing systems "including electronic communications such as electronic mail, to harass or make defamatory remarks[.]" The policy further specifies that "[f]ailure to abide by these conditions may result in denial of access to all [District] information systems and may subject users to formal disciplinary action up to and including dismissal."

AP 6506 was designed to "outline the policy for the proper use of the District computing systems for email communications." That policy also prohibits various e-mail

activity including, as relevant to this case "[e]mail that contains threatening, harassing or menacing language[.]"

Past Examples of Employees' E-Mail Usage

Although AP 6506 places restrictions on employees' use of distribution lists, the record in this case shows that faculty were permitted to use that system widely for communicating over Association business. In addition, in PERB Decision No. HO-U-1168-E, ALJ Racho found that Vasek used the District's e-mail system frequently to express his opinions on the District's Human Resources (HR) department, working conditions at the District, the Association, and negotiations between the Association and the District. ALJ Racho detailed certain communications from Vasek in November 2009, in which he criticized then-Vice President of HR Irma Ramos. On November 9, 2009, the District issued Vasek a letter stating that his e-mail activity violated the District's acceptable use policies. (*Id*. at p. 7.)

ALJ Racho further found that Association President Karen Cranney e-mailed all faculty members in August 2012, regarding a union meeting and progress in contract negotiations with the District. Her message suggested that District administrators were part of the Faculty distribution list. On October 17, 2012, Vasek wrote a message to all faculty members criticizing Cranney for not challenging the District's inclusion of management on the Faculty distribution list. (PERB Decision No. HO-U-1168-E, pp. 8-9.)

ALJ Racho also determined that on October 20, 2012, Vasek sent an e-mail to all faculty with the subject "The Future of Union Negotiations" and including an attachment entitled "What Lies Ahead." In the e-mail and attachment, Vasek again criticized Cranney's leadership of the Association. He also disparaged other Association leaders and advocated for replacing the Association leadership with a team picked and led by Vasek. ALJ Racho found that Cranney filed a complaint with the District against Vasek over his October 20, 2012 e-

mail and that Ramos hired an independent investigator, Carla Barboza, to address the complaint. (PERB Decision No. HO-U-1168-E, pp. 9-11.)

Vasek's November 4, 2013 E-Mail Message

On November 4, 2013, Vasek sent an e-mail message to members of the Association leadership as well as to the Faculty distribution list. Vasek sent a courtesy copy, or "cc," to both Ramos and to the Classified distribution list. Vasek's e-mail responded to earlier faculty messages about the recent tentative agreement between the District and the Association and unresolved salary issues. Those earlier communications were sent to the Faculty distribution list, with a copy to Ramos, but did not include the Classified distribution list.

Vasek's e-mail attached a letter with ten sub-parts numbered by Roman numerals. The majority of Vasek's message focused on his critical views of the Association's leaders and how the salary matters being discussed could have been avoided by more competent negotiators. He also commented on the number of faculty who declined to join the Association and raised the idea of decertifying the Association and replacing it with a more effective organization.

Section IX forms the central basis of the parties' dispute in this case and for that reason, it is quoted in its entirety:

> To the few of you who are formally involved in MSJCFA matters and who are sincere in your efforts to rectify problems that exist, please be advised that, at some point in the next several months, some nasty stuff is going to hit the fan, and some if it is likely going to splatter on you if you're not careful. So, I suggest that you take great care to distan[ce] yourself from the MSJCFA lest you also suffer untoward consequences; for, ignorance of the law, or of facts upon which the law relies, is not a valid defense in the eyes of the law.
>
> To employ another metaphor, I am warning you, in advance of the coming judicial proceedings, that I will be taking aim and pulling the trigger on certain individuals. Your failure to heed

> the warning I am now giving you will not dissuade me from pulling the trigger when the time comes. In essence, I am calling out for you to crouch down out of the line of fire lest you yourself become a casualty.

In the final section of his message, Vasek stated that he sent the e-mail the Classified distribution list because some classified employees expressed appreciation in being included in other, similar communications.

During the hearing, Vasek said that the "judicial proceedings" mentioned in his message referred to PERB case number LA-CE-5789-E, and another charge he filed against the Association, PERB case number LA-CO-1567-E, also assigned to ALJ Racho. Vasek was not involved in any other legal proceedings at the time.

Initial Reactions to Vasek's November 4, 2013 E-Mail

During the hearing, Cranney testified that she felt fearful after receiving Vasek's e-mail. She also said that other employees expressed similar fears, but none were identified and none testified. Cranney complained to Ramos about the e-mail. Ramos corroborated that Cranney registered a complaint, and said that other employees complained to HR, but she too did not identify any of those people.

Shortly after Vasek sent the e-mail, someone from the District contacted the local police department, but no one at the hearing could recall who it was. A police office spoke with Vasek about his e-mail. There was no evidence that any police report was filed or that the police took any other action about the incident. Vasek testified that he spoke with several employees who felt that the District overreacted to Vasek's e-mail. Like Cranney and Ramos, Vasek did not identify any of these employees, and none testified on his behalf.

The November 7, 2013 Letter

On November 7, 2013, then-District Interim Associate Dean, HR, Victor Collins, sent Vasek a letter with the subject line "Violation of Email and Acceptable Use Policies." In the letter, Collins referenced Vasek's November 2009 e-mails which Collins said violated the e-mail usage policy. Collins also mentioned Vasek's October 2012 e-mails, stating that a private investigator concluded that Vasek had violated District policy.

The primary focus of Collins's letter was Vasek's November 4, 2013 e-mail. Collins quoted extensively from Section IX of Vasek's message, describing it as "threatening comments." Collins stated that "[s]uch emails constitute a blatant violation of the District's acceptable use and e-mail policies." Collins noted that AP 6506 prohibits both e-mails containing "threatening, harassing, or menacing language," as well as, according to Collins, "use of District email distribution lists to send messages that are not essential to the proper execution of daily operations." He further stated that AP 6505 requires use of District technology in a responsible, efficient, ethical, and lawful manner, and prohibits sending messages to harass or defame others.

In the letter, Collins informed Vasek that the "letter shall serve as a final formal warning concerning your repeated violations [of District policy]." Collins directed Vasek to:

> cease and desist any improper use of MSJC's computer and email system to send messages making any threatening, harassing, or otherwise unprofessional statements. Please be advised that, further violation of these policies and/or MSJC's [e-mail policies] will result in the immediate suspension or revocation of your MSJC computer and email privileges.

Collins closed the letter by stating that the letter and any written response to the letter from Vasek would be included in Vasek's personnel file.

Collins, unfortunately, passed away shortly before the hearing in this case. However, Ramos said that she worked closely with Collins in drafting the letter and reviewed it before the District sent it to Vasek. Ramos said that she and Collins were concerned about Vasek's "taking aim" and "pulling the trigger" comments. She stated her belief that the District was required to take any shooting reference seriously. She also said that she did not know Vasek's mindset at the time, did not know whether he had access to any firearms, and did not meet with Vasek to discuss any of his e-mail activity. She was also not aware that Collins ever spoke with Vasek on the subject either.

Vasek's Responses to the November 7, 2013 Letter

On or around December 2, 2013, Vasek delivered his initial response to the District's November 7, 2013 letter. In the response, Vasek stated that his November 4, 2013 e-mail was legally protected speech and that the District's response violated his rights. He also described his "taking aim" and "pulling the trigger" statements as "common metaphors" and said that he does not own any firearms. Vasek said that he was simply trying to warn others of "potentially embarrassing situations" if they testified in his PERB hearings on calendar at the time. Vasek filed a second response on January 21, 2015, where he requested that the District rescind the November 7, 2013 letter. Both responses were included in Vasek's personnel file along with the District's letter.

ISSUE

Was the District's November 7, 2013 letter an adverse employment action sent in retaliation for Vasek's protected activity?[3]

[3] Vasek alternatively frames the issue in this case as whether the District's November 7, 2013 letter interfered with his rights to engage in protected activity under the standard articulated in *Carlsbad Unified School District* (1979) PERB Decision No. 89, pp. 10-11. I find, however, that the claims in this case, as described in the PERB complaint, are best

CONCLUSIONS OF LAW

The PERB complaint in this case alleges that the District issued Vasek the November 7, 2013 letter in retaliation for his protected e-mail activity on November 4, 2013. To demonstrate 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 under EERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action *because of* the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210, pp. 6-8 (*Novato USD*).)

The primary issues in dispute here are whether Vasek's e-mail activity was protected under EERA and also whether the District's November 7, 2013 letter was an adverse employment action. There is no serious dispute that the District knew of Vasek's e-mail activity and that the District's response was sent because of Vasek's e-mail. Both of those facts are made clear from the face of the November 7, 2013 letter, and from the testimony of its HR witness, Ramos.[4] Accordingly, this proposed decision will focus on the more heavily disputed issues.

1. Vasek's Protected E-Mail Activity

The first issue in dispute is whether Vasek engaged in any activity protected under EERA. This section will address that question in three sub-parts: (a) the extent to which

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analyzed under PERB's retaliation doctrine. (See *State of California (Department of Personnel Administration)* (2011) PERB Decision No. 2106a-S, p. 14.)

[4] The District does maintain that there is no circumstantial evidence of any connection between Vasek's e-mail and the District's letter. However, because it is undisputed that the letter was sent in response to Vasek's e-mail, I find circumstantial evidence unnecessary here. (*Alisal Union Elementary School District* (1998) PERB Decision No. 1248, p. 6.)

Vasek's e-mail activity described in PERB Decision No. HO-U-1168-E should be considered in the present case; (b) whether the subject matter of Vasek's e-mails are protected; and (c) whether those e-mails lost any protected status.

a. Consideration of E-Mail Activity From PERB Decision No. HO-U-1168-E

Both parties recognize that there is some overlap between ALJ Racho's findings in PERB Decision No. HO-U-1168-E and the present case, as the District's November 7, 2013 letter references Vasek's e-mail activity from both November 2009 and October 2012. That earlier e-mail activity was not described in the PERB complaint in the present case and Vasek seeks to have it considered. The District opposes. PERB addresses these disputes under its so-called "unalleged violation" doctrine, which states:

> The Board has authority to review unalleged violations where the following criteria are met: (1) adequate notice and opportunity to defend has been provided the respondent; (2) the acts are intimately related to the subject matter of the complaint and are part of the same course of conduct; (3) the unalleged violation has been fully litigated; and (4) the parties have had the opportunity to examine and be cross-examined on the issue.

(*Lake Elsinore Unified School District* (2012) PERB Decision No. 2241, p. 8 (*Lake Elsinore USD*), citing *County of Riverside* (2010) PERB Decision No. 2097-M; *Fresno County Superior Court* (2008) PERB Decision No. 1942-C; *Tahoe-Truckee Unified School District* (1988) PERB Decision No. 668.) PERB uses the same approach for requests to consider additional instances of protected activity not pleaded in the complaint. (*Lake Elsinore USD*, p. 9; see also *Los Angeles Unified School District* (2014) PERB Decision No. 2390, p. 5, fn. 3.)

In *Lake Elsinore USD*, *supra*, PERB Decision No. 2241, the Board declined to consider whether an employer took adverse actions against an employee because of protected conduct not described in the complaint where the new protected acts were raised for the first time in the charging party's closing brief. (*Id*. at pp. 9-10, citations omitted.) In contrast, in *West Contra*

Costa Healthcare District (2010) PERB Decision No. 2145-M, the Board found that the employer had adequate notice of a claim not in the complaint because facts relating to the claim were discussed in the charging party's original charge, its opening statement, and its closing brief. (*Id*. at pp. 16-17.)

Here, the District acknowledges the applicability of the above test, but asserts that it had insufficient notice that Vasek's 2009 and 2012 e-mail activity would be an issue here. It argues that the earlier e-mails were not specifically described in the PERB complaint. However, that assertion is true in every request to consider "unalleged" violations or protected activity. The very purpose of PERB's unalleged violation doctrine is to decide what treatment to give matters not pleaded in the PERB complaint. Moreover, the record shows that the District had significant notice that Vasek's earlier e-mail activity would be relevant in this case. Most prominently, the District's November 7, 2013 letter refers directly to Vasek's 2009 and 2012 e-mail activity and uses those e-mails as support for issuing the "final formal warning." In addition, the District acknowledges that Vasek referred to his 2009 and 2012 e-mail activity in his underlying unfair practice charge in this case. Likewise, on January 23, 2015, Vasek stated his intent to introduce evidence from case number LA-CE-5789-E if PERB denied his abeyance request. I also referenced the overlap of evidence in pre-hearing discussions and during the hearing. Based on these facts, the District had sufficient notice that Vasek's 2009 and 2012 e-mail activity would be at issue in this case.

The remaining elements of the above test are also met. As stated above, Vasek's 2009 and 2012 e-mail activity were expressly mentioned in the District's November 7, 2013 letter, which is the alleged adverse action in this case. That letter is described as a "final formal warning" due to Vasek's "repeated violations" of the District's e-mail policy. I infer from this that Vasek's earlier e-mails are inseparably intertwined with whether the District's letter

constitutes retaliation for protected activity. I also conclude that both parties presented witnesses and other evidence on this earlier e-mail activity during the hearing in case number LA-CE-5789-E. ALJ Racho expressly determined that Vasek's 2009 and 2012 e-mail activity was protected. (See PERB Decision No. HO-U-1168-E, pp. 28-32.) Both parties had the chance to file exceptions to those conclusions and neither elected to do so. Instead, both parties expressly agreed that ALJ Racho's determinations have collateral estoppel effect here. (See *State Center Community College District* (2001) PERB Decision No. 1471, p. 10 (*State Center CCD*), citing *People v. Simms* (1982) 32 Cal.3d 468, p. 484; *State of California (Department of Developmental Services)* (1987) PERB Decision No. 619-S, proposed decision, p. 14.) Under these circumstances, I find that the parties had a sufficient opportunity to question witnesses and present evidence regarding Vasek's 2009 and 2012 e-mail activity and have both litigated those issues to their mutual satisfaction. It is accordingly appropriate to consider Vasek's e-mail activity from November 2009 and October 2012 as unalleged protected activity.

b. The Subject-Matter of Vasek's E-Mail

EERA section 3543, subdivision (a), protects public school employees' right to form, join, and participate in employee organization activities on matters concerning employer-employee relations. As ALJ Racho observed, a central tenet of this right is employees' ability to communicate shared concerns over wages, hours, and other working conditions. (PERB Decision, No. HO-U-1168-E, p. 19, citing *Los Angeles Community College District (Perez)* (2014) PERB Decision No. 2404.)

Under these standards, an employee's public advocacy over terms and conditions of employment is protected activity. (*Livingston Union School District* (1992) PERB Decision No. 965, proposed decision, p. 3; *San Ramon Valley Unified School District* (1982) PERB

Decision No. 230, pp. 15-18.) Accordingly, speech "related to matters of legitimate concern to employees as employees," is protected under EERA, including public commentary over "such subjects as teacher safety, negotiations, leaves, the autonomy and effectiveness of the exclusive representative and other employee organizations, educational policy and academic freedom." (*Rancho Santiago Community College District* (1986) PERB Decision No. 602, pp. 12-13 (*Rancho Santiago CCD*).) Furthermore, that "protection extends to speech that is uncomplimentary to the employer, and even to speech concerning inaccuracies and exaggerations." (*Trustees of the California State University (Sonoma)* (2005) PERB Decision No. 1755 (*CSU Sonoma*), p. 6, citing *Pomona Unified School District* (2000) PERB Decision No. 1375, *State of California (Department of Transportation)* (1983) PERB Decision No. 304-S.) In deciding the protected status of a communication, the main question is whether the purpose of the statements is to advance employees' interests in working conditions. (*CSU Sonoma*, p. 6, citing *Regents of the University of California* (1984) PERB Decision No. 449-H, proposed decision, p. 143.)

Turning first to Vasek's November 2009 and October 2012 e-mails, ALJ Racho specifically found that this e-mail activity was protected under EERA. (PERB Decision HO-U-1168-E, pp. 28-32.) As stated above, the parties are now bound by those conclusions. (See *State Center CCD*, *supra*, PERB Decision No. 1471.)

Vasek's November 4, 2013 e-mail also qualifies as protected speech. The majority of his e-mail pertains to matters common to all faculty members, including the ramifications of the recent tentative agreement, salary parity, the effectiveness of the Association's leadership, and the possibility of decertifying the Association as the faculty representative. In addition, Vasek's e-mail was his response to other faculty who were similarly discussing the tentative

agreement and salary matters. Vasek's e-mail, at least, broadly, fits into that ongoing conversation among faculty about issues affecting them all.

Even Section IX of Vasek's e-mail, at its core, concerns protected subjects. In that section, Vasek discusses his intent to address his disputes with the Association through upcoming legal proceedings, i.e., the hearings before ALJ Racho, for PERB case numbers LA-CE-5789-E and LA-CO-1567-E. Filing and pursuing unfair practice charges or representation petitions with PERB are expressly protected under EERA. (EERA, § 3541.5, subdivision (a); *Fresno County Office of Education* (2004) PERB Decision No. 1674, p. 8, 13.) Likewise, statements of one's intent to pursue legal remedies, even those unassociated with PERB processes, are protected. (*California State Employees Association (Hutchinson)* (1999) PERB Decision No. 1355-S, warning letter, p. 6, citing *Rio Hondo Community College District* (1980) PERB Decision No. 128.)

The District argues that Vasek's e-mail was not protected because EERA does not protect "purely intraunion" communications. This argument is unpersuasive both as a matter of law and fact. As stated above, EERA protects discussions over a variety of topics, including critical commentary about an incumbent union. (*Rancho Santiago CCD*, *supra*, PERB Decision No. 602, pp. 12-13.) The case cited by the District in support of its argument, *California State Employees Association (Gonzalez-Coke, et al.)* (2000) PERB Decision No. 1411-S (*Gonzalez-Coke*), is inapposite. The main holding in that case was that the Board typically refuses to intervene in internal union procedures, such as union member complaint procedures or union elections, unless it can be shown that those internal procedures substantially impact the employer-employee relationship. (*Id*. at p. 23; see also *California State Employees Association (Hutchinson)* (1999) PERB Decision No. 1369-S, p. 3.) That holding does not render employees' discussions about their union unprotected. To the

contrary, the Board in *Gonzalez-Coke* also stated that employees' participation in a reform organization to challenge the current leadership of their union was protected. (*Id*. at p. 18, citing *California State Employees Association (Hackett, et al.)* (1995) PERB Decision No. 1126-S.) Vasek's e-mail in this case similarly discusses various ways that faculty could reform the Association and its leadership.

Moreover, Vasek's e-mail was not limited to internal union matters. Rather, he commented on issues such as faculty salary disparity, the possibility of decertifying the Association, and pursuing unfair practice charges. As explained above, those are protected subjects. (*Rancho Santiago CCD*, *supra*, PERB Decision No. 602, pp. 12-13.)

The District also asserts that Vasek's November 4 2013 e-mail was not protected because it did not fall within the range of permissible uses for District e-mail, citing in support *Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C (*Superior Court*). Once again, I find the District's cited authority inapplicable. *Superior Court* addressed an employer's decision to discipline an employee under a content-neutral e-mail usage policy for sending messages on behalf of her union. The Board in that case utilized an "as applied" analysis, holding that "an employer may limit employees' non-business use of its e-mail system without committing an unfair practice as long as the limitation does not discriminate along union lines." (*Id*. at p. 12.) The Board ultimately found that the employer could enforce that policy against the union activist so long as it did not punish her because of the content of

her messages. (*Id*. at pp. 12-13.)[5] In contrast with this case, there is no dispute here that the District issued the November 7, 2013 letter because of the content of Vasek's e-mail.

In addition, ALJ Racho found, and I agree, that the District openly permits faculty to discuss Association matters via e-mail. (See PERB Decision No. HO-U-1168-E, pp. 26-27.) Even before Vasek's November 4, 2013 e-mail, faculty had been e-mailing each other about salary matters and the tentative agreement. Likewise, in August 2013, Vasek and Association representatives discussed ratifying the tentative agreement and exchanged critical comments. ALJ Racho similarly found that, in October 2012, Vasek participated in protected activity by sending other e-mail to faculty and staff about the Association's negotiators and executive board. (HO-U-1168-E, pp. 9-10, 27.) These facts show that Vasek's e-mail in this case concerned similar subjects to other e-mail activity already permitted by the District. The holding in *Superior Court*, *supra*, PERB Decision No. 1979-C, does not permit the District to restrict Vasek's e-mail because of its content.

c. Loss of Protected Status

An employee's participation in protected activity does not insulate him or her from legitimate employer action. (*Ventura County Community College District* (1999) PERB Decision No. 1323 (*Ventura CCD*), p. 10, citing *Fall River Joint Unified School District*

[5] Some may question the continued vitality of the Board's holding in *Superior Court*, *supra*, PERB Decision No. 1979-C, because the Board based its "as applied" analysis in that case largely from the NLRB's decision in *The Register Guard* (2007) 351 NLRB 1110. In *Purple Communications, Inc*. (2014) 361 NLRB No. 126, the NLRB expressly overruled *The Register Guard*, in favor of a broader access right for employees to use their employer's e-mail system for protected communications. (*Id*. at slip op. pp. 6-7, 12.) PERB has yet to address whether it will continue to follow the reasoning of *The Register Guard*, or whether it will abandon that approach as did the NLRB did in *Purple Communications*. (See *Capistrano Unified School District* (2015) PERB Decision No. 2440, pp. 28-29 [finding that when PERB elects to "follow federal authority on a particular issue, PERB is not automatically bound by subsequent developments in federal law on that point"].)

(1998) PERB Decision No. 1259, pp. 22-24; *Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375, proposed decision, p. 69.) This is because an "'employee's right to engage in concerted activity may permit some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect.'" (*Rio Hondo Community College District* (1982) PERB Decision No. 260, p. 12 (*Rio Hondo CCD*), quoting *National Labor Relations Board (NLRB) v. Thor Power Tool Co*. (7th Cir. 1956) 351 F.2d 584, p. 585.)

PERB has relied of federal decisions decided under the National Labor relations Act (NLRA) when striking the balance between protected speech rights and discipline and order in the workplace. Borrowing language from such federal decisions, the Board has found that statements about matters of common interest are protected unless the statements are so "'opprobrious, flagrant, insulting, defamatory, or fraught with malice,'" that the employee forfeits any protected under EERA. (*Mt. San Antonio Community College District* (1982) PERB Decision No. 224 (*Mt. San Antonio CCD*), quoting *Academy of Art College* (1979) 241 NLRB 839; see also *Oakland Unified School District* (2007) PERB Decision No. 1880, p. 21 (*Oakland USD*); *Rancho Santiago CCD*, pp. 12-13.) The context of the statements at issue is critical in deciding whether the statements deserve protection. (See *County of Riverside* (2010) PERB Decision No. 2119-M, p. 17, citing *Los Angeles Unified School District* (1988) PERB Decision No. 659.)

In general, these standards allow for robust debate among employees over labor disputes, management practices, the quality of union representation, and other matters relating to employee working conditions. For instance, in *Rancho Santiago CCD*, *supra*, PERB Decision No. 602, the Board considered newsletters published and distributed by a faculty member and organizer for a minority union. (*Id*. at pp. 2-3.) The employee used the

newsletters to criticize both her employer and her incumbent union using some notably provocative language. She likened the employer to "Nazi Germany" after it disciplined her for the content of prior newsletters, stating that the district used "fear and intimidation" to run the college. (*Id*. at pp. 6-7.) She further stated that her dissident union focused on academic freedom and abuses by the district administration. She contrasted those goals with the incumbent union which she described as "sell[ing] out" in contract negotiations and the "weakest in California." (*Id*. at pp. 10-11.) The Board found that those subjects were protected under EERA. (*Id*. at p. 13.)

The Board in *Rancho Santiago CCD*, *supra*, PERB Decision No. 602, further concluded that language used in the newsletters was not so "flagrant, opprobrious or malicious as to lose its protected status." (*Id*. at pp. 13-14.) In the context of that case, the Board found that the employee was expressing her opinions on widely known and discussed issues at the college and that the readers were free to form their own opinions on the issues covered. (*Ibid*.) The Board also rejected as too conclusory the district's evidence that the newsletters disrupted operations, noting the lack of testimony from non-administration and the lack of evidence of any actual disruption. (*Ibid*.)

In *Rio Hondo CCD*, *supra*, PERB Decision No. 260, the Board held that a union officer's utterance of the word "chickenshit," towards the district superintendent during a public assembly because the superintendent declined to answer questions about the status of the parties' negotiations was not so disrespectful as to impair the district in its ability to maintain order and discipline. (*Id*. at p. 12, citing *NLRB v. Blue Bell, Inc.* (5th 1955) 219 F.2d 796, p. 797; see also *California Teachers Association v. PERB* (2009) 169 Cal.App.4th 1076, p. 1092; *Mt. San Antonio CCD*, *supra*, PERB Decision No. 224, pp. 6-7.)

In contrast with those cases, *Oakland USD*, *supra*, PERB Decision No. 1880, involved, in relevant part, a memo from a teacher about conflicts with his principal. (*Id*. at p. 20.) The Board found that the memo discussed faculty committee activity and school policy reform only "in passing," and that the teacher dedicated much of the memo to issues largely irrelevant to other teachers. Those issues included the principal's apparent ignorance of the teacher's qualifications, and the teacher's own personal feelings about the site administration. He also accused the principal of singling him out as a "disloyal enemy," isolating him, and making an example out of him for other faculty. (*Id*. at p. 2, proposed decision, p. 51.) The Board found that the "overall tone of the memo conveys a mocking and accusatory message" towards the site administration and the principal in particular. (*Id*. at pp. 20-21.) For that reason, the Board held that the memo was an unprotected attempt to "wage his own personal attacks" on his principal with whom he had several disagreements. (*Id*. at p. 21.)

The Board in *Oakland USD*, *supra*, PERB Decision No. 1880, further concluded that even if the memo was protected, the employee forfeited that protection through his subsequent threatening conduct. (*Id*. at pp. 21-22.) The Board found that the teacher substantially disrupted school site operations by forcing discussion over the memo during faculty committee meetings. (*Id*. at p. 22.) During one of those meetings, the teacher yelled at others and was rude, compelling a discussion among the participants about the teacher's mental, emotional, and physical stability. (*Id*. at pp. 23-24.) The Board credited testimony from other faculty at the meeting who said they felt threatened by the teacher's aggressive behavior. (*Id*. at p. 25.)

A number of federal decisions have applied the above-referenced standards in cases involving statements with arguably threatening language. For instance, in *Leasco, Inc*. (1988) 289 NLRB 549, a group of employees approached their manager at an after-hours lounge to discuss an unpopular new vehicle assignment policy. When the manager refused to discuss the

policy in that setting, one of the employees in the group said "If you're taking my truck, I'm kicking your ass right now." (*Id*. at p. 550.) He repeated the comment at least once and also pointed his finger at the manager. He did not raise his fist or make any other aggressive gestures. The NLRB found that the driver's statements were merely a "profane colloquialism used commonly to verbalize the speaker's desire to prevail over another person or group." (*Id*. at p. 552.) It accordingly held that the statement, unaccompanied by other indicators of actual violence did not lose protection. (*Ibid*.)

In *Alpha Resins Corporation* (1992) 307 NLRB 1219 (*Alpha Resins*), an employee driver went to speak with his manager about perceived favoritism in driving assignments. The discussion got heated and the employee said "[t]he best thing for me to do is get up and get out of here before I wind up saying something and I'll regret it and I'll kick your ass and I'll get fired." (*Id*. at p. 1222.) He then said that senior drivers were upset about losing assignments and that "one of these days and you're going to piss them off and they're going to come in here and it's going to be worse than the McDonald's deal[6] out yonder. They're going to wind up killing all of us." The NLRB concluded that the employee's comments were not so threatening as to lose their protected status, noting that the employer had tolerated profane language in the workplace in the past and the employee did not engage in any threatening acts or gestures. (*Id*. at p. 1234.) It further concluded that his reference to a mass-shooting was "impersonal" and was more "symbolistic than threatening." (*Ibid*.; see also *Kewitt Power Constructors Co. v. NLRB* (D.C. Cir. 2011) 652 F.3d 22, pp. 25, 28-29 [holding that an employee's statement that, if he lost his job "it's going to get ugly and [his manager] better bring [his] boxing gloves,"

[6] It was understood by all those present that the "McDonald's deal" referred to a mass-shooting by a lone gunman at a restaurant in California. (*Alpha Resins Corp*., *supra*, 307 NLRB at p. 1224.)

without accompanying gestures or other threatening circumstances was merely an intemperate figure of speech]; *Fieldcrest Cannon, Inc*. (1995) 318 NLRB 470, p. 547 [holding that the comment, "don't you think [the plant superintendent] would look good in a wheelchair?" was ambiguous and did not constitute a threat of immediate harm].)

However, the actual context of allegedly threatening statements is paramount and the turn of a phrase may fundamentally change the analysis. In *Town and Country Supermarkets* (2004) 340 NLRB 1410, an employee was an active officer for the incumbent union, but later signed an authorization card for a rival group organizing the employees at the store. She contacted the incumbent union president about whether to ratify a new contract and other wage issues, but he failed to return her calls. When she saw him again, she said "next time I see you I'm going to kick your ass. I'm not afraid of you." She later repeated those comments to him during a ratification vote meeting, in addition to challenging the president's leadership and vocally opposing ratification. A majority of the NLRB found that the employee's comments amounted to an actual threat of physical harm which was stripped of any protection under the NLRA. The majority noted that the statements were made in the context of an acrimonious debate over the two rival unions. It also distinguished the case from *Leasco*, *supra*, 289 NLRB 549, because the employee's statement, that "I'm not afraid of you" made the employee's remarks more like an actual threat of a physical confrontation. (*Id*. at p. 1413.)

In *Omni International Hotel* (1979) 242 NLRB 248 (*Omni Hotel*), two employees debated the merits of an active union organizing campaign with others, some of whom were on duty at the time. When the conversation started to escalate, security representatives instructed the two employees to leave because the conversation was disrupting others' work. As the employees left, they compared the security representatives to "Nazis." The employees then said "that they would be back, that they would kill any security guards they found on the street,

and that they would blow up the hotel and get rid of the Nazis." (*Id*. at p. 250.) That hotel had a history of six prior bomb threats in the past two years, each requiring a detailed investigation from the fire and police departments. (*Ibid*.) The NLRB found that the threatening statements were not protected. It rejected the assertion that the employees' comments were a protected response towards the employer's provocation, i.e., directing that the employees cease their conversation and leave the premises, reasoning that the NLRA contemplates only peaceful methods for resolving disputes. (*Id*. at p. 253.)

Regarding Vasek's November 2009 or October 2012 e-mails, ALJ Racho already determined that the language those e-mails was not so opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice that it lost protection under EERA. (PERB Decision No. HO-U-1168-E, p. 32.) The District raises no arguments to the contrary.

The District does argue that Vasek's November 4, 2013 e-mail lost any protection because the "taking aim" and "pulling the trigger," references constitute threats in violation of AP 6505 and AP 6506. The District does not maintain that any other aspect of the November 4, 2013 e-mail lost any protected status. Unsurprisingly, those comments are the focal point of the District's November 7, 2013 response. Regarding Section IX, Vasek notably states that he was speaking metaphorically. The comments in question are also clearly part of his discussion over his upcoming legal proceedings and, in a larger sense, his effort to point out and correct perceived inadequacies in the Association's leadership. In this context, it is reasonably clear that Vasek was describing his plan is to use the legal system to achieve his objectives and that that the only consequences others may face from him would be the product of those legal processes, not actual violence.

On the other hand, Vasek could have hardly picked a worse time to employ a gun metaphor. His November 4, 2013 e-mail was less than two months from a widely-publicized

mass-shooting by gunman at a military facility in Washington D.C. (Shear, *Gunman and 12 Victims Killed at Shooting in D.C. Navy Yard* (Sept. 16, 2013), ¶¶ 1-2.) It was also less than six months from another shooting at and around a community college in Santa Monica, California, and less than a year from a particularly devastating shooting at an elementary school in Newtown, Connecticut. (Lovett and Nagourney, *Gunman Kills 4 in California Before he is Killed* (Jun. 7, 2013), ¶ 1; Barron, *Children Were All Shot Multiple Times With a Semiautomatic, Officials Say* (Dec. 15, 2012), ¶¶ 1-2.) In addition, the violent imagery Vasek used was of a different tenor than any other communications in the record. Although Vasek points out that the District appears to have tolerated other metaphorical language in the past, he did not produce a single instance of another employee using similarly provocative language. I do not place Vasek's references to "taking aim," "pulling the trigger," on the same level as employees' prior references to putting "the fire to [one's] feet," "push[ing] the administration to the wall," or teaching a "pig to sing." I also note that the District hired a private investigator who concluded that Vasek had engaged in "threatening behavior" towards another employee. However, that report has limited evidentiary value as it is conclusory, hearsay, and also based entirely on hearsay. (See PERB Regulation 32176; *Palo Verde Unified School District* (2013) PERB Decision No. 2337, pp. 19-20 (*Palo Verde USD*).)

Evaluating the full context of Vasek's statements in conjunction with all the relevant legal authority was not an easy task. However, on balance, I conclude that Vasek's statements were not so egregious that they lost protection under EERA. As in *Rancho Santiago CCD*, *supra*, PERB Decision No. 602, *Leasco*, *supra*, 289 NLRB 549, *Alpha Resins*, *supra*, 307 NLRB 1219, and others, the most reasonable interpretation of Vasek's comments were that he was speaking figuratively, not literally. Unlike in *Oakland USD*, *supra*, PERB Decision No. 1880 and *Town and Country Supermarkets*, *supra*, 340 NLRB 1410, the statements in

question here were not accompanied by threatening actions, gestures, or other circumstances creating any reasonable perception of actual physical danger. To the contrary, Vasek made the comments in question via e-mail, which permitted a more measured reaction, including the opportunity to review Vasek's full message. And the terms "taking aim" and "pulling the trigger," though startling in light of events occurring in the news at the time, are both fairly common expressions in American vernacular referring respectively to preparing to take action and initiating an action or response. (See American Slang: The Abridged Edition of the Classic Dictionary of American Slang (4th Ed. 2008), p. 501; McGraw-Hill's American Idioms Dictionary (4th Ed. 2006), pp. 428, 512.)

The news reports of prior gun violence incidents around the time of Vasek's e-mail are troubling, but unlike in *Omni Hotel*, *supra*, 242 NLRB 248, I do not find that those contemporaneous outside events increase the likelihood that Vasek's comments should be taken literally. In *Omni Hotel*, the employer in that case received multiple bomb threats from unknown sources at that time and the employees also made other threatening and angry remarks, creating a greater sense of apprehension of actual violence. In this case, Vasek's own comments are more similar to *Alpha Resins*, *supra*, 307 NLRB 1219, where the employee's reference to a mass-shooting was merely "symbolistic" with no indication that such an attack would actually occur. I find that Vasek's comments were not more than pointed language used to convey his message about taking legal action to address perceived problems at the District and within the Association. And although at least one employee, Association President

Cranney, complained about Vasek's e-mail, there was no evidence of any disruption to District operations.[7]

I also note that Vasek's comments in Section IX were not merely an outburst during his discussion of protected subjects. Vasek admits that one of his goals was to discourage others from testifying against him in his then-upcoming PERB hearings. Just as Vasek has the protected right to pursue his PERB claims against the District and the Association, other District employees too have the protected right to testify before PERB. (*California State University, Fresno* (1990) PERB Decision No. 845-H, p. 10.) Those protections apply even if their testimony is in opposition to Vasek's legal positions. That said, I am not persuaded to change my conclusion that Vasek's e-mail retained its protected status in this situation. It is reasonably clear from his e-mail that he was merely informing others of what he believed the evidence would show at his hearings.[8] Healthy debate over disputed subjects inevitably results in some effort by one side to convince the other to change a position. Individual employees, such as Vasek may freely engage in those efforts so long as their statements and conduct are not so opprobrious, flagrant, insulting, defamatory, or fraught with malice that their actions lose their protected status. As stated above, Vasek's communications do not cross this line.[9]

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[7] Both Cranney and Ramos testified that other employees complained about Vasek's e-mail. Vasek alternatively testified that other employees understood the metaphorical context of Vasek's message and felt that the District's reaction was out of proportion. I find all of this testimony to be uncorroborated hearsay with limited evidentiary value.

[8] I might have been inclined to see the matter differently had the police pursued the matter as some kind of a crime (see e.g., Penal Code 136.1, subd. (a)(1) [making it a crime to "knowingly and maliciously" attempt to prevent or dissuade a potential witness from testifying in legal proceedings], or had ALJ Racho concluded that the hearings in case number LA-CE-5789-E or LA-CO-1567-E were compromised. There was no record that either occurred here.

[9] A different analysis would likely be required if the comments in question were made by a District or union representative. Notably, both employers and employee organizations have an affirmative duty under EERA not to interfere with employees' exercise of protected

In sum, Vasek's November 4, 2013 e-mail, when viewed in its proper context and under all the surrounding circumstances, I do not conclude that Vasek's November 4, 2013 e-mail was so threatening that it lost the protection of EERA. And because his message was not otherwise unacceptably opprobrious, flagrant, insulting, defamatory, or fraught with malice his e-mail retained its protected status under EERA. I stress that these conclusions do not amount to PERB's endorsement of Vasek's statements. It is not, however, PERB's place to evaluate the wisdom of an employee's remarks, even when those statements exceed the norms of polite company. It is nevertheless my sincere hope that the parties recognize that not everything that *can* be said *should* be said.

2. The November 7, 2013 Letter as an Adverse Employment Action

The next issue in dispute is whether the District's November 7, 2013 letter sent in response to Vasek's various e-mail activity was an adverse employment action. The central question is "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.) Not all writings from an employer meet this standard. For instance, an "expectations memorandum" issued to an employee that appeared to be a non-disciplinary clarification of the charging party's job duties—pursuant to her own request—was not considered objectively adverse to employment. (*State of California (Department of Transportation)* (2005) PERB Decision No. 1735-S, warning letter, p. 4.)

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rights. (EERA, §§ 3543.5, subd. (a); 3543.6, subd. (b); see also *State of California (Department of Corrections)* (1995) PERB Decision No. 1104-S, proposed decision, pp. 6, 18 [holding that a supervisor's pre-hearing meeting with a witness to get him to change his planned testimony about a disputed policy was unlawful]; *AM Holding Group* (2007) 350 NLRB 998, pp. 1042-1043 [holding that an employer engaged in unlawful witness coercion by questioning witnesses about their immigration status, when that status was irrelevant to the case].)

Conversely, a formal letter placed in an employee's personnel file that concluded that the employee engaged in "inappropriate and negative" conduct was considered adverse. (*Alisal Union Elementary School District* (2000) PERB Decision No. 1412, pp. 22-23 (*Alisal UESD*).) Similarly, "placing a document that could support future discipline in an employee's personnel file is also an adverse employment action." (*City of Long Beach* (2008) PERB Decision No. 1977-M, p. 13.)

In this case, the District's November 7, 2013 letter was not described as disciplinary and, as the District points out, does not expressly threaten future discipline. However, it is undisputed that the letter was Vasek's "final formal warning" that he violated both AP 6505 and AP 6506. The text of AP 6505 states that violations could result in "formal disciplinary action, up to and including termination." It is also undisputed that the letter was placed in Vasek's personnel file. Under these facts, a reasonable person under the circumstances would feel that the District could use the letter to initiate future discipline. For that reason, the letter is an adverse employment action. (See *City of Long Beach*, *supra*, PERB Decision No. 1977-M, p. 13.)

3. The District's Burden of Proof

Vasek has established all of the elements of a prima facie case. The burden of proof in the case now shifts to the respondent to show that the adverse action occurred for reasons unrelated to Vasek's protected activity. (*Chula Vista Elementary School District* (2011) PERB Decision No. 2221, p. 21, citing *Novato USD*, *supra*, PERB Decision No. 210; *Martori Bros. Dist. v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721.) This burden requires the employer to establish both:

> (1) that it had an alternative non-discriminatory reason for the challenged action; and (2) that it acted because of this alternative

> non-discriminatory reason and not because of the employee's protected activity.

(*Palo Verde USD*, *supra*, PERB Decision No. 2337, pp. 18-19, citations omitted; see also *County of Orange* (2013) PERB Decision No. 2350-M, p. 16.)

In this case, I credit Ramos's testimony where she states that Section IX of Vasek's November 4, 2013 e-mail was the impetus for the District's November 7, 2013 letter. In doing so, I conclude that the District would have issued Vasek a substantially similar letter regardless of whether Vasek had engaged in his 2009 and 2012 e-mail activity. The District had already responded to that earlier activity and it is unlikely that it would have spontaneously sent another letter a year later based solely on those earlier e-mails. That said, I have also found that Vasek's November 4, 2013 e-mail, including Section IX, was protected under EERA. Under the circumstances, I cannot conclude that the District would have issued the letter even if Vasek had not sent this protected e-mail. (See *State of California (Department of Corrections & Rehabilitation)* (2012) PERB Decision No. 2282-S, p. 14 [holding that the employer failed to sustain its burden where it admitted to disciplining an employee for conduct later determined to be protected].)

One other issue raised by the facts of this case is whether the District was entitled to take some action in response to Cranney's complaint about Vasek's November 4, 2013 e-mail. In *Trustees of the California State University (East Bay) (Liu)* (2014) PERB Decision No. 2391-H (*CSU East Bay*), PERB held that the employer was justified in excluding the charging party employee from campus after he sent an e-mail stating "if [the charging party] kills someone, then staff members of HR department should die first." The employee in that case also made other statements about "fighting to the death," in his personnel dispute with his employer, photographed his students before class, and ignored prior warnings from the

employer's police chief to adjust his behavior. (*Id*. at pp. 31-32, proposed decision, pp. 35-37.)[10] The parties did not litigate whether the employee's e-mail or other conduct, described above, was protected.

In *Ventura County CCD*, *supra*, PERB Decision No. 1323, the Board found that an employer was justified in sending an employee a disciplinary letter, placing him on leave, and requiring a psychological examination because of his angry confrontations with his coworker, his no-contest plea to a domestic violence incident, and his admission to his supervisor that he had anger issues. (*Id*. at p. 10.12.) Again, the Board did not consider whether the employee's arguably threatening behavior was protected.

In *Oakland USD*, *supra*, PERB Decision No. 1880, the Board found that an employer was entitled to take "reasonable safety precautions," such as contacting local authorities after employees complained about being threatened by another employee's conduct during a faculty committee meeting. (*Id*. at p. 26.) As stated above, the Board in that case expressly found that the employee's conduct was not protected under EERA. (*Id*. at pp. 21-22.)

Here, while the District may have been entitled to initiate some action because of Cranney's complaint, because the complaint concerns Vasek's protected communications, the District was not justified in sending Vasek a letter which raised the objective possibility of future discipline. Based on the Board's position in *Oakland USD*, *supra*, PERB Decision No. 1880, it may have been appropriate for the District to have contacted law enforcement, as someone did in this case. However, because the lawfulness of this action was neither pleaded

[10] At the time this proposed decision issued, the employee filed a petition to review the Board's decision in *CSU East Bay*, *supra*, PERB Decision No. 2391-H in the First Appellate District Court, Division Four, case number A145123.

in the PERB complaint nor litigated in this case, it is ultimately beyond the scope of this proposed decision to answer this question more specifically.

Vasek has proven all of the elements of a prima facie case for retaliation, and the District has not met its burden of proving that it would have issued the November 7, 2013 letter in the absence of Vasek's protected activity. Therefore, the District's conduct amounts to unlawful retaliation in violation of EERA section 3543.5, subdivision (a).

REMEDY

PERB has broad remedial powers to effectuate the purposes of EERA. When a violation occurs, PERB typically aims to restore the status quo. (*Baker Valley Unified School District* (2008) PERB Decision No. 1993, p. 16.) EERA section 3541.5, subdivision (c), states:

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

In cases where an employer unlawfully places documents into an employee's personnel file, the proper remedy is to rescind those documents, remove them from the personnel file, and destroy them. (*Alisal UESD*, *supra*, PERB Decision No. 1412, p. 35-37; *Yolo County Superintendent of Schools* (1990) PERB Decision No. 838, pp. 12-14.) In those cases, the Board also ordered the employer to cease and desist from interfering with protected rights and to post a notice of the violation. (*Ibid*.) These remedies are appropriate and are ordered here. Accordingly, the District is ordered to rescind the November 7, 2013 letter, remove it from Vasek's personnel file, and destroy any copies in its possession. The District is further ordered to cease and desist from retaliating against Vasek for engaging in protected activity and to post a notice signed by an authorized representative and incorporating the terms of the order below.

The notice posting shall include both a physical posting of paper notices at all places where certificated bargaining unit members are customarily placed, as well as a posting by "electronic message, intranet, internet site, and other electronic means customarily used by the District to communicate with its employees in the [faculty] unit." (*Centinela Valley Union High School District*, *supra*, PERB Decision No. 2378, pp. 11-12, citing *City of Sacramento* (2013) PERB Decision No. 2351-M.)[11]

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Mount San Jacinto Community College District (District) violated Educational Employment Relations Act (EERA), Government Code section 3543.5, subdivision (a). The District violated EERA by issuing Anthony G. Vasek the November 7, 2013 letter, described as a "final formal warning," in retaliation for Vasek's protected communications.

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

A. CEASE AND DESIST FROM:

Retaliating against Vasek for engaging in protected activity.

[11] Vasek also requests that PERB order the District to send press releases to local media outlets. I find no legal support for this remedy under the circumstances of this case and Vasek has provided none. Moreover, I conclude that the ordered physical and electronic notice postings adequately addresses Vasek's interests.

Vasek also requests unspecified monetary remedies. As part of its authority to order restoration of the status quo, PERB may order money damages such as back pay for lost wages, plus interest, resulting from the violation. (*City of Pasadena* (2014) PERB Order No. Ad-406-M, p. 13.) However, PERB lacks the authority to remedies designed to punish the respondent. (*Mark Twain Union Elementary School District* (2003) PERB Decision No. 1548, p. 8.) Here, there was no allegation or evidence of monetary losses resulting from the November 7, 2013 letter. Therefore, I reject Vasek's request for money damages.

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

1. Rescind the November 7, 2013 letter, remove it from Vasek's personnel file, and destroy it.

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

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

Right to Appeal

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

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

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

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

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