STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNITED TEACHERS LOS ANGELES, Charging Party, v. ALLIANCE ENVIRONMENTAL SCIENCE AND TECHNOLOGY HIGH SCHOOL, ALLIANCE MORGAN MCKINZIE HIGH SCHOOL, ALLIANCE GERTZ-RESSLER/RICHARD MERKIN 6-12 COMPLEX, ALLIANCE DR. OLGA MOHAN HIGH SCHOOL, and ALL INDIVIDUAL ALLIANCE AFFILIATED PUBLIC CHARTER SCHOOLS, Respondents.	Case Nos. LA-CE-6165-E LA-CE-6204-E PERB Decision No. 2717 May 18, 2020

Appearances: Bush Gottlieb by Megan L. Degeneffe and Erica Deutsch, Attorneys, for United Teachers Los Angeles; Robert A. Escalante, General Counsel, and Proskauer Rose, by Rochelle H. Schultz, Attorney, for Alliance Environmental Science and Technology High School, Alliance Morgan McKinzie High School, Alliance Gertz-Ressler/Richard Merkin 6-12 Complex, Alliance Dr. Olga Mohan High School, and all individual Alliance Affiliated Public Charter Schools.

Before Banks, Shiners, and Krantz, Members.

DECISION

BANKS, Member: These consolidated cases are before the Public Employment Relations Board (PERB or Board) on cross-exceptions to a proposed decision (attached) of an administrative law judge (ALJ). The underlying charges alleged

violations of the Educational Employment Relations Act (EERA)[1] during a campaign by United Teachers Los Angeles (UTLA) to organize certificated employees at 25 charter schools affiliated with the Alliance College-Ready Public Schools charter management organization (Alliance or the Alliance CMO).[2] The amended complaint in PERB Case No. LA-CE-6165-E alleged that all of the Alliance-affiliated charter schools (Charter Schools) violated EERA when Alliance, acting as their agent, summoned law enforcement to stop distribution of union literature outside a new teacher orientation program, and refused to meet and discuss a new teacher evaluation program. Additionally, the amended complaint alleged that one of the Charter Schools, Alliance Morgan McKinzie High School (Morgan McKinzie HS), interfered with protected rights by coercively misinforming employees about the consequences of unionization. Finally, the amended complaint in PERB Case No. LA-CE-6204-E alleged that another of the Charter Schools, Alliance Dr. Olga Mohan High School (Mohan HS), violated EERA by directing an employee and a UTLA organizer who were engaged in protected activities to leave the school premises.

The proposed decision concluded that the Charter Schools violated their duty to meet and discuss and that Morgan McKinzie HS interfered with protected rights, as alleged in the amended complaint. All other allegations were dismissed. The Charter

---

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

[2] The original charges and complaints named the Alliance CMO as a respondent. However, while these cases were pending, the Board issued *Alliance College-Ready Public Schools* (2017) PERB Decision No. 2545 (*Alliance*), which concluded that we have no jurisdiction over the Alliance CMO. Subsequently, the parties stipulated to the dismissal of the Alliance CMO as a respondent.

Schools filed exceptions contending that none of their conduct violated EERA. UTLA cross-excepted to the dismissal of the other allegations.

Based on our review of the proposed decision, the entire record, and relevant legal authority in light of the parties' submissions, we adopt the factual findings of the proposed decision, and affirm in part and reverse in part its conclusions. Specifically, we agree that the Charter Schools violated their duty to meet and discuss and that Morgan McKinzie HS interfered with protected rights. However, we conclude that the record evidence is sufficient to prove that the Charter Schools interfered with protected rights when their agent called law enforcement to stop union handbilling outside a teacher orientation program, and that Mohan HS interfered with access rights by directing an employee and a UTLA organizer to leave the premises. We will therefore issue a new order requiring the appropriate Charter Schools to cease and desist their unlawful conduct and to post a notice to affected employees.

A prefatory note is necessary before explaining our findings. In 2017 and 2018, UTLA and certain respondent Alliance schools filed exceptions asking us to review three different proposed decisions involving unfair practice allegations, including the proposed decision at issue here. Then, in 2019, the parties participated in a lengthy hearing regarding UTLA's requests for recognition at several individual schools, PERB Case Nos. LA-RR-1281-E, LA-RR-1282-E, and LA-RR-1283-E. Given that we already had before us the three unfair practice proposed decisions, rather than wait for the assigned ALJ to issue a decision, we transferred the representation matter to our docket at the conclusion of the hearing. Today, we issue decisions in the pending unfair practice and representation matters. In one of those unfair practice matters, UTLA sought to prove that Alliance schools and its CMO constituted a single employer, while

respondents disagreed and averred that each school was autonomous. By contrast, Respondents sought in the representation case to prove that the schools, without the CMO, constitute a single employer, and UTLA disagreed. The parties' evolving positions on the schools' autonomy and other facts relevant to the single employer doctrine would have made such issues difficult to decide, but ultimately there is no cause for us to do so. Respondents have notified PERB that effective January 1, 2020, they have adopted a new organizational structure. Although there are no such facts in the records in any case pending before the Board, this notification apparently suggests that future cases involving these parties might have different facts. We find no need to decide whether the now-superseded Alliance structure met the single employer test. In the unfair practice matters, the single employer question lost its salience given our 2017 decision that we have no jurisdiction over the CMO and the parties' subsequent stipulation that the CMO acted as the agent of the schools in certain instances (today, we find such agency to exist in one other case in which the parties did not enter into such a stipulation). In the absence of any single employer finding, we do not hold any school to be liable for the acts of any other school, especially as no party contended that one school acted as an agent for another school. Thus, we find a school liable only to the extent that it, or the CMO on its behalf, committed a violation. In the representation matter, we find that principles of justice prevent the schools from meeting their burden of proof on the single employer issue, even if the facts could be construed to satisfy the single employer test. Moreover, as an alternate basis for our decision in the representation decision, we explain therein why, even if principles of justice did not prevent the schools from meeting their burden to show single employer status, there

would still be other, independent reasons why they could not show that a network-wide unit was the only appropriate unit configuration.

FACTUAL BACKGROUND

The ALJ's procedural history and relevant findings of fact can be found in the attached proposed decision. We recount many of those facts here to provide context for our discussion of the parties' exceptions.

UTLA is an employee organization within the meaning of EERA section 3540.1, subdivision (d). Alliance Environmental Science and Technology High School (ESAT),[3] Morgan McKinzie HS, Mohan HS, and the following 22 individual Charter Schools are each public school employers within the meaning of EERA section 3540.1, subdivision (k): Alliance Gertz-Ressler High School/Richard Merkin 6-12 Complex, Alliance Collins Family College-Ready Academy High School, Alliance Judy Ivie Burton Technology Academy High School, Alliance Marc and Eva Stern Math and Science School, Alliance Patti and Peter Neuwirth Leadership Academy, Alliance Ouchi – O'Donovan 6-12 Complex, Alliance Piera Barbaglia Shaheen Health Services Academy, Alliance Cindy and Bill Simon Technology Academy High School, Alliance Tennenbaum Family Technology High School, Alliance Susan and Eric Smidt Technology High School, Alliance Ted K. Tajima High School, Alliance Renee and Meyer Luskin Academy High School, Alliance Margaret M. Bloomfield Technology Academy High School, Alliance Alice M. Baxter College-Ready High School, Alliance Jack H. Skirball Middle School, Alliance College-Ready Middle Academy No. 4, Alliance College-Ready Middle

[3] ESAT is presently known as Alliance Leichtman-Levin Family Foundation Environmental Science High School.

Academy No. 5, Alliance College-Ready Middle Academy No. 8, Alliance Kory Hunter Middle School, Alliance Leadership Middle Academy, Alliance Marine-Innovation and Technology 6-12 Complex, and Alliance College-Ready Middle Academy No. 12. According to the parties' stipulation, Alliance and its high-ranking employee, Howard Lappin (Lappin), were agents of the Charter Schools at all relevant times.

Alliance and Alliance Educators United

Alliance is a non-profit CMO affiliated with a network of 25 charter schools in the Los Angeles area, each bearing the name "Alliance." In 2015, a group of certificated employees from several Alliance-affiliated charter schools publicly announced their intent to form a union with UTLA. The group named itself Alliance Educators United (AEU).

UTLA and AEU's Request to Meet Regarding New Evaluation System

On April 1, 2016,[4] UTLA and AEU sent a request to Dan Katzir (Katzir), the CEO of Alliance, requesting "to meet and confer regarding the evaluation processes currently used for both teachers and counselors across the Alliance." The teachers believed the current evaluation system, which directly impacted their pay, was not useful and had suggestions for how to improve the system. UTLA and AEU's request asked that Alliance contact UTLA President Alex Caputo-Pearl (Caputo-Pearl) to schedule a time to meet.

On April 7, Alliance sent an e-mail to certificated employees at Alliance-affiliated schools announcing the creation of a new optional teacher evaluation system for the 2016-2017 school year, called the "Streamlined Evaluation Pilot." Alliance's

[4] All subsequent dates occurred in 2016.

e-mail stated it created the Streamlined Evaluation Pilot with input and feedback gathered over the previous year from teachers and school leaders. Based on that feedback, the e-mail stated the Streamlined Evaluation Pilot would make a number of changes to the evaluation process.

On April 8, Irina Constantin (Constantin), an attorney representing Alliance, sent a letter to Caputo-Pearl agreeing to meet at a mutually acceptable time to discuss evaluation processes but requesting further information prior to doing so, including identification of the specific parts of the evaluation process that UTLA and AEU wished to discuss and employee survey results that were referenced in AEU's April 1 letter.

On April 27, UTLA and AEU sent a letter to Katzir that included a non-exhaustive list of the parts of the evaluation process it wished to discuss and the survey results referenced in its April 1 letter. The letter proposed several dates in May for a meeting.

On May 10, Constantin sent a letter to Caputo-Pearl requesting "complete information" from UTLA and AEU or, in the alternative, an explanation as to why complete information was not provided. The letter proposed several dates in June for a meeting.

On May 20, UTLA and AEU sent a letter to Katzir agreeing to meet with Alliance on June 15. The letter also objected to Constantin's assertion that AEU had provided incomplete information.

The parties met as scheduled on June 15. The teachers who were present discussed a number of concerns they had about the evaluation process, proposed solutions, and raised questions about the Streamlined Evaluation Pilot. Although there was dialogue over some of the teachers' questions and suggestions, Alliance representatives did not respond to all of the teachers' proposed solutions. The meeting

ended with Caputo-Pearl requesting to schedule another meeting. Constantin asked that the request be put in writing.

On June 24, UTLA and AEU sent a letter to Katzir requesting "to schedule a meeting to meet and confer about evaluation processes and continue the discussion from the meeting held on June 15, 2016." The letter stated that a second meeting was necessary to hear Alliance's response to the proposed solutions the teachers offered during the June 15 meeting.

On July 26, Catherine Suitor, Alliance's Chief Communications Officer, sent a letter to Caputo-Pearl stating in relevant part, "[b]ased on guidance from our counsel, at this time, we do not believe a second meeting is required or necessary."

Distribution of Flyers at a New Teacher Orientation Held on the ESAT Campus

ESAT is located on property owned by the Los Angeles Community College District (LACCD). Alisha Mernick (Mernick) and Valerie Felix (Felix) are two teachers who work at Alliance-affiliated charter schools. Jessica Foster (Foster) is a UTLA organizer assigned to the AEU organizing campaign.

On July 25, the Charter Schools held a new teacher orientation on the ESAT campus. New teacher orientation provides onboarding for all teachers new to the Alliance network. That morning, Foster, Mernick, and Felix met at a restaurant adjacent to the ESAT campus. Mernick and Felix left the restaurant at 7:45 a.m. and passed through an automobile gate to enter the ESAT campus. From there, they walked to the campus buildings and positioned themselves on a sidewalk directly in front of the main entrance. Felix distributed literature for about 15 minutes then left to prepare for a presentation she was scheduled to give during the new teacher orientation.

While Mernick continued to distribute flyers, a sheriff's deputy, Deputy Fajardjo, pulled up in a marked car. He was wearing the uniform of the Los Angeles County Sheriff's Department, carried a gun, and wore a badge. Mernick testified that Deputy Fajardjo stated Alliance wanted Mernick to leave.[5] Mernick replied that she had a right to be there and asked who complained about her presence. Deputy Fajardjo stated Lappin complained. At that time, Lappin was serving as the Alliance Chief Schools Officer, but he was scheduled to serve as the interim principal of Alliance Gertz-Ressler High School (Gertz-Ressler HS) following the new teacher orientation.

There are glass doors at ESAT's main entrance, followed by a hallway and then another set of glass doors that open into a courtyard. From her position on the sidewalk in front of the main entrance, Mernick testified she could see Lappin in the ESAT courtyard for most of the time she was present on campus. She handed Deputy Fajardjo one of the flyers she was distributing and suggested he speak to Lappin. Deputy Fajardjo took the flyer and went into the building. Mernick could see Deputy Fajardjo speaking to Lappin in the courtyard. At that point, Mernick called Foster and requested that she come to ESAT.

By the time Deputy Fajardjo came back outside, Foster had arrived. Deputy Fajardjo told Foster "they" did not want Foster and Mernick to be there and that the two of them would have to leave. Foster replied that she and Mernick had a right to be there. Deputy Fajardjo stated his supervisor was on his way. Foster responded she would be glad to speak to the supervisor.

---

[5] Deputy Fajardjo did not testify.

At about 8:15 a.m., Deputy Fajardjo's supervisor arrived. Mernick continued distributing literature in front of the main entrance while Foster, Deputy Fajardjo, and Deputy Fajardjo's supervisor walked about 20 feet down the sidewalk. Foster testified that the supervisor stated Lappin and Alliance did not want Foster and Mernick to be there and that they had to leave.[6] Deputy Fajardjo also stated Alliance CEO Katzir did not want Foster and Mernick to be there. Foster replied she and Mernick had a legal right to be where they were. Deputy Fajardjo's supervisor stated there would be no issue if Foster and Mernick moved outside the automobile gate and distributed literature off ESAT grounds. Foster replied that she and Mernick did not have to leave the ESAT grounds. The sheriff's deputies responded that if Mernick and Foster stayed on the property over Lappin's objection, the deputies could make a citizen's arrest for trespassing if Lappin so desired.[7]

Foster asked to speak to Lappin. The sheriff's deputies escorted Foster inside ESAT and directed her to wait in the hallway outside their office while they spoke to Lappin. The sheriff's office is by the main entrance to ESAT, and from her position Foster could see the sheriff's deputies speaking to Lappin. Fajardjo's supervisor finished speaking to Lappin and informed Foster that Lappin did not want to speak to her and that Steve Harvey (Harvey), the property manager, would be contacting her

---

[6] Deputy Fajardjo's supervisor was not identified by name and did not testify.

[7] The Charter Schools contend that LACCD contracted with the Los Angeles County Sheriff to provide policing services. However, it is undisputed that the deputies were acting as peace officers at all relevant times. We therefore do not determine whether Deputy Fajardjo and his supervisor were working for Los Angeles County or LACCD during the events at ESAT on July 15, 2016, as that fact is irrelevant to the resolution of this dispute.

about trespassing charges. Foster exited ESAT and joined Mernick to distribute literature.

At around 8:40 a.m., the sheriff's deputies and Harvey approached Foster and Mernick. According to Foster, Harvey stated he was speaking in his capacity as property manager for the LACCD and that she and Mernick had to leave.[8] The sheriff's deputies stated that if Lappin had not complained, there would be no issue. While Foster was speaking to Harvey and the sheriff's deputies, Lappin approached Mernick and said that he had checked and it was okay for her and Foster to stay until 9:00 a.m. Lappin then approached Foster, the sheriff's deputies, and Harvey, and stated that he had spoken to the attorneys and Mernick and Foster could stay. Foster turned to Harvey and asked whether she and Mernick could then continue to distribute literature on the property, considering Lappin's approval. Harvey stated that they could.

Foster and Mernick distributed literature until shortly before the start of the new teacher orientation at 9:00 a.m., then left the ESAT campus.

Morgan McKinzie HS Staff Meeting

On August 5, teachers at Morgan McKinzie HS were on campus for a staff meeting followed by professional development training.

During the staff meeting, Arthur Sanchez (Sanchez), principal of Morgan McKinzie HS, used a whiteboard to explain how full-time equivalent (FTE) (i.e., the number of teachers needed at a school site) is calculated. His explanation included a mathematical formula. He explained that, first, special education students are subtracted from the total number of students, the resulting figure is multiplied by the

[8] Harvey did not testify.

number of periods in a day then divided by class size, and the resulting number is called the "section number." He further explained that the section number is then divided by the number of classes taught by each teacher to determine FTE.

Sanchez said that at Morgan McKinzie HS, there are about 320 students, of which 20 are special education students.[9] He continued by stating that there are six periods in a day, the class size is set at 20, and teachers are required to teach 5 classes.[10] After plugging these figures into the FTE formula, Sanchez calculated the school's FTE as 18. Sanchez then did the same calculation using different class size numbers, while keeping the other variables the same. First, he used a class size of 32, which he stated was the class size set forth in the collective bargaining agreement (CBA) between the school district and the exclusive representative when he was a principal at Eisenhower High School. The formula produced an FTE of 11.5. Next, he used a class size of 30, which he stated was the class size set forth in the CBA between the school district and the exclusive representative when he was a principal in the Montebello Unified School District. The formula produced an FTE of 12. Finally, he wanted to use class size in the Los Angeles Unified School District (LAUSD), which he believed to be 45 based on his review of the CBA between UTLA and LAUSD. However, because the classrooms at Morgan McKinzie HS could not hold 45 students, he used a class size of 35. The formula produced an FTE of 10. Sanchez then

---

[9] Sanchez testified these were not the exact student numbers for Morgan McKinzie HS but rather "rounded" numbers to make the calculations easier.

[10] Sanchez testified that Morgan McKinzie HS attempted to keep class sizes in the range of 15 to 20 students, but chose the number 20 in his hypothetical for arithmetic convenience.

subtracted 10 from 18 and drew an 8 on the whiteboard. Inside the 8 he drew a sad face because that is how many teachers would be lost if class sizes at Morgan McKinzie HS were 35. Sanchez stated that if the school were to lose teachers, the only teacher who would be safe was the special education teachers.

Gary Carter (Carter), a Morgan McKinzie HS teacher who is active in AEU, stated it seemed like Sanchez was attempting to discourage unionization. Sanchez replied that was not his intent and that he only wanted to give facts about how FTE is calculated. When Carter stated Alliance was spending a lot of money to oppose AEU's organizing campaign, Sanchez stated UTLA was also spending a lot of money on the campaign.

Sanchez testified that he discussed class sizes and FTE to address concerns two teachers had brought to him regarding the potential impact of unionization on their jobs. Sanchez claimed he told the teachers that he would follow whatever the CBA required and that there is a formula to determine FTE. He told the teachers he would raise the issue at the staff meeting.

Sanchez testified that he had reviewed the class size provisions of the CBA between UTLA and LAUSD two years prior to the hearing. He did not recall specifics, but recalled the number 45 sticking with him regarding class size. However, the class size provisions of the 2014-2017 CBA allowed for wide variance in class sizes based on a number of factors. They also limited maximum class size to 39, with the exception of physical education at secondary schools, which could go as high as 55.

Denial of Access at Mohan HS

On September 29, Mernick and Patrick Sheehan (Sheehan), a UTLA organizer, visited Mohan HS after classes ended to talk to teachers. After signing in, they went to

the first open classroom and engaged with the teacher inside. Mernick testified that at some point Kim Lim (Lim), another Mohan HS teacher, entered the classroom and said the campus was closed to Mernick and Sheehan.[11] Lim stated the policy was that no visitors be allowed on campus when the regular administrator was not present. She also said the principal had called her and told her to ask Mernick and Sheehan to leave. Sheehan contacted Foster for guidance. Foster advised Sheehan that he and Mernick were to leave the campus rather than escalate the situation.

On October 3, Stephanie Tsai (Tsai), Principal in Residence at Gertz-Ressler HS, sent an e-mail to Mernick, copying the principal of Mohan HS, Loreen Riley, that stated in relevant part:

> "I understand that on Thursday, September 29, you visited [Mohan HS] after school hours and were told by Ms. Kim Lim, a teacher at the school, that because the principal and assistant principal were not present, you and the [UTLA] representative accompanying you could not enter the school. Ms. Kim [sic], who was functioning as an administrative designee in the absence of the principal and assistant principal, was in error. Insofar as visits to any Alliance campus after school hours are concerned, you and any [UTLA] representative may enter the campus until the final extracurricular activity is completed and administration officially closes the school."

Mernick teaches at Gertz-Ressler HS. She testified that at her school site, the administrative designee acts as an administrator when there are none on campus and performs administrative duties such as issuing discipline and interacting with parents.

---

[11] Lim did not testify.

DISCUSSION

When resolving exceptions to a proposed decision, the Board applies a de novo standard of review both to issues of fact and law. However, "to the extent exceptions merely reiterate factual or legal contentions resolved correctly in the proposed decision, the Board need not further analyze those exceptions." (*San Diego Community College District* (2019) PERB Decision No. 2666, p. 5 (citations omitted).) With these principles in mind, we affirm for the reasons stated in the proposed decision the ALJ's conclusion that Sanchez's statements during the staff meeting at Morgan McKinzie HS on August 5, 2016, violated EERA because they implicitly threatened teachers with job loss if they selected UTLA as their bargaining representative.[12]

The Board also need not address alleged errors that would not impact the outcome of the case. (*Los Angeles Unified School District* (2015) PERB Decision

---

[12] We contextualize the proposed decision's citation to *Rio Hondo Community College District* (1980) PERB Decision No. 128, for the proposition that an employer's statement of views cannot be considered evidence of an unfair practice unless it contains a threat of reprisal or force or promise of benefit, i.e. is itself an unfair practice. While this statement of the law is generally correct in assessing a prima facie case for interference, it does not hold true in other contexts where an employer's motive is relevant. In those contexts, anti-union statements may be relied upon to establish animus even if they do not constitute a discrete unfair practice. (See, e.g., *Brink's* (2014) 360 NLRB 1206, 1206, fn. 3; *NLRB v. Vemco, Inc.* (6th Cir. 1993) 989 F.2d 1468, 1477 [protected speech like anti-union policy in employer's handbook may serve as "background evidence of anti-union animus"]; *Best Products Company* (1978) 236 NLRB 1024, enforcement denied *NLRB v. Best Products Co., Inc.* (9th Cir. 1980) 618 F.2d 70 ["conduct which may not violate Section 8(a)(1) of the Act may still be used to show union animus on the part of a respondent"].)

Although motive is not an issue in this case, Member Shiners agrees that anti-union statements by an individual involved in an allegedly discriminatory adverse action may be used to establish an unlawful motive for the action even if the statements do not

No. 2432, p. 2; *Regents of the University of California* (1991) PERB Decision No. 891-H, p. 4.) Many of the exceptions and cross-exceptions focus on minor factual disputes or discrepancies in the proposed decision that would not change the analysis. We focus instead on those issues that are critical to the findings and conclusions on review.

I. Failure to Meet and Discuss the Pilot Teacher Evaluation Program

The proposed decision concluded that the Charter Schools violated their duty to meet and discuss a matter of fundamental concern to employees by refusing to hold a second meeting with UTLA and AEU to discuss the new pilot teacher evaluation program. We affirm this conclusion for the reasons stated in the proposed decision, as supplemented by the below analysis of the Charter Schools' exceptions.

The Charter Schools except to the ALJ's decision to include in his analysis the fact that the Charter Schools implemented the pilot program in April 2016, without giving UTLA prior notice or an opportunity to meet and discuss the matter. According to the Charter Schools, the inclusion of this fact—the accuracy of which they do not contest—

---

themselves constitute unfair practices. (See, e.g., *Palo Verde Unified School District* (2013) PERB Decision No. 2337, pp. 15-16; *Trustees of the California State University (San Marcos)* (2009) PERB Decision No. 2070-H, p. 11.) However, Member Shiners would follow authority holding that an employer's general opposition to unionization, as conveyed through statutorily protected, non-coercive speech, cannot be used to prove anti-union animus in such a case. (See, e.g., *Medeco Security Locks, Inc. v. NLRB* (4th Cir. 1998) 142 F.3d 733, 744; *BE&K Const. Co. v. NLRB* (11th Cir. 1997) 133 F.3d 1372, 1376-1377; *NLRB v. Best Products Co., Inc.*, *supra*, 618 F.2d at p. 74.)

Additionally, we note that this case arose before the Legislature enacted section 3550, the Prohibition on Public Employers Deterring or Discouraging Union Membership (PEDD), which states that public employers "shall not deter or discourage public employees . . . from becoming or remaining members of an employee organization." We express no opinion as to whether any of Sanchez's communications would have violated the PEDD.

amounted to an impermissible finding of liability for an unalleged unilateral change to terms and conditions of employment. We disagree.

Under the unalleged violations doctrine, PERB has discretion to consider allegations not included in the charge or the complaint if: (1) the respondent has had adequate notice and opportunity to defend against the unalleged matter; (2) the unalleged conduct is intimately related to the subject matter of the complaint and is part of the same course of conduct; (3) the matter has been fully litigated; (4) the parties have had the opportunity to examine and be cross-examined on the issue; and (5) the unalleged conduct occurred within the same limitations period as those matters alleged in the complaint. (*Fresno County Superior Court* (2017) PERB Decision No. 2517-C, p. 13, affirmed in relevant part *Superior Court v. Public Employment Relations Bd.* (2018) 30 Cal.App.5th 158, 192–193.)

However, it is not necessary to determine whether these elements are satisfied here because the proposed decision did not find the Charter Schools liable for an unalleged unilateral change. Indeed, the complaint contained no such allegation because UTLA was not the exclusive representative of any of the Charter Schools' employees and thus had no standing to allege a bargaining violation. (See, e.g., *Alum Rock Union Elementary School District* (1983) PERB Decision No. 322, p. 24; *Hanford Joint Union High School District Board of Trustees* (1978) PERB Decision No. 58, p. 6.) Rather, the proposed decision concluded that the evidence supported the complaint allegation that the Charter Schools violated their duty under EERA section 3543.1, subdivision (a) to meet and discuss the pilot evaluation program with UTLA and AEU.

UTLA and AEU first requested to meet and discuss the evaluation program on April 1, 2016. The Charter Schools then announced the implementation of the pilot

program on April 7. By the time the parties first met on June 15, the Charter Schools had already reached a decision to proceed with the changes to the evaluation program. Such conduct undermined the possibility of a true give-and-take discussion of the subject and the ALJ was correct to note this fact. The use of uncontroverted evidence to support the ultimate conclusion that the Charter Schools violated their duty to meet and discuss does not amount to finding that the Charter Schools were also liable for an unalleged violation.

Likewise, we reject the Charter Schools' contention that they had no duty to meet and discuss the new teacher evaluation program. In *Los Angeles Unified School District* (1983) PERB Decision No. 285 (*LAUSD*), the Board held that EERA affords employees the right to be represented by a nonexclusive representative unless and until an exclusive representative has been selected. (*Id.* at pp. 6-7.) Without exploring the full scope of a nonexclusive representative's right of representation, the Board found that "at a minimum it encompasses the right to meet and discuss with the public school employer subjects as fundamental to the employment relationship as wages and fringe benefits." (*Id.* at p. 8.) While this right is not coextensive with the right of an exclusive representative to bargain about all matters within the scope of representation, it does require the public school employer to listen to and take into account the views of the nonexclusive representative before reaching a firm decision on the subject(s) of discussion. (*Ibid.*)

The evaluations at issue were matters of fundamental concern to the employees, since the Charter Schools used them for determining merit pay increases and promotional opportunities. (See *City of Davis* (2016) PERB Decision No. 2494-M, pp. 29-30, citing *Ampersand Publ'g, LLC* (2015) 362 NLRB No. 26 [employee

performance evaluations, especially those that have the potential to affect the amount of bonus an employee might receive, are important and mandatory subjects of bargaining].) Thus, it is clear that the Charter Schools had a duty to meet and discuss upon request before reaching any decision to implement a new evaluation regime.

The Charter Schools contend that the introduction of the pilot evaluation program did not constitute a change to its existing teacher evaluation policy. The record does not support this contention, particularly given that the Charter Schools announced multiple new program features, including that the program was designed to halve the time that teachers and observers spend on the observation cycle, eliminate the lesson planning requirement, and provide more opportunities for coaching and feedback. Such changes are material to the evaluation process and were legitimate subjects for meeting and discussion.

Citing to *Regents of the University of California* (1990) PERB Decision No. 842-H, the Charter Schools contend that "the rights of the nonexclusive employee organizations, to the extent they exist, are derivative; they are the rights of an agent or representative of the employee." (*Id.* at p. 13, emphasis omitted.) Notably, unlike EERA, the Higher Education Employer-Employee Relations Act (HEERA),[13] which governs the University of California, does not grant nonexclusive employee organizations an independent right to represent their members. (*Regents of University of California v. Public Employment Relations Bd.* (1985) 168 Cal.App.3d 937, 944-945.) But even under HEERA, a nonexclusive representative may assert employees' rights on their behalf, such as by meeting with the employer to discuss proposed changes in

[13] HEERA is codified at Government Code section 3560 et seq.

working conditions. (*Id.* at p. 945.) Thus, we reject the Charter Schools' contention that UTLA had no right to demand to meet and discuss the evaluation program.

Finally, we agree with the proposed decision's conclusion that the Charter Schools impermissibly refused to engage in more than one meeting to discuss the evaluation program. While no fixed number of meetings is required to satisfy a public school employer's duty to meet and discuss with a nonexclusive representative and EERA does not require them to bargain to impasse, the duty to meet and discuss does require the parties to engage in the process in good faith, i.e., with a willingness to listen and to give and accept reasons for their actions or positions. Here, although there were additional outstanding issues related to the evaluation program left for the parties to discuss, the Charter Schools unilaterally decided that one meeting was sufficient and gave no explanation for their refusal to engage in further discussions with UTLA. By slamming the proverbial door in UTLA's face, the Charter Schools interfered with the nonexclusive employee organization's right to represent its members and the employees' right to representation.

II. Interference with Protected Rights at the New Teacher Orientation

The proposed decision found that UTLA failed to prove the Charter Schools involved the sheriff's deputies or otherwise sought to have Gertz-Ressler HS employee Mernick and UTLA organizer Foster removed from ESAT during their efforts to communicate with new teachers outside the orientation session, concluding the record evidence amounted to hearsay that was insufficient to prove the complaint allegations. Specifically, the proposed decision concluded the evidence was insufficient to establish that the sheriff's deputies were acting as agents of Alliance or the Charter Schools, a conclusion to which UTLA takes exception.

We need not decide whether the ALJ's finding of lack of agency was correct because that is not the proper inquiry. In the great majority of cases, law enforcement officers do not become the agents of those who summon them. We therefore do not analyze whether the deputies were agents of the Charter Schools, but instead consider whether the deputies acted at the request of the Charter Schools or their agent. We conclude that they did.

All of the evidence on this issue comes from the testimony of Foster and Mernick. Although their testimony about what the sheriff's deputies and Harvey said is hearsay, PERB regulations allow us to consider hearsay as corroborating evidence if, as here, the record also contains non-hearsay evidence supporting the same finding. (PERB Reg. 32176).[14] Mernick testified that after Deputy Fajardjo arrived and spoke with her, she saw him enter the school and speak with Lappin, an admitted agent of the Charter Schools. Deputy Fajardjo then returned to the front entrance, his supervisor arrived, and they both spoke with Foster and Mernick. When Harvey arrived, he, the deputies, and Foster spoke about 20 feet away from Mernick. Lappin then came outside, spoke with Mernick, and then spoke with Foster, Harvey, and the deputies. After that conversation, the deputies departed. This uncontroverted, non-hearsay evidence supports a finding that Lappin requested the sheriff's deputies' presence at ESAT.

Moreover, Lappin's statements are not hearsay because they are authorized admissions. Under Evidence Code section 1222, a statement is not hearsay when "(a) [t]he statement was made by a person authorized by the party to make a statement

---

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

or statements for him concerning the subject matter of the statement"; and "(b) [t]he evidence is offered either after admission of evidence sufficient to sustain a finding of such authority or, in the court's discretion as to the order of proof, subject to the admission of such evidence." The parties stipulated that, at all relevant times, Lappin was acting as the Charter Schools' agent. Furthermore, Lappin's statement to the deputies, Harvey, and Foster that he had spoken with attorneys who confirmed the organizers could distribute union literature near the front entrance of the school indicates Lappin had authority to speak for the Charter Schools concerning the organizers' presence.

From the non-hearsay evidence in the record, it is logical and reasonable to infer that Lappin was the one who originally asked the deputies to remove the organizers from the front entrance of the school. (Evid. Code, § 600(b) ["[a]n inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action"].) The ALJ did not discredit Mernick, and we credit her testimony.[15] Thus, we infer that Lappin was the source of the police activity and believe no other inference is reasonable.

Moreover, this inference is buttressed by the hearsay evidence, including the witnesses' written statements made on the day of the encounter, that the deputies said they were following Lappin's directions. (See, e.g., *Palo Verde Unified School District*,

---

[15] We note that a current employee's testimony against the interests of her employer is also contrary to her own pecuniary interests, and thus entitled to additional weight. (See, e.g., *The Avenue Care and Rehabilitation Center* (2014) 360 NLRB 152, 152, fn. 2; *PPG Aerospace Industries, Inc*. (2008) 353 NLRB 223; *Advocate South Suburban Hospital* (2006) 346 NLRB 209, 209, fn. 1; *Flexsteel Industries, Inc*., 316 NLRB 745 (1995), affd. mem. (5th Cir. 1996) 83 F.3d 419.)

supra, PERB Decision No. 2337, p. 24 [hearsay evidence is admissible to corroborate non-hearsay evidence].) We therefore conclude that the Charter Schools, acting through their agent Lappin, asked the sheriff's deputies to stop Mernick and Foster from handbilling outside of the entrance to the new teacher orientation program.

Finally, the Charter Schools failed to call Lappin to testify, which itself leads to the inference that his testimony would not have contradicted the other witnesses' accounts. (*Santa Ana Unified School District* (2013) PERB Decision No. 2332, pp. 11-12, citing *Daikichi Sushi* (2006) 335 NLRB 622, 633 [failure to call witness leads to inference that testimony would have been contrary to respondent's litigation position]; see also *Regents of the University of California* (1987) PERB Decision No. 640-H, adopting proposed decision at p. 89 [discussing the adverse inference rule].) That is, if it were true, as the Charter Schools impliedly contend, that their agent was not responsible for the presence of the deputies, then they would have likely produced Lappin and others in order to contest the testimony of Mernick and the other witnesses who did testify.[16] That the Charter Schools chose not to contest this evidence suggests

[16] Although they were in a position to adduce evidence capable of disproving UTLA's allegations, we note that the Charter Schools advanced no clear explanation for the presence of the sheriff's deputies. Rather, the Charter Schools simply denied responsibility and highlighted what they believed to be UTLA's reliance on uncorroborated hearsay evidence as part of their effort to cast doubt on Lappin's apparent role. Thus, the Charter Schools variously suggested that the LACCD might have called the deputies or that the property manager could have been responsible. But they never furnished sworn testimony to that effect or otherwise attempted to respond to UTLA's witnesses with evidence of their own. The most likely explanation for this failure is that no truthful witness would have contradicted UTLA's evidence. It is particularly appropriate to draw an adverse inference given that the Charter Schools had more access than UTLA to investigate the true reasons for the deputies' presence.

that Mernick's testimony was correct. Therefore, based on these rational inferences drawn from the uncontroverted evidence, we conclude it is more likely than not that Lappin summoned the deputies and requested assistance in removing the employees and UTLA's organizer. (PERB Reg. 32178 [charging party must prove the allegations in the complaint by a preponderance of the evidence].)

We also conclude that the act of involving the deputies constituted unlawful interference under these circumstances. Regardless of its subjective motivation, an employer engages in unlawful interference in violation of EERA section 3543.5, subdivision (a), when its conduct interferes or tends to interfere with the exercise of protected rights in the absence of operational necessity. (*Carlsbad Unified School District* (1979) PERB Decision No. 89, pp. 10-11.) First, it is beyond dispute that Mernick and Foster were engaged in protected activities when they distributed union literature on non-work time in a non-work location, i.e., outside ESAT before the new teacher orientation. (See, e.g., *Mt. San Antonio Community College District* (1982) PERB Decision No. 224, pp. 6-7; *Fresno County Superior Court*, *supra*, PERB Decision

---

Member Shiners would not draw an adverse inference from the Charter Schools' failure to call Lappin to testify because UTLA had Lappin under a testimonial subpoena but declined to call him. Similarly, Member Shiners would not draw an adverse inference from the Charter Schools' failure to call the sheriff's deputies or Harvey to testify because UTLA had the opportunity to call them as witnesses but did not do so. (*Trustees of the California State University* (2008) PERB Decision No. 1970-H, p. 6; *Victor Valley Community College District* (1986) PERB Decision No. 570, p. 8, fn. 7.) Nonetheless, the Charter Schools' decision not to present any evidence about the events at ESAT on July 15, 2016, leaves us to rule based solely on the evidence presented by UTLA. (See *Woodland Joint Unified School District* (1987) PERB Decision No. 628, adopting proposed decision at p. 29 ["when a party testifies to favorable facts, and any contrary evidence is within the ability of the opposing party to produce, a failure to bring forth such evidence will require acceptance of the uncontradicted testimony unless there is some rational basis for disbelieving it"].)

No. 2517-C, p. 29, affirmed in relevant part, *Fresno County Superior Court v. Public Employment Relations Board* (2018) 30 Cal.App.5th 158; *Richmond Unified School District/Simi Valley Unified School District* (1979) PERB Decision No. 99, pp. 10, 15.)

Second, it is equally clear that the Charter Schools' conduct, viz., attempting to use the deputies to stop Mernick and Foster from distributing union literature on the property, actually interfered with this protected activity and thus caused at least slight harm to protected rights. (See, e.g., *Fabric Warehouse* (1989) 294 NLRB 189, enfd. sub nom. *Hancock Fabrics v. NLRB* (4th Cir. 1990) 902 F.2d 28; *Jerry Cardullo Ironworks, Inc.* (2003) 340 NLRB 515; see *Indio Grocery Outlet* (1997) 323 NLRB 1138 [*attempting* to cause police to arrest or remove persons engaged in protected activities constitutes interference].) Indeed, Mernick and Foster testified that they were unable to speak to as many new teachers as they had hoped because of the law enforcement presence. This is predictable since new teachers would be especially reluctant to associate themselves with any activity their employer might view as unlawful. Finally, the organizers' actions were at all times peaceful and did not interfere with the Charter Schools' operations. Thus, under these circumstances, there was no objective reason, let alone operational necessity, to involve the deputies or direct them to remove Mernick and Foster.

The proposed decision concluded that even if the Charter Schools wrongly attempted to have the deputies remove the organizers, this conduct was cured by Lappin's almost immediate retraction of the directive. We disagree. An employer's honest retraction can erase the effects of a prior coercive statement if and only if the retraction was made in a manner that completely nullified the coercive effects of the

earlier repudiated conduct. (See *Jurupa Unified School District* (2015) PERB Decision No. 2458, p. 12.) Thus, an effective retraction must be: (1) timely; (2) unambiguous; (3) specific in nature to the coercive conduct; (4) free from other illegal conduct; (5) adequately publicized to the employees involved; (6) not followed by other illegal conduct; and (7) accompanied by assurances that the employer will not interfere with their protected rights in the future. (*Id.* at pp. 12-13, citing *Passavant Memorial Hospital* (1978) 237 NLRB 138, 138-139.) These criteria are not satisfied here because Lappin made no effort to publicize to the new teachers attending the orientation that UTLA had a right to distribute literature and that the deputies should not have been involved. Moreover, nothing in the record establishes that Lappin gave assurances that he would not engage in similar interference in the future. Thus, the Charter Schools did not cure their unlawful conduct.[17]

For all of these reasons, we agree with UTLA that the record evidence supports a conclusion that the Charter Schools interfered with protected rights when Lappin directed the deputies to remove persons engaged in the lawful distribution of union literature.

III. Interference with the Right of Access at Mohan HS

The proposed decision concluded that UTLA failed to establish that Lim, the administrative designee at Mohan HS, was acting within the scope of her delegated duties when she directed Mernick and Sheehan to leave the premises on

[17] The proposed decision cited four decisions in which the Board found that interference was "de minimis" because it was fully and effectively retracted. (Proposed decision, pp. 23-24.) We clarify that the Board in those cases was not establishing separate "de minimis" and retraction defenses, and we treat them as one and the same.

September 29, 2016. We disagree because the record evidence was sufficient to establish that Lim was acting with apparent authority. We therefore conclude that Mohan HS violated EERA as alleged in the amended complaint.

Apparent authority may be found where an employer reasonably allows employees to perceive that it has authorized the agent to engage in the conduct in question. (*Chula Vista Elementary School District* (2004) PERB Decision No. 1647, p. 8.) Whether employees would reasonably believe under the circumstances that an agent was acting with apparent authority is an objective inquiry. (*Id.* at pp. 8-9; *City of San Diego* (2015) PERB Decision No. 2464-M, p. 18.) Here, the record evidence amply supports a reasonable belief by Mernick and Sheehan that Lim was acting within the scope of her authority as the school's agent when she instructed them to leave Mohan HS.

In its answer, Mohan HS admitted that Lim "told Mernick and [Sheehan] that they could not enter the school," and "that Lim was functioning as an administrative designee in the absence of the principal and assistant principal." Additionally, in an e-mail sent to Mernick four days later, the principal of Gertz-Ressler HS, Tsai, stated that Lim was acting as the administrative designee when she instructed Mernick and Sheehan to leave. Mohan HS's principal was copied on this e-mail and never corrected or disavowed it. Further, Lim told Mernick and Sheehan that the school's principal had told her to tell them to leave the campus. Based on this evidence, we conclude that Lim was an agent of Mohan HS on September 29, and that she was acting with apparent authority.

Mohan HS contends that this evidence is insufficient under the rule set out in *Inglewood Unified School District* (1990) PERB Decision No. 792 (*Inglewood*), to

establish that Lim was acting with apparent authority. However, the facts of that case are distinguishable. In *Inglewood*, a principal filed a lawsuit against a union and several teachers, alleging they had committed a number of torts against him. In response, the union filed a charge against the school district, contending that the principal was acting with apparent authority as the district's agent when he filed a retaliatory lawsuit. The ALJ agreed with the union, basing his conclusion on the fact that the principal used the employees' school mailboxes to serve the lawsuit and the school district never repudiated his conduct. The Board, however, reversed and concluded that the union failed to establish that the principal was acting with apparent authority, finding that the school secretary who served the complaints was merely following her normal procedures for delivering mail and that the district had no duty to repudiate conduct with which it was not connected. (*Id.* at p. 20.) Without evidence that the school district authorized or ratified the lawsuit, the Board concluded that the union failed to establish apparent authority.

While it is well within the realm of possibility for an actual agent to file a lawsuit in his or her personal capacity (as in *Inglewood*), it is exceedingly unlikely that Lim would have issued her directive except with the authority of the principal of Mohan HS. Indeed, Lim claimed to have spoken about Mernick and Sheehan's presence with her principal, who was also copied on an e-mail regarding the incident that another principal sent four days later. Such evidence is sufficient to establish that Lim was an agent acting with at least apparent authority when she directed the union representatives to leave the school premises. (See, e.g., *Einhorn Enterprises* (1986) 279 NLRB 576 [employee was an agent when she "acted as a conduit between management and employees. Management used [the employee] in that capacity to relay information to

[other] employees, and employees informed [her] of matters they desired to have brought to the Respondent's attention"].)

Mohan HS argues that Mernick and Sheehan failed to make the requisite inquiries to determine whether Lim was acting with apparent authority. To the contrary, the record evidence reveals that Sheehan asked Lim to explain her authority and the basis for her directive to leave the premises. Lim responded that the principal had told her to ask them to leave the premises. We are satisfied that Lim's actions were taken with apparent authority and that UTLA carried its burden to establish that Mohan HS is responsible for them.

Here, the record evidence establishes that Lim ordered Mernick and Sheehan to cease and desist their protected activities and to leave campus. This conduct interfered with the "fundamental rights of employee organizations to represent and communicate with employees and of employees to self-organize and communicate with one another in the *workplace*." (*Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, p. 44 (italics original.) Indeed, unless employees and employee organizations can effectively communicate with one another about these matters in the workplace, the statutorily guaranteed right to participate in employee organizational activities would be largely empty. (*Id*. at p. 45, citing *Richmond Unified School District/Simi Valley Unified School District*, *supra*, PERB Decision No. 99.) Mohan HS did not put forth any operational necessity for Lim's directive, and Tsai's October 3, 2016 e-mail saying Lim had given the directive in error shows there was none. Therefore, we conclude that Mohan HS violated EERA as alleged in the amended complaint.

REMEDY

PERB has broad remedial powers under EERA section 3541.5, subdivision (c), including:

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

In cases where an employer's statements or instructions to employees were found to interfere with protected rights, PERB has ordered the employer to cease and desist from future interference. (*Los Angeles Community College District* (2014) PERB Decision No. 2404, adopting proposed decision at pp. 21-22; *State of California (Employment Development Department)* (2001) PERB Decision No. 1365a-S, pp. 11-12.) These are all appropriate remedies here. We shall therefore order the Charter Schools to cease and desist their unlawful conduct and to post a notice to employees.

Further, we will order all Charter Schools to post a notice regarding the violations that were common to all schools, i.e. the failure to meet and discuss the pilot teacher evaluation program and the use of law enforcement to interfere with protected rights. As to the latter violation, the record evidence establishes that new teachers from many, if not all, of the Charter Schools were present at the new teacher orientation on the day the sheriff's deputies were summoned. Therefore, it is appropriate to post a remedial notice at each of the Charter Schools. (See *Placerville Union School District* (1978) PERB Decision No. 69, pp. 11-12, overruled on other grounds, *San Francisco*

Community College District (1979) PERB Decision No. 105 [purpose of posting is to notify all employees affected by employer's unfair practices of their rights under EERA].)

With respect to the unfair practices that occurred at specific schools, i.e., Sanchez's unlawful statements at Morgan McKinzie HS and the ejection of organizers at Mohan HS, we will order that the notices include additional language designed to remedy those discrete violations. UTLA argues that Gertz-Ressler HS should be named as a respondent in PERB Case No. LA-CE-6204-E and that it should be required to post a remedial notice regarding the unfair conduct at Mohan HS. We decline to do so because there was no evidence that employees or UTLA organizers were denied access to or removed from Gertz-Ressler HS. We will, however, amend the language of the proposed notice at Morgan McKinzie HS in order to better describe and remedy the unfair practice committed by Sanchez.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in these cases, it is found that Alliance Gertz-Ressler High School/Richard Merkin 6-12 Complex, Alliance Collins Family College-Ready Academy High School, Alliance Judy Ivie Burton Technology Academy High School, Alliance Marc and Eva Stern Math and Science School, Alliance Dr. Olga Mohan High School, Alliance Patti and Peter Neuwirth Leadership Academy, Alliance Ouchi – O'Donovan 6-12 Complex, Alliance Piera Barbaglia Shaheen Health Services Academy, Alliance Morgan McKinzie High School, Alliance Leichtman-Levin Family Foundation Environmental Science High School, Alliance Cindy and Bill Simon Technology Academy High School, Alliance Tennenbaum Family Technology High School, Alliance Susan and Eric Smidt Technology High School, Alliance Ted K. Tajima High School, Alliance Renee and

Meyer Luskin Academy High School, Alliance Margaret M. Bloomfield Technology Academy High School, Alliance Alice M. Baxter College-Ready High School, Alliance Jack H. Skirball Middle School, Alliance College-Ready Middle Academy No. 4, Alliance College-Ready Middle Academy No. 5, Alliance College-Ready Middle Academy No. 8, Alliance Kory Hunter Middle School, Alliance Leadership Middle Academy, Alliance Marine-Innovation and Technology 6-12 Complex, and Alliance College-Ready Middle Academy No. 12 (collectively "Respondents") violated Educational Employment Relations Act (EERA), Government Code section 3543.5, subdivisions (a) and (b) by refusing United Teachers Los Angeles's (UTLA's) request to meet and discuss a new pilot teacher evaluation program, and directing law enforcement to remove an employee and a UTLA organizer from school premises.

Additionally, Alliance Morgan McKinzie High School violated EERA, Government Code section 3543.5, subdivisions (a) and (b), when Arthur Sanchez made unlawful statements during a staff meeting on August 5, 2016, threatening job losses if teachers chose to be represented by UTLA. Additionally, Alliance Dr. Olga Mohan High School violated EERA, Government Code section 3543.5, subdivisions (a) and (b), when its administrative designee ordered an employee and UTLA organizer to leave the school premises on September 29, 2016.

Pursuant to EERA section 3541.5, subdivision (c), it is hereby ORDERED that Respondents, their governing boards, and their representatives shall:

A. CEASE AND DESIST FROM:

1. Interfering with employee rights by failing to meet and discuss with a nonexclusive representative matters of fundamental concern to employees;

2. Interfering with employee rights by asking law enforcement to remove from school premises persons engaged in protected activities.

Additionally, pursuant to EERA section 3541.5, subdivision (c), it is hereby ORDERED that Alliance Morgan McKinzie High School, its governing board, and its representatives shall CEASE AND DESIST FROM:

3. Interfering with employee rights by making unlawful statements threatening job losses if teachers chose to be represented by UTLA.

Additionally, pursuant to EERA section 3541.5, subdivision (c), it is hereby ORDERED that Alliance Dr. Olga Mohan High School, its governing board, and its representatives shall CEASE AND DESIST FROM:

4. Interfering with employee rights by directing persons engaged in protected activities to leave the school premises.

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

1. Within 10 workdays following the date this Decision is no longer subject to appeal, post at all work locations where notices to certificated employees at Alliance Gertz-Ressler High School/Richard Merkin 6-12 Complex, Alliance Collins Family College-Ready Academy High School, Alliance Judy Ivie Burton Technology Academy High School, Alliance Marc and Eva Stern Math and Science School, Alliance Patti and Peter Neuwirth Leadership Academy, Alliance Ouchi – O'Donovan 6-12 Complex, Alliance Piera Barbaglia Shaheen Health Services Academy, Alliance Leichtman-Levin Family Foundation Environmental Science High School, Alliance Cindy and Bill Simon Technology Academy High School, Alliance Tennenbaum Family Technology High School, Alliance Susan and Eric Smidt Technology High School,

Alliance Ted K. Tajima High School, Alliance Renee and Meyer Luskin Academy High School, Alliance Margaret M. Bloomfield Technology Academy High School, Alliance Alice M. Baxter College-Ready High School, Alliance Jack H. Skirball Middle School, Alliance College-Ready Middle Academy No. 4, Alliance College-Ready Middle Academy No. 5, Alliance College-Ready Middle Academy No. 8, Alliance Kory Hunter Middle School, Alliance Leadership Middle Academy, Alliance Marine-Innovation and Technology 6-12 Complex, and Alliance College-Ready Middle Academy No. 12 are customarily posted, copies of the Notice attached hereto as Appendix A. Within 10 workdays following the date this Decision is no longer subject to appeal, post at all work locations where notices to certificated employees at Alliance Morgan McKinzie High School are customarily posted, copies of the Notice attached hereto as Appendix B. Within 10 workdays following the date this Decision is no longer subject to appeal, post at all work locations where notices to certificated employees at Alliance Dr. Olga Mohan High School are customarily posted, copies of the Notice attached hereto as Appendix C.

The Notices must be signed by an authorized agent of each entity, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. The Notice shall also be posted by electronic message, intranet, internet site, and other electronic means customarily used by Respondents for communicating with certificated employees. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.

2. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board

(PERB or Board), or the General Counsel's designee. Respondents 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 UTLA.

Members Shiners and Krantz joined in this Decision.

APPENDIX A

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 Nos. LA-CE-6165-E and LA-CE-6204-E, *Alliance Environmental Science and Technology High School, Alliance Morgan McKinzie High School, Alliance Gertz-Ressler/Richard Merkin 6-12 Complex, Alliance Dr. Olga Mohan High School, and All Individual Alliance Affiliated Public Charter Schools*, in which all parties had the right to participate, it has been found that all individual public charter schools affiliated with Alliance College-Ready Public Schools violated the Educational Employment Relations Act by refusing United Teachers Los Angeles's (UTLA's) request to meet and discuss a new pilot teacher evaluation program, and directing law enforcement to remove employees and UTLA's organizer from school premises.

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

CEASE AND DESIST FROM:

1. Interfering with employee rights by failing to meet and discuss with a non-exclusive representative matters of fundamental concern to employees;

2. Interfering with employee rights by asking law enforcement to remove from school premises persons engaged in protected activities.

Dated: _____

ALL INDIVIDUAL PUBLIC CHARTER SCHOOLS AFFILIATED WITH ALLIANCE COLLEGE-READY PUBLIC SCHOOLS

By: _____
Authorized Agent

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

APPENDIX B

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 Nos. LA-CE-6165-E and LA-CE-6204-E, *Alliance Environmental Science and Technology High School, Alliance Morgan McKinzie High School, Alliance Gertz-Ressler/Richard Merkin 6-12 Complex, Alliance Dr. Olga Mohan High School, and All Individual Alliance Affiliated Public Charter Schools*, in which all parties had the right to participate, it has been found that all individual public charter schools affiliated with Alliance College-Ready Public Schools violated the Educational Employment Relations Act (EERA) by refusing United Teachers Los Angeles's (UTLA's) request to meet and discuss a new pilot teacher evaluation program, and directing law enforcement to remove employees and UTLA's organizer from school premises. Furthermore, it was found that McKinzie High School violated EERA by threatening teachers with job losses if they chose to be represented by UTLA.

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

CEASE AND DESIST FROM:

1. Interfering with employee rights by failing to meet and discuss with a non-exclusive representative matters of fundamental concern to employees;

2. Interfering with employee rights by asking law enforcement to remove from school premises persons engaged in protected activities.

3. Interfering with employee rights by making unlawful statements threatening job losses if teachers chose to be represented by UTLA.

Dated: _____ ALLIANCE McKINZIE HIGH SCHOOL

By: _____
Authorized Agent

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

APPENDIX C

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 Nos. LA-CE-6165-E and LA-CE-6204-E, *Alliance Environmental Science and Technology High School, Alliance Morgan McKinzie High School, Alliance Gertz-Ressler/Richard Merkin 6-12 Complex, Alliance Dr. Olga Mohan High School, and All Individual Alliance Affiliated Public Charter Schools*, in which all parties had the right to participate, it has been found that all individual public charter schools affiliated with Alliance College-Ready Public Schools violated the Educational Employment Relations Act (EERA) by refusing United Teachers Los Angeles's (UTLA's) request to meet and discuss a new pilot teacher evaluation program, and directing law enforcement to remove employees and UTLA's organizer from school premises. Furthermore, it was found that Dr. Olga Mohan High School violated EERA by directing persons engaged in organizing activities to leave the premises.

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

CEASE AND DESIST FROM:

1. Interfering with employee rights by failing to meet and discuss with a non-exclusive representative matters of fundamental concern to employees;

2. Interfering with employee rights by asking law enforcement to remove from school premises persons engaged in protected activities.

3. Interfering with employee rights by directing persons engaged in protected activities to leave the school premises.

Dated: _____

ALLIANCE DR. OLGA MOHAN HIGH SCHOOL

By: _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

UNITED TEACHERS LOS ANGELES, Charging Party, v. ALLIANCE COLLEGE-READY PUBLIC SCHOOLS, ALLIANCE ENVIRONMENTAL SCIENCE AND TECHNOLOGY HIGH SCHOOL, ALLIANCE MORGAN MCKENZIE HIGH SCHOOL, ALLIANCE GERTZ-RESSLER/RICHARD MERKIN 6-12 COMPLEX, ALLIANCE DR. OLGA MOHAN HIGH SCHOOL, and ALL INDIVIDUAL ALLIANCE AFFILIATED PUBLIC CHARTER SCHOOLS, Respondents.	UNFAIR PRACTICE CASE NOS. LA-CE-6165-E LA-CE-6204-E PROPOSED DECISION (June 20, 2018)

Appearances: Bush Gottlieb, by Megan L. Degeneffe and Erica Deutsch, Attorneys, for United Teachers Los Angeles; Robert A. Escalante, General Counsel, and Proskauer Rose, by Rochelle H. Schultz, Attorney, for Alliance College-Ready Public Schools, Alliance Environmental Science and Technology High School, Alliance Morgan McKenzie High School, Alliance Gertz-Ressler/Richard Merkin 6-12 Complex, Alliance Dr. Olga Mohan High School, and all individual Alliance Affiliated Public Charter Schools.

Before Shawn P. Cloughesy, Chief Administrative Law Judge.

INTRODUCTION

In these two consolidated cases, an employee organization alleges that individual public charter schools violated the Educational Employment Relations Act (EERA)[1] by attempting to and actually denying organizers access to facilities, refusing to meet and discuss matters concerning the employment relationship, and soliciting employees to oppose unionization. The individual public charter schools deny any violation of EERA.

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

PROCEDURAL HISTORY

On August 26, 2016, United Teachers Los Angeles (UTLA) filed an unfair practice charge (charge) with the Public Employment Relations Board (PERB or Board) against Alliance College-Ready Public Schools (Alliance), a private charter management organization (CMO), and its individual affiliated public charter schools, including Alliance Environmental Science and Technology High School (ESAT), Alliance Morgan McKenzie High School (Morgan McKenzie), and Alliance Gertz-Ressler/Richard Merkin 6-12 Complex (Gertz-Ressler), alleging both interference and retaliation violations. PERB assigned the matter as case number LA-CE-6165-E.

On January 9, 2017, UTLA filed another charge against Alliance and Alliance Dr. Olga Mohan High School (Olga Mohan), alleging additional interference violations. PERB assigned the matter as case number LA-CE-6204-E.

On March 9, 2017, the PERB Office of the General Counsel issued a complaint in case number LA-CE-6165-E alleging that Alliance[2] violated EERA by directing two organizers to leave ESAT while they were distributing union literature; monitoring an organizer at ESAT; refusing to meet and discuss Alliance's proposed evaluation pilot project; and speaking against unionization at a staff meeting at Morgan McKenzie.

On June 8, 2017, the Office of General Counsel issued a complaint in case number LA-CE-6204-E alleging that Alliance[3] violated EERA by directing two UTLA organizers to leave Olga Mohan.

---

[2] The complaint only listed as a respondent "Alliance College-Ready Public Charter Schools."

[3] The complaint only listed as a respondent "Alliance College-Ready Public Charter Schools."

On March 28, 2017, Alliance filed an answer to the complaint in case number LA-CE-6165-E. On June 28, 2017, it filed its answer to the complaint in case number LA-CE-6204-E. In both answers, Alliance denied that it was a public school employer or a joint or single employer with any of the individual public charter schools mentioned in the complaints and that Alliance was subject to the exclusive and preemptive jurisdiction of the National Labor Relations Board (NLRB) and as a private entity is not subject to PERB's jurisdiction. Alliance also denies many of the other substantive allegations in both complaints.

On May 4, 2017, an informal settlement conference was held for case number LA-CE-6165-E, but the case was not resolved. An informal settlement conference was scheduled for July 7, 2017, but was never held.

On July 21, 2017, both cases were set for hearing from September 26 through 29, 2017.

On September 22, 2017, UTLA filed motions to amend both complaints to include the named respondent as "Alliance College-Ready Public Schools, a network of charter schools, and all its affiliated charter schools." In the alternative, UTLA requested that the complaints name as individual respondents the four individual public charter schools named in the complaints: ESAT, Morgan-McKenzie, Gertz-Ressler, and Olga Mohan. UTLA also withdrew the allegations of paragraphs 9, 10, and 11 of the complaint in case number LA-CE-6165-E, which alleged that Respondent(s) monitored an organizer at ESAT.

On September 25, 2017, Alliance filed its partial opposition to the motion to amend the complaint. Alliance did not object to amending the complaints to include the four individual affiliated public charter schools and the withdrawal of allegations in Paragraphs 9 through 11 of the complaint in case number LA-CE-6165-E, but it argued that adding all individual affiliated public charter schools was unnecessary.

On the first day of formal hearing, September 26, 2017, the Chief Administrative Law Judge (ALJ) granted the motion to amend in part. The ALJ dismissed the allegations in Paragraphs 9 through 11 of the complaint in case number LA-CE-6165-E and added ESAT, Morgan McKenzie, and Gertz-Ressler as individual respondents to that case. For those allegations in the complaint in case number LA-CE-6165-E that were not site specific (i.e., the issues regarding the distribution of literature at ESAT and the request to meet and discuss the evaluation pilot project), the ALJ added all individual Alliance affiliated public charter schools as respondents. With regard to the complaint in case number LA-CE-6204-E, the ALJ added Olga Mohan as an individual respondent. The ALJ also amended both complaints to correctly identify Alliance by its proper name.

On September 26, 2017, the formal hearing was bifurcated pursuant to the parties' joint request to bifurcate the formal hearing so that the violation phase was heard first, and the issue as to PERB's jurisdiction over Alliance, or whether a single employer relationship existed, be decided after PERB issued its decision in *Alliance College-Ready Public Schools, et al.* (2017) PERB Decision No. 2545 (*Alliance I*).[4] Formal hearing on the violation phase was completed on September 28, 2017, and the matter was placed in abeyance pending the issuance of the Board's decision in *Alliance I*.

On October 2, 2017, the ALJ issued amended complaints in case numbers LA-CE-6165-E and LA-CE-6204-E reflecting his rulings at the September 26, 2017 formal hearing. Included with the amended complaints was a notice of a prehearing conference for December 1, 2017, to discuss the potential impact of the issuance of *Alliance I*.

[4] The proposed decisions at issue in *Alliance I* were case numbers LA-CE-6025-E and LA-CE-6027-E.

Respondents filed amended answers to the amended complaints on October 27, 2017, which again denied that Alliance was an employer under EERA and asserted that PERB lacked jurisdiction over Alliance. Respondents also disputed that Alliance had a joint or single employer relationship with the four named individual affiliated public charter schools and all individual Alliance affiliated public charter schools.

The prehearing conference set for December 1, 2017, was not held as *Alliance I* had not been issued. The prehearing conference was continued to January 8, 2018.

On December 28, 2017, the Board issued its decision in *Alliance I*, which held PERB lacked jurisdiction over Alliance, either on its own or as a single or joint employer with an entity that is subject to PERB's jurisdiction. The parties agreed to continue the prehearing conference set for January 8 to January 22, 2018, in order to discuss the second phase of the formal hearing.

On January 22, 2018, a telephonic prehearing conference was conducted between the parties and the ALJ. The parties indicated that they were confident that they could come to a stipulation regarding the agency of Alliance on behalf of the individual affiliated public charter schools that would forego the need to take additional evidence during the second phase of the formal hearing. The parties set a deadline of February 5, 2018, to arrive at an agreed stipulation of the agency of Alliance.

On February 5, 2018, the parties notified the ALJ that they were unable to arrive at a stipulation to resolve the remaining issues and requested another teleconference. A teleconference was scheduled for February 9, 2018.

On February 9, 2018, the ALJ and the parties participated in another prehearing teleconference. The ALJ discussed the type of testimony he would allow that would establish

an agency relationship between Alliance and the individual Alliance affiliated public charter schools. The parties decided they would meet in person at the PERB office after an informal conference on another matter and further discuss a stipulation regarding agency.

On February 16, 2018, the parties arrived at an agreement that would forego the need to take additional evidence for the second phase of the proceedings. Without waiving any right to contend differently in any other proceeding, the parties agreed to the following facts:

1. For all conduct relevant to the allegations made in paragraphs 3 through 8[5] of the Amended Complaint in Case No. LA-CE-6165-E (the "Complaint"), Howard Lappin and Alliance CMO acted as agents on behalf of each and every Respondent.

2. For purposes of the allegations made in paragraphs 9 through 14[6] of the Complaint, Alliance CMO's representatives acted as agents for each and every Respondent.

Additionally, the parties agreed that Alliance would be dismissed as a respondent from the proceedings. The ALJ hereby accepts these stipulations and dismisses Alliance as a respondent in these proceedings.

Both parties filed closing briefs on April 3, 2018. The matter was submitted for proposed decision with the filing of reply briefs on April 13, 2017.

Motion to Dismiss

Respondents' closing brief asserts that the ALJ erred in granting UTLA's motion to amend the complaint in case number LA-CE-6165-E to include as respondents, for certain alleged violations, all individual Alliance affiliated public charter schools. Respondents' brief

[5] These paragraphs of the amended complaint concerned the allegations regarding the distribution of literature at ESAT.

[6] These paragraphs of the amended complaint concerned the refusal to further meet and discuss the evaluation pilot project.

moves to dismiss any respondent not named in UTLA's initial unfair practice charge. However, the charge itself names as respondents Alliance *and all its individual schools.* It alleges a single employer theory of liability and includes specific allegations of misconduct that have network-wide impact. In this instance, amending the complaint to conform to the charge did not prejudice Respondents because the charge put them on notice that UTLA sought to find them all liable for the conduct of Alliance or any individuals acting on Alliance's behalf. Accordingly, Respondents' motion to dismiss is denied.

FINDINGS OF FACT

The Parties

UTLA is an employee organization within the meaning of EERA section 3540.1, subdivision (d).

ESAT, Morgan McKenzie, Gertz-Ressler, Olga Mohan, and each of the individual Alliance affiliated public charter schools (collectively, "the Schools") are public school employers within the meaning of EERA section 3540.1, subdivision (k).

Alliance and Alliance Educators United

Alliance is a non-profit CMO affiliated with a network of 27 charter schools in the Los Angeles area, each bearing the name "Alliance." In 2015, a group of certificated employees from several Alliance affiliated charter schools publicly announced their intent to form a union with UTLA. The group named itself Alliance Educators United (AEU).

AEU's Request to Meet regarding Evaluations

On April 1, 2016,[7] AEU sent a request to Dan Katzir (Katzir), the CEO of Alliance, requesting "to meet and confer regarding the evaluation processes currently used for both

[7] All subsequent dates occurred in 2016.

teachers and counselors across the Alliance." A teacher testified AEU wanted to meet with Alliance about evaluations because evaluations directly impact pay, the teachers believed the current system was not useful, and they had suggestions for how to improve the system. AEU's request asked that Alliance contact UTLA President Alex Caputo-Pearl (Caputo-Pearl) to schedule a time to meet.

On April 7, Alliance sent an e-mail to certificated employees at Alliance affiliated schools announcing the creation of a new optional teacher evaluation system for the 2016-2017 school year called the "Streamlined Evaluation Pilot." Alliance's e-mail stated it created the Streamlined Evaluation Pilot with input and feedback gathered over the previous year from teachers and school leaders. Based on that feedback, the e-mail stated the Streamlined Evaluation Pilot would make a number of changes to the evaluation process.

On April 8, Irina Constantin (Constantin), an attorney representing Alliance, sent a letter to Caputo-Pearl agreeing to meet at a mutually acceptable time to discuss the evaluation processes, but requesting further information prior to doing so, including identification of the specific parts of the evaluation process that AEU wished to discuss and survey results that were referenced in AEU's April 1 letter.

On April 27, AEU sent a letter to Katzir that included a non-exhaustive list of the parts of the evaluation process it wished to discuss and the survey results referenced in its April 1 letter. The letter proposed several dates in May for a meeting.

On May 10, Constantin sent a letter to Caputo-Pearl requesting "complete information" from AEU or, in the alternative, an explanation why complete information was not provided. The letter proposed several dates in June for a meeting.

On May 20, AEU sent a letter to Katzir agreeing to meet with Alliance on June 15. The letter also objected to Constantin's assertion that AEU had provided incomplete information.

AEU and Alliance met as scheduled on June 15. The teachers who were present discussed a number of concerns they had about the evaluation process, proposed solutions, and raised questions about the Streamlined Evaluation Pilot. Although Alliance representatives listened to what the teachers had to say, they did not respond to the teachers' proposed solutions. The meeting ended with Caputo-Pearl requesting to schedule another meeting. Constantin asked that the request be put in writing.

On June 24, AEU sent a letter to Katzir requesting "to schedule a meeting to meet and confer about evaluation processes and continue the discussion from the meeting held on June 15, 2016." The letter states a second meeting is necessary to hear Alliance's response to the proposed solutions AEU offered during the June 15 meeting.

On July 16, Catherine Suitor (Suitor), Alliance's Chief Communications Officer, sent a letter to Caputo-Pearl stating in relevant part, "Based on guidance from our counsel, at this time, we do not believe a second meeting is required or necessary."

Distribution of Flyers at ESAT

ESAT is located on a property owned by the Los Angeles Community College District (LACCD). Alisha Mernick (Mernick) and Valerie Felix (Felix) are two teachers who work at schools in the Alliance network. Jessica Foster (Foster) is a union organizer working on behalf UTLA to assist AEU's organizing campaign.

On July 25, 2016, Respondents held a new teacher orientation on the ESAT campus. New teacher orientation provides onboarding for all teachers new to the Alliance network. That morning, Foster, Mernick, and Felix met at a restaurant adjacent to the ESAT campus.

Mernick and Felix left the restaurant at 7:45 a.m. and passed through an automobile gate to enter the ESAT campus. From there, they walked to the campus buildings and positioned themselves on a sidewalk directly in front of the main entrance. Felix distributed literature for about 15 minutes then left to prepare for a presentation she was scheduled to give during new teacher orientation.

While Mernick was distributing flyers, a sheriff's deputy, Deputy Fajardjo, pulled up in a marked car. He was wearing the uniform of the Los Angeles County Sheriff's Department, carried a gun, and wore a badge. Mernick testified that Deputy Fajardjo stated Alliance wanted Mernick to leave.[8] Mernick replied that she had a right to be there and asked who complained about her presence. Deputy Fajardjo stated Howard Lappin (Lappin) complained. Lappin had been serving as the Alliance Chief Schools Officer, but was scheduled to serve as the interim principal of Gertz-Ressler following new teacher orientation.

There are glass doors at ESAT's main entrance followed by a hallway and then another set of glass doors that open into a courtyard. From her position on the sidewalk in front of the main entrance, Mernick could see Lappin in the ESAT courtyard. She handed Deputy Fajardjo one of the flyers she was distributing and suggested he speak to Lappin. Deputy Fajardjo took the flyer and left to speak to Lappin. Mernick could see Deputy Fajardjo speaking to Lappin. At that point, Mernick called Foster and requested that she come to ESAT.

Deputy Fajardjo came back outside and told Mernick "they" still wanted Mernick to leave. By that time, Foster had arrived. Deputy Fajardjo told Foster "they" did not want Foster and Mernick to be there and that the two of them would have to leave. Foster replied that she

[8] Deputy Fajardjo did not testify.

and Mernick had a right to be there. Deputy Fajardjo stated his supervisor was on his way. Foster responded she would be glad to speak to the supervisor.

At about 8:15 a.m., Deputy Fajardjo's supervisor arrived. Mernick continued distributing literature in front of the main entrance while Foster, Deputy Fajardjo, and Deputy Fajardjo's supervisor walked about 20 feet down the sidewalk. Foster testified that the supervisor stated Lappin and Alliance did not want Foster and Mernick to be there and that they had to leave.[9] Deputy Fajardjo also stated Katzir did not want Foster and Mernick to be there. Foster replied she and Mernick had a legal right to be where they were. Deputy Fajardjo's supervisor stated there would be no issue if Foster and Mernick moved outside the automobile gate and distributed literature off ESAT grounds. Foster replied that she and Mernick did not have to leave the ESAT grounds. The sheriff's deputies responded that if they stayed on the property over Lappin's objection, they could make a citizen's arrest for trespassing if Lappin so desired. The deputies clarified that they were contracted by ESAT to provide security and at that time were not on the payroll of the Los Angeles County Sheriff's Department.

Foster asked to speak to Lappin. The sheriff's deputies escorted Foster inside ESAT and directed her to wait in the hallway outside their office while they spoke to Lappin. The sheriff's office is right by the main entrance to ESAT, and from her position Foster could see the sheriff's deputies speaking to Lappin. After speaking to Lappin, Deputy Fajardjo's supervisor returned and informed Foster that Lappin did not want to speak to her and that Steve Harvey (Harvey), the property manager, would be contacting her about trespassing charges. Foster exited ESAT and joined Mernick to distribute literature.

[9] Deputy Fajardjo's supervisor was not identified by name and did not testify.

At around 8:40 a.m., the sheriff's deputies and Harvey approached Foster and Mernick. Foster testified Harvey stated he was speaking in his capacity as property manager for the LACCD and that she and Mernick had to leave.[10] The sheriff's deputies stated that if Lappin had not complained, there would be no issue. At some point while Foster was speaking to Harvey and the sheriff's deputies, Lappin approached Mernick. He patted her on the shoulder and said that he had checked and that it was okay for her and Foster to stay until 9:00 a.m. He then approached Foster, the sheriff's deputies, and Harvey and stated, "It's fine. They can stay. I spoke to the attorneys" or words to that effect. Foster turned to Harvey and asked whether now that Lappin had given his approval for her and Mernick to distribute literature, it was permissible for them to do so. Harvey stated that it was.

Foster and Mernick distributed literature until shortly before the start of new teacher orientation at 9:00 a.m., then left the ESAT campus.

Morgan McKenzie Staff Meeting

On August 5, 2016, teachers at Morgan McKenzie were on campus for a staff meeting followed by professional development training.

During the staff meeting, Arthur Sanchez (Sanchez), principal of Morgan McKenzie, used a whiteboard to explain how full-time equivalent (FTE) (i.e., the number of teachers at a school site) is calculated. His explanation included a mathematical formula. He explained that, first, special education students are subtracted from the total number of students, the resulting figure is multiplied by the number of periods in a day then divided by class size, and the resulting number is called the "section number." He further explained that the section number is then divided by the number of classes taught by each teacher to determine FTE and

[10] Harvey did not testify.

that at Morgan McKenzie, there are about 320 students, of which 20 are special education students. He continued by stating that there are six periods in a day, the class size is set at 20, and teachers are required to teach 5 classes. After, plugging these figures into the FTE formula, Sanchez calculated the school's FTE as 18. Sanchez then did the same calculation using different class size numbers, but keeping the other variables the same. First, he used a class size of 32, which he stated was the class size set forth in the collective bargaining agreement (CBA) between the school district and the exclusive representative when he was a principal at Eisenhower High School.[11] The formula produced an FTE of 11.5. Next, he used a class size of 30, which he stated was the class size set forth in the CBA between the school district and the exclusive representative when he was a principal in the Montebello Unified School District. The formula produced an FTE of 12. Finally, he wanted to use class size in the Los Angeles Unified School District (LAUSD), which he believed to be 45 based on his review of the CBA between UTLA and LAUSD. However, because the classrooms at Morgan McKenzie could not hold 45 students, he used a class size of 35. The formula produced an FTE of 10. Sanchez then subtracted 10 from 18 and drew an 8. Inside the 8 he drew a sad face because that is how many teachers would be lost if class sizes at Morgan McKenzie were 35. Sanchez stated that if the school were to lose teachers, the only teacher who would be safe was the special education teacher.

Gary Carter (Carter), a Morgan McKenzie teacher who is active in AEU, stated it seemed like Sanchez was attempting to discourage unionization. Sanchez replied that was not his intent and that he only wanted to give facts about how FTE is calculated. When Carter

[11] The record does not reflect the school district Eisenhower High School is part of.

stated Alliance was spending a lot of money to oppose AEU's organization campaign, Sanchez stated UTLA was also spending a lot of money.

Sanchez testified that he discussed class sizes and FTE to address concerns two teachers had brought to him regarding the potential impact of unionization on their jobs. Sanchez had told the teachers he would follow whatever the CBA required and that there is a formula to determine FTE. He told the teachers he would raise the issue at the staff meeting.

Sanchez reviewed the class size provisions of the CBA between UTLA and LAUSD two years prior to when he testified. He did not recall specifics, but recalled the number 45 sticking with him. However, the class size provisions of the 2014-2017 CBA allow for wide variance in class sizes based on a number of factors. They also limit maximum class size to 39, with the exception of physical education at secondary schools, which can go as high as 55.

Denial of Access at Olga Mohan

On September 29, 2016, Mernick and Patrick Sheehan (Sheehan), a union organizer, visited Olga Mohan to talk to teachers. After signing in, they went to the first open classroom and engaged with the teacher inside. Mernick testified that at some point Kim Lim (Lim), another teacher, entered the classroom and stated that the campus was closed for Mernick and Sheehan.[12] Lim stated the policy was that no visitors be allowed on campus when the administration was not present. She also stated that the principal had called her and told her to ask Mernick and Sheehan to leave. Sheehan contacted Foster for guidance. Foster advised Sheehan that Mernick and he leave the campus rather than escalate the situation.

On October 3, Stephanie Tsai (Tsai), Principal in Residence at Gertz-Ressler, sent an e-mail to Mernick, that stated in relevant part:

[12] Lim did not testify.

> I understand that on Thursday, September 29, you visited [Olga Mohan] after school hours and were told by Ms. Kim Lim, a teacher at the school, that because the principal and assistant principal were not present, you and the [UTLA] representative accompanying you could not enter the school. Ms. Kim [sic], who was functioning as an administrative designee in the absence of the principal and assistant principal, was in error. Insofar as visits to any Alliance campus after school hours are concerned, you and any [UTLA] representative may enter the campus until the final extracurricular activity is completed and administration officially closes the school.

Mernick teaches at Gertz-Ressler. She testified that at her school site, the administrative designee acts as an administrator when there are none on campus and performs administrative duties such as issuing discipline and interacting with parents.

ISSUES

Did Respondents engage in unlawful interference in violation of EERA when:

1. Respondents refused to further meet with AEU after its initial meeting about the Streamlined Evaluation Pilot;
2. Respondents directed Foster and Mernick to leave ESAT on July 25;
3. Sanchez discussed class sizes and FTE at the August 5 staff meeting; and
4. Lim directed Sheehan and Mernick to leave Olga Mohan on September 29?

CONCLUSIONS OF LAW

EERA section 3543, subdivision (a), protects public school employees' right to "form, join, and participate in the activities of employee organizations" in matters concerning employer-employee relations. EERA section 3543.1, subdivision (a), provides employee organizations with the concomitant right to represent their members in employment relations with their employers. PERB's interference test does not require evidence of unlawful motive, only that at least "slight harm" to protected rights results. (*Simi Valley Unified School District*

(2004) PERB Decision No. 1714, p. 17 (*Simi Valley USD*).) The Board described the prima facie standard as follows:

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

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

If a prima facie case is established, then PERB balances the degree of harm to protected rights against the employer's asserted interests. (*Hilmar Unified School District* (2004) PERB Decision No. 1725, pp. 16, citing *Carlsbad*, *supra*, PERB Decision No. 89 at pp. 10-11.) "Where the harm is slight, the Board will entertain a defense of operational necessity and then balance the competing interests." (*Ibid*.) On the other hand, "[w]here the harm is inherently destructive [of protected rights], the employer must show the interference was caused by circumstances beyond its control." (*Ibid*.) The employer bears the burden of proving the necessity of its actions. (*Simi Valley USD*, *supra*, PERB Decision No. 1714, pp. 17-18, citing *Carlsbad*, *supra*, PERB Decision No. 89.)

1. Meet and Discuss

In *Los Angeles Unified School District* (1983) PERB Decision No. 285 (*LAUSD*), the Board held that EERA affords representation to employees represented by a nonexclusive representative while an exclusive representative has not been selected. (*Id.* at pp. 6-7.) Without exploring the full scope of a nonexclusive representative's right of representation, the Board found that "at a minimum it encompasses the right to meet and discuss with the public school employer subjects as fundamental to the employment relationship a wages and fringe benefits." (*Id.* at pp. 7-8.) However, the Board stressed the obligation to meet and discuss with a nonexclusive representative is not the same as that imposed with regard to an exclusive representative, stating:

> [W]hereas the public school employer and representative of a recognized or certified employee organizations have the mutual obligation to meet and negotiate in good faith with regard to matters within the scope of representation [citation], the Board finds that the obligation imposed by EERA on public school employers with respect to nonexclusive representatives is to provide notice and a reasonable opportunity to meet and discuss wages, fringe benefits, and other matters of fundamental concern to the employment relationship prior to the time the employer reaches a decision on such matters.[footnote omitted]

(*Id.* at p. 8.)

Whether an employer has satisfied its obligation to meet and discuss is determined on a case-by-case basis. (*Regents of the University of California (Los Angeles)* (2009) PERB Decision No. 2084-H, partial dismissal letter at p. 2, citing *Regents of the University of California* (1990) PERB Decision No. 829-H.) The Board considers whether: (1) notice was given before the employer's decision is final or implemented; (2) reasonable time and opportunity for meeting and discussing was provided between notice and the final decision or implementation; and (3) good faith conduct in listening to and considering proposals. (*Ibid.*)

The procedures for evaluating teachers at Alliance affiliated public charter schools are a matter of fundamental concern to the employment relationship because performance evaluations directly impact the wages of certificated employees working at Alliance affiliated schools. The Streamlined Evaluation Project constituted a change to the evaluation procedures. Alliance's April 7 e-mail regarding the Streamlined Evaluation Pilot is an announcement of Respondents' final decision to implement the new pilot program in the 2016-2017 school year. The e-mail states that discussions with constituents took place over the prior year and that those discussions led to the creation of the pilot program. Although the e-mail identifies some of the issues constituents raised regarding the current evaluation system and sets forth how the Streamlined Evaluation Pilot is designed to address those issues, it does not include a call for more proposals, feedback, or discussion.

Respondents' failure to provide AEU an opportunity to meet and discuss the Streamlined Evaluation Pilot prior to the final decision being made constituted a violation of EERA. While the complaint does not address this specific violation, the violation tainted the entire meet and discuss process at issue. Conducting a meeting to discuss a change after the decision to implement the change has already been made renders the meeting futile. There is nothing left to discuss since the employer has already made up its mind. This was born out in Respondents' conduct during the June 15 meeting with AEU. While Respondents listened to AEU's proposals, they did not respond during the meeting or provide any feedback. When AEU submitted a written request to convene a second meeting and identified several outstanding proposals regarding the Streamlined Evaluation Pilot, Respondents summarily refused the request without providing any indication that it had considered AEU's proposals at all. Under these circumstances, Respondents' conduct violated their duty to meet and discuss.

Based on the above, Respondents failed to discharge their duty to meet and discuss under EERA section 3543.1, subdivision (a), and violated EERA section 3543.5, subdivisions (a) and (b). (*LAUSD*, *supra*, PERB Decision No. 285, p. 9.)

2. Distribution of Literature at ESAT

The evidence UTLA presented in support of this claim is primarily the hearsay statements of Deputy Fajardjo, his supervisor, Harvey, and Lappin. Hearsay evidence is insufficient to support a finding unless it would be admissible over objection in civil actions. (PERB Regulation 32176.) The statements attributed to Deputy Fajardjo, his supervisor, and Harvey are inadmissible hearsay and cannot be used to assert the truth of the matters asserted, namely that Alliance did not want Foster and Mernick to distribute literature in front of ESAT.

UTLA asserts Deputy Fajardjo, his supervisor, and Harvey were agents of Lappin and/or Alliance, and the statements attributed to them are authorized admissions.[13] A hearsay statement can be offered against a party as an authorized admission if:

> (a) The statement was made by a person authorized by the party to make a statement or statement for him concerning the subject matter of the statement; and
>
> (b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authority or, in the court's discretion as to the order of proof, subject to the admission of such evidence.

(Evid. Code § 1222.)

[13] UTLA's brief argues the statements are adoptive admissions under Evidence Code section 1221, but quotes the text from Evidence Code section 1222. Since UTLA's argument relies on the agency status of the three individuals, the argument will be addressed as whether the statements were authorized admissions. However, even applying the test for adoptive admissions, the statements would be inadmissible hearsay because there is no evidence to show that any of the Respondents manifested their adoption of the statements.

After proof of agency, the relevant admissions of an agent made within the scope and course of the agency, during its existence and in connection with the discharge of his duties, are admissible in evidence against the principal. (*Marshall v. Marshall*, (1965) 232 Cal.App.2d 232, 256.)

The party seeking to establish agency bears the burden of proving, by a preponderance of the evidence, the existence of an actual or ostensible agency as well as the scope of the agent's authority and the principal's ratification of the agent's unauthorized acts. (*Inglewood Unified School District* (1990) PERB Decision No. 792, p. 19, (*Inglewood*), affd. *sub nom.*, *Inglewood Teachers Assn. v. Public Employment Relations Bd.* (1991) 227 Cal.App.3d 767.) In *Inglewood*, PERB determined that in order to establish ostensible or apparent authority of an employer's agent, the charging party must establish: (1) representation by the principal [the employer] of the agency; (2) justifiable reliance by the party seeking to impose liability on the principal; and (3) a change in position resulting from that reliance. (*Id*. at pp. 19-20, citing *Yanchor v. Kagan* (1971) 22 Cal.App.3d 544.) In *Trustees of the California State University* (2014) PERB Decision No. 2384-H, the Board had acknowledged that its more recent decisions concerning agency articulate slightly different tests. (*Id.* at p. 39; see also *Santa Ana Unified School District* (2013) PERB Decision No. 2332, p. 9.) For example, in *Compton Unified School District* (2003) PERB Decision No. 1518 (*Compton*), the Board described the test as "whether the perception of agency is reasonable under the circumstances" and cited with approval National Labor Relations Board (NLRB) case law: "whether under all circumstances, employees 'would reasonably believe that the employee in question [the alleged agent] was reflecting company policy and speaking and acting for management.'" (Citations omitted). In *West Contra Costa County Healthcare District* (2011) PERB Decision No. 2164-M (*West*

Contra Costa), the Board reiterated this test: "Both PERB and the courts have held that apparent authority to act on behalf of the employer may be found where the manifestations of the employer create a reasonable basis for employees to believe that the employer has authorized the alleged agent to perform the act in question." (*Id.* at p. 7, citing *Chula Vista Elementary School District* (2004) PERB Decision No. 1647; *Compton*, *supra*, PERB Decision No. 1518; and *Inglewood Teachers Assn. v. Public Employment Relations Bd.*, *supra*, 227 Cal.App.3d 767.)

The common thread running through PERB's different tests for agency is some manifestation from the principal regarding the authority of the agent to act on its behalf and the scope of the agent's authority. Here, absent their own hearsay statements, there is little evidence to support a finding that Deputy Fajardjo, his supervisor, or Harvey were acting as agents of Lappin and/or Alliance. While Foster saw Lappin speak to the sheriff's deputies, there is no non-hearsay evidence as to what was said, or more importantly, the nature of the sheriff's deputies' relationship with Lappin and/or Alliance. Although the Los Angeles County Sheriff's Department maintains a presence on the ESAT campus, there is no non-hearsay evidence to explain the nature of their presence (i.e. whether they act in their capacity as employees of the sheriff's department or in some capacity for Alliance and/or ESAT separate from their normal roles as sheriff's deputies). The same is true for Harvey. While the record reflects that Alliance rents space from LACCD to operate ESAT, there is no non-hearsay evidence to suggest a relationship beyond that of landlord-tenant, which does not suggest any kind of agency relationship. Frankly, even Harvey's status as a property manager for LACCD is unsupported by any non-hearsay evidence.

Since UTLA has not established an agency relationship (much less the scope of any such agency relationship) between Deputy Fajardjo, his supervisor, Harvey, and Lappin and/or Alliance, the hearsay statements attributed to Deputy Fajardjo, his supervisor, and Harvey are inadmissible as authorized admissions.[14]

Regarding the hearsay statements attributed to Lappin, Evidence Code section 1224 states that when liability if based in whole or in part of a declarant, a statement made by the declarant is admissible against the party as it would be if offered against the declarant involving that liability. Here, Respondents' liability for the alleged interference with protected activity at ESAT is based in large part on Lappin's statements. However, of these statements, the only ones that are admissible for the truth of the matter asserted are the statements attributed to him that he spoke the attorneys and it was permissible for Foster and Mernick to distribute literature until 9:00 a.m. The remaining hearsay statements attributed to him are inadmissible hearsay because they are contained within the inadmissible hearsay statements of Deputy Fajardjo, his supervisor, and Harvey. (See Evid. Code § 1201 [where a statement involves multiple hearsay, each level must satisfy a hearsay exception in order for the entire statement to be admissible].)

Disregarding the inadmissible hearsay, there is little to support UTLA's claim for unlawful interference. UTLA established that Foster and Mernick distributed literature at ESAT prior to new teacher orientation. By speaking to Deputy Fajardjo, his supervisor, and Harvey, they formed the belief that Alliance wanted them to leave ESAT. After some back and

[14] UTLA also asserts the sheriff's deputies' statement that they would make a citizen's arrest if Foster and Mernick did not leave ESAT is admissible hearsay because it has independent legal significance because "citizen's arrest" is suggestive of an agency relationship. However, the record does not reflect that the deputies ever actually stated they *would* make a citizen's arrest. Foster only testified the deputies stated they *could* make a citizen's arrest if Lappin so desired, and there is nothing to support a finding that Lappin ever desired such an outcome, took steps to achieve that outcome, or otherwise directed the deputies to threaten Foster and Mernick with that outcome.

forth with Deputy Fajardjo, his supervisor, and Harvey, Lappin arrived and stated he had spoken to "the attorneys," and it would be permissible for Foster and Mernick to distribute literature until the beginning of new teacher orientation at 9:00 a.m. Foster and Mernick's belief that Alliance wanted them to leave is insufficient to establish that Alliance, through Lappin or anyone else, directed Foster and Mernick to leave. Additionally, Lappin's statements that it would be permissible for Foster and Mernick to distribute literature do not establish that Alliance or anyone acting on its behalf had ever directed Foster and Mernick to leave. Accordingly, UTLA did not meets it burden to establish that Lappin or any other agent of the Respondents directed Foster and Mernick to leave ESAT on July 25, and that allegation is dismissed for lack of proof.

Even assuming UTLA had established that Lappin directed Foster and Mernick to leave ESAT, Respondents would be absolved from liability based on Lappin's almost immediate retraction of the directive. The Board has held that an honest retraction of an offending statement or conduct can erase the effects of the unlawful act. (*Regents of the University of California* (2012) PERB Decision No. 2300-H.) In *Carlsbad Unified School District* (1989) PERB Decision No. 778, a denial of a union activist's request to be on the bargaining team was rescinded by another administrator. PERB found the retraction made the conduct "de minimis," and thus not a violation. In *County of Riverside* (2012) PERB Decision No. 2233-M, a violation of the access rules by the union was held to be "de minimis" where the union's improper posting of materials was inadvertent and promptly corrected. In *West Contra Costa Healthcare District*, *supra*, PERB Decision No. 2145-M, the Board declined to find interference when, several days later, the union corrected a misrepresentation about where election ballots were to be returned by mailing a notice to bargaining unit members with the correct information. In

contrast, in *Regents of the University of California*, *supra*, PERB Decision No. 2300-H, the employer engaged in multiple instances of interference with access. The Board concluded that a single retraction of a denial of access did not cure the violation.

Here, Lappin allegedly made statements that would have constituted a retraction and negated any prior directive that Foster and Mernick leave ESAT. He made the retraction shortly after any prior directive would have been given, and afterwards, Foster and Mernick distributed literature without incident. The record does not reflect that Respondents or Alliance attempted to prohibit representatives of UTLA and AEU from distributing literature at ESAT on prior occasions or following the July 25 incident. Accordingly, Lappin's statement that it was permissible for Foster and Mernick to distribute literature would have constituted an honest retraction of any directive that they leave the premises.

Based on the above, the allegation that Respondents directed Foster and Mernick to leave the ESAT premises is dismissed.

3. Sanchez's Statements at the Staff Meeting

In general, employers are entitled to express their own views on employment-related matters in order to facilitate a full and knowledgeable debate on those subjects. (*Chula Vista City School District* (1990) PERB Decision No. 834, p. 11 (*Chula Vista*), citing *Rio Hondo Community College District* (1980) PERB Decision No. 128 (*Rio Hondo*).) The expression or dissemination of views, arguments, or opinion does not constitute, nor is it evidence of, an unfair practice as long as there is no threat of reprisal or force, or promise of benefit. (*Rio Hondo*, *supra*, PERB Decision No. 128, pp. 19-20.) Whether an employer's speech is protected or constitutes a proscribed threat or promise is determined by applying an objective rather than a subjective standard. (*California State University* (1989) PERB Decision

No. 777-H, adopted proposed decision, p. 8.) Thus, "the charging party must show that the employer's communications would tend to coerce or interfere with a reasonable employee in the exercise of protected rights." (*Ibid.*) The Board also places considerable weight on the accuracy of the content of the speech in determining whether the communication constitutes an unfair labor practice and will not find the speech unlawful if it accurately describes an event and does not on its face carry the threat of reprisal or force, or promise of benefit. (*Chula Vista*, *supra*, PERB Decision No. 834, pp. 12-13, citing *Alhambra City and High School Districts* (1986) PERB Decision No. 560 and *Muroc Unified School District* (1978) PERB Decision No. 80.) Further, statements made by an employer are to be viewed in their overall context (i.e. in light of surrounding circumstances) to determine if they have a coercive meaning. (*Los Angeles Unified School District* (1988) PERB Decision No. 659 at 9.) The Board has recognized that "facially noncoercive" conduct could nevertheless be "implied intimidation" when considered as part of a total course of conduct. (*San Francisco Unified School District* (1983) PERB Decision No. 317, p. 5.)

At the August 5, 2016 staff meeting, Sanchez did not explicitly state that unionization would lead to larger class sizes and the reduction of FTE at Morgan McKenzie. However, based on his presentation, a reasonable teacher would have drawn that conclusion. Although Morgan McKenzie attempts to frame Sanchez's presentation as one involving budgets and FTE, the purpose of the presentation was to address concerns regarding what would happen to teachers if Morgan McKenzie unionized. His statements must be analyzed under that backdrop.

If Sanchez had merely presented the formula for calculating FTE, there would be no issue since the formula's accuracy is undisputed. In fact, had he stopped after applying the formula to the class size numbers from Eisenhower High School and Montebello Unified

School District, neither of which were shown to be inaccurate, his conduct may have been lawful. However, Sanchez crossed the line into impermissible employer speech when he applied the formula to an arbitrary class size number that he attributed to the CBA between LAUSD and UTLA.

While Sanchez testified the class size number 45 stuck out to him when he reviewed the CBA two years prior, the CBA from that time does not contain a uniform class size number for all situations or state that class sizes for academic subjects may reach 45. The CBA contains varying class size numbers based on a variety of parameters. Sanchez did not explain these nuances to his staff. Instead, he presented as fact that class sizes in LAUSD are 45--more than double what they are at Morgan McKenzie and so large that the school could not physically accommodate that number of students. He then applied the FTE formula using a class size of 35 students, which he derived from a class size of 45 students, and concluded the school would have 8 fewer teachers. To emphasize the loss of teachers, he drew a sad face inside the 8.

It was no secret to the teachers in the staff meeting that AEU was working with UTLA to organize Alliance affiliated schools. It was also no secret that UTLA was the exclusive representative of certificated employees employed by LAUSD. Attributing an arbitrary and misleading class size number to the CBA between UTLA and LAUSD and then using that number to present a hypothetical situation where 8 employees lose their jobs is coercive. The implication is that unionization, and especially unionization with UTLA, would result in substantially increased class sizes and the loss of jobs. While Sanchez did not specifically use those words, a reasonable teacher would have drawn that conclusion based on the manner in which he gave his presentation.

Based on the above, Sanchez's statements during the August 5, 2016 staff meeting constituted unlawful employer speech in violation of EERA section 3543.5, subdivisions (a) and (b). (*Compton*, *supra*, PERB Decision No. 1518, adopted proposed decision, p. 24.)

4. Denial of Access at Olga Mohan

UTLA argues Lim was acting as an agent of Olga Mohan when she directed Mernick and Sheehan to leave campus on September 29. A rank-and-file employee performing supervisory duties can have apparent authority to act on behalf of the employer, but it is the charging party's burden to establish the agency relationship. (*West Contra Costa*, *supra*, PERB Decision No. 2164-M, pp. 8-9.) Here, UTLA did not present sufficient evidence to support a finding that Lim was acting as an agent of Olga Mohan. The parties do not appear to dispute that Lim was acting as an administrative designee. However, it is unclear what functions an administrative designee at Olga Mohan performs in the absence of the principal or assistant principal. UTLA argues the title of "administrative designee" is self-evident as to the individual's duties. Even assuming the title of administrative designee implies the employee is acting on behalf of the administration, the title presents no information as to the scope of the designee's duties. To begin with, it is not stated what the principal or assistant principal's authority as an agent of Olga Mohan is. It is also not stated whether the scope of the authority of the administrative designee's is the same as that of a principal or assistant principal or less and if less, how much less and whether it includes the authority to direct individuals to leave campus[15] The record is unclear since Lim did not testify as to what her duties were neither did any other individual from Olga Mohan. While Mernick testified as to the functions that an

[15] Tsai's e-mail to Mernick would suggest that, at least at Gertz-Ressler, an administrative designee's authority does not include the ability to direct lawfully present individuals to leave campus.

administrative designee performs at Gertz-Ressler, there is insufficient evidence to conclude that all administrative designees perform the same functions at all Alliance affiliated schools. Accordingly, UTLA did not establish that Lim was acting as an agent of Olga Mohan, let alone what the scope of her agency would have been.

The evidentiary record only supports a finding that Lim, a teacher purporting to act as an administrator, directed Mernick and Sheehan to leave Olga Mohan on September 29. Because there is insufficient evidence to find that Lim was actually acting as an agent of Olga Mohan or that Olga Mohan had otherwise ratified her conduct, Lim's conduct cannot be imputed to Olga Mohan. Accordingly, the allegation that Olga Mohan directed Mernick and Sheehan to leave the campus on September 29 is dismissed for lack of proof.[16]

REMEDY

PERB has broad remedial powers under EERA section 3541.5, subdivision (c), including:

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

In this case, it has been found that Respondents' conduct constituted unlawful interference in violation of EERA when they failed to discharge their duty to meet and discuss

[16] Respondent(s) assert that even if Lim was acting within the scope of her authority as an agent of the school, Olga Mohan repudiated her conduct. However, the record does not indicate Olga Mohan itself ever repudiated Lim's conduct. The e-mail Mernick received repudiating Lim's conduct was from Tsai, the principal in residence at Gertz-Ressler. The record does not show that, as a general matter, one Alliance affiliated school has the authority to repudiate the conduct another Alliance affiliated school, especially since Respondents have taken the posture that each school is a separate and distinct employer under EERA. Specifically, with regard to Tsai's e-mail, there is no indication that anyone from Olga Mohan ratified its contents or otherwise had knowledge of the e-mail before it was sent.

the Streamlined Evaluation Pilot with AEU. It is appropriate to order Respondents to cease and desist from such conduct. (*LAUSD*, *supra*, PERB Decision No. 285, p. 10.) It has also been found that Respondent Morgan McKenzie's conduct constituted unlawful interference in violation of EERA when Sanchez made unlawful statements during an August 5 staff meeting. It is appropriate to order Respondent Morgan McKenzie to cease and desist from such conduct. (*Inglewood Unified School District* (1987) PERB Decision No. 624, p. 12.)

Respondents are further ordered 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 employees are customarily placed at all individual Alliance affiliated public charter schools, as well as a posting by "electronic message, intranet, internet site, and other electronic means" customarily used by Respondents to communicate with certificated employees at all individual Alliance affiliated public charter schools. (*Centinela Valley Union High School District* (2014) PERB Decision No. 2378, pp. 11-12, citing *City of Sacramento* (2013) PERB Decision No. 2351-M.) The posting/publication are to be located at all individual Alliance affiliated schools as the meet and discuss over the Streamlined Evaluation Pilot had a network-wide application.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in these cases, it is found that Respondents violated Educational Employment Relations Act (EERA), Government Code section 3543.5, subdivisions (a) and (b), when they failed to discharge their duty to meet and discuss the Streamlined Evaluation Pilot with Alliance Educators United. It is also found that Respondent Alliance Morgan McKenzie High School violated EERA, Government Code section 3543.5, subdivisions (a) and (b), when Arthur

Sanchez made unlawful statements during a staff meeting on August 5, 2016. All other allegations from both PERB complaints are dismissed.

Pursuant to EERA section 3541.5, subdivision (c), it hereby is ORDERED that Respondents, their governing boards, and their representatives shall:

A. CEASE AND DESIST FROM:

1. Interfering with employee rights by failing to meet and discuss with a non-exclusive representative and by making unlawful statements to employees.

2. Interfering with the right of Alliance Educators United to represent its members.

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

1. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to certificated employees at all public charter schools affiliated with the Alliance College-Ready Public Schools charter management organization are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of Respondents, 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 Notice shall also be posted by electronic message, intranet, internet site, and other electronic means customarily used by Respondents for communicating with certificated employees at all public charter schools affiliated with the Alliance College-Ready Public Schools charter management organization. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.

2. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board),

or the General Counsel's designee. Respondents 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 United Teachers Los Angeles.

Right to Appeal

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

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

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

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135, 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, 32091 and 32130.)

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