*** * * JUDICIAL APPEAL PENDING * * ***

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ALLIANCE JUDY IVIE BURTON TECHNOLOGY ACADEMY HIGH, ET AL., Employers, and UNITED TEACHERS LOS ANGELES, Petitioner.	Case Nos. LA-RR-1281-E LA-RR-1282-E LA-RR-1283-E PERB Decision No. 2719 May 18, 2020

Appearances: Bush Gottlieb by Erica Deutsch, Attorney, and California Teachers Association Legal Department by Megan Degeneffe, Attorney, for United Teachers of Los Angeles; Liebert Cassidy Whitmore by Adrianna Guzman, Alysha Stein-Manes, and Alexander Volberding, Attorneys, and Robert Escalante, General Counsel, for Alliance Judy Ivie Burton Technology Academy High, Alliance College-Ready Middle Academy No. 5, and Alliance Gertz-Ressler/Richard Merkin 6-12 Complex.

Before Banks, Shiners, Krantz, and Paulson, Members.

DECISION

BANKS, Member: These consolidated representation cases[1] before the Public Employment Relations Board (PERB or Board) concern three petitions for recognition filed by United Teachers Los Angeles (UTLA), which seeks to represent separate units of certificated employees at three charter schools: Alliance Judy Ivie Burton Technology Academy High ("Burton Tech" [LA-RR-1281-E]), Alliance College-Ready Middle Academy No. 5 ("Middle 5" [LA-RR-1282-E]), and Alliance Gertz-

[1] The petitions were consolidated during the investigation because they presented identical issues for resolution. (*Paso Robles Union School District* (1979) PERB Decision No. 85, p. 1.)

Ressler/Richard Merkin 6-12 Complex ("Gertz/Merkin" [LA-RR-1283-E]) (collectively "Charter Schools"). As of the date of the filing of the petitions, all three Charter Schools had an administrative services agreement (ASA) with a non-profit charter management organization (CMO) called Alliance College-Ready Public Schools (Alliance or Alliance CMO). By virtue of this agreement, the Charter Schools also claim to be members of an unincorporated network of 25 Alliance-affiliated charter schools (sometimes hereinafter referred to as the "Alliance Network" or "the Network").[2] The Charter Schools refused to recognize UTLA as the exclusive representative of the petitioned-for units, contending that the Alliance Network constitutes a single-employer and that the only appropriate bargaining unit is one consisting of all certificated employees throughout the network.

We have reviewed the extensive record in these and other related cases, including our prior decision in *Alliance College-Ready Public Schools* (2017) PERB Decision No. 2545 (*Alliance*),[3] and we conclude that UTLA's petitioned-for units are

[2] The number of charter schools comprising the network has changed over the years apparently due to mergers. According to Alliance's closing brief in this matter, the network consists of 25 charter schools, each of which has an ASA with the Alliance CMO; we therefore use that number, noting that the precise number does not impact the outcome.

[3] PERB may take official notice of its own records and files. (*Bellflower Unified School District* (2017) PERB Decision No. 2544, p. 6, citing Santa Clara County Superior Court (2014) PERB Decision No. 2394-C, p. 16 and *Antelope Valley Community College District* (1979) PERB Decision No. 97, p. 23.) In addition to *Alliance*, we take official notice of our records in PERB Case Nos. LA-CE-6061-E, LA-CE-6073-E, LA-CE-6165-E, and LA-CE-6204-E.

appropriate under the Educational Employment Relations Act (EERA).[4] Since UTLA has demonstrated majority support among the employees in those units, we certify UTLA as the exclusive representative of each unit, and order each respondent Charter School to recognize UTLA and commence bargaining.

PROCEDURAL HISTORY AND FACTS

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

At the time of hearing, the Charter Schools were separately incorporated as non-profit public benefit corporations with separate articles of incorporation and bylaws. Each individual corporation held a separate charter with the Los Angeles Unified School District (LAUSD) to operate within the boundaries of the District. Those charters declared each individual corporation to be the "exclusive public school employer of all employees of the charter school" for collective bargaining purposes pursuant to subdivision (b) of Section 47611.5 of the Education Code. Notably for the unit question at issue here, EERA section 3540.1, subdivision (k) defines "public school employer" and "employer" to mean one of the following: "the governing board of a school district, a school district, a county board of education, a county superintendent of schools, a charter school that has declared itself a public school employer pursuant to subdivision (b) of Section 47611.5 of the Education Code, [or certain auxiliary organizations and joint powers agencies]." Here, where each individual school declared itself to be the employer, our starting point is that each Charter School is itself a public school employer.

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

UTLA has been organizing certificated employees at charter schools affiliated with Alliance since at least March 13, 2015, when a group of teachers and counselors working at Alliance-affiliated schools formed Alliance Educators United (AEU) and publicly announced their support for and decision to organize a union with UTLA.[5] Alliance has apparently opposed those efforts since it became aware of them. The Board first considered the history of anti-union conduct at Alliance-affiliated charter schools in *Alliance*, where an administrative law judge (ALJ) found that two such affiliated schools, Alliance Susan & Eric Smidt Technology High School and Alliance Renee & Meyer Luskin Academy High School, unlawfully interfered with UTLA's right to access the schools and the employees' right to be represented by UTLA. (*Alliance*, *supra*, PERB Decision No. 2545, p. 15, adopting ALJ's conclusions in the absence of exceptions.)

Our decision in *Alliance* mainly concerned the Alliance CMO's status as a private, non-profit entity existing outside our direct jurisdiction. (*Alliance*, *supra*, PERB Decision No. 2545, pp. 9-15.)[6] In the absence of any timely allegation that the Alliance CMO acted as agent for the respondent schools, or that those schools

[5] The full group of certificated employees who are part of the organizing drive includes teachers, psychologists, counselors, social workers, English learning development (ELD) specialists, special education coordinators, education specialists, and resource teachers, as well as substitutes. Except where context indicates otherwise, we intend to refer to the entire group even when we use a shorthand summary such as "teachers and counselors," or simply "teachers."

[6] To the extent we have jurisdiction over the CMO, it would be indirectly, if the CMO acted as agent of a public school employer. That theory is raised in other cases currently pending before the Board, and we express no opinion on it here.

constituted a single employer even without the CMO, we found no basis to address or remedy the misconduct attributable to a private entity, and we therefore reversed those portions of the proposed decision that centered entirely on Alliance, while affirming the findings involving specifically-named respondent schools and their unlawful interference with protected rights.[7] We thus found no need to choose between the respondents' factual claim that each school was functionally autonomous and UTLA's contrary factual contention.

Immediately after this decision, Alliance sent an e-mail to employees at every Alliance-affiliated school, announcing, inter alia, that "PERB upheld Alliance's decentralized school network model that recognizes the autonomy of local Alliance schools." Faced with this employer contention during and after PERB's decision, UTLA concluded that Alliance's factual position as to the functional autonomy of each school required employees to refocus their strategy from a campaign seeking a single, network-wide unit to one focused on school-by-school organizing. As UTLA organizer Zenaida Perez Fuentes testified, the teachers and counselors decided after *Alliance* to take the Alliance-affiliated schools at their word and deal with them as separate employers.

Thus, on May 2, 2018, UTLA filed three "request for recognition" petitions, seeking to represent, at each Charter School, a bargaining unit of all certificated educational personnel but excluding "all other employees, including Management,

[7] In October 2015, the Los Angeles Superior Court issued an injunction against Alliance and its affiliated charter schools requiring them to cease and desist certain practices that violated employee and organizational rights. That injunction remains in place as of the date of this decision.

Supervisory, and Confidential employees." Along with the petitions, UTLA submitted proof of support to PERB in order to establish that the petitions enjoyed the support of a majority of the employees in each petitioned-for unit.[8]

In June 2018, after receiving a list of all employees in the petitioned-for units,[9] PERB's Office of the General Counsel (OGC) issued administrative determinations finding that a majority of the employees supported each of UTLA's petitions. Pursuant to PERB Regulation 33190,[10] OGC informed the Charter Schools that each of them had to recognize UTLA or file a statement contesting the appropriateness of the unit.

Between late June and early July 2018, each of the Charter Schools filed a statement refusing to recognize UTLA and disputing the appropriateness of the petitioned-for units. The Charter Schools claimed: "The minimum appropriate unit is a single unit encompassing all similar personnel employed at schools within the network of charter schools affiliated with Alliance College-Ready Public Schools (the 'Alliance Network'), not an individual unit that includes only [each charter school's] employees."

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[8] On May 18, 2018, Gertz/Merkin notified PERB that employees at Richard Merkin Middle School, part of the Gertz/Merkin complex, filed a petition seeking an election to determine whether they wished to be represented by UTLA. On June 19, 2018, in the administrative determination announcing that UTLA had demonstrated majority support of all unit employees at Gertz/Merkin, PERB's OGC dismissed that petition, concluding it was unnecessary to conduct an election because there was a pending petition for recognition and no employee organization filed a timely request to intervene. No party to these proceedings seeks review of that determination.

[9] Burton Tech stated there were 34 employees in the petitioned-for unit, Middle 5 stated there were 15, and Gertz/Merkin stated there were 56.

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

According to the Charter Schools, the Alliance Network accomplishes a shared mission "by pooling a percentage of resources into [the Alliance CMO], which provides collective and uniform support to all the schools." Primarily on the basis of this support from the Alliance CMO, the Charter Schools claimed they retained only nominal autonomy and were actually part of a single, integrated enterprise. Thus, citing to *California Virtual Academies* (2016) PERB Decision No. 2484 (*CAVA*), the Charter Schools asserted that the Alliance Network constituted a single-employer and that the only presumptively appropriate unit was one consisting of all certificated employees at every charter school within the network. Additionally, the Charter Schools claimed that "UTLA has not shown, and cannot show, that certificated educational personnel throughout the Alliance Network lack a network-wide community of interest on matters within the scope of bargaining under the EERA." Accordingly, the Charter Schools requested under EERA section 3544.5, subdivision (a) that PERB convene hearings to investigate and resolve the appropriateness of the petitioned-for units.

On July 23, 2018, UTLA filed position statements arguing that the Charter Schools should be estopped from insisting that only a network-wide unit is appropriate. OGC held an informal settlement conference in an attempt to mediate the dispute regarding the appropriateness of the petitioned-for units, but the parties failed to reach an agreement.

On July 26, 2018, UTLA filed what amounted to a motion for summary judgment, seeking an order requiring the Charter Schools to recognize and bargain with UTLA. In this motion, it argued again that the Charter Schools should be

equitably and judicially estopped from asserting they constituted a single-employer. On September 28, OGC determined that a hearing was necessary to resolve the unit questions and the matter was transferred to PERB's Division of Administrative Law for that purpose. After receiving opposition and reply briefs, the assigned ALJ ultimately denied UTLA's motion for summary judgment on January 15, 2019.

The ALJ subsequently scheduled a hearing to receive evidence relevant to determining whether UTLA's requested school-by-school units were, as the Charter Schools claimed, legally untenable. The hearing took place over the course of 14 days between January 23 and May 22, 2019.[11] The parties then filed opening and reply briefs, and the record was closed on August 14, 2019.

On August 30, 2019, the unit determination question was submitted directly to the Board itself for decision, pursuant to PERB Regulation 32215.

The hearing to determine the appropriateness of the petitioned-for units focused almost exclusively on the Charter Schools' contention that, together with the other Alliance-affiliated schools, they constitute a single-employer, and that the only appropriate unit must encompass all teachers and counselors within this network. We will summarize the extensive evidence from the hearing and organize it around the relevant factors for determining the existence of a single-employer. Since much of the evidence relates to more than one of the four relevant factors, we group those factors into two categories, as follows: (1) functional integration of operations, and common

[11] In April 2019, UTLA filed two additional petitions for recognition at Alliance Leichtman-Levine Family Foundation Environmental Science High School and Alliance Morgan McKinzie High School. The parties agreed to place those petitions in abeyance pending our decision in this matter.

ownership or financial control; and (2) centralized control of labor relations and common management. (*CAVA*, *supra*, PERB Decision No. 2484, p. 64.)

However, it is necessary to observe that the hearing was not the first time the parties had occasion to offer sworn evidence relevant to this question. Rather, in *Alliance* and several subsequent unfair practice cases now pending before the Board on exceptions, Alliance and its affiliated-schools introduced extensive evidence in their effort to prove that each charter school, including the three named in these petitions, were not part of a single enterprise but were instead functionally autonomous. Therefore, in addition to summarizing the evidence adduced at the hearing in this matter, we also recount the parties' prior factual assertions.[12]

I. Functional Integration of Operations and Common Ownership

A. The Record in the Instant Case

During the hearing, the Charter Schools' witnesses averred that the Alliance Network is a functionally integrated operation, and that individual schools within that Network were not structured to operate without engaging the Alliance CMO for a variety of integral back-office services.

Although separately incorporated, each Alliance charter school operates under materially identical Articles of Incorporation. These Articles of Incorporation list Alliance CMO's address as each school's corporate address for service of process and provide that each school is to be "operated, exclusively to support The Alliance for

[12] UTLA opposed these contentions at the time and has now reversed its position as well. However, as noted *post*, the Alliance CMO and its affiliated schools enjoy far greater access to the facts in question, meaning that their change in position constitutes a much more problematic reversal.

College-Ready Public Schools." If any of the schools should dissolve, its remaining assets would become the property of the Alliance CMO.[13]

The corporate bylaws of each Alliance charter school are also materially identical. Although for many years a single set of board members served on each school's board, the schools later appointed different boards, though their membership still overlapped. The schools altered their corporate boards in order to respond to concerns raised by LAUSD, which wanted to assure independent governance at each school. As of the time of hearing, the Charter Schools each had nine board members, five of whom were appointed by Alliance: two of those may be individuals who also serve on Alliance's board, the others are teachers and parents who either volunteer or are elected (typically in cases where there are more volunteers than vacancies.) The remaining four board seats were filled by members of each school's community, selected by Alliance based on recommendations from principals, staff, and community partners like Teach for America. LAUSD has the right to appoint one board member, but there is no evidence it exercises that right. The common denominator is Howard Lappin (Lappin), a longtime senior employee of Alliance, former principal of several Alliance-affiliated schools, and current senior advisor to Alliance's CEO, who served as a member of the board of every Alliance-affiliated school, as of the time of hearing.

Typically, each Charter School board meets four times a year for approximately 45 minutes to 1.5 hours, unless a special meeting is needed between regular

[13] Most of the physical school sites are owned by a number of limited liability companies, each of which are controlled by the Alliance College-Ready Public Schools Facilities Corporation, whose board, in turn, consists of board members of Alliance.

meetings. An Alliance employee attends each board meeting to act as secretary, and Alliance's Chief Business Officer, David Lauck (Lauck), or his designee, serves as the Charter Schools' Chief Financial Officer. According to Alliance's witnesses at the hearing in this matter, none of the Charter Schools' boards creates its own policies, but instead each simply adopts without comment or amendment those policies that Alliance recommends, including employee handbooks, parent-student handbooks, and fiscal policies and procedures.

Alliance also exerts its influence through the various ASAs it has with these Charter Schools and the others within the Alliance Network, which are materially identical.[14] According to Alliance's most recent testimony and evidence, its ASAs provide "essentially, everything that can be considered back office support for [the Charter Schools]." Since at least July 2016, the Charter Schools, like others affiliated with Alliance, pay 10% of revenues from various tax-dollar sources to the CMO in exchange for these services; the remainder is allocated to each school's budget. While each Charter School's board approves its ASA with Alliance, Alliance claims that only its CEO, Dan Katzir (Katzir), has final decision-making authority over the terms of the agreements. Katzir testified that a Charter School's board could refuse to enter into an ASA, but that he would take whatever steps were necessary to force compliance, including the removal of recalcitrant board members.

In addition, each ASA provides as follows:

> "Alliance and the School are independent contractors. No representations or assertions shall be made or actions taken

[14] The term of the current ASAs ends in 2021.

> by either party that would create any agency, joint venture, partnership, employment or trust relationship between the parties with respect to the subject matter of this Agreement. Except as may be expressly agreed upon in this Agreement or on a Schedule, neither party has any authority or power to enter into any agreement, contract or commitment on behalf of the other, or to create any liability or obligation whatsoever on behalf of the other, to any third person or entity."

Finally, with respect to employees, each ASA provides:

> "Each party will exercise day-to-day control over and supervision of their respective employees, including but not limited to hiring, evaluation, promotion, demotion, compensation, employee benefits, discipline and discharge. All work assignments instruction, scheduling, staffing and direction of the School employees shall be the exclusive province of the School. Each party is responsible for obtaining and maintaining worker's compensation coverage and unemployment insurance on its employees."

In order to support the array of back office services it provides to the Charter Schools, Alliance employs a team of executives. In addition to Katzir and Lauck, the Alliance executive team includes these positions: (1) Chief of Staff, (2) Chief Schools Officer, (3) Chief Academic Officer; (4) Chief Talent Officer; (5) Chief Advancement Officer; (6) Chief College Officer; and (7) Chief Business Officer. Together, this team supervises a variety of administrative services and according to Alliance ensures that each school adheres to the centrally developed set of policies governing the schools' administration. The specific role some of these executives play in the management of the schools and their control over the schools' labor relations will be described in further detail below.

In addition to this executive team, Alliance employs a number of Instructional Superintendents who are supervised by Alliance's Chief Schools Officer, and who in turn supervise the principals and other administrators at the Charter Schools. This authority is delegated to them by the schools' boards. There are weekly meetings between these superintendents and the Charter Schools' administrative personnel where they discuss Alliance's "common operational, instructional, and professional development expectations" for the schools in the Network. As of the time of the filing of the petitions, there were three such superintendents, whose work was supplemented by two principals that shared some superintendent responsibilities.

Much of this evidence, as Alliance now contends, points in favor of finding an integrated enterprise, even though LAUSD has sought to ensure local governance and each school's ASA with Alliance asserts that the school exercises control over employment functions and over assignments, instruction, scheduling, staffing and direction. In prior cases, Alliance and its charter schools cast much of this evidence differently, and we note some of those differences below.

B. The Record in Prior Cases

In several unfair practice cases litigated prior to the filing of these petitions, including PERB Case Nos. LA-CE-6061-E, LA-CE-6073-E, LA-CE-6165-E, and LA-CE-6204-E, Alliance and various charter schools belonging to the Alliance Network vigorously disputed the notion that the schools were part of any integrated operation. For instance, in the record developed during *Alliance*, the Alliance CMO firmly denied such integration, claiming that while it offered certain administrative services, "[a]side from and except for this high-level support, the Charter Schools have substantial

autonomous authority for all aspects of their daily operations, and exercise that authority independent of Alliance." The truth of this statement was verified by an authority no less than Lappin, who serves as a member of the board of every charter school, in a declaration he filed in support of Alliance's motion to dismiss the complaints in *Alliance*.

In that motion, Alliance also stated "the administrators and [boards] of the Charter Schools are responsible for all aspects of the schools' day-to-day operations."[15] Alliance further stated that "[a]dditional decision-making authority regarding the Charter Schools, by law (and in actual practice), rests solely with their *respective* nine-member Boards."[16] (Emphasis in original.) Finally, with respect to functional integration of the operations, Alliance declared that:

> "Each Charter School Board is responsible for independently providing fiscal accountability by approving and monitoring the schools' budget. [Citing Lappin Declaration] Further, each Board is responsible for ensuring effective organizational planning for each school by approving long-range goals and annual objectives, and monitoring each Charter School's general policies including, but not limited to, compliance mandates, health and safety requirements, the use and maintenance of facilities, and overseeing the Charter Schools' resources. [*Id.*] Liabilities, including all debts and obligations, are also the *sole* responsibility of the Charter Schools."

[15] On cross-examination during the hearing on these petitions, Lappin initially denied the truth of that statement. However, at another point during cross-examination, Lappin agreed that each school's leadership team was responsible for making day-to-day operational decisions.

[16] On cross-examination during the hearing on the petitions, Lappin denied the truth of these statements without explanation.

Similarly contradicting the evidence proffered in the hearing on the petitions here at issue, Alliance earlier claimed that the charter schools comprising the Alliance Network "may opt to not take advantage of many of the services provided [by the Alliance CMO] and/or to separately perform or contract for them on their own. In addition, they may decline to follow the recommendations of the various subject matter experts at the Alliance [CMO] and to make whatever decisions are considered best for each school."[17]

Alliance made further inconsistent statements about its functional integration and common ownership in other PERB cases. For instance, in the record developed in PERB Case Nos. LA-CE-6061-E and LA-CE-6073-E, Alliance stated that despite the assistance of its executive team, individual schools had complete financial autonomy, that there was complete segregation of funds, that the schools had complete freedom to spend their money as they saw fit, and that Alliance had no authority to reallocate an individual school's budget. Moreover, in answering the complaint in PERB Case No. LA-CE-6061-E, Gertz/Merkin stated that it had no knowledge regarding any of the alleged facts pertaining to the other named charter schools or Alliance, ostensibly because Gertz/Merkin claimed it was entirely autonomous from those entities.

We discuss the legal significance of these discrepancies and contradictions later in this decision.

II. Centralized Control of Labor Relations and Common Management

[17] When confronted with these representations on cross-examination, Alliance's CEO, Katzir, essentially denied their truth.

A. The Record in the Instant Case

The Charter Schools now contend that Alliance controls labor relations and leads a centralized management that governs the entire Alliance Network. The Charter Schools further claim that while each principal is the nominal administrator in charge of his or her respective school, each was hired by Alliance and answers to one of its superintendents. While principals may provide input regarding matters such as the academic calendar and employment agreements for other staff, including those they personally supervise, the ultimate decisions over such matters are left to Katzir or his designees on the executive team.

Along the same lines, and contrary to certain representations in the ASAs, Alliance contends that it is responsible for formulating job descriptions, employment agreements, calendars, and salary schedules for all employees within the Alliance Network. Additionally, while principals have ultimate authority for identifying vacancies and selecting new teachers and staff, Alliance coordinates the application and hiring process for prospective employees using EDJOIN, an education job board used by most public schools.[18] And although employees enter into their employment agreements with their individual schools, the cover letter is signed by Alliance's Vice President of Human Resources, who reports to Alliance's Chief Talent Officer. Similarly, Alliance contends that it provides the schools with a single teacher evaluation rubric and it has standardized the number and timing of classroom

[18] Alliance, however, claims to have a policy forbidding principals from selecting candidates with certain criminal records or those that appear on Alliance's internal "do not hire" list.

observations.[19] If a teacher's performance falls below standards, the principal may place that teacher on a Performance Improvement Plan, which Alliance's staff reviews before implementation to determine that it is reasonable and within Alliance's mandated guidelines.

Alliance has attempted to establish roughly consistent salaries throughout its Network, maintaining separate salary schedules for new and returning teachers, and a single schedule for all counselors. Some schools in the Alliance Network provide signing bonuses for new staff, as well as relocation stipends, which are capped at amounts set by Alliance. There are also stipends for extra-duties with ranges set by Alliance. Similarly, Alliance negotiates all health and welfare benefits for all schools within the Network.[20]

Alliance also maintains an employee handbook for all schools within the Network that controls working conditions throughout the Charter Schools. The handbook is updated on an annual basis with the assistance of principals and adopted by the schools' boards. The Charter Schools' principals are responsible for ensuring compliance with the handbook. Additionally, each principal has the authority to supplement the Network-wide handbook with sections governing conduct and responsibilities specific to that school, e.g., dress codes, but these sections are not formally adopted by the school's board.

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[19] Alliance has also standardized the evaluation process for certificated counselors.

[20] Pension contributions and benefits for certificated personnel of the Charter Schools are determined by the policies of the California State Teachers' Retirement System, as governed by state law. (Ed. Code, § 47611.)

The Network-wide handbook has sections specifying an employee grievance process as well as the multi-step process for discipline and termination. With respect to discipline, the Charter Schools' principals have full authority to impose sanctions for misconduct that does not merit a suspension or termination. But Alliance contends that a principal must involve Alliance's staff before suspending or firing an employee. No principal is involved in the discipline of another school's employees. Likewise, if a school reaches a settlement with an employee regarding discipline, such information is not shared with other schools within the Alliance Network.

Teachers work only at the school where they were hired, and they have only one contract within the Alliance Network. Alliance maintains an internal transfer policy requiring teachers to apply for a transfer to another school within the Alliance Network. If the principal at the new school decides to hire a transfer applicant, then that teacher's seniority date remains the same and all accrued leave balances are transferred to the new school. Teachers have no contractual right to transfer between schools, rather it is entirely at the principals' discretion.

Some schools within the Alliance Network share a small number of personnel. The record suggests that Burton Tech shares an English Language Arts coach with two other schools in the Network, and approximately eight schools share four certificated psychologists. Each shared employee is employed by a single school, which then enters into a Memorandum of Understanding with one or more schools to share that employee's services. Those employees continue to receive one paycheck from their home school, reimbursed by the other schools on a pro rata basis. Apart

from these examples, there is no evidence of employee interchange between Alliance-affiliated charter schools.

Alliance hosts professional development events where employees from schools throughout the Alliance Network come together for trainings and seminars. These are part of Alliance's overall effort to inculcate a sense of "shared mission" or common "brand" that defines the Alliance Network. But distinct emphasis is placed on the "built-in autonomy" of each school, which retains authority above and beyond what is common in the traditional public school system to determine whom to hire, what courses to offer, and how to structure the curriculum.

B. The Record in Prior Cases

In prior cases, when Alliance opposed a single-employer finding and sought to limit liability for unfair practices to the individual schools named in UTLA's various charges, it vigorously resisted any suggestion of common management or centralized authority over labor relations. For instance, in *Alliance*, it made the following argument to the ALJ, with copious citations to the record: "It is without question that core employment decisions concerning the hiring, discipline and firing of teachers and counselors, as well as decisions regarding teacher and counselor evaluations and contract renewals are made at the school level."

With respect to hiring, Alliance claimed that there was no network or common managerial authority, rather Alliance provided only back office support. Thus, according to Alliance at that time, it was entirely within the province of each principal to choose whom to hire at each school: "While [Alliance's] Human Resources department facilitates the background check for the selected candidate, if problems in

the candidate's background are revealed and to the extent discretion under state law exists,[21] the School makes the ultimate determination of whether to proceed with hiring." And to put to rest any lingering doubts, it stated, "[s]imply put, no one in the Human Resources department or the Alliance Home Office tells a School what teacher or counselor to hire, provides input into the School's decision, or overrides that decision in any way."

Similarly, Alliance claimed that it exerted no control over the evaluation of each Charter School's staff: "Throughout a teacher's or counselor's employment with the [Charter] School, the [Charter] School's administrators (not anyone at [Alliance]) monitor his or her performance, suggest ways to improve performance as needed, and make decisions as to whether lack of performance or any other type of misconduct warrants termination or non-renewal of the teacher's or counselor's contract." According to Alliance's then Vice President of Human Resources, Laura Alvarez (Alvarez), it had only the power to provide an advisory opinion or recommendation, [22] which the Network schools were privileged to reject for whatever reason and which they did in fact reject from time to time.

With respect to wages, Alliance claimed that principals had substantial discretion to award bonuses without approval from anyone in human resources. Similarly, principals were free to depart from the supposedly centralized, consistent

[21] Under the Education Code, persons convicted of certain crimes are categorically disqualified from employment in public schools.

[22] With respect to her role as Vice President of Human Resources, Alvarez testified that she was merely a "thought partner" with principals who had sole, actual authority to control disciplinary matters.

salary schedule in order to match a teacher's past salary. According to Alliance, none of these decisions required approval from Alliance itself.

Indeed, Alliance provided a bullet-point summary of the plenary authority exercised by each charter school, with record citations to the testimony of key executives and principals. According to that summary, each of the Charter Schools:

- "Makes all teacher and counselor hiring, firing and disciplinary decisions.
- "Determines the number, credentials and areas of expertise of the teachers and counselors to be hired by the School.
- "Oversees and conducts all teacher and counselor evaluations.
- "Pays all teacher and counselor salaries and benefits.
- "Tracks and keeps all teacher and counselor attendance and time records.
- "Sets teacher and counselor schedules.
- "Is the sole location at which teachers and counselors work (as provided in the employment agreements), with no interchange of personnel with either Alliance or any other school.[23]
- "Maintains sole control over fiscal planning decisions and decisions concerning expenditures in every area of School operations, including salaries, benefits, textbooks, classroom technology, classroom supplies, building maintenance, and security.

[23] On this point, Alvarez testified that a teacher seeking to transfer to another Alliance-branded school had to undergo the same application process as a new applicant and had to resign from the old school before accepting employment at the new one.

- "Pays for all of the above-referenced items out of its separate yearly budget.

- "Is responsible for ensuring adequate student enrollment.

- "Determines non-State mandated class offerings.

- "Determines whether to incorporate technology in the classroom, how to incorporate it and what type of technology to rely upon.

- "Decides what vendors or providers to use for the vast amount of services—*i.e.* school uniforms, food, building maintenance, janitorial.

- "Determines the composition of its internal leadership team, which is involved in making most, if not all of the above-referenced decisions."

We address the significance of these inconsistent statements below.

DISCUSSION

According to the Charter Schools, our resolution of this unit appropriateness determination hinges on a single question: do the facts establish that the single employer doctrine applies to the Alliance schools? However, a single employer inquiry and a unit appropriateness inquiry involve separate analyses, and the outcome of one does not necessarily determine the other. (*Lawson Mardon USA* (2000) 332 NLRB 1282, citing other authorities; National Labor Relations Board (NLRB) Outline of Law and Procedure in Representation Cases, NLRB Office of the General Counsel (2017), sec. 14-500 ("A determination of single-employer status does not determine

the appropriate bargaining unit."].)[24] Indeed, unit appropriateness is based on community of interest factors, which are not dispositive in the single employer inquiry. We focus only on the question of whether UTLA's request for school-by-school units constituted one appropriate unit configuration as of the time that UTLA filed its petitions, and we express no opinion as to whether it also had the option of network-wide organizing. In doing so, we consider only the unusual circumstances before us and do not attempt to consider all possible scenarios in which employees organizing within a charter school network may have the option of network-wide organizing and/or school-by-school organizing.[25] For the reasons explained herein, we find that UTLA properly had at least the option of school-by-school organizing.

I. Precedent Supports Finding Single School Units to be One Appropriate Unit Configuration Where Each School Has Legally Declared Itself to Be a Separate Employer

As an initial matter, we note that the Board long ago rejected the Charter Schools' apparent argument that EERA invariably requires a petitioning union to seek

[24] While we have repeatedly noted that PERB precedent protects representational rights to a greater extent than corresponding NLRB precedent, we consider NLRB precedent for its persuasive value when it is consistent with California authority. (*Capistrano Unified School District* (2015) PERB Decision No. 2440, pp. 13-15 & 29, fn. 15.) Given that PERB's single employer doctrine has its roots in federal law, there is reason to take into account NLRB principles. On the other hand, EERA and California's charter school framework have important features that distinguish the instant case from most arising under federal law. As discussed below, those characteristics strongly support UTLA's requested units, as does federal law to the extent it is a relevant guidepost.

[25] Thus, we need not determine whether charter school unit determinations should as a general matter be viewed in light of the NLRB's general rule that either a petitioned-for single facility unit or a petitioned-for employer-wide unit may be presumptively appropriate.

to represent only the "most" appropriate unit. (*San Joaquin County Office of Education* (2004) PERB Decision No. JR-21, p. 4; *Antioch Unified School District* (1977) EERB[26] Decision No. 37, p. 3.) Rather, we are tasked with determining in as direct a manner as possible whether the petitioned-for units are appropriate. In every case we must weigh and balance the statutory criteria in order to achieve consistency of application and the general objectives of EERA. (*Antioch Unified School District*, *supra*, EERB Decision No. 37, p. 3; *Marin Community College District* (1978) PERB Decision No. 55.) Among these statutory criteria, we must take into account the purposes and goals of the Charter School Act (CSA) when deciding cases involving charter schools. (*Orcutt Union Elementary School District* (2011) PERB Decision No. 2183, p. 5.)

EERA section 3545, subdivision (a) requires PERB, in each instance where the appropriateness of a sought-after unit is at issue, to decide the question based on "the community of interest between and among the employees and their established practices including, among other things, the extent to which such employees belong to the same organization, and the effect of the size of the unit on the efficient operation of the school district." The same section, at subdivision (b)(1), establishes a statutory presumption that all certificated employees of a "public school employer" should normally be included in a single bargaining unit—the "*Peralta* presumption," bearing the designation of our landmark decision in *Peralta Community College District* (1978) PERB Decision No. 77 (*Peralta*). The presumption may be rebutted based on the

[26]Prior to 1978, PERB was known as the Educational Employment Relations Board or EERB.

cumulative weight of three factors: community of interest, established practices, and employer efficiency. (*St. HOPE Public Schools* (2018) PERB Decision No. Ad-472, pp. 4-5.)

Here, UTLA named each individual Charter School as the "public school employer" in the petitions. UTLA had a strong basis for doing so, as EERA section 3540.1, subdivision (k) includes in its definition of "public school employer" any individual "charter school that has declared itself a public school employer pursuant to subdivision (b) of Section 47611.5 of the Education Code." All three Charter Schools filed such declarations, naming themselves as "the exclusive public school employer of the employees at [each] charter school for the purposes of [EERA]." (Ed. Code, § 47611.5, subd. (b).) Thus, to the extent it applies, the *Peralta* presumption largely favors school-by-school units.

However, the Charter Schools claim that the *Peralta* presumption favors them, even though they do not dispute that their charters identify each individual school as the "exclusive public school employer," and they admit that these declarations are true. The Charter Schools claim that PERB must disregard these declarations. In aid of this goal, the Charter Schools point to *CAVA*, *supra*, PERB Decision No. 2484, where a union asserted that 11 charter schools satisfied the single employer test and we found that *Peralta* supported granting the union's request to find a network-wide unit to be an appropriate configuration. The Charter Schools in this case ask us to extend *Peralta* and find that, where the single employer test is satisfied, a single unit of all employees of the single employer is the *only* appropriate bargaining unit, regardless of the union's objection and despite the Charter Schools' past

representations in other cases. The Charter Schools thus reject any reading of *CAVA* that would allow the single employer construct to give rise to merely one alternative appropriate unit. In the circumstances of this case, we find this extreme and constraining interpretation to be a bridge too far. We conclude that the Charter Schools' declarations and the underlying charters, together with the record as a whole, are sufficient to establish that each Charter School is a "public school employer," even if the legal construct of all Alliance schools might arguably also constitute an appropriate unit under *CAVA*.

We have never addressed whether two or more nominally distinct employers are in fact a single-employer for unit determination purposes, unless the petition on its face raised that issue. For instance, in *Turlock School Districts* (1977) EERB Order No. Ad-18 (*Turlock*), several employee organizations filed petitions naming two public entities as a single employer, and the Board analyzed whether the entities were in fact one integrated enterprise because that was the question presented by those petitions. In *Paso Robles*, *supra*, PERB Decision No. 85, one of two petitioners sought to represent a single unit of teachers from two school districts it named as a single-employer, leaving the Board no choice but to decide the matter. Similarly, in *Plumas Unified School District and Plumas County Superintendent of Schools* (1999) PERB Decision No. 1332, the Board was required to address whether two public school employers were in fact a single-employer because the matter was squarely raised in an employer-initiated unit modification petition.

Finally, in *CAVA* the Board only took up the question of whether numerous charter schools comprised a single-employer because that was the very question

presented in that petition. Indeed, the Board refused to consider the role of the CMO in *CAVA*, or its alleged impact on the Board's jurisdiction over the single-employer network of charter schools, because it was not named in the petition and the petitioning union did not claim that the CMO had any employment relationship with the teachers in the petitioned-for unit. (*CAVA*, *supra*, PERB Decision No. 2484-E at pp. 16-17.) At no point in any case has the Board looked beyond the plain language of the petition to decide whether two or more public school employers satisfy the single employer test and, if so, whether that relationship requires that we allow only a singular global bargaining unit despite the petitioning union's request for localized bargaining units.[27]

It is hardly surprising that there is no prior case in which we have overruled a petitioning union and declared that only a single employer unit is appropriate. Doing so would afford more weight to employer efficiency than to EERA's fundamental policy that "[p]ublic school employees shall have the right to form, join, and participate in the

[27] Similarly, in deciding representation matters, we must always conduct our inquiry based on the facts present at the time of the filing of the petition. (See *Children of Promise Preparatory Academy* (2013) PERB Order No. Ad-402, p. 14.) For instance, "proof of support is determined by PERB when a petition is filed and an employer provides a list of employees that comprise the petitioned-for unit." (*Ibid.*) On September 18, 2019, Alliance wrote a letter to the Board stating that it had decided to merge all Alliance-affiliated schools into a single legal entity, effective January 1, 2020. Alliance provided no further information about this transition and did not argue that the transition had any effect on these petitions. Alliance did not ask us to augment the record with this September 2019 letter, nor did we do so. In any event, as noted, we must consider the entities as they existed in May 2018, when the petitions were filed. (*Ibid*.; *Regents of the University of California* (2017) PERB Order No. Ad-453-H, pp. 14, 19, 21 & fn. 5, and cases cited therein.) We express no opinion on any interactions or litigation between the parties occurring under a new Alliance structure.

activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." (EERA, § 3543, subd. (a).) The petition for recognition is the formal moment of genesis in our collective bargaining process; we cannot give effect to the right to representation and employee choice unless we accept and process the petitions actually filed by employee organizations. Therefore, our central inquiry is whether UTLA requested appropriate units of employees of the public school employers named in the petitions.

We do not accept the Charter Schools' contention that *CAVA*, *supra*, PERB Decision No. 2484 forecloses UTLA's argument that certificated employees at a single Charter School may constitute an appropriate unit. As noted above, in *CAVA* we held that all certificated personnel within a single employer constitutes an appropriate unit configuration, given that the petitioning union sought to represent a single statewide unit and the employer could not show that community of interest and other relevant factors made the unit inappropriate. (*Id*. at pp. 83-86.) Notably, CAVA was a virtual school. Teachers frequently reported to supervisors at a school different from where they mainly taught, and also frequently had homeroom students outside their geographic areas and their contract schools. *CAVA* therefore presented a very different factual scenario from the instant case. Even with those facts, however, we noted that while the *Peralta* presumption applicable to school districts has some potential utility within a truly integrated charter school network, it does not prevent us from considering all relevant factors, and we further noted that employer efficiency does *not* trump representational rights: "In balancing the impact on the efficient operations of an employer with the employees' right to effective representation in

appropriate units, the Board has never found the efficiency factor to outweigh representation rights." (*CAVA*, *supra*, PERB Decision No. 2484, p. 82.)

Most importantly, *CAVA* noted that new and structurally unique charter school contexts constitute "uncharted waters" that require us to return to first principles in determining appropriate units. (*CAVA*, *supra*, PERB Decision No. 2484, p. 86.) "Because the scope of the unit is basic to and permeates the whole of the collective bargaining relationship, each unit determination, in order to further effective expression of the statutory purposes, must have a direct relevancy to the circumstances within which collective bargaining is to take place. For, if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered." (*Ibid*. [citation omitted]; see also *Regents of the University of California* (2015) PERB Decision No. 2422-H, pp. 5-6 [In assessing and applying unit criteria under its statutes, PERB must apply criteria holistically, not mechanistically, with a view to fulfilling the purposes of the statute].) Based on a holistic approach, we found that the union's requested network-wide unit was an appropriate unit, particularly given that school-by-school units might make a single employee subject to 11 separate collective bargaining agreements, and in light of the fact that the CAVA schools "have chosen to unify every employment condition across all of the schools, so it is curious why they desire separateness in collective bargaining." (*CAVA*, *supra*, PERB Decision No. 2484. at pp. 82-83.)

In this case, each side claims that the *Peralta* presumption favors its position. Even if the *Peralta* presumption were to favor the Charter Schools, however, we find it

has been rebutted for all the reasons set forth herein. As an initial matter, the presumption, and the statutory language it interprets (EERA, § 3545), were created forty years ago with school districts in mind, rather than charter school networks operating very differently from a traditional school district. Thus, while our traditional unit determination criteria disfavor the proliferation of bargaining units in order to maximize the operational efficiency of school districts, we are required to take into account the CSA's unique policy goals when dealing with charter schools. (Ed. Code, § 47611.5, subd. (d).) Among those goals, the Legislature sought to "[e]ncourage the use of different and innovative teaching methods," to "[c]reate new professional opportunities for teachers, including the opportunity to be responsible for the learning program at the school site," and to "[p]rovide vigorous competition within the public school system to stimulate continual improvements in all public schools." (Ed. Code, § 47601, subds. (c), (d), and (g).) It is evident that educators, in pursuit of these goals, have created a wide variety of charter school structures requiring us to certify a variety of unit configurations in order that EERA's goals of promoting fair collective bargaining not be erased by CSA's goals of promoting innovation and competition within the school system. In other words, the extreme variation we find in charter school contexts does not favor mechanistic presumptions and instead requires that we assure that efficiency does not trump representational rights.[28]

[28] Variations in charter school facts are far from theoretical. As noted *ante*, *CAVA* involved virtual education. In some cases, a charter school network includes schools in multiple districts. Here, and in *CAVA*, PERB lacks jurisdiction over the CMO, which would be the logical bargaining entity for any network-wide unit. While that did not dissuade the union from seeking such a unit in *CAVA*, one can well imagine (for reasons we discuss *post*), why that fact might dissuade a union such as UTLA from

Having noted UTLA's reasoning that the *Peralta* presumption favors its position here, but having found that in any event the presumption operates more weakly in a charter school context, we rely on traditional criteria to determine whether UTLA has submitted a request for recognition that is at least appropriate, even if it is not the most appropriate unit. As noted above, these traditional criteria are community of interest, established practices, and employer efficiency.

Certain record facts show that a community of interest exists beyond the walls of any particular Alliance school, including but not limited to network-wide compensation and benefits, training, evaluation, and multiple policies and

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seeking a network-wide unit, even where the schools involved had not spent years proclaiming their individual autonomy, as occurred here.

Adding to our analysis is this consideration: Even when we apply the *Peralta* presumption to traditional public school districts, for which section 3545 was initially drafted, that section is a "burdensome provision" whose language is a "troublesome scripture" posing a "dilemma" via its "alluringly ingenuous" language and "apparent contradiction[s]" that challenge the "frailty of our multi-cellular intellectuality." (*Peralta, supra,* PERB Decision No. 77, pp. 6-9.) *Peralta*'s weaknesses even in the traditional school district context further inform how we apply it in charter school cases. While in *CAVA Peralta*-type considerations were consistent with the union's argument that a network-wide unit was one appropriate configuration, it would be a mistake to read *CAVA* as establishing that *Peralta* creates a categorical rule dictating the scope of all teacher bargaining units in today's variegated world of charter schools, which did not exist when EERA's drafters wrote section 3545. It is therefore appropriate to find the *Peralta* presumption has less weight in the charter school context than in traditional public school districts. In this case, where both sides have a colorable claim that *Peralta* supports their argument, the *Peralta* presumption has particularly limited utility. As explained herein, we find the presumption favors UTLA more than the Charter Schools, but even were that not the case, it is overcome in the instant case.

procedures.[29] Other parts of the record—including employees' lack of transfer opportunities between schools and the fact that schools do not share information with one another about terminated teachers—point in the opposite direction and also show some of the many differences between Alliance's network and a school district. Meanwhile, the schools' conflicting statements regarding certain policies and procedures make it difficult to assess some community of interest facts. In these circumstances, and considering the record of the various Alliance cases as a whole, we find that there is sufficient community of interest to support school-by-school units, though also record facts which would have supported a network-wide unit had that been requested. (See, e.g., *Lawson Mardon USA*, *supra*, 332 NLRB at p. 1286 [Employees at just one location found to constitute an appropriate unit, even though many community of interest factors would also support comprehensive unit proposed by the employer, covering the full extent of a demonstrated single-employer enterprise].)

Employer efficiency remains relevant even though it should not trump representational rights, as explained above. We take the schools at their word that they may find it more efficient to have a network-wide unit, though that possible efficiency is undercut by the schools' prior positions that they are autonomous, as well as by the fact that we have no jurisdiction over the Alliance CMO, the central entity in the alleged single-employer. Indeed, the ramifications of that jurisdictional hurdle, which we consider *post*, at Section III, further demonstrate that employer efficiency—

[29] Other record facts reflect employee characteristics and employment terms shared by a large percentage of certificated public school employees in California—including qualifications, training, skills, job duties, and pension benefits

the strongest of the schools' arguments—does not have the full import it would have in a traditional school district context.

The third factor we consider is established practices. Here, the practice on which UTLA relied is established in the schools' declarations that each is an independent employer, the schools' individual charters, and the prior cases before PERB in which the schools strenuously asserted their autonomy. We return now to those prior contentions and find that the schools have adopted a litigation tactic that undermines their community of interest and efficiency arguments, while having the purpose and effect of disrupting representational rights.

II. The Alliance Schools' Shifting Factual Contentions Further Undercut Their Claim That the Only Appropriate Unit is Network-Wide

Whether two or more nominally distinct entities constitute a single-employer is determined by four factors: (1) functional integration of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership. (*County of Ventura* (2018) PERB Decision 2600-M, p. 18 *(Ventura)*; *CAVA*, *supra*, PERB Decision No. 2484, at p. 64.) This determination is fact-intensive, and while no single factor is controlling, the first three are typically considered the most important. (*CAVA*, *supra*, PERB Decision No. 2484, at p. 64.) Ultimately, the single-employer doctrine is a legal construct meant to foster productive and effective collective bargaining. (*Id*. at p. 67.) Like any of the legal constructs PERB relies upon to decide its cases, the single-employer doctrine requires attention to the animating purposes of EERA:

> "to promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California by providing a uniform

> basis for recognizing the right of public school employees to join organizations of their own choice, to be represented by the organizations in their professional and employment relationships with public school employers, to select one employee organization as the exclusive representative of the employees in an appropriate unit, and to afford certificated employees a voice in the formulation of educational policy."

(EERA, § 3540.)

In promoting these purposes, we bear in mind the fact that the Legislature has entrusted us with the responsibility of "stabilizing labor relations conflict and . . . equitably and delicately structuring the balance of power among competing forces so as to further the common good." (*Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 893, citing *Motor Coach Employees v. Lockridge* (1971) 403 U.S. 274, 286.) Therefore, in applying the single-employer doctrine to any case, we should always remain attuned to the peculiar equities of labor-management relations and bear in mind our duty to give full effect to employees' right to representation.

Here, the Charter Schools presented extensive evidence to buttress their present contention that they satisfy the single employer test—over 450 exhibits spanning thousands of pages along with the testimony of more than a dozen witnesses. However, as the above recitation of the changing factual representations makes clear, this evidence was directly contradicted by evidence in prior cases from Alliance personnel, including key executives and charter school administrators. The combined records from these cases raise substantial questions regarding whether Alliance and its affiliated schools had the facts right then, now, or some of each. But we need not resolve these contradictions, because the burden belongs to the Charter

Schools to show not only that they are part of a single employer construct, but also that the only appropriate unit subsumes all certificated personnel within the purported single employer. The self-contradicting set of factual representations the Charter Schools have made substantially impair them in making this case. Moreover, we conclude that finding school-by-school organizing to be categorically unavailable for Alliance teachers would be a manifest injustice, particularly given that Alliance schools have benefited from PERB rulings that took into account the schools' past factual representations regarding the schools' autonomy, and given that UTLA has also relied on those representations.[30]

The Charter Schools contend that operations of the Alliance Network are functionally integrated by both design and practice. But Lappin declared in prior cases that each school is designed to operate autonomously and without the direct involvement of Alliance, which provided only high-level administrative support. Similarly, with respect to common management, the Charter Schools' contention that they function within a "rigidly hierarchical" structure with centralized executive control is belied by prior inconsistent statements from Alliance that the board and principal of

[30] There is also evidence suggesting that Alliance may be a joint employer with each school, though neither party has asked us to consider that possibility. (*County of Ventura v. PERB* (2019) 42 Cal.App.5th 443 [joint employer relationship exists if two entities each have a right of control over certain terms and conditions of employment, or a right of control over certain aspects of the manner and method in which the work is done].) In cases in which there is a joint employer or single employer relationship that spans both entities under our jurisdiction and others outside our jurisdiction, we assert jurisdiction over only those within our jurisdiction. (*Ventura*, *supra*, PERB Decision No. 2600 at pp. 38-43.) No such issues are raised here, however, as no party asks us in this case to consider whether the Charter Schools have either of these types of relationship with Alliance.

each Charter School have full, independent managerial control over day-to-day operations, and that they are free to disregard the recommendations from Alliance's senior managers. As to common labor relations, the Charter Schools now claim that Alliance exerts Network-wide control over such policies through its imposition of a "nonunion framework," (cf. *Local No. 627, Int'l Union of Operating Engineers, AFL-CIO v. NLRB* (D.C. Cir. 1975) 518 F.2d 1040, 1046, modified on other grounds 425 U.S. 800 (1976), cited by Charter Schools), together with uniform job descriptions, hours of work, performance standards, and discipline policies. However, these claims are undermined by prior declarations and testimony that each school's principal and board had plenary authority to set all significant employment policies, including hiring and firing decisions.

Taken as a whole, the Charter Schools' evidence regarding the four-factor single-employer test establishes that they have spoken out of both sides of their mouths throughout the different proceedings. On this basis, UTLA contends that the Charter Schools should be estopped on judicial and equitable grounds from asserting that they are part of a single-employer. We analyze both judicial estoppel and equitable estoppel below, finding each to have some relevance to these proceedings. However, even in the absence of estoppel, we would conclude that the Charter Schools' shifting factual contentions further confirm they cannot meet their burden to show that the *only* appropriate unit is network-wide.

A. The Judicial Estoppel Factors Are Met

The doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, prohibits a party from successfully taking

inconsistent positions in the same or different judicial proceedings. (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181.) It applies when (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake. (*Id*. at p.183.) The doctrine's purpose is to protect the integrity of the judicial process by preventing parties from playing fast and loose with the courts. (*Id*. at p. 181.) UTLA contends that the Charter Schools should be estopped from claiming they are part of a single-employer because the schools in *Alliance* argued that they were not part of any integrated operation.

The third factor, relating to whether Alliance schools were "successful" in their prior assertions, presents a close question. On the one hand, in *Alliance* the Board did not determine the single employer issue one way or the other. Rather, the Board simply concluded in *Alliance* that we had no jurisdiction over the Alliance CMO because it was a private entity. Indeed, we expressly did not reach the single-employer question: "Our conclusion that the issue of whether the network of 27 Alliance charter schools comprise a single employer was not properly raised or litigated in this case in no way forecloses UTLA from demonstrating in a future case that those schools do comprise a single employer." (See *Alliance*, *supra*, PERB Decision No. 2545 at p. 14-15.)

On the other hand, the Alliance schools made factual representations inconsistent with their current representations when they successfully thwarted

UTLA's attempt to amend various complaints to name all of the constituent schools. Specifically, the schools in *Alliance* and in PERB Case Nos. LA-CE-6061-E and LA-CE-6073-E successfully opposed UTLA's motions seeking to name every Alliance charter school as a respondent. In each instance, both Alliance and the schools denied the existence of any single-employer entity and supported their denials with sworn declarations. Instead they represented that the charter schools were separate, autonomous entities, and that it would therefore offend due process to add them as named respondents in light of their denial of any single or joint employer status. These arguments were successful in defeating UTLA's motions.

Alliance and the charter schools could not have made those arguments had they taken then the position they take now, viz., that the schools are functionally integrated, not autonomous, and part of a single-employer.[31] Rather, it was necessary for the schools to assert facts showing their alleged autonomy, and that they were therefore not part of an integrated enterprise, in order to prevail on their due process argument. (See, e.g., *Viking Indus. Sec., Inc. v. NLRB* (2d Cir. 2000) 225 F.3d 131, 135 ["Because the businesses that compose a 'single employer' are deemed to have identical interests, the representation of the interests of one of them at the unfair labor

[31] The dissent wrongly contends that the doctrine of judicial estoppel cannot apply because the Charter Schools did not assert inconsistent facts but merely changed their legal position between the earlier unfair practice cases and these proceedings. It is clear from the record that both the Charter Schools and Alliance proffered a host of different facts in support of their former contention that the schools were autonomous, as detailed *ante*, precisely because the single-employer analysis is fact-intensive. (*Ventura*, *supra*, PERB Decision 2600-M, p. 51 (diss. opn. of Member Shiners).) These shifting facts underlie the Charter Schools' shifting legal positions and form the basis for our decision to apply the doctrine in this case.

practice hearing amounts to representation of both for the purposes of due process"]; cf. *NLRB v. O'Neill* (9th Cir. 1992) 965 F.2d 1522, 1529 ["Where two parties are alter egos, timely service on one is sufficient to initiate proceedings against both within the statute of limitations"]; see also *Southeastern Envelope Co.* (1979) 246 NLRB 423, 424 [a constituent entity of a single-employer cannot complain that it should have had notice and an opportunity to defend itself against the underlying unfair labor practice charges because its interests are identical].)[32] In other words, schools within the Alliance Network successfully avoided the very possibility of liability in those unfair practice cases by making factual representations that are antithetical to the Charter Schools' current representations.

Contrary to our dissenting colleague's view, the manifest purpose of the doctrine of judicial estoppel is to prevent this very type of legerdemain from corrupting the Board's truth-seeking function. Therefore, we conclude that UTLA has satisfied the factors necessary to apply the doctrine of judicial estoppel.

B. The Equitable Estoppel Factors Are Met

Similarly, UTLA has shown that the Charter Schools should be equitably estopped from asserting an alleged single employer relationship as a basis for finding

[32] Because of the unique due process considerations that apply to single-employers, and the necessity of naming every potentially responsible legal entity for remediation purposes, Board agents should be careful not to deny motions to amend charges or complaints to name all entities comprising the alleged single-employer unless it is abundantly clear that the proposed amendment offends due process, is outside the statute of limitations, or would cause undue prejudice. Even in such cases, given the overriding importance of including every potentially responsible party in an ultimate remedial order, Board agents should consider carefully whether to certify for interlocutory appeal pursuant to PERB Regulation 32200 any order denying a proposed amendment to name additional constituent entities of an alleged single-employer.

that school-by-school units are inappropriate. Under the doctrine of equitable estoppel, also known as estoppel in pais or estoppel by conduct, "[w]henever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it." (*Moncada v. West Coast Quartz Corp.* (2013) 221 Cal.App.4th 768, 782, internal citations omitted.) Stated another way, "a person may not lull another into a false sense of security by conduct causing the latter to forbear to do some things which he otherwise would have done and then take advantage of the inaction caused by his own conduct." (*Lovett v. Point Loma Development Corp.* (1968) 266 Cal.App.2d 70, 75, citing Evid. Code, § 623.) Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) the party being estopped must either intend its word or conduct to be acted upon or cause the other party to believe that such was the intent; (3) the other party must be ignorant of the facts; and (4) the other party must rely on the first party's conduct to its detriment. (*Santa Ana Unified School District* (2013) PERB Decision No. 2332, p. 22, citing *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 493.)

Insofar as this question concerns their own operations, there is no reasonable dispute that the Charter Schools and Alliance have always been apprised of the facts at issue. Nor can there be any doubt that they had the requisite intent, since all of their statements denying the existence of a single-employer entity occurred both in the context of an ongoing organizing campaign and unfair practice charge proceedings; thus, they knew UTLA would likely take responsive actions based on these denials.

Similarly, the record reflects that UTLA had much less access to the relevant information and was therefore missing the knowledge it would need to disregard the assertions of separateness and autonomy. Therefore, as in most cases, the application of the doctrine here turns on the presence of detrimental reliance.

"The sine qua non of estoppel is that the party claiming it relied to its detriment on the conduct of the party to be estopped." (*Orange County Water Dist. v. Association of Cal. Water etc. Authority* (1997) 54 Cal.App.4th 772, 780.) UTLA and the teachers it seeks to represent demonstrated detrimental reliance by altering their course and filing petitions at individual schools, thereby aligning their position with the schools' claim of separateness in order to avoid, or so they thought, further litigation over functional integration and autonomy. We find UTLA's reliance was reasonable in this case. Indeed, on January 23, 2018, Alliance's Chief Advancement Officer, Catherine Suitor, sent an e-mail to all teachers at every Alliance-affiliated school with the subject "Good News!" in which she announced the Board's decision in *Alliance* and stated, "PERB upheld Alliance's decentralized school network model that recognizes the autonomy of local Alliance schools."[33] On the basis of these representations, UTLA and the teachers adopted a new school-by-school organizing

[33] Alliance distributed this e-mail before it complied with the Board's order in *Alliance* to post a remedial notice. UTLA did not file a charge or compliance complaint regarding this e-mail, so we have no occasion to consider whether it constitutes an unlawful side-notice. (See, e.g., *Bangor Plastics, Inc*. (1966) 156 NLRB 1165, 1167 (1966), enf. denied 392 F.2d 772 (6th Cir. 1967) [Posting or otherwise disseminating to employees a letter or other written communication constitutes noncompliance with a Board order where the communication attempts to "minimize the effect of the Board's notice" and "suggests to employees that the Board's notice is being posted as a mere formality and that Respondent's true sentiments are to be found in its own notice, not the Board's].)

strategy. By so doing, in the context of an organizing campaign, we find UTLA's change in course is sufficient to demonstrate that it relied to its detriment on the representations of Alliance and the Charter Schools.

While there are no PERB cases directly on point, we find a legal foundation for the kind of detrimental reliance present here by analogizing to a decision of the NLRB. In *Red Coats* (1999) 328 NLRB 205, the NLRB applied a substantially similar formulation of the equitable estoppel doctrine to find that the employer was estopped from withdrawing recognition from a union based on alleged inappropriateness of units, as it previously had voluntarily recognized the union as the representative of the challenged units and, in fact, had insisted upon bargaining in the challenged single-location units. (*Id*. at p. 206.) This act of insisting on the single-location units induced the union to believe that the employer would not challenge the appropriateness of the units: "The Union, acting on its belief regarding the Respondent's intentions, relied to its detriment on the Respondent's actions. Had the unit appropriateness been promptly challenged, the Union would have been in a stronger position at that time either to commence a companywide organizing campaign or to seek the Board's processes to establish itself as the representative of the employees." (*Ibid*.) Here, the repeated representations of the Charter Schools and Alliance to the Board, UTLA, and the teachers that the schools were autonomous and separate led UTLA to believe that single-school units would not be challenged.[34] Had Alliance instead agreed with

[34] The dissent improperly dismisses UTLA's evidence on this point as uncorroborated hearsay evidence because UTLA relied on its organizer, Fuentes, and did not call individual teachers to explain the shift in strategy. However, we rely on Fuentes' testimony and the teachers' statements to her to explain UTLA and AEU's

UTLA's initial position that the network of affiliated charter schools were functionally integrated, then UTLA could have continued its original system-wide organizing campaign without fear of having to keep litigating issues of functional integration and autonomy. But in light of Alliance's own communications and legal positions, UTLA accommodated the schools' representations, only to have the schools cynically begin asserting their interdependence and functional integration.[35]

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state of mind attending their subsequent actions of, viz. the filing of the separate petitions, which are themselves not hearsay. (See *Alexander v. Community Hospital of Long Beach* (2020) 46 Cal.App.5th 238 ["An out-of-court statement is not hearsay if offered to prove something other than its truth, for example to explain an action the recipient took in reliance upon it"].) In any event, even if the statements were offered for the truth of the matters asserted and not as circumstantial evidence explaining a course of conduct, the parties to a representation proceeding are not bound by the technical rules of evidence and may proffer hearsay evidence especially if it corroborates other evidence, as it does here, i.e., the petitions themselves. (PERB Reg. 32175.) We also reject the dissent's contention that Fuentes is not credible simply because she is a UTLA staff organizer. Indeed, the notion that a staff person's testimony is inherently biased and thus unreliable would undermine the credibility of all the Charter Schools' witnesses. Finally, we reject the dissent's contention that UTLA changed its organizing strategy only because it could not successfully organize all the schools at once. There is no evidence in the record to support this inference. And even if UTLA felt forced to proceed only where it had super-majorities in an effort to focus its resources rather than mount simultaneous bargaining campaigns at too many tables, such conduct also demonstrates reliance upon the schools' representations.

[35] We note that UTLA, too, has shifted its position since the earlier cases noted above. However, the Charter Schools' inconsistent positions are more significant for four main reasons. First, in most cases, including here, employers have easier access to facts and therefore cannot rely on having pleaded facts on information and belief. Second, the Charter Schools have the burden of proof in this case, because each school has individually represented to the State of California that it is, by itself, a "public school employer," meaning the Charter Schools have the burden to overcome that representation. Third, even if the Charter Schools could meet this burden, it is also the Charter Schools' burden to prove that there is only one appropriate unit, rather than a

Therefore, we find that UTLA has successfully established all the elements of equitable estoppel and that the Charter Schools should be prevented from asserting that functional integration and/or single employer status means that the only appropriate unit is a network-wide one.

C. Even Absent Estoppel, The Charter Schools' Inconsistent Statements Further Confirm They Cannot Prove That Only A Network-Wide Unit Is Appropriate

Even if UTLA could not establish that the Charter Schools are estopped from asserting that functional integration and the Charter Schools' related representations bar school-by-school units, we would still not find they have met their burden to prove that the only appropriate unit is a network-wide one. Aside from our discussion *ante* regarding differences between the instant case and *CAVA*, as well as the reality that more than one unit configuration is often appropriate, we note that the Charter Schools have not given a reasonable or persuasive account of their shifting positions. Indeed, in the post-hearing briefs, the Charter Schools do not even touch upon the above-described past inconsistent declarations and sworn testimony.[36] This failure to

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choice of a network-wide or school-by-school configuration. Finally, and perhaps most importantly, estoppel and related principles of justice turn on whether a tribunal or the opposing party has relied on a particular representation, and in this case we do not find any material reliance on UTLA's past positions. In fact, once UTLA relied on the Charter Schools' representations about autonomy and filed school-by-school petitions, UTLA had little choice but to change its position. UTLA's reliance on the schools' position, and its resulting attempt to brings its position in harmony with the schools, is simply not of the same character as the schools' brazenly conflicting factual contentions in the service of frustrating statutory rights at every turn.

[36] In their initial position statements and joint opposition to UTLA's pre-hearing motion for summary judgment, the Charter Schools claimed that Alliance offered sworn testimony attesting to the unintegrated nature of its affiliated schools only as part of its

address the conflicting positions is relevant for several reasons. (See *Ventura*, *supra*, PERB Decision 2600-M, p. 19, fn. 23 [failure to adequately explain inconsistent sworn statements leads to negative inference concerning single-employer status].)

First, the Charter Schools' past positions constitute another reason they have failed to carry their burden to prove that they are part of a single-employer, and, even if they are part of such a construct, they have failed to prove that only a network-wide unit is appropriate. It is unreasonable to take inconsistent positions on facts and issues of such central importance and expect the Board to find that a brand new position renders UTLA's proposed units inappropriate. Furthermore, it is well-established that "under the rules of evidence, prior inconsistent statements, whether or not they are under oath, may be admitted to prove the truth of the matter asserted as well as for impeachment." (*The Swahn Group* (2010) 183 Cal.App.4th 831, 847.) Thus, regardless of the applicability of judicial or equitable estoppel, Alliance's

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effort to defeat a "vertical" application of the single-employer doctrine, i.e. an application that would find that the Alliance CMO was part of the single-employer. They further claimed that Alliance never directly opposed a "horizontal" application of the single-employer doctrine, i.e. one premised on the unity of the schools themselves. However, none of the inconsistent factual assertions at issue tracked this supposed distinction; rather, the schools denied the very facts they now espouse regarding integration and common control. And in any case, in at least two critical filings in opposition to UTLA's motions to amend the complaints to include all network schools, Alliance and the schools successfully objected to any suggestion that the schools were part of an integrated enterprise (see discussion, *ante* at pp. 37-39). Similarly, in PERB Case Nos. 6165 and 6204, Alliance opposed a motion to name all schools within the Alliance Network as a "horizontal single-employer" and refused to stipulate to any such relationship. Thus, even assuming for the sake of argument that the Charter Schools attempted to address differences in their past legal position, the proffered explanation does not track its actual shifts in arguments, and would in any event not explain past inconsistent factual representations.

inconsistent factual assertions are admissible both to impeach and disprove the Charter Schools' current contentions. Since the extent of those inconsistent statements is so great as to touch upon every aspect of the Charter Schools' current position, these past statements further strengthen our finding that school-by-school units are at least one appropriate unit configuration.

Second, in the absence of any reasonable explanation for these inconsistent statements, and in view of the Alliance schools' determined opposition to the unionization of teachers, we infer that the Charter Schools shifted their position after UTLA filed these petitions for recognition as part of a longstanding effort to defeat the organizational rights of employees. In order to grasp the import of these inconsistent statements, it is necessary to consider the context in which they were made. That is, when faced with unfair practice charges concerning its conduct at the various charter schools, Alliance and its affiliated schools relied on their separate status and took the position that each school was a single ship upon the sea, captained by autonomous principals.[37]

In this way, Alliance and Alliance-affiliated schools sought to restrict liability to those schools that were individually named in the charges or complaints, and they

[37] Indeed, consistent with this position, the schools named in the consolidated complaint in PERB Case Nos. LA-CE-6061-E and LA-CE-6073-E (including Gertz/Merkin) went so far as file an answer in which they denied having any knowledge about the factual allegations pertaining to other schools, including whether those schools were even public school employers, thus maintaining with firm conviction the notion that one school had nothing to do with another. (See, e.g., *Magnolia Square Homeowners Assn. v. Safeco Ins. Co.* (1990) 221 Cal.App.3d 1049, 1061 [pleadings may properly be considered as evidentiary admissions or prior inconsistent statements].) These denials, which the dissent does not even acknowledge, belie the Charter Schools' present contention that they belong to one, fully integrated enterprise.

strenuously objected to any effort to name all the schools as a network even in instances where the unfair conduct was clearly common to all schools, e.g. allegedly unlawful e-mail communications from Alliance to employees at every school. For instance, as discussed *ante* at p. 37-39, in opposition to UTLA's motion to amend the complaint in *Alliance*, the respondent-school argued that there was no basis for naming all schools as respondents on any theory of liability because each was separate and governed by its own principal and board of directors. The schools repeated these arguments in other cases, like PERB Case Nos. LA-CE-6165-E and LA-CE-6204-E, always with the object of using the corporate form to limit liability to certain schools.

Once UTLA filed the petitions at issue here, the Charter Schools took the contrary position, claiming the Charter Schools lacked autonomy, and only a network-wide unit could be appropriate. But they never filed amended position statements in any of the pending unfair practice cases to admit that all schools actually belonged to a fully integrated enterprise (contrary to prior representations), nor did they take any action to correct the record in those cases. Rather, the Charter Schools simply shed the concepts of separateness and autonomy when they were no longer useful.

In other words, when UTLA sought to hold Alliance schools liable for unfair practices, they demanded that UTLA fight them one-by-one; but once UTLA sought recognition and to bargain, the Charter Schools suddenly demanded that UTLA take on all of them. We must infer there is one clear explanation for this conduct: Alliance and the Charter Schools believed that these inconsistent factual assertions would help defeat UTLA in both types of cases. Such a patent misuse of the corporate form is

akin to unlawful unit packing in that it is clearly intended to dilute the showing of support and thus interfere with the organizational rights of employees and their unions. (Cf. *Sonoma Mission Inn & Spa* (1977) 322 NLRB 898 [an employer unlawfully interferes with employee rights if it misuses its hiring power to introduce a substantial number of new employees prior to a representation election in order to "pack the unit" and thereby dilute the union's strength]; see also *County of Lassen* (2018) PERB Decision No. 2612-M, p. 6 [employer's about-face is unlawful interference and discrimination, where it is motivated by protected activity].) We will not reward such conduct that frustrates the right to representation, especially as longstanding precedent regarding unit determinations holds that employer efficiency does not outweigh employees' right to be represented. (*CAVA*, *supra*, PERB Decision No. 2484, p. 82.)[38]

Thus, in addition to the Charter Schools' failure to carry its burden to prove the existence of a single-employer and that only a network-wide unit is appropriate, we conclude it would be inequitable to dismiss these petitions on the basis of such arguments. Doing so would place the employer's new efficiency argument, brazenly adopted as a litigation tactic, above representational rights.

III. The Charter Schools Have Also Failed to Explain How Network-Wide Representation and Bargaining Would Have Worked, Given PERB's Lack of Direct Jurisdiction Over the CMO

[38] The dissent suggests that shifting positions is a legitimate litigation tactic. We do not have before us any motion for attorney fees, and we therefore express no opinion on issues of bad faith. However, a party that knowingly makes one set of factual representations and then shifts to inconsistent representations must be aware that it could face estoppel-type claims or, at the very least, be unable to meet its burden of proof due to the self-contradictory record it has created.

Since the Charter Schools have not met their burden to prove that they have a single employer relationship with one another and with the employees of all Alliance-affiliated schools, it is arguably unnecessary to consider their additional arguments concerning the appropriateness of a "Network-wide" unit. (See, e.g., *Turlock*, *supra*, PERB Order Ad-18 and *Paso Robles*, *supra*, PERB Decision No. 85 [petitions seeking single-employer bargaining unit dismissed without addressing the appropriateness of what amounted to a multi-employer bargaining unit].)[39] But even were we to find that the Alliance Network of similarly branded schools satisfies the single-employer test, we would not conclude that a single unit of all teachers within the Network was appropriate. This is because the Charter Schools noticeably fail to address how a network-wide unit would have worked given that the head of the putative integrated enterprise, i.e. Alliance itself, was beyond our jurisdiction as of the time the petitions were filed. On what singular entity, for instance, would UTLA serve demands for recognition, demands for information, grievances, and bargaining proposals? The schools have offered neither a clear answer nor reason to believe that they would work to solve this issue. Instead, the record reflects the likelihood that some or all of the schools would continue using their corporate forms in creative ways at different times, for litigation purposes.[40]

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[39] Of course, nothing in this decision prevents the parties from agreeing to engage in multi-employer bargaining.

[40] In *CAVA*, where there was no history of using the corporate form to escape liability, the union was willing to brave the challenge of bargaining even without PERB jurisdiction over the CMO. That union's choice to seek a network-wide unit in the differing circumstances there do not bind all future unions to make the same choice.

"Meaningful negotiation can only occur where the employer has the authority and ability to reach agreement with the duly selected representative of its employees about those matters within the scope of representation." (*Paso Robles*, *supra*, PERB Decision No. 85 at p. 10.) In view of the Charter Schools' present contention that Alliance plays a predominant role in the management of the Alliance Network, we cannot conclude that employees' only avenue for representation requires their willingness to band together into a network-wide unit, even absent a network-wide entity with which to bargain. UTLA would have had no power to compel Alliance, the omnipresent yet untouchable hand supposedly controlling the Network, to comply with any of the duties imposed by EERA. Rather than fostering good faith negotiations, such a mandated single-employer unit would frustrate the very purposes and policies of collective bargaining; unlike the dissent, we are confident that the unit determination criteria of EERA do not require such an inequitable result.[41] Particularly in light of the

[41] As noted *ante*, the only arguable jurisdiction we had over Alliance CMO as of the time UTLA filed the petitions would have been based on the CMO acting as an agent of a school. In that regard, we note that an agency finding would not be possible unless we first had jurisdiction over an actual legal entity capable of authorizing, ratifying or benefitting from conduct by Alliance CMO. For the reasons discussed throughout this decision, the schools themselves were the proper legal entities, as of when UTLA filed the petitions.

Furthermore, it is important to note that even in those cases in which the single employer test is satisfied, such a relationship does not create a new legal entity. Indeed, we do not have the power to create a new entity where none exists. Rather, the purpose of the single employer doctrine, like the joint employer doctrine, is to determine whether certain employees are as a matter of law employed by entities that are not their putative employers. Here, the Charter Schools' argument in favor of a single employer relationship, even if proven, would only have meant that all of the schools' teachers were employed as a matter of law by all of the schools. No new legal entity would be

Charter Schools' shifting, self-serving contentions regarding their autonomy, we decline to compel UTLA to seek a network-wide unit centered around an entity that is beyond our jurisdiction.

For all of these reasons, we certify UTLA as the exclusive representative of employees in the petitioned-for bargaining units, retroactive to the date UTLA filed its petitions.

ORDER

Based on the foregoing and the entire record in this matter, the Public Employment Relations Board hereby ORDERS that the Requests for Recognition filed by the United Teachers of Los Angeles are GRANTED. It is hereby CERTIFIED that the United Teachers of Los Angeles is and has been the exclusive representative of employees in the following units, retroactive to May 2, 2018, the date of the filing of the petitions.

PERB Case No. LA-RR-1281-E (Alliance Judy Ivie Burton Technology Academy High)

INCLUDING: All certificated educational personnel including, but not limited to, certificated teachers; psychologists; counselors; social workers; ELD specialists; special education coordinators; education specialists; resource teachers; substitutes employees employed by the employer; and teachers holding other equivalent documents pursuant to Education Code section 47605 subdivision (l).

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created with which UTLA could bargain. We have taken this reality into account, *ante*, in explaining the difficulty in involuntarily forcing UTLA into such a relationship with multiple schools that have declared themselves individually to be separate employers, particularly where we lack jurisdiction over the CMO linking them together.

EXCLUDING: All other employees, including Management, Supervisory, and Confidential employees as defined in EERA section 3540.1.

PERB Case No. LA-RR-1282-E (Alliance College-Ready Middle Academy No. 5)

INCLUDING: All certificated educational personnel including, but not limited to, certificated teachers; psychologists; counselors; social workers; resource teachers; substitutes employees employed by the employer; and teachers holding other equivalent documents pursuant to Education Code section 47605 subdivision (l).

EXCLUDING: All other employees, including Management, Supervisory, and Confidential employees as defined in EERA section 3540.1.

PERB Case No. LA-RR-1283-E (Alliance Gertz-Ressler/Richard Merkin 6-12 Complex)

INCLUDING: All certificated educational personnel including, but not limited to, certificated teachers; psychologists; counselors; social workers; substitutes employees employed by the employer; and teachers holding other equivalent documents pursuant to Education Code section 47605 subdivision (l).

EXCLUDING: All other employees, including Management, Supervisory, and Confidential employees as defined in EERA section 3540.1.

Members Krantz and Paulson joined in this Decision.

Member Shiners' dissent begins on page 54

SHINERS, Member, dissenting: I respectfully dissent from the majority's decision to certify separate bargaining units of certificated employees at three of the 25 charter schools affiliated with the Alliance College-Ready Public Schools charter management organization.[42] The crux of these consolidated cases is whether the three Charter Schools named in the representation petitions filed by United Teachers Los Angeles (UTLA) are individual public school employers or constituent parts of a single integrated public school employer composed of all charter schools affiliated with the Alliance CMO. The evidence before us clearly shows the schools in the Alliance Network constitute a single employer under *California Virtual Academies* (2016) PERB Decision No. 2484 (*CAVA*). The evidence also is insufficient to rebut the statutory presumption, as articulated in *Peralta Community College District* (1978) PERB Decision No. 77 (*Peralta*), that a network-wide bargaining unit is the appropriate unit for certificated employees of the Alliance Network schools. Because the petitioned-for single school units are not appropriate, I would deny the representation petitions in these cases.

[42] Unless otherwise stated, in this dissent: (1) "Alliance" or "CMO" refers to the Alliance College-Ready Public Schools charter management organization; (2) "Alliance Network" or "Network" refers to the 25 charter schools affiliated with the CMO; (3) "Alliance Parties" refers to the CMO and any Alliance-affiliated charter schools named as respondents in unfair practice cases before PERB; and (4) "Charter Schools" refers to the three charter schools named in the representation petitions at issue in this case—Alliance Judy Ivie Burton Technology Academy High (Case No. LA-RR-1281-E), Alliance College-Ready Middle Academy No. 5 (Case No. LA-RR-1282-E), and Alliance Gertz-Ressler/Richard Merkin 6-12 Complex (Case No. LA-RR-1283-E).

A. Estoppel

Rather than grappling with the merits of the single employer issue, the majority sidesteps the issue by finding two types of estoppel preclude the Charter Schools from arguing that the schools in the Alliance Network constitute a single employer. For the following reasons, neither form of estoppel applies here.[43]

1. Judicial Estoppel

Although not raised or briefed by the parties, the majority invokes the doctrine of judicial estoppel to bar the Charter Schools from arguing that the Alliance Network schools constitute a single employer. I find no basis to apply judicial estoppel here.

"Judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, prevents a party from advocating a position in a legal proceeding that is contrary to a position taken previously in the same or some earlier proceeding. [Citation.] The doctrine is invoked to prevent a party from changing its position over the course of litigation when such positional changes have an adverse impact on the judicial process." (*Trustees of the California State University* (2008) PERB Decision No. 1949-H, p. 9.) Judicial estoppel may be applied "when: (1) the same party has taken two positions; (2) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (3) the positions were taken in judicial or quasi-judicial administrative proceedings; (4) the two positions are totally inconsistent;

[43] While the Board has never held that estoppel cannot apply in a representation case, it has refused to allow the parties' conduct to waive or override PERB's statutory duty to determine appropriate bargaining units. (*Regents of the University of California* (2010) PERB Decision No. 2107-H, pp. 18-19; *Hemet Unified School District* (1990) PERB Decision No. 820, p. 5; see also, Gov. Code, § 3541.3, subd. (a) [granting PERB the authority and obligation "[t]o determine in disputed cases, or otherwise approve, appropriate units"].)

and (5) the first position was not taken as a result of ignorance, fraud, or mistake." (*Id.* at p. 10; *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 181, 183 (*Jackson*).)

Here, three of the elements for judicial estoppel are met. In two prior consolidated unfair practice cases (LA-CE-6025-E & LA-CE-6027-E and LA-CE-6061-E & LA-CE-6073-E),[44] the Alliance Parties argued that the schools in the Alliance Network were not part of a single employer; in this case, the Charter Schools argue that the schools in the Alliance Network constitute a single employer. Both positions were taken in quasi-adjudicative proceedings before PERB, and there is no evidence the Alliance Parties took the first position "as a result of ignorance, fraud, or mistake."

The positions taken by the Alliance Parties and the Charter Schools, however, are not "totally inconsistent." For judicial estoppel to be invoked, "the seemingly conflicting positions must be clearly inconsistent so that one necessarily excludes the other." (*Jackson*, *supra*, 60 Cal.App.4th at p. 182, internal quotations omitted.) In the two prior cases, the Alliance Parties argued that the Network schools were not a single employer *with the Alliance CMO*. In this case, the Charter Schools argue that the Network schools constitute a single employer *without the Alliance CMO*. As demonstrated in *CAVA*, a network of charter schools affiliated with the same charter management organization may constitute a single employer separate from the management organization. (*CAVA*, *supra*, PERB Decision No. 2484, pp. 66-67.) Thus, a finding that the Network schools do not constitute a single employer with the

[44] LA-CE-6025-E & LA-CE-6027-E were decided by the Board in *Alliance College-Ready Public Schools* (2017) PERB Decision No. 2545 (*Alliance I*). LA-CE-6061-E & LA-CE-6073-E were decided by the Board in *Alliance College-Ready Public Schools* (2020) PERB Decision No. 2716, issued concurrently with this decision.

Alliance CMO does not necessarily exclude a finding that the Network schools constitute a single employer without the CMO.

Furthermore, "[t]he inconsistent position generally must be factual in nature." (*ABF Capital Corp. v. Berglass* (2005) 130 Cal.App.4th 825, 832.) Thus, "judicial estoppel is usually limited to cases where a party misrepresents or conceals material facts." (*California Amplifier, Inc. v. RLI Ins. Co.* (2001) 94 Cal.App.4th 102, 118.) Here, with minor exceptions, the parties presented the same evidence on the single employer issue in the two prior cases as they did in this case.[45] A thorough review of the record in all three cases reveals no basis for finding that the Alliance Parties misrepresented or concealed material facts in the two prior cases.

Finally, the Alliance Parties were not successful in asserting their first position, viz., that the Network schools are not part of a single employer relationship. In each of the prior two cases, an administrative law judge (ALJ) held that the Network schools constituted a single employer along with the Alliance CMO. In neither case was the Alliance Parties' assertion of school autonomy or independence successful. Consequently, allowing the Charter Schools to argue that the Network schools constitute a single employer does not create a risk that PERB will make an inconsistent ruling in this case. (See *The Swahn Group, Inc. v. Segal* (2010) 183 Cal. App. 4th 831, 846, quoting *New Hampshire v. Maine* (2001) 532 U.S. 742, 750-751 ["Absent success in a prior proceeding, a party's later inconsistent position introduces no 'risk of

[45] Even conflicting evidence would not necessarily support applying judicial estoppel. "Judicial estoppel is applied with caution to avoid impinging on the truth-seeking function of the court because the doctrine precludes a contradictory position without examining the truth of either statement." (*Jogani v. Jogani* (2006) 141 Cal.App.4th 158, 175, quotations and citation omitted.)

inconsistent court determinations,' [citation], and thus poses little threat to judicial integrity."].) In fact, the risk of inconsistent rulings is greatly diminished when both cases are before the same tribunal, which can evaluate both positions and reach "an internally consistent final decision." (*Jackson*, *supra*, 60 Cal.App.4th at p. 181.)

The majority finds the Alliance Parties were successful in asserting their first position in opposition to prehearing motions in consolidated cases LA-CE-6061-E & LA-CE-6073-E. In those cases, the ALJ denied UTLA's motion to amend the complaints to name all Network schools as respondents based on declarations from Alliance administrators asserting that each of the schools operates autonomously from the others and from the CMO. Nevertheless, neither the Board nor any PERB ALJ has ever found that the Network schools operate independently of one another such as to preclude a single employer relationship between them.

In its response to the Alliance Parties' cross-exceptions in *Alliance I*, *supra*, PERB Decision No. 2545, UTLA belatedly raised the issue of the single employer status of the Network schools without the CMO. The Board declined to address the issue on the merits because the unalleged violation doctrine was not satisfied. (*Id.* at p. 14.) In doing so, the Board explicitly recognized that the issue remained open: "Our conclusion that the issue of whether the network of 27 Alliance charter schools comprise a single employer was not properly raised or litigated in this case in no way forecloses UTLA from demonstrating in a future case that those schools do comprise a single employer (e.g., *CAVA*, *supra*, PERB Decision No. 2484)." (*Id.* at pp. 14-15.) After *Alliance I*, UTLA explicitly acknowledged this issue remained open when it entered into a

stipulation in consolidated Case Nos. LA-CE-6165-E & LA-CE-6204-E[46] that stated, in relevant part, "by agreeing to this stipulation, the parties do not waive any rights in this proceeding or subsequent proceedings to . . . make alternative arguments regarding the nature of the employer, including whether the network of public charter schools constitutes a single employer." The stipulation was executed on February 16, 2018—three months before the petitions in the instant case were filed. In light of the Board's and UTLA's recognition that the issue remains open, judicial estoppel does not bar the Charter Schools from arguing that the schools in the Alliance network constitute a single employer.

In this case, the parties have swapped legal arguments in service of their current litigation objectives.[47] Absent evidence that either party tried to mislead PERB in the two prior cases, this swap "is a reasonable litigation tactic [that] does not undermine the integrity of the judicial process." (*California Amplifier, Inc. v. RLI Ins. Co.*, *supra*, 94 Cal.App.4th at p. 118; see *Kitty-Anne Music Co. v. Swan* (2003) 112 Cal.App.4th 30, 35-36 [judicial estoppel did not bar a party from moving for summary judgment based on the same evidence underlying a prior summary judgment motion that party had successfully opposed].) Accordingly, judicial estoppel does not bar the Charter Schools' single employer argument.

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[46] These consolidated cases were decided by the Board in *Alliance Environmental Science and Technology High School* (2020) PERB Decision No. 2717, issued concurrently with this decision.

[47] Indeed, the single employer argument in UTLA's post-hearing briefing in cases LA-CE-6061-E & LA-CE-6073-E is remarkably similar to the single employer argument in the Charter Schools' post-hearing briefing in this case.

2. Equitable Estoppel

UTLA argues, and the majority finds, that the doctrine of equitable estoppel bars the Charter Schools from making a single employer argument. But the facts necessary to support equitable estoppel are not present here.

"Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it." (*Moncada v. West Coast Quartz Corp.* (2013) 221 Cal.App.4th 768, 782, internal citations omitted.) Generally, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) the party being estopped must either intend its word or conduct to be acted upon or cause the other party to believe that such was the intent; (3) the other party must be ignorant of the facts; and (4) the other party must rely on the first party's conduct to its detriment. (*Santa Ana Unified School District* (2013) PERB Decision No. 2332, p. 22, citing *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 493.)

As the majority notes, "[t]he sine qua non of estoppel is that the party claiming it relied to its detriment on the conduct of the party to be estopped." (*Orange County Water Dist. v. Association of Cal. Water etc. Authority* (1997) 54 Cal.App.4th 772, 780.) The record here falls far short of proving detrimental reliance by UTLA.

To establish reliance, UTLA relies solely on testimony from one of its paid organizers, Zenaida Perez Fuentes (Fuentes). Fuentes testified that in response to an e-mail to Network school employees from Alliance Chief Advancement Officer Catherine Suitor (Suitor) stating, "PERB upheld Alliance's decentralized school network model that recognizes the autonomy of local Alliance schools," the Alliance Educators United

organizing committee, over the course of three meetings Fuentes attended from February through April 2018, decided to change course and organize on a school-by-school basis instead of network-wide. Fuentes testified that she did not participate in these discussions but was merely present when they occurred. None of the organizing committee members testified about these meetings or about their decision-making process. Nor did UTLA introduce any documentary evidence showing what was discussed at the three organizing committee meetings.

Fuentes' testimony about what the organizing committee members said is hearsay.[48] The regulation governing representation hearings does not prohibit consideration of hearsay evidence. (See PERB Reg. 32175 ["Compliance with the technical rules of evidence applied in the courts shall not be required."].) Nonetheless, we must take the hearsay nature of Fuentes' testimony into account when determining how much evidentiary weight to give it. (*Trustees of the California State University (San Marcos)* (2004) PERB Decision No. 1635-H, p. 6.) Hearsay testimony should only be given weight when it is "the kind of relevant matter upon which responsible persons customarily rely in the conduct of serious affairs." (*Skip Fordyce, Inc. v. Workers'*

[48] I disagree with the majority's claim that UTLA did not offer Fuentes' testimony for the truth of the matter asserted. Fuentes did not testify that she made a particular decision in response to what the organizing committee said, which might have implicated the state of mind exception to the hearsay rule the majority cites. Rather, she testified as to what the organizing committee members said was the reason for their change from a network-wide organizing strategy to a school-by-school organizing strategy. This testimony clearly was offered to prove the truth of the assertion that the organizing committee changed its strategy in reliance on Alliance's position that each of the Network schools was autonomous. It therefore is hearsay.

Comp. Appeals Bd. (1983) 149 Cal.App.3d 915, 927, internal quotations and citation omitted.)

I decline to credit Fuentes' hearsay testimony for two reasons. First, she was not a neutral witness but a paid agent of UTLA involved in implementing its organizing strategy. Fuentes thus had reason to slant her testimony in favor of UTLA's litigation objectives.[49] (See *Morgan Hill Unified School District* (1985) PERB Decision No. 554, pp. 13-14 [discrediting witness's testimony when he had an interest in shaping his testimony to vindicate his position].) Second, had any of the actual decisionmakers testified or had UTLA presented documentary evidence of the discussions at the organizing committee meetings, such evidence would show whether the reasons testified to by Fuentes were the actual reasons for UTLA's change in strategy. (See *California Virtual Academies* (2018) PERB Decision No. 2584, p. 35, citing Evid. Code, § 412 ["If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust."].) As it is, the only evidence about UTLA's reason for the change other than Fuentes' testimony was the organizing committee's May 4, 2018 newsletter saying UTLA now was filing petitions on a school-by-school basis because "[f]iling by schools is consistent with what PERB has ruled in recent decisions related to Alliance." In the complete absence of any credible evidence to support it, I decline to give Fuentes' post-hoc, self-serving testimony about the reasons for UTLA's change in

[49] The witness's "bias, interest or motive" is relevant in determining the credibility of testimony. (*State of California (Department of Corrections and Rehabilitation)* (2012) PERB Decision No. 2285-S, p. 10, fn. 15, citing Evid. Code, § 780.)

strategy any weight.[50] (See *Palo Verde Unified School District* (2013) PERB Decision No. 2337, p. 12 ["the Board is free to draw inferences from all the circumstances, and need not accept [a witness's] self-serving declarations of intent, even if they are uncontradicted."].)

Moreover, the record establishes other possible reasons for the organizing committee's change in strategy. (See *County of Riverside* (2018) PERB Decision No. 2591-M, pp. 16-17 [in addition to those assertions posited by the parties, PERB is free to draw "other reasonable explanations" from the evidence before it].) As UTLA's post-hearing brief admits, "the Schools where employees filed for recognition are the Schools where the union has supermajority support and therefore where there is a strong extent of organization." An inference could be drawn that UTLA changed its strategy because of its success organizing at certain schools but not others.[51]

Further, Suitor's e-mail upon which the organizing committee purportedly relied announced the decision in *Alliance I*, *supra*, PERB Decision No. 2545, in which the Board ruled that the Network schools were not a single employer with the Alliance CMO. Fuentes testified there was discussion of the *Alliance I* decision at one of the organizing committee meetings in early 2018. On May 4, 2018, the organizing committee issued a newsletter saying UTLA now was filing petitions on a school-by-

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[50] The "existence or nonexistence of facts testified to" is another relevant factor in determining the credibility of witness testimony. (*State of California (Department of Corrections and Rehabilitation)*, *supra*, PERB Decision No. 2285-S, p. 10, fn. 15, citing Evid. Code, § 780.)

[51] The majority claims there is no evidence in the record to support this inference. But one need only look to the petitions filed in these consolidated cases to find such evidence.

school basis because "[f]iling by schools is consistent with what PERB has ruled in recent decisions related to Alliance." An inference could be drawn that UTLA changed its strategy based on the Board's ruling in *Alliance I*, *supra*, PERB Decision No. 2545.

Because the actual decisionmakers did not testify, these other potential reasons for the change in strategy cannot be ruled out. As a result, UTLA failed to prove Alliance's statements were the actual reason it changed to school-by-school organizing—the essential factual predicate for equitable estoppel. (See *Stephens & Stephens XII, LLC v. Fireman's Fund Ins. Co.* (2014) 231 Cal.App.4th 1131, 1149 [no equitable estoppel where property owner failed to prove the insurer's alleged nondisclosure of policy provisions was the cause of the owner's failure to make a claim, especially as the owner was "a sophisticated professional owner of real estate" who had been advised by a broker in its dealings with the insurer].)[52]

In sum, neither judicial nor equitable estoppel bars the Charter Schools from arguing that the network of Alliance-affiliated schools constitutes a single employer.

B. Single Employer Status

In deciding whether to grant a representation petition filed under the Educational Employment Relations Act (EERA), PERB must first ascertain the identity of the "public school employer" before determining whether the petitioned-for unit of that employer's employees constitutes an appropriate unit for purposes of collective bargaining. (*CAVA*, *supra*, PERB Decision No. 2484, pp. 49, 52 [before reaching the

[52] Additionally, although the lack of detrimental reliance is fatal to UTLA's equitable estoppel claim, UTLA also failed to prove it was ignorant of the true facts about the Alliance Network's organizational structure given that, at the time of the change in organizing strategy, UTLA had favorably litigated the single employer issue twice before PERB on largely the same facts presented in this case.

appropriate unit question and applying the attendant *Peralta* presumption, PERB "must first decide the threshold issue" of employer status]; see also, *Ravenswood City Elementary School District* (2004) PERB Decision No. 1660 (*Ravenswood*), p. 5 (conc. opn. of Whitehead, M.) ["It is this Board's responsibility to determine the identity of the public school employer for purposes of compliance with EERA."].) Here, the Charter Schools argue they are not individual public school employers, but rather part of a single public school employer along with the remainder of the Alliance Network schools.

A single employer relationship "exists where two [or more] nominally separate entities are actually part of a single integrated enterprise so that there is, in reality, only a single employer." (*CAVA, supra,* PERB Decision No. 2484, p. 64, original bracketed insertion, citing *El Camino Hospital District* (2009) PERB Decision No. 2033-M (*El Camino*), p. 18.)[53] PERB considers four factors in assessing a single employer claim: (1) functional integration of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or common financial control. (*CAVA, supra,* PERB Decision No. 2484, p. 64.) "It is well recognized that many cases involving single employer status involve evidence of commonality as well as evidence of independent operations." (*Ibid*.) Thus, single employer status does

[53] As noted in *County of Ventura* (2018) PERB Decision No. 2600-M, *Alliance I* overruled *El Camino*'s holding that PERB may assert jurisdiction over a private entity under a single employer theory. (*County of Ventura*, *supra*, PERB Decision No. 2600-M, p. 22, fn. 25.) *Alliance I* did not, however, overrule the single employer analysis in *El Camino*, which the Board majority in *County of Ventura* relied upon in finding a single employer relationship between the county and private medical clinics over which PERB has no jurisdiction. (*County of Ventura*, *supra*, PERB Decision No. 2600-M, p. 27.)

not require the presence of all four factors nor is any single factor controlling, though the first three are more critical than the fourth. (*Ibid*.) Accordingly, we must conduct a fact-intensive, case-by-case analysis to determine the employer's true identity. (*Ibid*.) The burden of proof is on the Charter Schools as the party asserting single employer status. (*Id.* at p. 52.)

Preliminarily, in setting aside the single employer analysis, the majority suggests UTLA had a strong basis for naming each individual Charter School as the "public school employer" in its petitions for recognition, citing each schools' statutorily-mandated charter declaring them to be the "exclusive public school employer of all employees of the charter school for collective bargaining purposes."[54] (See EERA, § 3540.1, subd. (k) [including in its definition of a "public school employer" any "charter school that has declared itself a public school employer pursuant to [Ed. Code, § 47611.5, subd. (b)]"].) The majority thus finds the Charter Schools' charter declarations sufficient to establish them as individual employers. But this places too much significance on the charter declarations themselves.

As the Board noted in *CAVA*, *supra*, PERB Decision No. 2484, "[t]here is no indication that the Legislature, by requiring this designation in the charter petition,

[54] The Charter Schools Act of 1992 (Charter Schools Act) applies EERA to charter schools and requires each charter school to declare whether it or the authorizing school district where the charter school is located shall be the public school employer for purposes of EERA. (Ed. Code, § 47611.5, subd. (b); *Chula Vista Elementary School District* (2004) PERB Decision No. 1647, p. 3, fn. 2; see also, Ed. Code, § 47605, subd. (b)(6) [permitting an authorizing school district to consider a declaration of whether or not the charter school shall be deemed the exclusive public school employer under EERA when determining whether to approve or reject a charter application].) The Charter Schools Act is codified at Education Code section 47600 et seq.

intended to impede PERB in its determination of [whether a group of charter schools] together under the single employer doctrine operate as a single integrated enterprise and meet EERA's definition of '[p]ublic school employer' for representation and collective bargaining purposes." (*Id*. at p. 53.) Accordingly, a group of charter schools' ostensibly independent status as separate "exclusive public school employers" under the Charter Schools Act and EERA's definition of that term "does not bar [our] application of the single . . . employer doctrine in the appropriate case." (*Id*. at pp. 55-57.) We thus must judge each case on its own merits to determine whether the "declaration" was made in a manner that satisfies the Legislature's requirements. (*Ravenswood, supra,* PERB Decision No. 1660, p. 5 (conc. opn. of Whitehead, M.) ["[I]t would be impossible to write a general rule that would govern [the public school employer's identity on] all occasions."].) On this basis, the Board in *CAVA* found that eleven separately chartered and accredited charter schools' declarations carried little weight, and instead held that evidence of their administrative, supervisory, and management structure demonstrated the integration and commonality of a single employer.

The majority then suggests the record as a whole is so riddled with inconsistent factual assertions that, without the Charter Schools' reasonable or adequate explanation for these shifting positions, it is impossible to tell fact from fiction. Citing alleged inconsistent evidentiary records in *Alliance I, supra*, PERB Decision No. 2545, as well as in Case Nos. LA-CE-6061-E & LA-CE-6073-E, and LA-CE-6165-E & LA-CE-6204-E, and alluding to the declarations and testimony underlying those cases as though they are separate evidentiary records, the majority finds the Charter Schools'

purported inconsistent factual assertions both impeach and disprove their current contentions.

First, close examination of the evidentiary records in these cases reveals that the Charter Schools have, in fact, avoided taking inconsistent factual positions. The evidence in this and the related cases generally relies on the same record. Indeed, the many joint exhibits cited by the parties are, in large part, copies of documents and hearing transcripts from the earlier related cases. Therefore, while the individual Charter Schools may have raised different legal arguments in these related cases, the record as a whole is consistently based on the same underlying facts, circumstances, and testimony.

Second, with one exception, UTLA did not attempt to impeach the credibility of the Charter Schools' witnesses regarding their supposedly contradictory assertions.[55] The Charter Schools were thus deprived of any opportunity to explain or deny these perceived inconsistences. Moreover, it is not PERB's role to impeach witnesses when the party against whom they testified chose not to do so. (See *Chico Unified School District* (2015) PERB Decision No. 2463, p. 15 [if a party believes testimony is not credible, "it ha[s] an obligation to discredit it either through impeachment on cross-

[55] The only instance of attempted impeachment occurred when UTLA questioned Howard Lappin (Lappin), Senior Advisor to the CMO's Chief Executive Officer, about specific assertions made by the Alliance Parties in their Motion to Dismiss in *Alliance I*, *supra*, PERB Decision No. 2545. Though Lappin prepared a declaration in support of the motion, in which he verified the statements therein as true, he made no such verification regarding the motion itself. UTLA failed to cross-examine Lappin about any of the verified statements in his declaration, nor do the assertions in the motion cite to or rely on his supporting declaration. As a result, Lappin's testimony about the statements in the motion holds little weight for impeachment purposes.

examination or by offering more credible testimony through its own witnesses"].)

Regardless, on the entire record before us, I find little evidence of true independent operations by the Charter Schools. Rather, based on the four factors we are bound to consider, the Alliance Network is clearly a single integrated enterprise and thus a single employer.

1. Functional Integration of Operations

The operation of the Charter Schools is functionally integrated at inception by design. Alliance CMO owns and operates each of the Network schools, including the Charter Schools. The CMO creates each Network school's charter, as well as all other legal and financial filings, and the CMO's Chief Executive Officer (CEO) then presents each charter petition to the Los Angeles Unified School District (LAUSD) for approval.

Accordingly, each Network school is incorporated as a non-profit public benefit corporation using materially indistinct articles of incorporation. The CMO's Chief Business Officer/Chief Financial Officer (CBO/CFO), Controller, and legal counsel prepare each incorporating document, which is then signed by a representative of the CMO for filing purposes. The incorporating documents state that each school "corporation is formed, and shall be operated, exclusively to support [t]he [Network]." The incorporating documents also identify the CMO's mailing address as the schools' corporate address for service of process and the CEO as the agent for service.[56]

[56] Until her retirement, each Network school's incorporating documents identified Judy Burton (Burton), the CMO's former CEO, as the school's agent for service of process. Schools that have since incorporated after her retirement identify Lappin, who

(See *CAVA*, *supra*, PERB Decision No. 2484, p. 68 [charter schools formed the same way, using same general counsel to prepare charter documents and bylaws, signed by their management organization for presentation to the authorizing district].)

The Administrative Service Agreements (ASA) between the CMO and Network schools, discussed *post*, describe the CMO's obligation to "create the school" and "research[], locat[e,] and prepar[e] a suitable facility . . . for [each school's] operation." The CMO is the sole member of each Network school's non-profit corporation (e.g., the Gertz-Ressler corporation), which in turn leases the property on which each school operates. The CMO also owns and operates a "Facilities Corporation," which controls the limited liability corporations (LLCs) leasing property to 21 of the 25 Network schools.[57] The CMO's Board members also sit on the Facilities Corporation Board. Thus, the CMO was deeply involved in both sides of the schools' real estate transactions. Further, as the articles of incorporation explain, should a Network school dissolve itself, that school's remaining assets and property become that of, or revert to, the CMO and the Network.

Functional integration also is achieved through the creation of an organizational structure akin to a school district. (*CAVA*, *supra,* PERB Decision No. 2484, p. 69.) The CMO's current CEO, Dan Katzir (Katzir), is atop the organizational structure and

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then served as Burton's former Chief of Staff and subsequently Chief Schools Officer prior to his current position, as that agent.

[57] In *Alliance I*, *supra*, PERB Decision No. 2545, the CMO introduced evidence showing that Alliance Susan & Eric Smidt Technology High School leased property from the 1918 Broadway Charter Facilities Corporation, for example. Of the four remaining Network schools, one owns its own property and facilities, and three lease their properties from a third party that is not controlled by the CMO.

acts in a capacity similar to the superintendent of a district. Katzir supervises his Chief of Staff; the CMO's General Counsel; and the Chief Schools Officer, Academic Officer, Talent Officer, Advancement Officer, College Officer, and Business Officer. In turn, each chief supervises a team, which may be comprised of further sub-teams or departments. For example, the Chief Schools Officer supervises the "Schools Team," which includes: (1) the Instructional Superintendent Team, including five Instructional Superintendents; (2) the School Leadership Development Team; (3) the Family and Parent Engagement Team; and (4) the Governance and Compliance Team. Each Instructional Superintendent oversees five to seven Network schools, supervising each principal in their charge, as discussed *post*. The administrative executives and their teams thus function on a Network-wide basis, providing operational administrative support to each Network school, akin to a district office.

The CMO has one office, which serves as the central repository for all personnel files and student records across the Network. (See *CAVA*, *supra*, PERB Decision No. 2484, pp. 69-70, citing *American Theater Corp.* (1975) 220 NLRB 295, enforced (8th Cir. 1976) 542 F.2d 1178, cert. denied sub nom. *Global Industries, Inc. v. NLRB* (1977) 430 U.S. 967 [single employer status found where corporate offices of all the entities were located in the same building, which was owned by the parent company, and a common accounting service was used by all the entities].) An employee needing to update their personnel information or request references must notify the CMO Human Resources Team. In the latter case, no other supervisor or employee is authorized to release employee references, including the Network principals.

All Network schools are governed by identical bylaws and enter into the same contractual relationship with the CMO, approving an ASA under which the CMO provides common policies and practices ratified by the Network, including administrative support and, as discussed *post*, "core labor relationship" policies (e.g., employee agreements, salaries, performance evaluation systems, benefits, etc.). Through these contractual relationships, Alliance CMO provides absolute functional integration in human resources, operations, management, and payroll and benefits administration, as well as materially indistinct curriculum and operations. In exchange, each Network school pays a flat percentage of its public entitlement revenue (e.g., 10%) to the CMO as an administrative service fee. Each school board must approve their school's ASA to enter the contractual relationship, but the CEO has final decision-making authority over the ASA's content and substantive provisions.[58]

The ASAs state, for example, that the CMO shall provide all human resources services. As discussed *post*, Network principals are empowered to decide whether they need to hire new employees at their school, provided the school's budget can afford it. If so, the CMO initiates the recruitment process, screening all applicants and providing the principal with a list of candidates who successfully pass the background

[58] During Katzir's tenure, no Network school board exercised its authority to terminate an ASA, or refused to enter into an ASA or successor ASA presented by the CMO. If a school board refused to approve a successor ASA, Katzir testified that he would speak with the school board to understand their financial, operational, or academic concerns and attempt to resolve or influence their decision. If the school board continued to refuse, Katzir would speak with the CMO Board and his executive team, and "force [the] school to continue to operate within the [Network] by swapping out a Board member."

check, from which the principal may select candidates to interview for the position.[59] The CMO's Talent Team maintains materially indistinct employment agreements for each school's principal and certificated employees. Once the principal decides to extend an offer, the CMO issues a form hiring letter and corresponding employment agreement, and processes the successful candidate's pre-employment paperwork. Thereafter, the CMO adds the new employee's personnel information into a central human resources system that coordinates with its payroll services system.

Under the ASAs, and in furtherance of the Network Schools' "share[d] brand," the CMO "shall provide . . . marketing [services] for student enrollment [and] assist[] with public relations," as well as "provid[e] any other operational . . . needs . . . that the [school] may reasonably request" of the CMO. The CMO's Communications Team develops and is responsible for all marketing for student enrollment or staff recruitment, and any press communications. The CMO hosts one website for itself and all Network Schools, which, in most respects, presents the Network Schools to

[59] In *Alliance I*, *supra*, PERB Decision No. 2545, the Alliance Parties argued that the principal is responsible for the final hiring decision, while the CMO facilitates the background check. However, in PERB Case Nos. LA-CE-6061-E and LA-CE-6073-E, UTLA proposed that the Network principals are hired and serve at the pleasure of the CMO Board, to whom they are ultimately accountable, and that the CMO influences each principal's hiring authority by requesting that they "only move forward with candidates" who have passed the CMO's screening process, citing witness testimony and exhibits submitted in *Alliance I*. The Charter Schools similarly argue in the instant case that, while the principals retain final hiring authority, they may not deviate from the terms and standards prescribed by the CMO. Furthermore, the Chief Schools Officer may pursue discipline against a principal if he or she hires an applicant against the CMO's recommended guidelines. Taking the evidence in each of these matters as a whole, I credit UTLA's and the Charter Schools' assertion that the CMO substantially influences the principals' ultimate hiring decisions.

the public as a single entity,[60] and provides all CMO and Network employees e-mail addresses that share a common domain: @laalliance.org. (See *CAVA*, *supra*, PERB Decision No. 2484, p. 70 [that network of charter schools held itself out to the public as a single entity supported single employer finding]; *County of Ventura*, *supra*, PERB Decision No. 2600-M, p. 20 [name badges identifying clinic employees as part of the county medical center network and assignment of county e-mail addresses to clinic employees supported single employer finding].)[61] The CMO develops one Parent-Student Handbook annually, to which the Network principals may add any site-specific policies before distributing the Handbook to the families enrolled in their school. The Parent-Student Handbooks are materially indistinct, include the Network logo on every page, and present the Network schools as a single entity. (See *CAVA*, *supra*, PERB Decision No. 2484, pp. 20, 70 [uniform parent-student handbook supported single employer finding.) The CMO's Advocacy and Government Relations Team also is responsible for communications with internal and external stakeholders, and organizes events to advocate on the Network schools' behalf regarding charter school legislation and charter renewal campaigns before LAUSD.

Network school principals may choose to utilize the CMO's recommendations of preapproved vendors or use a vendor who is not yet in the CMO's vendor

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[60] The Network schools also maintain their own websites, though the CMO website links to each school's website. Katzir testified that this structure—the school system and its individual schools each having their own websites—is common. We however decline to make a finding on this claim because neither party introduced further evidence in support of this statement.

[61] Although I dissented in *County of Ventura*, *supra*, PERB Decision No. 2600-M, I apply it here as current Board law.

management system. In the latter case, the CMO still must approve the new vendor prior to its use. No school has ever used a vendor not included in the CMO's system.

As in *CAVA*, *supra*, PERB Decision No. 2484, the Network schools have adopted "[n]ear- identical policies, employee handbooks, and compensation structures." (*Id.* at pp. 68-69.) Each school board ratifies those policies recommended to them by the CMO, including their handbooks and fiscal policies; they generally do not create their own policies, or direct the CMO or school staff to create policies.[62] In addition to the Parent-Student Handbook, the CMO's Human Resources Department develops the Network schools' Employee Handbook. The Network principals are not involved in the CMO's final approval of the Employee Handbook, though they may supplement the Employee Handbook with additional policies (e.g., dress code). The additional policies, however, are minimal. The CMO also provides information technology services for all Network schools[63] and payroll services, generating payroll reports for each school's review and issuing payments.

Network staff must attend several CMO trainings and educational programs each year. All newly hired Network teachers must attend a weeklong new teacher orientation where they receive training on Network-centered educational techniques. Similarly, at the beginning of each school year, the CMO holds a mandatory Network-

[62] Katzir testified that only once has a local school board rejected the CMO's recommendation. The recommendation, however, involved the individual school's student feeder patterns, a decision that did not affect the Network as a whole or otherwise infringe on the CMO's "core practices."

[63] A limited number of schools employ their own IT staff but they do not provide services within the scope of those provided by the CMO under the ASA.

wide conference called “One Alliance Day” for all teachers, where they receive subject-matter training. Network principals and educators receive several additional professional development training programs over the course of each year. Furthermore, the CMO Employee Engagement Team manages a Network-wide appreciation and recognition program each year, selecting one teacher and two counselors from across the Network to receive the Network’s teacher or counselors of the year award.

2. Centralized Control of Labor Relations

Because Network school employees have not been represented by an employee organization, there is no evidence of control over labor-management relations to date. In these circumstances, we examine human resources management in general, particularly the terms and conditions of employment for all employees at every school. (*County of Ventura*, *supra*, PERB Decision No. 2600-M, p. 20.)

There is centralized control over important aspects of compensation. The CMO has established Network-wide salary schedules to maintain consistent salaries for principals, teachers, and counselors, respectively. The CMO grants Network principals some discretion to deviate from the salary schedule to provide additional recruitment or relocation stipends.[64] However, these stipends are limited by a cap, certain eligibility requirements, and to specific subject-matters in accordance with Network-wide policies developed by the CMO. Should a Network principal provide compensation exceeding the limit of a CMO policy, the CMO may take any corrective

[64] The evidence shows that the Network principals rarely exercise this discretion, as fewer than 3.5% of Network teachers have a salary that deviates from the Network-wide salary schedule.

action necessary. Thus, while the CMO does not necessarily involve itself in each principals' individual salary decisions, it ultimately limits the principals' discretion in such a way as to dictate the appropriate salary for all Network teachers. (See *County of Ventura*, *supra*, PERB Decision No. 2600-M, p. 21 [recognizing that "centralized control of labor relations does not necessarily depend on centralized authority over day-to-day matters"].)

The facts further show centralized control over other human resources issues, including significant influence over employee evaluations, grievances, discipline, job duties, and other employee benefits. Each Network Principal is evaluated by an Instructional Superintendent from the CMO, who may recommend to the school's board that it not renew the principal's contract if he or she determines that the principal is not adequately performing their duties.[65] The Network schools also use the same comprehensive employee evaluation system, and the CMO trains each school's evaluation team to ensure consistent evaluation ratings across the Network.[66] Nevertheless, Network teachers may appeal their evaluation to the CMO's Performance Management Team and, before exercising their authority to place a

[65] As discussed *post*, the CMO has taken direct control of each Network school's board.

[66] In *Alliance I*, *supra*, PERB Decision No. 2545, the Alliance Parties argued that each school conducted all performance evaluations without any input from the CMO. At that time, however, Network schools were utilizing evaluation systems that have since been replaced. The Network launched the above-described evaluation system, "Grow," beginning with a one-year pilot program during the 2016-2017 academic year before adopting it in full during the 2017-2018 academic year. Based on the Charter Schools' explanation for this change in the evaluation procedures, I credit the evidence presented in this matter.

teacher on a Performance Improvement Plan (PIP), each principal must provide a copy to the Employee Relations Team and Performance Management Team for their review to ensure that it is reasonable and provides sufficient time for improvement.

The CMO's Employee Handbook describes the Network employees' grievance procedure and requires that all grievances be filed with the CMO's Employee Relations Team. The handbook further describes the Network's disciplinary policies, which require Network administrators to undergo progressive discipline training with the Employee Relations Team to "ensure corrective action is implemented fairly" and consistently. The disciplinary policies generally grant the Network principals the authority to address performance issues and lower level discipline on their own. In such case, a Network principal may consult with the CMO before taking disciplinary action. However, if the discipline involves a letter of reprimand, suspension, or termination, the principal must first contact the Employee Relations Team, who will investigate the situation before the principal may move forward. The Employee Handbook further describes the CMO's substantive role in the disciplinary process, where it is responsible to issue the final decision on appeal.[67]

The CMO also controls Network teachers' academic calendars, job descriptions, and employee benefits, all of which are uniform across the Network. For

[67] The Alliance Parties argued in *Alliance I*, *supra*, PERB Decision No. 2545 that each Network school makes all "hiring, firing[,] and disciplinary decisions" but largely cited testimony discussing the schools' hiring decisions and performance evaluations. Vice President of Human Resources Laura Alvarez provided the only relevant, albeit limited testimony, stating that her department had no role in any schools' disciplinary decision other than to provide recommendations if asked to do so by a principal.

example, Katzir and Chief Talent Officer Monica Vasquez negotiate and develop Network-wide quotes and coverage for health and welfare benefits.

The record as a whole demonstrates substantial CMO-level authority to establish the terms and conditions of employment. The Network schools, for all of their alleged discretion or control over certain matters, "could not significantly alter course on high-level labor relations matters" affecting the school without approval from the CMO, which exercises significant influence over each principal's local employment decisions. (*County of Ventura*, *supra*, PERB Decision No. 2600-M, p. 22.) I therefore find centralized control of labor relations. (See *id.* at pp. 21-22 [finding centralized control of labor relations where the county exercised "significant influence over compensation and staffing levels" even though individual clinics had "authority to establish individual compensation levels, schedules, and duties, to set local policies, and to evaluate, promote, and discipline individual employees"]; *CAVA*, *supra*, PERB Decision No. 2484, p. 72 [centralized control of labor relations is demonstrated where each network school has adopted the same terms and conditions of employment for certificated employees].)

3. Common Management

CMO administrators are the Network schools' legal managers. Just as each of the schools in *CAVA* was formed when the same person signed their charter documents as their "Authorized Representative" (*CAVA*, *supra*, PERB Decision No. 2484, p. 12), here the CMO executed various legal formation documents on behalf of the Network schools. Moreover, the record here illustrates that the Network schools have used nearly identical charter proposals and governing documents, evidence of common management we found notable in *CAVA*. (*Id*. at p. 12.)

The management structure in this case is rigidly hierarchical, with Katzir at the top and several management levels beneath him organized by "team" or "department," beneath which are all of the Network schools. Each level supervises those beneath it, and this working relationship is exemplified best by the Instructional Superintendents and Network principals. Not only do the Instructional Superintendents supervise and evaluate the principals, as discussed *ante*, but the two classifications regularly meet to develop school operating plans. The plans contain a set of metrics to measure both the school's and Network's progress toward meeting specific CMO goals. The CMO evaluates the principals against these metrics to encourage student growth over the year. The plans also are used to develop specific goals to encourage the principals in making progress toward their growth metrics. As we held in *CAVA*, this hierarchy and the level of CMO involvement at the school level is certainly indicative of common management. (*CAVA*, *supra*, PERB Decision No. 2484, pp. 72-73.)

The CMO also created a Principals' Cabinet, a committee of 4-6 Network principals responsible to provide input into issues that may affect the Network. Members of the Principals' Cabinet have no authority to make decisions for the Network, emphasizing each schools' place in the management structure—while the CMO may solicit input from time to time, it is ultimately responsible for overseeing the schools' operation and ensuring they can function. The CMO's role is therefore necessary for the Network schools' continued operations, particularly given that the schools are light on management structure, lacking their own human resources or payroll departments, for example. Thus, while the principal may serve in that role for a Network school, in reality, he or she defers to the CMO administration to handle

difficult or high-level matters. (See *County of Ventura*, *supra*, PERB Decision No. 2600-M, pp. 25-26 [finding common management where clinic directors generally relied on the county to perform essential management functions].)

4. Common Ownership or Financial Control

Of the four factors, the common ownership and financial control factor is least translatable to public sector employment because it is primarily based on considerations unique to private sector employment. (*CAVA*, *supra*, PERB Decision No. 2484, p. 73.) However, the record before us presents a few considerations that are appropriate in the charter school setting.

First, the Network school boards do not operate independently in any kind of policy-making capacity or with respect to labor relations. (*CAVA*, *supra*, PERB Decision No. 2484, p. 75.) The CMO has taken direct control of the individual school boards, which are responsible for independently approving their school's budget and other monetary policies. (*Id*. at pp. 20-21.) The bylaws authorize the CMO to appoint 5 of each school board's 9 members. The 4 remaining members are usually members of the school's surrounding community, but they are selected by the CMO based on recommendations received from the school itself and community partners. In this capacity, the CMO, through its board members, has direct control over each Network school's finances.[68] The boards typically meet for 45-90 minutes four times per year. The five CMO-appointed board members meet at the CMO offices where the four community members join via Skype. The CMO prepares the meeting agendas,

[68] The Network schools are divided into three to four groups. The five CMO-appointed board members serve on each of the school boards for every school in their group; Lappin is a board member for all 25 Network schools.

resolutions, and facilitates each meeting, with CMO staff serving as the school board secretary and the CBO/CFO serving as each individual school's CFO. As in *CAVA*, the school boards are not sufficiently independent of the CMO to defeat a finding of single employer status. (*CAVA*, *supra*, PERB Decision No. 2484, pp. 78-79.)

The CMO and Network principals work together to develop each school's financial policies and budgets. After taking the principals' feedback into consideration, the CMO exercises final authority over any revisions thereto. The CBO/CFO presents the budget to the Network school board, which the CMO controls, and, upon the school board's approval, the CMO's Finance Team continues to provide financial services to the school and maintains its financial records. (See *County of Ventura*, *supra*, PERB Decision No. 2600-M, p. 26 [finding common ownership or financial control where the county helped each clinic prepare its annual budget, had final approval over the clinic's budget, and monitored the clinic's budget throughout the year].)

Network principals utilize their budget as they deem necessary once the CMO prepares the schools' budgets and the school boards approve them. The principals may make staffing level determinations, purchase academic supplies, etc. This is consistent with the Alliance Parties' previous argument that each school maintained sole control and discretion over fiscal planning and decisions regarding expenditures,[69] though the record as a whole shows that the principals' "discretion" is limited by budgetary boundaries set by the CMO.

[69] *Alliance I*, *supra*, PERB Decision No. 2545.

In sum, all four of the single employer factors support the conclusion that the Network schools, including the Charter Schools, are a single employer.

C. Unit Determination

Having determined that the network of Alliance-affiliated charter schools constitutes a single public school employer for purposes of EERA, UTLA now must prove that a network-wide certificated employee bargaining unit is inappropriate. (*CAVA*, *supra*, PERB Decision No. 2484, p. 79.) UTLA has not met its burden.

EERA section 3545 provides, in relevant part:

> (a) In each case where the appropriateness of the unit is an issue, the board shall decide the question on the basis of the community of interest between and among the employees and their established practices including, among other things, the extent to which such employees belong to the same employee organization, and the effect of the size of the unit on the efficient operation of the school district.
>
> (b) In all cases:
>
> (1) A negotiating unit that includes classroom teachers shall not be appropriate unless it at least includes all of the classroom teachers employed by the public school employer, except management employees, supervisory employees, and confidential employees.

In *Peralta*, *supra*, PERB Decision No. 77, the Board harmonized the above two provisions of EERA section 3545 by creating a rebuttable presumption that all of a public school employer's classroom teachers should be placed in a single bargaining unit unless the resulting unit would be inappropriate under the criteria in subdivision (a). (*Id*. at p. 10.) The party opposing creation of a comprehensive classroom

teachers unit bears the burden of proving such a unit would be inappropriate. (*Ibid*.; *CAVA*, *supra*, PERB Decision No. 2484, p. 79.)

Turning to the first criterion under EERA section 3545, subdivision (a), in determining whether there is a community of interest among public school employees, PERB considers many factors, including qualifications, training, and skills; job duties; method of wages or pay schedule; fringe benefits; hours of work; supervision; interaction with other employees; and interchange of job functions. (*Center Unified School District* (2014) PERB Decision No. 2379, p. 2; *Rio Hondo Community College District* (1979) PERB Decision No. 87, pp. 8-11.) No single factor is determinative, and the overriding issue is whether the employees share substantial mutual interests in matters subject to meeting and negotiating. (*Hartnell Community College District* (1979) PERB Decision No. 81, pp. 32-33.)

The record shows that certificated employees across the Alliance Network share many common terms and conditions of employment. All have identical employment contracts; the same salary schedule, bonus/stipend structure, evaluation system, and master academic calendar; the same benefit options; and are bound by the same policies and procedures, including those governing discipline, termination, and grievances. Certificated employees from different Alliance schools interact with each other during mandatory Network-wide professional development sessions held five times per year, and they serve on Network-wide committees on issues such as teacher evaluations, instructional strategies, and grading expectations. While

supervision below the principal level is school-specific,[70] school principals are supervised by Instructional Supervisors whose job is to maintain instructional consistency across the Alliance Network. Thus, it is clear that certificated employees at all Alliance-affiliated schools share a community of interest, and neither UTLA nor the majority contends otherwise.

The second statutory criterion, "established practices, [includes] both negotiating history and the extent to which employees belong to the same employee organization." (*Los Rios Community College District* (2018) PERB Decision No. 2587, p. 4.) Because certificated employees at Alliance Network schools currently are unrepresented, negotiating history is non-existent. As UTLA organizer Fuentes testified, certificated employees throughout the Alliance Network are members of, and are being organized by, UTLA because they share common goals and interests. This criterion therefore weighs in favor of a Network-wide unit.

The third statutory criterion, the effect of the petitioned-for unit on the efficiency of the employer's operations, is aimed at avoiding an undue proliferation of bargaining units that would strain the employer's administrative resources. (*San Francisco Community College District* (1994) PERB Decision No. 1068, pp. 4-5; *Livermore Valley Joint Unified School District* (1981) PERB Decision No. 165, pp. 8-9.) In *CAVA*,

[70] The majority claims the fact that the Network schools do not share information with one another about terminated teachers demonstrates a marked difference between the Network and a public school district. There is no evidence demonstrating school district practices in the record. Nonetheless, I find it unlikely that any school would share a terminated teacher's personnel records with a school in the same district as a matter of course. Instead, it is likely the personnel records of all teachers in the district would be maintained by the district's central administrative office, as the personnel records of all teachers in the Alliance Network are maintained by the Alliance CMO.

the Board found that a network-wide unit did not impair the efficiency of the employer's operations, thereby implying that requiring the union to negotiate with each of the 11 schools in the network individually would impair efficiency. (*Id.* at pp. 82-83.) Here, unless each individual school were to establish its own negotiations team (which seems unlikely given the Network schools' reliance on the Alliance CMO for administrative functions), efficiency would be impaired by requiring separate negotiations with each of the 25 schools in the Network. Accordingly, this criterion also weighs in favor of a Network-wide unit.

Furthermore, the Board in *Peralta* observed that EERA section 3545, subdivision (b)(1), is "meant to minimize the dispersion of school district faculty into unnecessary negotiating units." (*Peralta*, *supra*, PERB Decision No. 77, p. 9.) Accordingly, subdivision (b)(1) prohibits "unit configurations based on geographical, or campus considerations, or split along lines of academic disciplines and teaching specializations." (*Ibid*.) As in *CAVA*, the relationship between Alliance and its affiliated charter schools is "akin to a school district." (*CAVA*, *supra*, PERB Decision No. 2484, p. 69.) As single school units would run afoul of EERA section 3545, subdivision (b)(1) in a public school district, it follows that single school units also would not be appropriate in a network of charter schools that operates like a school district.

In sum, none of the statutory criteria in EERA section 3545, subdivision (a), weighs in favor of the petitioned-for single school bargaining units. Consequently, UTLA has failed to rebut the presumption that a Network-wide unit is the appropriate unit for certificated employees of the Alliance-affiliated charter schools.

The majority gives short shrift to the *Peralta* analysis, contending PERB should afford the statutory *Peralta* presumption less weight in charter school cases and instead apply only the statutory criteria in EERA section 3545, subdivision (a) in such cases.[71] This would allow PERB, as the majority does in this case, to certify a petitioned-for unit at a charter school as long as the unit is an appropriate unit under the statutory criteria. Such an approach is problematic for several reasons.

First, the Charter Schools Act, specifically Education Code section 47611.5, "subdivision (a) expressly mandates that the provisions of EERA apply to charter schools." (*Orcutt Union Elementary School District* (2011) PERB Decision No. 2183, p. 5.) Subdivision (d) of section 47611.5 requires PERB to "take into account" the Charter Schools Act "when deciding cases brought before it related to charter schools." However, "nothing in the [Charter Schools Act] addresses the bargaining unit placement of charter school employees". (*Id.* at p. 5.) As a result, EERA section 3545, subdivision (b)(1) applies to charter schools just as it does to non-charter public schools.

In *Orcutt Union Elementary School District*, *supra*, PERB Decision No. 2183, the Board recognized the application of EERA section 3545, subdivision (b)(1) to charter schools when it held that the *Peralta* presumption applies in charter school cases. (*Id.* at pp. 7-8.) Similarly, in *CAVA* the Board applied the *Peralta* presumption

[71] The majority justifies its departure from the Legislature's statutory scheme by contending that charter schools operate differently from traditional public school districts. However, in enacting the Charter Schools Act, the Legislature gave no indication that it intended for PERB to set aside its existing statutory obligations under EERA with respect to charter schools. (See *CAVA*, *supra*, PERB Decision No. 2484, p. 53.)

to a network of charter schools affiliated with the same charter management organization.[72] (*CAVA*, *supra*, PERB Decision No. 2484, p. 79.) The majority's minimization of *Peralta* in charter school cases thus is contrary to both the governing statutes and Board precedent. Moreover, it has the practical effect of writing EERA section 3545, subdivision (b)(1) out of the statute as to a particular class of cases—a revision PERB is not empowered to make. (See *Regents of the University of California v. Public Employment Relations Bd.* (1985) 168 Cal.App.3d 937, 944-945 [PERB may not rewrite a statute to suit its notion of what the statute should say].)

Second, the majority suggests *Peralta* should not apply in charter school cases because it predates the establishment of charter schools,[73] and thus fails to account for their varied organizational structures. Admittedly, charter schools have more organizational options than public school districts. But, whatever organizational structure PERB may be faced with in another case, the organizational structure of the Alliance Network schools is "akin to a school district," the only distinction being that a private entity serves as the district-wide administrator. This structure is not so

[72] While the *CAVA* Board noted that it was in "uncharted waters" because the Board had not previously addressed unit determination in the network charter school context (*CAVA*, *supra*, PERB Decision No. 2484, p. 86), the thorough and well-reasoned *CAVA* decision charted a course for PERB to follow in subsequent network charter school cases such as this one.

[73] The Charter Schools Act was enacted in 1992, 14 years after the Board's *Peralta* decision.

different from public school districts that it compels a departure from *Peralta* in this case.[74]

Third, the majority suggests that when a charter school declares itself to be the "exclusive public school employer" for purposes of EERA, a unit of certificated employees at that school is an appropriate unit notwithstanding *Peralta*. As discussed *ante*, in *CAVA* the Board rejected a similar argument that the individual charter schools' declarations that each was an "exclusive public school employer" for EERA purposes prevented PERB from finding them to be a single employer. (*CAVA*, *supra*, PERB Decision No. 2484, pp. 53-57.) In rejecting this argument, the Board noted that a charter school's declaration does not override PERB's authority to determine employer status for purposes of unit determination. (*Id.* at p. 53; see *Ravenswood*, *supra*, PERB Decision No. 1660, p. 5 (conc. opn. of Whitehead, M.) [PERB determines on a case-by-case basis whether an individual charter school is a "public school employer" under EERA].) It necessarily follows that such declarations also are not determinative as to whether a petitioned-for unit of certificated charter school employees is appropriate.

Fourth, the majority finds the petitioned-for single school units are appropriate because PERB lacks jurisdiction over the Alliance CMO. In *CAVA*, the Board did not find its lack of jurisdiction over the charter management organization to be an impediment to certifying a network-wide bargaining unit. (*CAVA*, *supra*, PERB

[74] In my view, it is more anomalous for the certificated employees of a charter school that does not declare itself to be an "exclusive public school employer" to be placed in the same bargaining unit as the certificated employees of the public school district in which the school is chartered, but that result is permitted under EERA. (*Orcutt Union Elementary School District*, *supra*, PERB Decision No. 2183, p. 8.)

Decision No. 2484, pp. 66-67.) That there the union chose to petition for a network-wide unit despite PERB's lack of jurisdiction over the charter management organization is irrelevant, as the majority provides no authority—nor have I discovered any—for the proposition that a network-wide unit is appropriate only when the union chooses to petition for it. Indeed, under the statutory presumption the employer-wide unit is always the default appropriate unit regardless of employer or employee organization preference.

Furthermore, the majority worries that, without PERB jurisdiction over the Alliance CMO, there will be no "network-wide entity" that can be compelled to bargain with UTLA. Notably, in *California Virtual Academies*, *supra*, PERB Decision No. 2584, we held the charter school network, as the named respondent, liable for the unlawful termination of a teacher even though the termination action was taken by employees of the charter management organization, not the individual charter school where the teacher was employed. (*Id.* at pp. 21-22, 36.) Thus, the majority's fear that there will be no network-wide entity for UTLA to bargain with is unfounded, as the Alliance Network itself will be the statutory employer and therefore subject to an unfair practice charge for failing to comply with its statutory obligations. Moreover, it does not appear that single school units will resolve the majority's concern, as by virtue of the ASAs the Alliance CMO still will play a significant role in each Charter School's labor relations.

Fifth, the majority's suggestion that, in charter school cases, unions have a choice as to whether to petition for a network-wide or single school unit continues the erosion of the *Peralta* presumption that began in *St. HOPE Public Schools* (2018) PERB Order No. Ad-472 (*St. HOPE*). In that case, the Board majority found a

certificated bargaining unit that excluded day-to-day substitutes appropriate in part because the petitioning union chose not to organize those substitutes. (*Id.* at pp. 8-9.) In dissent, I observed that deeming a unit appropriate based on the extent to which the petitioning union chose to organize certificated employees "allows employee organizations to usurp PERB's role as the decision maker in unit determination matters simply by choosing to organize only some of a district's classroom teachers." (*Id.* at p. 22.)

In *St. HOPE*, the majority ostensibly applied *Peralta* but gave the "established practice" criterion dispositive weight. Here, the majority guts *Peralta* by giving employee organizations a choice to petition for any unit that could be found appropriate under the criteria in EERA section 3545, subdivision (a). The statutory mandate in EERA section 3545, subdivision (b)(1) that a single unit including all of the public school employer's classroom teachers is the default appropriate unit for certificated employees is now gone—at least in charter school cases—and replaced by a scheme under which unions, not PERB, determine the appropriate certificated bargaining unit. As much as the majority may favor the more liberal unit determination regime under the National Labor Relations Act, that is not the regime the Legislature enacted in EERA. (See *Los Angeles Unified School District* (1998) PERB Decision No. 1267, pp. 5-6 ["EERA calls for more general uniformity and a more limited range of units in the public school setting as intended by the Legislature."]; see also *County of Santa Clara* (2019) PERB Decision No. 2670-M (judicial appeal pending), p. 27 [in balancing California public employees' right to representation with a public employer's

operational efficiency interests, the Board seeks to avoid the fragmentation of employee groups and favors broader bargaining units].)

Finally, the majority's brushing aside of the single employer relationship between the Alliance Network schools ignores the reality of the parties' situation. As the *CAVA* Board recognized:

> "[E]ach unit determination, in order to further effective expression of the statutory purposes, must have a direct relevancy to the circumstances within which collective bargaining is to take place. For, if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered."

(*Id.* at p. 86.) Here, the parties "must deal" with the "factual situation" that the Network schools are a single employer. By ignoring that reality and certifying single school units, the majority places those units in competition with the Network schools where certificated employees remain unrepresented. That is not a recipe for productive collective bargaining.

D. Conclusion

This case should be a straightforward application of *CAVA* and *Peralta* to UTLA's representation petitions. Instead, the majority uses this case to eviscerate PERB's longstanding interpretation of EERA section 3545 as established in *Peralta*, as well as to question the reasoning in *CAVA*—a re-examination of precedent the parties neither requested nor briefed. The majority's decision is inconsistent with established Board precedent and, because our precedent must be capable of consistent and coherent application, I dissent.

Applying *CAVA* and *Peralta*, I conclude that the schools in the Alliance Network constitute a single employer, and that a Network-wide bargaining unit is the appropriate

unit for the Network's certificated employees. Consequently, I would dismiss the petitions.