STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES LOCAL 3299, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	Case No. SF-CE-1188-H
UNIVERSITY PROFESSIONAL & TECHNICAL EMPLOYEES, COMMUNICATION WORKERS OF AMERICA, LOCAL 9119, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	Case No. SF-CE-1189-H
TEAMSTERS LOCAL 2010, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	Case No. SF-CE-1192-H PERB Decision No. 2755-H March 1, 2021

Appearances: Leonard Carder by Afroz Baig and Andrew Ziaja, Attorneys, for American Federation of State, County & Municipal Employees Local 3299, and University Professional & Technical Employees, Communication Workers of America, Local 9119; Beeson, Tayer & Bodine by Susan Garea, Attorney, for Teamsters Local 2010; Sloan Sakai Yeung & Wong by Timothy G. Yeung, Attorney, for Regents of the University of California.

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

DECISION

PAULSON, Member: These consolidated cases are before the Public Employment Relations Board (PERB or Board) on exceptions and cross-exceptions to the proposed decision of an administrative law judge (ALJ). American Federation of State, County & Municipal Employees Local 3299 (AFSCME), University Professional and Technical Employees, Communication Workers of America, Local 9119 (UPTE), and Teamsters Local 2010 (Teamsters) (collectively "Unions" or "Charging Parties") filed similar unfair practice charges alleging that the Regents of the University of California violated the Higher Education Employer-Employee Relations Act (HEERA) and the Prohibition on Public Employers Deterring or Discouraging Union Membership chapter (PEDD) when it circulated documents regarding the impact of the United States Supreme Court's decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31* (2018) 585 U.S. ___, 138 S.Ct. 2448 (*Janus*).[1]

Having reviewed the record, the law, applicable legislative history, and the parties' submissions and arguments before the Board, we affirm in part and reverse in part the conclusions of the proposed decision (PD). We affirm the ALJ's finding that the University violated PEDD section 3550, although we reach that conclusion differently, as summarized and detailed *post*. We reverse the PD's interference

[1] HEERA is codified at Government Code section 3560 et seq. PEDD is codified at section 3550 et seq. Unless otherwise indicated, all statutory references are to the Government Code. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. This decision does not address possible violations of PERB Regulation 32611 subdivisions (a), (b), and (c) because those regulations were enacted after the events underlying these consolidated cases.

findings, dismissing the alleged violations of section 3571, subdivisions (a) and (b) as unproven.[2]

EXECUTIVE SUMMARY

Because this is a case of first impression regarding recently enacted PEDD section 3550, we provide here an overview of the standards explained in this decision, as well as the outcome of the consolidated cases.

The PEDD provides that "[a] public employer shall not deter or discourage public employees or applicants to be public employees from becoming or remaining members of an employee organization, or from authorizing representation by an employee organization, or from authorizing dues or fee deductions to an employee organization." (§ 3550.) In this context, and drawing from existing court and Board precedent, "deter or discourage" means to tend to influence an employee's free choice regarding whether or not to authorize representation, become or remain a union member, or commence or continue paying union dues or fees. The test for "tends to influence" is objective; it is a charging party's prima facie burden to show that the challenged conduct or communication is reasonably likely to deter or discourage employee free choice, not that the conduct actually did deter or discourage. When conducting this prima facie analysis, we treat section 3550 even-handedly, as

[2] The parties do not challenge the PD's finding that the University violated section 3553 and by extension section 3571, subdivision (c) (failure to meet and confer), and those rulings remain final and binding only on the parties. (PERB Regs. 32215, 32300, subd. (c); *City of Torrance* (2009) PERB Decision No. 2004-M, p. 12.) Accordingly, we incorporate the ALJ's order as to those allegations but only address their substance to the extent they impact other relevant considerations, such as the section 3550 and interference allegations, or the remedy.

prohibiting public employer conduct which tends to influence employee choices as to *whether or not* to authorize representation, become or remain a union member, or commence or continue paying dues or fees. Section 3550 thus does not merely duplicate the existing interference standard; it creates a new and more robust protection that is not subject to the free speech safe harbor of HEERA section 3571.3.

Upon finding a prima facie section 3550 violation, the Board will analyze an employer's business necessity argument as an affirmative defense that the employer has the burden to plead and prove. The Board will resolve such an asserted defense by weighing the tendency to deter or discourage against the employer's asserted business necessity. Finally, where a charging party proves that the employer violated section 3553 by failing to meet and confer in good faith with the charging party before issuing a mass communication concerning public employees' rights to join or support, or to refrain from joining or supporting, an employee organization, a rebuttable presumption arises that the communication also violates section 3550. The employer may rebut the presumption by proving that the communication does not deter or discourage employee decisions protected by section 3550.

After articulating this standard, we apply it to the instant facts. We find the University failed to rebut the presumption of a section 3550 violation created by its unchallenged violation of section 3553. Further, we find that even if the University had not presumptively violated section 3550, Charging Parties established a prima facie case that the University's communications tended to influence employee free choice, including by attaching a financial disincentive to union membership without context, and by actively and presumptively subverting the Unions' participation in related

conversations. Balancing all relevant factors, we find the University failed to establish an affirmative defense that its business need to communicate regarding *Janus* in the manner it did outweighed the communications' tendency to influence employee free choice. We do not rule that the University was prohibited from communicating with its employees concerning *Janus*, and we note that had the University bargained with the Unions over the communication, the parties could have either worked out a joint communication or issued separate but simultaneous communications compliant with both section 3550 and section 3553. Finally, we address the related interference allegations before turning to the appropriate remedy.

FINDINGS OF FACT[3]

The University is an employer within the meaning of section 3562, subdivision (g). AFSCME, UPTE, and Teamsters are each an exclusive representative within the meaning of section 3562, subdivision (i). AFSCME represents the following bargaining units at the University: Patient Care Technical (EX), Service (SX), and Skilled Craft UCSC (K7). UPTE represents the following bargaining units at the University: Health Care Professionals (HX), Research Support Professionals (RX), and Technical (TX). Teamsters represents the following bargaining units at the

[3] The record, and our recitation of the facts, includes the parties' joint factual stipulations. The Board's review of exceptions is de novo, but it need not address alleged errors that have no bearing on the outcome. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 5.) To the extent the parties' exceptions raise limited factual disputes, we find they have no bearing on the outcome; most dispositive facts are undisputed. While we affirm the PD's factual findings, we reiterate and supplement the relevant facts for context and in light of the standard the Board adopts herein to evaluate alleged violations of section 3550.

University: Clerical & Allied Services (CX), Skilled Craft UCLA (K4), Skilled Craft UCSD (K6), Skilled Craft UCSB (K8), Skilled Craft UCI (K9), and Skilled Craft Merced (KM).

On June 27, 2018,[4] the United States Supreme Court issued the *Janus* decision. Overturning forty years of precedent, *Janus* held it unconstitutional for a public sector employer to enforce compulsory agency fee deductions from non-union member employees. (See *Abood v. Detroit Board of Education* (1977) 431 U.S. 209.) Also on June 27, the Governor signed Senate Bill 866 (SB 866). As relevant to this matter, SB 866 amended section 3550, which prohibits public employers from deterring or discouraging employees from making some types of union-related decisions, and added section 3553, which requires public employers to negotiate with exclusive representatives before issuing mass communications concerning employee rights to join, support, or refrain from joining or supporting, employee organizations.

On June 28, the Executive Director of the University's Systemwide Labor Relations, Peter Chester, issued a letter on behalf of the University of California Office of the President (UCOP), which provided, in relevant part:

> "I'm writing to inform you about a recent United State[s] Supreme Court decision concerning paycheck deductions for union-represented employees who work for public employers, including public universities such as UC.
>
> "In a case brought by an Illinois state employee against the American Federation of State, County and Municipal Employees (AFSCME) union, the Supreme Court on June 27, 2018[,] ruled that it is unconstitutional for unions that represent government employees to collect what are known as "agency fees" from nonmembers. The court

[4] Subsequent dates are 2018, unless otherwise noted.

> decision affects represented government employees in 22 states, including California, where unions collect these fees.
>
> "Unions collect dues from their members and agency fees from nonmembers. Nonmembers are people who are not registered dues-paying members but who are still represented by a union and therefore pay a fee for that representation. By law, UC is required to deduct dues and agency fees from the paychecks of represented employees and transfer the funds to the unions.
>
> "As a result of the Supreme Court ruling, UC will no longer deduct agency fees from the paychecks of union nonmembers. These deductions will stop with the July 25, 2018 paycheck for most employees who are paid biweekly (every other week) and August 1, 2018 for employees who are paid monthly.
>
> "The Supreme Court decision does not affect the dues that union members pay. UC will continue to deduct dues from these employees' paychecks and transfer the funds to the unions.
>
> "Attached and available online[5] is additional information about how this decision affects employee paychecks.
>
> "If you have any questions about union fees, dues or membership, you may contact your local Labor Relations Office."

This *Janus* letter also included a Frequently Asked Questions (FAQ) document as an attachment.[6] That document stated:

> **"What the U.S. Supreme Court's ruling in the Janus case means for UC union-represented employees**
> On June 27, 2018, in *Janus v. AFSCME Council 31*, the U.S. Supreme Court ruled that requiring non-members of public sector labor unions to pay agency fees violated those

[5] The electronic version of the letter, which was widely circulated to employees at their work e-mail addresses, contained a hyperlink to the FAQ discussed below.

[6] We refer to these documents collectively throughout as the "*Janus* letter and FAQ."

employees' right to free speech under the First Amendment of the U.S. Constitution. As a result of that decision, public sector labor unions are no longer permitted to collect agency fees from non-members. The University is required to comply with the *Janus* decision, and as explained in further detail below, will stop deducting agency fees from employees that have chosen not to join a union.

"Q. Who does this decision apply to?
A. This court decision applies to all U.S. public sector employees represented by a union but [who] have chosen not to join the union. Those employees have been previously required under law to pay monthly "agency fees" as a condition of employment. The decision does not affect union members who pay monthly union dues. The decision also does not apply to union-represented employees who are employed by private (i.e., non-governmental) organizations.

"Q. What's the difference between union dues versus agency fees?
A. Union dues are paid by members who have chosen to join a union. Those employees who have declined to join a union are required to pay what is known as agency fees. Agency fees are intended to cover the cost of negotiation, contract administration, and other activities of the union that are germane to its functions as the exclusive bargaining representative. Dues-paying members may enjoy rights and privileges, such as voting rights, that are not similarly enjoyed by non-members.

"Q. I don't know if I pay dues or fees – how do I find out if I'm affected by this decision?
A. If you are unsure about whether you pay dues or fees, contact your local labor relations office or your local union representative.

"Q. How will this decision affect UC employee paychecks?
A. Since employees who pay a fee to the union are now no longer required to make those contributions as a result of this decision, UC will discontinue paycheck deductions for these employees.

"Q. If I'm an employee who is affected by this decision, when will I see a change in my paycheck?

A. Most employees who are paid biweekly (every other week) can expect a change by their July 25, 2018 paycheck. Employees who are paid monthly can expect to see a change in their August 1, 2018 paycheck.

"Q. How do I find out how much the fees are – and therefore, how much will no longer be deducted from my paycheck?
A. Fees and union dues for each UC bargaining unit are listed at [UC website link]

"Q. Whom can I contact if I have questions or want more information about this?
A. If you have questions or want more information, please contact your local labor relations office or your local union representative."

Also on June 28, Paul Schwartz, Internal Communications Director for the University, e-mailed the *Janus* letter and FAQ to University labor relations representatives at every campus and medical center with instructions to distribute the communications to all employees represented by labor organizations. Schwartz's e-mail noted the communications were for "FOR IMMEDIATE DISTRIBUTION." (Emphasis in original.) The documents were then widely distributed at each campus and medical center, including being posted physically and electronically, distributed in-person by supervisors, and e-mailed directly to bargaining unit members, though the precise distribution varied at each separate campus or medical center. Most locations distributed the documents on or about June 28 or June 29. The University used a decentralized distribution process, filtering the documents through labor relations managers, local human resources, academic personnel, and communications offices, with many different individuals responsible for distributing to represented employees.

The University translated the *Janus* letter and FAQ into Spanish, and where the documents were disseminated via e-mail, such e-mails typically attached both the English and Spanish versions. Maricruz Manzanarez, a University employee and member of AFSCME's executive board, had previously advocated that the University translate work rules and other kinds of communications that affect employees in the workplace, but the University typically denied such requests. Libertad Ayala, a Lead Organizer for AFSCME, likewise testified that it was "extremely unusual" for the University to translate communications with bargaining unit members into other languages. She noted that during a recent insourcing of a large group of monolingual Spanish-speaking employees, the University refused to help AFSCME translate safety regulations.

The University did not meet and confer with representatives from AFSCME, UPTE, or Teamsters before disseminating the *Janus* letter and FAQ. Teamsters had requested to meet and confer regarding the anticipated effects of the *Janus* decision on April 10. Teamsters representatives met informally with University representatives on or about April 30, but the University maintained it had no bargaining obligation given *Janus* remained pending before the Supreme Court. Teamsters again requested to meet and confer regarding *Janus'* effects on June 27, after the decision issued.[7] Schwartz was aware of SB 866's enactment and its amendments to the PEDD when

[7] The record includes testimony that AFSCME and UPTE also made similar demands to bargain, though does not establish when or in what manner. No party excepted to the PD's conclusion that "[t]he parties' testimony establishes that Unions made multiple demands to meet and confer with UC over the content of the *Janus* letter (albeit prior to the effective date of the statute), and UC refused."

he e-mailed the *Janus* letter and FAQ for distribution on June 28. That same day, Teamsters' Chief Counsel John Varga sent Chester a demand that the University cease and desist distributing the *Janus* letter and FAQ based on its failure to comply with PEDD section 3553.

On July 6, UCOP informed University labor relations representatives that they should stop disseminating the *Janus* letter and FAQ. Despite this direction, in some locations the communications were distributed on or after July 6. University of California, Berkeley (UC Berkeley) did not begin distributing the *Janus* letter and FAQ until approximately July 6. Around that same time, UC Berkeley received the notice from UCOP to cease distribution. UC Berkeley distributed the *Janus* letter and FAQ to all AFSCME and UPTE-represented units but ceased further distribution before reaching all represented employees.

On August 10, Deborah Valentine, Executive Director of the Early Childhood Development Center at the University of California, Los Angeles (UCLA) sent the *Janus* letter and FAQ to employees represented by Teamsters. Elsewhere at UCLA, in some dining areas the communications remained posted on bulletin boards or video monitors into August and September.

Charging Parties presented a variety of evidence on the *Janus* letter and FAQ's alleged impact following the University's communications, including loss of membership and lost staff time to answer unit members' questions.

AFSCME's Lead Negotiator, Seth Newton Patel, testified that there may have been a "dip" in membership in the immediate aftermath of the *Janus* decision, but membership before the *Janus* decision was above 80 percent of the bargaining units,

and that continued to be the membership enrollment rate at the time of the hearing. After *Janus*, UPTE received approximately 140 inquiries about membership resignation. Fifty-five people dropped their membership. Of those people, approximately half had signed voluntary fee payer agreements and were compelled to continue their financial support of the union for the life of the collective bargaining agreement.

UPTE President Jamie McDole noted a "substantial" increase in workload during the period after the *Janus* decision, as union staffers had to stop doing the "representation and the general work of the union to . . . respond to employees that had received [the *Janus* letter and FAQ] and had questions and concerns . . . ." McDole testified that UPTE did not see the same impact in the California community college districts where it also represents employees. She attributed this difference to the fact that the community college districts did not send *Janus*-related letters to their employees.

Teamsters' Principal Officer Jason Rabinowitz testified that Teamsters incurred increased expenses in the immediate aftermath of the *Janus* decision due to a higher than usual volume of inquiries from members about the effects of *Janus*. Teamsters' Regional Director for Southern California, Tanya Akel, testified that as the University distributed the *Janus* letter and FAQ at different locations, she would see an increase in inquiries from members at those locations. Akel also noted that Teamsters-represented bargaining units at the California State University (CSU) system did not experience the same changes in membership and inquiries about the *Janus* decision,

which she attributed to the fact that CSU did not send any *Janus*-related communications to its employees like the University did.[8]

Akel was particularly concerned about the impact of the *Janus* letter and FAQ at the Early Childhood Development Centers at UCLA. During the period from mid-July to mid-August 2018, Teamsters engaged in an organizing effort involving the centers' Lead Teachers, as they had recently been added to the CX unit.[9] A Teamsters organizing meeting on August 8 was attended by approximately 80 percent of the newly added Lead Teachers, whom Akel described as "enthusiastic." The *Janus* letter and FAQ were distributed to the UCLA Early Childhood Development Center employees on August 10. A Teamsters organizing meeting on August 15 had fewer attendees and less enthusiastic participation than the August 8 meeting. Akel attributed the difference in attendance and enthusiasm to the August 10 distribution of the *Janus* letter and FAQ. Teamsters set a goal of enrolling 100 percent of the newly-added teachers as union members. Ultimately, one Lead Teacher declined Teamsters' membership invitation.[10]

---

[8] Though Akel also testified that union membership dropped during this time frame, her testimony conflicted with that of Rabinowitz, who testified that membership rates remained approximately the same. Teamsters offered no explanation for this discrepancy and did not introduce any documents to substantiate its asserted change in membership levels.

[9] See *Regents of the University of California* (2018) PERB Decision No. 2578-H.

[10] At the time of the hearing, the Lead Teacher who did not join the union was no longer employed in a bargaining unit position.

The University's witnesses described distributing the *Janus* letter and FAQ in different departments. Anthony Solana, Labor Relations Director for UCLA, testified regarding the campus's "notoriously decentralized" human resources group communication mechanisms. Valentine took responsibility for distributing the communications to employees at UCLA's Department of Early Child Care and Education after UCOP directed their retraction, as well as any failures to remove posted letters from employee bulletin boards; she testified that these actions resulted from her inadvertent errors and misunderstandings.

Chester testified about his involvement in drafting the *Janus* letter and FAQ, the University's reasons for doing so, and his belief that its conduct did not fall within the definition of the various actions prohibited by the PEDD. The University anticipated, according to Chester, that *Janus* would significantly impact University employees' terms and conditions of employment, and "we did not want them to be in the dark with respect to this and have [sic] suddenly discover[ed] that there was a change in their take-home pay. So, we wanted to alert them to the fact." He acknowledged that though the University knew informing union members of the *Janus* decision might prompt them to drop their membership, the University found "that was outweighed, that concern, was outweighed by our interest in ensuring that employees had the information." He indicated that he did not recall the University issuing written directives to local labor relations departments regarding potential employee questions raised by the *Janus* letter and FAQ, including which questions should be referred to the Unions.

Chester maintained at hearing that the PEDD did not prohibit the University's conduct and emphasized its right to communicate with its own employees regarding

terms and conditions of employment. Chester testified that though he was aware the Governor signed and thus enacted SB 866, including section 3553, he did not believe the *Janus* letter and FAQ were of a nature which required the University to meet and confer under the new provisions.

PROCEDURAL HISTORY

AFSCME filed Unfair Practice Case No. SF-CE-1188-H on July 3, asserting that the University violated PEDD sections 3550 and 3553, and HEERA section 3571, when it issued communications to employees regarding *Janus*. UPTE filed a similar charge, Unfair Practice Case No. SF-CE-1189-H, on July 9, as did Teamsters, Unfair Practice Case No. SF-CE-1192-H, on July 10.

OGC issued three nearly identical complaints on September 14. On September 20, Charging Parties filed a "Joint Consolidated Amended Charge." PERB consolidated the complaints for purposes of the formal hearing, which was held November 5, 14, and 15. The ALJ issued the PD on July 19, 2019, finding the University violated HEERA section 3571, subdivisions (a), (b), and (c), and PEDD sections 3550 and 3553, by failing to meet and confer in good faith with the Unions prior to disseminating a mass communication concerning employees' rights to join or support an employee organization, by failing to distribute a communication or communications of reasonable length provided to it by the exclusive representatives, and by interfering with, deterring, or discouraging employees from authorizing dues deductions and/or membership in the Unions.

The ALJ found that based on the totality of the context and circumstances surrounding the *Janus* letter and FAQ, the University's speech unlawfully interfered

with the rights of both employees and their exclusive representatives by sending a message to employees that the University, rather than the Unions, is the exclusive source of important information regarding employee rights to engage in or refrain from engaging in protected activity. As this interfering conduct also had the natural and probable consequence of deterring and discouraging employees from authorizing dues deductions and/or membership in their unions, the ALJ found it also violated section 3550.

Teamsters filed a request to extend the time to file exceptions to September 3, 2019, which PERB granted on August 8, 2019. All Charging Parties filed exceptions on September 3, 2019.[11] The University filed its response, cross-exceptions, and request for oral argument on October 18, 2019. Charging Parties each filed reply briefs on November 27, 2019, in which they also requested oral argument.

On March 3, 2020, the Board granted the request for oral argument.[12] The Board provided the following direction to the parties:

> "The Board invites argument as to whether it should apply its longstanding interference standards in evaluating alleged violations of Government Code § 3550, and, if not,

[11] Initially, the Appeals Office rejected AFSCME and UPTE's exceptions as untimely because PERB only granted the extension of time to Teamsters. AFSCME and UPTE appealed this determination, supported by a joint stipulation with Teamsters and the University that all parties had understood and intended the extension of time to apply to all. In *Regents of the University of California* (2020) PERB Order No. Ad-477-H, the Board granted AFSCME and UPTE's appeal and accepted the exceptions as timely.

[12] The Board granted combined oral argument in the instant cases and the dismissal appeal in *Teamsters Local 2010 v. Regents of the University of California*, Unfair Practice Case No. SF-PE-5-H. We resolve that appeal in PERB Decision No. 2756-H.

what standards the Board should apply, including any potential defenses. In your argument, please address the following two questions and any others you believe are relevant:

"1. What statutory construction best describes the relationship (if any) between § 3550 in the PEDD and § 3571.3 in HEERA?

"2. When interpreting the terms "deter" and "discourage," what is the relevance (if any) of (a) the definition of "deter" in subdivision (a) of § 16645; (b) the employer's motive; (c) the truthfulness or misleading nature of the employer's communication or conduct; (d) the specific context in which the communication or conduct occurred; and (e) any other potentially relevant circumstances.

"In answering the above questions, please discuss whether the same or different standards should apply in the two contexts presently before the Board. First, we seek input on the standards for determining whether an employer has violated § 3550 while communicating with unrepresented employees during a union organizing campaign. Second, we seek input on the standards for assessing allegations that an employer violated § 3550 through a mass communication to represented employees, and we specifically seek input on the extent to which the outcome may be influenced by an employer's compliance with § 3553."[13]

[13] The Board also provided the parties with the opportunity to solicit non-party petitions for informational briefs and/or argument, in accordance with PERB Regulation 32210, but the Board received no such petitions.

The Board held oral argument via a publicly viewable video-teleconference on July 23, 2020, and advocates appeared on behalf of each party.[14]

DISCUSSION

These cases present the Board's first opportunity to interpret and apply the PEDD, including the scope of section 3550's prohibition on deterring or discouraging employee decisions about union membership and support, and section 3550's relationship to section 3553. Section 3550, as amended June 27, 2018, provides:

> **"**A public employer shall not deter or discourage public employees or applicants to be public employees from becoming or remaining members of an employee organization, or from authorizing representation by an employee organization, or from authorizing dues or fee deductions to an employee organization. This is declaratory of existing law."[15]

---

[14] The Board initially scheduled the argument to occur in-person in April 2020 but rescheduled several times and ultimately conducted the argument remotely due to the COVID-19 pandemic.

[15] As initially enacted effective January 1, 2018 by Senate Bill 285, section 3550 stated in full: "A public employer shall not deter or discourage public employees from becoming or remaining members of an employee organization." (§ 3550, added by Stats. 2017, ch. 567, § 1, eff. Jan. 1, 2018, amended by Stats. 2018, ch. 53, § 11, eff. June 27, 2018.) SB 866 made three changes: it clarified that "public employees" includes "public employees or applicants to be public employees"; it clarified that "becoming or remaining members of an employee organization" includes "authorizing representation by an employee organization" and "authorizing dues or fee deductions to an employee organization"; and it noted that the changes were "declaratory of existing law." The Senate Floor Analysis of SB 866 stated that the bill "[c]larifies, by making explicit as declaratory of existing law, that applicants for public employment also are among those whom the public employer is strictly prohibited from deterring or discouraging from becoming or remaining members of an employee organization, and expressly applies these prohibited activities involving the authorization of dues or fee deductions to an employee organization." (Sen. Rules Com., Off. of Sen. Floor Analyses, Rep. on Sen. Bill No. 866 (2017-2018 Reg. Sess.) as amended June 13,

As relevant to this matter, section 3553, also effective on June 27, 2018, states:

> "If a public employer chooses to disseminate mass communications to public employees or applicants to be public employees concerning public employees' rights to join or support an employee organization, or to refrain from joining or supporting an employee organization, it shall meet and confer with the exclusive representative concerning the content of the mass communication."

(§ 3553, subd. (b).)

Rather than placing the provisions of the PEDD within the existing statutes covering various segments of California's public sector employees, the Legislature placed the PEDD in its own chapter, independent of the approximately eleven other statutes over which PERB has jurisdiction.[16] Though there are many similar provisions and guiding principles among the statutes, there are also differences among their provisions. (See Zerger et al., editors, *California Public Sector Labor Relations* (2nd ed. 2020) § 2.10.) Board and court interpretations under one statute are instructive and may establish precedent for other similar statutes. (*Id*.; see, e.g., *Redwoods Community College Dist. v. Public Employment Relations Bd.* (1984) 159 Cal.App.3d 617, 623-624 [relying on Meyers-Milias-Brown Act (MMBA) cases to interpret Educational Employment Relations Act (EERA)[17]]; but see *Regents of the University of California v. Public Employment Relations Bd.* (1985) 168 Cal.App.3d

---

2018, pp. 4-5.) We thus conclude the final sentence of section 3550 indicates that the 2018 amendments were declaratory of the existing meaning of section 3550, not that section 3550 was declaratory of existing law at the time of its original enactment.

[16] This approximation combines as one the various transit district statutes.

[17] EERA is codified at section 3540 et seq.

937; 944-945 [court refused to apply EERA and Dills Act[18] precedent because of HEERA's different statutory language].)

A. The Applicable Standards for Section 3550

1. Prima Facie Violation

To determine what constitutes a prima facie violation of section 3550, we first must interpret what it means to "deter or discourage" public employees in their decisions to join, authorize, or support a union. The PEDD itself does not provide definitions, nor are the words "deter" or "discourage" found in the other labor relations statutes administered by PERB.

When interpreting statutory language, PERB begins with the fundamental rule that we should ascertain the intent of the Legislature so as to effectuate the purpose of the law. (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230; *North Orange County Regional Occupational Program* (1990) PERB Decision No. 857, p. 7 (*NOCROP*).) "[W]here the language of a statute is clear and unambiguous . . . the construction intended by the Legislature is obvious from the language used." (*NOCROP*, *supra*, PERB Decision No. 857, p. 7.) Additionally, statutes are to "be given a reasonable and common sense interpretation consistent with the apparent purpose and intention of the lawmakers." (*DeYoung v. City of San Diego* (1983) 147 Cal.App.3d 11, 18; *Inglewood Unified School District* (1991) PERB Order No. Ad-222, p. 11.) Further, "every statute should be construed with reference to the whole system of which it is a part so that all may be harmonized and have effect." (*Joint Powers*

[18] The Ralph C. Dills Act is codified at section 3512 et seq.

Board of Directors, Tulare County Organization for Vocational Education, Regional Occupational Center and Program (1978) PERB Decision No. 57, p. 5, citing *Select Base Materials v. Bd. of Equalization* (1959) 51 Cal.2d 640, 645.) "Where [the provisions of] a statute [are] subject to two or more reasonable interpretations, the interpretation which will harmonize rather than conflict with other provisions thereof should be adopted." (*San Bernardino City Unified School District* (1989) PERB Decision No. 723, adopting proposed decision at p. 13, citing *People v. Kuhn* (1963) 216 Cal.App.2d 695, 698.)

As evident from the language of the statute itself, in enacting section 3550 the Legislature intended to prohibit employer influence over certain categories of employee decisions surrounding union contributions and union membership. As explained below, "deter or discourage" means to tend to influence an employee's free choice regarding whether or not to (1) authorize union representation, (2) become or remain a union member, or (3) commence or continue paying union dues or fees. Though the phrase does not appear elsewhere in the statutory scheme administered by PERB, we find useful equivalents for each word within the Government Code.

Section 16645 et seq. prohibits the use of state funds or facilities to "assist, promote, or deter union organizing." Section 16645, subdivision (a) explicitly defines these terms:

> "'Assist, promote, or deter union organizing' means any attempt by an employer to influence the decision of its employees in this state or those of its subcontractors regarding either of the following:
>
> "(1) Whether to support or oppose a labor organization that represents or seeks to represent those employees.

> "(2) Whether to become a member of any labor organization."

In *Teamsters Local 2010 v. Regents of the University of California* (2019) 40 Cal.App.5th 659 (*Regents*), the court considered whether a communication circulated by the employer could reasonably be found to "deter" union organizing. Although the employer argued there was no evidence presented to show the bulletin in question was intended to or did in fact "deter" organizing, the appellate court held that the definition of "assist, promote, or deter union organizing" only required a showing of "any attempt by an employer to *influence* the decision of its employees . . ." (*Id*. at p. 666, original italics.) The court further noted that "[a]lthough the bulletin was not coercive, in that [the employer] professed neutrality on the issue of unionization, couched the communication in terms of providing employees with facts, and did not threaten employees with reprisals if they unionized, a trier of fact could reasonably find the bulletin was an attempt to 'influence' the employees who were on the receiving end." (*Id*. at pp. 666-667 [citing Black's Law Dict. (10th ed. 2014) p. 898 and noting the definition of "influence" as, among other things, "one or more inducements intended to alter, sway, or affect the will of another, but falling short of coercion"].) We find the court's reasoning supports defining "deter" similarly under section 3550.[19]

[19] *Regents* noted that the case arose before the enactment of the PEDD, and the court thus declined to rule whether PERB might, under the provisions of the PEDD, have exclusive initial jurisdiction over a dispute that could be litigated under either the PEDD or section 16645 et seq. (*Regents*, *supra*, 40 Cal.App.5th 659, 668-671.) These points do not lessen the import of *Regents* in interpreting "deter" in the PEDD.

The University argues we should not follow the *Regents* court's interpretation of "deter" because the Legislature could have incorporated section 16645, subdivision (a)'s definition of "deter" into section 3550 but did not do so. This argument disregards that while the Legislature did not repeat the definition, it did choose to use "deter" in both statutes. Generally, when the Legislature uses a word or phrase in a particular sense in one statute, the word or phrase should be understood to carry the same meaning when it appears in another statute dealing with the same subject matter. (*People v. Tran* (2015) 61 Cal.4th 1160, 1167-1168.) Sections 16645 and 3550 deal with the same subject matter—employer conduct related to employee decisions about union support. The Legislature's use of "deter" in both statutes thus indicates it intended for the word to be interpreted similarly in each. Further, the Legislative Counsel's Digest and other parts of the legislative history reveal the Legislature was specifically aware that section 16645 et seq. already barred an employer from using state funds to deter union support.[20]

Unlike "deter," "discourage" is not defined in any related law, yet statutory comparison nonetheless favors interpreting "discourage" in a similar manner as "deter." Under HEERA section 3571, subdivision (d) an employer may not "in any way encourage employees to join any organization in preference to another." To establish

[20] At oral argument, the University's counsel expressed displeasure with the *Regents* court's interpretation of "deter," calling it a "gag order" because it does not provide a safe harbor for non-coercive employer speech. But the University's dislike of the ruling in *Regents* does not blunt the case's persuasive value for interpreting "deter" in section 3550. We further address the University's objections to *Regents* in our discussion of section 3550's relation to the pre-existing interference standard *post* at pp. 28-34.

a violation, an employee organization need not show that the employer intended its actions to impact employee free choice. (*Santa Monica Community College District* (1979) PERB Decision No. 103, p. 22 (*Santa Monica*) [interpreting EERA section 3543.5, subd. (d), which has identical language to HEERA section 3571, subd. (d)[21]].) "The simple threshold test . . . is whether the employer's conduct tends to influence that choice or provide stimulus in one direction or the other." (*Santa Monica*, *supra*, PERB Decision No. 103, p. 22; *State of California (Departments of Personnel Administration, Mental Health, and Developmental Services)* (1985) PERB Decision No. 542-S, pp. 2-3.) The Board's longstanding definition of "encourage" as "tending to influence" lends support for interpreting "discourage" in a similar manner.

Consistent with appellate precedent interpreting "deter" and Board precedent interpreting "encourage," the test for whether conduct or communication deters or discourages employees in making the choices enumerated in section 3550 is objective. It is the charging party's burden to show that the conduct or communication tends to influence employee free choice, not that the conduct actually did influence employee choice. We will look first to the conduct or communication itself in determining whether it tends to influence employee free choice. But context matters in even the objective assessment. Therefore, we also will examine the context surrounding the conduct or communication when determining whether such conduct is reasonably likely to deter or discourage employee choices on union matters. (Cf. *Los*

[21] Other statutes we enforce contain comparable provisions. (See Gov. Code, §§ 3506.5, subd. (d), 3519, subd. (d), 3524.71, subd. (d), Ed. Code, § 8438.1, subd. (c); Pub. Util. Code, §§ 28858, subd. (d), 99563.7, subd. (d).)

Angeles Unified School District (1988) PERB Decision No. 659, p. 9 ["Statements made by an employer are to be viewed in their overall context (i.e., in light of surrounding circumstances) to determine if they have a coercive meaning."].)

However, we do not adopt the "strict neutrality" test proposed by Teamsters to the extent that such a test considers *only* the likelihood that an act or communication may deter or discourage employee free choice, irrespective of any underlying business necessity. (See, e.g., *Santa Monica*, *supra*, PERB Decision No. 103, p. 22 [interpreting EERA section 3543.5, subd. (d) as imposing on employers "an unqualified requirement of strict neutrality"].) Instead, we find an employer may establish an affirmative defense via a legitimate business necessity that outweighs the tendency to deter or discourage, as explained *post* at pp. 34-37. This is based on longstanding, bedrock labor law principles consistent with Board analysis in other contexts, and comports with the Board's approach to affirmative defenses even under a "strict neutrality" framework.[22]

i. Even-Handed Interpretation

While at first glance the PEDD appears to prohibit only an employer's negative conduct, we treat section 3550 even-handedly as prohibiting public employer conduct which tends to influence employee choices as to *whether or not* to authorize representation, become or remain a union member, or commence or continue paying union dues. As we proceed to explain, this approach is consistent with longstanding

[22] In *City of Arcadia* (2019) PERB Decision No. 2648-M, for instance, the Board noted that where there is a split between union factions, the employer will typically have a duty to keep dealing with the faction it believes, in good faith, based on objective evidence, to be in charge. (*Id*. at p. 26.)

labor law principles, our duty to give effect to the Legislature's intent to create a coherent labor relations framework, and the legislative history.

PEDD section 3551 vests the Board with the same broad powers and duties vis-à-vis the PEDD as the Board has long held for the other labor relations laws we administer. In carrying out those powers and duties, we may not "construe statutes in isolation" and instead must give effect to the Legislature's intent to create "a coherent and harmonious system of public employment relations laws." (*Coachella Valley Mosquito & Vector Control Dist. v. Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1089-1090.)

In isolation, section 3550 arguably could be interpreted to permit an employer to encourage employees to become or remain union members. Through such support, however, the employer's conduct would tend to encourage support for that union over any contemporaneous or future competing union. As noted *ante*, however, an employer may not "encourage" support for one union over another under HEERA section 3571, subdivision (d).

Therefore, construing the PEDD in harmony with other laws, as well as the above-noted Board precedent interpreting "encourage" as tending to influence "in one direction or the other," we interpret section 3550 broadly to protect an employee's free choice regarding *whether or not* to take the actions enumerated in the statute, viz., authorize representation, become or remain a union member, or commence or continue paying union dues or fees. Even though the statute does not include section 16645's additions of "assist or promote," preventing an employer's influence even-

handedly best effectuates the purpose of the PEDD and other laws to prevent employer influence over employee free choice.[23]

[23] This interpretation also matches the position of the parties in this matter at oral argument. When asked at oral argument whether the Board should "interpret 3550 in an even-handed manner to prohibit employer conduct that deters or discourages employees from making a free choice whether or not to authorize representation, become or remain a union member, or pay union dues?" counsel provided the following responses:

> "MR. YEUNG: So, I think you certainly could read into 3550, you know, pure neutrality and prohibit employer from promoting union membership. I mean, I use as an analogy the MMBA, which, you know, has unfair practices by employers, but doesn't have any by employee organizations. But PERB, in your wisdom, in your regulations, has put out the employee unfair practices, at least with the MMBA, which was enacted under PERB's jurisdiction.
>
> "So, there is precedent for that in order to create a harmonious system of labor relations. PERB has done that, read into statutes what is necessary to essentially make it work.
>
> "To answer your question whether your [sic] should, in the abstract, you probably should in order to, again, be consistent with your existing precedent, consistent with other labor relations statutes, make it a, you know, neutrality requirement.
>
> "[¶ . . . ¶]
>
> "MS. GAREA: I agree with Counsel for the [University] that PERB could interpret it in the way that you suggest. And I would note that I think there is also potentially consistency with an overall legislative approach when you look at the suite of legislation passed in response to anticipated *Janus* decision. It really was focused on removing the public

Finally, our interpretation is also consistent with legislative history. For instance, the Senate Floor Analysis for Senate Bill 285 (SB 285), through which the Legislature enacted the critical substance of section 3550, notes that the bill "essentially seeks to ensure that public employers shall remain neutral when their employees are deciding whether to join a union or to stay in the union." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 285 (2017-2018 Reg. Sess.) as amended March 14, 2017, p. 4.) An Assembly Floor Analysis similarly quoted the bill's author as stating that SB 285 "ensure[s] that public employees remain free to exercise their personal choice as to *whether or not to become union members*, without being deterred or discouraged from doing so by their employer." (Assem. Com. on Public Employees, Retirement, and Social Security, Analysis of Sen. Bill No. 285 (2017-2018 Reg. Sess.) as amended March 14, 2017, p. 3, italics added.)

ii. Relation to Pre-Existing Interference Standard

The University argues that section 3550, in the context of an employer communication, is limited by the free speech safe harbor of HEERA section 3571.3; that is, only threatening or coercive communications may be considered violations of section 3550. We find that section 3550 is not subject to the limitations of section 3571.3 because it does not duplicate the interference standard. We again base this

---

> employer from the relationship between employees and the union."

Counsel for AFSCME and UPTE did not disagree or provide additional comments.

interpretation on statutory language, the overall statutory framework, precedent, legislative history, and longstanding labor law principles.

Generally, an employer does not commit an interference violation if it expresses or disseminates its views, arguments, or opinions on employment matters, unless such expression contains a threat of reprisal or force or promise of benefit. (*California Virtual Academies* (2018) PERB Decision No. 2584, p. 29.) However, following National Labor Relations Board precedent regarding comparable language, the Board has held that the safe harbor provision does not shield employer statements in other contexts, such as in discrimination cases. (*Ibid*.) Moreover, even in analyzing interference claims, the safe harbor for employer speech does not apply "to advocacy on matters of employee choice such as urging employees to participate or refrain from participation in protected conduct, statements that disparage the collective bargaining process itself, implied threats, brinkmanship, or deliberate exaggerations." (*Hartnell Community College District* (2015) PERB Decision No. 2452, p. 25, citing *County of Riverside* (2010) PERB Decision No. 2119-M, pp. 16-23; *NLRB v. Gissel Packing Co.* (1969) 395 U.S. 575, 619-620.)

By the plain language of the statutes, section 3550 is not limited by section 3571.3. Section 3571.3 provides:

> "The expression of any views, arguments, or opinions, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute, or be evidence of, an unfair labor practice *under any provision of this chapter,* unless such expression contains a threat of reprisal, force, or promise of benefit; provided, however, that the employer shall not express a preference for one employee organization over another employee organization."

(Emphasis added.) Because the PEDD is in its own chapter separate from HEERA, section 3571.3 by its plain terms does not apply to conduct subject to section 3550.[24]

Furthermore, the above-noted statutory provisions and precedent which help define "deter" and "discourage" support this interpretation. "Deter" under section 3550, like "deter" under section 16645, subdivision (a), carries no coercion requirement. Similarly, the Board has interpreted "encourage" under section 3571, subdivision (d) as not requiring a showing of coercion. The PEDD itself uses no language which duplicates the limitations of HEERA's free speech safe harbor, nor does it reference that provision explicitly or implicitly. (See also *Regents*, *supra*, 40 Cal.App.5th 659, 667). The language the Legislature used and the language it omitted, taken together, indicate that the Legislature did not intend to limit the scope of section 3550 to coercive speech.

Treating section 3550 as providing no different protections than already existed would also make it superfluous. "[A] statute should be construed so that effect is given to all its provisions, leaving no part superfluous or inoperative, void or insignificant and so that one section will not destroy another." (*United Public Employees v. Public Employment Relations Bd*. (1989) 213 Cal.App.3d 1119, 1127, citing *Stewart v. Board of Medical Quality Assurance* (1978) 80 Cal.App.3d 172, 179.) Particularly given that section 3550 uses new and broader language than prior law, we have little choice but

[24] While the PEDD does not specify that violations are considered unfair practices, we do not find this omission to be meaningful. Not long after this matter was submitted to the ALJ for decision, PERB adopted regulations deeming violations of the PEDD to constitute unfair practices. (See PERB Regulations 32611-32611.5.)

to find that it added a new prohibition rather than reiterating pre-existing interference prohibitions.

While the statute itself is sufficiently clear and unambiguous to sustain this interpretation, we note that section 3550's plain meaning is further supported on balance by additional relevant factors. Where a statute is susceptible to multiple interpretations, we may divine its meaning by turning to a variety of extrinsic sources, including the legislative history, the nature of the overall statutory scheme, and consideration of the sorts of problems the Legislature was attempting to solve when it enacted the statute. (See *State of California (Office of the Inspector General)* (2019) PERB Decision No. 2660-S, p. 16, citing *Day v. City of Fontana* (2001) 25 Cal.4th 268, 272; *Mt. Hawley Insurance Co. v. Lopez* (2013) 215 Cal.App.4th 1385, 1400, citing *Clayworth v. Pfizer, Inc.* (2010) 49 Cal.4th 758, 770.)

Looking first at the overall statutory scheme, there is certainly employer conduct that may simultaneously deter or discourage employee free choice on one of the enumerated subjects and interfere with protected rights under HEERA or another PERB-enforced statute. However, whereas the pre-existing prohibition on interference protects all employee and union rights under HEERA, section 3550 protects a more narrow set of employee prerogatives: authorizing representation; becoming or remaining a union member; or commencing or continuing to pay union dues or fees. Thus, section 3550 provides more robust protection than already existed under our interference standard, but only to a narrow set of three types of employee decisions that the Legislature deemed worthy of extra protection against employer influence.

The legislative history similarly indicates the Legislature's desire to afford special protection to employee decisions regarding union selection, membership, and support. First, the Legislature enacted the PEDD with the knowledge that looming threats to public sector collective bargaining on the federal level, including eventually *Janus* itself, would potentially alter existing dynamics and protections at the state level. (See Sen. Rules Com., Off. of Sen. Floor Analyses, Rep. on Sen. Bill No. 285 (2017-2018 Reg. Sess.) as amended March 14, 2017, p. 6 ["The California Labor Federation argues that the bill is necessary to address 'new threats on the federal level, both through the courts and legislatively, that threaten the existence of public sector unions'"].) These threats ostensibly included the series of Supreme Court cases, culminating with *Janus* itself, which eroded the public sector union framework provided by agency fees under *Abood*. (See Gould, *How Five Young Men Channeled Nine Old Men: Janus and the High Court's Anti-Labor Policymaking* (2019) 53 U.S.F. L.Rev. 209, 222-229 [explaining development of federal precedent leading to *Janus*, and how *Janus* erodes the principle on which union exclusivity is based].) Indeed, at roughly the same time the Legislature enacted section 3550, the California Attorney General submitted an amicus curiae brief in *Janus*, arguing to uphold agency fees. (See Brief of Amicus Curiae State of California in Support of Affirmance at p. 2, *Janus v. American Federation of State, County, and Municipal Employees, Council 31* (2018) 585 U.S. ___, 138 S. Ct. 2448.) As it turned out, public sector labor stakeholders accurately predicted that *Janus* would alter law which mandated agency fees, and accordingly fundamentally shift the power balance and funding of public sector unions.

These contextual realities frame the Legislature's decision to enact section 3550. If section 3550 is subject to the strictures of section 3571.3, preventing only coercive speech, it fails to provide any meaningful counter to the shifts in power and funding that flow from *Janus*. To give the provision practical meaning in context of the Legislature's aims, section 3550 must provide a more robust shield to employer influence over the three named categories of employee decisions.

As is sometimes the case, the legislative history contains certain anomalies. On the one hand, legislative history shows that the Legislature was aware that pre-existing law prohibited a public employer from using state funds to deter union organizing, via section 16645.6, and that the Legislature sought to close a legal "loophole" or "gap" that nonetheless left employers free to influence such decisions. (Legis. Counsel's Dig., Sen. Bill No. 285 (2017-2018 Reg. Session); Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading of Sen. Bill No. 285 (2017-2018 Reg. Sess.) as amended March 14, 2017, pp. 3-4; Assem. Com. on Public Employees, Retirement, and Social Security, Analysis of Sen. Bill No. 285 (2017-2018 Reg. Sess.) as amended March 14, 2017, p. 3.) The clearest loophole being closed was the possibility of deterring or discouraging free choice using non-state funds. This inference is manifest in the Legislature's choice to borrow from section 16645 by using its critical word—"deter"—in section 3550.[25] The phrase "deter or discourage" covers a broader segment of conduct than coercion, and it must be given effect. Indeed, the

[25] We note, however, that the Legislature did not have the benefit of the court's further interpretation of "deter" in *Regents*, *supra*, 40 Cal.App.5th 659, as the court issued that decision after the Legislature enacted and amended section 3550.

addition of the word “discourage” reflects, if anything, a further broadening of section 16645’s prohibitions.

On the other hand, the history also includes a note from the author that “[c]urrently, there is nothing to stop public employers from engaging in unfair tactics in an attempt to convince or coerce their employees to withdraw from union membership.” (Assem. Com. on Public Employees, Retirement, and Social Security, Sen. Bill No. 285 (2017-2018 Reg. Sess.) as amended March 14, 2017, p. 3.) This statement appears to ignore existing interference standards prohibiting coercion, or perhaps uses the phrase “convince or coerce” in a manner that does not reflect PERB precedent on coercion. On balance, we find any inconsistencies in the legislative history insufficient to overcome the plain meaning of the language and the many other interpretive principles and guidance noted herein, including the main thrust of the Legislature’s purpose in the context of *Janus* and support from the comparisons to section 16645 and other instances which require neutrality.

2. Affirmative Defenses

Though section 3550 does not duplicate the interference standard, the Board’s test to weigh the potential harm of interference implicates similar concerns as those raised by section 3550 allegations. We thus will apply a tailored version of the Board’s balancing test for interference, first articulated in *Carlsbad Unified School District* (1979) PERB Decision No. 89, to assess an employer’s affirmative defense to a charging party’s prima facie case of a section 3550 violation.

To establish a prima facie interference case, a charging party must show that a respondent’s conduct tends to or does result in some harm to protected rights under

our statutes. (*Trustees of the California State University (Northridge)* (2019) PERB Decision No. 2687-H, p. 3 (*CSU*).) Once a charging party has established a prima facie case, the burden shifts to the respondent. (*Ibid*.) The degree of harm dictates the respondent's burden. (*Ibid*.) If the harm is "inherently destructive" of protected rights, then the respondent must show that the interference was caused by circumstances beyond its control and that no alternative course of action was available. (*City of San Diego* (2020) PERB Decision No. 2747-M, p. 36.)[26] For conduct that is not inherently destructive, the respondent may attempt to justify its actions based on operational necessity and PERB will balance the respondent's asserted interests against the tendency to harm protected rights. (*Ibid*.) If the tendency to harm outweighs the asserted business justification, PERB finds a violation. (*Ibid*.)

We apply a similar balancing test where an employer raises a legitimate business necessity for conduct which deters or discourages employees from authorizing union representation, choosing to become or remain a union member, or commencing or continuing to pay union dues or fees. Where a charging party shows employer conduct tended to influence employee decisions on one of these topics, the burden shifts to the employer. The degree of likely influence dictates the employer's burden. If the likely influence is "inherently destructive" of employee free choice, then

[26] In *Regents of the University of California (Berkeley)* (2018) PERB Decision No. 2610-H, the Board explained that conduct is inherently destructive if its "natural and probable consequence" is to discourage protected activity, including but not limited to requiring employees to give up protected activity to receive a pay increase; maintaining an overbroad restriction that bars a mix of protected and unprotected activities; or implementing a wholesale replacement of represented employees with non-represented employees. (*Id.* at pp. 58-61 & 71.)

the employer must show that the deterring or discouraging conduct was caused by circumstances beyond its control and that no alternative course of action was available. For conduct that is not inherently destructive, the employer may attempt to justify its actions based on operational necessity and PERB will balance the employer's asserted interests against the likelihood of influencing employee free choice. Within the category of conduct or communications that are not inherently destructive of section 3550's protections, the stronger the likelihood to influence employee free choice, the greater is the employer's burden to show its purpose was important and that it narrowly tailored its conduct or communication to attain that purpose while limiting influence on employee free choice to the extent possible. If the likelihood of influence outweighs the asserted business necessity, we will find a violation.[27]

As in interference cases and the prima facie section 3550 analysis, a variety of contextual factors may be relevant in assessing an employer's asserted business justification and will depend on the evidence and circumstances of each particular case. For example, truthfulness, whether an employer is responding to a misleading union communication, and employer motive, as well as the mode, frequency, and/or

[27] For the reasons stated in his dissent in *Contra Costa County Fire Protection District* (2019) PERB Decision No. 2632-M, Member Shiners disagrees that the concept of "inherently destructive conduct" should be part of PERB's interference standard. (*Id*. at pp. 72-76.) Because section 3550 violations, like interference violations, require no showing of unlawful motive—which "inherently destructive conduct" indicates—he would not import that concept into PERB's standard for finding section 3550 violations but instead would simply "balance the harm to protected rights against the employer's asserted justification for its conduct." (*Id*. at p. 75.)

timing of a communication, may all be relevant considerations. We discuss which contextual circumstances inform the instant matters *post* at pp. 46-52.

3. Section 3553 Presumption

We next confront the extent to which an employer's section 3553 violation may be relevant context in finding a section 3550 violation, as the ALJ found here. We find that where a charging party meets its burden to prove an employer violated section 3553, it creates a presumptive section 3550 violation. The employer may rebut the presumption by showing that although the communication required section 3553 negotiations pre-publication, it does not meet the threshold prima facie test for deterring or discouraging employee decisions protected by section 3550. In other words, a section 3553 violation shifts the burden to the employer to prove the mass communication does not tend to influence employee free choice. We explain.

As established by California law, "[a] presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action. A presumption is not evidence." (Evid. Code, § 600, subd. (a).) "A presumption is either conclusive or rebuttable. Every rebuttable presumption is either (a) a presumption affecting the burden of producing evidence or (b) a presumption affecting the burden of proof." (*Id*., § 601.) The effect of a presumption affecting the burden of proof is "to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact." (*Id*., § 606.) A presumption affecting the burden of proof "is established to implement some public policy other than to facilitate the particular action in which it applies." (*In re Heather B.* (1992) 9 Cal.App.4th 535, 561; Evid. Code, § 605.)

The Board has found and applied rebuttable presumptions in the past not only based upon explicit statutory language, but also by harmonizing statutory language and considering its legislative purpose. For example, in *Peralta Community College District* (1978) PERB Decision No. 77, the Board read EERA section 3545, subdivision (b), together with its companion subdivision (a), to give rise to the presumption that all teachers are to be placed in a single bargaining unit, except where the criteria of the latter section cannot be met. (*Id*. at p. 10.) The Board found this presumption satisfies the legislative preference for the largest possible viable unit. (*Ibid*.) The Board then placed the burden of proving the inappropriateness of a comprehensive teachers' unit on those opposing it. (*Ibid*.)

In the case of sections 3550 and 3553, we similarly consider the statutes together and look to their purpose to establish a presumption. We read the two provisions in harmony due to their proximity in the same chapter and their apparently overlapping purposes. As a practical matter, we find that where an employer distributes a communication concerning public employees' rights to join or support (or to refrain from joining or supporting) an employee organization without negotiation, such a communication more than likely tends to influence employee decisions on whether to authorize a representative, choose to become or remain a union member, or commence or continue to pay union dues or fees. The category of communications which may concern employee rights to choose whether or not to join or support an employee organization (and thus meet the threshold of section 3553), but yet not tend

to influence employee decisions on those topics (thus avoiding liability under section 3550) is very narrow.[28]

The statutes protect different facets of similar rights by restricting an employer's influence over employee decisions irrespective of whether employees are exclusively represented by a union, and, for represented employees, obligating the employer to bargain before issuing a communication which may exert such influence. Where a charging party proves a section 3553 violation, it gives rise to a rebuttable presumption that the communication also violates section 3550.[29]

Having established the standards that the Board will use to evaluate alleged section 3550 violations, we turn to applying these standards to the facts in this matter.

---

[28] Though narrow, the possibility of such communications precludes a derivative section 3550 violation based solely on a proven section 3553 violation.

[29] In so finding, we do not foreclose the possibility of a legitimate business necessity which is so strong as to overcome the presumption even where the communication tends to influence employee free choice. But such circumstances likely would trigger an emergency exception to bargaining. (See, e.g., MMBA, § 3504.5; Dills Act, § 3516.5; Judicial Council Employer-Employee Relations Act, § 3524.62, subd. (b); Trial Court Act, § 71634.1, subd. (b); *Calexico Unified School District* (1983) PERB Decision No. 357, adopting proposed decision at p. 20 (*Calexico*).) However, PERB has interpreted emergency exceptions narrowly, often finding that an employer did not meet its burden, even in cases of severe financial distress. (*City of Selma* (2014) PERB Decision No. 2380-M, pp. 20-21; *City of Davis* (2012) PERB Decision No. 2271-M, adopting proposed decision at pp. 24-25*; City of Long Beach* (2012) PERB Decision No. 2296-M, pp. 27-28; *Lucia Mar Unified School District* (2001) PERB Decision No. 1440, adopting proposed decision at p. 46; *Compton Community College District* (1989) PERB Decision No. 720, pp. 20-23; *Calexico*, *supra*, PERB Decision No. 357, adopting proposed decision at p. 20; *Sutter Union High School District* (1981) PERB Decision No. 175, p. 7, fn. 5.) And when the emergency defenses apply, they do not relieve an employer of its duty to provide notice to the union as soon as possible and to meet at the earliest practicable time.

B. Standard Applied to the University's *Janus* letter and FAQ

1. The University failed to rebut the presumption of a section 3550 violation created by its unchallenged violation of section 3553.

The University does not except to the ALJ's finding that its failure to meet and confer with the Unions regarding its communications violated PEDD section 3553. Applying our articulated standard, this leads to a presumption that the communications violated section 3550.

However, because the ALJ found the University's section 3553 violation created a derivative section 3550 violation, rather than a presumption of a violation, we view the University's arguments as broadly and favorably as possible to assess whether it rebutted the presumption. Further, though we ultimately rest our conclusion on balancing all relevant factors, *post*, we provide this assessment as guidance for future cases.

The evidence presented in the University's defense, as discussed further below, fails to rebut the presumption that the University's section 3553 violation led to unilateral issuance of communications that deterred or discouraged employee free choice. To the extent the University's defenses rely on interpreting "deter or discourage" as mimicking the standard for interference, we have dispensed with this theory and are unpersuaded. No defense raised by the University convinces us that the *Janus* letter and FAQ did not tend to influence employee free choice. Nor, as addressed more fully below, does the University prove a business necessity so strong as to otherwise overcome the presumption.

2. Even if the University had not presumptively violated section 3550, Charging Parties have established a prima facie case and the University has failed to establish an affirmative defense.

i. Prima Facie Case

Even without the benefit of the presumption created by the section 3553 violation, Charging Parties successfully met their burden to show the University's *Janus* letter and FAQ tended to influence employee free choice by attaching a financial disincentive to union membership without context, and by actively and presumptively subverting the Unions' participation in conversations with bargaining unit employees. This tendency to influence manifests in both the *Janus* letter and FAQ themselves, and the contextual factors.

The letter stated, "[a]s a result of the Supreme Court ruling, [the University] will no longer deduct agency fees from the paychecks of union nonmembers . . . The Supreme Court decision does not affect the dues that union members pay." Further, the FAQ anticipated the following question: "How do I find out how much the fees are - and therefore, how much will no longer be deducted from my paycheck?" The University—in a communication sent to union members who would not see any change in their paychecks unless they resigned their membership—thus connected the choice to refrain from union membership with a larger paycheck and thereby reasonably tended to influence employee decisions on union membership and support by directly framing the Supreme Court's decision only in terms of a financial advantage to agency fee payers, eliding any hint that the right-to-work framework *Janus* imposed may reduce compensation and protections over time. As discussed further below, the University's decision to act hurriedly, unilaterally, and without any attempt to portray competing views of the *Janus* decision aptly shows one reason why

a failure to bargain as section 3553 requires tends to lead to communications that violate section 3550.

Compounding the likely impact of the communications, the answer to another FAQ directed employees with questions about the status of their union membership solely to their "local labor relations office." The University's choice to direct employees solely to itself to deliver information about union membership status tended to influence employee free choice.[30] The University provided no evidence of directives to local labor relations offices regarding such conversations, nor which questions should be referred to the Unions, suggesting a lack of uniformity and less control over what local offices might tell represented employees. We find on their face the *Janus* letter and FAQ tended to influence employee free choice.

Additional facts and circumstances surrounding the communications increased the likelihood that they would deter or discourage employee free choice in violation of section 3550. First, as noted above, the *Janus* letter and FAQ were even more harmful delivered without any context from the Unions regarding the value or benefits of exclusive representation or union membership. Indeed, the Legislature's addition of section 3553 animates its interest in providing a balanced perspective through either a negotiated communication or simultaneous distribution of employer and union communications. That the University distributed the communications unilaterally and in

[30] In some places, the FAQ referred employees to either labor relations or their union representative. Whether purposefully or not, the inconsistent message contributed to the FAQ's tendency to influence employee decisions about union membership or support.

isolation, notwithstanding the Charging Parties' requests to meet and confer, increases the tendency to influence even without applying a presumption.

At oral argument, the Board asked counsel the relevance of a number of additional contextual factors: mode of communication (including the University's unusual decision to translate this communication when it had refused to translate other such communications in the past), timing, frequency, and duration, for example. While the University excepted to how the ALJ applied the contextual factors, claiming in particular they should hold no weight given that she should have found no actual impact on employees, the University admitted at oral argument that all of these factors are relevant to determining the likelihood of influencing a reasonable employee.[31]

We find many of these factors helpful in assessing the tendency of the *Janus* letter and FAQ to influence free choice. In some instances, this context is clear on its face, while in others we frame the factors in comparison to other University communications to assess whether the challenged communications stand out for their

[31] University counsel, when asked at oral argument whether these factors might be relevant, answered:

> "Yeah, I would actually agree. But again, I would emphasize that the focus has to be on the effect on the employees, a reasonable employee. But again, that all goes to context . . . .If employees, in their mind, believe that the employer never translates something, and then all of a sudden you're translating something, and they believe it's unusual, it could affect how they perceive that communication."

speed, repetition, duration, urgency, pervasiveness, and translation to other languages, among any other relevant contextual factors.[32]

The University e-mailed the *Janus* letter and FAQ "FOR IMMEDIATE DISTRIBUTION" to "**all represented** employees," and, in most cases, forwarded or delivered the documents to represented employees that business day or the day after. (Emphasis in original.) While not all employees necessarily received the message tagged as "for immediate distribution," the content of the message itself showed the communications were released with urgency. The text of the *Janus* letter stated the Supreme Court issued its decision on June 27, and a reasonable employee could infer from receiving the University's related communication within 48 hours of the decision's issuance that the University believed the message was particularly urgent and important.

While the University's initial directive to circulate the documents did not specify the mode of communication, it was delivered via e-mail, via hand-delivery, and posted conspicuously across the University's campuses. Despite the University's decentralized communications structure for labor relations, it is undisputed that the University, with few exceptions, made good on its decision to reach as many employees as quickly as possible. In places where employees received this message more than once (e.g., both via e-mail and again via hand-delivery; or hand-delivered and by placement in a break area or on a video monitor), such employees would be

[32] We note this list is non-exclusive and anticipate it may expand as case law applying section 3550 develops.

even more susceptible to the inference that the communications were crucial and time-sensitive, and thus would tend to be influenced by them.

Further, based on the context in the record, the University's decision to translate the communications into Spanish and simultaneously distribute both English and Spanish language versions to employees increased the extent to which reasonable employees were influenced by the *Janus* letter and FAQ. The record establishes that translation is not a regular practice for most communications to employees, and the University in fact has declined past AFSCME requests for translation. Singling out these documents for translation sent a message that the *Janus* letter and FAQ were particularly important. Whether or not employees were aware of the Unions' past efforts to convince the University to translate documents, the fact that many types of documents were not offered in translated versions gives extra weight to those that are translated. Even for non-Spanish speakers, the fact that the communication required translation and circulation to all in the translated version would cause a reasonable employee to ascribe greater significance to it.

Combined with the content of the communications themselves, the context in which the *Janus* letter and FAQ were received by employees tended to influence employee choice and thus deterred and discouraged decisions to become or remain union members. Having reached the conclusion that Charging Parties met their prima face burden, we turn to balancing the likelihood to influence employee free choice with the University's stated business necessity for issuing the letter and FAQ.[33]

[33] Although not necessary to establish a section 3550 violation, Charging Parties attempted to establish actual harm through testimony regarding decreased

ii. The University's Affirmative Defense

The University asserted a business purpose for distributing the *Janus* letter and FAQ: that, as an employer, it has both an obligation and a right to communicate with its employees regarding their terms and conditions of employment. Specifically, the University asserted the need to get information about *Janus*'s impact to employees before any changes were reflected in their paychecks.

While we find little question that the communications tended to influence employee decisions, we do not find the communications inherently destructive.[34] Thus, applying the balancing test described *ante*, we weigh the communications' tendency to influence free choice against the University's reasons for action. We conclude that the University's stated business purposes do not constitute a business necessity and are not compelling enough to outweigh the tendency to harm free choice, in part again due to contextual factors, including the University's insistence on getting in front of the Unions to disseminate information to represented employees, failure to narrowly tailor

---

membership rates and burden on staff time to respond to inquiries about *Janus*. While the kind of influence exerted by deterring or discouraging conduct can be difficult to quantify, Charging Parties' evidence on this point raises additional questions of causation which were not fully explored or explained by the evidentiary record. We thus do not rely on this evidence in finding Charging Parties established a prima facie case.

[34] Analogizing to the categories of "inherently destructive" conduct discussed in *Regents of the University of California (Berkeley)*, *supra*, PERB Decision No. 2610-H, the University's communications do not rise to the level of more severe conduct such as transferring activists to a remote location, replacing represented employees with unrepresented employees, or providing a benefit only to those who did not engage in protected activity. (See *id*. at pp. 58-71.) To the extent an act is inherently destructive, it is the *Janus* decision. While the University is responsible for its reaction to *Janus*, it bears no responsibility for the decision itself.

its communication, failure to timely cease distributing the *Janus* letters, and evidence of the University's unlawful motive. We explain.

Undisputedly, the University released its communications swiftly in the wake of the *Janus* decision, with directions for labor relations and human resources managers to distribute them "as quickly as possible." That it did so without providing any notice to the Unions, despite the meet and confer requirements of section 3553 and already having received the Unions' requests to negotiate any related communications, is relevant to our balancing inquiry as well as the initial assessment of the section 3550 violation.[35] While the University asserted it was urgent to ensure employees learned immediately of coming changes to the paychecks of non-union members, this explanation falls of its own weight. First, no employee would lose money, reducing any alleged urgency. Second, the record reflects nearly a full month between when the University issued the communications and the date the first pay checks issued that reflected applicable changes to agency fee deductions. Third, as discussed below, the University sent the communications to employees who would see no changes, and the University had other more plausible and less defendable reasons for wanting to send its communications.

The University failed to narrowly tailor the *Janus* letter and FAQ, which weighs against its business necessity defense. For example, the University chose to communicate with all represented employees, rather than communicating with those

[35] In contrast, an employer's compliance with section 3553 would likely favor an employer's affirmative defense, but we need not consider its potential value fully here given the facts before us, viz. the University's unchallenged violation of section 3553.

employees whose paychecks would be impacted by implementing the *Janus* decision. The communications were sent not only to agency fee payers whose paychecks would change, but also to dues payers, who may have been influenced by the financial incentive to drop union membership. Even if the University had reason to believe that all represented employees should learn of the *Janus* decision, any alleged urgency to communicate within a month, before the next paychecks reflecting a change, would have warranted at most communication with the actually impacted agency fee payers.

The University also failed to uniformly cease publishing the *Janus* letter, instead continuing to publish it in multiple ways and locations even after allegedly deciding to cease doing so. The University undertook its effort at ceasing publication haphazardly and without the same sense of urgency as distribution of the initial message. The *Janus* letter and FAQ went out quickly, urgently, and through most or all available channels, but the University withdrew the documents slowly and indecisively, which allowed the communications' content to continue to influence employees.

A communication's truthfulness weighs in favor of the employer in defending a section 3550 claim, particularly if it is countering a misleading communication from a union. Here, balancing all circumstances, it is not a sufficient defense that the communications in question were relatively truthful, given the many factors noted above and the final consideration we address below.

In any case involving an employer's business necessity defense, the employer's defense fails if its claimed need was in fact a pretext for discrimination, interference, or, in this case, influencing employee free choice. (See, e.g., *CSU*, *supra*, PERB Decision No. 2687-H, p. 4; *Community Learning Center Schools, Inc.*

(2017) PERB Order No. Ad-448, p. 9.) Thus, our analysis would be incomplete without considering additional facts bearing on the University's motive.

As discussed above, there are multiple reasons why the University's asserted urgency was pretextual: no employees were losing money, the University refused to meet with the Unions and instead unilaterally sent its communications well before agency fee payers would see the extra money in their paychecks, and the University acted with equal urgency for all represented employees, including the vast majority of bargaining unit members who were union members and would see no impact at all. These factors alone are strong evidence that the University's true motive was to influence union members to resign their memberships and weaken the Unions.

Other evidence supports this finding of pretext. In June 2018, the University had been in a heated labor negotiation with AFSCME and UPTE (as well as a third union, the California Nurses Association) for more than six months, including a strike the previous month. (See, e.g., *Regents of the University of California* (2019) PERB Order No. IR-62-H, pp. 3-4.) In other words, the University had every reason to seek to act urgently to weaken the Unions at this time.

Based upon these circumstances, together with the weakness of the University's arguments for acting so urgently, we find that the University had such a motive. This finding also takes into account that the Unions charged the University with numerous unfair practices tending to show anti-union animus. We do not consider most of these matters, because they settled when the parties eventually settled their

contracts.[36] Those that did not settle show a series of actions revealing anti-union animus. (See *Regents of the University of California (Irvine)* (2018) PERB Decision No. 2593-H [University singled out and unlawfully prohibited membership recruitment by Teamsters steward, while allowing other non-business activity having nothing to do with protected union conduct]; *Regents of the University of California* (2018) PERB Decision No. 2601-H [University reprimanded AFSCME statewide vice-president for engaging in protected activity]; *Regents of the University of California (Berkeley)*, *supra*, PERB Decision No. 2610-H, pp. 84-86 [finding University "acquiesce[d]" to a manager's overt "hostility to the University's collective bargaining obligations" and, as a result, laid off group of employees while replacing them with non-union employees in order to "extricate" the University from its bargaining obligation]; *Regents of the University of California* (2018) PERB Decision No. 2616-H [finding University to have promulgated overbroad ban on union insignia]; *Regents of the University of California*, *supra*, PERB Decision No. 2646-H, p. 7 [University engaged in "serious and persistent" refusal to bargain with a systemwide group of employees represented by UPTE, which PERB found to be "misconduct [that] could predictably contaminate all aspects of the parties' relationship and prevent the possibility of good faith negotiations"]; *Regents of the University of California* (2019) PERB Decision

[36] PERB may take administrative notice of its own records and files, and we do so here for context. (*Alliance Judy Ivie Burton Technology Academy High, et al.* (2020) PERB Decision No. 2719, p. 2, fn. 3; *Regents of the University of California* (2019) PERB Decision No. 2646-H, p. 3, fn. 4; *Children of Promise Preparatory Academy* (2018) PERB Decision No. 2558, p. 2, fn. 3.)

No. 2704-H (judicial appeal pending) [University terminated union activists as a result of protected activity].)

While we are not required to take into account other, unrelated unfair practices, we do so when they provide probative value as to motive. (*City of Oakland* (2014) PERB Decision No. 2387-M, p. 27, fn. 9, citing *City of Torrance* (2008) PERB Decision No. 1971-M, p. 21, fn. 13 ["Employer statements alleged as interference violations are also relevant for inferring unlawful motive"].) This is true even in cases where the separate violations do not, themselves, require a showing of motive. (*City of Oakland*, *supra*, PERB Decision No. 2387-M, p. 36, citing *E.L. Jones, Dodge* (1971) 190 NLRB 707, p. 708, fn. 6.) This is because, "when the natural and probable consequence of the employer's conduct is to discourage (or encourage) protected activity. . . the Board may fairly presume that the employer intended such a result." (*Hartnell Community College District*, *supra*, PERB Decision No. 2452, pp. 20-21.)

The PEDD confers extra protection on employee decisions about whether or not to authorize, join, or support a union, and this extra protection in turn places special importance on determining whether employer conduct has a legitimate business purpose when the same conduct tends to influence employee free choice. To this end, we find the above circumstances further undercut the University's claimed business need and suggests an ulterior motive for its conduct.[37]

[37] For the reasons stated in his dissent in *Contra Costa County Fire Protection District*, *supra*, PERB Decision No. 2632-M, Member Shiners disagrees that motive is relevant in determining whether a respondent has a legitimate justification for conduct that tends to or does harm protected rights. (*Id.* at pp. 72-76.) Accordingly, he does not join the finding that the University acted with an unlawful motive.

On balance and considering the larger context surrounding the University's *Janus* letter and FAQ, we find the communications' likelihood of influencing employee free choice outweighs any asserted business necessity to communicate anticipated paycheck changes to all represented employees immediately following the *Janus* decision. Thus, the University violated section 3550.

C. Interference Allegations

While the PD found that the University's *Janus* letter and FAQ also constituted interference with protected rights, we disagree. Charging Parties have not met their burden to show that the communications were threatening or coercive such that they constitute interference violations under section 3571, subdivisions (a) or (b).

As detailed in our discussion of the balancing test, *ante* at pp. 34-35, to establish a prima facie interference case, a charging party must show that a respondent's conduct tends to or does result in some harm to protected rights under our statutes. (*City of San Diego*, *supra*, PERB Decision No. 2747-M, p. 36; *CSU*, *supra*, PERB Decision No. 2687-H, p. 3.) Once a charging party establishes a prima facie case, the burden shifts to the employer. (*City of San Diego*, *supra*, PERB Decision No. 2747-M, p. 36.) The degree of harm dictates the employer's burden. (*Ibid*.) Furthermore, as also detailed above, the expression of views, arguments or opinions does not constitute interference unless such expression contains a threat of reprisal or force or promise of benefit. (*California Virtual Academies*, *supra*, PERB Decision No. 2584, p. 29.)

In resolving an interference claim involving employer speech, we consider the employer's statement in its overall context, i.e., in light of surrounding circumstances,

to determine if an employee or union representative would objectively tend to feel that the statement coerces, restrains, or otherwise interferes with protected rights. (See, e.g., *Los Angeles Unified School District*, *supra*, PERB Decision No. 659, p. 9.) One relevant factor is the extent to which a statement is truthful or misleading. (See, e.g., *California State University* (1989) PERB Decision No. 777-H, p. 3; *Alhambra City and High School District* (1986) PERB Decision No. 560, pp. 16-17; *Muroc Unified School District* (1978) PERB Decision No. 80, p. 21.)

We disagree with the PD's interference analysis. Given the overall context of the *Janus* letter and FAQ, from an objective standpoint the communications do not rise to coercion or restraint, and thus Charging Parties fail to show unlawful interference based on the limitations set by section 3571.3. The *Janus* letter and FAQ are communications which were not previously unlawful under HEERA section 3571, subdivisions (a) or (b) but are unlawful under PEDD section 3550, given all of the circumstances noted above.[38] We also note that because the University's violations of PEDD section 3550 did not require a showing of coercive effect, they do not give rise to derivative interference violations.[39]

---

[38] Notably, we do not rule that the University was prohibited from communicating with its employees concerning *Janus*. Had the University bargained with the Unions over the communication, the parties could either have worked out an appropriate joint communication or, failing that, separate but simultaneous communications compliant with both section 3550 and section 3553. (See § 3553, subd. (c) [separate but simultaneous communication in the event of disagreement on a single communication].)

[39] While the University did not except to the finding that it violated section 3571, subdivision (c) by failing to meet and confer under section 3553, and thus a question of whether the University violated section 3571, subdivision (c) is not before us, we

REMEDY

PEDD section 3551 gives PERB authority to remedy violations of sections 3550 and 3553, incorporating by reference the Board's remedial responsibilities initially set forth in section 3541.3, subdivision (i). The Legislature has delegated to PERB broad authority to effectuate the remedies it deems necessary to fulfill the purposes of the Acts within its jurisdiction. (See, e.g., EERA, § 3541.5, subd. (c); HEERA, § 3563.3; MMBA, § 3509, subd. (b), 3510; *City of San Diego* (2015) PERB Decision No. 2464-M, p. 42, affirmed *sub nom*. *Boling v. Public Employment Relations Bd.* (2018) 5 Cal.5th 898, 920, rehg. den. (Oct. 10, 2018); *Mt. San Antonio Community College Dist. v. Public Employment Relations Bd.* (1989) 210 Cal.App.3d 178, 189-190.) Section 3541.3, subdivision (i) likewise authorizes PERB to "take any action and make any determinations in respect of these charges or alleged violations as the board deems necessary to effectuate the policies of this chapter."

The ALJ ordered that the University cease and desist its unlawful conduct, remove and rescind the *Janus* communications, meet and confer with the Unions concerning the *Janus* communications on request, reimburse the Unions for the costs, if any, of distributing responses to the University's communications, and post a notice. On exceptions, the Unions assert the remedies for the University's conduct deterring or discouraging union membership should also include make-whole remedies, including lost dues caused by the University's communications and lost staff time caused by responding to employees' inquiries about the unlawful communications,

---

note that our reasoning for finding no derivative interference violation would not preclude finding a derivative failure to meet and confer.

and attorney's fees and costs based on the University's frivolous denial of its section 3553 violation.

We largely affirm the ALJ's proposed order but modify it to address specific nuances of the statute and the potential harm inherent in conduct which deters or discourages employee free choice, and specifically the harm caused by the University's *Janus* letter and FAQ.

We also frame the remedies available for violations of PEDD section 3550 within the context of the statute and its place within the scheme of California labor relations. The PEDD (together with Government Code sections 3555-3559, known as the Public Employee Communication Chapter (PECC)) is the first California labor relations statute in more than fifty years that applies to a wide spectrum of public employees employed by the full range of public employers.[40] As previously noted, we find that the PEDD confers a higher level of protection to employee decisions to authorize union representation, become or remain a union member, or commence or continue to pay union dues or fees. Conduct which deters or discourages employees from making such decisions can have lasting effects well beyond the conduct itself. The potential for PEDD violations to cause long-lasting effects justifies considering remedies commensurate to the conduct and resulting harm. (*Alliance College-Ready Public Schools et. al.* (2017) PERB Decision No. 2545, pp. 16-18 [greater remedies

[40] In 1961, California enacted the George M. Brown Act, which applied to a broad swath of public employees, but conferred only limited meet and confer rights. (See Stats. 1961, ch. 1964, § 1, p. 4141.) Subsequent statutes have conferred more protective rights for specific groups of public employees. (See, e.g., MMBA [county, city, and special district employees]; EERA [public school employees]; HEERA [University of California and California State University Employees].)

appropriate in a variety of circumstances, including: where conduct was egregious, intentional, systematic, or repeated; or whenever customary remedies are insufficient, including but not limited to as a result of the nature of the conduct, workforce language or literacy issues, or significant time has passed since the violation].)

Here, we order that the University cease and desist its unlawful conduct, and upon request of the Unions, post a traditional notice or notices tailored to the unfair conduct. We also incorporate the ALJ's remedies for the unchallenged section 3553 violation with some adjustments to better address the section 3550 violation. We do not, however, order make-whole relief or attorney's fees, as explained below.

A. Make-Whole Relief

While we do not foreclose the possibility of make-whole relief for section 3550 violations generally, we concur with the ALJ's conclusion that make-whole relief is not appropriate in this instance. PERB uses a preponderance of evidence standard to estimate damages even if the exact measure of damages is uncertain. (*City of Pasadena* (2014) PERB Order No. Ad-406-M, p. 13.) Staff time is allowable under this standard. (*Sacramento City Unified School District* (2020) PERB Decision No. 2749, p. 15 (*Sacramento City*); *City of Palo Alto* (2019) PERB Decision No. 2664-M, p. 8, fn. 6.) Normally, if liability is established, then a charging party can prove damages in compliance. While the issues of uncertainty in quantifying damages cited by the ALJ do not preclude full adjudication at a hearing on remedial issues, the more fundamental questions are those of causation—given the well-publicized nature of the *Janus* decision, we do not find the Charging Parties' relatively limited testimony sufficient to attribute lost staff time or lost dues to the University's unlawful conduct.

Such a finding was unnecessary to establish the University's liability for violations of section 3550, as explained *ante*, but its absence prevents us from awarding make-whole relief.

On the subject of dues, the hearing testimony raised substantial questions about the number of employees who dropped union membership, the time period in which they did so, and the subset of those employees who entered contractual agreements that obligated them to continue making financial contributions to the Unions even as non-members. We would normally order a make-whole remedy and rely on compliance proceedings to assure that a charging party is made whole only for a reasonable estimate of damages proven by a preponderance of the evidence. Under the circumstances, however, as above with the Unions' request for staff time reimbursement, causation issues preclude us from doing so. It is impossible to separate out for this purpose the well-publicized *Janus* decision itself and related Union communications from the University's communications about *Janus*.[41] We do not order a make-whole remedy here, though such an award may be appropriate under the PEDD with different facts.

[41] While McDole, on behalf of UPTE, and Akel, on behalf of Teamsters, testified that the number of inquiries from their members at the University outpaced those from the community colleges and CSU campuses, respectively, neither UPTE nor Teamsters provided enough other comparative information to establish that the communications from the University caused the difference. For instance, the record does not adequately address differences between faculty members UPTE represents at the community colleges and the non-faculty it represents at the University.

B. Attorney's Fees

Charging Parties further seek reimbursement for attorney's fees incurred in this matter. We do not find adequate justification in the record to support attorney's fees under current Board law and find no special justification in the PEDD to deviate from the current standard.

To obtain reimbursement of attorney's fees or other litigation expenses incurred while litigating a matter at PERB, the moving party must demonstrate that the claim, defense, motion, or other action or tactic was "without arguable merit" and pursued in "bad faith." (*Sacramento City*, *supra*, PERB Decision No. 2749, p. 11; *Lake Elsinore Unified School District* (2018) PERB Order No. Ad-446a, p. 5 (*Lake Elsinore*); *City of Alhambra* (2009) PERB Decision No. 2036-M, p. 19 (*Alhambra I*); *City of Alhambra* (2009) PERB Decision No. 2037-M, p. 2.) To determine whether a claim, defense, motion, or other action is frivolous, we examine whether it is so manifestly erroneous that no prudent representative would have filed or maintained it. (*Lake Elsinore*, *supra*, PERB Order No. Ad-446a, p. 5 and cases cited therein). In *Lake Elsinore*, for instance, we found that the employer's request for reconsideration was without even arguable merit where it failed to comply with PERB regulations and decisional law directly on point, and it included no serious argument for extending, modifying, or reversing existing law or for establishing new law. (*Ibid*.) Even if a party requesting attorney's fees can meet the "without arguable merit" prong, it must also show that the opposing party acted in bad faith. (*Lake Elsinore*, *supra*, PERB Order No. Ad-446a, p. 6.) For the purposes of this test, the term "bad faith" includes conduct that is dilatory, vexatious, or otherwise an abuse of process. (*Ibid*., citing *Alhambra I*, *supra*,

PERB Decision No. 2036-M, p. 19.) Showing that an action or tactic was undertaken in "bad faith" does not require showing that the party and/or representative necessarily acted with an evil motive. (*Lake Elsinore*, *supra*, PERB Order No. Ad-446a, p. 6, citing *West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 702 (*West Coast Development*).) Prosecution of a frivolous action or defense may itself be evidence supporting a finding of subjective bad faith, as might other conduct which a party or representative knows or reasonably should know will unreasonably or unnecessarily cause delay or harass or injure an opposing party or representative or impede the tribunal's own process. (*Lake Elsinore*, *supra*, PERB Order No. Ad-446a, p. 6.) However, we follow California Code of Civil Procedure section 128.5 in requiring some showing of subjective bad faith, even if it must be inferred from circumstantial evidence. (*Ibid.*, citing *West Coast Development*, *supra*, 2 Cal.App.4th 693, 704-705 and *Levy v. Blum* (2001) 92 Cal.App.4th 625, 635-636.)

While the University was ultimately unsuccessful in arguing its communications did not require section 3553 negotiations, given the lack of prior interpretation and the statute's recent enactment immediately prior to the University's distribution of its communications, we do not find its position to have been without arguable merit. The University's decision not to except to the ALJ's conclusion does not undermine that finding. Further, while we ultimately disagree with the University's assertion that the standard for section 3550 requires a showing of coercion, our finding on this issue of first impression does not render the University's arguments without arguable merit. Given that the University's conduct does not meet the standard of being without

arguable merit, we need not separately assess whether such arguments were made in bad faith.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Regents of the University of California (University) violated the Prohibition on Public Employers Deterring or Discouraging Union Membership chapter (PEDD), Government Code sections 3550 and 3553, and the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571, subdivision (c), by failing to meet and confer in good faith with American Federation of State, County & Municipal Employees Local 3299 (AFSCME), University Professional and Technical Employees, Communication Workers of America, Local 9119 (UPTE), and Teamsters Local 2010 (Teamsters) (collectively "Unions" or "Charging Parties") prior to disseminating a mass communication concerning the employees' rights to join or support an employee organization, by failing to simultaneously distribute a communication or communications of reasonable length provided to it by the exclusive representatives, and by deterring or discouraging employees from authorizing dues deductions and/or commencing or continuing membership in the Unions.

Pursuant to Government Code sections 3551, subdivision (a), and 3563, subdivisions (h) and (m), it hereby is ORDERED that the University, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Unilaterally disseminating mass communications concerning public employees' rights to join or support an employee organization or to refrain from joining or supporting an employee organization to employees or applicants, without meeting and conferring with the recognized or certified representative of the employees.

2. Deterring or discouraging employees or applicants from becoming or remaining members of an employee organization, or from authorizing representation by an employee organization, or from authorizing dues or fee deductions to an employee organization.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE PEDD AND HEERA:

1. Remove and rescind the letter and FAQ that were distributed to employees and posted on or after June 28, 2018.

2. The University shall take one or both of the following actions with regard to each Charging Party to the extent each Charging Party so requests:

a. Meet and confer with the Union concerning the content of a mass communication to be distributed to employees it represents, pursuant to Government Code, section 3553, subdivision (b); and/or

b. Distribute to employees the Union represents a communication of reasonable length provided to it by the Union, pursuant to Government Code, section 3553, subdivision (c), including translated copies if requested.

3. Reimburse each Union the cost, if any, of distribution of its response to the University's letter and FAQ, plus interest at seven percent per year. This amount shall not include the cost of producing sufficient copies of its response, as these costs are to be borne by the Unions, as contemplated in Government Code section 3553, subdivision (c).

4. Within 10 workdays of the date this decision is no longer subject to appeal, if and only if a Charging Party so requests, post at all work locations where notices to employees in AFSCME, UPTE, and/or Teamsters bargaining units customarily are posted, copies of the Notice corresponding to the requesting Charging Party/Parties, attached hereto as Appendix A, Appendix B, and Appendix C. The Notice must be signed by an authorized agent of the University, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays.[42] The Notice shall also be sent to all bargaining unit

[42] In light of the ongoing COVID-19 pandemic, the University shall notify PERB's Office of the General Counsel (OGC) in writing if, due to an extraordinary circumstance such as an emergency declaration or shelter-in-place order, a majority of employees at one or more work locations are not physically reporting to their work location as of the time the physical posting would otherwise commence. If the University so notifies OGC, or if a Charging Party requests in writing that OGC alter or extend the posting period, require additional notice methods, or otherwise adjust the manner in which employees receive notice, OGC shall investigate and solicit input from all relevant parties. OGC shall provide amended instructions to the extent appropriate to ensure adequate publication of the Notice, such as directing the University to commence posting within 10 workdays after a majority of employees have resumed physically reporting on a regular basis; directing the University to mail the Notice to all employees who are not regularly reporting to any work location due to the extraordinary circumstance, including those who are on a short term or indefinite furlough, are on layoff subject to recall, or are working from home; or directing the

employees by electronic message, intranet, internet site, or other electronic means customarily used by the County to communicate with employees in AFSCME, UPTE, and/or Teamsters' bargaining units, if and only if the Unions so request. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.

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

Chair Banks and Members Shiners and Krantz joined in this Decision.

University to mail the Notice to those employees with whom it does not customarily communicate through electronic means.

APPENDIX A

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

After a hearing in Unfair Practice Case No. SF-CE-1188-H, *American Federation of State, County & Municipal Employees Local 3299 v. Regents of the University of California*, in which all parties had the right to participate, it has been found that the Regents of the University of California violated the Prohibition on Public Employers Deterring or Discouraging Union Membership chapter (PEDD), Government Code section 3550 et seq. and the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3560 et seq. by the letter and FAQ it distributed to represented employees on or about June 28, 2018.

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

A. CEASE AND DESIST FROM:

1. Unilaterally disseminating mass communications concerning public employees' rights to join or support an employee organization or to refrain from joining or supporting an employee organization to employees or applicants, without meeting and conferring with the recognized or certified representative of the employees.

2. Deterring or discouraging employees or applicants from becoming or remaining members of an employee organization, or from authorizing representation by an employee organization, or from authorizing dues or fee deductions to an employee organization.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE PEDD AND HEERA:

1. Remove and rescind the letter and FAQ that were distributed to employees and posted on or after June 28, 2018.

2. The University shall take one or both of the following actions to the extent AFSCME so requests:

a. Meet and confer with AFSCME concerning the content of a mass communication to be distributed to employees it represents, pursuant to Government Code, section 3553, subdivision (b); and/or

b. Distribute to employees AFSCME represents a communication of reasonable length provided to it by AFSCME, pursuant to Government Code, section 3553, subdivision (c), including translated copies if requested.

3. Reimburse AFSCME the cost, if any, of distribution of its response to the University's letter and FAQ, plus interest at seven percent per year. This amount shall not include the cost of producing sufficient copies of its response, as these costs are to be borne by AFSCME, as contemplated in Government Code section 3553, subdivision (c).

Dated: _____

REGENTS OF THE UNIVERSITY OF CALIFORNIA

By: _____
Authorized Agent

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

APPENDIX B

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

After a hearing in Unfair Practice Case No. SF-CE-1189-H, *University Professional and Technical Employees, Communication Workers of America, Local 9119 v. Regents of the University of California*, in which all parties had the right to participate, it has been found that the Regents of the University of California violated the Prohibition on Public Employers Deterring or Discouraging Union Membership chapter (PEDD), Government Code section 3550 et seq. and the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3560 et seq. by the letter and FAQ it distributed to represented employees on or about June 28, 2018.

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

A. CEASE AND DESIST FROM:

1. Unilaterally disseminating mass communications concerning public employees' rights to join or support an employee organization or to refrain from joining or supporting an employee organization to employees or applicants, without meeting and conferring with the recognized or certified representative of the employees.

2. Deterring or discouraging employees or applicants from becoming or remaining members of an employee organization, or from authorizing representation by an employee organization, or from authorizing dues or fee deductions to an employee organization.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE PEDD AND HEERA:

1. Remove and rescind the letter and FAQ that were distributed to employees and posted on or after June 28, 2018.

2. The University shall take one or both of the following actions to the extent UPTE so requests:

a. Meet and confer with UPTE concerning the content of a mass communication to be distributed to employees it represents, pursuant to Government Code, section 3553, subdivision (b); and/or

b. Distribute to employees UPTE represents a communication of reasonable length provided to it by UPTE, pursuant to Government Code, section 3553, subdivision (c), including translated copies if requested.

3. Reimburse UPTE the cost, if any, of distribution of its response to the University's letter and FAQ, plus interest at seven percent per year. This amount shall not include the cost of producing sufficient copies of its response, as these costs are to be borne by UPTE, as contemplated in Government Code section 3553, subdivision (c).

Dated: _____

REGENTS OF THE UNIVERSITY OF CALIFORNIA

By: _____
Authorized Agent

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

APPENDIX C

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

After a hearing in Unfair Practice Case No. SF-CE-1192-H, *Teamsters Local 2010 v. Regents of the University of California*, in which all parties had the right to participate, it has been found that the Regents of the University of California violated the Prohibition on Public Employers Deterring or Discouraging Union Membership chapter (PEDD), Government Code section 3550 et seq. and the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3560 et seq. by the letter and FAQ it distributed to represented employees on or about June 28, 2018.

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

A. CEASE AND DESIST FROM:

1. Unilaterally disseminating mass communications concerning public employees' rights to join or support an employee organization or to refrain from joining or supporting an employee organization to employees or applicants, without meeting and conferring with the recognized or certified representative of the employees.

2. Deterring or discouraging employees or applicants from becoming or remaining members of an employee organization, or from authorizing representation by an employee organization, or from authorizing dues or fee deductions to an employee organization.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE PEDD AND HEERA:

1. Remove and rescind the letter and FAQ that were distributed to employees and posted on or after June 28, 2018.

2. The University shall take one or both of the following actions to the extent Teamsters so requests:

a. Meet and confer with Teamsters concerning the content of a mass communication to be distributed to employees it represents, pursuant to Government Code, section 3553, subdivision (b); and/or

b. Distribute to employees Teamsters represents a communication of reasonable length provided to it by Teamsters, pursuant to Government Code, section 3553, subdivision (c), including translated copies if requested.

3. Reimburse Teamsters the cost, if any, of distribution of its response to the University's unilateral letter and FAQ, plus interest at seven percent per year. This amount shall not include the cost of producing sufficient copies of its response, as these costs are to be borne by Teamsters, as contemplated in Government Code section 3553, subdivision (c).

Dated: _____

REGENTS OF THE UNIVERSITY OF CALIFORNIA

By: _____
Authorized Agent

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