STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

VICTOR VALLEY TEACHERS ASSOCIATION, Charging Party, v. VICTOR VALLEY UNION HIGH SCHOOL DISTRICT, Respondent.	Case No. LA-CE-6562-E PERB Decision No. 2822 June 14, 2022

Appearances: California Teachers Association by Richa Amar, Staff Counsel, for Victor Valley Teachers Association; Fagen Friedman & Fulfrost by Milton E. Foster III and Kara Walton, Attorneys, for Victor Valley Union High School District.

Before Banks, Chair; Shiners and Paulson, Members.

DECISION

SHINERS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions and cross-exceptions to a proposed decision by an administrative law judge (ALJ). The complaint alleged that Victor Valley Union High School District interfered with rights protected by the Educational Employment Relations Act (EERA)[1] when, during a deposition, the District's attorney asked Victor Valley Teachers Association President Kathleen Montague-Hanson questions about: (1) confidential communications she had with a bargaining unit member, A.B., concerning a disciplinary matter in which she advised A.B.; and (2) confidential

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

communications she had with other bargaining unit members and union personnel about A.B.[2]

Following a two-day evidentiary hearing and briefing by the parties, the ALJ issued a proposed decision finding the District violated EERA as alleged in the complaint. Based on our review of the proposed decision and the entire record in light of the parties' submissions, we affirm the proposed decision's legal conclusions, grant one of the Association's cross-exceptions related to the ALJ's factual findings, and supplement the proposed decision's analysis with discussion of the District's exceptions and the Association's cross-exceptions.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual Background

The District is a public school employer within the meaning of EERA section 3540.1, subdivision (k). The Association is an employee organization within the meaning of EERA section 3540.1, subdivision (d), and an exclusive representative within the meaning of EERA section 3540.1, subdivision (e).

Montague-Hanson was the president of the Association at all relevant times. She was also a teacher at the same school as A.B. A.B. was a certificated employee of the District and a member of the Association's bargaining unit. In her capacity as Association President, Montague-Hanson represented A.B. in meetings with District management on approximately three to five occasions.

In representing A.B. and other Association unit members, Montague-Hanson

[2] Pursuant to the parties' stipulated protective order, we refer to the employee who was the subject of the discipline matter relevant to this case only by his initials.

sought advice from Dawn Murray, the California Teachers Association (CTA) staff representative assigned to assist the Association. Montague-Hanson and Murray also communicated by e-mail on Montague-Hanson's personal Yahoo account, which she used for union business, concerning the Association's representation of A.B.

On August 28, 2018, Montague-Hanson and Murray co-authored and filed a complaint on behalf of A.B. regarding alleged discrimination and harassment by Principal Kent Crosby and the Director of Information Technology at A.B.'s school. The complaint included several incidents between A.B. and Crosby beginning in February 2018.

Around this same time, the District hired an outside investigator to look into complaints it had received about A.B.'s conduct. The investigator interviewed witnesses including seven teachers, two of whom called the investigator directly and wished to remain anonymous. The investigator did not interview Montague-Hanson.

On August 22, 2019, the District issued A.B. a Statement of Charges alleging misconduct, including unprofessional behavior toward parents, failing to secure chemicals and equipment, making threats against Crosby and aggressive statements toward employees and students, leaving students unattended, and vaping in class in the presence of students.

On November 7, 2019, the District's Board of Trustees voted to dismiss A.B. from District employment for a variety of alleged misconduct including rude and discourteous behavior, making death threats, mishandling dangerous chemicals, vaping on campus, and profanity.

A.B. appealed his dismissal, initiating a proceeding before a Commission on

Professional Competence administered through the Office of Administrative Hearings (OAH). The appeal stated several affirmative defenses, including that the dismissal was in retaliation for having a disability and requesting accommodations, and for reporting unsafe working conditions. Montague-Hanson did not represent A.B. during the dismissal proceedings.

On December 30, 2019, A.B. filed initial disclosures which listed Montague-Hanson as a witness likely to have discoverable information "regarding incidents listed in Statement of Charges, Respondent's defenses, and working conditions including, but not limited to, administration." A.B. made substantially identical statements in a March 18, 2020 prehearing conference statement and an April 15, 2020 prehearing disclosure.

On March 23, 2020, the District filed a prehearing conference statement listing Montague-Hanson as a witness to several allegations listed in the Statement of Charges, including: (1) the January 31, 2018 incident involving a telephone call with a student's mother; (2) the February 2, 2018 incident involving a meeting in Crosby's office and a student's parents; (3) the Conference Summary Report related to the February 2, 2018 incident; (4) the August 28, 2018 incident involving chemicals found in A.B.'s classroom during a *Williams* visit;[3] (5) an undated staff meeting where A.B. yelled about his dissatisfaction with the school; and (6) the October 2, 2018 incident

[3] A class action lawsuit, *Eliezer Williams, et al., v. State of California, et al.* (Super. Ct. S.F. City and County, 2004, No. 312236.) (*Williams*), was settled through enactment of several laws including the requirement that the county superintendent of schools "[v]isit and examine each school in the county at reasonable intervals to observe its operation and to learn of its problems." (Ed. Code, § 1240, subd. (c)(1).) These visits are colloquially called "*Williams* visits."

concerning a broken air conditioner and chemical smell. Contrary to the District's representation in its prehearing conference statement, Montague-Hanson did not personally witness the above incidents, and her involvement with the allegations in the Statement of Charges was solely as A.B.'s representative.[4]

On April 14, 2020, the District served a deposition subpoena and deposition notice on Montague-Hanson as part of its statutory dismissal proceeding against A.B.

On April 27, 2020, District counsel Kara Walton took Montague-Hanson's deposition for more than four hours. Richa Amar, an attorney with the CTA Legal Department, represented Montague-Hanson. When Walton began asking questions about Montague-Hanson's communications with Association bargaining unit members about A.B., Amar objected based on the questions calling for communications that are protected by associational privacy rights. Amar explained:

> "You're asking the witness questions in her capacity as a union officer concerning protected union communications and the case I cited earlier, William Hart Union High School District, which is a case from 2018, and that case found the district committed an unfair practice when it questioned a union rep about what any other bargaining unit employees complained to her about another member who the district is investigating. It constituted interference with protected rights and said that an employer's legitimate investigation into an alleged wrongdoing cannot include quizzing the

[4] The ALJ found that Montague-Hanson "had at times been [A.B.'s] representative where his misconduct occurred . . . and witnessed some of his misconduct." Montague-Hanson testified that she did not personally witness any of the incidents alleged in the Statement of Charges and that she only knew of the incidents through her representation of A.B. No evidence in the record contradicts Montague-Hanson's testimony on this point. Because the evidence does not support a finding that Montague-Hanson personally witnessed any of the misconduct alleged in the Statement of Charges, we grant the Association's first cross-exception.

shop stewards about the substance of communications between employees and their union reps, thereby deputizing the union as the employer's agent for conducting disciplinary investigation.

"To the extent that's what you're doing here, I request that you withdraw this line of questioning."

Despite Amar's objection, Walton continued her questions about Montague-Hanson's conversations with Association bargaining unit members about A.B.:

- "[A]t Lakeview in your role as the union rep and president, have you become aware of other concerns by district employees regarding [A.B.]?"
- "[W]ere you made aware of other concerns reported by district employees regarding [A.B.]'s behavior?"
- "When Ms. Kugies came to speak to you about [A.B.], what concerns did she report to you?"
- "Did she ask your advice on how to address [A.B.] or for help to address [A.B.]'s behavior?"
- "How many times did Ms. Davis report her concerns [about A.B.] to you?"
- "With regards to Magen Kroell, what concerns did she report to you [about A.B.]?"
- "Was there any indication from Ms. Kroell . . . why [A.B.] was making angry statements about . . . [Principal] Crosby?"
- "The last person you mentioned was Melissa Hays. What concerns did Ms. Hays report to you regarding [A.B.]?"
- "Was Mr. Beyer afraid or had a serious concern that there, in fact, was a weapon on campus? . . . Was Mr. Beyer sincerely concerned or worried about there being

a gun on campus?"

Kellee Kugies, Allison Davis, Magen Kroell, Melissa Hays, and John Beyer were all teachers and Association bargaining unit members who spoke to Montague-Hanson in her capacity "[a]s a Union representative."

Walton also questioned Montague-Hanson about her conversations with A.B.:

- "[D]id you discuss at any time with [A.B.] concerns you had about his behavior in that meeting [with parents]?"
- "What did [A.B.] say about Mr. Crosby?"
- "On any other occasions, . . . did [A.B.] make statements, threatening statements, against Mr. Crosby?"
- "Did you find it unacceptable that he would speak about his principal in this manner?"
- "Did you ever talk to [A.B.] about your concerns regarding whether he should not bring weapons to campus?"
- "Did [A.B.] ever talk to you about trying to preserve the blue stain evidence for a lawsuit against the district?"
- "[W]hat e-mails would [A.B.] have sent you regarding what matters?"

Walton also questioned Montague-Hanson about communications with CTA staff representative Murray regarding A.B.:

- "What e-mails are in your Yahoo account from Ms. Murray regarding [A.B.]?"
- "[W]hat [did Murray advise you] to do?"

A.B.'s dismissal appeal settled prior to the OAH hearing.

II. Procedural History

On June 2, 2020, the Association filed the unfair practice charge. The District did not file a position statement in response to the charge.

On August 26, 2020, PERB's Office of the General Counsel issued a complaint. On September 15, 2020, the District filed an answer, denying all substantive allegations and asserting affirmative defenses, including lack of jurisdiction, litigation privilege, and mootness.

The parties participated in a virtual formal hearing on February 4-5, 2021.

On July 21, 2021, the ALJ asked the parties to submit supplemental briefs addressing the Board's recent decision in *Operating Engineers Local Union No. 3, AFL-CIO (Wagner et al.)* (2021) PERB Decision No. 2782-M (*OE3*). The case was submitted for decision on August 26, 2021, upon receipt of the supplemental briefs.

On December 29, 2021, the ALJ issued a proposed decision finding that the District's questioning of Montague-Hanson during the deposition interfered with EERA-protected rights. On February 28, 2022, the District filed a statement of exceptions. The Association filed a response and cross-exceptions on March 24, 2022.

DISCUSSION

In resolving exceptions to a proposed decision, the Board applies a de novo standard of review. (*County of San Joaquin* (2021) PERB Decision No. 2775-M, p. 19.) Under this standard, we review the entire record and are free to make different factual findings and reach different legal conclusions than those in the proposed decision. (*County of Sacramento* (2020) PERB Decision No. 2745-M, p. 10.) However,

the Board need not address issues that the proposed decision has adequately addressed or that would not impact the outcome. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 5; *Hartnell Community College District* (2018) PERB Decision No. 2567, p. 3; PERB Reg. 32300, subd. (e).)[5]

I. Interference

EERA section 3543.5, subdivision (a), makes it an unfair practice for a public school employer to "interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by [EERA]." Subdivision (b) makes it unlawful for a public school employer to deny employee organizations rights guaranteed by EERA, including the right to represent employees in their employment relations. (*Fremont Union High School District* (1983) PERB Decision No. 301, p. 6.)

To analyze allegations of employer interference with the rights of employees or employee organizations, PERB uses the standard articulated in *Carlsbad Unified School District* (1979) PERB Decision No. 89 (*Carlsbad*). Under *Carlsbad*, a charging party establishes a prima facie case of interference where an employer's conduct tends to or does result in at least slight harm to protected rights. (*County of Santa Clara* (2018) PERB Decision No. 2613-M, p. 8.) The test for whether a respondent has interfered with protected rights does not require that unlawful motive be established. (*Claremont Unified School District* (2019) PERB Decision No. 2654, p. 20.)

Once a charging party has established a prima facie case, the burden shifts to the respondent. (*OE3*, *supra*, PERB Decision No. 2782-M, p. 7.) The degree of harm

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

dictates the respondent's burden. (*Ibid*.) If the harm is "inherently destructive" of protected rights, the respondent must show that the interference results from circumstances beyond its control and that no alternative course of action was available. (*Ibid*.) For conduct that is harmful but not inherently destructive, the respondent may attempt to justify its actions based on operational necessity. (*Ibid*.) In such cases, we balance the asserted need against the tendency to harm protected rights; if the tendency to harm outweighs the necessity, we find a violation. (*Ibid*.) Within the category of actions or rules that are not inherently destructive, the stronger the tendency to harm, the greater is the respondent's burden to show its need was important and that it narrowly tailored its actions or rules to attain that purpose while limiting harm to protected rights as much as possible. (*Ibid*.)[6]

In cases where the alleged interference is caused by a party's litigation conduct, we apply the principles articulated in *Bill Johnson's Restaurants, Inc. v. NLRB* (1983) 461 U.S. 731 (*Bill Johnson's*), "effectively follow[ing] a qualified litigation privilege that preserves parties' ability to litigate colorable legal rights while disallowing baseless, bad faith conduct that tends to harm protected labor rights."[7]

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[6] 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.) Instead, in all interference cases he would simply "balance the harm to protected rights against the employer's asserted justification for its conduct." (*Id*. at p. 75.)

[7] The District argues that the absolute litigation privilege in Civil Code section 47, subdivision (b) protects the deposition questioning at issue, but as we held in *OE3*: "PERB charges do not assert tort claims, and the statutory litigation privilege does not apply in PERB proceedings." (*OE3*, *supra*, PERB Decision No. 2782-M,

(*OE3*, *supra*, PERB Decision No. 2782-M, p. 11; see *Bill Johnson's*, *supra*, 461 U.S. 731.) Thus, in cases where litigation conduct is alleged to interfere with protected rights, "the charging party faces an extra hurdle that is not present in other interference cases: the charging party must establish that the respondent acted without any reasonable basis and for an unlawful purpose." (*Id*. at p. 8.)

Applying *Bill Johnson's* principles, the National Labor Relations Board (NLRB) has held that when an interference claim is based on the employer's conduct during litigation discovery, the employer's interest in acquiring the information sought must be balanced against the impact disclosing the information would have on statutorily-protected rights. (*Wright Electric, Inc.* (1999) 327 NLRB 1194, 1195 (*Wright Electric*); *National Telephone Directory Corp.* (1995) 319 NLRB 420, 421-422.)[8] In *Guess?, Inc.* (2003) 339 NLRB 432 (*Guess?, Inc.*), the NLRB adopted a three-part test to determine if deposition questioning unlawfully interferes with protected rights:

> "First, the questioning must be relevant. Second, if the questioning is relevant, it must not have an illegal objective. Third, if the questioning is relevant and does not have an illegal objective, the employer's interest in obtaining this

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p.10.) The District's citation to *County of San Bernardino* (2018) PERB Decision No. 2556-M (*San Bernardino*) is inapposite because, as we noted in *OE3*, the ALJ's discussion regarding litigation privilege in *San Bernardino* was non-precedential because no exceptions were taken to that portion of the proposed decision. (*OE3*, *supra*, PERB Decision No. 2782-M, p. 11, n. 13.) In *OE3*, we also noted that the proposed decision wrongly analyzed the statutory litigation privilege as if it were an evidentiary privilege incorporated into PERB procedure. (*Ibid*.)

[8] Although California public sector labor relations precedent frequently protects employee and union rights to a greater degree than does federal precedent governing private sector labor relations, we consider federal precedent for its potential persuasive value. (*OE3*, *supra*, PERB Decision No. 2782-M, p. 9, fn. 10.)

> information must outweigh the employees' [protected rights]." (*Id*. at p. 434.)

California's Agricultural Labor Relations Board recently adopted the *Guess?, Inc.* test as the applicable framework for determining whether deposition questions interfere with protected rights under the Agricultural Labor Relations Act (ALRA).[9] (*Fowler Packing Co., Inc.* (2020) 46 ALRB No. 1, p. 12.)

Because it provides a workable framework for balancing the respective interests at stake, we likewise adopt *Guess?, Inc.* as the legal standard for determining whether deposition questions interfere with protected rights under the PERB-administered statutes.[10] For the following reasons, we agree with the ALJ that the District's questioning of Montague-Hanson during her deposition fails the *Guess?, Inc.* test.

A. Relevance

The District argues the ALJ erred in finding the questions posed to Montague-Hanson irrelevant because they were likely to lead to admissible evidence regarding A.B.'s defenses, confirm facts provided by other witnesses to establish A.B.'s credibility, and disclose the identity of other witnesses for corroboration. Education Code section 44944.1, subdivision (d)(1)(B), provides that the scope of discovery in teacher dismissal proceedings is the same as under the Civil Discovery

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[9] The ALRA is codified at Labor Code section 1140 et seq.

[10] Because this standard applies the *Bill Johnson's* qualified litigation privilege in the context of deposition questioning, it does not create, as the District contends, a union representative-bargaining unit member evidentiary privilege akin to that rejected by the court of appeal in *American Airlines, Inc. v. Superior Court* (2003) 114 Cal.App.4th 881, 890.

Act, which allows a party to obtain discovery of any non-privileged matter "that is relevant to the subject matter involved in the pending action . . . if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence."[11] (Code Civ. Proc., § 2017.010.) Given this broad scope of discovery, we cannot conclude that the District's questions were plainly irrelevant to material issues in A.B.'s dismissal proceeding.

B. Illegal Objective

The Association filed a cross-exception to the ALJ's conclusion that there was no evidence that the District had an illegal objective when questioning Montague-Hanson. A discovery request has an illegal objective when an employer seeks to identify employees who support a union. (*Dilling Mechanical Contractors, Inc.* (2011) 357 NLRB 544, 546; see *Wright Electric*, *supra*, 327 NLRB at p. 1195 [discovery request seeking names of employees who signed authorization cards has an illegal objective].) However, caselaw is unclear what other discovery requests evidence an illegal objective. We need not resolve that issue in this case because even if we were to agree that there was an illegal objective to the District's questioning of Montague-Hanson, it would not change the outcome since, as explained *post*, the District's interest in obtaining the information sought does not outweigh the harm to protected rights from disclosure of the information. Accordingly, we dismiss the Association's exception. (See *Fremont Unified School District* (2003) PERB Decision No. 1528, p. 3 ["Absent good cause, the Board will dismiss as without merit any initial

[11] The Civil Discovery Act is codified at Code of Civil Procedure section 2016.010 et seq.

exceptions filed by a prevailing party unless the Board's ruling on the exceptions would change the outcome of the ALJ decision"].)

C. Balancing Test

At the third step of the *Guess?, Inc.* analysis, we weigh the employer's interest in obtaining the information sought against the employees' interest in nondisclosure of the information. (*Guess?, Inc.*, *supra*, 339 NLRB at p. 434.) As a general matter, the NLRB has repeatedly recognized the importance of keeping employees' Section 7 activities confidential because the willingness of employees to engage in those activities would be undermined if an employer could easily obtain such information.[12] (*Guess?, Inc.*, *supra*, 339 NLRB at p. 434; *Wright Electric*, *supra*, 327 NLRB at p. 1195.) In *United Nurses Associations of California v. NLRB* (9th Cir. 2017) 871 F.3d 767, the Ninth Circuit similarly held that:

> "'It is well settled that Section 7 of the [NLRA] gives employees the right to keep confidential their union activities.' . . . [and] the Board here reasoned that 'the breadth of the subpoenas at issue here and the nature of the information requested—encompassing communications between employees and the Union . . . would subject

[12] Codified at 29 U.S.C. § 157, Section 7 of the National Labor Relations Act (NLRA) provides:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

> employees' [Section 7] activities to unwarranted investigation and interrogation.'" (*Id*. at p. 785.)

In applying the *Guess?, Inc.* test, the NLRB has found employers' attempts to use litigation discovery to inquire into union activities as particularly indicative of unlawful conduct. (*Guess?, Inc.*, *supra*, 339 NLRB 432 [employer questioned an employee during a workers' compensation deposition about her activities at the union hall and the names of other employees who attended union meetings]; *Century Restaurant & Buffet, Inc.* (2012) 358 NLRB 143, 157 [employer asked during depositions in a federal wage and hour lawsuit whether the employees were union members]; *Dilling Mechanical Contractors, Inc.*, *supra*, 357 NLRB at pp. 545-546 [employer propounded discovery in a state court action seeking the names of employees who had joined the union]; *Tower Industries Inc*. (2007) 349 NLRB 1077, 1079-1083 [employer during a deposition in a state court lawsuit asked for the names of employees who attended union meetings, what was discussed at union meetings, and whether there were discussions at the meetings relating to efforts to organize at the employer's business]; *Wright Electric*, *supra*, 327 NLRB at p. 1195 [employer propounded discovery in a state court action seeking copies of any authorization cards obtained by the union].)

Similarly, PERB has recognized the harm that flows from an employer's inquiries into communications between employees and their union representatives:

> "It is also beyond dispute that an employer's inquiries into discussions between employees and their union representatives have a tendency to chill the protected activities of both the employees and the representatives. (E.g., *County of Merced* (2014) PERB Decision No. 2361-M, pp. 7-8, 10 [employer order that union

> president disclose identity of bargaining unit members informing union of safety concerns constitutes interference].) As the [NLRB] has explained, allowing an employer to compel disclosure of the substance of conversations between an employee and his or her union steward 'manifestly restrains employees in their willingness to candidly discuss matters with their chosen, statutory representatives' and 'inhibit[s] stewards in obtaining needed information from employees.' (*Cook Paint & Varnish Co.* (1981) 258 NLRB 1230, 1232 (*Cook Paint*).) Such conduct also interferes with protected rights more generally, because it 'cast[s] a chilling effect over all of [the] employees and their stewards who seek to candidly communicate with each other over matters' concerning their employment. (*Ibid*.)"

(*William S. Hart Union High School District* (2018) PERB Decision No. 2595, p. 6.)

Here, the District asked Montague-Hanson about her conversations with A.B., other Association bargaining unit members, and CTA staff, all of which concerned protected activities. "Questions like these that are designed to uncover protected activities have a chilling effect on the exercise of employee rights." (*City of Santa Maria* (2020) PERB Decision No. 2736-M, pp. 30-31, citing *Guess?, Inc.*, *supra*, 339 NLRB 434.) Thus, Montague-Hanson, A.B., and other bargaining unit members had a strong interest in Montague-Hanson not disclosing the content of their conversations, as well as the identity of bargaining unit members who spoke with Montague-Hanson about A.B., for fear that the District could ask the union representative about any conversation and use that information against them.

While we found that the questions were potentially relevant to the dismissal proceeding, the District's interest in obtaining the information from Montague-Hanson does not outweigh Montague-Hanson's and the bargaining unit employees'

confidentiality interests. As the ALJ found, there was no evidence Montague-Hanson was the only source of information about A.B.'s conduct or that the District had exhausted other avenues before seeking this information from Montague-Hanson. Indeed, the District had the ability to obtain much of the information it sought from Montague-Hanson through witnesses who had personal knowledge of the conduct underlying the allegations in the Statement of Charges, such as those District employees interviewed during the investigation. However, as the District concedes in its exceptions, it instead attempted to elicit details about bargaining unit employees' conversations with Montague-Hanson to gain further incriminating information, including potential admissions by A.B. of wrongdoing. As we observed in *William S. Hart Union High School District*, *supra*, PERB Decision No. 2595, it is improper for an employer to deputize a union representative as a source of incriminating evidence against an accused employee because doing so chills employees' willingness to speak candidly to their union representatives. (*Id*. at p. 9.)

Further, the questions asked of Montague-Hanson were broad in scope and not narrowly tailored to the allegations in the Statement of Charges or Montague-Hanson's involvement in A.B.'s defenses, particularly regarding A.B.'s claims of retaliation for reporting unsafe working conditions and requesting accommodations. If the District had narrowly tailored its questions to Montague-Hanson's involvement in co-authoring the August 28, 2018 complaint, her personal observations of A.B.'s misconduct, or her involvement in securing accommodations for A.B., the District's interest in obtaining that information may have outweighed the harm to protected rights. (See *City of San Diego* (2020) PERB Decision No. 2747-M, p. 37, fn. 19 [an employer may successfully

defend against an interference allegation by showing "it narrowly tailored its actions or rules to attain [an important] purpose while limiting harm to protected rights to the extent possible"].) However, with regard to most of the questions, the District's need for the answers does not outweigh the employees' strong interest in confidentiality.

The District argues, however, that A.B. and other bargaining unit employees waived their confidentiality interest by providing information about their communications with Montague-Hanson to the District. As part of his disclosures in the dismissal appeal, A.B. produced Montague-Hanson's notes from a meeting with A.B. as well as e-mail correspondence between A.B. and Montague-Hanson. While this may have weakened A.B.'s confidentiality interest as to these particular communications, it did not amount to a blanket waiver of confidentiality as to all of A.B's communications with Montague-Hanson.

As for the argument that other bargaining unit members waived their confidentiality interest in their communications with Montague-Hanson, the District provides no citations to the record for this argument, and we therefore need not consider it. (See PERB Reg. 32300, subd. (a) ["The statement of exceptions shall . . . (2) cite to the relevant exhibit or transcript page in the case record to support factual arguments"]; *id*. at subdivision (d) ["Absent good cause, a statement of exceptions that does not comply with this Section will not be considered by the Board itself"]; see *WFG National Title Ins. Co. v. Wells Fargo Bank, N.A.* (2020) 51 Cal.App.5th 881, 894 ["Rather than scour the record unguided, we may decide that the appellant has forfeited a point urged on appeal when it is not supported by accurate citations to the record"].)

In sum, the District's interest in the questions posed to Montague-Hanson at her deposition does not outweigh Montague-Hanson's, A.B.'s, and other bargaining unit employees' strong interest in maintaining the confidentiality of their EERA-protected communications. Accordingly, the District unlawfully interfered with protected rights in violation of EERA section 3543.5, subdivision (a).

II. Affirmative Defenses

As affirmative defenses, the District argues that PERB lacks jurisdiction over the parties' dispute because discovery issues related to A.B.'s dismissal matter were under the exclusive jurisdiction of the OAH and because the Association failed to exhaust its administrative remedies.[13] We find no merit to these defenses.

A. Jurisdiction

"To avoid acting in excess of its authority, PERB has an obligation to determine whether it has jurisdiction over a dispute, regardless of whether the parties themselves have raised the issue." (*Lake Elsinore Unified School District* (2018) PERB Decision No. 2548, p. 11.) EERA section 3541.5 explicitly states that "the initial determination as to whether the charges of unfair practices are justified . . . shall be a matter within the exclusive jurisdiction of the board." Further, the Legislature has given PERB "a specialized . . . and . . . focused task: to protect both employees and . . . employer[s] from violations of the organizational and collective bargaining rights guaranteed by

[13] The District waived its mootness argument by not excepting to the ALJ's finding that this case is not moot. In the absence of a specific exception, the ALJ's conclusion is not before us and is non-precedential. (*County of Santa Clara*, *supra*, PERB Decision No. 2613-M, p. 2, fn. 2; PERB Reg. 32300, subd. (e).) We accordingly express no opinion on whether the ALJ's conclusion was correct.

[EERA] . . . [PERB is] . . . an agency which possesses and can further develop specialized expertise in the labor relations field." (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 198.) Accordingly, courts have consistently upheld PERB's primary and exclusive jurisdiction over alleged unfair practices. (See, e.g., *Curcio v. Fontana Teachers Assn. CTA/NEA* (2021) 68 Cal.App.5th 924, 932; *Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 895.)

The District argues that because Education Code section 44944 grants OAH jurisdiction over teacher dismissal proceedings, including pre-hearing discovery (see Ed. Code, § 44944, subd. (c)), PERB lacks jurisdiction over the parties' dispute. As we recently reaffirmed in *Cerritos Community College District* (2022) PERB Decision No. 2819 (judicial appeal pending), the Education Code does not preempt EERA when there is no conflict between the two statutes. (*Id*. at pp. 21-23.) For example, PERB has rejected the argument that it lacked jurisdiction over a claim that a certificated employee was nonrenewed because of his EERA-protected activity, finding no conflict between the Education Code's procedure for determining cause for nonrenewal and PERB's inquiry into whether this particular nonrenewal was motivated by protected activity. (*Baker Valley Unified School District* (2008) PERB Decision No. 1993, pp. 14-15.) Similarly, PERB's inquiry in this case into whether the District's questioning of Montague-Hanson interfered with EERA-protected rights is not in conflict with the Education Code's provisions for pre-hearing discovery in teacher dismissal proceedings. The District's argument that the Education Code preempts PERB's jurisdiction in this case consequently fails.

The District also cites to portions of the ALJ's decision in *Wright Electric*, *supra*, 327 NLRB 1194, for the proposition that PERB should refrain from the "micro-management" of litigation in other venues because doing so interferes with those courts' ability to determine factual and legal issues relevant to their jurisdiction. However, the District cites to a portion of the ALJ's decision in *Wright Electric*, *supra*, 327 NLRB 1194 that was not adopted by the NLRB. Rather, the NLRB found that because the employer's discovery demand sought the names of employees who signed union authorization cards, it had an objective that was illegal under federal labor law and therefore could be enjoined. (*Id*. at pp. 1195-1196.) *Wright Electric* thus does not help the District.

Here, the complaint alleged that the District interfered with employee and Association rights under EERA by extensively questioning Montague-Hanson regarding protected communications with A.B., other unit members, and Murray. Such allegations are squarely within PERB's jurisdiction. Thus, we uphold the ALJ's rejection of the District's defense that PERB lacks jurisdiction in this matter.

B. Failure to Exhaust Administrative Remedies

The District argues that because the Association did not move to quash Montague-Hanson's deposition subpoena nor instruct her not to answer the questions objected to, it failed to exhaust its administrative remedies and therefore is barred from bringing this charge. We disagree.

The District first cites to *County of Tehama* (2010) PERB Decision No. 2122-M (*County of Tehama*) to argue that the Association did not follow the procedures for discovery disputes during the OAH proceeding, thus precluding it from bringing that

claim before PERB. However, *County of Tehama* does not discuss failure to follow procedures at another administrative agency. Rather, the ALJ in that case denied a motion to exclude evidence based on the employer's alleged failure to respond to an information request because the charging party failed to subpoena those documents pursuant to PERB regulations. (*Id*. at pp. 10-11.) Therefore, the District's reliance on *County of Tehama* is misplaced.

The District also cites to *OE3* to support this claim, where PERB found that the charging parties' failure to object to their employer's disclosure of their work e-mails undercut their claim. (*OE3*, *supra*, PERB Decision No. 2782-M, p. 16.) *OE3* does not stand for the proposition that a charging party must exhaust all administrative remedies in another forum prior to filing a charge alleging interference. Even if that were the case, during the deposition Amar objected to questions individually and lodged a standing objection to any questions about communications protected by associational privacy. We find those objections sufficient to preserve the issue for PERB's review.

III. Remedy

A "properly designed remedial order seeks a restoration of the situation as nearly as possible to that which would have obtained but for the unfair labor practice." (*Modesto City Schools* (1983) PERB Decision No. 291, pp. 67-68.) A remedy should also serve to deter future misconduct, so long as the order is not a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act. (*City of Palo Alto* (2019) PERB Decision No. 2664-M, p. 3.)

The District argues that affirming the ALJ's proposed remedy would be highly

prejudicial because it would preclude the deposition or testimony of an employee due to their role in the union. That is simply not true. The ALJ ordered the District to cease and desist from unlawfully interrogating union representatives about union activities and their communications with bargaining unit members. Such an order would not preclude an employer from deposing or questioning a union representative about matters the individual personally witnessed or any matter that does not involve EERA-protected activities. And as discussed *ante*, an employer may lawfully inquire into a union representative's communications with bargaining unit members when its need for the information outweighs the employees' interest in confidentiality. We thus affirm and adopt the ALJ's proposed cease-and-desist order.

Additionally, the District excepts to the ALJ's order to pay the Association four hours in attorney fees to make the Association whole for the time it spent defending EERA-protected rights during the deposition. As the District notes, the ALJ found the District's defenses were not without arguable merit and were not pursued in bad faith. But PERB may order payment of attorney fees "when a party seeks to be made whole for legal expenses it reasonably incurred in a separate proceeding to remedy, lessen, or stave off the impacts of the other party's unfair practice." (*Sacramento City Unified School District* (2020) PERB Decision No. 2749, pp. 11-12.) The District also claims an order to pay attorney fees is inappropriate because the District had a legal right to take Montague-Hanson's deposition. While the right to take the deposition is not in question, the District cannot exercise that right in a way that interferes with EERA-protected rights. (Cf. *City of San Diego*, *supra*, PERB Decision No. 2747-M, p. 29 [when an employer has a managerial, statutory, or contractual right to take an

employment action, its decision to act cannot be based on an unlawful motive, intent, or purpose].) Because the deposition would have been much shorter without the questioning into Montague-Hanson's representational communications with A.B., other bargaining unit members, and CTA staff, it is appropriate to require the District to reimburse the Association for its reasonable attorney fees incurred and thereby make it whole. (*Sacramento City Unified School District*, *supra*, PERB Decision No. 2749, pp. 11-14; *Omnitrans* (2009) PERB Decision No. 2030-M, p. 30.) We therefore affirm the ALJ's order to pay the Association four hours in attorney fees as a reasonable approximation of what was necessary to defend the District's unlawful deposition questioning.

ORDER

Based on the foregoing findings of fact and conclusions of law, and the entire record in this case, it is found that the Victor Valley Union High School District violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq., when, during a deposition, its attorney asked Victor Valley Teachers Association (Association) President Kathleen Montague-Hanson questions about: (1) confidential communications she had with a bargaining unit member concerning a disciplinary matter in which she advised that member; and (2) confidential communications she had with other bargaining unit members and union personnel about the disciplinary matter.

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

A. CEASE AND DESIST FROM:

1. Unlawfully interrogating union leaders about union activities and their communications with bargaining unit members.

2. Interfering with the right of the Association to represent bargaining unit employees.

3. Interfering with the right of bargaining unit employees to be represented by the Association.

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

1. Pay the Association four hours of attorney fees.

2. Within 10 workdays following the date this Decision is no longer subject to appeal, post at all work locations where notices to District employees in the bargaining unit(s) represented by the Association are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays.[14] In

[14] In light of the ongoing COVID-19 pandemic, the District 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 District so notifies OGC, or if the Association requests in writing that OGC alter or extend the posting period, require additional notice methods, or otherwise adjust the manner in

addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the District to communicate with employees in the bargaining unit represented by the Association. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.

3. Within 30 workdays after this decision is no longer subject to appeal, notify the PERB General Counsel or designee in writing of the steps taken to comply with the terms of this Order. Continue to report in writing to the General Counsel, or designee, periodically thereafter as directed. All reports regarding compliance with this Order shall be served concurrently on the Association.

Chair Banks and Member Paulson joined in this Decision.

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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 District to commence posting within 10 workdays after a majority of employees have resumed physically reporting on a regular basis; directing the District 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 District to mail the Notice to those employees with whom it does not customarily communicate through electronic means.

APPENDIX

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

After a hearing in Unfair Practice Case No. LA-CE-6562-E, *Victor Valley Teachers Association v. Victor Valley Union High School District*, in which all parties had the right to participate, it has been found that Victor Valley Union High School District violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq., when, during a deposition, its attorney asked Victor Valley Teachers Association (Association) President Kathleen Montague-Hanson questions about: (1) confidential communications she had with a member concerning a disciplinary matter in which she advised that member; and (2) confidential communications she had with other union members and union personnel about the disciplinary matter.

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

A. CEASE AND DESIST FROM:

1. Unlawfully interrogating union leaders about union activities and their communications with members.
2. Interfering with the right of the Association to represent bargaining unit employees.
3. Interfering with the right of bargaining unit employees to be represented by the Association.

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

1. Pay the Association four hours of attorney fees.

Dated: _____

VICTOR VALLEY UNION HIGH SCHOOL DISTRICT

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.