STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

TEAMSTERS LOCAL 2010, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	Case No. SF-CE-1314-H PERB Decision No. 2835-H October 7, 2022

Appearances: Beeson, Tayer & Bodine by Susan Garea, Attorney, for Teamsters Local 2010; Sloan Sakai Yeung & Wong by Timothy G. Yeung and Reed S. Horowitz, Attorneys, for Regents of the University of California.

Before Shiners, Krantz, and Paulson, Members.

DECISION

SHINERS, Member: This case is before the Public Employment Relations Board (PERB or Board) for a decision based on the evidentiary record from a hearing before an administrative law judge (ALJ). The complaint alleged that the Regents of the University of California violated the Prohibition on Public Employers Deterring or Discouraging Union Membership (PEDD), the Higher Education Employer-Employee Relations Act (HEERA), and PERB Regulations by distributing a communication to employees in the Administrative Officer II (AO2) classification concerning their choice whether to join or support Teamsters Local 2010.[1] The communication, which the

[1] PEDD is codified at Government Code section 3550 et seq. HEERA is codified at Government Code section 3560 et seq. Unless otherwise specified, all statutory references are to the Government Code. PERB Regulations are codified at

University sent shortly after PERB added the AO2s to the Teamsters-represented Clerical and Allied Services Bargaining Unit (CX Unit), included a set of four Frequently Asked Questions with answers (FAQs), including one addressing union membership and one addressing union dues.

We have reviewed the record and considered the parties' arguments. As explained below, we find that the University violated PEDD section 3553 by sending the FAQs to AO2s without first providing Teamsters an opportunity to meet and confer over the communication. We also find that the University violated PEDD section 3550 by distributing the FAQs because they tended to influence employee free choice about whether to join or support Teamsters, and the University failed to prove a business necessity for their distribution. Notwithstanding the University's PEDD violations, we deny Teamsters' request for attorney fees and costs given that, at the time of the parties' post-hearing briefs the Board had not yet interpreted section 3553, and the University's section 3550 affirmative defense was not clearly foreclosed by existing PERB precedent.

FACTUAL FINDINGS

The University is an employer under HEERA section 3562, subdivision (g), and therefore is a public employer under PEDD section 3552, subdivision (c). Teamsters is an exclusive representative within the meaning of HEERA section 3562, subdivision (j). It represents the statewide CX Unit, which consists of approximately 12,000 employees at University of California (UC) campuses, medical centers, Office of the President (UCOP), and Lawrence Livermore labs. Although it includes such

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California Code of Regulations, title 8, section 31001 et seq.

diverse classifications as early childhood education teachers, public safety dispatchers, library assistants, and survey workers, administrative support classifications make up the majority of the CX Unit.

In August 2018, Teamsters filed a unit modification petition to accrete the systemwide AO2 classification to the CX Unit; the University filed an opposition the following month. A PERB hearing officer conducted a formal hearing on January 8 and 9, 2020.[2] On September 9, the hearing officer issued a proposed decision finding the proposed unit appropriate and granting Teamsters' petition. Neither party filed exceptions to the proposed decision, and it consequently became final on October 5.

Exchanges Between the University and Teamsters

On October 13, E. Kevin Young, the University's Associate Director of Systemwide Labor Relations, e-mailed Jason Rabinowitz, Teamsters' Secretary/ Treasurer/Principal Officer, about the AO2s' accretion into the CX Unit. Young copied the e-mail to Tanya Akel, Teamsters Field Director; Melissa Munio, Teamsters Chief of Staff; and Peter Chester.[3] Young wrote he would "like to discuss sending a statement to the employees advising them that they are becoming members of the CX unit and that bargaining over the process shall commence soon." He asked Rabinowitz to "[p]lease review the below language and let me know your thoughts[.]" The draft statement read:

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[2] All further undesignated dates are in 2020.

[3] There is no evidence in the record as to Chester's title. However, as of August 7, Chester was the University's Executive Director of Systemwide Labor Relations. (*Regents of the University of California* (2021) PERB Decision No. 2783-H, p. 14.)

> "Dear colleague:
>
> "I am writing to update you about a recent court decision regarding UC Administrative Officer IIs. As you may know, the Teamsters union petitioned the state Public Employment Relations Board (PERB) to have Administrative Officer IIs added to the Teamsters' existing Clerical bargaining unit employees bargaining unit [*sic*] (CX), and PERB granted Teamsters' request. As a result, the University and Teamsters will soon begin bargaining over the terms governing the integration of non-supervisory, non-managerial employees in the Administrative Officer II classification into the CX bargaining unit.
>
> "Administrative Officer IIs with questions should direct them to their local Teamster representative."

Young's e-mail did not mention any FAQs.

On October 16, at 10:04 a.m., Teamsters sent an e-mail to the newly-accreted AO2s. The subject line stated: "UC Admin Officer 2s: Welcome to the Teamsters!" It included a welcome message and explained the accretion. Along with advising AO2s of a guaranteed three-percent raise scheduled for July 2021, the e-mail listed other benefits of union representation. It also informed AO2s of upcoming welcome town halls on October 21.

Later on October 16, at 1:38 p.m., Young e-mailed Rabinowitz: "I would like to send a notice to the Admin Officer IIs to advise them of their accretion into the Teamsters and that bargaining will start soon. I was hoping to get your buy in on the notice as drafted. Please let me know if you have any concerns about the notice."

Rabinowitz replied at 1:52 p.m. He acknowledged receipt of Young's e-mail and stated that he would circulate the draft language to his team for feedback, then call Young.

At 2:11 p.m., the University Labor and Employee Relations team received an e-mail from Gina Torgersen, a UC San Diego employee.[4] Torgersen forwarded an e-mail she had received from a UC San Diego AO2, which stated:

> "Hi Gina,
>
> "I received this email from Teamsters today. Just wanted to check in with you as it's not something I had heard of until this email (unless I have another email buried in my inbox). Do you know anything about this?
>
> "Thank you!
>
> "Best,
>
> "[Name redacted]"

Torgersen said she was not aware the AO2 classification had been accreted into the CX Unit and asked the Labor and Employee Relations team for information.

At 3:10 p.m., Young sent another e-mail to Rabinowitz:

> "Jason,
>
> "As you are most likely aware notices from the Teamsters were sent out to the Admin Officers II. As that being the case the University is compelled to send out notices to the impacted employees. Below please find a template of the language being sent to the impacted employees:
>
> "Dear Colleague:
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> "We are writing to update you about a recent decision of the California Public Employment Relations Board (PERB) regarding UC Administrative Officers (AO). Previously your position was reclassified to AO 2 as a result of the UC Career Tracks initiative. As you may know, the Teamsters union petitioned PERB to have Administrative Officers

[4] Torgersen's title is not in the record.

> added to its existing clerical bargaining unit (CX), and PERB recently granted Teamsters' request. As a result, the University and Teamsters will bargain over the terms governing the integration of non-supervisory, non-managerial, employees in the Administrative Officer 2 classification into the CX bargaining unit.
>
> "A set of FAQs regarding this change is attached. In addition, the Union will schedule a meeting with all UCI AO 2s. If you have any questions regarding this matter you may contact the Teamsters Local 2010 representative listed below. Administrative Officers with questions should direct them to the local Teamsters representative.
>
> "Teamsters - CX Unit
> Eve Kent, Union Representative
> Teamsters Local 2010
> [Kent's e-mail address]
> [Kent's cell phone number]
>
> "Sincerely,
> Leslie Kleiman
> Senior Director, Enterprise Workforce Relations
>
> "Please feel free to contact me if you have any questions and/or concerns."

Young did not seek input from Rabinowitz and did not include a copy of the FAQs he referenced.

Rabinowitz replied to Young at 4:38 p.m., writing the notice "looks fine to us" and asking Young to share the FAQs he intended to send.

Within minutes, at 4:50 p.m., UC Davis Labor Relations sent an e-mail to campus AO2s with the subject line "Labor Relations Update – Admin Officer 2 – October 16, 2020." Above the body of the e-mail, a statement read: "*Sent on behalf of Stephen Green, Executive Director, Employee & Labor Relations*." (Original italics.)

The e-mail stated:

> "Dear Colleague:
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> "I am writing to update you about a recent court decision regarding UC Administrative Officer IIs. As you may know, the Teamsters union petitioned the state Public Employment Relations Board (PERB) to have Administrative Officer IIs added to the Teamsters' existing Clerical bargaining unit (CX), and PERB granted Teamsters' request. As a result, the University and Teamsters will soon begin bargaining over the terms governing the integration of non-HEERA confidential, nonsupervisory, non-managerial employees in the Administrative Officer II classification into the CX bargaining unit.
>
> "Here are some commonly asked questions and answers regarding this accretion:
>
> "**Q1: Why was my position moved to a bargaining unit represented by a union?**
>
> "A: A determination was made, based on the duties and responsibilities listed in your job description, that your position shares a community-of-interest with positions in the bargaining unit. This is a standard that is used to determine what positions should be in a bargaining unit. Multiple factors are considered including job function, skills and duties.
>
> "**Q2: Must I join the Union?**
>
> "A: The decision to join a union or not is personal. The University does not take a position on this issue.
>
> "**Q3: Will I have to pay monthly union dues?**
>
> "A: You may contact the union for information about union membership and financial contributions.

> "**Q4: Where can I get information about the union?**
>
> "A: Your union representative is available to answer questions about your bargaining unit, the union contract and union membership. Please see contact information below.
>
> "[Contact information omitted.]"

(Original boldface.)

Less than an hour later, at 5:40 p.m., Terri Winbush, Senior Director of Labor and Employee Relations at UC San Diego, sent an e-mail to campus AO2s with the subject line "Administrative Officer 2 update." Winbush copied Eve Kent, a Teamsters Representative, on the e-mail. The e-mail had only immaterial differences from the one UC Davis had sent an hour earlier.

Shortly after, at 6:22 p.m., an AO2 from UC San Diego sent an e-mail to Winbush and copied Kent. The employee requested a copy of their job description to confirm that they fit into the classification and title. [5] They believed that the "evolution of [their] job doesn't fit this title" and asked if there was someone with knowledge of titles and job descriptions at the campus who could provide assistance. The employee did not inquire about Teamsters membership or dues. Winbush forwarded the e-mail to Kent, who responded to the employee with an explanation of an AO2's job functions and information for confirming the appropriateness of the designation. At 9:13 p.m., Kent e-mailed Winbush to thank her for sharing the University's communication.

On October 20, Nancy Pluzdrak, Executive Director of UCOP Human Resources, sent an e-mail to AO2s at UCOP. The subject line stated: "Important Information Re:

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[5] Because employees' identities were redacted from the record, we employ the non-gendered "they/them" to refer to any unnamed employees.

Recent California Public Employment Relations Board Decision Regarding UC Administrative Officers." The e-mail had largely immaterial differences from those that UC Davis and UC San Diego sent on October 16.

On October 21, at 10:23 a.m., Young e-mailed Rabinowitz. He apologized for missing Rabinowitz's October 16 e-mail and provided the FAQs as an attachment. Young did not disclose that the University had sent its own communication, including the FAQs, to AO2s on October 16 and 20.

At 1:14 p.m. that day, an AO2 at UC San Diego e-mailed Winbush and copied Kent. The employee wrote they had received an e-mail from Teamsters regarding the accretion and asked Winbush if they were properly accreted because while they were in the AO2 classification, they also supervised one staff employee. Kent responded and explained the general requirement for an employee to be considered a manager or supervisor under HEERA.

At 5:45 p.m., Akel e-mailed Veronica Garcia at UCOP and Young asking them to remove the second and third FAQs and to add anti-union discrimination language. Neither Garcia nor Young responded to this e-mail.

PROCEDURAL HISTORY

Teamsters filed this charge on March 16, 2021, alleging that on October 16 and 20, the University e-mailed the FAQs to AO2s at three locations without first providing Teamsters notice or an opportunity to meet and confer over the FAQs as required by PEDD section 3553. The charge also alleged that the FAQs violated PEDD section 3550 because they tended to deter or discourage newly-represented AO2s from joining or supporting Teamsters. The charge further alleged that the University's conduct violated HEERA section 3571, subdivisions (a) and (c). The

University did not file a position statement in response to the charge.

The Office of the General Counsel (OGC) issued the complaint on August 26, 2021. The complaint alleged that the University violated PEDD sections 3550 and 3553, and HEERA section 3571, subdivisions (a) and (c), by sending the FAQs. The University filed an answer to the complaint in which it admitted jurisdictional facts and the content of the FAQs, while denying any PEDD or HEERA violations and asserting affirmative defenses.

OGC conducted an informal settlement conference on October 20, 2021, but no settlement resulted. Shortly thereafter, the case was assigned to the Division of Administrative Law for formal hearing.

An ALJ held a formal hearing by videoconference on March 11, 2022. The parties filed simultaneous post-hearing briefs on May 9, 2022.

On May 20, 2022, the Board's Appeals Office notified the parties that the case had been placed on the Board's docket for decision.[6]

DISCUSSION

I. PEDD Section 3553

This is a case of first impression regarding PEDD section 3553. In *Regents of the University of California* (2021) PERB Decision No. 2755-H (*Regents*), we considered for the first time PEDD section 3550's prohibition on public employers deterring or discouraging employees or applicants from exercising free choice about union

[6] PERB Regulation 32320, subdivision (a)(1), allows the Board itself to "[i]ssue a decision based upon the record of hearing[.]" PERB Regulation 32215 allows the Board itself to direct a Board agent to "submit the record of the case to the Board itself for decision."

membership and support, and we analyzed section 3550's relationship to section 3553. (*Id*. at p. 18.) We did not need to construe or apply section 3553, however, because the parties had not challenged the ALJ's finding of a section 3553 violation in the underlying proposed decision. (*Id*. at p. 3, fn. 2.)

As relevant herein, section 3553 provides:

> "(a) This section shall apply only when an employee organization has been recognized or certified by the governing body of the public employer or the Public Employment Relations Board as the exclusive representative of employees in a bargaining unit.
>
> "(b) 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.
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> "(c) If the public employer and the exclusive representative do not come to agreement on the content of a public employer's mass communication covered by this section, and if the public employer still chooses to disseminate the mass communication, the public employer shall distribute to the public employees, in addition to, and at the same time as, its own mass communication, a communication of reasonable length provided to the public employer by the exclusive representative. The exclusive representative shall provide the public employer with adequate copies of its own mass communication prior to distribution.
>
> "[¶] . . . [¶]
>
> "(e) For purposes of this section, a 'mass communication,' means a written document, or script for an oral or recorded presentation or message, that is intended for delivery to multiple public employees."

Because Teamsters approved the University's statement that accompanied the FAQs, our analysis focuses only on the FAQs. The parties' dispute centers on FAQ 2 and FAQ 3:

> "**Q2: Must I join the Union?**
>
> "A: The decision to join a union or not is personal. The University does not take a position on this issue.
>
> "**Q3: Will I have to pay monthly union dues?**
>
> "A: You may contact the union for information about union membership and financial contributions."

The complaint alleged that the University violated section 3553, subdivision (b), by distributing these FAQs to AO2s in October 2020 without first meeting and conferring with Teamsters. We address each element of subdivision (b) in turn.[7]

A. Mass Communication

The University does not dispute that its e-mails containing the FAQs were a "mass communication" as defined in section 3553, subdivision (e), nor could it. The UC Davis, UC San Diego, and UCOP e-mails were written documents intended for delivery to all AO2s at their respective campuses or offices and, in fact, were electronically delivered to those employees. The first element of a section 3553, subdivision (b), violation thus is clearly established.

[7] The University does not contest that Teamsters is the certified exclusive representative of the CX Unit, which includes AO2s. Accordingly, there is no question that section 3553, subdivision (a), is satisfied.

B. Concerning Public Employees' Rights to Join or Support an Employee Organization

The second element of a section 3553, subdivision (b), violation is whether the mass communication is one "concerning public employees' rights to join or support an employee organization, or to refrain from joining or supporting an employee organization." The term "concerning" is the fulcrum of the parties' debate. Teamsters argues for a broad construction of "concerning" that covers any mass communication about union membership or dues, while the University asks us to adopt a narrow construction that focuses on whether the employer took a position on those subjects. We agree with Teamsters that a broad construction of "concerning" is appropriate.

PERB's fundamental task in statutory construction is to ascertain the Legislature's intent so as to effectuate the purpose of the law. (*Regents*, *supra*, PERB Decision No. 2755-H, p. 20; *Region 2 Court Interpreter Employment Relations Committee & California Superior Courts of Region 2* (2020) PERB Decision No. 2701-I, p. 32 (*Region 2*).) In construing a statute, we first examine the statutory language, "affording the words their ordinary and usual meaning." (*Region 2*, *supra*, PERB Decision No. 2701-I, p. 33.) If the statutory language is clear, we generally assume the Legislature meant what it said. (*Ibid*.; *State of California (Office of the Inspector General)* (2019) PERB Decision No. 2660-S, p. 15.) Moreover, we are to give statutes a "reasonable and common sense interpretation consistent with the apparent purpose and intention of the lawmakers." (*Regents*, *supra*, PERB Decision No. 2755-H, p. 20, internal citation omitted.) In doing so, we interpret a statutory provision with "reference to the whole system of which it is a part so that all may be harmonized and have effect." (*Ibid*., internal citation omitted; *Skidgel v. California Unemployment Ins. Appeals Bd.*

(2021) 12 Cal.5th 1, 14.) We turn to extrinsic aids such as legislative history and the wider historical circumstances of the statute's enactment only when the plain meaning of a statute is unclear. (*Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M, pp. 16-17.)

"'Concerning' is a broad term meaning 'pertaining to; regarding; having relation to; [or] respecting . . . . ' [Citation.]" (*Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, 531; see Merriam-Webster <https://www.merriam-webster.com/dictionary/concerning> ["relating to; REGARDING"] [as of Oct. 5, 2022]; Dictionary.com <https://www.dictionary.com/browse/concerning> ["relating to; regarding; about"] [as of Oct. 5, 2022]; Oxford Languages Dictionary <https://tinyurl.com/4rz4n29f> ["on the subject of or in connection with; about"] [as of Oct. 5, 2022].) Use of words such as "concerning" or "respecting" "in a legal context generally has a broadening effect, ensuring that the scope of a provision covers not only its subject but also matters relating to that subject." (*Lamar, Archer & Cofrin, LLP v. Appling* (2018) ___ U.S. ___, ___ [138 S.Ct. 1752, 1760]; see, e.g., *San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 857 [PERB's expansive interpretation of § 3543.2, subd. (a)'s use of the phrase "matters relating to" conforms to the language and purpose of the statute]; *Essick v. County of Sonoma* (2022) 80 Cal.App.5th 562, 569-570 [California Public Records Act's definition of "public records" as including "any writing containing information relating to the conduct of the public's business prepared, owned, used or retained by any state or local agency" is an "expansive framing"].)

A broad interpretation of "concerning" in section 3553, subdivision (b), comports with the circumstances animating the PEDD's enactment. Section 3553 was "'part of a broader legislative package designed to address the impact of *Janus v. American*

Federation of State, County, & Municipal Employees, Council 31, ___ U.S. ___, 138 S. Ct. 2448, 201 L.Ed.2d 924 (2018).' In *Janus*, the Supreme Court held that the First Amendment barred 'States and public-sector unions' from 'extract[ing] agency fees from nonconsenting employees.' 138 S. Ct. at 2486." (*Barke v. Banks* (9th Cir. 2022) 25 F.4th 714, 717.) To counter potential threats to public employee union support after *Janus*,[8] the PEDD explicitly aims to protect employee choice as to whether or not to become a union member, unconstrained by employer influence. (*Regents*, *supra*, PERB Decision No. 2755-H, p. 28.) Section 3553 furthers this goal by requiring an employer, if it needs to communicate with employees about joining or supporting a union or refraining from doing so, to negotiate with the employees' union before sending such a communication. (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, 250-251 [observing that in the context of informing public employees about their organizational rights, "[t]he potential for coercion and misinformation is considerable absent some form of intervention designed to promote cooperation between both labor and management"].) Interpreting "concerning" in section 3553, subdivision (b), broadly to encompass any communication about union membership or dues is consistent with the Legislature's intent to protect employee free choice on those issues.

Applying these principles here, we find that the FAQs were mass communications concerning public employees' rights to join or support an employee organization. FAQ 2 asked, "Must I join the Union?" This question relates to, regards,

[8] See *Regents*, *supra*, PERB Decision No. 2755-H, p. 32 [describing the existential threat to public sector collective bargaining in the leadup to and aftermath of *Janus*].

and is about AO2s' rights to join, or not join, Teamsters. FAQ 3 asked, "Will I have to pay monthly union dues?" This question relates to, regards, and is about AO2s' rights to financially support, or refrain from supporting, Teamsters. The answers to these FAQs plainly relate to, regard, and are about those issues.

The University nonetheless argues that its FAQs do not "concern[ ] public employees' rights to join or support an employee organization" because they "do not provide any commentary on whether employees should join the union or pay monthly dues." Rather, the University underscores, it expressly took no position on union membership (FAQ 2) and directed employees to contact their union representative regarding dues (FAQ 3). This argument appears to conflate the standard for finding a section 3550 violation, where content of the communication is relevant (*Regents*, *supra*, PERB Decision No. 2755-H, pp. 41-42), with a section 3553 violation, where the statute focuses on the general subject matter of the communication, not its particular content. Whereas section 3550 (discussed *post*) requires us to consider if an employer's conduct or communication has a tendency to deter or discourage free choice, and if so whether the employer can establish a business necessity justifying the conduct or communication, section 3553 calls for no such inquiry.[9] Thus, even if FAQ 2 and FAQ 3 were content neutral (and as we discuss *post*, they were not), that would not provide a defense to a section 3553 violation. FAQ 2 and FAQ 3 therefore were "communications . . . concerning public employees' rights to join or support an employee organization,

[9] Moreover, while section 3550 prohibits certain conduct and communications, section 3553 can apply to communications not prohibited by section 3550, requiring the employer to bargain before issuing them. (See *Regents*, *supra*, PERB Decision No. 2755-H, pp. 38-39.)

or to refrain from joining or supporting an employee organization" under section 3553, subdivision (b).

In sum, we hold that any mass communication addressing the general subject matter of union membership or dues is a communication "concerning public employees' rights to join or support an employee organization, or to refrain from joining or supporting an employee organization" under section 3553, subdivision (b), regardless of whether the communication expresses any particular viewpoint on those subjects, or no viewpoint at all. We thus conclude that FAQ 2 and FAQ 3 concerned AO2s' rights to join or support Teamsters, or to refrain from joining or supporting Teamsters.[10]

C. Meet and Confer Requirement

The third element of a section 3553, subdivision (b), violation is whether the employer met and conferred with the exclusive representative about the content of the mass communication before distributing it to employees. While we have not yet addressed the meet and confer obligation under section 3553, subdivision (b), PERB precedent provides a robust body of law to apply to that issue, and we do so here.

It is undisputed that the University did not meet and confer with Teamsters over the FAQs before distributing them to employees. Young admitted this, testifying that he neither intended to meet and confer nor did so, based on his incorrect belief that the University had no such obligation.[11]

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[10] Nothing in this decision should be construed as limiting the word "support," as used in section 3553, subdivision (b), to mean only financial support.

[11] Young's view stemmed from his belief that, while the communication "related" to union support and membership, it did not "concern" those topics—an argument we have rejected, *ante*.

The University's post-hearing brief adjusts its argument, claiming that Teamsters waived any right to meet and confer by sending its own communication to AO2s on the morning of October 16. However, this argument contravenes established waiver principles and relies on a faulty construction of section 3553.

A waiver of the statutory right to meet and confer must be "clear and unmistakable," with the evidence demonstrating an "intentional relinquishment" of the right to bargain. (*Modoc County Office of Education* (2019) PERB Decision No. 2684, p. 11.) "Public policy disfavors finding a waiver based on inference and places the burden of proof on the party asserting the waiver." (*County of Santa Clara* (2013) PERB Decision No. 2321-M, p. 19.) An employer asserting a waiver defense must prove that: "(1) it provided the employee organization clear and unequivocal notice that it would act on a matter, and (2) the employee organization clearly, unmistakably and intentionally relinquished its right to meet and confer in good faith." (*City of Palo Alto* (2017) PERB Decision No. 2388a-M, p. 38, underline in original.) Because of the notice requirement, "a union cannot waive bargaining over a negotiable matter when it had no actual or constructive notice of the issue, until after the employer had already reached a firm decision." (*Regents of the University of California* (2018) PERB Decision No. 2610-H, p. 47.)

Under this well-established precedent, the University failed to prove that Teamsters waived its right to meet and confer over the FAQs. Teamsters did not receive a copy of the FAQs before the University sent them to AO2s. Without advance notice of the entirety of the University's intended communication to AO2s, Teamsters could not have intentionally relinquished its right to meet and confer over the FAQs. (See *City of Sacramento* (2013) PERB Decision No. 2351-M, pp. 39-40 [when the

exclusive representative first learns of a unilateral change after it has been implemented, "the 'notice' is nothing more than 'notice' of a *fait accompli* and the question of waiver never arises"].)

Moreover, the University's waiver defense relies on a faulty interpretation of section 3553, subdivision (c). The University points to the statute's requirement that an employer simultaneously distribute the union's communication with its own if the parties cannot negotiate a single, joint message. From this, the University argues that the entire meet and confer requirement no longer served any purpose once Teamsters sent its own communication to AO2s. But the operative provision plainly states it is the employer's decision to send a mass communication that triggers its meet-and-confer obligation. We therefore decline the University's suggestion to hold, as a matter of law, that an exclusive representative which has already sent a communication to employees no longer has an entitlement to meet and confer over the content of the employer's mass communication. Rather, to constitute a waiver of the right to meet and confer, the exclusive representative's communication, or the context in which it was made, must clearly indicate that the representative intentionally relinquished its right to bargain over the content of the employer's communication. Although we do not foreclose a scenario where an employer could successfully assert a waiver defense to section 3553, subdivision (b), the University did not meet its burden to prove such a defense here.

For these reasons, the University violated PEDD section 3553, subdivision (b), by failing to give Teamsters notice and an opportunity to meet and confer over the FAQs before distributing them to AO2s at three UC locations on October 16 and 20.[12]

[12] The complaint also alleged that the University's distribution of the FAQs

II. PEDD Section 3550

A. Prima Facie Case

Section 3550 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." The Board interprets "deter or discourage" as 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. (*Regents*, *supra*, PERB Decision No. 2755-H, p. 21.) The test for whether an employer's communication "tends to influence" is objective. (*Id*. at p. 24.) The charging party has the burden to show that the communication tends to influence, not that it actually did influence free choice. (*Ibid*.) We will first examine the content of the communication itself to determine whether it tends to influence employee free choice, and then consider the communication's context. (*Id*. at pp. 24-25.)

Preliminarily, however, "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

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without first meeting and conferring with Teamsters violated HEERA section 3571, subdivision (c). Teamsters did not address this allegation in its brief, and we accordingly consider the allegation abandoned. Moreover, although we have not yet ruled on the issue (*Regents*, *supra*, PERB Decision No. 2755-H, pp. 53-54, fn. 39), we decline to address whether the University's violation of section 3553, subdivision (b), constituted a derivative violation of HEERA section 3571, subdivision (c), as neither party raised the issue in its briefs, and finding a derivative violation would not alter the remedy.

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." (*Regents*, *supra*, PERB Decision No. 2755-H, p. 37.) In light of our conclusion that the University violated section 3553, subdivision (b), we find that the University presumptively violated section 3550 by unilaterally disseminating the FAQs, and that it did not rebut that presumption by establishing the FAQs fell into the "narrow" category of communications that may concern employee rights to choose whether or not to join or support an employee organization but yet not tend to influence employee decisions on those topics. (*Id*. at pp. 38-39.) But even without the presumption, we conclude that Teamsters proved a prima facie case of a section 3550 violation.

The FAQs tended to influence employee free choice on several fronts. The University's selection and phrasing of the FAQ questions was problematic. FAQ 2, by asking "Must I join the Union?," couches union membership in a negative light as a potential compulsory obligation that an employee might wish to avoid. FAQ 3 suffers from a similar pitfall. The question, "Will I have to pay monthly union dues?," treats the choice to join a union as a financial burden an employee may wish to avoid, thereby emphasizing the cost of union membership without any mention of the benefits. (See *Regents*, *supra*, PERB Decision No. 2755-H, p. 41 [University's FAQ regarding union dues framed the *Janus* decision only in terms of a financial advantage to agency fee payers, eliding any hint that the right-to-work framework *Janus* imposed may ultimately reduce compensation and protections].) By highlighting these questions and labeling them as "FAQs," the University suggested that AO2s commonly ask these questions, or should ask them, rather than asking about membership benefits. Spotlighting these

topics to the exclusion of others reduced the accretion, and by extension the choice to join and support Teamsters, to an overall burden.

The context in which the University distributed the FAQs also supports finding that they tend to deter or discourage employee free choice. The University circulated the FAQs within days of the accretion becoming final, which was a crucial period for AO2s to decide whether to join Teamsters. The timing was therefore particularly sensitive to influencing employee free choice.

Additionally, the AO2s were part of a group of employees who received a previous University communication that violated section 3550. In *Regents of the University of California* (2021) PERB Decision No. 2756-H, we directed OGC to issue a complaint alleging a University website posting violated section 3550 because it suggested that Teamsters' wage increases are less substantial than unrepresented clerical employees' wage increases, and that unrepresented employees already have sufficient job protections. (*Id*. at pp. 8-9.) In a proposed decision that is now final and binding on the parties, an ALJ found the communication violated section 3550. (*Regents of the University of California*, PERB Decision No. HO-U-1705-H, non-precedential.) That prior communication likely tended to color how AO2s perceived the University's October 2020 FAQs.

The University argues that no section 3550 violation should be found because Teamsters failed to prove any employee actually was deterred or discouraged from joining Teamsters or paying dues. "[T]he 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." (*Regents*, *supra*, PERB Decision No. 2755-H, p. 24.) Thus, to prevail, Teamsters was not required to show that any employee actually was deterred or discouraged by the FAQs.

On these facts, we conclude Teamsters met its prima facie burden to demonstrate the University violated section 3550, even in the absence of the presumption arising from the section 3553, subdivision (b), violation.

B. University's Affirmative Defense

Once a charging party establishes a prima facie section 3550 violation, the burden shifts to the employer to prove a business necessity defense. (*Regents*, *supra*, PERB Decision No. 2755-H, p. 35.) As we stated in *Regents*:

> "The degree of likely influence dictates the employer's burden. If the likely influence is 'inherently destructive' of employee free choice, then 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."[13]

[13] As stated in *Regents*, *supra*, PERB Decision No. 2755-H, Member Shiners disagrees that the concept of "inherently destructive conduct" should be part of PERB's standard for section 3550 violations and would simply "balance the harm to

(*Id*. at pp. 35-36.)

The University asserts that it had a legitimate business purpose for sending the FAQs, namely the AO2s' accretion and "a sudden influx of questions" that were "largely prompted by the Teamsters[']' own communication that it sent on October 16, 2020." We find that the University failed to establish a business necessity defense for circulating its FAQs to employees.[14]

Even assuming the University had a business necessity to communicate with its employees about the accretion prior to completing meeting and conferring with Teamsters, it could have sent the statement that Young drafted and Rabinowitz approved on October 16. Indeed, Young's statement provided the most pertinent information about the accretion: that the AO2s had been accreted into the CX Unit and that bargaining between Teamsters and the University would begin soon. Not only could that statement be lawfully distributed under section 3553, but it did not have the same tendency to deter or discourage employee choice because it was not drafted in the prejudicial manner of the FAQs, as discussed *ante*.

Furthermore, the University did not prove any urgency to respond to an allegedly high volume of employee inquiries about the accretion. The University's evidence in

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protected rights against the employer's asserted justification for its conduct" in all section 3550 cases. (*Id*. at p. 36, fn. 27, citing *Contra Costa County Fire Protection District* (2019) PERB Decision No. 2632-M, p. 75 (dis. opn. of Shiners, M.).)

[14] Because we find the University's conduct was not justified under the less stringent test applied to conduct that is not inherently destructive of employee free choice, we need not determine whether the potential influence was inherently destructive. (Cf. *Chula Vista Elementary School District* (2018) PERB Decision No. 2586, p. 29, fn. 11.)

support of its business necessity defense consisted of just three employee e-mails. Two employees inquired—after the University sent the FAQs—about whether they were properly classified as AO2s. The third employee asked simply, "Do you know anything about this?" in reference to Teamsters' October 16 welcome e-mail. None of the employees' questions were about becoming a Teamsters member or paying dues. (See *Alliance Marc & Eva Stern Math & Science High School et al.* (2021) PERB Decision No. 2795, pp. 71-72 (*Alliance*) (judicial appeal pending) [employer failed to produce evidence of alleged employee complaints it claimed necessitated its e-mails that tended to deter or discourage union membership or support, or that the e-mails were narrowly tailored to the issues about which employees allegedly complained].) Moreover, the University's statement that it "knew there would be questions about joining the union and union dues" belies its own claim that it sent its communication in response to an "influx" of employee queries. The University did not establish that it narrowly tailored its communication to address employees' actual inquiries about the accretion.

Finally, just as in its defense to the section 3553 allegation, the University relies on the fact that Teamsters sent a communication about the accretion to AO2s before the University sent its own. An employer may attempt to establish a business necessity defense based on an alleged need to correct a union's inaccurate communication. (See, e.g., *Alliance*, *supra*, PERB Decision No. 2795, pp. 52-75; *Regents of the University of California*, *supra*, PERB Decision No. 2756-H, p. 9.) But the University does not claim that Teamsters' communication was inaccurate such that it necessitated a corrective response from the University. Thus, the fact that the University sent its communication in response to Teamsters' earlier communication does not establish a business necessity defense.

For the foregoing reasons, we conclude that the FAQs' likelihood of influencing employee free choice outweighs the University's purported necessity to communicate with newly-represented AO2s about union membership and dues. We accordingly find that the University's FAQs violated section 3550.[15]

REMEDY

The Legislature has granted PERB broad authority to order remedies it deems necessary to fulfill the purposes of the Acts within its jurisdiction. (See, e.g., Educational Employment Relations Act (EERA), § 3541.5, subd. (c); HEERA, § 3563.3; Meyers-Milias-Brown Act (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; *Mt. San Antonio Community College Dist. v. Public Employment Relations Bd.* (1989) 210 Cal.App.3d 178, 189-190.)[16] PEDD section 3551 grants PERB authority to remedy violations of sections 3550 and 3553. Section 3551 incorporates by reference section 3541.3, subdivision (i), which authorizes PERB to "take any action and make any

[15] The complaint also alleged that the FAQs interfered with employee rights in violation of HEERA section 3571, subdivision (a). Teamsters did not address the interference allegation in its brief, and we accordingly consider that allegation abandoned. Nevertheless, we note that a violation of PEDD section 3550 does not constitute a derivative violation of HEERA section 3571, subdivision (a). (*Regents*, *supra*, PERB Decision No. 2755-H, p. 53.) Nor did the FAQs contain any "threat of reprisal or force or promise of benefit," as necessary to establish an independent interference violation. (*Id*. at p. 52.)

[16] EERA is codified at section 3540 et seq. MMBA is codified at section 3500 et seq.

determinations in respect of these charges or alleged violations as the board deems necessary to effectuate the policies of this chapter."

I. Cease-and-Desist Order and Notice Posting

In *Regents*, *supra*, PERB Decision No. 2755-H, where we also found violations of sections 3550 and 3553, we ordered the University to cease and desist its unlawful conduct and to post a notice of the violations. (*Id*. at p. 61.) We also ordered the University to, at each charging party's election, meet and confer over a joint communication to employees or distribute to employees a communication of reasonable length provided to it by the charging party. (*Ibid*.) We find those remedies appropriate here as well. Since there is no evidence that Teamsters sent AO2s a communication in response to the University's October 16 and 20 distribution of the FAQs, there is no basis for us to order the University to reimburse Teamsters for any costs of such a response, as ordered in *Regents*, *supra*, PERB Decision No. 2755-H.

II. Request for Attorney Fees and Costs

Teamsters requests attorney fees and costs for what it contends is repeated unlawful conduct and bad faith on the part of the University. It argues that by the time the University committed the instant PEDD violations on October 16 and 20, 2020, it knew that its conduct was unlawful based on: (1) a PERB ALJ decision finding that the University violated sections 3550 and 3553 by sending mass communications to employees regarding the impact of *Janus* (the underlying proposed decision at issue in *Regents*, *supra*, PERB Decision No. 2755-H); (2) a stipulated judgment against the University after its alleged violation of section 16645.6 for distributing a flyer during an organizing campaign; and (3) a PERB complaint issued against the University for an alleged violation of section 3550 by distributing a flyer to unrepresented employees

regarding unionization. Teamsters additionally argues that the University took a frivolous position in this case.

To obtain reimbursement of attorney fees or other expenses as a litigation sanction, the moving party must demonstrate that the opposing party's claim, defense, motion, or other action or tactic was "without arguable merit" and pursued in "bad faith." (*City of Palo Alto* (2019) PERB Decision No. 2664-M, p. 7.) 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. (*Ibid*., citing *Lake Elsinore Unified School District* (2018) PERB Order No. Ad-446a, p. 5 (*Lake Elsinore*), and cases cited therein.) To determine whether a party acted with subjective bad faith, we examine whether the party's conduct was dilatory, vexatious, or otherwise an abuse of process, and we may infer such intent from circumstantial evidence. (*Ibid*., citing *City of Alhambra* (2009) PERB Decision No. 2036-M, p. 19.)

Although we have rejected the University's argument that section 3553 did not apply to its FAQs, we nonetheless find that its position was not without arguable merit considering the Board had not interpreted section 3553 prior to this decision. Because section 3553 lies at the heart of this case, we do not find that the University's litigation position was so manifestly erroneous that no prudent representative would have maintained it. Nor was the University's section 3550 affirmative defense clearly foreclosed by existing PERB precedent. Given that the University's legal arguments did not meet the standard of being without arguable merit, we need not separately

assess whether such arguments were made in bad faith. Consequently, we deny Teamsters' request for attorney fees and costs.[17]

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 violated the Prohibition on Public Employers Deterring or Discouraging Union Membership (PEDD), Government Code sections 3550 and 3553, by failing to meet and confer in good faith with Teamsters Local 2010 prior to disseminating a mass communication concerning employees' rights to join or support an employee organization, and by deterring or discouraging employees from becoming members of or supporting Teamsters.

Pursuant to Government Code sections 3551, subdivision (a), and 3541.3, subdivision (i), it hereby is ORDERED that the University, its governing board, and its representatives shall:

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[17] We note Teamsters' argument that the University is a repeat PEDD offender, and that the serial nature of the University's conduct has led Teamsters to spend considerable resources in three separate charges concerning PEDD violations. Repeat offenses may be relevant to one or both elements under our litigation sanctions standard, as well as when considering other requests for non-standard remedies, including reimbursement of litigation expenses incurred in an ancillary case. (See, e.g., *Bellflower Unified School District* (2022) PERB Decision No. 2544a, p. 51, fn. 32 [PERB may order reimbursement of litigation expenses as make-whole relief where respondent fails to comply with a final Board order, thereby leading to unnecessary ancillary proceedings]; *Regents*, *supra*, PERB Decision No. 2755-H, pp. 55-56 [PERB may consider extraordinary remedies based on repeat violations, among other factors].) Here, however, Teamsters has not met its burden to prove that litigation sanctions are warranted, and we have concluded that standard remedies are sufficient to effectuate the PEDD's purposes. We further note that, effective January 1, 2023, a public employer is subject to civil penalties for each PEDD violation, and that one criterion to be considered in assessing such penalties is "[a]ny prior history of violations by the public employer." (§ 3551.5, added by Stats. 2022, ch. 823, § 1.)

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 to impasse or agreement.

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 TO EFFECTUATE THE POLICIES OF THE PEDD:

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 Administrative Officer IIs, pursuant to Government Code, section 3553, subdivision (b); and/or

b. Distribute to Administrative Officer IIs a communication of reasonable length provided to it by Teamsters, pursuant to Government Code section 3553, subdivision (c).

3. Within 10 workdays of the date this decision is no longer subject to appeal, post at all work locations where notices to employees in the Clerical and Allied Services Bargaining Unit are posted, copies of the Notice attached hereto as an Appendix. 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.[18] The Notice shall also be sent to all bargaining unit employees by electronic message, intranet, internet site, or other electronic means used by the University to communicate with Clerical and Allied Services Bargaining Unit members. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.

4. 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 designee. All reports regarding compliance with this Order shall be concurrently served on Teamsters.

Members Krantz and Paulson joined in this Decision.

[18] 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 University to mail the Notice to those employees with whom it does not 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. SF-CE-1314-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 (PEDD), Government Code section 3550 et seq., by unilaterally distributing a mass communication to employees on October 16 and 20, 2020, that tended to deter or discourage union membership or support.

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 to impasse or agreement.

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 TO EFFECTUATE THE POLICIES OF THE PEDD:

Take one or both of the following actions to the extent Teamsters Local 2010 so requests:

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

2. Distribute to Administrative Officer IIs a communication of reasonable length provided to it by Teamsters, pursuant to 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.