STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

GOMPERS PREPARATORY ACADEMY, Employer, and KRISTIE CHISCANO AND A GROUP OF EMPLOYEES, Petitioners, and SAN DIEGO EDUCATION ASSOCIATION, CTA/NEA, Exclusive Representative.	Case No. LA-DP-441-E PERB Order No. Ad-481 October 22, 2020

Appearances: National Right to Work Legal Defense Foundation, Inc. by Frank D. Garrison, Attorney, for Kristie Chiscano and a Group of Employees; California Teachers Association by Megan Degeneffe, Staff Counsel, for San Diego Education Association, CTA/NEA.

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

DECISION

SHINERS, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Kristie Chiscano and a Group of Employees (Petitioners) of the attached administrative determination (AD) by PERB's Office of the General Counsel (OGC). The San Diego Education Association, CTA/NEA (SDEA or Union), is the exclusive representative of certificated personnel at Gompers Preparatory Academy (GPA). Eleven months after it was certified as the exclusive

representative, SDEA filed an unfair practice charge against GPA, Case No. LA-CE-6531-E, alleging that GPA bargained in bad faith over an initial collective bargaining agreement and took other unlawful actions away from the bargaining table. In the midst of the Union's continuing efforts to obtain a first contract, Petitioners filed a petition to decertify SDEA as their exclusive representative. The Union then filed a request to stay the decertification election, arguing that GPA's alleged unfair practices, if true, likely would affect employee free choice. OGC agreed and stayed the election.

We have reviewed the AD, the files in this case and Case No. LA-CE-6531-E,[1] and relevant legal authority in light of the parties' submissions. We find that applicable law and the unfair practice allegations support the AD's thorough and detailed analysis, including the AD's findings regarding potential impacts on employee free choice. Accordingly, we adopt the AD as the decision of the Board itself, as supplemented by the following discussion.

DISCUSSION

Petitioners do not contend the AD is unsupported by the allegations in the charge or incorrectly applied existing law to those allegations. Instead, Petitioners urge PERB to adopt a different legal standard for deciding when an election should be stayed pending resolution of a related unfair practice charge. Before addressing Petitioners' proposed standard, we briefly review the established legal standard applicable to a request to stay an election and explain why that standard is met in this case.

[1] PERB may take official notice of its own records and files. (*Bellflower Unified School District* (2017) PERB Decision No. 2544, p. 6.)

I. Legal Standard for Staying an Election

PERB Regulation 32752 provides, in pertinent part:

> "The Board may stay an election pending the resolution of an unfair practice charge relating to the voting unit upon an investigation and a finding that alleged unlawful conduct would so affect the election process as to prevent the employees from exercising free choice."[2]

PERB Regulation 32752 adopted a "blocking charge rule" that "serves to insulate an election from unfair practices that may influence its outcome." (*Imagine Schools at Imperial Valley* (2016) PERB Order No. Ad-431, p. 9 (*Imagine Schools*); *Jefferson School District* (1980) PERB Order No. Ad-82, pp. 5-6.)[3] In considering whether to stay an election, OGC must "determine whether the facts alleged in the unfair practice complaint, if true, would be likely to affect the vote of the employees and, thus, the outcome of the election." (*Pleasant Valley Elementary School District* (1984) PERB Decision No. 380, p. 5.) When, as in this case, a union argues that a decertification election should be stayed because the employer's alleged unfair practices eroded employee support for the union, a stay is warranted when the conduct alleged in the charge is "of such character and seriousness that, if it were proven to have occurred, it would be reasonable to infer that it would contribute to employee dissatisfaction and hence prevent a fair election." (*Children of Promise*

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

[3] A charge alleging "unlawful conduct [that] would so affect the election process as to prevent the employees from exercising free choice" is commonly called a "blocking charge" because it prevents, or "blocks," an election until the charge is resolved. (*City of Fremont* (2013) PERB Order No. Ad-403-M, p. 6, fn. 11, & p. 8.)

Preparatory Academy (2015) PERB Order No. Ad-428, p. 9, quoting *Regents of the University of California* (1984) PERB Decision No. 381-H, p. 6.)

Each stay request is to be investigated and evaluated on its merits rather than disposed of by rote application of the blocking charge rule. (*Jefferson School District* (1979) PERB Order No. Ad-66, p. 6.) Blocking charge allegations must be evaluated based upon the factual contexts in which they arise. (*Children of Promise Preparatory Academy*, *supra*, PERB Order No. Ad-428, adopting administrative determination at p. 16; *State of California (Department of Personnel Administration)* (1985) PERB Order No. Ad-151-S, p. 3; *Antelope Valley Community College District* (1979) PERB Decision No. 97, pp. 11-12.)

In cases concerning a stay of a decertification election, "the inquiry on appeal is whether the OGC abused his or her discretion." (*Imagine Schools*, *supra*, PERB Order No. Ad-431, p. 6.) The Board has described this standard of review as whether "the conclusions [in the determination are] supported by facts developed during the course of a properly conducted investigation." (See, e.g., *Children of Promise Preparatory Academy*, *supra*, PERB Order No. Ad-428, p. 8.) At the same time, the Board has said that in determining whether an election stay is warranted, PERB "does not resolve factual disputes" and "assumes that the essential facts alleged in the charge are true." (*Id.* at p. 9.) Because OGC makes no factual findings in deciding whether to stay an election, the Board's inquiry on appeal is whether the determination to stay the election is supported by the allegations in the blocking charge.

II. Application of the Established Legal Standard

Before addressing the charge allegations, it is crucial to recognize that GPA's alleged misconduct occurred in the course of first-contract bargaining. An employer's bad faith bargaining conduct during negotiations for an initial contract typically has a more deleterious effect on employee support for the nascent union than it would in a well-established collective bargaining relationship because such conduct sends the message that "employees [will] see no change in their working lives from having a collective-bargaining representative." (*Radisson Plaza Minneapolis* (1992) 307 NLRB 94, 96, enfd. (8th Cir. 1993) 987 F.2d 1376 (*Radisson Plaza*); see *Gerawan Farming, Inc. v. Agricultural Labor Relations Bd.* (2017) 3 Cal.5th 1118, 1132 ["[W]hen an employer engages in dilatory tactics after a representation election[,] his action may substantially impair the strength and support of a union . . . Employee interest in a union can wane quickly as working conditions remain apparently unaffected by the union or collective bargaining," internal quotations and citations omitted]; *Karp Metal Prods. Co.* (1943) 51 NLRB 621, 624 ["Whether or not the employer bargains with a union chosen by his employees is normally decisive of its ability to secure and retain its members."].)[4] Moreover, the diminution of union support resulting from the employer's recalcitrance in bargaining a first contract ordinarily cannot be remedied by a subsequent bargaining order. (*Small v. Avanti Health Systems, LLC* (9th Cir. 2011) 661 F.3d 1180, 1192-1193.) As a result, "[r]efusing to bargain for a first contract is a

[4] Federal judicial and administrative precedent is not binding on PERB, though we may find such precedent persuasive in construing California's public sector labor relations statutes. (*City of Sacramento* (2020) PERB Decision No. 2702-M, p. 9, fn. 13.)

powerful weapon in the arsenal of employers determined to remain union free, as it prevents a nascent union from ever getting off the ground." (Fisk & Pulver, *First Contract Arbitration and the Employee Free Choice Act* (2009) 70 La. L.Rev. 47.)

Because during first-contract bargaining "management has very strong incentives to violate the duty to bargain in good faith because it can defeat the union entirely" (Fisk & Pulver, *supra*, 70 La. L.Rev. at p. 54), labor boards "should be especially sensitive to claims that bargaining for a first contract has not been in good faith" (*APT Medical Transportation* (2001) 333 NLRB 760, fn. 4; *id.* at p. 760 (conc. opn. of Liebman, M.), quoting *NLRB v. Katz* (1962) 369 U.S. 736, 747 ["The Board should therefore exercise special care in monitoring the first contract bargaining process and closely scrutinize behavior which 'reflects a cast of mind against reaching agreement.'"]).

GPA formally recognized SDEA as the exclusive representative of its certificated personnel on January 2, 2019. Over a period of eight months, the parties' bargaining sessions resulted in tentative agreement on only one subject. SDEA's charge alleges this lack of progress toward a first contract resulted from GPA's bargaining conduct including, but not limited to, delaying meetings, cancelling bargaining sessions, refusing to schedule sufficient time for meetings, and failing to provide proposals or relevant information to the Union. Additionally, SDEA alleges that GPA retaliated against bargaining team members, disparaged the Union in letters sent to employees, and engaged in other conduct that interfered with employees' exercise of protected rights. Amid SDEA's continuing efforts to obtain a first contract—and just

five days after the one-year certification bar expired—certain unit employees signed a decertification petition declaring their desire to oust the Union.[5]

In the context of first-contract bargaining, employee disaffection with the Union is a natural and probable consequence of the types of unfair practices alleged in SDEA's charge. (See, e.g., *Radisson Plaza*, *supra*, 307 NLRB at p. 96 [employee dissatisfaction with the union was a reasonably foreseeable consequence of the employer's surface bargaining, unilateral schedule changes for a number of unit employees, and refusal to provide vital information to the union]; *Children of Promise Preparatory Academy*, *supra*, PERB Order No. Ad-428, adopting administrative determination at p. 26 [concluding that "employee dissatisfaction is in all likelihood attributable to the [employer's] alleged refusal to provide contact information and bargaining information and refusal to negotiate in good faith"].) Furthermore, the allegations in SDEA's charge constitute a textbook scenario where the employer frustrates bargaining for a first contract so the one-year certification bar will expire without a contract in place, thereby allowing the filing of a decertification petition. (See, e.g., *Children of Promise Preparatory Academy*, *supra*, PERB Decision No. 2558, p. 35 [concluding "there was ample evidence that [the employer] had no intent to

[5] The Educational Employment Relations Act (EERA) requires PERB to dismiss a representation petition when "[t]he public school employer has, within the previous 12 months, lawfully recognized an employee organization other than the petitioner as the exclusive representative of any employees included in the unit described in the petition." (EERA, § 3544.7, subd. (b)(2); EERA is codified at Government Code section 3540 et seq. [unless otherwise indicated, all further statutory references are to the Government Code].) This 12-month period is commonly known as the "certification bar." (*Children of Promise Preparatory Academy* (2018) PERB Decision No. 2558, p. 18.) The purpose of the certification bar is "to give the new exclusive representative 'breathing room' to bargain an initial collective bargaining agreement." (*Id.* at p. 22.)

reach agreement with the Association and that it was in fact 'running out the clock' until the Association could be decertified"]; *Pratt Towers, Inc.* (2002) 338 NLRB 61, 105-106 ["[T]he Respondent engaged in bad-faith bargaining intending to draw out the negotiations to allow for the expiration of the certification year and tending to undermine the Union's representational status"].) Although the AD does not explicitly rely on the fact that GPA's alleged misconduct occurred during first-contract bargaining, OGC properly concluded that the conduct alleged in SDEA's charge likely would affect employee free choice if an election were held on the decertification petition.

While at this stage of the case we cannot determine whether employer misconduct actually occurred, and, if it did occur, whether it tainted the decertification petition, the possibility of such an effect requires us to stay the decertification election until the Board resolves those issues through its adjudicative process. (See, e.g., *Children of Promise Preparatory Academy* (2018) PERB Order No. Ad-470, pp. 5-6 [affirming dismissal of decertification petition based on finding that employer's proven unfair practices would prevent employees from exercising free choice in a decertification election].) Staying the election in this case therefore serves the purpose of the Board's blocking charge rule, viz., "to insulate an election from unfair practices that may influence its outcome." (*Imagine Schools*, *supra*, PERB Order No. Ad-431, p. 9.)

III. Petitioners' Arguments for a New Legal Standard

Petitioners argue that PERB's standard for staying an election pending resolution of a blocking charge "conflicts with employee free choice."[6] Specifically, Petitioners oppose PERB's use of an objective standard based on allegations in the charge, which they contend allows a decertification election to be blocked based on unproven allegations. Instead, they argue, for a stay to be granted PERB should require the party seeking the stay to prove a causal nexus between the employer's alleged unfair practices and employee free choice.

As an initial matter, to the extent we were inclined to adopt any aspects of Petitioners' proposed standard that conflict with PERB Regulation 32752, such changes could be made only through the administrative rulemaking process, not through case adjudication. (*Regents of the University of California* (2016) PERB Order No. Ad-434-H, p. 9.) Nonetheless, even assuming Petitioners' proposed standard would be a permissible interpretation of PERB Regulation 32752, we decline to adopt it for several reasons.

First, Petitioners' proposed standard is partly based on an inapposite National Labor Relations Board (NLRB) decision, *Saint Gobain Abrasives, Inc.* (2004) 342 NLRB 434 (*Saint Gobain*). There, after a regional director issued an unfair

[6] Petitioners assert that EERA grants California public school employees "a right to a secret-ballot election." Petitioners' claim is an overstatement. EERA does not provide for a secret ballot election on a decertification petition if (1) the petition lacks adequate proof of support (EERA, § 3544.5, subd. (d)); (2) the petition runs afoul of an applicable contract bar or the above-noted certification bar (EERA, § 3544.7, subd. (b)); or (3) it is determined that the employer's proven unfair practices likely would prevent employees from exercising free choice in a decertification election (*Children of Promise Preparatory Academy*, *supra*, PERB Order No. Ad-470, p. 6).

practice complaint and administratively dismissed a decertification petition, the NLRB held a hearing was necessary to determine whether there was a causal relationship between the employer's alleged unilateral change to health benefits and the subsequent decertification petition. (*Ibid.*) Thus, in addition to holding a standard evidentiary hearing to resolve the complaint allegations, the NLRB found that it should hold a separate evidentiary hearing on largely the same facts, to assess whether the election should remain stayed pending resolution of the complaint allegations.

Even assuming *Saint Gobain* is still good law in the private sector,[7] we decline to follow it because it is contrary to longstanding PERB precedent, which has never directed parties to engage in two evidentiary hearings covering nearly identical facts. Rather, where alleged unfair practices would be sufficient to taint an election if proven to be true, PERB has generally stayed the election while the parties litigate their claims and defenses. In over four decades we have not found conducting two separate evidentiary hearings necessary to protect employee free choice, and Petitioners present no compelling reason to impose such a burdensome requirement now. (Cf. *Imagine Schools*, *supra*, PERB Order No. Ad-431, p. 16 [finding no abuse of discretion where OGC did not require "that the Association submit in support of its stay request an 'offer of proof' to establish that the stay request was made for legitimate reasons and not for delay"].)

[7] Although *Saint Gobain* has not been overruled, the NLRB later noted it had "substantial doubts as to whether that case was correctly decided and would consider overruling it in an appropriate case." (*Wellington Industries, Inc.* (2012) 359 NLRB 246, fn. 6.)

Second, Petitioners' proposed standard improperly focuses on whether the employer's alleged unfair practices motivated employees to file the decertification petition. "[T]he proper inquiry in a blocking charge situation is not the employees' motivation for filing the decertification petition but whether the employer's alleged unlawful conduct would prevent bargaining unit employees from exercising free choice in an election." (*Children of Promise Preparatory Academy*, *supra*, PERB Order No. Ad-470, p. 6, fn. 5; *Grenada Elementary School District* (1984) PERB Decision No. 387, p. 11.) PERB's current standard protects the free choice of all employees, including those who did not sign the decertification petition but would be eligible to vote in the decertification election. (See *Regents of the University of California*, *supra*, PERB Decision No. 381-H, p. 6 [finding the regional director's inquiry was "properly limited to the potential impact of the alleged conduct on all of the employees in the unit"].) Petitioners' proposed standard, on the other hand, would at best promote the interests of those employees who supported the decertification petition, potentially at the expense of the free choice of other employees in the bargaining unit.[8]

For these reasons, the Board has previously rejected Petitioners' argument that employees' subjective state of mind should be dispositive in deciding whether to stay a decertification election. For instance, in *Regents of the University of California*, *supra*, PERB Decision No. 381-H, the Board found "the motivation of the individual petitioners in seeking a decertification election is not determinative" because the

[8] Petitioners' proposed standard also would not adequately protect free choice for employees who may have signed a decertification petition for reasons unrelated to their employer's alleged unfair practices. Such employees must remain free to vote either for or against decertification without undue influence, and employer misconduct may influence how they ultimately vote.

inquiry under PERB Regulation 32752 is "limited to the potential impact of the alleged conduct on all of the employees in the unit, rather than the actual motivation of those filing the petition for decertification." (*Id.* at p. 6.) Likewise, in *Grenada Elementary School District*, *supra*, PERB Decision No. 387, the district presented evidence from seven of the nine bargaining unit members that the employer's alleged unfair practices did not motivate them to sign the decertification petition. (*Id.* at p. 11.) The Board rejected this evidence, noting that "the proper focus of the Board agent's inquiry is an objective evaluation of the probable effect of the conduct alleged and the possibility of a free election." (*Ibid.*)[9]

Finally, Petitioners urge us to alter our longstanding rule to make sure that incumbent unions are unable to use a blocking charge to stymie a decertification election based on unsupported allegations of unlawful employer conduct. Petitioners assert this possibility renders PERB's blocking charge rule "inequitable" and urge the Board to abolish the rule as the NLRB has recently done. (See 29 C.F.R. § 103.20, amended June 1, 2020, 85 Fed.Reg. 18366-01 [effective June 1, 2020, NLRB regulations provide that in most cases decertification elections will no longer be stayed pending resolution of related unfair labor practice charges, and in the remainder of cases the election will proceed but ballots will be impounded until the charges are

[9] Similarly, a California court of appeal recently affirmed the Agricultural Labor Relations Board's method of analyzing alleged election misconduct under which "misconduct is tested and evaluated under an objective standard of its reasonable impact on workers' free choice in light of all the facts and circumstances, rather than by making endless inquiries into the subjective motivations of particular employees." (*Gerawan Farming, Inc. v. Agricultural Labor Relations Bd.* (2018) 23 Cal.App.5th 1129, 1228.)

resolved].) As noted *ante*, because PERB's blocking charge rule is codified in a regulation, the Board may only abolish it through administrative rulemaking, not through adjudication. (*Regents of the University of California*, *supra*, PERB Order No. Ad-434-H, p. 9.)

In any event, Petitioners' concern is unfounded because PERB's longstanding blocking charge precedent provides a nuanced balance protecting employee free choice. A stay request must be investigated and evaluated on its merits based upon the factual context in which the request arose. (*Antelope Valley Community College District*, *supra*, PERB Decision No. 97, pp. 11-12; *Jefferson School District*, *supra*, PERB Order No. Ad-66, p. 6.) To support a stay, the conduct alleged in the charge must be "of such character and seriousness" that, if proven, it would likely affect employee free choice. (*Children of Promise Preparatory Academy*, *supra*, PERB Order No. Ad-428, p. 9.) By eschewing a mechanical application of the blocking charge rule in favor of a holistic, case-specific analysis, PERB is able to sufficiently determine whether the charge allegations justify staying an election under the particular circumstances presented. Petitioners have not convinced us that anything more is required to protect employee free choice.[10]

[10] Petitioners also argue that the blocking charge rule infringes on their First Amendment rights of association and free speech by preventing them from voting against continued representation by SDEA. In support, Petitioners cite *Janus v. American Federation of State, County, and Mun. Employees, Council 31* (2018) 138 S. Ct. 2448, *Harris v. Quinn* (2014) 573 U.S. 616, and *Knox v. Service Employees Intern. Union, Local 1000* (2012) 567 U.S. 298. We agree with OGC that these decisions have no bearing here, as they all address the constitutionality of compelling public employees to financially support a union, not the constitutionality of exclusive representation.

In sum, we are not persuaded that PERB's long-established standard for granting an election stay should be modified as Petitioners urge. We therefore deny Petitioners' appeal.

ORDER

The administrative determination staying the decertification election in Case No. LA-DP-441-E is AFFIRMED.

Members Banks, Krantz, and Paulson joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

GOMPERS PREPARATORY ACADEMY, Employer, and KRISTIE CHISCANO AND A GROUP OF EMPLOYEES, Petitioners, and SAN DIEGO EDUCATION ASSOCIATION, CTA/NEA, Employee Organization.	REPRESENTATION CASE NO. LA-DP-441-E ADMINISTRATIVE DETERMINATION May 13, 2020

Appearances: Frank D. Garrison, Attorney, for Kristie Chiscano, M.D., and a Group of Employees; Wendy L. Tucker, Attorney, for the Gompers Preparatory Academy; Megan Degeneffe, Attorney, for the San Diego Education Association.

Before Mary Weiss, Supervising Regional Attorney.

I. INTRODUCTION

This is the administrative determination of an election stay request by the San Diego Education Association (SDEA or Association) in the pending decertification petition filed by Kristie Chiscano, M.D., and a Group of Employees (Petitioners) on January 7, 2020. Petitioners are employed by Gompers Preparatory Academy (GPA or Academy) in the certificated employees bargaining unit represented by SDEA. This Determination sets forth background information, a description of the unfair practice charge filed by SDEA seeking to stay or block the decertification petition (blocking charge), the Petitioners' and GPA's positions concerning SDEA's blocking charge, the

applicable law for evaluating a blocking charge, application of the law to the allegations contained in the blocking charge, consideration of the parties' positions, and the resultant determination that the request to stay the decertification election is GRANTED.

A. REPRESENTATION HISTORY

On November 13, 2018, SDEA—pursuant to the Educational Employment Relations Act (EERA)[1]—filed a petition for representation with support of the majority of all certificated educational personnel at GPA.[2] The proposed bargaining unit included certificated teachers, psychologists, counselors, librarians and nurses. On January 2, 2019, GPA voluntarily recognized SDEA as the exclusive representative of the bargaining unit.

B. DECERTIFICATION PETITION

On January 7, 2020, Petitioner filed the instant decertification petition. All parties concur that there is no agreement in effect between SDEA and GPA. SDEA filed a letter with PERB on January 27, 2020, asserting that after certification of SDEA as the exclusive representative of the bargaining unit, GPA "engaged in a course of conduct that has impeded SDEA's ability to represent its bargaining unit members." It further stated that the details were outlined in SDEA's December 12, 2019 Unfair Practice Charge (UPC) Case Number LA-CE-6531-E.

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

[2] The representation petition, Case Number LA-RR-1289-E, is a public record and PERB may take notice of its contents. (*County of Riverside* (2012) PERB Decision No. 2280-M, pp. 6-8.)

On February 12, 2020, SDEA filed a First Amended Charge in UPC Case Number LA-CE-6531-E that was identical to the original charge with the exception that in the remedy section, at subsection c., SDEA requested "An order that the certification year be extended in light of GPA's bad faith bargaining during the certification year, that the decertification petition filed in Case No. LA-DP-441-E be dismissed and, that during PERB's processing, the charge be considered as blocking an election."

On February 24, 2020, the undersigned Board agent issued a letter to the parties informing them that the decertification petition was timely filed and that the proof of support submitted by Petitioners was sufficient pursuant to PERB Regulation 32770(b)(1), which requires an initial showing of 30% of bargaining employees support for the decertification. The letter also stated that SDEA had filed a blocking charge requesting that PERB stay the decertification election pending resolution of UPC Case Number LA-CE-6531-E. The Board agent provided each party with the opportunity to submit to PERB their respective responses to the stay request. After the Board agent granted requests for extensions of time to file responses, Petitioners and GPA each filed responses to SDEA's blocking charge on March 27, 2020.

C. BLOCKING CHARGE

SDEA asserts in UPC Case Number LA-CE-6531-E that GPA violated the law by: deterring and discouraging union membership by sending certain letters to employees in the SDEA represented bargaining unit; interfering with employee rights by sending the letters; failing and refusing to bargain in good faith with SDEA; failing and refusing to provide information requested by SDEA; retaliating against a

bargaining unit member after he exercised rights protected by EERA; interfering with the exercise of rights protected by EERA; and denying SDEA's right to represent employees. SDEA asserts that GPA's conduct "undermines concerted activity and chills further union support" and "influenced employees' views of SDEA, which would impact the outcome of any election" such that "the Association is seeking as a remedy that the certification year be extended." SDEA also asserts that "[t]he Association's charge must be processed, the unfair labor practices remedied, and a period of good faith bargaining occur in advance of any election in this bargaining unit."

1. Allegations that GPA violated the Prohibition on Public Employers Deterring or Discouraging Union Membership

SDEA asserts that GPA issued three communications to bargaining unit members that deterred and discouraged union membership. The first was a July 29, 2019[3] letter to all staff issued by GPA Director Vincent Riveroll (Riveroll) that began with a lengthy description of GPA's mission and belief system. Next, Riveroll informed employees that a couple of teachers had requested to audio record a meeting and proposed an alternate master schedule, and Riveroll stated that it had never occurred in his 25 years of experience with union and non-union schools. He stated that "[t]he proposed changes represent[] a different belief system that, in my opinion, reflects content first." He further stated "I love creative ideas from my teachers, however, the belief system must match, too." Riveroll also asserted that "[c]reating articles that represent our masterpiece and the belief system of our school is revolutionary work that has not yet been done between a school and a union." He concluded the four page communication by stating: "you are my team, and we will get

[3] All dates hereafter refer to the year 2019, unless otherwise specified.

through this together…[¶]…think on the important decision of working at GPA, GPA isn't a job, it's a mission. We need missionaries. Our mission is too important."

The second communication was a September 24 letter on GPA letterhead to all staff from the GPA Bargaining Team. The one page communication claimed, among other things, that SDEA had issued a bargaining update that was an "attack" that "undermines GPA's mission by untruth and omissions," that contained "numerous lies and misstatements," and showed a "lack of discretion and professionalism." It also asserted that SDEA "has often shown a lack of knowledge and disregard and disrespect for GPA's bargaining team, leadership and mission." It further asserted that an SDEA bargaining team member's comment at the bargaining table that "GPA's leadership is a 'good ol' boys' club, where Director Riveroll rewards only his favorites while all other employees are unfairly evaluated and compensated" was "slanderous," "culturally insensitive" and "highly offensive." The communication said "these insulting and disrespectful comments [] made it difficult to effectively collaborate…." The communication also stated that "until all of the bargaining proposals are in, GPA will not know how much money it will have for salaries, nor whether existing salaries can be 'grandfathered' at the current rate under a union contract. This is just another example of the union's unfair tactics." It concluded by stating that there was "divisiveness last year," and "[w]hen we are divided, no one wins but the union. We hope that the bonds and the trust created by our many years together will allow us to move forward together as a team to put our students first."

The third communication was on GPA letterhead and was titled "GPA Founders and Leadership Update on Collective Bargaining November 2019." It was addressed

to “GPA Families and Community Members.” It stated, in part: “we hope our GPA will remain the special school that it is designed to be. Therefore, we hope our GPA belief system will live in every aspect of the union contract [and] [w]e consider all stakeholders in every decision, not just teachers or ‘unit members’….” It also asserted that “SDEA continues to claim that we are not moving fast enough…, SDEA… reminded us that if we did not find more time to meet with them, their bargaining team members could request to use valuable teaching time to bargain instead of teaching students [and] bargaining has been made more difficult by the inflammatory statements that continue to be made by SDEA and members of their bargaining team.” It further asserted that SDEA and its bargaining team allegedly stated that “all teachers feel there is a ‘culture of fear and silence’ on our campus created by leadership.” It said that such language “creates an ‘us versus them’ feeling that is often used as a tool to legitimize the union’s presence.” Finally, the three page communication stated that GPA “made a promise to our parents 15 years ago to build a school worthy of our most precious gifts – our children – and to ensure they have a safe and joyful learning environment with a pathway to college. We will work tirelessly and unwaveringly to continue to keep that promise regardless of the new bureaucratic challenges ahead of us.”

2. Allegations that GPA Failed and Refused to Bargain in Good Faith

SDEA asserts that GPA failed and refused to bargain in good faith by: delaying meetings, cancelling bargaining sessions, refusing to schedule sufficient time for meetings, failing to provide proposals to the union, and failing to provide a wage proposal without placeholders. SDEA further asserts that other unfair labor practices

also evidenced GPA's alleged bad faith, including: failing and refusing to provide requested information, retaliating against a GPA teacher that served as an SDEA steward and bargaining team member, interfering with EERA rights, and attempting to deter and discourage union membership.

3. Allegations that GPA Failed and Refused to Provide Information

SDEA asserts that on January 11, it requested current salary schedules for all SDEA bargaining unit members currently employed by GPA including "any and all forms of compensation (e.g. bonuses, stipends, tuition assistance)." SDEA reiterated the request on February 20 and April 11 and that GPA agreed, in a May 23 letter, to provide a description of the work performed to earn "other pay." SDEA reiterated the request again on October 11. GPA responded on October 28 that it "did not include information on…other pay as it was not available."

4. Allegations GPA Retaliated Against a Teacher

SDEA asserts that in July, GPA retaliated against teacher Spencer Mills (Mills), an SDEA steward and bargaining team member, by transferring him to a middle school assignment for the 2019 summer session and for the 2019-2020 school year, and by issuing him a reprimand in October that accused him of unprofessional behavior and directed him to raise his workplace concerns exclusively with Riveroll and the GPA Talent Services Manager.

5. Allegations that GPA interfered with employees' exercise of EERA protected rights

SDEA asserts that GPA interfered with Mills' rights when the September 24 communication stated that "[an SDEA] bargaining team member felt it necessary to say that GPA's leadership is a 'good ol' boys' club, where Director Riveroll rewards

only his favorites while all other employees are unfairly evaluated and compensated. This slanderous and culturally insensitive statement by a[n SDEA] bargaining team member was highly offensive…." SDEA also contends that GPA interfered with Mills' rights when it issued him the reprimand in October. SDEA further asserts that "[a]s other bargaining unit members learn that Mr. Mills faced adverse action for engaging in protected activity and was directed not to engage in protected activity in the future, there is a likely chilling effect on their exercise of EERA-protected rights." SDEA also asserts that the three communications interfered with the exercise of employee rights and denied SDEA its right to represent employees.

D. PARTIES' POSITIONS CONCERNING THE BLOCKING CHARGE

1. Petitioners' Response to the Blocking Charge

Petitioners filed a response to the blocking charge on March 27, 2020, contending that it is unfounded and PERB should proceed with the decertification election without delay so Petitioners may exercise their statutory right to determine whether they want to bargain with their employer with or without a bargaining representative. Petitioners assert a stay of the election would be inequitable and would burden and unnecessarily delay employees' constitutional rights to free association and statutory right to an election. Petitioners assert that none of the facts cited by SDEA in UPC Case Number LA-CE-6531-E, even if true, would affect GPA employees' free choice in an election.

With regard to bad faith bargaining, Petitioners argue that even if the facts in support of the bad faith allegations were true, they do not affect employees' ability to

exercise free choice in a secret-ballot election, and that SDEA was upset that GPA was not bargaining fast enough, not that GPA was negotiating in bad faith.

With regard to the alleged failure of GPA to provide information in response to SDEA's request, Petitioners assert that even if GPA should have provided certain information earlier, it only shows a technical dispute and not necessarily bad faith conduct that would warrant taking away employees' rights to a secret-ballot election. Petitioners assert that GPA provided much, if not all, of the information SDEA requested and that "SDEA…points to no factual evidence…that would taint employee free choice."

With regard to retaliation, Petitioners assert that there is no causal connection between Mills' protected activity and the reassignments because Riveroll had considered moving Mills' to teach middle school before SDEA became the representative, and there is no factual evidence that shows GPA targeted Mills. Petitioners also assert that Riveroll specifically stated that the Letter of Reprimand had nothing to do with Mills' participation in union activity but stemmed from Mills' repeated and documented unprofessional correspondence.

With regard to interference, Petitioners assert that it would be absurd to conclude that GPA's reprimand and reassignments of Mills would prevent reasonable employees from making a free choice in a secret ballot election. Petitioners contend that there is no factual basis for concluding that when a school administrator disciplines an employee for sending unprofessional e-mails, it would chill other employees' right to vote for or against a union.

Petitioners further assert that the second communication was not interference because those factual allegations would not affect any employee's free choice in an election. Petitioners argue:

> SDEA had accused [GPA's leadership][4] of using profanity and being a "good ol' boys' club." This, as a factual matter, would not affect employees' free choice in an election. Both sides were able to equally present their side of what happened during negotiations and reasonable employees can determine who was in the right and who was in the wrong. It would be manifestly unfair to allow SDEA to send a letter to the bargaining unit with its views of what happened during a bargaining session, but then punish the employees by taking away their right to vote when [GPA] merely presented its side of the facts. This too would produce absurd results. It would mean anytime a union presents its view and the employer responds, employees lose their right to vote.

Petitioners assert two "equitable reasons" why the election should not be stayed. The first is that "exclusive representation burdens public sector employees' fundamental constitutional rights and thus, the mechanism—the secret-ballot election—by which employees[] exercise their right to free association should not be taken away on baseless unfair practice charges." Petitioners state that the Supreme Court has acknowledged that labor unions are "a significant impingement on associational freedoms that would not be tolerated in other contexts."

Petitioners' second reason is that blocking the decertification petition will cause unwarranted delay in employees' right to a secret ballot election that works an injustice on their right to freely choose whether to have a bargaining representative.

[4] The attached copy of GPA's September communication states that SDEA made the accusation against GPA leadership, however, Petitioners' response to the blocking charge erroneously states that SDEA accused the GPA bargaining team.

Petitioners assert that the NLRB recently promulgated a rule to change the blocking charge policy to better effect employee free choice, and that, in the rulemaking, the NLRB stated that blocking charges "'can preclude holding the petitioned-for election for months, or even years, if at all.'"

2. GPA's Response to the Blocking Charge

GPA filed a response to the blocking charge on March 27, 2020, claiming that the charge does not establish conduct which would prevent bargaining unit members from exercising their free choice. With regard to bad faith bargaining, GPA asserts that there was no delay in bargaining because both parties took time to respond to proposals and counter-proposals. GPA also asserts that even though only one article was tentatively agreed to in early December, after eight months of bargaining, GPA had presented proposals on all of its articles and had presented one or more counter-proposals on all the articles SDEA proposed, "as well as proposing two MOU[]s to benefit the students." GPA additionally asserts:

> SDEA itself states that the alleged delay impeded it in representing its members and has prevented the unit members from experiencing the benefits of collective bargaining. Regardless of the veracity of that allegation, that does not establish that this alleged conduct would prevent the unit members from exercising free choice in the election. Because SDEA does not allege that GPA engaged in conduct that would impact unit members' free choice, the election should be permitted to proceed.

With respect to retaliation and interference concerning the reprimand and directive to Mills, GPA asserts it was not shared with any other unit members and therefore, it could not impact their freedom to choose. With respect to the allegation that GPA accused Mills of slander in a communication distributed to all employees,

GPA asserts the communication did not name any individuals and that GPA's statement was "an unimportant one made many months before the decertification petition was filed." GPA further asserts the parties later issued statements that the parties were working well together and SDEA issued a written communication to its members in December 2019, "just days before filing the unfair practice charge," "reiterating how well negotiations were going and emphasizing the cooperati[on] between SDEA and GPA. Because this statement was so minor and remote in time, it does not support a request to delay the decertification."

GPA concludes by requesting the following:

> [I]n the event that PERB decides to delay the decertification election based on SDEA's unsupported allegations, GPA respectfully requests that *PERB permit the parties*[] *to delay further bargaining* so that the employees who brought the decertification petition are not prejudiced. Contrary to SDEA's allegations, GPA has been bargaining in good faith and it is likely that a final agreement between SDEA and GPA will be reached within the near future. GPA has an obligation to treat both the employees supporting SDEA and the employees supporting the decertification in an equal and neutral fashion. It therefore seeks PERB's approval to maintain the status quo should it choose to delay the decertification election.

(Emphasis added.)

E. THE ADMINISTRATIVE COMPLAINT

On April 6, 2020, the Board agent assigned to investigate UPC Case Number LA-CE-6531-E issued an administrative complaint (complaint) on all of SDEA's allegations.[5]

II. ISSUE

Would the alleged unlawful conduct so affect the election process as to prevent the employees from exercising free choice? Are the unfair labor practices allegedly comitted by GPA likely to affect the vote and thus the outcome of the election?

III. CONCLUSIONS OF LAW

EERA section 3540 provides:

> It is the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California by providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice, to be represented by the organizations in their professional and employment relationships with public school employers, to select one employee organization as the exclusive representative of the employees in an appropriate unit, and to afford certificated employees a voice in the formulation of educational policy.

Section 3543, subdivision (a), provides that "[p]ublic school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee

[5] According to the UPC Case Number LA-CE-6531-E file, on or about April 6, 2020, SDEA withdrew allegations that GPA had violated EERA sections 3543.1 and 3543.2, which describe employee representatives' rights and the scope of representation. (*County of Riverside*, *supra*, PERB Decision No. 2280-M, pp. 6-8 [PERB may take notice of the contents of case files].)

relations." Pursuant to PERB Regulations 32720 and 33490, PERB is authorized to conduct elections in order to implement the guarantee of rights provided by Government Code section 3543. And, where a decertification petition raises a question concerning representation, PERB's statutory obligation is to expeditiously resolve the issues raised by the petition. (*International Union of Operating Engineers, State of California Locals 3, 12, 39 and 501, AFL-CIO (California State Employees' Association, SEIU, AFL-CIO)* (1984) PERB Decision No. 390-S, p. 2.)

In determining whether the election should be stayed, it is necessary to apply PERB Regulation 32752 to the alleged facts of this case in accordance with appropriate precedent. PERB Regulation 32752, "Stay of Election" provides:

> The Board may stay an election pending the resolution of an unfair practice charge relating to the voting unit upon an investigation and a finding that alleged unlawful conduct would so affect the election process as to prevent the employees from exercising free choice. ...

The issue is whether the unfair labor practices allegedly committed by GPA, if true, are likely to affect the vote of employees, and thus, the outcome of the election. (*Manton Joint Union Elementary School District* (1992) PERB Decision No. 960, pp. 4-5 (*Manton*); *Pleasant Valley Elementary School District* (1984) PERB Decision No. 380, p. 5 (*Pleasant Valley*).)

The Board agent is obligated to presume that the allegations in the blocking charge are true for purposes of evaluating whether or not an election should be blocked. (*Grenada Elementary School District* (1984) PERB Decision No. 387, p. 14 (*Grenada*).) A determination to stay an election is not intended to involve adjudication of the unfair practice charge itself. (*Children of Promise Preparatory Academy* (2015)

PERB Order No. Ad-428, proposed decision, p. 15 (*Children of Promise*).) The determination cannot decide for the parties their obligation to negotiate under the circumstances as it "is neither the Board agent's obligation nor function to resolve disputed facts or venture into a pre-judgment of the merits of the unfair practice complaint." (*Grenada*, *supra*, PERB Decision No. 387, p. 13, quoting *Pleasant Valley*, *supra*, PERB Decision No. 380 at p. 7.) Nor shall the Board agent resolve defenses and answers on the merits of the complaint because those matters must be addressed in the unfair practice hearing. (*Ibid*.) It therefore follows that the Office of the General Counsel (OGC) does not consider possible affirmative defenses.

In *Regents of the University of California* (1984) PERB Decision No. 381-H, the Board held that the Board agent correctly analyzed "whether [the conduct alleged] is of such character and seriousness that, if it were proven to have occurred, it would be reasonable to infer that it would contribute to employee dissatisfaction and hence prevent a fair election." (*Id.* at p. 6.) The only relevant issue is whether the employer's conduct, as alleged in the complaint, will so taint the election process as to interfere with employee free choice. (*Imagine Schools at Imperial Valley* (2016) PERB Order No. Ad-431, p. 13 (*Imagine*).)

The Board made clear, even prior to the adoption of PERB Regulation 32752, that each stay request is to be investigated and evaluated on its merits rather than being disposed of by rote application of a blocking charge rule. (*Jefferson School District* (1979) PERB Order No. Ad-66, p. 6 (*Jefferson*).) PERB does not apply the blocking charge rule mechanically, but rather determines on a case-by-case basis whether applying the rule will serve the purposes of the statutes enforced by PERB.

(*Pleasant Valley*, *supra*, PERB Decision No. 380, proposed decision at pp. 3, 8.) The blocking charge allegations are not evaluated separately and without regard to the factual contexts in which they arose. (*Antelope Valley Community College District* (1979) PERB Decision No. 97, pp. 11-12 (*Antelope Valley*).)

"A primary goal of EERA is to provide a uniform basis for recognizing the right of public school to join organizations *of their own choice.*" (*Jefferson*, *supra*, PERB Order No. Ad-66 at p. 5, internal quotations and brackets omitted, emphasis in original; Gov. Code, § 3540.) In similar circumstances, PERB has adopted the "blocking charge rule" used by the National Labor Relations Board (NLRB) in the private sector. (See, e.g., *NLRB v. Big Three Industries, Inc.* (5th Cir. 1974) 497 F.2d 43.) The Board found it appropriate, therefore:

> to delay decertification elections in circumstances in which the employees' dissatisfaction with their representative is in all likelihood attributable to the employer's unfair practices rather than to the exclusive representative's failure to respond to and serve the needs of the employees it represents.

(*Jefferson*, *supra*, PERB Order No. Ad-66 at pp. 5-6, citations omitted.) The stay procedure "serves to insulate an election from unfair practices that may influence its outcome." (*Imagine*, *supra*, PERB Order No. Ad-431 at p. 9.)

PERB's blocking charge decisions are consistent with Supreme Court rationale dating from the inception of the NLRB and affirmed ever since. (*Franks Bros. Co. v. National Labor Relations Board* (1944) 321 U.S. 702, 704 (Black, J.); accord *NLRB v. Gissel Packing Co.* (1969) 395 U.S. 575, 611 (*Gissel Packing*). In *Gissel Packing*, Chief Justice Warren explained:

> There is, after all, nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a representation petition. [F]or, as we pointed out long ago, in finding that a bargaining order involved no "injustice to employees who may wish to substitute for the particular union some other arrangement," a bargaining relationship "once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed," after which the "Board may, upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships."

(*Id*. at p. 613.)

In *Imagine*, the Board found that a decertification election was properly blocked because, after a decertification petition had been filed, the employer issued a letter to employees that expressed opposition to the union and misstated the amount of union dues. (*Imagine*, *supra*, PERB Order No. Ad-431 at p. 14.) The employer's letter stated, for example, "Our School Is Better Off Without a Union," "unions create a divisive atmosphere between teachers and administration," and "union representation is not the right choice for our certificated staff." (*Ibid*.) The Board rejected the employer's claims that the union had ample opportunity to rebut the statements because "an opportunity for rebuttal cannot be counted on to undo the taint on the election process." (*Id*. at pp. 14-15.) The Board found that the communication had the probable effect of undermining the union and tended to impede employee free choice. (*Ibid*.)

The proposed decision in *Imagine* discussed Ninth Circuit and PERB precedent that held "an employer may not impliedly threaten retaliatory consequences within his

control, nor may he, in an excess of imagination and under the guise of prediction, fabricate hobgoblin consequences [of unionization] outside his control which have no basis in objective fact." (*Imagine*, *supra*, PERB Order No. Ad-431, proposed decision, pp. 15-16, citing *NLRB v. Lenkurt Electric Co.* (9th Cir. 1971) 438 F.2d 1102 and *Office of Kern County Superintendent of Schools* (1985) PERB Decision No. 533.) An employer may not make statements about a union or unionization that, when viewed in their totality, are delivered as statement of fact, if they are actually incorrect and unsupported. (*Id*. at p. 15.) An election also may be stayed where a contentious relationship between the employer and the union "could disrupt employee morale, and deter employees from participating in union activity." (*Children of Promise*, *supra*, PERB Decision No. Ad-428 at p. 4.)

Statutory law also prohibits an employer from deterring or discouraging public employees from becoming or remaining members of unions:

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

(Gov. Code, § 3550 et seq. (PEDD).)

Bad faith bargaining may also serve as a basis to stay an election. In *Grenada*, the Board affirmed the proposed decision finding that alleged bad faith bargaining, if found to be true, would preclude the holding of a fair election. (*Grenada*, *supra*, PERB Decision No. 387 at p. 6.) The Board cited NLRB precedent to explain:

> It would be particularly anomalous and disruptive of industrial peace to allow the employer's wrongful refusal to bargain in good faith to dissipate the union's strength, and then to require a new election which "would not be likely to demonstrate the employee's true undistorted desires."
>
> [¶…¶]
>
> The reasoning underlying this limitation on temporary employee sentiment flows from the Supreme Court's decision in *Frank*[*s*] *Bros.* [*Co. v. National Labor Relations Board* (1944)] 321 U.S. 702 []. As the Court there stated, "Out of its wide experience, the Board many times has expressed the view that the unlawful refusal of an employer to bargain collectively with its employees' chosen representative disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions.["]
>
> [¶…¶]
>
> []Blocking a decertification petition[] works no injustice to the employees. In the first place, courts have long recognized that employee free choice is not necessarily reflected in an election where the employer, by committing substantial unfair labor practices, has poisoned the electoral well. [Citations omitted.] Indeed, a decertification petition tendered on the heels of employer unfair labor practices may "merely indicate that the unfair labor practices ... continue to affect employee sentiment and make a fair election impossible."

(*Id.* at pp. 8-9.) The Board summarized that "an election may properly be blocked where there has been a failure to bargain in good faith, since that conduct by its very nature undercuts support for an individual union or unions in general, and renders a fair election impossible." (*Id.* at p. 9; accord *Clovis Unified School District* (1984) PERB Decision No. 389, p. 25 [an employer, by "obstructing negotiations with the

exclusive representative," had "interfere[d] with employees[']right to select an exclusive representative to meet and negotiate with the employer on their behalf"].)

The Board in *Grenada* also indicated that an employer's alleged unfair practices of potentially any kind, may support a determination to stay an election. (*Ibid*.) This could include allegations of retaliation or interference, as such unlawful employer conduct may chill other employees exercise of protected rights. (See, e.g., *Carlsbad Unified School District* (1979) PERB Decision No. 89, p. 13 (*Carlsbad*) [the transfer of a union activist teacher away from Carlsbad High School "would have the natural and probable consequence of causing other employees reasonably to fear that similar action would be taken against them if they engaged in organizing for [the union]. This chilling effect on the exercise of the employees' right of self-organization was unlawful interference within the meaning of [EERA] section 3543.5(a)"].)

IV. DISCUSSION

A. Alleged Unfair Practices

Attention must be paid to the context in which SDEA's allegations against GPA arose. (*Antelope Valley*, *supra*, PERB Decision No. 97 at pp. 11-12.) The allegations arose during the time from January 2019, when SDEA became recognized as the exclusive representative of GPA's certificated employees after a majority of certificated employees provided their signatures in support of SDEA, to January 2020, when Petitioners filed the instant petition to decertify SDEA as the exclusive representative.

1. The Three Alleged GPA Communications

For purposes of evaluating the blocking charge, PERB assumes that the attached copies of GPA's three communications are accurate photocopies.[6] (*Grenada*, *supra*, PERB Decision No. 387 at p. 14; *Pleasant Valley*, *supra*, PERB Decision No. 380 at p. 5.)

As described above, the first communication was issued in July by Riveroll to GPA employees. The first page was devoted to describing GPA's belief system. On the second page, Riveroll discussed "a few aspects of our masterpiece. [¶] First, our master schedule." He then stated, among other things, that last week, a couple of teachers, to his surprise, requested to audio record a meeting and proposed an alternate master schedule, which had never occurred in his 25 years of experience with union and non-union schools. The comment suggests that the conduct was irregular and outside of the norm of collective bargaining, and it conveys to employees that Riveroll has doubts about or, perhaps, discredits teachers' and SDEA's methods.

Riveroll's further statements that the request and proposal "represent a different belief system that, in my opinion, reflects content first" and he "loves creative ideas from his teachers," but only if the "ideas match" the GPA belief system, indicate that teachers must be careful to couch their concerns, ideas or proposals about the terms and conditions of employment in language that venerates the GPA belief system.

On page four, Riveroll asserts that creating a collective bargaining agreement (CBA) containing "articles that represent our masterpiece and the belief system of our

[6] Petitioners and GPA each attached a copy of UPC Case Number LA-CE-6531-E, including exhibits, to their respective March 27 responses to the blocking charge.

school is revolutionary work that has not yet been done between a school and a union." The statement could be understood by teachers to assert that no CBA has ever been reached between a charter school and a union and it could lead them to incorrectly conclude that SDEA's presence at GPA is entirely unique and novel.

Riveroll concludes the July communication by stating: "you are my team, and we will get through this together…[¶]…think on the important decision of working at GPA, GPA isn't a job, it's a mission. We need missionaries. Our mission is too important." The statements portray collective bargaining and SDEA's presence as unwelcome and obstructive to GPA's mission. The statements also pose a choice to employees: be a missionary and serve the GPA mission or support SDEA and simply view your work as a job. The posed choice contrasts the GPA mission and collective bargaining as two diametrically opposed concepts that cannot coexist.

The one page September communication on GPA letter head from the GPA bargaining team asserts that SDEA has "attack[ed]"and "undermine[d] GPA's mission by untruth and omissions" and "numerous lies and misstatements." This is an outright accusation that SDEA lies and undermines GPA's mission. GPA's assertion that SDEA's bargaining team has "often shown a lack of knowledge and disregard and disrespect for GPA's bargaining team, GPA's leadership and GPA's mission" informs employees that, as a factual matter, SDEA is unknowledgeable and disrespectful. The message has the potential to lead employees to question SDEA's expertise and professionalism. GPA's statements would tip off employees receiving the communication to the fact that GPA and its bargaining team view SDEA as an untrustworthy threat to the GPA mission.

The communication then states that “until all of the bargaining proposals are in, GPA will not know how much money it will have for salaries, nor whether existing salaries can be ‘grandfathered’ at the current rate under a union contract.” The logic GPA suggests here is that current salaries would not be at risk were it not for the fact that collective bargaining with SDEA is now required.

Finally, the communication states that there was “divisiveness last year,” and “[w]hen we are divided, no one wins but the union. We hope that the bonds and the trust created by our many years together will allow us to move forward together as a team to put our students first.” The communication informs employees’ that GPA’s new relationship with SDEA is not harmonious. It also derides employees who chose to support unionization of achieving only a “win” for the union. These statements also reiterate management’s concern that unionization threatens GPA’s belief system or mission.

The third communication, titled “GPA Founders and Leadership Update on Collective Bargaining November 2019” states “[W]e hope our GPA will remain the special school that it is designed to be. Therefore, we hope our GPA belief system will live in every aspect of the union contract [and] [w]e consider all stakeholders in every decision, not just teachers or ‘unit members.’” Once more, GPA’s message is that unionization threatens the GPA belief system, including by failing to consider community members, GPA supporters, parents and students.

Next, the communication places blame on SDEA for creating an “‘us versus them’ feeling that is often used as a tool to legitimize the union’s presence.” This

would lead employees to believe that SDEA is illegitimate and responsible for disrupting peace at the school.

The third communication concluded by stating that GPA "made a promise to our parents 15 years ago to build a school worthy of our most precious gifts – our children – and to ensure they have a safe and joyful learning environment with a pathway to college. We will work tirelessly and unwaveringly to continue to keep that promise regardless of the new bureaucratic challenges ahead of us." These statements reduce SDEA's role as a mere bureaucracy while harkening to the theme of all three GPA communications that GPA's laudable mission is endangered by unionization.

It remains for the ALJ, after a full hearing on the administrative complaint in the blocking charge, to determine whether the alleged communications were in fact made by GPA to teachers and whether they violated the PEDD or EERA, by deterring or discouraging teachers from becoming or remaining members of SDEA, or by having the tendency or actual effect of causing at least slight harm to the exercise of rights under EERA. (§ 3550; *State of California (Department of Developmental Services)* (1983) PERB Decision No. 344-S, pp. 12-15.) The question to be resolved here is whether the decertification election must be blocked because unfair practices allegedly committed by GPA are likely to affect the vote and thus the outcome of the election. (*Manton*, *supra*, PERB Decision No. 960 at pp. 4-5; *Pleasant Valley*, *supra*, PERB Decision No. 380 at p. 5; PERB Reg. 32752.)

GPA's communications to its employees are similar to communications in *Imagine*, *supra*—that expressed opposition to the union and misstated facts—that justified staying the decertification election. As described above, the Imagine charter

school issued statements to employees like “Our School Is Better Off Without a Union," "unions create a divisive atmosphere between teachers and administration," and "union representation is not the right choice for our certificated staff." (*Imagine*, *supra*, PERB Order No. Ad-431 at p. 13.) GPA’s communications that inform employees of divisiveness between GPA and SDEA would likely have an effect on employees similar to that in *Children of Promise*, *supra*, PERB Decision No. Ad-428:

> Employees would reasonably be deterred from engaging in communications or activities with the Association when they know that their employer is opposed to the Association and/or its status as a representative, or they are aware that the employer and representative have a contentious relationship such that name-calling and threats of physical altercations have allegedly occurred.

(*Id*. at p. 4, proposed decision, p. 20.)

Assuming it is true that GPA made the alleged communications, GPA’s manifest opposition to SDEA and unionization, its fabrication of “hobgoblin consequences outside [GPA’s] control which have no basis in objective fact,” e.g., threat to salary levels and lengthy negotiations because such a CBA has never been negotiated before, and continual communications informing employees of GPA’s contentious relationship with SDEA, are likely to affect the vote and thus the outcome of the election. (*Imagine*, *supra*, PERB Order No. Ad-431, proposed decision at pp. 15-16; *Children of Promise*, *supra*, PERB Decision No. Ad-428, proposed decision at p. 21; *Manton*, *supra*, PERB Decision No. 960 at pp. 4-5; *Pleasant Valley*, *supra*, PERB Decision No. 380 at p. 5; PERB Reg. 32752.)

Petitioners assert that GPA’s communications, “as a factual matter, would not affect employees’ free choice in an election [because b]oth sides were able to equally

present their side of what happened during negotiations and reasonable employees can determine who was in the right and who was in the wrong." Petitioners cite no authority supporting their proposition and it must be rejected because "an opportunity for rebuttal cannot be counted on to undo the taint on the election process." (*Imagine*, *supra*, PERB Order No. Ad-431 at pp. 14-15.) Petitioners' argument that it would be "manifestly unfair to allow SDEA to send a letter to the bargaining unit with its views of what happened during a bargaining session, but then punish the employees by taking away their right to vote when Gompers merely presented its side of the facts," similarly must be rejected because it fails to discuss the body of law recognizing that employer speech may have a detrimental effect on employees free exercise of choice in an election. (*Gissel Packing*, *supra*, 395 U.S. at p. 611; *Franks Bros. Co. v. National Labor Relations Board*, *supra*, 321 U.S. at p. 704; *Grenada*, *supra*, PERB Decision No. 387 at pp. 8-9.)

Particularly relevant to answering the question of whether neutral conditions for a fair election exist, Petitioners' assertion that employees are equipped to determine whether GPA or SDEA is right or wrong, concedes that employees are in fact aware of the fractious relationship between GPA and SDEA. (*Children of Promise*, *supra*, PERB Decision No. Ad-428 at p. 4.) Employees might adopt GPA's views about SDEA and become dissatisfied with SDEA, not because SDEA has not served them, but because GPA's communications have thrown SDEA's legitimacy into question. (*Jefferson*, *supra*, PERB Order No. Ad-66 at pp. 5-6.) And to the extent that the communications are shown later at hearing to deter and discourage union membership in violation of the PEDD, the communications would also, "in all

likelihood" contribute to employee dissatisfaction. (*Ibid*.) Petitioners' assertion also presupposes incorrectly that an employer and a recently recognized union have equal sway on employees, such that employees may be privy to any manner of disagreements, including communications that allegedly deter and discourage union membership, and still could "determine who was in the right and who was in the wrong." But EERA protects employees' rights to select their representative without the influence of an employer's unfair practices. (*Ibid*.)

Petitioners' are also incorrect in their assertion that to stay the election here on the basis of the September communication "would mean anytime a union presents its view and the employer responds, employees lose their right to vote." As stated above, each stay request is investigated and evaluated on a case-by-case basis, not by rote or mechanical application of blocking charge rules, to determine whether applying the rule will serve the purposes of EERA. (*Jefferson*, *supra*, PERB Order No. Ad-66 at p. 6; *Pleasant*, *supra*, PERB Decision No. 380, proposed decision at pp. 3, 8.) This administrative determination addresses the allegations raised in this case and does not create a rule dictating that an employer's response to a union communication eliminates employees rights to vote in a representation proceeding.

GPA asserts that its communication regarding slander did not name any individuals, was "an unimportant one made many months before the decertification petition was filed," that the parties later issued statements communicating that the parties were working well together, and that SDEA issued a communication just days before filing the unfair practice charge that reiterated "how well negotiations were going and emphasizing the cooperati[on] between SDEA and GPA." GPA argues that

the slander statement "was so minor and remote in time, it does not support a request to delay the decertification." The argument must be rejected because no party has presented any information showing that the later communications from SDEA and the passage of time might have removed the taint of the "slander" communication. (*Imagine*, *supra*, PERB Order No. Ad-431 at pp. 13-15.) And to the extent that GPA asserts that Mills "was not named in the communication," SDEA has alleged that other bargaining unit members will learn of the alleged retaliation by GPA after a teacher engaged in protected activity and therefore, they too will be impacted by GPA's alleged retaliation against Mills. Whether SDEA's allegations may be defeated by GPA's defenses are properly reserved for adjudication of the blocking charge. It is not the province of this administrative determination to adjudicate whether employees understood that the communication was about Mills specifically. (*Children of Promise*, *supra*, PERB Order No. Ad-428, proposed decision at p. 15.)

2. GPA's Alleged Refusal to Negotiate in Good Faith

SDEA asserts that GPA failed and refused to bargain in good faith by delaying meetings, cancelling two bargaining sessions, refusing to schedule sufficient time for meetings, failing to provide proposals to the union, failing to provide a wage proposal without placeholders, delaying in providing SDEA a copy of the budget and the date of hire information, failing to provide information about extra pay, retaliating against bargaining team member Mills, interfering with EERA rights and attempting to deter and discourage union membership.

Assuming the allegations are true, GPA's refusal to bargain in good faith would affect the exercise of free choice because the alleged unlawful conduct occurred after

the "divisiveness of last year" and during the period when the failure to bargain in good faith would undercut support for the newly designated representative. (*Grenada*, *supra*, PERB Decision No. 387 at p. 9 ["an election may properly be blocked where there has been a failure to bargain in good faith, since that conduct by its very nature undercuts support for an individual union or unions in general, and renders a fair election impossible"]; accord *Clovis Unified School District*, *supra*, PERB Decision No. 389 at p. 25.) And GPA's wrongful refusal to bargain in good faith, if proven, could dissipate SDEA's strength, and an election "would not be likely to demonstrate the employee's true undistorted desires." (*Grenada*, *supra*, PERB Decision No. 387 at p. 8.) The alleged unlawful refusal of GPA to, in good faith, bargain collectively with its employees through their chosen representative SDEA likely "disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions." (*Id.* at pp. 8-9, citing *Franks Bros. Co. v. National Labor Relations Board*, *supra*, 321 U.S. 702.)

Petitioners assert that SDEA was actually upset that GPA was not bargaining fast enough, not that GPA was negotiating in bad faith. Regardless, delaying negotiations, including by "not bargaining fast enough," is an indicia of bad faith and may support a finding of bad faith under a totality of the circumstances.[7]

[7] Bargaining in good faith is a "subjective attitude and requires a genuine desire to reach agreement." (*Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9, 25.) PERB has held it is the essence of bad faith or surface bargaining that a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement. (*Muroc Unified School District* (1978) PERB Decision No. 80, p. 13.) Surface bargaining allegations must be determined from an examination of the "totality of circumstances" or "entire course of conduct" in which the negotiations took place,

GPA asserts that there was not a pattern of delay in bargaining because both parties took time and there were many proposals. GPA's defense is properly raised in the hearing on the blocking charge, not here where it must be presumed true that delay impeded SDEA in representing its members and potentially prevented bargaining unit members from experiencing the benefits of collective bargaining. (*Grenada*, *supra*, PERB Decision No. 387 at p. 14; *Pleasant Valley*, *supra*, PERB Decision No. 380 at p. 5.)

GPA's assertion that "SDEA does not establish that this alleged [delay in negotiations by GPA] would prevent the unit members from exercising free choice in the election," must be rejected because, as stated above, "courts have long recognized that employee free choice is not necessarily reflected in an election where the employer, by committing substantial unfair labor practices, has poisoned the electoral well." (*Grenada*, *supra*, PERB Decision No. 387 at pp. 8-9, 11.) A variety of cases, as well as PERB Regulation 32752, recognize that an employer's wrongful

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including the parties' conduct at and away from the bargaining table, to determine whether a party has negotiated with the requisite subjective intention of reaching an agreement. (*City of San Jose* (2013) PERB Decision No. 2341-M, p. 22; *Pajaro Valley Unified School District* (1978) PERB Decision No. 51, pp. 4-5.)

Recalcitrance in the scheduling of meetings is evidence of manipulation to delay and obstruct a timely agreement. (*Oakland Unified School District* (1983) PERB Decision No. 326, pp. 41-42.) Dilatory and evasive tactics including canceling meetings or failing to prepare for meetings is evidence of bad faith. (*Id.* at p. 34.) Conditioning agreement on economic matters upon prior agreement on non-economic subjects is evidence of an unwillingness to engage in a give-and-take. (*State of California (Department of Personnel Administration)* (1998) PERB Decision No. 1249-S, dismissal letter, p. 3.) The ultimate question raised in every surface bargaining case is whether the respondent's conduct, when viewed in its totality, was sufficiently egregious to frustrate negotiations. (*City of San Jose*, *supra*, PERB Decision No. 2341-M at p. 22.)

refusal to bargain in good faith might dissipate the union's strength, rendering it unfair to require an election which "would not be likely to demonstrate the employee's true undistorted desires." (*Id*. at p. 6; *Manton*, *supra*, PERB Decision No. 960 at pp. 4-5; *Pleasant Valley*, *supra*, PERB Decision No. 380 at p. 5.)

GPA is similarly incorrect in asserting that "SDEA does not allege that GPA engaged in conduct that would impact unit members' free choice." SDEA's bad faith bargaining allegations themselves—that GPA created delays, failed to provide a wage proposal without placeholders, failed and refused to provide information, retaliated against bargaining team member Mills, interfered with EERA rights and attempted to deter and discourage union membership—logically fall within employer conduct that might so taint the election process as to interfere with employee free choice. (*Imagine*, *supra*, PERB Order No. Ad-431 at p. 13; *Clovis Unified School District*, *supra*, PERB Decision No. 389, p. 25 [an employer, by "obstructing negotiations with the exclusive representative," had "interfere[d] with employees[']right to select an exclusive representative to meet and negotiate with the employer on their behalf"].) Any of these alleged acts could impact free choice by dissipating SDEA's strength, and an election under these circumstances "would not be likely to demonstrate the employee's true undistorted desires." (*Grenada*, *supra*, PERB Decision No. 387, p. 6.) Neither Petitioners nor GPA offer any information distinguishing the instant case from the abundant precedential holdings that elections may be properly blocked where the employer's alleged bad faith bargaining has allegedly disrupted, deterred and discouraged union support. (*Id.* at pp. 8-9; *Imagine*, *supra*, PERB Order No. Ad-431 at p. 13; *Clovis Unified School District*, *supra*, PERB Decision No. 389 at p. 25.)

3. GPA's Alleged Refusal to Provide Information Relevant to Bargaining

SDEA asserts that, on January 11, it requested current salary schedules for all SDEA bargaining unit members currently employed by GPA including "any and all forms of compensation (e.g. bonuses, stipends, tuition assistance)." SDEA reiterated the request on February 20, April 11, and October 11. GPA agreed in a May 23 letter to provide a description of the work performed to earn the "other pay," but on October 28 asserted that it "did not include information on…other pay as it was not available."

A party's refusal or delay in providing requested relevant and necessary information is a per se violation of the duty to bargain in good faith. (*Stockton Unified School District* (1980) PERB Decision No. 143, pp. 18-19.) As a per se violation, the reasoning adopted in *Grenada*—that "[i]t would be particularly anomalous and disruptive of industrial peace to allow the employer's wrongful refusal to bargain in good faith to dissipate the union's strength, and then to require a new election which 'would not be likely to demonstrate the employee's true undistorted desires'"—applies to GPA's refusal to provide information. (*Grenada*, *supra*, PERB Decision No. 387 at pp. 8-9.) Indeed, SDEA's inability to acquire vital information about extra wages means that SDEA lacked information necessary to bargain over an important aspect of employees' wages. (*Clovis Unified School District*, *supra*, PERB Decision No. 389, p. 25.) The alleged lack of information would work against SDEA's ability to carry out its duties to represent employees. (*Ibid*.; *Children of Promise*, *supra*, PERB Decision No. Ad-428, proposed decision at p. 21; PERB Reg. 32752.) This would likely have the effect of making SDEA appear weak and ineffective in the eyes of bargaining unit members, dissipating SDEA's strength, and an election "would not be likely to

demonstrate employees' undistorted desires." (*Grenada*, *supra*, PERB Decision No. 387 at pp. 8-9; PERB Reg. 32752.)

Petitioners assert that "not provid[ing] information quick enough for SDEA [] only shows a technical dispute and not necessarily bad faith conduct." However, since a refusal or delay in providing information is a per se violation of the duty to bargain in good faith, the allegation, if true, does "necessarily" show bad faith conduct. Petitioners cite *Jefferson School District* (1980) PERB Order No. Ad-82 (*Jefferson School District*) and assert that elections are not blocked where bargaining issues are only technical. The technical dispute in *Jefferson School District,* however, is not comparable to what allegedly occurred here. The technical dispute in *Jefferson School District* was whether or not the parties were obligated to bargain over a particular issue. (*Id*. at pp. 10-15.) Here, there is not a legal question about whether GPA had a duty provide wage information upon SDEA's request. There is no dispute that SDEA was entitled to wage information, that GPA agreed to provide SDEA with additional pay information, but never did. GPA did not discuss this allegation in its response to the blocking charge.

4. GPA's Alleged Retaliation Against an Employee

It is assumed for the purposes of evaluating the blocking charge that GPA reassigned Mills from teaching high school to teaching middle school for the summer of 2019 and for the 2019-2020 school year. (*Pleasant Valley*, *supra*, PERB Decision No. 380, p. 5.) It is also assumed to be true that GPA issued a reprimand to Mills accusing him of unprofessional behavior, because of Mills' e-mails to Riveroll raising workplace concerns, and directing Mills to raise his workplace concerns exclusively

with Riveroll and the GPA Talent Services Manager. (*Ibid*.) GPA's alleged conduct against Mills, if true, would logically influence Mills' vote because he might choose to abandon support for SDEA in the aftermath of the adverse actions. (*Jefferson*, *supra*, PERB Order No. Ad-66, pp. 5-6; *Pleasant Valley*, *supra*, PERB Decision No. 380 at pp. 5-7.)

Petitioners challenge SDEA's retaliation allegations on the basis that there is no causal connection between Mills' protected activity and GPA's adverse actions because Riveroll had already considered moving Mills' to teach middle school. Petitioners also assert that SDEA failed to provide facts showing that GPA targeted Mills. Petitioners also argue that Riveroll disclaimed, in the reprimand itself, that it had anything to do with Mills' protected activities. However, the question of whether the retaliation allegations will be defeated, because of a lack of causal connection, or any other defense, must be reserved for the hearing on the blocking charge, if GPA chooses to raise such defenses. (*Children of Promise*, *supra*, PERB Decision No. Ad-428 at p. 9.)

5. GPA's Alleged Interference with the Exercise of Protected Rights

Mills is presumably aware of the adverse actions—e.g., reassignments and reprimand—that GPA imposed upon him. SDEA alleges that other bargaining unit members will learn that Mills faced adverse action by GPA after he engaged in protected activity and, therefore, they too will be impacted by GPA's alleged retaliation against Mills. As with Mills, other employees, upon learning of the alleged retaliation, might fear similar repercussions if they also choose to exercise EERA protected rights by voicing voice concerns about the terms and conditions of employment or by

supporting SDEA. (*Carlsbad*, *supra*, PERB Decision No. 89 at p. 13.) Thus, GPA's alleged retaliation would likely interfere and have a chilling effect on employees' exercise of rights and so taint the election process as to interfere with employee free choice. (*Ibid*. [transfer of union activist teacher away from his high school assignment could chill other employees from engaging in protected activities]; *Imagine*, *supra*, PERB Order No. Ad-431 at pp. 13-16 [dissatisfaction with their representative is in all likelihood attributable to the employer's unfair practices rather than to the exclusive representative's failure to respond to and serve the needs of the employees it represents].)

Petitioners assert that it would be "absurd to conclude that GPA's reassignments of Mills and reprimand would prevent reasonable employees from making a free choice in a secret ballot election" and that "there is no factual basis for concluding that when a school administrator disciplines an employee for sending unprofessional emails, it would chill other employees right to vote for or against a union." Petitioners' arguments ignore the variety of above-described precedent supporting the conclusion that an employer's treatment of an employee in the wake of the employee's exercise of EERA protected rights may chill other employees from engaging in protected activities. (See, e.g., *State of California (Department of Developmental Services)*, *supra*, PERB Decision No. 344-S at pp. 12-15; *Carlsbad*, *supra*, PERB Decision No. 89 at p. 13.) Their arguments do not discuss the well-established law informing the interference analysis, nor do they discuss the well-established law holding that an election may be set aside or blocked "where the

employer, by committing substantial unfair labor practices, has poisoned the electoral well." (*Grenada*, *supra*, PERB Decision No. 387 at p. 9.)

Petitioners' further argument, that a finding that GPA's actions against Mills interfered with the rights of other employees would "allow a union to block an election anytime an employee who happened to be a union member acted disrespectfully towards a school administrator," is incorrect, because as discussed above, each stay request is investigated and evaluated on a case-by-case basis, not by rote or mechanical application of a blocking charge rule, to determine whether applying the rule will serve the purposes of EERA. (*Jefferson*, *supra*, PERB Order No. Ad-66 at p. 6; *Pleasant Valley*, *supra*, PERB Decision No. 380, proposed decision at pp. 3, 8.)

GPA asserts that the allegations of retaliation and interference could not impact employees' freedom to choose because its reprimand and directive to Mills was private and not shared with any other unit members. Like GPA's assertion that its "slander" communication did not name any individuals, the argument must fail as it does not discuss SDEA's contention that as other bargaining unit members learn that Mr. Mills faced adverse action for engaging in protected activity and was directed not to engage in protected activity in the future, there is a potential chilling effect on their exercise of EERA-protected rights. (Accord, *Imagine*, *supra*, PERB Order No. Ad-431 at p. 9.)

The three alleged communications issued by GPA also would likely interfere and have a chilling effect on employees' exercise of rights because, as discussed above, employees might be deterred and discouraged from supporting SDEA and might adopt GPA's views that SDEA is an illegitimate bureaucracy that is incompatible

with a charter school that has a belief system. (*Imagine*, *supra*, PERB Order No. Ad-431 at pp. 13-16; *Carlsbad*, *supra*, PERB Decision No. 89 at p. 13.)

B. Petitioners' Equity Arguments

Petitioners assert that there are two equitable reasons for not staying employees' right to a secret-ballot election. Their first argument is that public sector employees' fundamental constitutional rights, and elections through which they exercise such rights, "should not be taken away on baseless unfair practice charges" and "a state's appointment of a labor union to speak for its employees as their exclusive representative was 'itself a significant impingement on associational freedoms that would not be tolerated in other contexts,'" citing *Janus v. American Federation of State, County, and Mun. Employees, Council 31* (2018) 138 S.Ct. 2448, 2478. Petitioners then state that "SDEA has been [the employees'] exclusive representative for over 14-months and [Petitioners] have never been able to exercise their right to a secret-ballot election."

Once more, Petitioners fail to discuss, much less distinguish, decades old precedent supporting the notion that representation elections may be stayed or set aside where an employer, by committing substantial unfair labor practices, has poisoned the electoral well. (*Grenada*, *supra*, PERB Decision No. 387 at p. 17.) Petitioners' claim that the unfair practice charges are "baseless" fails to acknowledge that SDEA has alleged significant unlawful acts by GPA: communications that deter and discourage union membership, multiple indicia of bad faith bargaining, refusal to provide requested information, retaliation and interference. Petitioners' equity claims also ignore competing equities arising from the majority of employees who exercised

their right to select SDEA as their exclusive representative in January but who, as a result of GPA's alleged unfair practices, may have not experienced the benefits of collective bargaining.

And Petitioners' citation to recent Supreme Court decisions like *Janus*, which does not involve a representation election at all, is inapt and provides no reason for PERB to abandon well-established blocking charge precedent underpinned by a variety of Supreme Court decisions affirming that delaying a decertification election works no injustice as there is nothing permanent in requiring the parties to continue bargaining. (*Gissel Packing*, *supra*, 395 U.S. at p. 611; *Franks Bros. Co. v. National Labor Relations Board*, *supra*, 321 U.S. at p. 705.)

Petitioners other "equity" argument is that blocking the election will cause unwarranted delay in their right to a decertification election. Petitioners assert that in a rulemaking, "the NLRB noted that blocking charges 'can preclude holding the petitioned-for election for months, or even years, if at all.'" Petitioners assert that if PERB stays the decertification election, PERB "will be working the same injustice that the NLRB warned about in its rulemaking." As with Petitioners first equity argument, the second equity argument fails to discuss applicable law or present any argument why the existing legal framework should not apply here. That framework held early on that delaying a decertification election involves "no 'injustice to employees who may wish to substitute for the particular union some other arrangement.'" (*Gissel Packing*, *supra*, 395 U.S. at p. 611; *Franks Bros. Co. v. National Labor Relations Board*, *supra*, 321 U.S. at p. 704.) Petitioners "equity" arguments do not advance their case because they fail to address the question presented here, whether the alleged unfair

practices by GPA would so affect the election process as to prevent the employees from freely selecting their exclusive representative. (*Manton*, *supra*, PERB Decision No. 960 at pp. 4-5.)

C. GPA's Request Regarding the Status Quo

GPA requests that if PERB blocks the decertification election, PERB should also permit GPA to "maintain the status quo" by allowing "the parties[] to delay further bargaining so that the employees who brought the decertification petition are not prejudiced." The status quo ante, in this case, however, would be *continued negotiations*, not discontinued negotiations. (See, e.g. *Franks Bros. Co. v. National Labor Relations Board*, *supra*, 321 U.S. at p. 705 [recalcitrant employers might be able by continued opposition to union membership indefinitely to postpone performance of their statutory obligation].) GPA provides no authority suggesting that the duty to bargain is suspended while the blocking charge and/or the decertification petition are pending. And, to the extent that there could possibly be a question about whether the duty to negotiate was suspended, the Board in *Grenada* held that "the District's obligation to negotiate under these circumstances is properly resolved through the hearing process, and is not properly considered by the Board at this stage of the proceedings." (*Grenada*, *supra*, PERB Decision No. 387 at p. 13.)

Within the same argument, GPA acknowledges that it "has an obligation to treat both the employees supporting SDEA and the employees supporting the decertification in an equal and neutral fashion." Here, that would mean fulfilling the duty to bargain in good faith with SDEA, not shutting down negotiations for an initial CBA simply because Petitioners' decertification petition may be granted after an

election. The obligation to treat employees in an equal and neutral fashion would be served by upholding legal obligations, including the duty to bargain in good faith, not by abandoning negotiations until the decertification petition is resolved.

D. SDEA's Requested Relief

SDEA requests (1) An order that the certification year be extended in light of GPA's bad faith bargaining during the certification year; (2) Dismissal of the decertification petition; and (3) A stay of the election during PERB's processing of the blocking charge.

A request for an extension of the certification year was similarly requested in *Manton*, *supra*. There, the union asked for "a one-year cooling off period to remove the 'taint'" of an anti-union letter sent by the superintendent to supporters of a decertification election. (*Manton*, *supra*, PERB Decision No. 960 at p. 5.) The Board refused the request because an employee who initiated the decertification effort had contacted the superintendent seeking certain information and the employer did not initiate any effort to direct the employees in their choice of employee representation. (*Ibid*.) The Board concluded that "Given these facts, it cannot be concluded that the employees' dissatisfaction with their representative was attributable to the employer's unfair practice." (*Ibid*.)

Unlike the facts in *Manton*, here there are sufficient allegations that the employer initiated an effort to direct the employees in their choice of employee representation, for example, when GPA issued the three communications to employees during the first year of SDEA's representation. However, SDEA's requested remedy does not appear necessary where their request to stay the election

is granted. (*Children of Promise Preparatory Academy* (2018) PERB Order No. Ad-470, p. 1 [after adjudication of blocking charge in favor of the union, the decertification petition was dismissed where there was no showing that the unfair practices would not affect employee free choice in a decertification election].)

V. CONCLUSION

Considering all of the arguments presented by the parties and considering the entire course of conduct in which each alleged unfair labor practices occurred, it is likely that employee dissatisfaction with SDEA may be attributed to the substantial unfair labor practices allegedly committed by GPA. (*Grenada*, *supra*, PERB Decision No. 387 at p. 9; *Jefferson*, *supra*, PERB Order No. Ad-66 at pp. 5-6.) GPA's communications amplified discord at the bargaining table and cast doubts as to whether SDEA's representation was legitimate, or even appropriate at a charter school with a mission like GPA's. In sum, neither Petitioners nor GPA allege that employee dissatisfaction with SDEA is attributable to SDEA's failure to respond to and serve the needs of GPA's certificated employees. (*Jefferson*, *supra*, PERB Order No. Ad-66 at pp. 5-6.) The alleged unlawful conduct by GPA is of such character and seriousness that, if true, could very well affect the election process so as to prevent the employees from exercising free choice. (PERB Reg. 32752; *Regents of the University of California*, *supra*, PERB Decision No. 381-H.) The decertification election must be stayed "to insulate" the election from unfair practices that may influence its outcome. (*Jefferson*, *supra*, PERB Order No. Ad-66 at pp. 5-6.)

VI. DETERMINATION

Based on the facts, conclusions of law and the entire record herein, SDEA's request to stay the election is **GRANTED**. PERB will not conduct an election where there is a likelihood that alleged unlawful conduct by GPA has affected voter choice. Staying the election until the blocking charge is resolved serves the purpose of EERA to promote the improvement of personnel management and employee-employee relations within the public school system in the State of California by providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice, to be represented by the organizations in their professional and employment relationships with public school employers, and to afford certificated employees a voice in the formulation of educational policy. It is hereby **ORDERED** that Case No. LA-DP-441-M be placed in abeyance pending the resolution of *San Diego Education Association v. Gompers Preparatory Academy*, UPC Case Number LA-CE-6531-E.

Right to Appeal

Pursuant to PERB Regulations, an aggrieved party may file an appeal directly with the Board itself and can request an expedited review of this administrative determination. (Cal. Code Regs., tit. 8, §§ 32147, subd. (a), 32350, 32360, 32802, 61060.) An appeal must be filed with the Board itself within 10 days following the date of service of this determination. (Cal. Code Regs., tit. 8, § 32360, subd. (b).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board. (*Ibid*.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135, subdivision (d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) & (d); see also Cal. Code Regs., tit. 8, §§ 32090 & 32130.) If an aggrieved party appeals this determination, any other party may file with the Board an original and five copies of a statement in opposition within 10 calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, § 32375.)

Notwithstanding the regulations discussed above requiring the filing and service of originals and copies, UNTIL FURTHER NOTICE, filings pertaining to this case are requested to be electronically submitted using PERB's e-filing address:

PERBe-file.Appeals@perb.ca.gov.

Also, until further notice, originals of any electronic filings must be retained by the filing party but should not be forwarded to PERB.

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 322-8231
Facsimile: (916) 327-9425
E-File: PERBe-file.Appeals@perb.ca.gov

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding and on the Sacramento regional office. A "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself (see Cal. Code Regs., tit. 8, § 32140 for the required contents). The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, § 32135, subd. (c).)

Extension of Time

A request for an extension of time in which to file an appeal or opposition to an appeal with the Board itself must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party (Cal. Code Regs., tit. 8, § 32132).