STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ASSOCIATION OF CLOVIS EDUCATORS, CTA/NEA, Charging Party, v. CLOVIS UNIFIED SCHOOL DISTRICT, Respondent.	Case Nos. SA-CE-3040-E SA-CE-3047-E PERB Order No. IR-63 December 16, 2021

Appearances: Bush Gottlieb by Erica Deutsch and Michael Plank, Attorneys, and California Teachers Association by Megan Degeneffe, Staff Counsel, for Association of Clovis Educators, CTA/NEA; Fagen Friedman & Fulfrost by David A. Moreno, Katy McCully Merrill, and Lynn Beekman, Attorneys, for Clovis Unified School District.

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

DECISION

SHINERS, Member: These cases are before the Public Employment Relations Board (PERB or Board) on a request for injunctive relief filed by the Association of Clovis Educators, CTA/NEA (ACE). ACE is engaged in ongoing efforts to organize certificated employees of the Clovis Unified School District. ACE contends that injunctive relief is necessary to prevent the District from continuing to hamper its organizing campaign by, among other things, financially supporting and granting preferential treatment to a rival employee organization, the Clovis Unified Faculty Senate, in violation of the Educational Employment Relations Act (EERA), and sending communications that deter or discourage employee support for ACE in

violation of the Prohibition on Public Employers Deterring or Discouraging Union Membership (PEDD).[1] As explained below, we grant the request because there is reasonable cause to believe the District violated—and continues to violate—EERA and PEDD and, due to the nature of the alleged violations and their potential impact on ACE's organizing efforts, an injunction is necessary to preserve the efficacy of any final Board order.

FACTUAL BACKGROUND

In evaluating ACE's request for injunctive relief, we rely on the allegations in ACE's unfair practice charges, as well as information contained in sworn declarations submitted by ACE and the District (to the extent such information does not conflict with ACE's charge allegations), exhibits attached to those declarations, and other information obtained by the Office of the General Counsel (OGC) during its investigation of the request. (*Sweetwater Union High School District* (2014) PERB Order No. IR-58, p. 2; *City of Fremont* (2013) PERB Order No. IR-57-M, p. 19, fn. 8.) While at this stage of the proceedings we presume ACE's allegations and information to be true, they "will be subject to verification or contradiction" at a formal evidentiary hearing. (*Sweetwater Union High School District*, *supra*, PERB Order No. IR-58, p. 2.) Accordingly, our preliminary determinations in this decision are not binding on PERB or the parties in subsequent proceedings in these cases. (*San Mateo County Superior*

[1] EERA is codified at Government Code section 3540 et seq. PEDD is codified at Government Code section 3550 et seq. All statutory references are to the Government Code unless otherwise indicated.

Court (2019) PERB Order No. IR-60-C, p. 3, fn. 1; *City of Fremont*, *supra*, PERB Order No. IR-57-M, p. 19, fn. 8.)

I. The Relationship between the Senate and the District

The District has distributed a document called "Doc's Charge" to its teachers upon hire.[2] Doc's Charge, which appears to serve as the District's mission statement, provides in pertinent part that the District is "proud that we do not have collective bargaining." Consistent with this statement, the District tells newly-hired employees that the District is a nonunion district and they are represented by the Senate. Doc's Charge is also posted in the District's Boardroom.

The Senate has acted as a nonexclusive representative of District teachers since 1977. (*Clovis Unified School District* (1984) PERB Decision No. 389, adopting proposed decision at pp. 31-32 (*Clovis*).)[3] The Senate's bylaws provide that it is "to be an effective advocate for teachers at all levels of policy making, procedures, and expenditures, in partnership with our administrators, fellow employees, and community

[2] In this decision, we use the term "teachers" as a shorthand to include teachers, mental health professionals, and other certificated educational employees of the District.

[3] EERA differentiates between employee organizations based on whether they have been formally certified or recognized as an exclusive representative. An exclusive representative is "the employee organization recognized or certified as the exclusive negotiating representative of public school employees, . . . in an appropriate unit of a public school employer." (§ 3540.1, subd. (e).) Thus, "nonexclusive representative" refers to an employee organization, as defined by section 3540.1, subdivision (d), that has not been recognized or certified as the exclusive representative. (See, e.g., *Mt. Diablo Unified School District* (1978) PERB Decision No. 68, pp. 9-10.)

as a quality educational team." The District views the Senate as the representative for teachers, as evidenced in the District's Board Policy No. 4118:

> "The Clovis Unified School District Faculty Senate is the representative body for teachers of the District. When a teacher is called to a meeting with his/her administrator(s), irrespective of the purpose of the meeting, the teacher may request to have a Faculty Senate representative or other person of his/her choosing present at the meeting."

The District and Senate do not have a negotiated collective bargaining agreement, but the Senate participates in numerous District committees and meetings where input from various employee organizations is shared as part of the District's decision-making process.

Senators are school site representatives who are elected every two years by teachers from that school. The District pays Senators an annual stipend of $889. The Senate is led by an Executive Board consisting of a President, Vice President, Parliamentarian, Secretary, and two Communication positions. The members of the Executive Board are elected by Senators and serve two-year terms. The District pays each Executive Board member a $1,538 annual stipend. The Senate President is relieved from teaching duties full-time to work on Senate business. The Vice President and Secretary receive 40 percent release time from their teaching duties to perform Senate duties. The District considers these three Executive Board members to be "teacher[s] on special assignment."

II. Additional District Support of the Senate

The Senate does not collect any dues or other monies from teachers to cover representation or operating expenses. Instead, the District provided the Senate with its

entire operating budget of $3,764 for the 2020-2021 school year. The Senate has used a District credit card to purchase refreshments for meetings. The Senate submits the receipts for these purchases to the Superintendent's office for approval.[4]

After a teacher complained to the District about the Senate's cancellation of meetings, the Associate Superintendent agreed with her that the meetings should not have been cancelled, and then moved the Senate President's office in order to keep an eye on the President. This office space is within the District's headquarters and is used to meet with teachers and conduct other Senate business. The District has permitted the Senate President to use a District vehicle for traveling to work sites.[5] The Senate does not reimburse the District for the salary and benefits its members receive while performing Senate business or for its operating expenses, office space, and other resources and services the District provides.

The Senate conducts its business at monthly meetings. District representatives regularly attend Senate meetings and provide updates and presentations to teachers. The Senate President, Vice President, and Secretary are included in standing meetings with District administrators, including the District Superintendent, Deputy Superintendent, and Associate Superintendent of Human Resources. The Senate President was included in the 2019-2020 organizational chart for the District.

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[4] According to the District's opposition papers, filed on August 13, 2021, it no longer allows the Senate to use this credit card.

[5] According to the District's opposition papers, it no longer allows the Senate President to use the vehicle.

The District maintains a website at www.cusd.com. The Faculty Senate website is a part of the District's website at www.cusd.com/FacultySenate.aspx. As recently as June 2021, the Senate published its meeting minutes on this website.

In September 2020, following a dispute over the validity of an internal Senate election, the Senate requested that District Associate Superintendent for Human Resources and Employee Relations Barry Jager assist the Senate with a revote. Jager assured Senate members that the vote would be done fairly and properly, and arranged for the District's Technology Department to provide a link to be used by Senate members to cast their votes.

In Spring 2021,[6] following multiple resignations in the Senate, the Senate again asked Jager to assist with its election. Jager was asked to reassure the group regarding the integrity of the election, and again arranged for the District's Technology Department to provide a link for Senate members to cast their votes. On February 26, Jager e-mailed Senators soliciting nominations for the Senate President. The e-mail included a timeline and a job description, and stated: "I want to ensure you that this process will be taken with tremendous pride and all necessary provisions are in place for a fair and accurate voting process." An attachment to the e-mail directed that all nominations were to be sent to Jager.

On March 1, Jager presided over an emergency meeting of the Senate held to discuss electing a new President. On March 5, the Senate distributed a Senator

[6] All further dates are 2021, unless otherwise indicated.

Elections notice, which quoted language from Doc's Charge that the District is "proud that we do not have collective bargaining." The notice included the District's logo.

In 2018, a Senate member sought to make changes to the Senate's bylaws and had to clear the proposed changes with the District. In 2021, the Senate undertook some revisions to its bylaws. One proposed revision provides for the removal of Senators and Officers from office for unprofessional conduct as defined in District policies and that such conduct shall be referred to the District's Human Resources Department. The proposed revisions had not been implemented when ACE filed its injunctive relief request.

ACE alleges that the Senate receives legal support from the District, citing an e-mail from a member of the Senate's Executive Board stating that she had just met with "legal" in Human Resources. The District admits that it did offer to have its legal counsel review the Senate's bylaws, but the offer was not accepted.

Each year the Senate and the District's Human Resources Department jointly develop a "Climate Assessment" survey, which is intended to solicit teacher input about their working conditions and views on representation. Teachers receive the survey via their work e-mail. They are not required to participate but are permitted to answer the survey during paid time.[7] For at least the past five years, the survey has included the following five questions asking teachers to provide their views and opinions regarding the Senate and how it represents teachers:

[7] The District asserts that employees "are not identified" when answering the survey, though the information before us at this stage does not specify what types of anonymity protections may be in place.

1. “Does Faculty Senate support teachers?
2. “Do I have access to Faculty Senate through my Senator?
3. “Does my Senator represent our staff without personal bias?
4. “Does my Senator keep our staff informed?
5. “Do I want Faculty Senate to continue as my representative group?”

The District’s Human Resources Department disaggregates the results for each site, showing both the results of the multiple-choice selections and written comments. Senators then follow up at their site on the issues identified as problems by teachers. They typically do so in two stages. First, Senators meet with their school principals to review the results. Soon thereafter, Senators discuss the results with teachers without any administrator present. Senators are then expected to establish Quality Improvement Teams to address concerns.

III. ACE’s Organizing Campaign and the District’s Response

ACE began organizing around July 2020 but did not officially notify the District of its efforts at that time. On August 21, 2020, then-Senate Vice President Amy Kilburn met with some teachers who expressed their concerns about the Senate not adequately representing them. When Kilburn later met with District administrators, they were upset that Kilburn had met with the teachers and asked for details about who attended the meeting. Kilburn later heard that the District believed ACE representatives attended this meeting. Consequently, Senate representatives now ask District administration before meeting with teachers in large groups if District

administrators will not be present. In at least one case, the District denied such a request.

In January, Jager reached out to Kilburn, telling her that he knew teachers were unhappy and "talking about *things*." He asked what the teachers want and "what does Amy Kilburn want to stop or to feel better about Faculty Senate."[8] When Kilburn met with Jager again, she told him she wanted to create a "safe space" for teachers to learn about unionizing and she wanted administrators to stop asking Senators about who was supporting unionization.

On or about January 25, the Senate held a meeting where there was a discussion about the lack of leadership within the Senate and the "threat" of employees unionizing. The parliamentarian unilaterally decided to table the issue until the next meeting. On March 22, the Senate tabled a discussion about questions Senators received from teachers regarding unions pending "guidance from administration on what could be discussed during a Faculty Senate meeting."

On April 5, more than 70 teachers sent an open letter to the District and the broader community in which they formally announced they had created ACE; they identified themselves as the ACE Organizing Committee. The letter stated that as the District had learned of their efforts to organize teachers over the preceding months, discussion of bonuses and other monetary improvements for teachers had begun. The letter also asked the District to respect their "legally protected, collective decision to

[8] Jager submitted a declaration disputing this allegation and asserting that he asked Kilburn if teachers were concerned that they did not have a strong enough voice through the Senate.

unionize and to not exercise influence, interference or intimidation around [their] efforts." Shortly thereafter, District administrators shared the letter amongst themselves, with one commenting "this makes me sick."

In April, at the Senate President's request, the District's Technology Department created a new e-mail list that improved the Senate's ability to send targeted e-mails to teachers on a regular basis, including weekly updates. On April 9, Jager e-mailed teachers explaining that it is legal for outside representation groups to send e-mails to teachers, but anyone who does not wish to receive such communications can ask to be removed from the ACE's e-mail list. On May 11, a teacher responded and asked Jager if a request to remove her from the ACE's e-mail list required the sender to do so. Jager responded that the representation group should honor the request, and when the teacher said they did not, Jager asked the teacher to send the group's response to him so he could "look into their language."

On April 30, the ACE Organizing Committee wrote to the District that it intended to file a petition for recognition with PERB in the upcoming months. ACE expressed its concerns about the District showing "clear favoritism" toward the Senate and using District resources to oppose ACE. Jager responded on May 14 on behalf of the District and assured ACE that the District "intends to adhere to [its legal] obligations [under EERA] during the ongoing activities" and that it "wish[es] to correct this impression" that it practices "clear favoritism." Jager stated that the Senate "has served as advocates and representatives for teachers as a non-exclusive representative." Jager wrote that the District has "worked collaboratively" with the Senate, just as it has with

other employee organizations, and that is "simply a fact of how business has been conducted."

On May 27, Superintendent Eimear O'Farrell sent an e-mail to employees announcing a $4,000 one-time payment to employees. She also stated that the Employee Compensation Committee (ECC), which includes Senate representatives, was recommending a 5.5 percent increase to salary schedules, a two-day decrease in duty days for the 2021-2022 school year, and an increase in the District's contribution to its health benefits fund. The Superintendent credited these recommendations to the priorities identified on behalf of "employee groups" including the "Faculty Senate, Classified Unit Business Support Senate, and CSEA Chapter 250."

On June 1, after ACE filed an unfair practice charge regarding the District's failure to give ACE notice of these changes, the District offered to meet and discuss them. On June 7, the parties met to discuss the recommendations, which were on the District Board's June 9 meeting agenda. ACE expressed concern over discussing predetermined recommendations which had already been discussed with other employee groups.[9] ACE requested representation equal to the Senate on all committees and at any events. ACE also asked the District for financial information shared with other employee groups since April 5. As of the date of the injunctive relief request, the District had not provided the requested information.

On June 9, the District's Board held a meeting where it considered and approved an action item entitled "Public Disclosure of Collective Bargaining

[9] The District contends that ACE did not propose any changes, and notes that the District's Board did not act on the recommendations until after this meeting.

Agreement Related to Employees," which contained a notation that the "Certificated" unit agreement was "Settled."

On June 23, Jager notified Kilburn by e-mail that the District would "provide ACE and Faculty Senate the same representation at meetings once they resume."

On July 13, representatives from ACE and the District met to discuss a neutral process for organizing. One of the items discussed was the District permitting the Senate to give presentations at new employee orientation. The District stated that because the orientation would be virtual this year, the Senate would not be presenting, and thus ACE would also be excluded to observe neutrality. When ACE asked to be present when the District meets with the Senate, the District instead offered ACE separate meetings on the same agenda. ACE also requested time to present at the District's governing board meetings, as the Senate has done in the past, but the District refused as there were no plans for the Senate to be part of those meetings any longer. ACE also raised concerns over the unequal financial and material support the District was providing the Senate. The District did not address these concerns or provide a timeline for correction.

On August 6, ACE again met with District administrators and asked about the District's efforts to address the unequal organizing environment, including financial support for the Senate. The District was unable to provide any information regarding any steps it had taken in response to ACE's concerns.

That same day, ACE representatives asked Jager for equal access to the "CUSD Sender" e-mail list, which the Senate President uses to send e-mails to the

entire district, because the District's other e-mail lists are not as accurate. As of August 13, the District had not provided ACE access to this e-mail list.

IV. Effects of District Support of the Senate on ACE's Organizing Campaign[10]

The District's continuing support for the Senate after the announcement of ACE's organizing campaign has caused confusion about the legal status of ACE vis-à-vis the Senate. On approximately April 1, ACE organizer Laura Riley spoke to a teacher who believed that the Senate already represented teachers and was "our own type of union" that made decisions with the District. Riley spoke to another teacher who thought the Senate was already the elected representative of teachers. In April or May, Riley met with another teacher who also believed the Senate was an elected representative and asked if ACE's attempt to unionize teachers was "breaking the law." The teacher remained confused even after Riley discussed the law regarding unionization. Since April, Riley has received an average of two or three questions every week from teachers who are confused about the legal status of the Senate and ACE.

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[10] The District argues that the statements alleged in this section cannot be considered because they are hearsay. It is generally accepted that hearsay evidence may be considered in deciding whether temporary injunctive relief is appropriate in an unfair labor practice case. (*Coffman v. Queen of the Valley Medical Center* (9th Cir. 2018) 895 F.3d 717, 729; *Asseo v. Pan American Grain Co., Inc.* (1st Cir. 1986) 805 F.2d 23, 26.) Moreover, testimony that employees feared retaliation by their employer for supporting a union is subject to the hearsay exception for the declarant's existing state of mind. (*Hirsch v. Corban Corporations, Inc.* (E.D. Pa. 1996) 949 F.Supp. 296, 303-304; *Lightner v. Dauman Pallet, Inc.* (D.N.J. 1992) 823 F.Supp. 249, 252, fn. 2.) Such testimony is "not accepted to establish the employer acts which caused fear, but simply that the fear existed. That fear is highly relevant to the propriety of injunctive relief." (*Lightner v. Dauman Pallet, Inc.*, *supra*, 823 F.Supp. at p. 252, fn. 2.)

In addition to causing confusion, the District's continuing support for the Senate has led multiple teachers who initially expressed support for ACE to later revoke their support. One teacher who supported ACE in February said in March that the "new" Senate needed a chance, and then he himself became a Senator. Another teacher told Kilburn she supported ACE, but then in April changed her mind because she was impressed with the District's response to ACE and wanted to see how things turned out.

Teachers also fear that the District will retaliate against them for supporting ACE. At the end of April, teachers reported hearing of a District principal telling teachers that if employees sign a petition in support of ACE, they must want to work at a particular school site where students with behavior issues are sent, and that if Area Superintendent Steve France found out he would transfer employees there. Employees understood this as a threat and became reluctant to sign a petition in support of ACE.

One teacher who supported ACE before its efforts to organize became public later told Kilburn she "wanted her signature back" so the District would not be able to know she supported ACE. One teacher reportedly told an ACE organizer that "signing for ACE was like signing a death sentence." One teacher arranged to sign his support for ACE in private so that no one would see him meeting with an ACE supporter. Other teachers requested that ACE organizers keep their association with ACE secret so that a family member applying for a position with the District would not face retaliation.

On June 4, the last day of the school year, a Senator told Kilburn she should go to a so-called “union district.” Many other teachers have simply opted not to support ACE because it is “not the Clovis way.”

PROCEDURAL HISTORY

On June 1, ACE filed its unfair practice charge in Case Number SA-CE-3040-E. On August 6, ACE amended that charge and filed a separate unfair practice charge in Case Number SA-CE-3047-E. On August 11, ACE filed an injunctive relief request as to both cases. The parties filed briefs and numerous declarations over the ensuing week. On August 19, the Board granted the injunctive relief request, and OGC issued complaints in each case.

The complaint in Case Number SA-CE-3040-E mainly alleges that the District violated EERA when it, among other things: (1) failed to remain neutral between ACE and the Senate; (2) dominated, interfered with the administration of, and contributed financial or other support to the Senate; (3) limited the rights of ACE and employees to communicate with teachers; and (4) acting through the Senate, issued several communications that interfered with protected rights. That complaint also alleged that the District violated PEDD section 3550 by deterring and discouraging employees from supporting ACE.

The complaint in Case Number SA-CE-3047-E alleges that the District violated EERA by, among other things: (1) failing to provide financial information that the District had shared with other employee organizations; (2) interrogating, surveilling, surveying, and/or polling teachers concerning their beliefs, positions, or intentions regarding unionization, collective bargaining, goals or aims of employees favoring or

disfavoring unionization, or the reasons employees may favor or disfavor certain organizations; (3) unilaterally improving teachers' working conditions thereby granting them a benefit; (4) failing to address ACE's concerns about providing preferential treatment to the Senate; and (5) retaliating against Kilburn for protected activities by discontinuing an extra class and associated stipend that she had enjoyed for 15 years.

DISCUSSION

"Upon issuance of a complaint charging that any person has engaged in or is engaging in an unfair practice, the board may petition the court for appropriate temporary relief or restraining order." (EERA, § 3541.3, subd. (j).) "PERB cannot seek an injunction unless it finds (1) 'reasonable cause' to believe an unfair practice has been or will be committed; and (2) that injunctive relief is 'just and proper.'" (*San Mateo County Superior Court*, *supra*, PERB Order No. IR-60-C, p. 2, citing *Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 895-896 (*Modesto*).) Even when both prongs of the *Modesto* test are satisfied, the Board retains substantial discretion to decide whether injunctive relief should be sought and, if so, the appropriate scope of such relief. (*El Rancho Unified School Dist. v. National Education Assn.* (1983) 33 Cal.3d 946, 961; *Modesto*, *supra*, 136 Cal.App.3d at p. 895 [PERB "carefully considered and investigated the situation" and sought a "rational, practical" combination of interim injunctive relief measures]; *San Mateo County Superior Court*, *supra*, PERB Order No. IR-60-C, pp. 2-3.)

As the above procedural history indicates, these cases involve numerous alleged violations, implicating a wide variety of legal theories. Several of the alleged violations, however, are the type that tend to erode support for ACE if not enjoined.

We therefore exercise our discretion to seek a narrow injunction based on this subset of alleged violations because it is the least amount of interim relief necessary to prevent irreparable harm and preserve our remedial authority.

I. Reasonable Cause

To establish the "reasonable cause" prong of the *Modesto* test, the Board must sustain "a minimal burden of proof." (*Modesto*, *supra*, 136 Cal.App.3d at p. 902.) "It need not establish an unfair labor practice has in fact been committed[,] nor is the court to determine the merits of the case." (*Ibid*.) "[T]he key question is not whether PERB's theory would eventually prevail, but whether it is insubstantial or frivolous." (*Id*. at p. 897, italics omitted.)

One category of ongoing alleged conduct that must be enjoined, because it infringes on employee free choice in a long-lasting manner that cannot be remedied after-the-fact, involves the District violating EERA section 3543.5, subdivision (d) by: (1) dominating or interfering with the administration of the Senate; (2) contributing financial or other support to the Senate; and (3) violating its duty of strict neutrality by favoring the Senate over ACE. A second category of alleged conduct creates a similar problem: the District has communicated with teachers in a way that deters or discourages support for ACE in violation of PEDD. As set forth below, ACE has established reasonable cause to believe that the District committed—and continues to commit—such unfair practices in violation of EERA and PEDD.

A. Reasonable cause exists to believe the District has violated—and continues to violate—EERA section 3543.5, subdivision (d).

EERA section 3543.5, subdivision (d) makes it unlawful for a public school employer to "[d]ominate or interfere with the formation or administration of any

employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another." To show a prima facie violation of EERA section 3543.5, subdivision (d), the charging party must allege facts which demonstrate that the employer's conduct tends to interfere with the internal activities of an employee organization or tends to influence employees' choice between employee organizations. (*Santa Monica Community College District* (1979) PERB Decision No. 103, p. 22 (*Santa Monica*); *Redwoods Community College District* (1987) PERB Decision No. 650, adopting proposed decision at p. 53 (*Redwoods*).) Whether an employer has violated EERA section 3543.5, subdivision (d) is based on the totality of the circumstances. (*Redwoods*, *supra*, PERB Decision No. 650, adopting proposed decision at p. 54.) Proof that an employer intended to unlawfully dominate, assist, or influence employees' free choice is not required. (*Id*., adopting proposed decision at pp. 56-57.) Nor is it necessary to prove that employees actually changed their support as a result of the employer's conduct. (*Santa Monica*, *supra*, PERB Decision No. 103, p. 22.)

The charges allege that the District violated all three prohibitions in section 3543.5, subdivision (d). We consider each in turn.

1. Allegations that the District is dominating or interfering with the administration of the Senate

EERA section 3543.5, subdivision (d)'s prohibition on "[d]ominat[ing] or interfer[ing] with the formation or administration of any employee organization" looks to whether the employer's conduct tends to interfere with the employee organization's ability to maintain an arm's length relationship with the employer. (*City of Arcadia* (2019) PERB Decision No. 2648-M, pp. 24-25 (*Arcadia*); *Azusa Unified School District*

(1977) EERB Decision No. 38, adopting recommended decision at p. 6, fn. 3 (*Azusa*).)[11] In such cases, PERB considers the level of the employer's involvement in the employee organization's internal affairs. (*Arcadia*, *supra*, PERB Decision No. 2648-M, p. 23; see *Poway Unified School District* (2015) PERB Decision No. 2441, p. 54 ["an employer must not intervene to address the lawfulness of a union's internal procedures affecting voting or to police the union's actions, lest it be held liable for interfering in the administration of the union"].)

At this stage, the information before us does not resolve whether the District created the Senate.[12] But the available information does show that the District is intimately involved in the Senate's internal affairs.

The District's official policy holds the Senate out as the representative for teachers, thereby giving it the District's imprimatur. For example, the District's official disciplinary policy provides that a teacher may have a Senate representative present at disciplinary meetings. The District's organizational chart shows that the Senate President reports to the District Superintendent. The District and the Senate jointly develop the yearly Climate Assessment Survey, which is administered by school site Senators.

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[11] Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board or EERB.

[12] The District's superintendent sent a letter to faculty in 1977 endorsing the Senate concept after it had been proposed "as an alternative to exclusive representation and collective bargaining." (*Clovis*, *supra*, PERB Decision No. 389, adopting proposed decision at pp. 31-32.) It is unclear who made the proposal the Board referenced in *Clovis*, or what steps were then taken to create the Senate.

As a result of a teacher's complaints to the District regarding the conduct of the Senate, the District performed an investigation, and informed the teacher that the Senate determined it would take action, including amending its bylaws to address the issue. One of these proposed revisions provides that removal from office of Senators and Officers for unprofessional conduct—as defined in District policies—would be referred to the District's Human Resources Department.

Following concerns by members of the Senate regarding the validity of the last two internal elections, the Senate asked Associate Superintendent Jager to step in to assure members that the vote would be done fairly and properly. While the District downplays its involvement as only providing links for members to vote, the fact that the District involved itself to alleviate Senate members' concerns over the election indicates that the Senate is able to receive assistance from the District in internal organizational matters and creates the impression that the District is directly involved in administering the Senate.

When questions regarding unionization arose at a Senate meeting, a motion was made "to table [the] Union conversation until we could receive guidance from administration on what could be discussed during a Senate meeting." A former member of the Executive Board needed the District's permission to revise the Senate's bylaws, and likewise needed the District's permission before meeting with teachers in large groups at school sites. The Senate thus seeks the District's permission and advice on various internal and organizational matters.

District administrators regularly attend and give presentations at Senate meetings. The Senate also sits on several committees with other employee

organizations and administrators that provide recommendations to the District Board on employment matters. After a teacher complained to the District about the Senate's cancellation of meetings, the Associate Superintendent agreed with her that the meetings should not have been cancelled, and then moved the Senate President's office in order to keep an eye on the President.

The District's de facto recognition of the Senate has continued since ACE gave notice of its organizing campaign, including the continued domination of and interference with the Senate's internal affairs, further contributing to the unmistakable conclusion that the Senate is a "company union," by: (1) hosting the Senate's webpage on the District's website; (2) directing its Technology Department to assist the Senate in two elections; (3) offering to have its legal counsel review the Senate's bylaws; (4) allowing the Senate to use the District's Climate Assessment Survey to poll teachers about their views on the Senate; and (5) setting up an e-mail list for the Senate President to communicate with teachers via the District's e-mail system.

Taken together, the totality of the circumstances establishes reasonable cause to believe that the District has had—and continues to have—pervasive involvement in the affairs of the Senate in violation of EERA section 3543.5, subdivision (d). (*Arcadia*, *supra*, PERB Decision No. 2648-M, p. 24; *Redwoods*, *supra*, PERB Decision No. 650, p. 2 and adopting proposed decision at pp. 54-55.)

2. Allegations that the District is providing financial support and other assistance to the Senate

EERA section 3543.5, subdivision (d) prohibits contributing "financial or other support" to an employee organization. In determining if an employer has violated this prohibition, we examine the totality of the employer's conduct to determine whether its

support would tend to inhibit employees in their free choice regarding a bargaining representative or interfere with the representative's maintenance of an arm's length relationship with the employer. (*Arcadia*, *supra*, PERB Decision No. 2648-M, pp. 24-25.) This is an objective test; it is not necessary to look into the employer's intent or the employees' subjective reaction to the employer's assistance to the employee organization. (*Arcadia*, *supra*, PERB Decision No. 2648-M, pp. 24-25; *NLRB v. Vernitron Elec. Components, Inc., Beau Products Div.* (1st Cir. 1977) 548 F.2d 24, 26.)[13]

The most common type of unlawful support case involves an employer that provides support to one of two competing nonexclusive representatives. The Board usually resolves such cases by deciding whether the employer failed to remain strictly neutral between the two competing organizations. Here, ACE and the Senate are both nonexclusive representatives and the District therefore must treat them equally with respect to financial or other support. (*Redwoods*, *supra*, PERB Decision No. 650, adopting proposed decision at pp. 54-57; *Clovis*, *supra*, PERB Decision No. 389, p. 9.) We thus must decide whether the District failed to remain strictly neutral by providing support to the Senate but not to ACE.[14]

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[13] 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.)

[14] As an early Board decision recognized, "it may be an unfair practice to render assistance to an employee organization even if there is no other organization in competition with it." (*Azusa*, *supra*, EERB Decision No. 38, adopting recommended decision at pp. 6-7.) Because that situation is not present here, we need not decide

Clovis, *supra*, PERB Decision No. 389, is instructive. There the Board found that the District violated EERA by giving assistance and support to the Senate that it did not also provide to the Clovis Unified Teachers Association (CUTA), a competing nonexclusive representative. (*Id*. at p. 8.) The assistance and support consisted of typing and distribution of minutes, and provision of stationery and release time to the Senate, which was not offered to CUTA. (*Ibid*.) The Board also found that the District's crediting the Senate with being responsible for teachers not having to work the final Saturday of the school year, reorganized grievance procedures, and a proposed salary increase demonstrated further favoritism toward the Senate. (*Id*. at p. 10.) Given that the District unlawfully favored the Senate by not affirmatively offering the same support to CUTA, the Board found it "not necessary to decide whether, as the District claims, its conduct constituted 'permissible cooperation' rather than unlawful support." (*Id.* at p. 9.) Consistent with its decision not to reach that issue, the Board's remedial order prohibited the District from preferencing one nonexclusive representative over another, but it did not bar the District from providing equal support to both nonexclusive representatives. (*Id*. at p. 21.) Thus, while the Board noted that the District's "relationship of support for the Faculty Senate [] not only exceeded its statutory obligations [to a nonexclusive representative], but tended to create the

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what level of employer support is unlawful in the absence of a competing employee organization. Board decisions also have recognized that an employer may provide support to an exclusive representative without having to provide the same support to a competing nonexclusive representative. (See, e.g., *County of San Bernardino* (2018) PERB Decision No. 2556-M, pp. 10 & 18; *West Contra Costa Healthcare District* (2010) PERB Decision No. 2145-M, p. 22.) Because the Senate is not an exclusive representative, that line of cases does not apply here.

appearance, if not the fact, of an 'in-house' or 'company' union" (*id*. at p. 19), the Board's overall approach suggested that the District may not have violated EERA section 3543.5, subdivision (d) had it affirmatively offered the same support to CUTA.

In *Redwoods*, *supra*, PERB Decision No. 650, lack of neutrality combined with other factors led the Board to order the employer to cease supporting the preferred nonexclusive representative. There, the employer formed a Classified Employees Council and provided it with release time and a revolving fund for social and recreational activities. The Council was 100 percent employer funded; it did not receive dues from employees.[15] The employer also conducted elections for the Council, allowed it to use district stationery and copying facilities, and sometimes distributed its questionnaires to employees. (*Id*., adopting proposed decision at p. 58.) Although the employer's financial assistance was limited, the Board nonetheless found it was "impermissible activity under Section 3543.5[, subdivision] (d)" (*id*., adopting proposed decision at p. 57) and ordered the employer to disestablish the Council. The Board reached this conclusion in a context in which the employer failed to offer the same support to the charging party (an exclusive representative), the Council was 100 percent employer-funded, and the employer dominated the Council by forming it and assisting with administration. (See *id*., adopting proposed decision at pp. 54-57.)

[15] Just as offering support equally to competing nonexclusive representatives makes it less likely that either organization appears to be a company union, so too does an organization having a dues structure as a primary means of funding make it look less likely that some level of employer financial support equates to employer control.

As noted in *Redwoods*, PERB precedent does not clearly demarcate the line between permissible and impermissible employer support. (*Redwoods*, *supra*, PERB Decision No. 650, adopting proposed decision at p. 53.) But neither *Redwoods* nor any other Board decision has held that financial or other support is unlawful when it is not accompanied by other conduct indicating preferential treatment, domination, or interference. Indeed, in *Redwoods* the Board considered all the assistance in its totality: "[w]hile any of these forms of assistance, standing alone, may not rise to the level of unlawful conduct, when considered in their totality they present a pattern of employer assistance which cannot realistically be described as mere cooperation." (*Id*., adopting proposed decision at p. 59.) Board precedent thus does not absolutely bar an employer from providing release time and other support, either as a result of bargaining with an exclusive representative or by offering such support on an equal basis to all nonexclusive representatives.

In the present case, the information before us suggests the District provides a high level of support, in absolute terms, to the Senate because the Senate is 100 percent employer-funded. Also, as discussed *ante*, the District dominates and interferes with the Senate's internal affairs and, as discussed *post*, expresses a preference for the Senate over ACE, while failing to offer ACE the same support the Senate receives. Under existing Board precedent, this is sufficient to establish reasonable cause to believe the District violated—and continues to violate—EERA

section 3543.5, subdivision (d)'s prohibition on contributing financial or other support to an employee organization.[16]

3. Allegations that the District breached its duty to observe strict neutrality

In cases where two employee organizations are competing for the right to represent the same employees, the employer must remain neutral. (*County of Monterey* (2004) PERB Decision No. 1663-M, adopting proposed decision at pp. 17-18.) To establish a violation of EERA section 3543.5, subdivision (d)'s prohibition on "encourag[ing] employees to join any organization in preference to another," the test is "whether the employer's conduct tends to influence [free] choice or provide stimulus in one direction or the other." (*Santa Monica*, *supra*, PERB Decision No. 103, p. 22.)[17]

On April 5, ACE notified the District that it was an employee organization that represented certain District teachers. On April 30, ACE informed the District that it intended to file a recognition petition with PERB and asserted its rights and the District's obligations under EERA. ACE requested that the District provide it with

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[16] Since we make no conclusive factual findings at this preliminary stage, we express no opinion as to whether the District could lawfully provide such support to the Senate had it offered equal support to ACE and avoided other dominating, interfering, and preferential conduct.

[17] When one organization is an exclusive representative and the other is not, remaining neutral may include continuing to bargain with the incumbent union and to honor contractual and legal obligations to that union. (*RCA Del Caribe, Inc.* (1982) 262 NLRB 963, 965-966; *West Contra Costa Healthcare District*, *supra*, PERB Decision No. 2145-M, p. 22.) But if the employer goes beyond such commitments, it must be careful to do so equally. Here, since neither the Senate nor ACE is an exclusive representative, they are owed exactly equal treatment.

notice and the opportunity to meet and discuss any changes to teachers' terms and conditions of employment the District contemplated. ACE expressed its concern that the District and Senate had incorrectly represented to teachers that the Senate was their representative, existing policies demonstrated favoritism by the District for the Senate, the District continued to provide the Senate with resources including paid release time, and the Senate was using that time to oppose ACE.

Around this same time, Senate representatives participated in the ECC and recommended changes to the working conditions of teachers. Then the Superintendent credited these recommendations to the Senate and the other organizations participating on the committee. During April and May, the Senate made statements to teachers that it is the representative for teachers, and that it opposes unionization at the District.

In opposing the injunctive relief request, the District claims it will include ACE in committee meetings and asserts it met multiple times with ACE over the summer. While the District further asserts that it will treat both organizations equally, it has not done so. Since ACE announced its organizing campaign, the District stopped providing a vehicle and credit card for Senate use, but continues to provide stipends to Senate members, release time for Executive Board members, an operating budget, and use of an office to perform Senate duties.

Likewise, the District continued to maintain policies declaring that the Senate is the representative of teachers, including for disciplinary matters. In April, the Senate assisted the District with distribution of the Climate Assessment Survey, which solicited teachers' views on the Senate's representation.

District representatives also continued to meet with the Senate about matters fundamental to the employment relationship (e.g., length of the school year, wages, health benefits), and made a significant change in benefits without first notifying or meeting with ACE. Senate representatives participating in the ECC prepared recommendations for the District's Board on compensation and other employment issues. The District, despite being aware of ACE's status as a nonexclusive employee organization, did not notify ACE that this committee was meeting. On May 27, Superintendent O'Farrell sent an e-mail to employees announcing a $4,000 payment and informed them that the ECC was also recommending a 5.5 percent increase to salary schedules, two fewer duty days, and an increase in the District's contribution to its health benefits fund. The Superintendent credited these recommendations to the priorities of employees represented by the Senate and the other organizations participating on the committee.

An employer that does not maintain strict neutrality in the face of competing employee organizations is deemed to encourage employees to prefer one organization over another, in violation of employees' right to choose an organization free of employer interference. (*Azusa*, *supra*, EERB Decision No. 38, pp. 7-8.) Here, it is undisputed that the District continues to provide financial support and other assistance to the Senate and is not offering the same level of support to ACE. As we observed in *Clovis*, *supra*, PERB Decision No. 389, "strict neutrality clearly required the District either to discontinue these practices, . . . or, to the extent that its conduct constituted 'permissible cooperation,' to affirmatively make similar assistance available to all employee organizations." Its failure to do either sends the message that it favors

the Senate over ACE, thereby unlawfully tending to influence employee choice between the two organizations. The District's history of disregarding our decision in *Clovis*, and in failing to treat the two competing organizations equally again in 2021, further belies its promises to do so.

Additionally, just as in *Clovis*, *supra*, PERB Decision No. 389, the District credited the Senate with securing a benefit for certificated employees—here, a $4,000 payment, 5.5 percent salary increase, two-day decrease in duty days, and an increase in the District's contribution to its health benefits; there, eliminating the last Saturday of the school year as a workday, reorganized grievance procedures, and a proposed salary increase. This conduct has the tendency to encourage employees to support the Senate over ACE in order to continue receiving Senate-negotiated benefits from the District. (*Id*. at pp. 19-20.) Thus, there is reasonable cause to believe the District breached its duty of strict neutrality in violation of EERA section 3543.5, subdivision (d).

A charging party union need not establish employer intent or actual diminution in its level of support in order to succeed in a charge under EERA section 3543.5, subdivision (d). (*West Contra Costa Healthcare District* (2011) PERB Decision No. 2164-M, p. 6.) Nonetheless, as discussed *post*, there is substantial information before us suggesting that the District's conduct has led to diminished support for ACE, thereby further supporting our conclusion that there is reasonable cause to believe the District violated—and continues to violate—EERA section 3543.5, subdivision (d) by showing preference for the Senate over ACE.

B. There is reasonable cause to believe the District has deterred and discouraged support for ACE in violation of PEDD section 3550.

PEDD section 3550 provides that "[a] public employer shall not deter or discourage public employees or applicants to be public employees from becoming or remaining members of an employee organization, or from authorizing representation by an employee organization, or from authorizing dues or fee deductions to an employee organization." "'Deter or discourage' means to tend to influence an employee's free choice regarding whether or not to (1) authorize union representation, (2) become or remain a union member, or (3) commence or continue paying union dues or fees." (*Regents of the University of California* (2021) PERB Decision No. 2755-H, p. 21 (*Regents*).) To establish a prima facie case of a section 3550 violation, the charging party need only show that the challenged conduct or communication is reasonably likely to deter or discourage employee free choice, not that the conduct actually did deter or discourage employees. (*Id*. at p. 24.) In cases that involve union organizing, section 3550 leaves it to employees on opposite sides of the organizing debate to lobby their colleagues without the employer's involvement, except where a business necessity compels the employer to take some action that may also incidentally influence employee free choice. (*Alliance Marc & Eva Stern Math & Science High School, et. al.* (2021) PERB Decision No. 2795, pp. 70-71 (judicial appeal pending).)

1. Content of the District's Communications

We begin by examining the content of the District's communications during ACE's organizing campaign. (*Regents*, *supra*, PERB Decision No. 2755-H, pp. 41-42.) Several days after ACE announced its organizing campaign to the District, Associate

Superintendent Jager sent an e-mail to teachers stating that anyone who does not wish to receive communications from ACE should request to be removed from their ACE's e-mail list.

On May 14, in response to a letter from ACE expressing its concern that the District was showing clear favoritism to the Senate, Jager responded that the Senate "has served as advocates and representatives for teachers as a non-exclusive representative." He also said the District's close relationship with the Senate is "simply a fact of how business has been conducted."

On May 27, Superintendent O-Farrell sent an e-mail to employees crediting the Senate with securing a $4,000 one-time payment to employees, and recommending a salary increase, a two-day decrease of duty days, and increased District contributions to healthcare premiums.

The content of these communications tends, in several ways, to influence employees' choice whether or not to authorize representation by ACE. First, they create the impression that the Senate is already the teachers' established bargaining representative, causing teachers to doubt ACE's status as a legitimate employee organization. Such communications have led some teachers to question whether there would be any point to organizing since they are already represented and have left others confused about the relative status of the Senate and ACE.[18] Some teachers question whether ACE is an "illegal" interloper that they should not support. By casting

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[18] Although the charging party need not allege or prove that the employer's conduct actually deterred or discouraged employee support for a union (*Regents*, *supra*, PERB Decision No. 2755-H, p. 24), we are not required to ignore such information when it is present.

doubt on ACE's legitimacy, the District's communications tend to deter or discourage support for ACE.

Second, the communications suggest that it is the Senate, not ACE, that can achieve better working conditions for teachers because of its close relationship with District administration. The District Superintendent's e-mail to teachers gave the Senate credit for securing a $4,000 one-time payment to employees, and recommending a salary increase, a two-day decrease of duty days, and increased District contributions to healthcare premiums. In *Regents of the University of California* (2021) PERB Decision No. 2756-H, the university sent a flyer to unrepresented employees who were the target of a union organizing campaign. The flyer suggested that the wage increases of employees represented by the union were less substantial than unrepresented employees' wage increases, and that unrepresented employees "already have sufficient job protections." (*Id*. at p. 9.) We found this communication tended to influence employee free choice because it suggested employees would be better off without union representation. (*Ibid*.) The same tendency is present here, where the Superintendent's e-mail implies that ACE would not be able to obtain the same benefits for teachers as the Senate.

Third, the communications evince the District's animus toward unionization. According to Doc's Charge, which is given to newly-hired teachers and posted in the District's Boardroom, the District is "proud that we do not have collective bargaining." Additionally, in April 2021, teachers reported hearing of a principal telling teachers that if employees signed in support of ACE's petition, and if Area Superintendent Steve

France found out, he would transfer employees to a particular school site where students with behavioral issues are sent.

The District's communications, viewed as a whole, tended to influence employee choice about whether or not to authorize representation by ACE by strongly suggesting that unionization is against the District's longstanding viewpoint and has no place when the Senate provides the representation ACE could provide. Based solely on the content of the communications, reasonable cause exists to believe the District violated PEDD section 3550.

2. Contextual Circumstances

In addition to the content of the communications, several contextual factors further support finding a prima facie section 3550 violation here. (*Regents*, *supra*, PERB Decision No. 2755-H, p. 43.) First, the communications occurred against the backdrop of the District's longstanding opposition to collective bargaining. For decades the District has distributed Doc's Charge to its teachers upon hire. Doc's Charge, which appears to serve as the District's mission statement, provides in pertinent part that the District is "proud that we do not have collective bargaining." Consistent with this statement, the District tells newly-hired employees that the District is a nonunion district.

Second, the communications occurred in the context of the District's longstanding support of the Senate as an alternative to collective bargaining. The Senate's bylaws provide that it is "to be an effective advocate for teachers at all levels of policy making, procedures, and expenditures, in partnership with our administrators, fellow employees, and community as a quality educational team." Similarly, District

Board Policy No. 4118 states: “The Clovis Unified School District Faculty Senate is the representative body for teachers of the District.” The District’s official disciplinary policy provides that a teacher may have a Senate representative present at disciplinary meetings. The Senate and the District thus both hold out the Senate as the teachers’ representative in dealing with the District. This, in turn, colors teachers’ perception of the District’s communications about ACE and the Senate.

Third, the timing and repetition of the communications would tend to influence employee free choice about supporting ACE. Many of the communications described *ante* occurred in the two months after ACE announced its organizing campaign on April 5. This timing strengthens their impact, as does circulating similar messages on a repeated basis, which would tend to cause a reasonable employee to believe “the message[s were] particularly urgent and important” to the District. (*Regents*, *supra*, PERB Decision No. 2755-H, p. 44.)

Finally, as discussed *ante*, the District provides essentially all the resources needed for the Senate to operate, including paying employees to engage in Senate activities, paying the organization’s expenses, providing office space, and providing professional services. Not only did the District administer the Senate’s internal elections, but the District also exercised oversight of the Senate’s representational functions, and prompted the Senate to revise its bylaws which, in their current proposed form, would increase District control and assistance to the organization.

Although the content of the communications themselves tended to influence employee choice, that tendency was strengthened by the context in which the communications occurred—shortly after ACE announced its organizing campaign, by

high-ranking administrators of the District, which has long supported the Senate as the District's preferred alternative to collective bargaining. This context further supports finding reasonable cause that the District deterred or discouraged support for ACE in violation of PEDD section 3550.[19]

II. Just and Proper

To meet the second prong of the *Modesto* test, PERB must demonstrate to the court that injunctive relief is "just and proper." "Although [interim] injunctive relief is an extraordinary remedy, it may be used whenever an employer or union has committed unfair labor practices which, under the circumstances, render any final order of the Board meaningless or so devoid of force that the remedial purposes of [EERA] will be frustrated." (*Modesto*, *supra*, 136 Cal.App.3d at p. 903.) The "just and proper" standard is met "[w]here there exists a probability that the purposes of [EERA] will be frustrated unless temporary relief is granted or the circumstances of a case create a reasonable apprehension that the efficacy of the [Board's] final order may be nullified, or the administrative procedures will be rendered meaningless." (*Id*. at p. 902, internal brackets and quotations omitted.) Injunctive relief is just and proper here because certain of the District's alleged unfair practices have the foreseeable effect of causing employee support for ACE to vanish before PERB's administrative adjudication procedures are complete.

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[19] When a charging party establishes a prima facie violation of section 3550, "the burden then shifts to the employer to plead and prove a business necessity as an affirmative defense." (*Regents of the University of California*, *supra*, PERB Decision No. 2756-H, p. 7.) Because we make no conclusive factual findings at this preliminary stage, any affirmative defense the District may raise to the section 3550 allegation must be resolved at a formal evidentiary hearing. (*Id*. at p. 9.)

"PERB's injunctive relief authority, when invoked by employees or employee organizations, serves two purposes: to protect the integrity of the collective bargaining process, including the right of employees to choose their representative organizations and the right of employee organizations to organize in the workplace; and to preserve the effectiveness of PERB's remedial power while the merits of the case are being decided." (*Trustees of the California State University (East Bay)* (2013) PERB Order No. IR-56-H, p. 4 (*Trustees*), citing *Frankl v. HTH Corp.* (9th Cir. 2011) 650 F.3d 1334, 1355 (*Frankl*).) Like the authority vested in the National Labor Relations Board by the National Labor Relations Act (NLRA) section 10, subdivision (j), "PERB's injunctive relief authority seeks to vindicate the public interest, rather than purely private rights."[20] (*Trustees*, *supra*, PERB Order No. IR-56-H, p. 4, citing *Miller v. California Pacific Medical Center* (9th Cir. 1994) 19 F.3d 449, 455, overruled on other grounds, *Winter v. Natural Resources Defense Council, Inc.* (2008) 555 U.S. 7.) In labor board injunction cases, "the public interest is to ensure that an unfair labor practice will not succeed because the [b]oard takes too long to investigate and adjudicate the charge." (*Frankl*, *supra*, 650 F.3d at p. 1365.) "In this way, the injunctive relief available through collective bargaining statutes differs from traditional injunctive relief available through the civil judicial system." (*Trustees*, *supra*, PERB Order No. IR-56-H, p. 4.)

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[20] The NLRA is codified at 29 U.S.C. section 151 et seq. NLRA section 10, subdivision (j) provides, in relevant part: "The Board shall have power, upon issuance of a complaint as provided in subsection (b) [of this section] charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order." (29 U.S.C. § 160, subd. (j).)

As provided for in collective bargaining statutes, “interim relief is designed to prevent employers from using unfair labor practices in the short run to permanently destroy employee interest in collective bargaining. To allow such interference with a unionization effort would make the [b]oard’s remedial process ineffective simply because it is not immediate.” (*Pye v. Excel Case Ready* (1st Cir. 2001) 238 F.3d 69, 75.) Courts consequently have recognized that “the disappearance of the ‘spark to unionize’ may be an irreparable injury for the purposes of” injunctive relief. (*Ibid*.; see *Small v. Avanti Health Systems, LLC* (9th Cir. 2011) 661 F.3d 1180, 1192 [“[a]s time passes, the benefits of [representation] are lost and the spark to organize is extinguished. The deprivation to employees from the delay in bargaining and the diminution of union support is immeasurable”].

Injunctive relief is just and proper when an employer is using a company union to hinder an outside union’s efforts to organize its employees. For example, in *Fuchs v. Jet Spray Corp.* (D. Mass. 1983) 560 F.Supp. 1147 (*Fuchs*), the court granted an injunction where the employer established a committee to resolve employee grievances and then negotiated a collective bargaining agreement with the committee in the face of an outside union’s organizing campaign. (*Id*. at pp. 1155-1156.) The company’s president created the committee, had his secretary take notes during its meetings that occurred on company time, and gave committee members free run of the plant and ready access to supervisors. (*Id*. at pp. 1150.) Company management also told employees that their complaints could be resolved without the help of “outsiders.” (*Ibid*.) As a basis for granting injunctive relief, the court observed that “the [company’s] recognition confers upon the [committee] a certain favored status, and the

contract it negotiated serves to solidify its position as employee representative." (*Id*. at p. 1156.) As the court recognized, failure to grant injunctive relief "may make a fair election in the future impossible." (*Ibid*.)

As in *Fuchs*, the employer in *Hirsch v. Trim Lean Meat Products, Inc.* (D. Del. 1979) 479 F.Supp. 1351 (*Hirsch*), recognized and collectively bargained with one union, United, while another union campaigned to represent its employees. (*Id*. at p. 1354.) The court found reasonable cause to believe that the employer unlawfully assisted United and discharged over twenty supporters of the rival union, which "most likely had a drastic impact upon the [rival union's] organizational support." (*Id*. at p. 1361.) The court then explained why an injunction was just and proper:

> "The longer these violations go unremedied, the less likely it is that the policies of the Act, such as according employees a free and unhampered right to choose their own collective bargaining representatives, and allowing employees to reap the benefits of collective bargaining conducted by these representatives, can be effectuated. Absent injunctive relief, the employer will be free to deal with United as though that union had been properly selected by a majority of its employees, while further undermining the strength of [the rival union] through its unlawful conduct."

(*Ibid*.)

As in *Fuchs* and *Hirsch*, injunctive relief is necessary here to prevent the District's ongoing unfair practices from eroding support for ACE while PERB adjudicates the underlying unfair practice charges. There has never been an election or other determination that a majority of the District's teachers support the Senate as their representative. Nonetheless, since 1977 the District has treated the Senate as the representative of its teachers. The District negotiates wage and benefit changes

with the Senate, and grants it preferential access to meetings, school sites, and the District's e-mail system—access it has not granted to ACE. The District also fully funds the Senate's operations, pays Senators and Officers stipends, and provides the Senate with office space. Unlike the hastily recognized company unions in *Fuchs* and *Hirsch*, the Senate is deeply entrenched as the District's longstanding preferred employee organization. Against this backdrop, the District's recent communications suggest that the Senate would be a better representative because of its existing close relationship with District administration, and explicitly state the District remains opposed to true collective bargaining. Without an injunction, the District can continue to use the Senate as a cudgel to crush ACE's organizing efforts. If those efforts are extinguished before PERB can resolve the underlying unfair practice charges, any remedy PERB could order at the conclusion of its adjudication process would be meaningless.

Here, diminution of support for ACE resulting from the District's alleged unfair practices is not merely speculative or threatened; the declarations submitted in support of the request for injunctive relief show that loss of support has already occurred because of the District's current course of action.[21] Several teachers who supported ACE prior to its public announcement have since revoked their support. Some teachers did so out of fear that the District would know they supported ACE, and another because he received a position on the Senate. Other teachers remain

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[21] To succeed in an injunctive relief request, a charging party employee organization need not establish actual diminution in its level of support. (*County of San Joaquin (Health Care Services)* (2001) PERB Order No. IR-55-M, pp. 13-14.) Nonetheless, we are not required to ignore allegations of such diminution.

confused about the legal status of ACE and the Senate, due in part to the District's and the Senate's statements about the Senate's role in representing teachers. And various teachers have expressed their concern over District retaliation if it discovers their support for ACE. This information suggests that the District's conduct has already negatively impacted ACE's organizing campaign and that it will continue to be negatively impacted if the District is allowed to continue on the same course while PERB adjudicates the unfair practice charges.

For all these reasons, it is necessary to obtain an affirmative order for the District to place ACE on equal footing with the Senate while ACE pursues its organizing campaign during the pendency of PERB's adjudication of ACE's unfair practice charges. Such an affirmative order "is appropriate to prevent irreparable harm to the rival union by the defection of its supporters and to prevent the recognized union's entrenchment." (*Fuchs*, *supra*, 560 F.Supp. at p. 1156; see *Brown v. Pacific Tel. & Tel. Co.* (9th Cir. 1955) 218 F.2d 542, 544 [injunctive relief is appropriate when a union may suffer irreparable harm from the "drifting away of [its] members to the union favored by the employer[]"].) Injunctive relief is also necessary here because it is typically not possible to provide employees retroactively the monetary and non-monetary benefits they might have achieved had they been exclusively represented. (See *Small v. Avanti Health Systems, LLC*, *supra*, 661 F.3d at p. 1192 ["The value of the right to enjoy the benefits of union representation is immeasurable in dollar terms once it is delayed or lost"].)

Without an injunction, it is likely that ACE's organizing efforts will be further irreparably harmed and "there exists a probability that the purposes of [EERA] will be

frustrated [because] the efficacy of the Board's final order may be nullified, or the administrative procedures will be rendered meaningless" by the District's continuing conduct. (*Modesto*, *supra*, 136 Cal.App.3d at p. 902.) An injunction thus is necessary to preserve PERB's ability, if it finds the District committed the alleged unfair practices, to restore the situation as nearly as possible to what it would have been had the District not committed the violations.

ORDER

For the foregoing reasons, the Board GRANTS the Association of Clovis Educators, CTA/NEA's request for injunctive relief in Case Nos. SA-CE-3040-E and SA-CE-3047-E.

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