STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ANTELOPE VALLEY COLLEGE FEDERATION OF TEACHERS, Charging Party, v. ANTELOPE VALLEY COMMUNITY COLLEGE DISTRICT, Respondent.	Case No. LA-CE-6549-E PERB Decision No. 2854 February 23, 2023

Appearances: Bush Gottlieb by Lisa C. Demidovich and Dexter Rappleye, Attorneys, for Antelope Valley College Federation of Teachers; Atkinson, Andelson, Loya, Rudd & Romo by John M. Rajcic, Barbara J. Ginsberg, and Leslie J. Kim, Attorneys, for Antelope Valley Community College District.

Before Shiners, Krantz, and Paulson, Members.

DECISION

SHINERS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by Antelope Valley Community College District to the attached proposed decision of an administrative law judge (ALJ). The complaint issued by PERB's Office of the General Counsel (OGC) alleged that the District violated the Educational Employment Relations Act (EERA) by: (1) unilaterally implementing a restructured calendar for the 2020-2021 school year; (2) bypassing, undermining, and derogating the authority of the Antelope Valley College Federation of Teachers (Faculty Union); (3) refusing the Faculty Union's request to bargain over plans to restructure the calendar; and (4) engaging in an overall course of bad faith

bargaining regarding the calendar changes.[1] Following an evidentiary hearing and briefing by the parties, the ALJ found in the Faculty Union's favor on the unilateral change and bypass allegations, and dismissed the remaining allegations. The District excepted to the ALJ's finding of a unilateral change violation but not to the finding of a bypass violation. The Faculty Union filed a response to the District's exceptions but no exceptions of its own.

Based on our review of the proposed decision, the entire record, and the parties' arguments in light of applicable law, we find the proposed decision's factual findings are supported by the record and its legal conclusions on the unilateral change issue are well-reasoned and in accordance with applicable law. We therefore adopt the proposed decision (except for sections 1.b, 1.c, and 2) as the decision of the Board itself, as supplemented by our discussion below.[2]

DISCUSSION

When resolving exceptions to a proposed decision, the Board applies a de novo standard of review. (*County of Santa Clara* (2019) PERB Decision No. 2629-M, p. 6.)

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

[2] Because neither party filed exceptions related to the ALJ's finding of a bypass violation or dismissal of the complaint's claims for outright refusal to bargain and overall bad faith bargaining, those findings are not before us on appeal. (*County of Santa Clara* (2018) PERB Decision No. 2613-M, p. 2, fn. 2; PERB Reg. 32300, subd. (e). PERB Regulations are codified at Cal. Code. Regs, tit. 8, § 31001 et. seq.) We accordingly express no opinion about those conclusions, which are final and binding on the parties but are otherwise nonprecedential. (*County of Orange* (2018) PERB Decision No. 2611-M, p. 2, fn. 2.) We will incorporate the ALJ's proposed remedy for the bypass violation into our final order.

However, to the extent a proposed decision has adequately addressed issues raised by certain exceptions, the Board need not further analyze those exceptions. (*Ibid*.) The Board also need not address alleged errors that would not affect the outcome. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 5.) Here, the proposed decision adequately addressed each of the arguments raised by the District in its exceptions, but we supplement the ALJ's analysis on both liability and remedy to clarify the parties' obligations.

EERA requires employers to meet and negotiate in good faith with recognized employee organizations regarding "matters relating to wages, hours of employment, and other terms and conditions of employment." (EERA, §§ 3543.2, subd. (a)(1); 3543.5, subd. (c).) EERA also provides that "matters not specifically enumerated are reserved to the public school employer." (§ 3543.2, subd. (a)(4).) The California Supreme Court, noting that these provisions are in tension with one another, and that the Legislature authorized PERB to apply its expertise to make close calls on matters that "relate to" employment terms and conditions, has endorsed PERB's three-part test for distinguishing between mandatory and non-mandatory bargaining subjects. (*San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 857-860.) Pursuant to that test, which the Board adopted in *Anaheim Union High School District* (1981) PERB Decision No. 177 (*Anaheim*), an employer must bargain over a decision if: "(1) it is logically and reasonably related to hours, wages or an enumerated term and condition of employment, (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict,

and (3) the employer's obligation to negotiate would not significantly abridge [its] freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of [its] mission." (*San Bernardino Community College District* (2018) PERB Decision No. 2599, p. 8, quoting *Anaheim*, *supra*, PERB Decision No. 177, pp. 4-5.)

While instructors' work calendar would ideally match students' academic calendar, in reality that is not always true. (*Palos Verdes Peninsula Unified School District/Pleasant Valley School District* (1979) PERB Decision No. 96, pp. 31-32 (*Palos Verdes*).) Accordingly, PERB precedent applying the *Anaheim* test distinguishes between a calendar setting employee workdays and a calendar setting student instructional days, requiring bargaining over the former but not the latter. (*Pittsburg Unified School District* (2022) PERB Decision No. 2833, p. 10; *Pasadena Area Community College District* (2015) PERB Decision No. 2444, pp. 13-15; *Jefferson School District* (1980) PERB Decision No. 133, pp. 40-41; *Palos Verdes, supra,* PERB Decision No. 96, pp. 31-35.)

A calendar setting instructors' workdays during the school year must be negotiated because the term "hours" encompasses not only work schedules and workdays, but also the distribution of workdays in a year. (*Palos Verdes*, *supra*, PERB Decision No. 96, pp. 31-35.) In contrast, a calendar that only sets instructional days for students falls outside the scope of representation. (*Compton Community College District* (1990) PERB Decision No. 790, adopting proposed decision at pp. 21-22; *San Jose Community College District* (1982) PERB Decision No. 240, pp. 7-9.) The decision whether to offer certain courses beyond the state's minimum instructional

requirements is also outside the scope of representation. (*Mt. San Antonio Community College District* (1983) PERB Decision No. 297, adopting proposed decision at pp. 45-46 (*Mt. San Antonio*); see Ed. Code, § 70901, subd. (b)(1); Cal. Code Regs., tit. 5, § 55701.) An employer therefore may unilaterally decide to reduce, expand, or cancel classes held outside the regular school year, subject to a duty to bargain the effects of such a decision. (*Mt. San Antonio*, *supra*, PERB Decision No. 297, p. 3, fn. 1 & adopting proposed decision at p. 45.)

The District characterizes its actions here as merely canceling the non-mandatory Winter Intersession and expanding the non-mandatory Summer Session, and thus asserts no decision bargaining obligation arose. It is without dispute that the District is under no obligation to offer Winter or Summer sessions, and that it may unilaterally cease offering them at its election. However, when an employer elects to move courses from one non-mandatory session to another non-mandatory session and in doing so alters distribution of workdays, holidays, and workload as it did here, it must provide affected employees' exclusive representative adequate notice and an opportunity to bargain over both the decision and its effects. (*Pasadena Area Community College District*, *supra*, PERB Decision No. 2444, pp. 14-15 [distribution of workdays]; *Palos Verdes*, *supra*, PERB Decision No. 96, p. 34 [holidays]; *County of Kern* (2018) PERB Decision No. 2615-M, p. 10 & adopting proposed decision at p. 11 [workload].) Because the District did not do so here and did not establish that it was excused from negotiating these changes, we affirm the ALJ's finding of a unilateral change violation.

REMEDY

EERA grants PERB broad remedial powers, including the authority to issue cease-and-desist orders and to require such affirmative action as PERB deems necessary to effectuate the policies and purposes of the Act. (EERA, § 3541.5, subd. (c).) A "properly designed remedial order seeks a restoration of the situation as nearly as possible to that which would have obtained but for the unfair labor practice." (*Modesto City Schools* (1983) PERB Decision No. 291, pp. 67-68.) PERB's standard remedy for an employer's unlawful unilateral change is an order to cease and desist the unlawful conduct, post a notice of the violation, restore the status quo ante, make affected employees whole for any losses, and bargain with the union upon request. (*Pasadena Area Community College District*, *supra*, PERB Decision No. 2444, pp. 23-24.)

In cases where an employer fails to fulfill its bargaining obligation before altering instructors' work calendar as part of adjusting the student academic calendar, PERB has delayed its requirement to restore the status quo when necessary to prevent unwarranted disruption or interference with student instruction or district operations. (*Pasadena Area Community College District*, *supra*, PERB Decision No. 2444, p. 23.) We find such a delay appropriate here, though the parties may modify the rescission date by mutual agreement. The record shows that the District adopted the calendar changes on December 9, 2019, in order to implement them for the 2020-2021 academic year. A similar timeline will be ordered for rescinding those changes. Thus, absent mutual agreement, the District must rescind the unilaterally adopted changes to the calendar at the beginning of the next successive academic year

following the date this decision is no longer subject to appeal. If that date falls after December 9 of an academic year, rescission must occur at the beginning of the second successive academic year after that date.

It is also appropriate to order the District to make employees whole for any losses suffered as a result of the District's failure to meet and negotiate in good faith over the calendar changes. Although the Faculty Union presented no evidence that any employee suffered a loss as a result of the calendar changes, an unfair practice finding creates a presumption that employees suffered some loss as a result of the employer's unlawful conduct. (*Bellflower Unified School District* (2019) PERB Order No. Ad-475, p. 10; *Desert Sands Unified School District* (2010) PERB Decision No. 2092, pp. 31-32.) Consistent with the presumption, the Faculty Union will have the opportunity to establish in compliance proceedings that any employees they represent suffered a loss of compensation or benefits as a result of the changes to the 2020-2021 calendar and its continuation in subsequent academic years.

In accord with our standard unilateral change remedy, it also is appropriate to order the District to cease and desist from the unlawful conduct found in this decision, to meet and negotiate with the Faculty Union upon request over changes to instructors' work calendar, and to post physical and electronic notices of its violation. (*City of Sacramento* (2013) PERB Decision No. 2351-M, pp. 43-45.)

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, the Public Employment Relations Board (PERB) finds that Antelope Valley Community College District violated the Educational Employment

Relations Act (EERA), Government Code section 3540 et seq., by unilaterally changing instructors' work calendar and dealing directly with faculty bargaining unit employees regarding the calendar changes, thereby bypassing their exclusive representative, Antelope Valley College Federation of Teachers (Faculty Union).

Pursuant to EERA section 3541.3, subdivisions (i) and (n), and section 3541.5, subdivision (c), it hereby is ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Unilaterally changing instructors' work calendar in a manner that alters employee hours and other working conditions, without providing the Faculty Union adequate notice and an opportunity to negotiate over the decision.

2. Bypassing the Faculty Union and dealing directly with represented employees about changes to instructors' work calendar that alter their hours, workload, and other working conditions.

3. Interfering with employees' right to be represented by the Faculty Union.

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

1. Within 30 days after this decision is no longer subject to appeal, rescind the unilaterally adopted changes to instructors' work calendar before the beginning of the next successive academic year, and restore instructors' work calendar to the one that existed before the 2020-2021 academic year. If this decision becomes no longer subject to appeal after December 9 of an academic year, rescission shall occur at the beginning of the second successive academic year

following that date. The parties may modify the rescission date by mutual agreement.

2. Upon demand by the Faculty Union, meet and negotiate in good faith over changes to instructors' work calendar.

3. Make affected employees whole for any losses suffered as a result of the unlawful unilateral changes to instructors' work calendar, including interest at the rate of 7 percent per annum.

4. Within 10 workdays following the date this decision is no longer subject to appeal, post at all work locations where notices to Faculty Union-represented employees are posted, copies of the Notice attached hereto as an Appendix. An authorized agent of the District must sign the Notice, indicating that the District will comply with the terms of this Order. The District shall maintain the posting for a period of 30 consecutive workdays and shall also distribute it by electronic message, intranet, internet site, and other electronic means the District uses to communicate with employees in the Faculty Union. The District shall take reasonable steps to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.[3]

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

5. Provide PERB's General Counsel, or the General Counsel's designee, with written notification of all actions taken to comply with this Order, as well as any such further reports as the General Counsel or designee may direct; and concurrently serve the Faculty Union with all such notifications and reports.

Members Krantz and Paulson joined in this Decision.

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who are not regularly reporting to any work location due to the extraordinary circumstance, including those who are on a short term or indefinite furlough, are on layoff subject to recall, or are working from home; or directing Respondent to mail the Notice to employees with whom it does not communicate through electronic means.

APPENDIX

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

After a hearing in Unfair Practice Case No. LA-CE-6549-E, *Antelope Valley College Federation of Teachers v. Antelope Valley Community College District*, in which all parties had the right to participate, the Public Employment Relations Board found that Antelope Valley Community College District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq., by unilaterally changing instructors' work calendar and dealing directly with faculty bargaining unit employees regarding the calendar changes, thereby bypassing their exclusive representative, Antelope Valley College Federation of Teachers (Faculty Union).

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

A. CEASE AND DESIST FROM:

1. Unilaterally changing instructors' work calendar in a manner that alters employee hours and other working conditions, without providing the Faculty Union adequate notice and an opportunity to negotiate over the decision.

2. Bypassing the Faculty Union and dealing directly with represented employees about changes to instructors' work calendar that alter their hours, workload, and other working conditions.

3. Interfering with employees' right to be represented by the Faculty Union.

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

1. Within 30 days after this decision is no longer subject to appeal, rescind the unilaterally adopted changes to instructors' work calendar before the beginning of the next successive academic year, and restore the instructors' work calendar to the one that existed before the 2020-2021 academic year. If this decision becomes no longer subject to appeal after December 9 of an academic year, rescission shall occur at the beginning of the second successive academic year following the date this decision is no longer subject to appeal. The parties may modify the rescission date by mutual agreement.

2. Upon demand by the Faculty Union, meet and negotiate in good faith over changes to instructors' work calendar.

3. Make affected employees whole for any losses suffered as a result of the unlawful unilateral changes to instructors' work calendar, including interest at the rate of 7 percent per annum.

Dated: _____

ANTELOPE VALLEY COMMUNITY COLLEGE DISTRICT

By: _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

ANTELOPE VALLEY COLLEGE FEDERATION OF TEACHERS, Charging Party, v. ANTELOPE VALLEY COMMUNITY COLLEGE DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-6549-E PROPOSED DECISION September 13, 2022

Appearances: Bush Gottlieb, by Lisa C. Demidovich and Dexter Rappleye, Attorneys, for Antelope Valley College Federation of Teachers; Atkinson, Andelson, Loya, Ruud & Romo, by John C. Rajcic and Barbara J. Ginsberg, Attorneys, for Antelope Valley Community College District.

Before Valerie Racho, Administrative Law Judge.

INTRODUCTION

An exclusive representative alleges in this case numerous violations of the duty to bargain in good faith arising out of a public school employer's decision to cancel its winter intersession. The employer denies any violations.

PROCEDURAL HISTORY

On February 13, 2020, the Antelope Valley College Federation of Teachers (AVCFT or Faculty Union) filed an unfair practice charge (UPC) with the Public Employment Relations Board (PERB or Board) alleging that the Antelope Valley Community College District (District), had violated the Educational Employment Relations Act (EERA),[1] section 3543.5, subdivisions (a), (b), and (c). The Faculty

[1] EERA is codified at Government Code section 3540 et seq.

Union accused the District of multiple violations of the duty to bargain in good faith arising from the District's decision to restructure its academic calendar and eliminate its Winter Intersession. On April 20, 2020, the District filed its position statement in response to the Faculty Union's charge.

On July 13, 2021, the PERB Office of the General Counsel dismissed a claim that the District had violated EERA by refusing to supply the Faculty Union with requested information.[2] On the same day, the General Counsel's Office issued a complaint alleging that the District had: (1) unilaterally changed negotiable matters by significantly restructuring its academic calendar, including eliminating its Intersession; (2) bypassing, derogating, or undermining the authority of the Faculty Union by e-mailing the President of the Academic Senate about plans to change the academic calendar; (3) refusing the Faculty Union negotiating team's request to bargain over plans to restructure the academic calendar; and (4) engaging in an overall course of bad faith bargaining concerning the above changes to the academic calendar. These claims are alleged to violate EERA section 3543.5, subdivision (c), with derivative violations under subdivisions (a) and (b).

On August 2, 2021, the District filed an answer to the PERB complaint denying all but the jurisdictional allegations. The answer also asserted 25 affirmative defenses, including waiver and business necessity.

On August 10, 2021, the parties participated in an informal settlement

[2] The Faculty Union did not appeal the partial dismissal, pursuant to PERB Regulation 32635. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

conference with a Board agent, but the matter was not resolved and was thereafter assigned to PERB's administrative law division for formal hearing.

The District amended its answer on September 29, 2021 by correcting errors in two of its affirmative defenses and asserting five additional affirmative defenses.

Four days of hearing were held between December 8, 2021 and February 3, 2022. On the first day of hearing, the District moved to amend its answer a second time to include a statute of limitations defense. The motion was granted over the Faculty Union's objection.

The parties submitted closing arguments in the form of opening and reply briefs. On April 7, 2022, with the filing of the final briefs, the matter was considered submitted for decision.

FINDINGS OF FACT

The Parties and Their Witnesses

1. PERB's Jurisdiction

The District admits that it is a public school employer within the meaning of EERA section 3540.1, subdivision (k), and that the Faculty Union is an exclusive representative within the meaning of subdivision (e). The bargaining unit consists of the District's full-time and adjunct faculty. The parties are therefore within PERB's jurisdiction.

2. The Faculty Union's Witnesses

Four witnesses testified in the Faculty Union's case-in-chief. Heidi Preschler was a faculty member at the District from 1998 to 2016. She was chief negotiator for the Union from 1993 until 2010 and was also a prior Faculty Union President. She

testified about the genesis of certain provisions in the parties' Collective Bargaining Agreement (CBA), as well as the Faculty Union's past application of those terms. Dr. Scott Lee is a Librarian faculty member and was Union President from 2016 to spring 2020. He testified about his role on the District's Calendar Committee and his discussions with District Superintendent/President Ed Knudson and other administrators about the calendar changes at issue in this case. Aurora Burd is a faculty member at the District and is the current Faculty Union President. She served on the Faculty Union's negotiating team from 2014 to 2020. She testified about her time on the negotiating team. Pamela Ford is a Program Coordinator for the District and is the President of the Antelope Valley College Federation of Classified Employees (AVCFCE or Classified Union), which is the exclusive representative of the District's classified bargaining unit. She testified about her experience discussing the calendar changes at issue in the Calendar Committee as well as her correspondence with Knudson and other District administrators about the changes.

3. The District's Witnesses

The District called two witnesses. Barbara Ginsberg is an attorney in private practice and testified about her experience as the District's chief negotiator for the parties' 2018-2021 Collective Bargaining Agreement (CBA). Knudson testified about the purpose behind the calendar change and about his communications with Lee and Ford about the calendar changes.

The Academic Year and Calendar

The District's academic year refers to its annual schedule of offered classes and other educational programs at the Antelope Valley College. For several years

before the 2020-2021 academic year, the academic year consisted of a Fall and Spring semester, a 6-week Intersession between the Fall and Spring semesters, and an 8-week Summer session between the Spring and Fall semester. Lee provided unrebutted testimony that the academic calendar consistently included an Intersession every year since he started working at the District in 2001, except for the 2005-2006 academic year.

Starting in or around 2003, the District moved from an academic calendar consisting of 17-week semesters to a "condensed calendar" consisting of 16-week semesters. This resulted in multiple changes to terms and conditions of employment for the faculty unit, including a change to the number of workdays per week, the length of standard class times, and the number of weekly instructional minutes classroom faculty were expected to spend meeting with students.

The Collective Bargaining Agreement

The parties have negotiated a CBA covering terms and conditions of employment for faculty bargaining unit members. The parties introduced parts of the 2018-2021 CBA, even though agreement was not reached on that contract until December 10, 2019. This post-dates most of the alleged misconduct in the complaint. Neither party appears to dispute that the prior CBA remained in effect until the 2018-2021 agreement was ratified. Reference to specific CBA provisions in this section of the proposed decision is from the 2018-2021 CBA, but it is undisputed that those sections were not changed from the prior CBA.

Article X is titled "Faculty Assignments." Article X, Section 1.1 specifies that the standard teaching load for full-time classroom faculty is 30 lecture hour equivalents

(LHEs) each academic year. Under Section 13.4, classroom faculty may teach beyond their assignments for up to 10 LHE of overload, pay. Adjunct faculty may be assigned up to 10 LHE for the Summer session and up to 8 LHE for the Intersession.

Article X, Section 12, is titled "Calendar." Sections 12.1 and 12.2 were added to the CBA after the transition to the condensed calendar. Section 12.1 states in full:

> "All issues related to the calendar (starting and ending dates of the semester, summer session and intersession; starting and ending class times; holidays; flex days; orientation; parts of term; days counted as instructional days) shall be referred to the Calendar Committee, a campus-wide standing committee. The committee will have co-chairs consisting of the vice president of student services and either the AVCFT or AVCFCE representative in alternate years. Each year, the committee shall recommend a calendar to the presidents of the District, AVCFT and AVCFCE for final approval through a memorandum of understanding in time to meet the College's scheduling timelines."

Section 12.2, titled "Law of Unintended Consequences" states in full:

> "Though we have tried to anticipate all of the contractual ramifications of the move from a 17-week calendar to a 16-week calendar, there will likely be some problems and issues arising from this shift that we have not yet foreseen. In recognition of this fact, the Union and the District agree to work together to solve all contractual problems connected with the calendar in an amicable way, as quickly and efficiently as possible, even if this supersedes the usual negotiations process of full negotiations and re-openers. This does not preclude the possibility of negotiating any contract items."

(Emphasis in original.)

Preschler testified that Sections 12.1 and 12.2 were first incorporated into the 2003-2005 MOU in response to complications that arose during the transition to the condensed calendar. Both sections have remained in the CBA ever since.

Although the above language from Section 12.1 references a process for developing the calendar, there is no evidence that the 2018-2021 CBA defines the substantive terms of the District's academic calendar in any given year. Nor was there evidence that the CBA contains a provision that limits the parties' ability to request negotiations over matters not addressed in the CBA. There was also no evidence that the CBA contains a "management rights clause," or other provision authorizing the District to act unilaterally on matters that would otherwise be subject to negotiations.

The District's Participatory Governance Entities

The District's overall operations are governed by a Board of Trustees (Governing Board). The Superintendent/President acts as the chief executive of the District and is responsible for all day-to-day operations. Under Education Code section 70902, subdivision (b)(7), the Governing Board must establish procedures:

> "to ensure faculty, staff, and students the opportunity to express their opinions at the campus level, to ensure that these opinions are given every reasonable consideration, to ensure the right to participate effectively in district and college governance, and to ensure the right of academic senates to assume primary responsibility for making recommendations in the areas of curriculum and academic standards."

To that end, the District has adopted certain Board Policies (BPs) and Administrative Procedures (APs) covering participatory governance matters. BPs are adopted by the Governing Board and prescribe or delegate activity to different

participatory governance groups. APs, which are not formally adopted by the Governing Board, provide the means to administer BPs.

BP 4010 is titled "Calendar" and states:

> "Before presentation to the Board for approval, any major calendar changes that may have financial impact to the district or may affect student access and/or student learning must be fully explored, discussed campuswide, and presented in writing to the Superintendent/President.
>
> "After said presentation to the Superintendent/President and after reaching agreement with the Antelope Valley College Federation of Teachers (AVCFT) and Antelope Valley College Federation of Classified Employees (AVCFCE) and after consulting with other appropriate groups, the college Superintendent/President shall recommend a calendar to the Board of Trustees for its approval."

BP 4010 was adopted by the Governing Board on June 11, 2007, and revised on October 9, 2017. Accompanying BP 4010 is AP 4010. Although the text of AP 4010 was not introduced into the record, as noted below, other evidence suggests that its terms are similar to those in CBA, Article X, Section 12.1.

AP 2510, titled "Participation in Local Decision-Making," is designed to establish procedures for the District's various participatory governance committees. At issue in this case are the Academic Sente and the Calendar Committee.

1. <u>The Academic Senate</u>

AP 2510 defines the Academic Senate as an organization representing faculty "whose primary function is to consult collegially with the governing board of a district and/or administration of a college as their representative on academic and professional matters." At the times relevant to this case, faculty member Van Rider

has been the President of the Academic Senate. The Senate's membership consists exclusively of faculty members.

AP 2510 also defines the District's process for addressing recommendations from the Academic Senate on academic and professional matters. The District may accept the Academic Senate's recommendation on an academic and professional matter and present it to the Governing Board, or it may explain in writing why it cannot accept the recommendation. For matters that require the Academic Senate's agreement, a "Mutual Agreement Council," consisting of executives from the Senate and the District's administration, must deliberate until reaching agreement.

Appendix II of AP 2510 defines "academic and professional matters" in juxtaposition to "collective bargaining" matters. Academic and professional matters include curriculum, degree and certificate requirements, grading policies, educational program development, standards or policies for student preparation and success, district and college governance structures, faculty roles in accreditation, policies for professional development activities, sabbaticals, processes for program review, and processes for planning and budgets. In contrast, the list of collective bargaining subjects include several terms and conditions of employment, including leaves, vacations, holidays, workload, work hours, work days, and committees that deal with the academic year.

2. The Calendar Committee

The Calendar Committee is one of eight college-wide participatory governance committees. Its membership includes representatives from faculty, classified staff, administrators, and students. A representative from the Academic Senate may also

participate. The District's Vice President of Student Service serves as one of two co-chairs of the committee. A representative from the Faculty or the Classified Union serves as the other co-chair, on alternating years. Lee described the Calendar Committee as "a participatory governance committee that looks at the academic and other calendars on campus and makes recommendations to the President of the College, the President of the faculty union, and the President of the classified union for approved calendars."

In the past, the Calendar Committee primarily addressed the start and end dates of each term in the academic calendar and the dates to observe the various paid holidays throughout the academic year. Once the Calendar Committee has settled on an academic calendar, the co-chairs send the committee's recommendation to the Superintendent/President, the President of the Faculty Union, and the President of the Classified Union. Pursuant to Article X, Section 12.1 of the CBA between the Faculty Union and the District, the three presidents signify their approval of the committee's recommended calendar by signing a memorandum of understanding (MOU).[3] Neither party presented evidence on whether the Faculty Union ever requested negotiations before the Faculty Union President agreed to sign the MOU. Historically, the approved academic calendar is then presented to the District's Governing Board for final adoption and implementation.

[3] The Classified Union CBA does not contain any provisions similar to Article X, Section 12.1.

The District's Proposal to Eliminate the Intersession

On October 17, 2017, Knudson sent a letter to various District organizations, including the Faculty and the Classified Unions and the Academic Senate, with the subject line "Proposal for Change to the Academic Calendar." In the letter, Knudson asserted that changes to the calendar were needed to increase access to its college program by increasing scheduling flexibility for the greatest number of students. He further asserted that the Intersession provided only limited ability to increase enrollment and that enrollment in the Summer session was growing. Knudson proposed an academic calendar with a 16-week Fall semester running from the third week of August through the second week of December, a 16-week Spring semester starting in the first week of January after the New Year holiday through the first week of May, a 12-week Summer session (consisting of two 6-week terms) from the second week of May through the first week of August, and no Intersession. Under the proposal, the time between the Fall and the Spring semesters would be reduced to three weeks and the time between the Spring semester and the Fall semester of the following academic year would be increased to 14-15 weeks. According to Knudson, the proposed changes would increase student enrollment and facilitate students completing the College program.

On November 9, 2017, Knudson hosted a town hall meeting for all District stakeholders to discuss the proposed calendar change. During the meeting, Knudson reiterated several of the points raised in his October 17, 2017 letter.

An attendee asked Knudson when a decision would be made on the proposed change. Knudson replied:

> "The proposal that was made to the calendar committee, I would have to refer to the calendar committee for the timeline that they may have established at this point. We are using this information that we gathered here today [sic] will be forwarded to the calendar committee as on the side we have been recording this, the screening didn't work today but it has been reported. It will be posted up on youtube as soon as they can get it processed. It will be on the college youtube channel so you can, your friends and neighbors can watch it. So it has to be left to the calendar committee at this point for their process and going through it. Both collective bargaining units have to get involved, it has to be an agreement with an MOU then it comes forward to my office and then to the Board."

Knudson also said that the earliest possible time the change could take effect would be for the January 2020 Intersession, but that the matter still required discussions in the Calendar Committee and that he was not suggesting a particular implementation date.

Another attendee asked what effect the proposed change would have on the number of LHEs the District offered each academic year. Knudson responded that he expected LHEs to increase by between 200 to 400, due to the greater flexibility of offering classes in the two 6-week Summer sessions or over a single 12-week Summer session. He opined that eliminating the Intersession and expanding the Summer session would also increase the number of available faculty unit member teaching opportunities.

On November 6, 2017, the Calendar Committee met. Vice President of Student Services Erin Vines and Lee served as committee co-chairs at the time. Ford also attended, as did Rider. The minutes from the meeting reflect that Knudson attended to discuss his proposal to eliminate Intersession and expand the Summer session.

The agenda for the meeting included a copy of Knudson's October 17, 2017 letter. However, the Committee took no action in 2017 to vote or approve any calendar that did not include an Intersession. There is also no evidence that the Calendar Committee considered a calendar that eliminated Intersession anytime in 2018.

The March and April 2019 Calendar Committee Meetings

The Calendar Committee met again on March 14, 2019. Vines and Scott Tuss, Vice President of the Classified Union, co-chaired the committee. Lee and Rider also attended. The Committee discussed, at length, the proposal to eliminate Intersession from the academic calendar. At the end of the meeting, a majority of the Committee voted to eliminate the Intersession from the academic calendar by a margin of 8-4. All four faculty members in attendance, including Lee and Rider, voted against the change. Two faculty Committee members were absent. Other calendar proposals that incorporated the elimination of the Intersession were also considered, but none of those proposals received a majority vote from the Committee. The Committee did not agree upon a specific implementation date.

The Calendar Committee met again on April 22, 2019. The Committee discussed different calendar proposals that incorporated the previously approved plan to eliminate the Intersession. The Committee voted 9 to 0 in favor of adopting a calendar with two 16-week semesters, a 12-week Summer session, and no Intersession. The four faculty members who voted against eliminating the Intersession in the previous meeting abstained from voting. One of the two faculty members who was absent from the March 14, 2019 meeting voted in favor of the new calendar format. The other absent faculty member was also absent for the

April 22, 2019 meeting. The minutes of that meeting do not reflect a specific implementation date, but the Committee did review a draft of the 2020-2021 academic calendar that incorporated all of the calendar changes.

On May 3, 2019, Vines e-mailed Knudson, Lee, and Ford, attaching a memo dated April 29, 2019. The memo outlined the changes approved by the Calendar Committee's vote on April 22, 2019 (i.e., two 16-week semesters, a 12-week Summer session, and no Intersession). The memo was signed by Vines and Tuss, as co-chairs.

The District Requests That the Faculty Union Sign the MOU

On May 7, 2019, then-Vice President of Human Resources Mark Bryant, e-mailed Lee and Knudson a draft MOU, pursuant to CBA Article X, Section 12.1. The draft MOU described the calendar changes voted-upon by the Calendar Committee in March and April 2019, and had spaces for both Knudson and Lee to sign, signifying their approval.

Lee responded later that day, as follows: "As per Board Policy 4010 which requires 'reaching agreement' with both Unions, this is a negotiated item that will affect multiple sections of the faculty CBA. I will need to consult with my negotiations team on their availability." Lee copied Knudson in his response.

Knudson responded around an hour later, stating that the requirements in BP 4010 were "further refined by the current CBA which delineates the process for a calendar change." Knudson further stated his opinion that the only impact of the change was to the Intersession provisions in the CBA.

On May 23, 2019, Bryant sent Lee a revised version of the draft MOU which referenced the Calendar Committee's March 14, 2019 vote, but eliminated the reference to the April 22, 2019 vote. The revised draft also stated: "The earliest that intersession will be eliminated is Winter 2021."

Lee responded on May 29, 2019, stating:

> "After discussing it with the Union's negotiating team and Executive Council, we find the potential changes to the faculty CBA would be significant. Additionally, as BP 4010 requires 'reaching agreement with the Antelope Valley College Federation of Teachers (AVCFT) and the Antelope Valley College Federation of Classified Employees [AVCFCE]' for any possible 'major calendar changes that may have financial impact to the district or may affect student access and/or student learning' (which is the oft stated reasons for attempting to implement them), these potential changes require negotiations to be implemented.
>
> "However, the Faculty Union's negotiating team is not available as it is engaged in current contract negotiations."

Bryant responded on June 6, 2019, acknowledging "that changes to the calendar may result in 'effects' that may need to be talked about for possible negotiation purposes." Bryant committed to meeting to "discuss any possible changes." In the same e-mail, Bryant asserted that the District had followed BP and AP 4010 and CBA Article X, Section 12.1.[4]

Bryant concluded his e-mail as follows:

> "Board Policy, Administrative Regulations and Faculty contractual language have been followed, as a result the

[4] As noted above, the text of AP 4010 was not admitted into the record, but Bryant's e-mail implies that the terms of AP 4010 were similar to those in CBA Article X, Section 12.1.

> parties should move forward with signing the MOU based on policy, regulation, and contractual language.
>
> "The District is willing to meet at anytime to discuss outstanding issues, including any identified effects as a result of the calendar changes."

Lee responded on June 7, 2019: "The Union is not arguing that the process . . . is not being followed (mostly). Instead, we are saying that the process from this point requires negotiations and other items and that signing the MOU, at this time, would be a negotiation . . . process." He continued: "It is too soon to sign anything as no agreement has been reached and no consultation with other appropriate groups has been completed."

Vines responded to Lee on June 17, 2019, stating that he found "several flaws" in Lee's suggestion that the calendar changes required negotiations. Like Bryant, Vines asserted that the District had followed the process outlined in BP and AP 4010,[5] and CBA Article X, Section 12.1. Vines asserted that the requirement to reach agreement with the Faculty and Classified Unions outlined in BP 4010 "is completed as the provision within the AVCFT CBA is a negotiated process agreed to and ratified by AVCFT and approved by the [Governing] Board[.]" Vines stated that Lee's failure to sign the MOU violated the District's participatory governance policies and also "violate[d] the AVCFT collective bargaining agreement as it defines the process for calendar change and its designation to the Calendar Committee." Like Bryant, Vines reiterated the District's willingness to discuss any effects arising from the change, but

[5] Like Bryant's June 6, 2019 e-mail, Vine's e-mail also suggests that the language AP 4010 is similar to what is stated in Article X, Section 12.1.

asserted that the District had followed BP 4010, the CBA, and past practice.

Lee responded to Vines on June 28, 2019. He included Knudson, the members of the Governing Board, and several other recipients in his response. In summary, Lee disagreed with Vines's description of the applicable policies and objected to how the matter was handled in the Calendar Committee. Lee also reasserted the Faculty Union's position that the calendar changes must be negotiated before he would sign the MOU.

There was no evidence that the parties discussed the changes to the academic calendar again until October 2019.

The October 2019 Calendar Committee Meeting

The Calendar Committee met on October 2, 2019. Lee assumed the committee co-chair role for that academic year. The Committee discussed and voted on various dates for the 2020-2021 academic year, including the start and end of the Fall semester, the dates of holidays, the start and end of the Spring semester, and the start and end of the 2021 Summer session. All dates considered were based on an academic calendar with no Intersession between the 2020 Fall semester and the 2021 Spring semester, and with a 12-week 2021 Summer session. All of those proposals passed by majority vote, though Lee, Tuss, and Ed Beyer, another faculty member on the committee, opposed them. The Committee also approved similar changes for the 2021-2022 academic year, with Lee, Tuss, and Beyer again voting against these changes. At the hearing, Lee testified that he voted against the changes because he did not want to imply that the Faculty Union had agreed to eliminate the Intersession and expand the Summer session.

During that meeting, Beyer recommended that the Committee consider approving a "contingency calendar." According to the minutes, Beyer suggested that the Calendar Committee develop "contingency calendars" in case "the District and the two bargaining units cannot come to an agreement on a calendar without an intersession[.]" Beyer reasoned that the contingency calendar would retain the Intersession, which could serve as a "backup" recommendation if "they start running out of time to implement one without an intersession before agreement is reached." Vines responded that Beyer's suggestion could be agendized for the next committee meeting.[6] Lee confirmed these facts from the minutes in his testimony.

The District's Subsequent Requests for the Union's to Sign the MOU

On October 16, 2019, Knudson e-mailed Lee about the Calendar Committee's votes concerning the 2020-2021 academic calendar. He wrote: "Consistent with the past practice of sending the recommendation of the Calendar Committee to the [Governing] Board, the College intends to implement the recommendations of the Committee." Knudson acknowledged that the changed calendar would have an "impact" on the faculty bargaining unit and "to this end, [he was] willing to meet with the [Faculty Union] to address the impact on bargaining unit members."

[6] The Calendar Committee met again on this issue on November 5, 2019. According to the minutes from that meeting, the Committee "reached consensus" on the contingency calendars for the 2020-2021 and 2021-2022 academic years, stating: "These calendars are in place as contingency plans if the current calendars presented to the Superintendent, Faculty Union President, and Classified Union President are not approved. If the two contingency calendars are necessary the Committee will reconvene and take a formal vote on the calendars."

Lee responded to Knudson on October 18, 2019, seeking clarification. He wrote that if the District intended to negotiate over the changes to the academic calendar, then the Faculty Union's negotiators would be ready to begin bargaining as soon as negotiations over the successor CBA concluded. Lee further stated that, if the District intended to adopt the changes to the academic calendar without bargaining, then the District would be violating the requirements of CBA Article X, Section 12.1 and BP 4010. Knudson did not respond.

On October 30, 2019, Vines presented Ford, Knudson, and Lee with a memo detailing the Calendar Committee's recommended academic calendars for the 2020-2021 and 2021-2022. The memo was signed by Lee and Vines as co-chairs of the committee. Lee inserted a section into the memo stating that his signature indicates only that it accurately reflected the recommendations of the Calendar Committee, and that the memo was not an MOU, as defined by CBA Article X, Section 12.1.

Later that day, John Hutak, Bryant's replacement as Vice President of Human Resources, e-mailed Lee an amended draft MOU for his signature. The new draft MOU included the specific start and end dates for the semesters and the Summer sessions for 2020-2021 and 2021-2022. Lee did not sign this MOU.

On November 1, 2019, Knudson e-mailed Lee and Ford stating, in part, "[i]n the best interest of students and staff, it is now incumbent on us to work together to finalize a calendar without further delay, so that a final recommendation can be presented to the [Governing] Board[.] It is important that we give deference to the recommendations approved by the majority of the members of the participatory governance Calendar Committee[.]" Knudson reiterated his previously stated reasons

for changing the academic calendar. He also stated that the 10 LHE course load limits for adjunct faculty would not apply during the proposed 12-week Summer session and that adjunct faculty who had previously taught during the Intersession could teach "up to 15 LHE and more" during an expanded Summer session. He concluded by stating: "I am available to meet with both of you to find a pathway for confirming the Calendar Committee's recommendation."

Lee responded on November 5, 2019, seeking clarification regarding whether Knudson was requesting to initiate "limited bargaining" over the academic calendar changes. He asked whether Knudson's November 1, 2019 letter indicated the District's willingness "to engage in an open and fair negotiations process" or whether "the District may view these negotiations purely as an effort to move towards a predetermined conclusion." Lee further asked whether Knudson's October 16, 2019 letter indicated an intent to implement the academic calendar changes without bargaining. Lee asked Knudson to respond by November 12, 2019.

Not long afterward, Knudson sent an electronic calendar invitation to Lee, Ford, Vines, and others, for a meeting on November 13, 2019. On November 6, 2019, Lee e-mailed Knudson stating that he had received the invitation, but was unavailable that day. Lee suggested November 14 or 15 as alternatives. Lee asked whether the purpose of the meeting was to negotiate over the changes to the academic calendar and stated that he would like to include Adams, the Faculty Union's chief negotiator in the meeting. Knudson canceled the November 13, 2019 meeting but otherwise did not respond.

Knudson's Communication to the Academic Senate

On or around November 18, 2019, Knudson e-mailed information about the planned calendar changes to Rider, President of the Academic Senate. He invited Rider to share the information with other members of the Academic Senate. The information was similar to the justification Knudson had provided to Lee in his November 1, 2019 letter. It repeated Knudson's assertion that adjunct faculty could teach 15 LHE or possibly more during an expanded 2021 Summer session. Knudson also stressed giving "deference" to the Calendar Committee's recommendation and "work[ing] together to finalize a calendar without delay[.]"

When asked why he e-mailed Rider, Knudson testified that he was attempting to "share . . . the information as broadly as we could[,]" and that he was communicating with several different District stakeholders to get their input.

The Parties' November-December Correspondence About the Calendar Change

On November 20, 2019, Knudson e-mailed Lee another letter, stating that through Article X, Section 12.1, the parties had "mutually agreed that decisions regarding work days and class times were delegated to the Calendar Committee, subject to final approval, memorialized in an MOU signed by the College President, the AVCFT President, and the AVCFCE President." Knudson further stated: "**Time is of the essence**" because the Governing Board had not yet adopted any academic calendar for the 2020-2021 academic year. (Emphases in original.) Knudson requested to meet on December 4, 2019 "to complete the negotiated process set forth in Article X, Section 12, and reach a memorandum of understanding with each of you reflecting final approval of the calendar." He stated that, otherwise:

> "I will have no choice but to explore my options for recommending the [Governing] Board adopt a tentative calendar for reasons of operational necessity, given that the District continues to remain without an agreed upon calendar. Such an action by the [Governing] Board would effect substantial compliance with the mutually agreed to provisions set forth in Article X Section 12."

(Emphasis in original.) Knudson sent a similar letter to Ford. By that point, the District had already placed approval of the 2020-2021 academic calendar on the agenda for the Governing Board's December 9, 2019 meeting.

Knudson sent Lee another letter on November 25, 2019, asserting that "Article X sets forth the mutually agreed upon process for adopting the recommendations of the Calendar Committee. There is no further obligation to 'meet and negotiate' the Calendar." Knudson contended that Lee was violating the CBA by refusing to sign the MOU approving the academic calendar changes. Knudson reiterated his willingness to meet on December 4, 2019.

Lee and Ford responded by a joint letter on November 27, 2019. In the letter, they disagreed with Knudson's assertion that negotiations over the calendar changes were not required under CBA Article X, Section 12.1. They acknowledged Knudson's willingness to meet on December 4, 2019, but stated that was insufficient time to complete negotiations over the calendar changes. They expressed interest in convening their bargaining teams to establish negotiation protocols. They also informed Knudson that the Calendar Committee had agreed-upon contingency calendars that did not modify the existing Intersession and Summer session in the 2020-2021 academic year, and that those calendars could be used while the parties negotiated over eliminating Intersession and expanding the Summer session for future

academic years.

Knudson responded the same day. He reiterated his willingness to meet on December 4, 2019 and also repeated his concern that the District had to adopt academic calendars for 2020-2021 and 2021-2022 soon.

On December 2, 2019, the Faculty Union sent the District and the Classified Union a "Union Sunshine List for Academic Calendar Negotiations."[7] The list included every CBA article that referenced Intersession. On December 3, 2019, Lee e-mailed Knudson stating that "AVCFT and AVCFCE are prepared to begin negotiations" with the District, but stated that the Faculty Union's negotiating team was not available on December 4, 2019. He offered December 9 and 12, 2019 as alternatives. He further stated that he would not sign an MOU that approved eliminating the Intersession until negotiations were completed.

Knudson responded on December 4, 2019, expressing disappointment that Lee had "elected not to meet with [Knudson] to conclude the calendar adoptions process" pursuant to CBA Article X, Section 12.1. He further wrote:

> "As stated on numerous occasions in the past, the calendar is not subject to traditional negotiation. The development of the Calendar has been delegated to the Calendar Committee and the District's governance process. This has been the practice for more than 12 years and precedes my tenure as Superintendent/President."

After summarizing his perspective of the events up until that point, Knudson then stated:

[7] The list was erroneously dated December 2, 2018.

> "Given your refusal to meet and conclude the process as dictated by both contract language and past practice, and the fact that the district remains without an adopted academic calendar for the 2020-2021 academic year, and consistent with my November 20 correspondence to you, I will be recommending at the December 9, 2019 [Governing] Board meeting that the Governing Board move to tentatively adopt the October 2, 2019 recommendation of the Calendar Committee."

Knudson concluded the letter by stating that he remains willing to meet with Lee and Ford to sign the MOU and discuss the unions' concerns, but he restated that such a meeting would not constitute "traditional negotiations," so the parties' negotiating teams need not attend.

The Governing Board's Adoption of the Tentative 2020-2021 Academic Calendar

The Governing Board held a regular meeting on December 9, 2019. One of the action items on the agenda was a motion to:

> "adopt the calendars recommended by the Calendar Committee as a tentative academic calendar of the District, effective beginning the 2020-2021 academic year, subject to further discussions between the District President and the Presidents of AVCFT and AVCFCE for the purpose of reaching final approval of the calendar through a memorandum of understanding, consistent with AVCFT Article X, Section 12 and past practice."

(Emphasis in original.)

Several speakers addressed the Governing Board either in favor of or against the calendar change. Lee and Ford both spoke against the motion. Jason Bowen from the Academic Senate read a resolution urging the Governing Board to reject the

proposed changes.[8]

After hearing all of the speakers, the Governing Board voted 5-0 in favor of adopting the tentative 2020-2021 academic calendar. Staff explained during the meeting that the "tentative" nature of the calendar meant that the approved academic calendar would become effective starting in the 2020-2021 academic year, pending final approval through an MOU between Knudson, Lee, and Ford.

On January 7, 2020, Knudson sent Lee and Ford another letter stating that the approved tentative calendar would take effect during the 2020-2021 academic year. Knudson repeated the District's position that negotiations were not required. He nevertheless requested to meet with Lee and Ford to "reach final approval of the calendar recommended by the Calendar Committee and tentatively adopted by the [Governing Board], including negotiation of any applicable effects concerning the recommended and tentatively adopted calendar." There is no record of a direct response from Lee or Ford, but the Faculty Union filed its UPC around a month afterward.

Lee and Ford never signed an MOU approving an academic calendar that eliminated the Intersession and expanded the Summer session. Both of those changes took effect starting in the 2020-2021 academic year.

The 2018-2021 Successor Negotiations

To some degree, negotiations for what would become the 2018-2021 CBA happened concurrently with the discussions on changing the academic calendar. By

[8] Knudson testified that he was unaware of this resolution and did not know of its contents.

December 2017, both parties had sunshined their proposals for which CBA articles they wanted to re-negotiate. Negotiations sessions began on March 8, 2018 and continued throughout that year. Neither side proposed changing the academic calendar or eliminating the Intersession in bargaining.

Negotiations continued into 2019. In March 2019, the parties exchanged proposals concerning Article X, Sections 12.1 and 12.2. Neither proposal was adopted. The Faculty Union's chief negotiator, David Adams, later suggested that the parties not change either section due to the Calendar Committee's still-ongoing discussions about changing the academic calendar. Consistent with her bargaining notes, Burd testified that, on March 29, 2019, Adams told the District's negotiators that the calendar changes being discussed by the Calendar Committee at the time were subject to negotiation. He wondered whether Presidents Knudson, Lee, and Ford could meet and "iron this out," meaning the process for negotiating over the decision and the effects of the proposed calendar changes. Ginsberg testified similarly, stating that the changes to the academic calendar under discussion had to be negotiated, that the terms of the CBA had to be followed, and that the Faculty Union wanted to see how the District planned to do that. Both parties eventually withdrew their proposals over Sections 12.1 and 12.2.

By May 2019, the parties were close to completing successor negotiations, but they were unable to finish negotiations before summer began. The Faculty Union declined the District's offer to continue negotiating through the summer.

The negotiating teams began meeting again in September 2019. After a few more sessions, the District presented the Faculty Union with a "comprehensive

tentative settlement agreement" (Tentative Agreement) on September 27, 2019. The Faculty Union's negotiators requested time to review the language. The negotiating teams did not meet again until December 10, 2019, whereupon both teams ratified the Tentative Agreement. This was one day after the Governing Board had tentatively approved the changes to the 2020-2021 academic calendar that eliminated Intersession, expanded the Summer session, and changed the start and end times for the Fall and Spring Semesters, as well as Summer session.

The Tentative Agreement included no changes to CBA Article X, Sections 12.1, 12.2, or 13.4. It did not mention the 2020-2021 academic calendar. The Tentative Agreement still included several sections from the CBA referring to the Intersession. Nothing in the Tentative Agreement specified that it was designed to resolve the parties' outstanding disputes over negotiable issues. Rather, the Tentative Agreement specified that the parties agreed to modify Articles I, III, V, VII, VIII, IX, X, XIII, and XVII, agreed to not modify Articles II, IV, VI, XI, XII, XIV, XV, XVI, XVIII, XIX, and XX, and agreed to update Article XXI (the signature page).

ISSUES

1. Did the District violate its duty to negotiate in good faith by: (a) unilaterally adopting and implementing an academic calendar that changed working hours and other conditions of employment for the faculty bargaining unit; (b) attempting to bypass, undermine, or derogate the authority of the Faculty Union by communicating directly with Academic Senate President Rider on November 18, 2019; or (c) refusing the Faculty Union negotiating team's September 2019 request to bargain over changes to the academic calendar?

2. Did the District engage in unlawful surface bargaining by its conduct from March 2019 to January 2020?

CONCLUSIONS OF LAW

Public school employers and exclusive representatives under EERA have a mutual obligation to meet and negotiate in good faith over matters within the scope of representation. (EERA §§ 3540.1, subd. (h); 3543.5, subd. (c); 3543.6, subd. (c).) Violations of this duty may be evaluated under a "totality of the circumstances," or surface bargaining analysis, which examines the parties' conduct as a whole, to ascertain their subjective intent. (*City of Sacramento* (2013) PERB Decision No. 2351-M, pp. 12-13, citing *Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9, p. 25 (*City of Placentia*), other citations omitted.)[9] Some individual actions, however, are considered "per se" violations of the duty to bargain because of their inherent ability to frustrate the bargaining process and undermine the authority of exclusive bargaining representatives. (*City of Sacramento*, p. 13, citing *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, p. 823.) In this case, the Faculty Union alleges violations by the District under both "per se" theories and under a "totality of the circumstances" theory. Each type of violation will be discussed separately below.

[9] When interpreting EERA, PERB may take guidance from other collective bargaining statutes containing parallel provisions. (*Ventura County Community College District* (2009) PERB Decision No. 2082, adopting warning ltr. at p. 3, fn. 3, citing *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

1. The "Per Se" Claims

a. Unilateral Change to the Academic Calendar

Absent a valid defense, unilateral changes to negotiable subjects are "per se" violations of the duty to bargain in good faith under EERA Section 3543.5, subdivision (c). (*Lodi Unified School District* (2020) PERB Decision No. 2723, p. 11.) To establish a prima facie case for an unlawful unilateral change, the charging party must prove: (1) the employer changed or deviated from the status quo; (2) the change or deviation concerned a matter within the scope of representation; (3) the change or deviation had a generalized effect or continuing impact on represented employees' terms or conditions of employment; and (4) the employer reached its decision without first providing adequate advance notice of the proposed change to the union and bargaining in good faith over the decision, at the union's request, until the parties reach an agreement or a lawful impasse. (*Bellflower Unified School District* (2021) PERB Decision No. 2796, p. 9, citing *County of Merced* (2020) PERB Decision No. 2740-M, pp. 8-9.)

i. Change to the Status Quo

The first issue is whether the District changed or deviated from the status quo when it adopted and then implemented changes to the academic calendar starting in the 2020-2021 academic year. There are three primary means of establishing that an employer changed or deviated from the status quo. Specifically, a charging party satisfies this element by showing any of the following: (1) deviation from a written agreement or written policy; (2) a change in established past practice; or (3) a newly created policy or application or enforcement of existing policy in a new way. (*County*

of Merced, *supra*, PERB Decision No. 2740-M, p. 9.)

Before the alleged changes, from 2003 to 2020, the District's academic calendar had consistently included two 16-week semesters, a 6-week Intersession between the Fall and Spring semesters, and an 8-week Summer session. There was no evidence of any deviation from that format, except for one year, when there was no Intersession in the 2005-2006 academic year. These facts show a clear, unequivocal, practice that was accepted by both parties for several years before the alleged change. (*City of Santa Maria* (2020) PERB Decision No. 2736-M, p. 18, citing *County of Orange* (2018) PERB Decision No. 2611-M, pp. 10-11, fn. 7, other citation omitted.)

The District does not dispute these facts, but it contends that no policy change occurred because the 2020-2021 academic calendar adopted by its Governing Board was labeled as "tentative." It analogizes this dispute to *Lake Elsinore School District* (1986) PERB Decision No. 606 (*Lake Elsinore SD*). There, during reopener negotiations for issues concerning one school year, the employer prepared a "draft tentative calendar" for the following school year, which would have increased the number of school days, thereby also increasing the number of teacher working days. (*Id*. at p. 2.) The employer provided a draft of the calendar to the faculty union and expressed interest in negotiating over the calendar immediately. (*Id*. at p. 3.) The union responded that it was unavailable to negotiate over the calendar until negotiations for the prior year were completed. The governing board tentatively approved a student calendar with the proviso that the working calendar was still "subject to negotiations." (*Ibid*.) The employer continued to express its willingness to negotiate over the calendar. The Board found no policy change because the union did

not prove that the adoption of the calendar was a "final calendar." The Board explained that because the adopted calendar was only tentative and the employer remained willing to negotiate prior to implementation, "the [employer's] conduct evidenced its continued recognition of its bargaining obligation." (*Id*. at pp. 13-14.) The Board additionally explained that an adopted calendar may be a "final calendar" if "the district implements it and, in so doing, changes the terms and conditions of employment." (*Id*. at p. 14; see also *San Jose Community College District* (1982) PERB Decision No. 240, pp. 8-9 (*San Jose CCD*).)

The present dispute is distinguishable from *Lake Elsinore SD* for the simple reason that the District in this case never acknowledged that bargaining was required over how changes to the academic calendar altered employee hours and other working conditions. Both before and after adoption, the District has maintained that no negotiations were required because the parties, through CBA Article X, Section 12.1, agreed to forgo negotiations on calendar issues.[10] In fact, the only reason why the 2020-2021 academic calendar was labeled as "tentative" at the time it was adopted by the District's Governing Board was because the Faculty Union and the Classified Union refused to sign an MOU approving of the calendar until the District completed negotiations. Moreover, unlike in *Lake Elsinore SD*, the District in this case actually implemented the new calendar terms starting in the 2020-2021 academic calendar,

[10] The merits of that argument will be addressed in the section of this proposed decision discussing the District's affirmative defenses. (See *City of Culver City* (2020) PERB Decision No. 2731-M, pp. 17-18 [holding that claims that a union has waived its right to bargain over an otherwise negotiable subject are appropriately addressed as affirmative defenses]; see also *County of Santa Clara* (2013) PERB Decision No. 2321-M, p. 18-19.)

thus changing the working hours and other terms and conditions of employment for employees in the Faculty Union bargaining unit.

This case is more like *Pasadena Area Community College District* (2015) PERB Decision No. 2444 (*Pasadena* Area *CCD*), where, for several years, the employer maintained an academic calendar with two semesters and one intersession each during summer and winter. (*Id*. at p. 18.) After approving another calendar consistent with that format, the employer recommended a new "tentative" calendar consisting of three trimesters and no winter intersession. The employer maintained that the change was for pedagogical and financial reasons. (*Id*. at pp 4-6.) The employer discussed the new calendar format with the faculty union in negotiations, but implemented its new calendar before reaching agreement with the union or completing the statutory impasse process. (*Id*. at pp. 6-7.) The Board found the employer in that case "took action to change policy" when it adopted and imposed the trimester-based academic calendar on its employees. (*Id*. at pp. 13, 18.)

The District contends that *Pasadena Area CCD*, *supra*, PERB Decision No. 2444 is distinguishable on this issue because the employer in that case had already adopted a semester-based calendar only to adopt a trimester calendar. The District maintains that a different outcome is warranted in this case because it had no approved academic calendar for the 2020-2021 academic year. This assertion misstates the Board's holding, including its reasoning that adopting *a newly created policy* where previously *there was none* is just as much a change in policy as a departure from established policy under a written agreement or past practice. The Board held that the employer's move to the trimester-based calendar deviated from

both the previously adopted calendar and from its longstanding practice of operating based on an academic calendar that had two semesters and a winter and summer. (*Id*., at pp. 13, 18, adopting proposed dec. at pp. 11-12.) Here, the District's academic calendar changes deviated from its long and consistent history of having an academic calendar with two 16-week semesters, a 6-week Intersession, and an 8-week Summer session. As in *Pasadena Area CCD*, the District in this case departed from that practice when it adopted an academic calendar without an Intersession and with an expanded 12-week Summer session. This altered the hours and other working conditions for faculty unit members. Alternatively, to the extent the District argues that it had not yet adopted any policy for the 2020-2021 academic calendar, under *Pasadena Area CCD*, it was not free to adopt an entirely new calendar format without completing good-faith negotiations and any applicable impasse resolution procedures. (*Id*. at pp. 15-16; see also *County of Kern* (2018) PERB Decision No. 2615-M, p. 5; *County of Monterey* (2018) PERB Decision No. 2579-M, p. 10.)

ii. The Scope of Representation

EERA section 3543.2, subdivision (a)(1), defines the "scope of representation" as "matters relating to wages, hours of employment, and other terms and conditions of employment." On the other hand, subdivision (a)(4) excludes other matters from the scope of representation, and the Board recognizes that bargaining may not be appropriate over matters that abridge the employer's "freedom to exercise managerial prerogatives essential to the achievement of its mission." (*Riverside Unified School District* (1989) PERB Decision No. 750, p. 17 (*Riverside USD*), citing *Anaheim Union High School District* (1981) PERB Decision No. 177.) Thus, bargaining is typically not

required "over matters of inherent managerial policy, which shall include but shall not be limited to such areas of discretion or policy as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel." (*Riverside USD*, p. 15, citation omitted.)

The District contends that the calendar changes in this case were within the District's authority to determine the nature, direction, and level of services provided. It cites *Huntington Beach Union High School District* (2003) PERB Decision No. 1525 (*Huntington Beach UHSD*) in support of this position. At issue in that case was an employer's decision to modify the hours of three new, and vacant, positions as part of the employer's plan to expand the hours of its library operations. The Board acknowledged that the employer could unilaterally set the hours of its libraries but found that its authority did not extend to unilaterally determining the work hours of library staff. (*Id*. at pp. 7-8, citing *Imperial Unified School District* (1990) PERB Decision No. 825 and *Jefferson School District* (1980) PERB Decision No. 133.) The Board accordingly held that requiring negotiations over changes to employees' work hours, including the hours of vacant bargaining unit positions, did not impinge upon the employer's right to dictate the nature, direction, or level of services provided. (*Huntington Beach UHSD*, p. 10.)[11]

[11] The District also argues that this case is similar to *Fremont Union High School District* (1987) PERB Decision No. 651 and *Stanislaus County Department of Education* (1985) PERB Decision No. 556. Both cases involved alleged subcontracting of educational services previously provided by the employer. (See also *Regents of the University of California (Berkeley)* (2018) PERB Decision No. 2610-H.) These cases are poor analogies for the present dispute because there

More on point is *Mt. San Antonio Community College District* (1983) PERB Decision No. 297 (*Mt. San Antonio CCD*), where the employer made several changes in response to what it considered to be a fiscal emergency. Relevant to the present dispute, the employer reduced the number of class offerings during the first of its two summer sessions and canceled the second session altogether. This was done in response to lower enrollment projections. (*Id*. at p. 2.) The employer then altered its method for assigning summer session classes, in part, to accommodate those faculty members who had lost assignments due to the cancelations. (*Id*. at p. 3.) The Administrative Law Judge (ALJ) concluded that the "cancellation of summer school classes is analogous to an employer's decision to close part of its business for financial reasons." (*Id*., adopting proposed dec. at p. 46.) He accordingly found that "the decision as to which classes to cancel, and on what basis is therefore a non-negotiable managerial prerogative." (*Ibid*.)[12] He reached the opposite conclusion with

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was no allegation that the District cancelled instruction during the 2021 Intersession and then continued to offer those services through a private entity. Rather, the evidence here shows that Knudson recommended cancelling the Intersession and shifting the LHEs that would have been offered in the winter to an expanded Summer session, to be taught by faculty unit members. For that reason, the cases discussed below, concerning academic calendar changes, provide a more useful comparison.

[12] The District also cites *Pasadena Area Community College District* (2011) PERB Decision No. 2218 as another case that supports this conclusion. In that case, the ALJ stated, citing the *Mt. San Antonio CCD*, *supra*, PERB Decision No. 297, that an employer's decision to cancel classes is outside the scope of representation. (See *Id*., adopted proposed dec. at p. 4.) However, it is unclear whether the sections of PERB Decision No. 2218 that the District relies on are precedential. Even where the Board adopts a proposed decision, ALJ conclusions are binding only on the parties where neither party excepts to those conclusions, unless the Board elects to reach the issue on its own motion. (*Contra Costa Community College District* (2019) PERB Decision No. 2652, p. 12, citations omitted.) In any event, the ALJ's conclusions in

respect to the employer's changes to how it assigned summer classes to faculty due to the clear effect the process for class assignments has on wages and hours. (*Id*., adopting proposed dec. at pp. 46-47.) The Board affirmed both conclusions. (*Id*. at pp. 3-4, fn. 1.)

In *Pasadena Area CCD*, *supra*, PERB Decision No. 2444, the Board addressed whether the employer's decision to move from a semester-based academic calendar to a trimester-based calendar was within the scope of representation. The Board adopted the ALJ's analysis concluding that school calendars represent "a kind of hybridized negotiable/permissive subject" due to the tension between school districts' prerogative to set education standards, including student instructional hours, and faculty working hours, which is traditionally a negotiable subject. (*Id*. at p. 13.) It also adopted the ALJ's findings that the move to the trimester-based calendar fell within the scope of representation because it significantly altered faculty working conditions, including different starting and ending dates for the work year and changes to the length of each term within the academic year, which in turn altered the number of course assignments unit members could accept. (*Id*. at pp. 14-15.) The Board explained its reasoning as follows:

> "Because there is no conceivable way that students could attend courses on a trimester schedule while staff members work on a semester schedule, the District's unilateral

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PERB Decision No. 2218, that the employer had the authority to cancel its winter intersession without bargaining, was based entirely on *Mt. San Antonio CCD*. PERB Decision No. 2218 is also distinguishable from this case because the District did more than merely cancel its Intersession. Rather, the changes made here amounted to the "wholesale adoption of a different type of calendar." (See *Pasadena Area CCD*, *supra*, PERB Decision No. 2444, p. 15.)

> adoption of a new calendar system necessarily encroaches on the bargaining rights of employees by imposing a different distribution of work days. This clearly has a direct impact on work hours, and other terms and conditions of employment[.]"

(*Id*. at p. 15; see also *Palos Verdes Peninsula Unified School District/Pleasant Valley School District* (1979) PERB Decision No. 96, p. 34 (*Palos Verdes USD*) ["Therefore, the dates of the beginning and ending of certificated service, vacations and holidays are primarily related to hours of employment as found in [EERA] section 3543.2, and are consequently negotiable items]; but see *San Jose CCD*, *supra*, PERB Decision No. 240, p. 10 [holding the decision to convert faculty in-service training days to instructional days was outside the scope of representation where it did not lengthen the work day, increase the number of work days, or affect the distribution of work days].)

In this case, eliminating the 2021 Intersession was the most discussed aspect of the changes adopted and implemented for the 2020-2021 academic calendar. The District correctly points out that it had the managerial prerogative to cancel classes from its voluntary education program, or even an entire session of such classes. (See *Mt. San Antonio CCD*, *supra*, PERB Decision No. 297, adopting proposed dec. at p. 46.)

However, canceling the Intersession was not the only change that the District implemented. Eliminating the Intersession was part of a larger plan to expand its 2021 Summer session from 8 to 12 weeks. Knudson explained that he believed that this plan would increase the number of courses that could be assigned to faculty unit members. During his November 9, 2017 public town hall meeting, Knudson estimated

that he expected the number of LHEs that faculty could be assigned to increase by between 200 to 400, due to the flexibility in offering classes in the two 6-week Summer sessions or in a single 12-week Summer session. In this sense, the change that occurred here was not so much an exercise of managerial discretion to simply cancel course offerings, but a strategic decision to move its course offerings from the period between the Fall and Spring semesters to the period between the Spring and Fall semesters. This necessitated changes to the start, end, and length of the winter and summer recesses, the start and end dates of the Spring and Fall semesters, and the length of the Summer session. Those changes, in turn, required further alterations to events such as the dates for observing holidays starting in the 2020-2021 academic year. The change was also projected to increase the number of teaching assignments for faculty unit members, thereby expanding their capacity to earn wages. These are precisely the types of changes that the Board found to be negotiable subjects in *Pasadena Area CCD*, *supra*, PERB Decision No. 2444 and *Palos Verdes USD*, *supra*, PERB Decision No. 96.

The District contends the scope of representation analysis from *Pasadena Area CCD*, *supra*, PERB Decision No. 2444 does not apply here because the move from a semester-based academic calendar to a trimester-based calendar was more drastic than the changes adopted by the District for the 2020-2021 academic calendar in this case. This assertion, while true, does not necessitate a different outcome. The employer in *Pasadena Area CCD*, eliminated its winter intersession, and then modified the length of its two semesters and its summer intersession into three trimesters. (*Id*. at p. 6.) Here, although the District did not change the length of its two 16-week

semesters, it is undisputed that the new academic calendar changed other items that the Board found to be negotiable, including start and end dates of the work calendar year, the number of work days, and the dates of vacation and holidays. (See *Pasadena Area CCD*, p. 15 and *Palos Verdes USD*, *supra*, PERB Decision No. 96, p. 34.) Because these changes to employees' work hours were inextricable from the District's new academic calendar plan, that decision is within the scope of representation.

iii. Generalized Effect or Continuing Impact

Turning to the third element of PERB's unilateral change test, there is no question that, by design, the changes to the 2020-2021 academic calendar were implemented and have remained in effect continuously throughout that year and beyond. Such changes impacted the entire faculty bargaining unit on an ongoing basis. This is sufficient to establish that the change had a generalized effect or continuing impact on represented employees. (*City of Culver City*, *supra*, PERB Decision No. 2731-M, pp. 12-13.)

iv. Notice and Opportunity for Bargaining

The final element of the prima facie case for a unilateral change is whether the District provided the Faculty Union with notice and the opportunity for bargaining before adopting its decision to change employees' working conditions. (*Victor Valley Union High School District* (1986) PERB Decision No. 565, pp. 4-5 (*Victor Valley UHSD*).) There is no dispute here that the District refused to bargain over its decision to make these calendar changes. According to the District's interpretation of CBA Article X, Section 12.1, calendar changes were subject to discussion through the

Calendar Committee, and neither party could request formal negotiations over calendar changes.[13] For that reason, the District only ever expressed willingness to bargain over the effects of the calendar changes. The *Pasadena Area CCD* Board resoundingly rejected that such a position satisfies an employer's bargaining obligations. "Working hours, including starting and ending dates and the dates of holidays, are mandatory subjects as to which decision bargaining, not merely effects/impact bargaining, is required. Offering to bargain over the effects/impact of the calendar change fails to satisfy the obligation imposed by EERA to decide bilaterally matters within the scope of representation." (*Pasadena Area CCD*, *supra*, PERB Decision No. 2444, p. 19.)

I reach the same conclusion here. The District's willingness to bargain over the effects of its decision to change the academic calendar does not satisfy its obligation to provide notice and the opportunity to bargain over the calendar change decision itself, and not merely over its effects.

The Faculty Union has established all four elements of its prima facie case for a unilateral change. The District's adoption and implementation of changes to its academic calendar starting in the 2020-2021 academic year therefore violated the duty to negotiate in good faith unless it has established that it was excused from negotiations. (See *Pasadena Area CCD*, *supra*, PERB Decision No. 2444, p. 16.)

[13] As explained above, the validity of this position will be discussed in the section below, concerning the District's affirmative defenses. (See *City of Culver City*, *supra*, PERB Decision No. 2731-M, pp. 17-18.)

v. The District's Affirmative Defenses

The District contends that no bargaining violations should be found because it was excused from negotiating with the Faculty Union over changes to the academic calendar. It claims that the Faculty Union waived its right to bargain over such changes either by agreeing to the terms of CBA Article X, Section 12.1 or by failing to request negotiations. The District additionally argues that any obligation to bargain over the calendar changes was excused due to an overriding operational or business necessity that required unilateral action. Each of these defenses will be addressed below.

(a) The Waiver by Contract Defense

A union may waive its right to bargain over otherwise mandatory subjects of bargaining. However, a waiver of the right to negotiate must be "clear and unmistakable[,] evincing "an intentional relinquishment of the right to bargain." (*Rio Hondo Community College District* (2013) PERB Decision No. 2313, p. 5 (*Rio Hondo CCD*), [emphasis in original], citing *California State Employees Assn. v. PERB* (1996) 51 Cal.App.4th 923, 937-938 (*CSEA*) and *Amador Valley Joint Union High School District* (1978) PERB Decision No. 74.) This is because there is strong public policy against finding waivers based solely on inference. (*Santa Ana Unified School District* (2013) PERB Decision No. 2332, p. 28, citing *Long Beach Community College District* (2003) PERB Decision No. 1568.) Accordingly, the "burden of establishing a waiver is upon the party asserting it, whether the claimed waiver is grounded in alleged inaction, contact language, or a simple failure to demand bargaining." (*Rio Hondo CCD*, *supra*, p. 6.)

Where, as here, the waiver theory is based on language in a contract, the terms of the agreement must unmistakably cover all aspects of the subject in question and must also specifically authorize unilateral action on that particular subject. (*Redwoods Community College District* (1996) PERB Decision No. 1141, p. 2, citations omitted; *Berkeley Unified School District* (2004) PERB Decision No. 1729, pp. 1-2.) In addition, although PERB lacks the general authority to enforce contracts (see EERA, § 3541.5, subd. (b)), it may interpret agreements when necessary to resolve unfair labor practice allegations. (*County of San Joaquin* (2021) PERB Decision No. 2775-M, pp. 39-40, citations omitted.) When the occasion arises, PERB applies traditional contract interpretation rules. (*City of Riverside* (2009) PERB Decision No. 2027-M, p. 10, citing *National City Police Officers' Assn. v. City of National City* (2001) 87 Cal.App.4th 1274, 1279 and *Grossmont Union High School District* (1983) PERB Decision No. 313.) The aim is to effectuate the parties' mutual intent at the time of the agreement, to the extent their intentions are lawful. (*County of Sonoma* (2012) PERB Decision No. 2242-M, pp. 15-16, citing Civ. Code, § 1636; see also *City of Riverside*, p. 10.) If the contract language is "clear and unambiguous, it is unnecessary to go beyond the "plain language of the contract itself" to determine its meaning. (*County of Sonoma*, pp. 15-16, citing Civ. Code, § 1638, *City of Riverside*, and *Marysville Joint Unified School District* (1983) PERB Decision No. 314 (*Marysville JUSD*).) If, on the other hand, the contract is silent on the subject or its meaning is susceptible to more than one reasonable interpretation, PERB may consider extrinsic evidence, including bargaining history, prior agreements, or past applications, to determine the meaning of contract provisions. (*County of Sonoma*, p. 16, citing *Marysville JUSD*, other citations

omitted.)

In this case, the District contends that it was excused from any bargaining obligation it had over changes to employee hours and working conditions caused by the new academic calendar under the terms of CBA Article X, Section 12.1. That section states:

> "All issues related to the calendar (starting and ending dates of the semester, summer session and intersession; starting and ending class times; holidays; flex days; orientation; parts of term; days counted as instructional days) shall be referred to the Calendar Committee, a campus-wide standing committee. The committee will have co-chairs consisting of the vice president of student services and either the AVCFT or AVCFCE representative in alternate years. Each year, the committee shall recommend a calendar to the presidents of the District, AVCFT and AVCFCE for final approval through a memorandum of understanding in time to meet the College's scheduling timelines."

Accompanying Section 12.1, is Section 12.2, which states:

> "Though we have tried to anticipate all of the contractual ramifications of the move from a 17-week calendar to a 16-week calendar, there will likely be some problems and issues arising from this shift that we have not yet foreseen. In recognition of this fact, the Union and the District agree to work together to solve all contractual problems connected with the calendar in an amicable way, as quickly and efficiently as possible, even if this supersedes the usual negotiations process of full negotiations and re-openers. <u>This does not preclude the possibility of negotiating any contract items</u>."

(Emphasis in original.)

Most contract-based waiver cases concern the extent to which the parties' agreement permitted the employer to act unilaterally on an otherwise negotiable

subject. (See e.g., *State of California (Department of Motor Vehicles)* (1999) PERB Decision No. 1347-S and *San Jacinto Unified School District* (1994) PERB Decision No. 1078 (*San Jacinto USD*).) The District's argument in this case is somewhat unique because it maintains that both parties agreed to waive their bargaining rights and cede decision-making authority about all decisions concerning the academic calendar to the Calendar Committee. The Calendar Committee is one of the District's participatory governance entities, composed of members from the faculty bargaining unit, the classified unit, administrators, and students.

The Board addressed a similar question in *Perris Union High School District* (1990) PERB Decision No. 861. There, the parties agreed to implement a particular health benefits plan unless an alternative plan was negotiated by a certain date. The parties further agreed to establish a joint "insurance committee," consisting of members from both parties, with the charge of studying other benefits options. (*Id*., adopting warning ltr. at pp. 1-2.) The committee met and prepared a set of recommendations, but the employer refused to implement those recommendations. (*Id*., adopting warning ltr. at p. 3.) The Board dismissed the union's claim that the employer was required to adopt the recommendations of the committee. (*Id*. at pp. 1-2.) The Board concluded that, while the parties agreed to form the committee and develop recommendations, the agreement did not require the employer to adopt those recommendations. (*Ibid*.)

A similar conclusion is warranted here. Article X, Section 12.1 specifies that several negotiable matters, including the starting and ending dates of the semester, holidays, and issues pertaining to Intersession and Summer session shall be "referred

to the Calendar Committee," who then must "recommend a calendar" to the District Superintendent/President and the Presidents of the Faculty and Classified Unions. However, nothing in this language requires the District or the Faculty Union to accept that recommendation. These terms also do not state that the Faculty Union waived its right to bargain over any changes to employee working conditions after receiving the committee's recommendation. The plain meaning of the term "recommend" to describe the Calendar Committee's plan indicates that the Committee's role is merely advisory.

Requiring an MOU before sending an academic calendar to the Governing Board also signifies that the Presidents of the District, the Faculty Union, and the Classified Union have discretion over whether to accept the Calendar Committee's recommendation. Absent clear evidence to this effect, I am unwilling to conclude that the MOU requirement was merely a ministerial adoption of the Calendar Committee's recommendation. This language is not consistent with a clear and unmistakable waiver of the right to bargain over changes to working conditions caused by a new academic calendar.[14]

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[14] The District also suggests that the Calendar Committee's deliberations were the equivalent of bargaining because both District administrators and Faculty Union representatives sat on the committee. However, the default rule established by the PERB-administered statutes is that negotiations occur as in-person meetings between the designated representatives of the employer and the bargaining agent (*Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, p. 34 (*Petaluma City ESD/JUHSD*), and that an employer may not use other, public proceedings to satisfy its bargaining obligations. (*City of Palo Alto* (2017) PERB Decision No. 2388a-M, pp. 33-34; see also *County of Orange* (2018) PERB Decision No. 2594-M, p. 12.) The Board has previously found such an argument "dubious" where the community college district's calendar committee included members from multiple bargaining units, administrators, and students. (See

My conclusion is no different when reading CBA Article X, Section 12.1 in conjunction with Section 12.2. By its own terms, Section 12.2 appears to pertain only to the transition to the 16-week condensed calendar. Even if applicable, the references to the parties' aspiration to solve issues relating to the calendar quickly and amicably, including finding solutions outside of "usual negotiations," does not clearly and unmistakably waive the Faculty Union's right to bargain over calendar changes. To the contrary, that section expressly leaves open "the possibility of negotiating any contract items."

The District also contends that the parties' past application of these contract sections shows that they have always treated Article X, Sections 12.1 and 12.2 as waivers. The District is correct that neither section specifies what process the three presidents go through before signing the MOU. The District is also correct that the parties' past application of a contract is one type of extrinsic evidence used to determine the meaning of ambiguous language or to fill gaps where the agreement is silent. (See *Antelope Valley Community College District* (2018) PERB Decision No. 2618, p. 21 (*Antelope Valley CCD*).) The District here maintains that the parties have a long history of accepting the Calendar Committee's recommendation for an academic calendar. It points out that there was no evidence that the Faculty Union had ever requested negotiations after receiving a committee recommendation in the past. These facts are insufficient to establish that the parties intended Article X, Sections 12.1 or 12.2 to act as a clear and unmistakable waiver of the right to bargain.

Pasadena Area CCD, *supra*, PERB Decision No. 2444, p. 13.) The same conclusion is reached here.

Ever since those sections were incorporated into the CBA, there was no evidence that the Calendar Committee ever recommended any changes to the academic calendar on the scale of its recommendation for the 2020-2021 academic year. Thus, it remains unclear whether the parties believed that negotiations were not permitted after receiving the Calendar Committee's recommendation or whether the Faculty Union merely believed that negotiations were unnecessary. Mere acquiescence to prior unilateral changes does not constitute a permanent waiver of the right to bargain over any future changes. (*San Jacinto USD*, *supra*, PERB Decision No. 1078, adopting proposed dec. at p. 23, citing *Johnson-Bateman Co*. (1989) 295 NLRB No. 26.) Under these circumstances, the District failed to meet its burden of proving that either the language in Sections 12.1 and 12.2, or the parties' past applications of that language establish that the Faculty Union waived its right to bargain over changes in employee working conditions arising out of adopting an academic calendar.

Turning to other extrinsic evidence, BP 4010 states that before approving "any major calendar changes that may have financial impact to the district or may affect student access and/or student learning," the District must, among other things, "reach[] agreement with the Antelope Valley College Federation of Teachers (AVCFT) and Antelope Valley College Federation of Classified Employees (AVCFCE)." BP 4010 was adopted in 2007 and updated in 2017, which was after Sections 12.1 and 12.2 were incorporated into the CBA in 2003. This policy from the District's own Governing Board further suggests that Sections 12.1 and 12.2 were not intended to preclude negotiations and reaching agreements with the Faculty and Classified

Unions over changes to the academic calendar.[15]

Similarly, even the members of the Calendar Committee did not appear to believe that its recommended academic calendar had to be approved by the Presidents of the District and the Faculty and Classified Unions. In November 2019, the committee "reached consensus" on approving contingency calendars in the event that the three presidents did not reach agreement after receiving the Calendar Committee's recommendation. For these reasons, the District has not established that Sections 12.1 and 12.2 operate as a waiver of the right to bargain over negotiable changes to the academic calendar.

The District additionally argues that the Faculty Union waived its right to bargain over the calendar changes adopted by the Governing Board on December 9, 2019, after its negotiators signed the Tentative Agreement for the 2018-2021 CBA on the following day. Generally speaking, parties may include a zipper clause in their agreements that authorizes each party to refuse bargaining over all covered matters

[15] The District contends that BP 4010 was superseded by Sections 12.1 and 12.2. EERA section 3540 states, in relevant part, that "[t]his chapter shall not supersede other provisions of the Education Code and the rules and regulations of public school employers . . . so long as the rules and regulations or other methods of the public school employer do not conflict with lawful collective agreements." According to the District, because the Faculty Union waived its right to bargain over calendar changes by agreeing to Sections 12.1 and 12.2, those provisions conflict with and therefore supersede BP 4010. However, I have rejected the premise of this argument. The District has not met its burden of proving that Sections 12.1 and 12.2 constitute a waiver of the right to bargain. I furthermore find no inherent conflict between the Section 12.1 requirement for signing an MOU and the BP 4010 requirement of "reaching an agreement." These two obligations can easily be read in harmony as requiring that the parties reach an agreement on a final academic calendar and then memorialize that agreement in an MOU.

during the life of that agreement. (See *County of Sacramento* (2020) PERB Decision No. 2745-M, p. 21, citing *Inglewood Unified School District* (2012) PERB Decision No. 2290, p. 12.) In this case, however, nothing in the record specifies that the parties intended the Tentative Agreement to address the issues related to the 2020-2021, or any other academic calendar. Nor was there evidence in the record that the 2018-2021 CBA contains a comprehensive zipper clause that would preclude negotiations over changes to the academic calendar. The Tentative Agreement also does not contain language authorizing the District to take unilateral action on calendar issues. Under these circumstances, the District failed to meet its burden of proving that the Faculty Union waived its right to negotiate over the changes to employee working conditions when it signed the Tentative Agreement or ratified the 2018-2021 CBA.

(b) The Waiver by Inaction Defense

The District also contends that the Faculty Union waived its right to bargain over changes to the academic calendar by failing to request negotiations. An exclusive representative may waive its right to bargain over a negotiable issue "where the employer shows that the exclusive representative failed to demand to negotiate, despite having received sufficient notice of the proposed change." (*West Covina Unified School District* (1993) PERB Decision No. 973, pp. 13-14, citing *Cloverdale Unified School District* (1991) PERB Decision No. 911 (*Cloverdale USD*).) As with any waiver, waivers by inaction must be clear and unambiguous and must be established by the asserting party. (*Rio Hondo CCD*, *supra*, PERB Decision No. 2313, pp. 5-6.) However, "[s]ilence, by itself is never clear and unambiguous." (*Id*. at p. 7.) Thus, to find a waiver, there must be other indicators that the union intentionally relinquished

its right to bargain. (*Ibid*.) Although an unreasonable delay in making a bargaining demand may be evidence of a waiver, the reasonableness of the delay turns on the specific facts of each case. (*Id*., citing *Compton Community College District* (1989) PERB Decision No. 720; *Victor Valley UHSD*, *supra*, PERB Decision No. 565.)

In this case, the District points out that Knudson began discussing changes to the academic calendar in as early as October 2017. Then, on March 14, 2019, the Calendar Committee approved the idea of eliminating the Intersession. On April 22, 2019, it approved a plan to increase the Summer session from 8 to 12 weeks. On October 2, 2019, the Calendar Committee voted to approve key dates for the 2020-2021 academic year, including the start and end dates for each semester, the dates of breaks and holidays, and the start and end of the expanded 2021 Summer session. All of these dates were consistent with an academic calendar with no Intersession and with a 12-week Summer session. According to the District, the Faculty Union failed to request negotiations during all of this time, and in doing so, waived its right to bargain over this issue.

This position misstates the record. Lee first raised the negotiability of the District's plans to alter its academic calendar on May 7, 2019, shortly after Bryant, then the Vice President of Human Resources, asked Lee to sign an MOU approving of the changes. Lee declined, stating "this is a negotiated item that will affect multiple sections of the faculty CBA. I will need to consult with my negotiations team on their availability." Lee also invoked BP 4010, which requires "reaching agreement" with the Faculty and Classified Unions before making any major changes to the academic calendar. Although the District disagrees with the Faculty Union over the

interpretation of BP 4010, it remains significant that Lee consistently asserted the desire to bargain and reach agreement over the changes to the academic calendar. Lee's statements adequately conveyed to the District that the Faculty Union considered the District's plans to eliminate the Intersession and expand the Summer session to be negotiable and that the Faculty Union desired negotiations. (See *County of Sacramento* (2013) PERB Decision No. 2315-M, p. 5 [holding that an exclusive representative's bargaining demand "'is not required to recite a formulaic phrase, but may express its request in any form that conveys its desire to meet and confer or negotiate about a matter within the scope of representation."]; see also *County of Ventura* (2021) PERB Decision No. 2758-M, p. 47, fn. 19.)

Knudson contacted Lee again about signing an MOU about the calendar shortly after the Calendar Committee approved implementation dates for the 2020-2021 academic calendar. Lee responded on October 18, 2019, repeating the Faculty Union's position that negotiations were required before he would sign the MOU. Knudson did not respond.

In total, between May 7, 2019 and December 3, 2020, the record includes at least eight instances where Lee either expressed the Faculty Union's desire to bargain over the District's decision to adopt the calendar changes voted on by the Calendar Committee, or inquired about the District's willingness to bargain over that decision. This conduct does not demonstrate that the Faculty Union was intentionally relinquishing its right to bargain over these changes.

The District also maintains that the Faculty Union's conduct during the 2018-2021 successor negotiations evidences a waiver. It points out that Faculty Union's

negotiators did not demand bargaining or offer calendar proposals during contract negotiations. The record shows that Adams, the Faculty Union's chief negotiator, told the District's negotiating team that the calendar changes were negotiable and that his team was waiting to see what would result from the then-ongoing discussions between Knudson, Lee, and Ford. As discussed above, Knudson disagreed with Lee that the calendar changes were subject to decisional bargaining.

Even assuming that the Faculty Union did not adequately express its desire to bargain over the planned calendar changes, the District only ever agreed to bargain over the negotiable effects of those changes. Although Knudson offered to meet with Lee, he never expressed any willingness to bargain over the decision to change the academic calendar. In responding to Knudson's requests to meet, Lee offered dates he was available to discuss the matter, but he insisted that the meetings lay the groundwork for negotiations. For example, Knudson offered to meet in November 2019, but he canceled that meeting after Lee suggested that the Faculty Union's chief negotiator attend. Then, on November 25, 2019, Knudson wrote to Lee that because the changes had been approved by the Calendar Committee, "[t]here is no further obligation to 'meet and negotiate' the Calendar."

When Knudson suggested another meeting in December 2019, Lee replied that the parties' bargaining teams should attend and that the meeting should be used to establish protocols for negotiating over the calendar decision. Knudson replied that participation by the bargaining teams was unnecessary and that, "[a]s stated on numerous occasions in the past, the calendar is not subject to traditional negotiation." Knudson maintained the same position in his January 7, 2020 letter, even after the

Governing Board adopted the 2020-2021 academic calendar. Notwithstanding the District's expressed interest in meeting with the Faculty Union, these facts make clear that the District remained unwilling to negotiate over the calendar change decision. The Faculty Union had no obligation to request negotiations over this decision in the face of the District's unwavering refusal to do so. (*Oxnard Unified School District* (2022) PERB Decision No. 2803, p. 49, citing *County of Merced*, *supra*, PERB Decision No. 2740-M, p. 20 and *Standard School District* (2005) PERB Decision No. 1775, adopting proposed dec. at p. 16.)

Under these circumstances, the District failed to prove that the Faculty Union waived its right to bargain over the changes implemented starting in the 2020-2021 academic calendar by failing to request bargaining.

(c) The Business/Operational Necessity Defense

The District's other affirmative defense to the unilateral change claim is that any bargaining obligations it had over the changes to the academic calendar should be excused due to operational necessity. Under "exceptionally limited circumstances," an employer may be excused from bargaining over an otherwise negotiable policy change due a "true emergency." (*County of San Bernardino (Office of the Public Defender)* (2015) PERB Decision No. 2423-M (*County of San Bernardino*), p. 54, citing *Cloverdale USD*, *supra*, PERB Decision No. 911.) To demonstrate this "operational necessity" or "business necessity" defense, the employer must establish an "actual financial or other emergency that leaves no alternative to the action taken and allows no time for meaningful negotiations before taking action." (*County of San Bernardino*, p. 54, citing *Calexico Unified School District* (1983) PERB Decision

No. 357, adopting proposed dec. p. 20.) The "necessity," moreover, must be the unavoidable result of a sudden change in circumstances beyond the employer's control. (*County of San Bernardino*, p. 54, citing *Lucia Mar Unified School District* (2001) PERB Decision No. 1440, adopting proposed dec. at p. 46.)

The District maintains that it only adopted the 2020-2021 academic calendar in December 2019 due to the need to start developing the course catalog and assigning faculty members to those courses. According to Knudson, this process can take several weeks. Without a doubt, these are important actions for maintaining the District's ability to offer classes and other educational services to students throughout the academic year. Nevertheless, these facts do not establish that there was an unavoidable emergency requiring that the District unilaterally eliminate its Intersession and expand its Summer session in 2021. The District had conceived of plans to change its academic calendar in 2017. Shortly after discussions in the Calendar Committee took place in March and April 2019, the Faculty Union was already signaling its desire to negotiate these changes. Thus, the District was aware well before December 2019 that negotiations might be required before the District could implement its plans. The District produced no evidence of a specific need to adopt these changes in the 2020-2021 academic year.

Any assertion that the District needed to change its academic calendar unilaterally due to an unanticipated emergency is further undermined by the fact that the Calendar Committee *did anticipate* that the District and the Faculty Union would need time to reach agreement about a change of this magnitude. For that reason, the Committee committed to reconvening to approve contingency calendars in the event

the parties could not agree on an academic calendar with no Intersession and a 12-week Summer session. Without taking any position on whether the changes to the academic calendar benefitted District students and other stakeholders, I find that the District failed to establish that it had no alternative to unilateral action. For that reason, the District has not established that its obligation to negotiate with the Faculty Union was excused for reasons of operational or business necessity.

The Faculty Union has proved all of the elements of a unilateral policy change. The District did not establish that any affirmative defenses excused its failure to bargain over this issue. Therefore, the District's unilateral action violated the duty to meet and confer in good faith, which is unlawful under EERA section 3543.5, subdivision (c). This conduct also derivatively violates employee and employee organization rights, which is unlawful under EERA sections 3543.5, subdivisions (a) and (b). (See *Pasadena Area CCD*, *supra*, PERB Decision No. 2444, p. 25.)

b. The Direct Dealing Claim

The Faculty Union also contends that the District committed a "per se" violation of the duty to bargain in good faith by bypassing the union and communicating directly with represented employees about the terms and conditions of employment. An employer's duty to bargain in good faith with an exclusive representative includes an obligation not to communicate directly with employees to undermine or derogate the representative's exclusive authority to represent unit members. (*City of Culver City*, *supra*, PERB Decision No. 2731-M, p. 22, citing *Omnitrans* (2010) PERB Decision No. 2143-M, adopting proposed dec. at p. 12; *Clovis Unified School District* (2002) PERB Decision No. 1504, p. 22; and *Muroc Unified School District* (1978)

PERB Decision No. 80, p. 13 (*Muroc USD*). An employer unlawfully bypasses an exclusive representative when it deals directly with represented employees to create a new policy of general application, or to obtain a waiver or modification of existing policies applicable to those employees. (*City of Culver City*, p. 22, citing *City of San Diego (Office of the City Attorney)* (2010) PERB Decision No. 2103-M, p. 7.) On the other hand, once a policy is lawfully established, an employer may communicate with employees in order to implement that policy. (*Antelope Valley CCD*, *supra*, PERB Decision No. 2618, pp. 24-27, citing *Walnut Valley Unified School District* (1981) PERB Decision No. 160, p. 6.)

In *Ventura Community College District* (1994) PERB Decision No. 1073, a union claimed that the employer engaged in unlawful direct dealing by discussing "negotiable options" with its classified senate. The Board dismissed this claim, finding no evidence that the employer violated the parties' agreement that the senate be limited to addressing "non-union concerns." It further found no evidence that anything said by the employer to the senate represented a change in any positions taken with the union. (*Id*., at p. 6, fn. 8, adopting proposed dec. at pp. 30-31; see also *County of Fresno* (2004) PERB Decision No. 1731-M, adopting dismissal ltr. p. 2; but see *Oak Grove School District* (1986) PERB Decision No. 582, pp. 17-19 (*Oak Grove SD*) [holding that the creation of a "Teachers Forum" where represented employees discussed solutions to negotiable issues unlawfully bypassed the union].)

Here, the Faculty Union alleges that Knudson unlawfully bypassed its status as the exclusive representative of the faculty bargaining unit by a November 18, 2019 e-mail he sent to Rider, the President of the Academic Senate. The e-mail describes

Knudson's justifications for changing the academic calendar and stresses the importance of giving "deference" to the Calendar Committee's recommendation and "work[ing] together to finalize a calendar without further delay[.]" Knudson does not deny sending this e-mail and further acknowledges that he intended Rider to share the e-mail with the other members of the Academic Senate, which is a participatory governance body created under AP 2510, and is composed of faculty unit members. These undisputed facts show that Knudson's e-mail was a communication directly to employees represented by the Faculty Union, advocating for changing hours and other terms and conditions of employment.

Without citation to any supporting authority, the District argues that any communications from Knudson to the Academic Senate are entitled to "qualified immunity" because AP 2510 requires the District to consult with the Academic Senate on academic and professional matters. However, when asked why he e-mailed Rider in the first place, Knudson said nothing about an interest in consulting with the Academic Senate.[16] Rather, Knudson testified that the e-mail was part of a larger push by the District to "share . . . the information that we had as broadly as we could."

Furthermore, the District is required to adopt and comply with procedures when responding to recommendations from the Academic Senate. (See *Diablo Valley College Faculty Senate v. Contra Costa Community College District* (2007) 148

[16] Rider's e-mail sharing Knudson's message with the Academic Senate appears to offer some insight into his discussions with Knudson. But because Rider did not testify and Knudson did not testify about their conversation in detail, the content of this e-mail is uncorroborated hearsay, which may not be the sole basis for any factual finding. (PERB Regulation 32176; *Palo Verde Unified School District* (2013) PERB Decision No. 2337, p. 19.)

Cal.App.4th 1023, 1033, citing Cal. Code Regs., tit. 5, § 53202, subd. (d); see also Cal. Code Regs., tit. 5, § 53200, subd. (d).) Here, AP 2510 defines its processes for handling feedback from the Academic Senate on academic and professional matters. It may accept the recommendation or explain to the senate why it cannot accept it. Alternatively, matters that require the Academic Senate's agreement are referred to the Mutual Agreement Council. There was no evidence that the District followed these approaches in this case. In fact, Knudson did not appear to be particularly interested in knowing about the Academic Senate's opinion of academic calendar changes at all. The senate eventually adopted a resolution opposing the planned calendar changes, which was read aloud during the December 9, 2019 Governing Board meeting. Knudson testified that he did not even know about it and was unaware of its contents. Thus, any claim that Knudson's e-mail to Rider was part of an effort to consult with the Academic Senate on academic and professional matters is unpersuasive.

The District also contends that no direct dealing violation should be found because the content of Knudson's e-mail was substantially similar to what had already been communicated publicly to the Calendar Committee. It is true that an employer does not bypass an exclusive representative by accurately communicating with union members about negotiable matters in a manner consistent with its position in negotiations. (*Muroc USD*, *supra*, PERB Decision No. 80, pp. 21-22.) However, misleading comments about the status of negotiations and about terms still under discussion in bargaining may constitute an unlawful bypass. (*California State University* (1989) PERB Decision No. 777-H, adopting proposed dec. at pp. 13-15.) "The touchstone for determining the propriety of an employer's direct communication

with employees is the effect on the authority of the exclusive representative." (*Petaluma City ESD/JUHSD*, *supra*, PERB Decision No. 2485, pp. 31-32, citing *California State University*, p. 9 and *Muroc USD*, pp. 19-20.)

In this case, Knudson's e-mail was different in at least one key way from prior public statements about calendar changes. His e-mail said that the typical 10 LHE load limit for faculty during semesters does not apply during the proposed 12-week Summer session and that adjunct faculty who had assignments in previous Intersessions could "move to summer where they could teach up to 15 LHE and more." There is no evidence that Knudson made a similar statement to the Calendar Committee or in any other public forum.[17] This statement is significant because, in successor negotiations, the District actually proposed *retaining a 10 LHE limit* for adjunct faculty Summer teaching assignments, as contained in CBA Article X, Section 13.4. That proposal was ultimately included in the Tentative Agreement under review by the Faculty Union at the time Knudson sent his e-mail. Knudson's e-mail was accordingly inconsistent with the District's position in the still-ongoing negotiations, and suggested that the planned calendar changes would offer more teaching opportunities than what the District was offering in bargaining, a kind of direct communication with employees long condemned as violating the principle of exclusivity in negotiations. (*Lake Elsinore Unified School District* (1986) PERB Decision No. 563, p. 4; *Medo Photo Supply Corp. v. NLRB* (1944) 321 U.S. 678, 683–684.)

[17] Knudson did say something similar in a private letter sent to Lee on November 1, 2019.

It is significant that Knudson's e-mail to Rider was sent before either the changes to the academic calendar were finalized and before the Tentative Agreement for the 2018-2021 CBA was approved. Thus, Knudson was not merely communicating with members about established policies. Rather, he was providing misleading information about negotiable matters still under consideration.

The District argues that this bypass claim is untimely because Knudson had been communicating about eliminating the Intersession since 2017 and because his comments then were similar to those made in the November 18, 2019 e-mail to Rider. Because a complaint has already issued on this claim, the District has the burden of proving that this claim falls outside the six-month statute of limitations period under EERA. (See *Los Angeles Unified School District* (2014) PERB Decision No. 2359, p. 3.) Here, the Faculty Union filed its UPC on February 13, 2020, which means that the statute of limitations period extends back to August 13, 2019. The evidence shows that, although Knudson had indeed commented about the calendar changes in the past, he had not publicly made similarly misleading comments about the number of LHEs available for adjunct faculty in a planned expanded Summer session. Because these comments to Rider were unique and were within the statute of limitations period, I reject the argument that this claim is untimely.

For all of these reasons, I hold that Knudson's inaccurate communications attempted to convince represented employees to change policies within the scope of representation. This communication also appears to be designed to apply pressure on the Faculty Union to accept the calendar changes without bargaining. The e-mail accordingly unlawfully bypassed the Faculty Union as the exclusive representative of

the faculty bargaining unit. (See *City of Culver City*, *supra*, PERB Decision No. 2731-M, p. 22.) This conduct is a violation of the duty to meet and confer in good faith, which is unlawful under EERA section 3543.5, subdivision (c), with derivative violations under subdivisions (a) and (b). (See *Oak Grove SD*, *supra*, PERB Decision No. 582, pp. 19-20.)

c. The Refusal to Bargain Claim

The PERB complaint alleges that the District refused to bargain over the changes to its academic calendar during a September 2019 successor negotiation session. Since this was pleaded separately from the unilateral change claim, discussed above, I view this claim as an independent claim, based on conduct from the District's bargaining team in negotiations.

Notwithstanding comments by Knudson and other administrators *outside of negotiations*, about the District's obligation to bargain over the decision to change its academic calendar, there was relatively little evidence about what the parties' bargaining teams said about the subject *during negotiations*. In March 2019, Adams, the Faculty Union's chief negotiator, stated that the calendar changes were negotiable but he did not attempt to initiate bargaining at that time. Rather, the Faculty Union's team took the position that Knudson, Lee, and Ford had to resolve their disagreement over how to proceed before the negotiation teams could begin discussions. There is no evidence that the negotiating teams discussed the calendar issue further in September 2019. And, although Adams's hoped-for resolution never came, there is insufficient evidence to find that the District's negotiating team refused to bargain over the calendar. This claim is therefore dismissed.

2. The Surface Bargaining Claim

In this case, the Association contends that the District's bargaining conduct, viewed in its totality between March 2019 and January 2020, demonstrates an overall pattern of bad faith. Bargaining in good faith is a subjective attitude that requires a genuine desire to reach an agreement. (*City of Placentia*, *supra*, 57 Cal.App.3d at p. 25, citing *NLRB v. MacMillan Ring-Free Oil Company, Inc*. (9th Cir. 1968) 394 F.2d 26, *NLRB v. Mrs. Fay's Pies* (9th Cir. 1965) 341 F.2d 489.) Surface bargaining, on the other hand, describes a respondent who approaches its bargaining obligations only superficially, without any actual intent to reach an agreement. At its essence, surface bargaining occurs when a party "merely goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement." (*Muroc USD*, *supra*, PERB Decision No. 80, p. 13, citing *Inter-Polymer Indus., Inc.* (1972) 196 NLRB 729, 759-760.)

Here, the District never expressed any willingness to bargain over the decision to change the academic calendar. Starting in as early as June 2019, District administrators said that they were only willing to discuss the effects of the calendar change. Knudson made unequivocal statements to that effect on November 25, 2019 and on December 4, 2019. It then adopted and implemented the changes to its academic calendar without bargaining that decision. These facts support a unilateral change theory, not a surface bargaining theory. There is no evidence, for example, that the District made even a superficial attempt to comply with its obligation to bargain over the decision to change the calendar or that it was "go[ing] through the motions of negotiations" without the good faith intent of reaching an agreement. (See

Muroc USD, *supra*, PERB Decision No. 80, p. 13.) Thus, while this conduct was inconsistent with the District's duty to meet and confer in good faith, it does not amount to unlawful surface bargaining. For that reason, this claim is dismissed.

REMEDY

PERB has broad remedial powers to effectuate the purposes of EERA. EERA section 3541.5, subdivision (c), states:

> "The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter."

1. Remedy for the Unilateral Change Violation

To remedy violations of the duty to meet and confer in good faith, the Board typically requires the respondent to cease and desist from violating EERA, rescind the unlawful conduct, bargain, upon request, over the policy in question, and make whole all of those who suffered losses because of the unlawful acts. (*Pasadena Area CCD*, *supra*, PERB Decision No. 2444, pp. 23-24; see also *CSEA*, *supra*, 51 Cal.App.4th 923, 946.) These remedies are appropriate in cases where the employer has both unilaterally changed negotiable matters and bypassed the exclusive representative. (*Antelope Valley CCD*, *supra*, PERB Decision No. 2618, pp. 24-27; see generally *City of Culver City*, *supra*, PERB Decision No. 2731-M, pp. 24-26.) In some cases, PERB will stay its requirement to restore the status quo if necessary to prevent either disruption to innocent third parties or interference with student or employee operations. (*Pasadena Area CCD*, at p. 23.)

The Board ordered all of these remedies to address the unilateral calendar changes in *Pasadena Area CCD*, *supra*, PERB Decision No. 2444. It acknowledged that ordering an immediate rescission of the calendar change had the potential to unreasonably disrupt the schedules and other plans for students, faculty, and staff. (*Id*. at p. 24.) It accordingly found:

> "We prefer instead rescission/restoration at the beginning of the next successive academic year following service of the final decision in this matter. However, if service of the final decision in this matter were to occur after May 1 . . . of an academic year, then the rescission/restoration would occur at the beginning of the second successive academic year following service of the final decision."

(*Ibid*.)

A similar approach is warranted to address the bargaining violations found in this case. The District is therefore ordered to: (1) cease and desist from unilaterally adopting changes to the terms and conditions of employment for Faculty Union bargaining unit members, bypassing the Faculty Union, and interfering with protected rights; (2) rescind the unilaterally adopted and implemented calendar; (3) bargain, on request from the Faculty Union, over future calendar changes that alter terms and conditions of employment; and (4) make any bargaining unit members whole for financial losses suffered as a result of the unilaterally adopted and implemented calendar, with 7 percent annual interest.

As in *Pasadena Area CCD*, delaying the implementation of the rescission order may be warranted to prevent undue disruption to student, faculty, and staff schedules. The record shows that the District was able to adopt the calendar changes on December 9, 2019 and implement these changes for the 2020-2021 academic year. A

similar timeline will be followed for rescinding those changes. Thus, the District should rescind the unilaterally adopted changes to the academic calendar at the beginning of the next successive academic year following service of the final decision in this matter, unless the final decision is served after December 9 of an academic year. In that case, rescission should occur at the beginning of the second successive academic year following service of the final decision. (See *Pasadena Area CCD*, *supra*, PERB Decision No. 2444, p. 24.)

The District is also ordered to post a notice of this violation and PERB's ordered remedies at all locations where notices to Faculty Union bargaining unit members are typically posted. (*Los Angeles Unified School District* (1987) PERB Decision No. 611, p. 7.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that ANTELOPE VALLEY COMMUNITY COLLEGE DISTRICT (District) violated the Educational Employment Relations Act (EERA), Government Code section 3540, et seq., by unilaterally changing its academic calendar to eliminate its Intersession and expand its Summer session from 8 to 12-weeks, and by dealing directly with faculty bargaining unit employees regarding the calendar changes, thus bypassing their exclusive representative, the Antelope Valley College Federation of Teachers (Faculty Union). All other claims were dismissed.

Pursuant to EERA section 3541.3, subdivisions (i) and (n) and section 3541.5, subdivision (c), it hereby is ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Unilaterally changing the academic calendar in a manner that alters employee hours and other working conditions, without providing the Faculty Union with notice and the opportunity for bargaining.

2. Bypassing the Faculty Union and dealing directly with represented employees about changes to the academic calendar that alters their hours and other working conditions.

3. Interfering with employees' right to be represented by the Faculty Union.

4. Interfering with the Faculty Union's right to represent its bargaining unit members.

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

1. Rescind the unilaterally adopted changes to the academic calendar at the beginning of the next successive academic year following service of the final decision in this matter, and restore the academic calendar that is substantially similar to the one that existed before the 2020-2021 academic year, unless the final decision is served after December 9 of an academic year. In that case, rescission should occur at the beginning of the second successive academic year following service of the final decision.

2. Upon receiving a demand from the Faculty Union within 60 days of the service of a final decision in this matter, meet and negotiate in good faith over the decision to implement an academic calendar that eliminates the Intersession and

expands the Summer session.

3. Make affected employees whole for any losses suffered as a result of the change, including interest at the rate of 7 percent per annum.

4. Within 10 workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the Faculty Union's bargaining unit customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. The Notice shall also be posted by electronic message, intranet, internet site, and other electronic means customarily used by the District to communicate with faculty unit employees. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.[18]

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

5. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on Faculty Union.

PERB Decision No. 2731-M, p. 29, fn. 13.)

The Board's Order, which appears on pages 7-10 of this Decision, supersedes the above proposed order. The proposed decision also contained an explanation of appeal rights and a proposed appendix; those portions of the proposed decision, which are superseded, are not shown here.