STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNITED TEACHERS LOS ANGELES, Charging Party, v. ALLIANCE COLLEGE-READY PUBLIC SCHOOLS, ALLIANCE COLLINS FAMILY COLLEGE-READY HIGH SCHOOL, ALLIANCE GERTZ-RESSLER HIGH SCHOOL, ALLIANCE PATTI AND PETER NEUWIRTH LEADERSHIP ACADEMY, Respondents.	Case Nos. LA-CE-6061-E LA-CE-6073-E PERB Decision No. 2716 May 18, 2020

Appearances: Bush Gottlieb by Jesús Quiñonez and Erica Deutsch, Attorneys, for United Teachers Los Angeles; Proskauer Rose by Harold M. Brody and Irina Constantin, Attorneys, and Robert A. Escalante, General Counsel, for Alliance College-Ready Public Schools, Alliance Collins Family College-Ready High School, Alliance Gertz-Ressler High School, and Alliance Patti and Peter Neuwirth Leadership Academy.

Before Banks, Shiners, and Krantz, Members.

DECISION

BANKS, Member: These consolidated cases involving various charter schools and their common charter management organization are before the Public Employment Relations Board (PERB or Board) on cross-exceptions to a proposed decision (attached) of an administrative law judge (ALJ). In PERB Case No. LA-CE-6061-E, the operative amended complaint alleged that the schools' charter management organization (CMO), Alliance College-Ready Public Schools (Alliance or

the Alliance CMO), violated the Educational Employment Relations Act (EERA or Act)[1] by failing to respond to United Teachers Los Angeles's (UTLA) request to meet and discuss subjects concerning the employment relationship, specifically "a fair and neutral process to organize." The complaint also alleged that Alliance and/or Alliance Collins Family College-Ready High School (Collins HS), a charter school, engaged in unlawful surveillance of employees' protected union activities and discriminated against an employee, Albert Chu (Chu), because he engaged in protected activities. Finally, the complaint alleged that Alliance and/or Alliance Gertz-Ressler High School (Gertz-Ressler HS), a charter school, hosted an online petition or poll for employees to indicate whether they supported UTLA. In PERB Case No. LA-CE-6073-E, the operative amended complaint alleged that Alliance and Alliance Patti and Peter Neuwirth Leadership Academy (Neuwirth), a charter school, engaged in several acts of unlawful surveillance of employees and UTLA staff.

The proposed decision found that Alliance and the charter schools operated as a single employer and that they interfered with UTLA's rights as an employee organization by failing to respond to UTLA's request to meet and discuss a fair and neutral organizing process. As a remedy, the proposed decision ordered Alliance and the charter schools named in PERB Case No. LA-CE-6061-E to cease and desist their unlawful conduct. In all other respects, the allegations in these consolidated cases, including the entirety of PERB Case No. LA-CE-6073-E, were dismissed.

[1] EERA is codified at Government Code section 3540 et seq. Unless otherwise specified, all statutory references herein are to the Government Code.

UTLA excepts to the dismissal of the discrimination allegation involving Chu and the interference allegation regarding the Gertz-Ressler HS online petition.[2] UTLA also excepts to the proposed remedy, contending that Alliance and the charter schools should be required not merely to respond to UTLA's request to meet and discuss, but to engage in a meaningful discussion regarding a neutral and fair organizing process. Alliance and the charter schools except, inter alia, to the conclusion that PERB has jurisdiction over the Alliance CMO, a private entity, and to the related single employer finding, and to the finding that Alliance violated its obligation to meet and discuss under EERA.[3]

Based on our review of the proposed decision, the entire record, and relevant legal authority in light of the parties' submissions, we affirm in part and reverse in part the proposed decision. Specifically, we do not adopt the proposed decision's conclusion that UTLA failed to state a prima facie case of discrimination. Instead, we agree with the proposed decision's conclusion that Collins HS established its affirmative defense by proving it would have reduced Chu's employment to part-time

[2] UTLA did not except to the dismissal of the surveillance allegations. Accordingly, those allegations are not before the Board on appeal and the ALJ's findings and conclusions on those allegations are binding only on the parties. (*County of Orange* (2018) PERB Decision No. 2611-M, p. 2, fn. 2, citing PERB Regs. 32215, 32300, subd. (c).) (PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.)

[3] Alliance and the Charter Schools filed objections to UTLA's exceptions, contending they should be rejected as untimely because they were filed after the extended deadline set by PERB's Appeals Assistant pursuant to a stipulation between the parties. However, the record shows that the Appeals Assistant sent an e-mail expressly permitting UTLA to file its exceptions on the date it did so. We will therefore treat the exceptions as timely filed. (PERB Reg. 32136.)

status regardless of his protected activities. Additionally, we affirm the proposed decision's conclusion that public school employers have a duty under EERA to meet and discuss neutrality and other related organizing agreements, as further discussed below.

However, in accordance with our decision in *Alliance College-Ready Public Schools* (2017) PERB Decision No. 2545 (*Alliance*), we conclude that we have no jurisdiction over the Alliance CMO and therefore do not adopt the proposed decision's single employer finding. Rather, based on the record evidence, we find that the Alliance CMO was acting as the agent of the named charter schools when it failed to respond to UTLA's valid request to meet and discuss, and that the named charter schools are the responsible parties under EERA for this violation. As no party contended that one school acted as an agent for another school, we find a school liable only to the extent that it, or the CMO as its agent, committed a violation.

Finally, as to the online poll/petition hosted by Gertz-Ressler HS, we reverse the proposed decision and conclude that it constituted an unlawful attempt by a public school employer to assess the union sympathies of its employees. In light of these conclusions, we will issue a revised order and notice to employees.

An additional prefatory note is necessary before explaining our findings. In 2017 and 2018, UTLA and certain respondent Alliance schools filed exceptions asking us to review three different proposed decisions involving unfair practice allegations, including the proposed decision at issue here. Then, in 2019, the parties participated in a lengthy hearing regarding UTLA's requests for recognition at several individual schools, PERB Case Nos. LA-RR-1281-E, LA-RR-1282-E, and LA-RR-1283-E. Given

that we already had before us the three unfair practice proposed decisions, rather than wait for the assigned ALJ to issue a decision, we transferred the representation matter to our docket at the conclusion of the hearing. Today, we issue decisions in the pending unfair practice and representation matters. In this case, UTLA sought to prove that Alliance schools and its CMO constituted a single employer, while respondents disagreed and averred that each school was autonomous. By contrast, Respondents sought in the representation case to prove that the schools, without the CMO, constitute a single employer, and UTLA disagreed. The parties' evolving positions on the schools' autonomy and other facts relevant to the single employer doctrine would have made such issues difficult to decide, but ultimately there is no cause for us to do so. Respondents have notified PERB that effective January 1, 2020, they have adopted a new organizational structure. Although there are no such facts in the records in any case pending before the Board, this notification apparently suggests that future cases involving these parties will have different facts. We find no need to decide whether the now-superseded Alliance structure met the single employer test. In the unfair practice matters, the single employer question lost its salience given our 2017 decision that we have no jurisdiction over the CMO and the parties' subsequent stipulation that the CMO acted as the agent of the schools in certain instances. (We also find such agency to exist in this case, where the parties did not enter into such a stipulation). In the absence of any single employer finding, we do not hold any school to be liable for the acts of any other school, especially as no party contended that one school acted as an agent for another school. Thus, we find a school liable only to the extent that it, or the CMO on its behalf, committed a

violation. In the representation matter, we find that principles of justice prevent the schools from meeting their burden of proof on the single employer issue, even if the facts could be construed to satisfy the single employer test. Moreover, as an alternate basis for our decision in the representation decision, we explain therein why, even if principles of justice did not prevent the schools from meeting their burden to show single employer status, there would still be other, independent reasons why they could not show that a network-wide unit was the only appropriate unit configuration.

FACTUAL BACKGROUND

The ALJ's procedural history and relevant findings of fact can be found in the attached proposed decision. We briefly recount certain facts here to provide context for our discussion of the parties' exceptions.

UTLA is an employee organization within the meaning of EERA section 3540.1, subdivision (d). Alliance is a non-profit CMO, affiliated with a network of charter schools in the Los Angeles area, each bearing the name "Alliance." Collins HS and Gertz-Ressler HS (hereinafter collectively "Charter Schools") are each a "public school employer" within the meaning of EERA section 3540.1, subdivision (k).[4]

The Charter Schools are non-profit public benefit corporations that operate public schools through individual charters authorized by the Los Angeles Unified School District (LAUSD). Each has entered into a Management Services Agreement

[4] Because we are dismissing PERB Case No. LA-CE-6073-E, our discussion of the facts does not include the charter schools named in that complaint.

(MSA)[5] with Alliance that requires Alliance to provide a range of operational and managerial services, including human resources services, information technology support, and all other services reasonably requested, in exchange for a service fee. Among these services, Alliance hosted webpages for the Charter Schools and also coordinated their response to their employees' unionization efforts.

The Organizing Campaign and Counter-Campaign

UTLA began an organizing campaign among teachers at the Alliance-affiliated schools in 2015. This campaign became public on March 13, 2015, when a group of 67 certificated employees announced their intent to form a union with UTLA. The announcement was sent to employees at Alliance-branded schools, the Alliance Board of Directors, Alliance's chief executive officer (CEO), and parents. The group named itself Alliance Educators United (AEU). The announcement featured the names and signatures of all 67 employees and photographs of 16 of those employees.

Soon after this announcement, Alliance and the Charter Schools initiated a campaign to counter UTLA and AEU's organizing efforts. Among the actions taken, Alliance distributed various flyers by e-mail and paper to Charter School employees that sought to dissuade the Charter Schools' employees from signing union authorization cards. Alliance also created a website, www.OurAllianceCommunity.com, which functioned as a central platform for its anti-union messages. Additionally, Alliance directed various anti-union communications to the parents of the Charter Schools' students, including flyers,

[5] In other cases, the parties referred to this as an Administrative Services Agreement (ASA). Discerning no difference, we elect to follow the nomenclature the parties used in this case.

e-mails, and automated telephone messages in both English and Spanish. While the specific content of most of these communications is not at issue in these cases, generally speaking, each stated Alliance and the Charter Schools' opposition to unionization.

For instance, on March 16, 2015, Alliance and the Charter Schools distributed a flyer entitled, "Some FACTS about Unionization & [UTLA]," and containing the following relevant assertion:

> "FACT: A union authorization card is a binding legal document. It is similar to a power of attorney or a blank check. A signed card can result in unionization without an election. Teachers need to get facts first before signing anything." (Capitalization in original.)

The document cited sections of the National Labor Relations Act and EERA in support of this assertion.

Shortly thereafter, on March 20, Alliance and the Charter Schools distributed another flyer entitled, "FAQs for Alliance Educators & School Community," which contained the following relevant assertion:

> "FACT: The union creates a barrier to the collaborative working relationship of teachers with their administrators. Teachers would no longer have the ability to consult with their principal on basic employment issues. In unionized workplaces, only one appointed employee union representative can speak or negotiate on behalf of staff with their supervisor about employment related issues covered in the contract."

The record shows that these flyers were sent by Alliance to all of the Charter Schools' employees.

On March 25, 2015, UTLA sent Alliance's CEO a letter signed by twenty AEU representatives expressing concern over Alliance's communications to employees and parents about the organizing campaign. In the letter, the teachers stated "[w]e are requesting that we sit down to meet for the sole purpose of discussing and reaching agreement on a fair and neutral process to organize." Alliance and the Charter Schools never responded to this letter.

In April 2015, Alliance hosted a meeting for principals and senior leaders of the Charter Schools where Alliance encouraged them to use one-on-one or small group conversations to determine and assess their employees' feelings about unionization. Also in that month, UTLA Lead Organizer Jessica Foster (Foster) accessed the Gertz-Ressler HS website.[6] Upon arriving at the site, she received a "pop-up" style message with the following statement in both English and Spanish:

> **"Our Alliance Community**
>
> Given the recent activity by United Teachers of Los Angeles (UTLA) to organize Alliance teachers into their union and their aggressive outreach in our schools, we feel it is our responsibility to inform our teachers and school community about the potential impact of unionization with UTLA."

(Original bold typeface.) The statement was followed by two links, one stating "Okay," the other stating "Read More." Selecting the first link directed the reader to the Gertz-Ressler HS homepage. But selecting the other link directed the reader to the webpage www.OurAllianceCommunity.com. The webpage included a link stating,

[6] The proposed decision mistakenly states that Foster accessed the webpage in April 2014.

"Take Action, Sign Our Petition." Selecting the link directed the reader to a petition, the text of which stated:

> **"Sign Our Petition!**
>
> "I chose Alliance College-Ready Public Schools because of its high expectations for all students, small and personalized learning environment, increased instruction time, parent engagement opportunities, and highly-effective teachers. I am very appreciative of the educational excellence Alliance teachers deliver to students.
> I believe that:
>
> - "Every decision made by Alliance teachers, staff and leadership should be based on what is best for students.
> - "Alliance is doing a great job of educating students and preparing them for college and beyond.
> - "Teachers have the right to choose whether or not to unionize without coercion or fear of retaliation by any party.
> - "UTLA is on record as opposed to charter schools.
> - "I believe that an independent Alliance, free of the UTLA union, is the structure that will best put the needs of students first."

(Original bold typeface.) This text was followed by the option for visitors to "sign" the petition by submitting their first and last name, e-mail address, and telephone number. Underneath these text fields were drop down menus allowing the signer to select their affiliated Alliance site, and their relationship to Alliance, including whether they were a teacher, student, or parent. While no employee testified that he or she viewed or signed this petition, it is undisputed that the petition was available publicly on the Gertz-Ressler HS webpage. Moreover, on April 10, April 20, and July 30, 2015, Alliance sent communications to Charter School employees urging them to visit the OurAllianceCommunity website containing the petition.

Albert Chu

Chu was a science teacher at Collins HS, where he had taught since 2011. For several years, he taught several sections of physics and one of biology. However, Chu's credential permitted him to teach only physics, a fact revealed by an LAUSD audit of Collins HS's science program in 2014. At the time of the audit, Chu had been assigned to teach a unit of anatomy/physiology, which required a biology credential. After the audit, Collins HS had to assign Chu a properly credentialed co-teacher for that class.

From the beginning of the organizing campaign, Chu was an active advocate for UTLA: he attended organizing committee meetings, distributed union literature to teachers and parents, and his picture appeared on AEU's March 13, 2015 flyer to announce publicly the unionization effort. Collins HS's principal, Robert Delfino (Delfino), was aware that Chu was a union adherent. Delfino distributed, or drew teachers' attention to, the March 16 and March 20 flyers described above, as well as other documents from Alliance regarding its opposition to the UTLA organizing campaign.

In April 2015, Delfino began planning for the 2015-2016 school year and ultimately determined that there would be too few students to fill a full-time schedule of physics courses for Chu. At the time, the existing science curriculum had the majority of students taking environmental science in 9th grade, biology in 10th grade, advanced placement (AP) environmental science in 11th grade, and physics in 12th grade. However, student data showed that only 43 rising 12th graders needed a

physical science class to graduate in the 2015-2016 school year.[7] Another 30 students who had already fulfilled their graduation requirements in science were expected to enroll in physics that year. Based on these figures, and Delfino's assessment that not many students elected to take physics in their senior year, he decided to offer only three physics sections, with up to 25 students in each section, in the 2015-2016 school year. To make up for the loss of the two physics sections and to increase available advanced placement offerings, Delfino planned to offer AP environmental science and/or AP chemistry to 12th grade students.

Because Chu's credential permitted him to teach only physics, this decision meant he would be reduced to part-time status. In order to maintain full-time status, Chu asked for additional assignments that would not require another credential, like an in-house substitute position, but Delfino declined these suggestions. Delfino did contact principals at other Alliance charter schools to see if they might need a physics teacher, but none responded. Delfino also wrote a letter of recommendation for Chu.

In late May 2015, parents and students circulated petitions in support of Chu and the physics program, but Delfino did not change his mind. Rather, on June 2, 2015, Delfino presented Chu with a contract for a part-time position in the 2015-2016 school year. Chu declined the position because of the loss of pay and benefits. At the suggestion of Delfino, Chu tendered a letter of resignation on June 8. After speaking with UTLA organizers, however, Chu changed his mind and rescinded his resignation

[7] Students needed one life science and one physical science class to graduate high school. The physical science requirement could also be met by taking chemistry, which many students took in the 11th grade.

the next day.[8] Nevertheless, Collins HS did not offer him a full-time position, and because Chu did not sign the part-time contract, his employment ended.

DISCUSSION

When resolving exceptions to a proposed decision, the Board applies a de novo standard of review both to issues of fact and law. However, "to the extent exceptions merely reiterate factual or legal contentions resolved correctly in the proposed decision, the Board need not further analyze those exceptions." (*San Diego Community College District* (2019) PERB Decision No. 2666, p. 5 (citations omitted).) We will therefore confine our discussion to the exceptions that raise significant questions about the proposed decision's conclusions.

I. Alleged Discrimination Against Chu

The proposed decision concluded that UTLA failed to establish a prima facie case of discrimination with respect to Collins HS's decision to reduce Chu's position to part-time. To demonstrate that a public school employer discriminated or retaliated against an employee in violation of EERA section 3543.5, subdivision (a), the charging party must make an initial showing that: (a) the employee exercised rights under EERA; (b) the employer had knowledge of the exercise of those rights; (c) the employer took adverse action against the employee; and (d) the employer took the action *because of* the exercise of those rights, meaning that the employee's protected conduct was a substantial motivating factor in the employer's decision to take the adverse action. (*Omnitrans* (2010) PERB Decision No. 2121-M, pp. 9-10*; Novato*

[8] The proposed decision mistakenly states that Chu rescinded his resignation on May 9, 2015.

Unified School District (1982) PERB Decision No. 210, pp. 6-8 (*Novato*).) Here, the proposed decision found that nothing other than the close temporal proximity between Chu's protected activities and the adverse action supported a finding of nexus. More specifically, the ALJ found there was no evidence of animus on the part of the decisionmaker, Delfino, because none of his communications regarding the union was coercive or otherwise violated EERA. We disagree with this analysis.

While coercive conduct, like threats or promises of benefit, are undoubtedly evidence of employer animus, anti-union conduct that does not in itself constitute an unfair labor practice may still be used to show that the decisionmaker and the employer as a whole harbored anti-union animus. (See, e.g., *Best Products Company* (1978) 236 NLRB 1024, enforcement denied *N.L.R.B. v. Best Products Co., Inc.* (9th Cir. 1980) 618 F.2d 70 ["conduct which may not violate Section 8(a)(1) of the Act may still be used to show union animus on the part of a respondent"]; *Overnite Transportation Co*. (2001) 335 NLRB 372, 375 [Board found that a non-charged statement in a company handbook that "this Company values union-free working conditions" evinced an antiunion motive].) While such conduct may or may not provide substantial evidence of anti-union animus, it is not irrelevant in the analysis of the prima facie case merely because it was not pled as or proven to be a discrete unfair practice.

Here, the evidence shows that Alliance and the Charter Schools were opposed to unions generally and to UTLA specifically. That this anti-union sentiment was pervasive, concrete, and concerted is established by the fact, among others, that Alliance created an entire website for the Charter Schools to publicize their adamant

opposition to the unionization effort. "An employer's clear and unequivocal hostility to collective bargaining, even if accomplished without threats of reprisal or promises of benefit, gives rise to a logical inference that it might target union supporters for adverse action." (*California Virtual Academies* (2018) PERB Decision No. 2584, pp. 29-30.) In this context, where public employers are determined to stamp out a nascent union, we will infer for purposes of analyzing a prima facie case of discrimination that key decisionmakers, like Delfino, were inclined to effectuate the employer's policies by targeting union adherents, like Chu.

Moreover, and contrary to the conclusion of the proposed decision, the record reflects that Delfino was directly involved in distributing several employer communications that crossed into coercive territory. For instance, Delfino e-mailed a flyer to all Collins HS employees on March 16, 2015, that equated signing a union card with giving UTLA "a power of attorney or a blank check," and incorrectly cited EERA as support for this assertion.[9] However, signing an authorization card is quite different from handing over a blank check or power of attorney. Among the many differences is the fact that a union has no legal right to withdraw unlimited funds from its members' bank accounts, as well as the fact that members retain direct democratic control over the union's officers and affairs. Thus, we conclude that Delfino's statement to employees was false or misleading. (See *Chula Vista City School*

[9] We note that this case arose before the Legislature enacted section 3550, the Prohibition on Public Employers Deterring or Discouraging Union Membership (PEDD), which provides that public employers "shall not deter or discourage public employees . . . from becoming or remaining members of an employee organization." We express no opinion as to whether any of the Charter Schools' communications would have violated the PEDD had it been in effect.

District (1990) PERB Decision No. 834, pp. 12-13 [false statements are more likely to be considered coercive].) Moreover, we conclude that alarmist statements like these are intended to incite fear and are not a proper appeal to reason. When unorganized employees are debating whether to join a union for their mutual aid and protection, an employer may not rely on such gross mischaracterizations in order to dissuade them. Such conduct constitutes coercion because it tends to harm employees in exercising their right to support a union and is unsupported by any business necessity. (*Trustees of the California State University* (2019) PERB Decision No. 2687-H, p. 3.)

Similarly, by e-mailing the March 20 flyer, Delfino wrongly asserted that employees would lose the ability to discuss problems with management and would instead be required to deal exclusively through one union representative in all matters affecting their employment. This assertion is directly contradicted by EERA section 3543, subdivision (b), which states that "[a]n employee may at any time present grievances to his or her employer, and have those grievances adjusted, without the intervention of the exclusive representative," as long as that resolution does not conflict with any provision of a collective bargaining agreement. It is improper for an employer to mislead employees about the consequences of collective bargaining in order to coerce them against selecting a bargaining representative. (See *NLRB v. Gissel Packing Co.* (1969) 395 U.S. 575, 620 [an employer can "avoid coercive speech simply by avoiding conscious overstatements he has reason to believe will mislead his employees"].)

Although the complaint did not allege that these communications violated EERA, they were not innocuous statements of the Charter Schools' views or opinions.

(Cf. *Hartnell Community College District* (2015) PERB Decision No. 2452, p. 25 [employer may freely express or disseminate its views, arguments or opinions but there is no safe harbor regarding matters of employee choice such as urging employees to participate or refrain from participation in protected conduct, statements that disparage the collective bargaining process itself, implied threats, brinkmanship or deliberate exaggerations].) Rather, they were coercive expressions designed to sow fear and discord among employees at the very moment they were considering whether to join UTLA. Such conduct, in combination with the general anti-union animus exhibited by Alliance and the Charter Schools, is more than sufficient to establish the causal nexus necessary under *Novato* to state a prima facie case.

While the proposed decision concluded that UTLA had not stated a prima facie case for discrimination, it nonetheless proceeded to consider the employer's affirmative defense and concluded that Delfino would have reduced Chu's position to part-time status regardless of his protected activities. In light of the record evidence, we agree.

"When it appears that the employer's adverse action was motivated by both lawful and unlawful reasons, the question becomes whether the [adverse action] would not have occurred 'but for' the protected activity." (*San Diego Unified School District* (2019) PERB Decision No, 2634, p. 12 (internal quotations omitted).) The employer bears the burden of proving by a preponderance of the evidence that it would have taken the adverse action even absent the protected activities. (*Id.* at p. 20.) Here, Delfino made a reasoned decision to discontinue some physics classes because of lower projected enrollment numbers and to give students other science

opportunities. Despite the presence of background anti-union sentiments, there is no indication that Delfino would have reached a different conclusion absent Chu's protected activity. On the contrary, all the evidence suggests that Delfino's decision was a legitimate exercise of his discretion. Delfino wanted to continue offering physics courses and offered Chu a part-time position; he simply believed that there was insufficient student demand to justify a full teaching load and Chu's lack of any other credential prevented him from teaching another subject. On these facts, we cannot conclude that Chu's protected activity was the "but for" cause of Delfino's decision.

After the close of the hearing, UTLA sought to reopen the record to show that Collins HS reinstituted a full complement of physics courses in 2018. The ALJ denied the motion, concluding that this evidence was not probative of Delfino's motivations in 2015. Both parties except to this conclusion: UTLA contends that the ALJ should have granted its motion, while Alliance and the Charter Schools contend the ALJ had no authority under PERB Regulations to entertain such a motion. We disagree with both contentions.

An ALJ or other Board agent conducting a hearing has broad authority to create a complete factual record. PERB Regulation 32170, subdivision (a) states that an ALJ has the power and duty to "[i]nquire fully into all issues and obtain a complete record upon which the decision can be rendered," while subdivisions (f) and (h) specify that an ALJ must rule on motions and the admissibility of evidence. Taken together, these provisions empower an ALJ to entertain any motion regarding the record evidence, including a motion to reopen the record to receive additional evidence if warranted.

Therefore, the ALJ was acting well within the authority conferred on him by PERB Regulations when he ruled on UTLA's motion to reopen the record.

Moreover, we find that the ALJ applied the correct standard when he denied the motion. In ruling on a motion to reopen the record, an ALJ should apply the same standard the Board applies under PERB Regulation 32410, subdivision (a), when confronted with a request for reconsideration based on the discovery of new evidence:

> "A request for reconsideration based upon the discovery of new evidence must be supported by a declaration under penalty of perjury which establishes that the evidence: (1) was not previously available; (2) could not have been discovered prior to the hearing with the exercise of reasonable diligence; (3) was submitted within a reasonable time of its discovery; (4) is relevant to the issue sought to be reconsidered; and (5) impacts or alters the decision of the previously decided case."

II. Duty to Meet and Discuss a Neutrality or Organizing Agreement

Here, UTLA's evidence of changes in 2018 to the science curriculum at all charter schools would not alter our decision regarding Delfino's decision in 2015 to reduce the number of physics classes at Collins HS. On this basis, the ALJ was correct to deny the motion. The proposed decision concluded that Alliance violated EERA section 3543.1, subdivision (a), when it failed to respond to UTLA's request to meet and discuss a "fair and neutral process to organize." We agree.

Under EERA, in the absence of an exclusive representative, nonexclusive representatives have, at a minimum, "the right to meet and discuss with the public school employer subjects as fundamental to the employment relationship as wages and fringe benefits." (*Los Angeles Unified School District* (1983) PERB Decision No. 285, pp. 6-8 (*LAUSD*).) Whether a particular matter is subject to the duty to meet

and discuss is determined on a case-by-case basis. (*Regents of the University of California (Lawrence Livermore National Laboratory)* (1982) PERB Decision No. 212-H, p. 11.) We have most commonly interpreted this right to mean that public school employers must give notice to nonexclusive representatives and an opportunity to meet to discuss contemplated changes to terms and conditions of employment before reaching a decision on such matters. (*Regents of the University of California (Los Angeles)* (2009) PERB Decision No. 2084-H, adopting partial dismissal, p. 2, citing *Regents of the University of California (Davis, Los Angeles, Santa Barbara and San Diego)* (1990) PERB Decision No. 842-H.) PERB has found that an employer violated its duty to meet and discuss when it implemented changes to the following subjects without giving prior notice to nonexclusive representatives: wages, union access and office space, layoffs and reorganizations, payment of merit increases, and employee parking. (See Zerger, et al., eds. (2nd ed. 2019) *California Public Sector Labor Relations* § 6.07[2] [collecting cases].)

However, we have never determined the full scope of an employer's obligation to meet and discuss or whether it applies to a nonexclusive representative's request to discuss a fair and neutral framework for organizing currently unrepresented employees. Principles of sound labor policy support a conclusion that a public school employer must meet upon request and discuss such matters when there is no exclusive representative in place.

In a neutrality agreement, an employer promises to remain neutral during a union's organizational campaign and to express no opposition to its employees' selection of union representation. (See, e.g., *Dana Corp.* (2010) 356 NLRB 256, 257,

pet. for review denied *Montague v. N.L.R.B.* (2012) 698 F.3d 307 (*Dana II*) [employer agreed to remain totally neutral regarding representation by the union].) The National Labor Relations Board (NLRB) and the courts have frequently upheld such agreements as not only consistent with the law, but as beneficial to the promotion of labor peace and stability. (See, e.g., *ibid*.; *Hotel & Rest. Employee Union Local 217 v. J.P. Morgan Hotel* (2d Cir. 1993) 996 F.2d 561, 566; *Hotel Employees, Rest. Employees Union, Local 2 v. Marriott Corp.* (9th Cir. 1992) 961 F.2d 1464, 1468.) Frequently, such agreements include provisions for union access to the employer's facilities, the sharing of lists of employees, and the parameters for the distribution of literature.[10] Such agreements may also contain restrictions on the union's ability to disparage the employer, as well as a dispute resolution process. In our view, neutrality agreements and the subjects they encompass touch upon matters of fundamental interest to employees.

First, to the extent a neutrality agreement settles questions of access and the right to distribute literature, it clearly implicates subjects we have previously found to be within the ambit of the "meet and discuss" duty. (*State of California (Department of Corrections)* (1980) PERB Decision No. 127-S, p. 5 ["Access to employees to facilitate an exchange of information is clearly a threshold concern not only in an organizing campaign but during the course of the ongoing relationship between the employee organization and its members."].) Moreover, union representation is itself a matter of

[10] Indeed, these very issues arose here when a staff organizer from UTLA attempted to distribute leaflets about the organizing campaign in September 2015. As he spoke with a teacher entering the Neuwirth faculty parking lot, a security officer stated that he was not permitted in the parking lot and the organizer returned to a nearby sidewalk.

fundamental concern to employees, and an employer's decision to initiate an anti-union campaign can constitute a change to prevailing working conditions that merits notice and an opportunity for reasoned discussion. (See *Hotel & Rest. Employee Union Local 217 v. J.P. Morgan Hotel*, *supra*, 996 F.2d at p. 566 [neutrality "agreement also governed the hotel's relations with its employees because the hotel agreed not to campaign against the union with its employees"].)

The conclusion that union representation and employer anti-union campaigns are subjects of fundamental concern to employees also follows directly from the purposes and policies of EERA, which the Legislature enacted in order

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

(EERA, § 3540.) A public school employer's decision to mount an anti-union campaign implicates these policies and might endanger them.[11] Therefore, it is reasonable to require that employers meet with employee organizations upon request in order to address those differences that are susceptible to reasoned discussion.

[11] In addition to the violations found here, we note that other Alliance-affiliated charter schools, Alliance Susan & Eric Smidt Technology High School and Alliance Renee & Meyer Luskin Academy High School, were previously found in *Alliance*, *supra*, PERB Decision No. 2545 at pp. 15-18, to have engaged in unfair practices during UTLA's organizing campaign.

Second, and relatedly, these discussions could effectively stave-off the types of bitter disputes that all too often typify organizing campaigns. Reasoned discussion regarding organizing procedures makes it more likely that employees will learn about collective bargaining in an atmosphere free of coercion and recriminations. Since "[i]t is the fundamental purpose of EERA to provide for and foster collective bargaining between [public school] employers and their employees," such discussions are entirely consistent with the purposes and policies of California public sector labor law. (*Barstow Unified School District* (1997) PERB Decision No. 1138b, p. 23.)

Finally, as noted in *Dana II*, "[m]eeting with a union early on to ascertain its goals and representation philosophy enables the employer to more realistically assess (1) the potential impact of the union on the employer's operations; and (2) the wisdom of expending company resources to campaign against the union." (*Dana II*, *supra*, 356 NLRB at p. 263.)[12] Thus, we conclude that neutrality agreements are among the fundamental employee interests that a public school employer must discuss upon request of a nonexclusive employee representative when there is no exclusive representative in place.

This is not to suggest, however, that the parties must bargain to agreement. Because they are not dealing with an exclusive representative, employers subject to the meet and discuss obligation are not bound to engage in the full breadth of good faith negotiations that apply in the context of EERA section 3543.5. (*LAUSD*, *supra*,

[12] We caution that California law might constrain the ability of public employers to mount such anti-union campaigns. (See, e.g., *Teamsters Local 2010 v. Regents of the University of California* (2019) 40 Cal.App.5th 659, 666 [discussing Government Code section 16645.6's prohibition against the use of public funds to deter union organizing].)

PERB Decision No. 285, p. 8.) Instead, the public school employer is required to listen and consider the union's proposals in good faith. Thus, while neutrality agreements are an appropriate subject for meeting and discussion, nothing in the law compels either party to enter into one.

Since Alliance and the Charter Schools simply ignored UTLA's request to meet and discuss a neutrality agreement, we agree with the proposed decision that such conduct violates EERA section 3543.1, subdivision (a). However, contrary to the proposed decision, we find that the Charter Schools, not the Alliance CMO, committed this violation.

As noted previously, in *Alliance* we concluded that we have no jurisdiction over the Alliance CMO, a private, non-profit entity. On that basis, we dismissed all unfair practice findings predicated exclusively on the CMO's conduct. (*Alliance*, *supra*, PERB Decision No. 2545, pp. 12-13.) Although UTLA then sought to add an agency theory to its case, we ruled that it could not do so after the close of all proceedings at every level of PERB. (*Alliance College-Ready Public Schools* (2018) PERB Decision No. 2545a, pp. 2-9.)

UTLA also moved to reopen the record in this case to provide additional evidence concerning the agency relationship between the Charter Schools and the Alliance CMO, or in the alternative, to file supplemental briefs on that issue. We granted leave to file supplemental briefs, as the instant case was not yet complete. Both parties filed their briefs on April 12, 2019. Having reviewed the parties' arguments, we conclude the evidence establishes that the Alliance CMO was acting at all relevant times as the agent for the Charter Schools in matters relating to labor

relations. On this basis, we conclude the Charter Schools are liable for the failure to meet and discuss, and that they must remedy the unfair practice.

Agency is generally a question of fact. (*Brokaw v. Black–Foxe Military Institute* (1951) 37 Cal.2d 274, 278.) Agents are classified according to the origin of their authority (actual or apparent) or the scope of their authority (general or special). (Civ. Code, §§ 2297, 2298, 2299, 2300.) An actual agent is one really employed by the principal. (Civ. Code, § 2299.) "Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess." (Civ. Code, § 2316.) An agent's authority necessarily includes the degree of discretion authorized or ratified by the principal for the agent to carry out the purposes of the agency in accordance with the interests of the principal. (*Skopp v. Weaver* (1976) 16 Cal.3d 432, 439; *Workman v. City of San Diego* (1968) 267 Cal.App.2d 36, 38.) Where an agent's discretion is broad, so, too, is the principal's liability for the wrongful conduct of its agent. (*Superior Farming Co. v. Agricultural Labor Relations Bd.* (1984) 151 Cal.App.3d 100, 117.) Agency theory is used routinely to impose liability on a respondent for the acts of its employees or representatives that were within the scope of their authority. (*City of San Diego* (2015) PERB Decision No. 2464-M, p. 15, affirmed sub. nom *Boling v. Public Employment Relations Bd.* (2018) 5 Cal.5th 898.) We apply these principles here with a view toward effectuating the broad remedial purposes of EERA. (*Id.*)

The record evidence leaves us no difficulty concluding that the Alliance CMO acted as the authorized agent of the Charter Schools throughout the organizing campaign and possessed actual authority to lead the opposition to that campaign.

Indeed, the MSAs expressly provided that the Alliance CMO would undertake such activities. Pursuant to the MSAs, the Alliance CMO was granted broad, comprehensive authority to provide a wide variety of "management services" to the Charter Schools. The MSAs refer to Alliance CMO as the "Manager" responsible for "providing professional development training" for employees, "human resources," compliance, "public relations," and a catch-all category described as "providing any other operational or educational needs relating to the [Charter Schools]." This broad language imbued the Alliance CMO with considerable authority to manage the response to UTLA's campaign.[13]

Thus, the Alliance CMO was acting within the scope of its authority to act on behalf of the Charter Schools when it ignored UTLA's request to meet and discuss a neutrality agreement. In these circumstances the respondent Charter Schools are liable for their agent's conduct.

III. The Online Petition Constituted an Unlawful Poll of Employees

The proposed decision concluded that the online petition hosted by Gertz-Ressler HS was a permissible poll and did not constitute interference under the Act because the text of the petition contained no threat and there was no pressure to participate. We disagree and conclude that the online petition was coercive because it invited employees to make an observable choice about the union.

[13] Additionally, in a related set of consolidated cases, PERB Case Nos. LA-CE-6165-E and LA-CE-6204-E, the Alliance CMO stipulated that it and its representatives were the agents of the Charter Schools. Similarly, in this case the Alliance CMO admits that the record evidence supports a finding that it was the apparent agent of Gertz-Ressler HS with respect to the online petition on Gertz-Ressler HS's webpage.

Public school employees have the protected right "to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." (EERA, § 3543.) Regardless of its subjective motivation, an employer engages in unlawful interference in violation of section 3543.5, subdivision (a), when its conduct interferes or tends to interfere with the exercise of these protected rights in the absence of operational necessity. (*Carlsbad Unified School District* (1979) PERB Decision No. 89, pp. 10-11.) Thus, our case law generally prohibits employers from conducting polls or otherwise questioning employees to assess their support for the union during an organizing campaign. (See, e.g., *Chula Vista Elementary School District* (2004) PERB Decision No. 1647; *Clovis Unified School District* (1984) PERB Decision No. 389 (*Clovis*).) While we look to the totality of the circumstances to judge whether a particular communication constitutes an unlawful poll or interrogation, in all cases we must scrutinize the employer's conduct to determine if pressure was brought to bear on employees to reveal their sympathies. (See, e.g., *Los Angeles Community College District* (1989) PERB Decision No. 748, adopting proposed decision at p. 15 [interference claims must be viewed under the totality of the circumstances to determine whether the respondent's actions had an unlawfully coercive effect].)

Here, Gertz-Ressler HS hosted an online petition that invited teachers to declare publicly their support for management and opposition to UTLA. On three separate occasions, Alliance sent communications to employees urging them to visit the OurAllianceCommunity website containing the petition. By so soliciting participation through the school's homepage, the employer was able to discern the

identity of those teachers on whom it could rely for support. Additionally, the online petition allowed the employer to determine the identity and number of teachers who were still undecided or might favor the union. Teachers would reasonably read such a petition to mean that their employer was soliciting their support and that it was assessing teacher sentiment. Such conduct constitutes unlawful interference because an employer may not pressure employees into making an observable choice about a union that indicates rejection or support. (*Circuit City Stores and United Food & Commercial Workers, Local 1776* (1997) 324 NLRB 147.)

In our view, the facts of this case closely resemble those of *Beverly California Corp*. (1998) 326 NLRB 232, enforced in relevant part *Beverly California Corp*. *v. NLRB* (7th Cir. 2000) 227 F.3d 817, where the NLRB concluded that an employer unlawfully polled employees about their union sentiments by hanging a poster outside a manager's office that employees could sign. The poster proclaimed, "We want to give new management a chance. We don't need a union now." Various managers had signed the poster and there was blank space underneath these signatures where employees could sign their names. On these facts, the NLRB concluded, "the posting was clearly not intended merely as a show of management support for the management position, but rather as a direct appeal to others to join with management. [This solicitation] of open employee support placed employees in the position of joining management in a public display of support or risking the Respondent's displeasure if they did not so." (*Beverly California Corp*., *supra*, 326 NLRB at p. 234.)

This case also resembles *House of Raeford Farms, Inc.* (1992) 308 NLRB 568. There, during an organizing campaign the employer gave 1000 "vote no" t-shirts to its

supply clerk to distribute to employees who wanted one. (*Id.* at p. 570.) The clerk required employees to sign a list indicating they received the t-shirt. (*Ibid.*) Although obtaining a t-shirt was voluntary, the NLRB found the signature requirement coercive because "[s]uch employer recordkeeping of the employee's antiunion sentiments enables the Respondent to discern the leanings of employees, and to direct pressure at particular employees in its campaign efforts." (*Ibid.*)

The same conclusions hold true in the present case. Gertz-Ressler did not post the petition on its homepage in order to publicize its own opposition to the union. Rather, it meant to solicit the sentiments of its teachers and to assess their opposition to or support for the union. Such conduct is coercive because it pressured employees to make an observable choice. (See *Clovis*, *supra*, PERB Decision No. 389, p. 15 [communication unlawfully coercive where it "conveys employer disapproval toward the union and creates an expectation of employee response"].)

Gertz-Ressler HS offers no business justification for its conduct. Therefore, we find that the petition constituted interference with protected rights in violation of EERA, as alleged in the complaint.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in these cases, it is found that Alliance Collins Family College-Ready High School and Alliance Gertz-Ressler High School (Gertz-Ressler HS) violated Educational Employment Relations Act (EERA), Government Code section 3543.5, subdivisions (a) and (b) by failing to respond to United Teachers Los Angeles's (UTLA's) March 25, 2015 request to meet and discuss a neutral process for organizing

the schools' employees. Additionally, Gertz-Ressler HS violated EERA section 3543.5, subdivision (a) by conducting a coercive poll of employees in order to assess their union sympathies. All other allegations from both PERB complaints are dismissed.

Pursuant to EERA section 3541.5, subdivision (c), it hereby is ORDERED that Alliance Collins Family College-Ready High School and Alliance Gertz-Ressler High School, their governing boards, agents, and representatives shall:

A. CEASE AND DESIST FROM:

1. Failing to meet and discuss in good faith matters of fundamental importance to employees.

2. Interfering with UTLA's right to represent its members.

3. Interfering with employees' right to be represented by UTLA.

4. Alliance Gertz-Ressler High School is further ordered to cease and desist coercively polling employees about their union sympathies.

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

1. Within 10 workdays following the date this Decision is no longer subject to appeal, post at all work locations where notices to certificated employees at Alliance Collins Family College-Ready High School are customarily posted, copies of the Notice attached hereto as Appendix A. Within 10 workdays following the date this Decision is no longer subject to appeal, post at all work locations where notices to certificated employees at Alliance Gertz-Ressler High School are customarily posted, copies of the Notice attached hereto as Appendix B. The Notices must be signed by an authorized agent of Alliance Collins Family College-Ready High School or Alliance

Gertz-Ressler High School, respectively, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. The Notices shall also be posted by electronic message, intranet, internet site, and other electronic means customarily used by Alliance Collins Family College-Ready High School and Alliance Gertz-Ressler High School for communicating with certificated employees. Reasonable steps shall be taken to ensure that the Notices are not reduced in size, altered, defaced, or covered with any other material.

2. 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. Alliance Collins Family College-Ready High School and Alliance Gertz-Ressler High School 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 UTLA.

Member Krantz joined in this Decision.

Member Shiners' concurrence begins on p. 32.

SHINERS, Member, concurring: I agree with my colleagues' disposition of the issues before the Board on appeal, and join in the reasoning for those dispositions with one exception. Although I agree Alliance Collins Family College-Ready High School (Collins HS) proved its affirmative defense that it would have reduced Albert Chu's (Chu) class load regardless of his protected activity, I would not reach that issue because United Teachers Los Angeles (UTLA) did not meet its burden to establish a prima facie case of discrimination.

To establish a prima facie case of discrimination, UTLA had to prove that Chu's protected activity was a substantial motivating factor in Collins HS Principal Robert Delfino's (Delfino) decision to offer Chu a reduced class load for the 2015-2016 school year. (*Omnitrans* (2010) PERB Decision No. 2121-M, pp. 9-10.) I agree with the majority that the close proximity in time between Chu's union organizing activities and Delfino's decision to reduce Chu's class load supports an inference of discrimination. I disagree, however, that the record shows Delfino held animus toward Chu's protected activities.

The majority finds animus on the part of Delfino because "Alliance and the Charter Schools were opposed to unions generally and to UTLA specifically." PERB has long held that under the Educational Employment Relations Act (EERA)[14] "a public school employer is . . . entitled to express its views on employment related matters over which it has legitimate concerns in order to facilitate full and knowledgeable debate." (*Rio Hondo Community College District* (1980) PERB Decision No. 128, p. 19.) "While the protection afforded the employer's speech is not

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

without limits, it must necessarily include both favorable and critical speech regarding a union's position provided the communication is not used as a means of violating the Act." (*Ibid.*) Thus, employer speech is protected unless it "contains a threat of reprisal or force or promise of benefit." (*Id.* at p. 20.) Because an employer's noncoercive speech about unionization is protected by EERA, it cannot be used to establish the employer's unlawful motivation for a particular adverse employment action. (See, e.g., *Medeco Security Locks, Inc. v. NLRB* (4th Cir. 1998) 142 F.3d 733, 744; *BE&K Const. Co. v. NLRB* (11th Cir. 1997) 133 F.3d 1372, 1376-1377; *NLRB v. Best Products Co., Inc.* (9th Cir. 1980) 618 F.2d 70, 74; *Overnite Transportation Co.* (2001) 335 NLRB 372, 378, fn. 5 (diss. opn. of Hurtgen, C.)

Moreover, even if an employer's general opposition to an organizing campaign could be used in such a manner, I disagree such animus should "be imputed to every manager or supervisor within the organization." (*California Virtual Academies* (2018) PERB Decision No. 2584, p. 40 (conc. opn. of Shiners, M.) Doing so creates a presumption that when an employer declines to maintain neutrality during an organizing campaign, every personnel action taken against union supporters is motivated by their protected activity. Instead of such a blanket imputation of motivation, PERB must examine whether the individual(s) involved in the decision to take the adverse action held antiunion animus and, if so, whether that animus played a substantial role in the decision. (See *Regents of the University of California (Los Angeles)* (2008) PERB Decision No. 1995-H, pp. 10-14 [declining to impute lower level supervisors' antiunion animus to manager who made layoff decision]; cf. *San Bernardino City Unified School District* (2004) PERB Decision No. 1602, p. 25,

fn. 22 [personnel director's knowledge of employee's protected activity could not be imputed to all district employees, including investigator upon whose findings the adverse action was based].)

On the record before us, I would not find that Delfino held animus toward Chu's protected activities. While I agree with my colleagues that the March 16 and 20, 2015 flyers Delfino distributed to Collins HS employees were coercive, the mere distribution of the documents is insufficient to support an inference that his actions toward Chu were motivated by antiunion animus. Delfino forwarded the documents from the Alliance CMO to Collins HS employees as part of his job duties as principal. The record contains no evidence that he had discretion not to forward the documents if he disagreed with them. Nor is there any evidence Delfino played a role in authoring the documents, expressed his support of the views in the documents to any employees, or was anything more than a passive participant in Alliance's opposition to UTLA's organizing campaign. Conversely, the record shows Delfino attempted to retain or promote other UTLA supporters at Collins HS. On these facts, I find no antiunion animus on the part of Delfino to support a finding that Chu's protected activity was a substantial motivating factor in Delfino's decision to offer Chu a reduced class load. Accordingly, I would dismiss the discrimination allegation for failure to establish a prima facie case.

APPENDIX A

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-6061-E, *United Teachers Los Angeles v. Alliance College-Ready Public Schools*, in which all parties had the right to participate, it has been found that the Alliance Collins Family College-Ready High School violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq. by failing to meet and discuss a "fair and neutral process to organize."

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

A. CEASE AND DESIST FROM:

1. Failing to meet and discuss in good faith matters of fundamental importance to employees.

2. Interfering with UTLA's right to represent its members.

3. Interfering with employees' right to be represented by UTLA.

Dated: _____

ALLIANCE COLLINS FAMILY COLLEGE-READY HIGH SCHOOL

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.

APPENDIX B

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-6061-E, *United Teachers Los Angeles v. Alliance College-Ready Public Schools*, in which all parties had the right to participate, it has been found that Alliance Gertz-Ressler High School violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq., by failing to meet and discuss a "fair and neutral process to organize," and by soliciting employees to sign an online petition opposing unionization.

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

A. CEASE AND DESIST FROM:

1. Failing to meet and discuss in good faith matters of fundamental importance to employees.

2. Interfering with UTLA's right to represent its members.

3. Interfering with employees' right to be represented by UTLA.

4. Coercively polling employees about their union sympathies.

Dated: _____

ALLIANCE GERTZ-RESSLER HIGH SCHOOL

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

UNITED TEACHERS LOS ANGELES, Charging Party, v. ALLIANCE COLLEGE-READY PUBLIC CHARTER SCHOOLS *ET AL.*, Respondent.	UNFAIR PRACTICE CASE NOS. LA-CE-6061-E LA-CE-6073-E PROPOSED DECISION (June 27, 2017)

Appearances: Bush Gottlieb, by Jesús Quiñonez and Eric Deutsch, Attorneys, for United Teachers Los Angeles; Proskauer Rose, by Harold M. Brody and Irina Constantin, Attorneys, and Robert A. Escalante, General Counsel, for Alliance College-Ready Public Charter Schools, Alliance Collins Family College-Ready High School, Gertz-Ressler High School, and Alliance Patti & Peter Neuwirth Leadership Academy.

Before Shawn P. Cloughesy, Chief Administrative Law Judge.

INTRODUCTION

In these two consolidated cases, an employee organization alleges that a charter management organization (CMO) and three affiliated charter schools act as a single integrated enterprise, which constitutes a public school employer within the meaning of the Educational Employment Relations Act (EERA).[1] The employee organization further alleges that the integrated employer unlawfully refused to meet and discuss matters concerning the employment relationship with the organization, monitored the organization's organizers, solicited employees to oppose the organization, retaliated against an employee for supporting the organizing effort, and denied access to one of the employee organization's organizers. The

[1] EERA is codified at Government Code section 3540 et seq. Unless otherwise specified, all statutory references herein are to the Government Code. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

CMO and the affiliated charter schools deny that they are a single employer, deny that the Public Employment Relations Board (PERB or Board) has jurisdiction over the CMO, and deny any violation.

PROCEDURAL HISTORY

On August 24, 2015, United Teachers Los Angeles (UTLA) filed an unfair practice charge (UPC) against Alliance College-Ready Public Charter Schools (Alliance), Alliance Collins Family College-Ready High School (Collins HS), and Alliance Getz-Ressler High School (Gertz-Ressler HS), alleging both interference and retaliation violations. PERB assigned the matter case number LA-CE-6061-E.

On October 8, 2015, UTLA filed another UPC against Alliance and Alliance Patti & Peter Neuwirth Leadership Academy (Neuwirth Academy), alleging additional interference violations. PERB assigned the matter case number LA-CE-6073-E.

On October 13, 2015, the PERB Office of the General Counsel issued a complaint in case number LA-CE-6061-E, alleging that Alliance violated EERA by ignoring UTLA's request on behalf of certificated employees at Alliance-affiliated schools, to meet and discuss matters concerning the employment relationship with UTLA, conducting surveillance on UTLA's organizers, supporting a petition that opposed UTLA's organizing efforts, and retaliated against teacher Albert Chu (Chu) for protected activities. On October 15, 2015, the General Counsel's Office issued a complaint in case number LA-CE-6073-E, again alleging that Alliance conducted unlawful surveillance of a UTLA organizer and also that an Alliance security guard unlawfully denied access to a UTLA organizer.

Alliance filed an answer to the complaint in case number LA-CE-6061-E on November 2, 2015. It filed its answer in case number LA-CE-6073-E on November 4, 2015.

In both cases, Alliance denies that it is an employer under EERA and denies many of the other substantive allegations. It also maintains multiple affirmative defenses relating to PERB's lack of jurisdiction over Alliance.

On April 14, 2016, the Administrative Law Judge (ALJ) issued amended complaints in both LA-CE-6061-E and LA-CE-6073-E, pursuant to UTLA's request and over the opposition of Alliance. The amendments added Collins HS, Getz-Ressler HS, and Neuwirth Academy as additional respondents.[2] Respondents filed amended answers to the amended complaints on April 20, 2016, again denying that Alliance is an employer under EERA and asserting that PERB lacks jurisdiction over Alliance. Respondents also dispute that Alliance has a joint or single employer relationship with Collins HS, Gertz-Ressler HS, and/or Neuwirth Academy.

Pre-hearing conferences were held on April 21, 2016, and May 18, 2016, to address issues relating to the production of documents and witnesses at hearing. Formal hearing dates were then set for June 2, 3, 6, and 7, 2016. On the first day of hearing, the parties stipulated to the admission of 52 joint exhibits, notably including transcripts of the testimony of Laura Alvarez, Dean Marolla-Turner, Robert Pambello, and Ben Wang, which were produced in an earlier PERB hearing involving both Alliance and UTLA.[3] As part of the stipulation, the parties agreed to treat the testimony and the exhibits discussed in those transcripts as if it was produced during the course of the present proceedings.

[2] Alliance, Collins HS, Getz-Ressler HS, and Neuwirth Academy, will be collectively referred to as "Respondents."

[3] The transcripts were from the formal hearing in PERB case numbers LA-CE-6025-E and LA-CE-6027-E before ALJ Kent Morizawa. ALJ Morizawa issued a proposed decision in that matter on June 3, 2016. As of the date that this proposed decision issued, ALJ Morizawa's proposed decision was subject to exceptions pending before the Board.

During the formal hearing, the ALJ ordered that Charging Party Exhibits 20 and 35 be sealed from public inspection. Exhibit 20 was a petition to support one of the teachers which was signed by students and listed their phone numbers. Exhibit 35 was a list of donors to Alliance. The students and donors are not parties to this proceeding and their actual names are only remotely relevant. Both exhibits are therefore sealed from public inspection to protect their privacy pursuant to Government Code section 11425.20 and Civil Code sections 1798.14 and 1798.24.

Both parties filed closing briefs on August 26, 2016. Reply briefs were filed on September 19, 2016. On February 17, 2017, UTLA filed a motion to re-open the evidentiary record. Respondents opposed the request on March 7, 2017. The record in these cases are now considered closed and submitted to the ALJ for decision, subject to a discussion of UTLA's motion.

FINDINGS OF FACT

The Parties

UTLA is an employee organization within the meaning of EERA section 3540.1, subdivision (d). Alliance is a non-profit CMO, affiliated with a network of 27 charter schools in the Los Angeles area, each bearing the name "Alliance." Collins HS, Gertz-Ressler HS, and Neuwirth Academy (collectively, "the Schools") are each public schools within the meaning of EERA section 3540.1, subdivision (k).

Alliance's Organizational Structure

Alliance's operations are governed by its Board of Directors. The Chief Executive Officer and President (CEO) position reports to the Board of Directors. Before March 2015, Judy Burton (Burton) was CEO. Dan Katzir (Katzir) has been CEO since March 2015.

Senior-level administrators, including the Chief Financial Officer (CFO), and the Chief of Schools, report to the CEO. At the times relevant to this case, David Hyun was CFO and Howard Lappin (Lappin) was the Chief of Schools. Alliance occupies physical office space in Los Angeles in what is referred to by all parties as the "Home Office." The Home Office employs roughly 100 people.

Alliance's Governance Relationship with Affiliate Schools

Each of the Schools operates through a charter authorized by Los Angeles Unified School District (LAUSD). Each is a non-profit public benefit corporation, whose only member is Alliance. Each School has its own Board of Directors consisting of nine voting members. Alliance selects at least five of those members.[4] Decisions are made by majority vote. LAUSD retains the right to appoint at least one non-voting member at each of the Schools. Currently, Alliance Chief of Schools Lappin chairs each of the Schools' Board of Directors. Each School Board meets separately, but at one point, the Boards all met at separate tables in the same meeting space. Alliance CFO Hyun is designated as the CFO for each of the Schools.

The Management Services Agreements

Each of the Schools is party to a Management Services Agreement (MSA) with Alliance. Under the terms of the MSA, Alliance provides the following services:

> (a) creating the School, including, but not limited to, any and all required legal and financial filings;
>
> (b) creating, preparing and submitting the School's charter;
>
> (c) researching, locating and preparing a suitable facility (the "Facility") for the operation of the School;
>
> (d) researching, providing or preparing for any future expansion of the Facility to accommodate growth of the School;

[4] In the case of Neuwirth Academy, Alliance selects all nine members.

> (e) providing professional development training for certain employees of the Company prior to the commencement of the school year and continuing throughout the school year as necessary;
>
> (f) providing office services, such as accounting, payroll, human resources and billing;
>
> (g) supervising the annual budget;
>
> (h) developing and executing fundraising opportunities;
>
> (i) working with the Los Angeles Unified School District (the "LAUSD") as necessary, including complying with reporting requirements and any other general inquiries received from the LAUSD;
>
> (j) supervising the parent coordinator and parent involvement generally;
>
> (k) marketing for student enrollment;
>
> (l) assisting with public relations;
>
> (m) writing grants for state and other funding;
>
> (n) providing guidance relating to the curriculum;
>
> (o) providing support for information technology;
>
> (p) providing financial support as needed; *provided*, however, that such support be agreed to by the parties in a separate writing; and [Emphasis in original.]
>
> (q) providing any other operational or educational needs relating to the School that the Company may reasonably request of Manager.

In exchange, Alliance receives a "service fee" from each of the Schools consisting of approximately 7 percent of each School's total revenue. In practice, this means that the Alliance Home Office manages payroll, provides Human Resources (HR) services, negotiates real estate matters, develops and manages the budget, and trains local administrators, at each of

the Schools. The Home Office may also offers the Schools assistance loans at an annual interest rate of 0.35 percent.

Regarding the budget, the Controller from the Home Office meets with the budget team for each school and helps translate their ideas into a functional budget. Once finished, the Home Office administers the budget to a large degree. For instance, each of the Schools has its own bank accounts, but the Controller is primarily responsible for those accounts. The Home Office may grant Principals access to their accounts on request, but according to Controller Ben Wang, this does not happen typically. More commonly, Principals will simply contact the Home Office and ask for the balance of their account. The Home Office also provides each School with monthly financial statements detailing the amount of funds they have on hand as well as comparisons of budgeted funds versus actual expenses. The Home Office will notify a school if they exceed their budget and will offer assistance in reallocating budget funds. Principals are not required to accept this assistance. The Alliance Home Office prepares and files tax paperwork with the Internal Revenue Service for each of the Schools and the Alliance CFO is the designated principal officer for those filings.

Regarding facilities and real estate matters, the Alliance Home Office, along with an affiliated Facilities Corporation, obtain the financing necessary to acquire land for the Schools, who then pay rent to the Facilities Corporation in a lessor-lessee relationship. Rent is determined by the individual School's Boards of Directors, based on industry standards. Alliance does not profit directly from the arrangement. Alliance charter schools may pass a Rent Equalization resolution, which is designed to redistribute any differences in rent payments among the participating schools. Under the program, each participating school pays

the average of their collective rent. All of Alliance's 27 affiliates have adopted the Rent Equalization resolution.

School Site Administration

The Principal is the primary administrator at each of the Schools. The Principal is responsible for day-to-day school operations, which includes deciding the classes that are offered (consistent with State standards), how to allocate budgeted funds, purchasing, and contracting with outside vendors, consistent with Alliance policy. At the times relevant to these cases, Principals were hired by the Alliance CEO and were supervised by Area Superintendents, who are Alliance employees in the chain of command of the Chief of Schools.

Regarding personnel matters, Principals determine their own staffing needs and have discretion to hire teachers, assuming they have the funds for the position. Principals inform the Alliance Home Office HR department of the desired qualifications for the position and the Home Office posts the job vacancy. Principals are responsible for screening, interviewing, and then selecting among the candidates. The Principal informs Alliance of the successful candidate. At that point, Alliance HR verifies the candidate's eligibility for hire and facilitates the candidate's mandatory background check. Alliance HR also notifies the unsuccessful candidates that they were not selected. All hired teachers must participate in an orientation developed by the Alliance Home Office.

Newly hired teachers enter into an employment contract with the School that selected them. Alliance prepares the employment contract using its standard template of fixed terms and sends it to the Principal of the hiring school. All teacher employment contracts include a substantially similar basic job description, evaluation process, performance measurement

metrics, and eligibility for benefits such as leave and health plans.[5] Teachers are subject to termination or non-renewal for the same reasons across each of the Schools. Teachers are all placed on the same salary scale, subject to minor variations.[6] The contract term for teachers at each of the Schools is one year, or 190 instructional days, a standard set by Alliance.

Teachers are hired into only one Alliance school and may not freely transfer to another school. A teacher seeking to work at another Alliance school must apply and be offered a position at that school and must resign his or her current position. Alliance offers some assistance with this process; it has a standard resignation letter and will transfer teacher records from one affiliate to another.

Principals have the authority to discipline and ultimately terminate certificated personnel. Principals may consult with Alliance HR, but are not required to accept any recommendations from that office. At least one Principal, Dean Marolla-Turner from Alliance Susan & Eric Smidt Technology High School, did not follow the Alliance HR advice when deciding to terminate a teacher.

Certificated employees at each of the Schools are issued the same employee handbook developed by the Alliance Home Office. The handbook details a set of policies and procedures on matters such as compensation, benefits, evaluations, discipline, termination, leave, Internet usage, safety, and resolution of complaints between employers and employees and third parties. Employees are required to sign a statement acknowledging receipt of the handbook.

[5] Each of the schools offers the same health plans to its certificated employees from the same providers, as negotiated through Alliance.

[6] For example, Principals have discretion to offer signing bonuses to newly hired teachers if they have the funds to do so.

Those acknowledgements are maintained in each employee's personnel file, which are housed at the Alliance Home Office.

Closing of Alliance College-Ready Middle Academy #7

In March 2015, Chief of Schools Lappin met with representatives from LAUSD's Charter Schools Division. Lappin learned that LAUSD did not intend on renewing the charter for Alliance College-Ready Middle Academy #7 (Middle Academy #7). At that same meeting, LAUSD informed Lappin that it was approving the charter petition for Alliance College-Ready Middle Academy #10 (Middle Academy #10). Lappin met with LAUSD Governing Board members to discuss closing Middle Academy #7 and opening Middle Academy #10 in the same location serving the same student population. This change was publicly announced before it was formally adopted by the Middle Academy #7 Board of Directors.

The Alliance Educators United Organizing Campaign

On March 13, 2015, a group of 67 certificated employees from seven different Alliance affiliated charter schools publicly announced their intent to form a union with UTLA. The announcement was sent to other employees, the Alliance Board of Directors, then-CEO Burton, incoming CEO Katzir, and parents. The group named itself Alliance Educators United (AEU). The announcement features the names and signatures of all 67 employees and photographs of 16 of those employees.

Alliance's Responses to the Organizing Campaign

Following AEU's announcement, Alliance issued multiple communications regarding unions, union activity, and UTLA. On March 13, 2015, Burton issued a memo stating that unions have reasonable access rights to public school property but that working time is reserved for performing work. In the memo, Burton also states that employees are free to

choose whether to unionize and that employees are not required to speak with union organizers or sign an authorization card. Burton encouraged employees to contact PERB for more information.

On March 16, 2015, Alliance issued a document entitled "Some FACTS about Unionization & United Teachers of Los Angeles (UTLA)." This document reiterates employees have the right to freely decide whether to unionize, which includes the right to express opinions against joining a union. The statement describes a union authorization card as "a binding legal document," which may result in unionization without an election. It states unionizing establishes the right to collective bargaining, but does not guarantee higher wages or benefits. It states that negotiations typically result in uniform working conditions. It contrasts this "one-size-fits-all" strategy with the "flexibility and innovation," that is currently part of Alliance's program.

The document goes on to describe UTLA and its relationship with LAUSD. It states that, at the time, UTLA-represented teachers at LAUSD had not received a salary increase for eight years and that UTLA charges its members around $57.42 in dues each month. It describes previous stances UTLA has taken against charter school policies and political candidates who support expanding charter schools.

On March 20, 2015, Alliance issued a document entitled "UTLA Unionization Campaign at Alliance Schools, FAQ for Alliance Educators & School Community." This document repeats some of the information from the March 16, 2015 fact sheet. It also describes other instances where UTLA has opposed charter schools policies and candidates supporting charter schools. It describes the collective bargaining process as limiting individual

collaboration between teachers and administrators. It also suggests that unions are not legally prohibited from being untruthful when gathering authorization cards.

AEU's March 25, 2015 Letter to Katzir

On March 25, 2015, twenty AEU representatives sent CEO Katzir a letter expressing concern over Alliance's attempt to dissuade employees from unionizing. In the letter, AEU states "[w]e are requesting that we sit down to meet for the sole purpose of discussing and reaching agreement on a fair and neutral process to organize." Alliance never responded to the letter.

Albert Chu's Employment History at Collins HS

In the 2011-2012 school year, Chu began teaching at the Alliance school which was eventually named as Collins HS.[7] That year, Chu taught four periods of Physics and one period of Biology. Chu holds a single subject teaching credential in Physics. He is not credentialed in Biology or any other subject.

During the first semester Chu's first year, the Principal of the school was Laura Galvan. Robert Delfino (Delfino) became the Principal during the 2nd semester. Delfino testified that, because he was hired into that position mid-year, he took no steps to change any course offerings or review any teachers' credential. Delfino did create a department chair position for each department, including as relevant here, Science. That position acted as a liaison between the department and the site administration. Delfino allowed each department to elect its Chair. The Science Department elected Chu.

Chu's full-time teaching position was renewed for the 2012-2013 school year. Delfino assigned Chu to teach the same courses as he had last year, four periods of Physics and one

[7] When Chu was first hired, the school was named Huntington Park College-Ready Academy High School.

period of Biology. Delfino again did not take steps to verify that any Collins HS teachers were properly credentialed for the subjects they were assigned. He did, however, increase the number of Advance Placement (AP) courses offered to students that year, adding AP U.S. History, AP Art History, and AP European History. During the hearing, Delfino testified that he reviewed research describing the benefits of exposing students to the college-level coursework. Delfino believes that students who have taken at least one AP class are better prepared for college, irrespective of whether those students pass the AP exam needed to receive college credit.

Delfino also testified that he begins planning the annual class schedule in April of the preceding school year. This process involves reviewing student data to ensure that returning students have the classes they need to fulfill their graduation requirements. Delfino also reviews student performance and interest in a particular class. Finally, Delfino bases the schedule on his "vision" for the school which, as relevant to this matter, involves increasing the number of AP classes offered. Delfino consults with the department chairs before finalizing the class schedule.

In April 2013, Delfino considered adding AP Biology as a class for 11th graders in the 2013-2014 school year. Later that month, Chu, in his capacity as the Science Department Chair, met with Delfino about this decision. Chu said that the Science Department discussed the matter and felt that students who had not previously demonstrated an aptitude for Biology or other life science classes would not perform well in AP Biology. Delfino disagreed and ultimately implemented the AP Biology plan.[8]

[8] Collins HS stopped offering AP Biology after one year.

Chu's full-time teaching contract was renewed for the 2013-2014 school year, but Delfino removed him as Science Department Chair. Delfino appointed another teacher, Michico Clark (Clark), into that position. He described her as the "top teacher in the department." Delfino assigned Chu four Physics classes and one Anatomy/Physiology class, which requires the same credential as a Biology class. Delfino again did not review Chu's credentials to teach that class. That year, however, the LAUSD's Charter Schools Division audited Collins HS's program. According to Delfino, the audit revealed that teachers at the site were assigned to classes they were not credentialed in. On April 1, 2014, Delfino contacted the Alliance Home Office HR department to determine the classes Chu was authorized to teach. He was informed that Chu was only authorized to teach Physics. Delfino informed Chu of the results of the audit and assigned another teacher, who was credentialed in Biology, to "co-teach" the Anatomy class with Chu.

1. Chu's Involvement in the Organizing Campaign

Chu's full-time teaching contract was renewed for the 2014-2015 school year. Delfino assigned Chu five Physics classes. That year, Chu began became involved with AEU. He attended organizing committee meetings at the start of that school year. Chu signed the March 13, 2015 letter announcing AEU's intent to organize a union with UTLA. His picture is also at the top of the page. He also participated in distributing the letter to teachers and parents. Delfino acknowledged seeing the letter, and knowing that Chu supported AEU. Other Collins HS teachers also signed the letter, including Clark, Shireen Noori (Noori), Elaina Ramirez (Ramirez),[9] Roberto Rivas (Rivas), and Kenneth Su (Su).

[9] Ramirez was listed under her maiden name, Elaina Olivarez.

On March 17, 2015, Delfino e-mailed Collins HS employees about AEU's organizing campaign. In it, Delfino describes a union authorization card as a "legal document" that can result in unionization without an election. He also suggested that if there were employees who have signed any documents supporting a union who later wished to withdraw that support, they should contact the union.

On March 20, 2015, Delfino again e-mailed Collins HS employees. This time, he emphasized that employees have the right to freely decide whether to be represented by a union. He encouraged employees "get more facts," before deciding what to do. Delfino included Alliance's March 20 FAQ document, described above, as an attachment to his e-mail.

2. The 2015-2016 Class Schedule

In April 2015, Delfino began planning for the 2015-2016 school year. He sought to continue his plan to expand the number of AP classes offered. Delfino also attempted to improve student performance on AP science exams. He reviewed existing student data and concluded that students performed particularly poorly in the life science class AP Environmental Science, which he had been offering to 11th graders. He reviewed the curriculum for that course and discovered that Chemistry, a physical science class, is a highly recommended precursor.

At the time, the existing class schedule had the majority of students taking Environmental Science in 9th grade, Biology in 10th grade, AP Environmental Science in 11th grade, and Physics in 12th grade. Delfino proposed to change this for the 2015-2016 school year to offering Environmental Science in 9th grade, Biology in 10th grade, Chemistry in 11th grade and AP Environmental Science and/or AP Chemistry in 12th grade. This change meant that fewer Physics classes could be offered that year. At the hearing, Delfino testified that he

knew that, because Chu was only credentialed in Physics, this plan would mean fewer classes for Chu. Delfino testified about feeling some personal remorse about that result, but he said that the student data showed that only 43 incoming 12th graders needed a physical science class to graduate in the 2015-2016 school year.[10] Another 30 students who had already fulfilled their graduation requirements were expected to enroll in Physics that year. Based on these figures, and Delfino's assessment that not many students elected to take Physics, he decided to offer three Physics classes, with up to 25 students in each class, in the 2015-2016 school year. Delfino consulted with the Science Department Chair and other department members about his planned schedule and those conversations did not change his decision.[11]

Delfino recalled one other instance where master schedule changes resulted in a teacher being reduced from full- to part-time. At the end of the 2012-2013 school year, the student data indicated only around 70 students eligible to take AP Spanish Literature and Language. Because of these numbers, Delfino reduced the number of classes offered to the teacher of that class from five to three.

On May 7, 2015, Delfino met with Chu and said that he was only offering Chu a part-time schedule with three Physics classes for the 2015-2016 school year. This meant Chu's salary would decrease by around $15,000 from the 2014-2015 school year and that he would no longer be eligible for health benefits. The two briefly discussed Delfino's plan to emphasize Chemistry over Physics to improve performance on AP Environmental Science and AP Chemistry classes. Delfino offered to inquire whether other Alliance principals needed a

[10] Students need one life science and one physical science class to graduate high school. The physical science requirement may also be met by taking Chemistry.

[11] Respondents offered only uncorroborated hearsay evidence about other Science Department members' opinions of Delfino's proposed schedule.

part- or full-time Physics teacher. He also agreed to provide Chu with a letter of recommendation. Delfino suggested that Chu pursue additional teaching credentials that would increase the number of classes he was eligible to teach at Alliance.[12] Chu did not disagree or protest Delfino's decision at the time because he felt that doing so would decrease his chances of retaining a full-time position at Collins HS. Delfino memorialized their meeting in an e-mail later that day.

Around a week later, Chu met with Delfino again to inquire whether other Alliance schools had the need for a Physics teacher. By that point, Delfino had e-mailed the other Alliance Principals about their need for a Physics teacher, but had not heard any response. Delfino also provided the letter of recommendation he promised to Chu. Chu expressed his desire to remain full-time and offered to teach AP Physics, Integrated Science, Computer Science, and the inter-disciplinary classes of Science, Technology, Engineering, and Math (STEM) and Math, Engineering, Science Achievement (MESA). Delfino said that he would consider those options.

3. The May 2015 Petitions Regarding Chu's Position

Around this time, two separate petitions were being circulated advocating retaining Chu as a full-time Physics teacher at Collins HS. One was driven primarily by Collins HS students and alumni. The other was signed by Collins HS teachers. Collectively, the petitions stressed the importance of Physics as a class offering, Chu's value to Collins HS, and the inclusion of teachers in curricular decisions. Chu was not responsible for starting or circulating either petition.

[12] Chu testified that a teacher who already completed the credentialing program in at least one other subject could become credentialed in another subject by passing a State exam in that subject.

The petition organizers decided to present both petitions to Delfino on May 29, 2015. At around 3:45 p.m., Chu met with UTLA organizers Francisco Cendejas (Cendejas) and Jesse Yeh, Collins HS teacher Rivas, one student and one alumnus. They met outside the Collins HS campus, around 20 feet from the entrance. This was right after teachers were released for the day, around 15 minutes after students were released. Assistant Principal Karen Krausen-Ferrer (Krausen-Ferrer) stood at the entrance of the school watching them. The group met briefly and then Chu, Rivas, the student, and the alumnus went inside the school. Delfino was not on site at the time, so the group met with Vice Principal Marco Ibarra (Ibarra). They presented the petitions to Ibarra and discussed options for retaining Chu as a full-time teacher. At one point, Krausen-Ferrer interrupted the meeting so she could speak with Ibarra. The reason for the interruption was not made clear for the record. Ibarra agreed to present the petitions to Delfino. At hearing, Delfino confirmed receiving the petitions. Neither Krausen-Ferrer nor Ibarra testified.

After the meeting with Ibarra, the group met up with the UTLA organizers who were still standing outside the Collins HS exit. The group discussed the meeting that had just occurred. Krausen-Ferrer was again present at the entrance of the school. By this time, Rivas considered her presence in the area to be unusual because most students and teachers were no longer present. But, Delfino and Rivas both testified that site administrators are responsible for ensuring the safety of the campus, including ensuring that unauthorized personnel are not entering school grounds. Delfino further testified that he tasks either himself or other administrators with monitoring the exits to ensure that students and personnel exit safely.

While the group was still meeting, the parent of a student approached them and expressed her opposition to UTLA's organizing campaign. Rivas and the parent expressed

their opposing opinions about the campaign. Rivas acknowledges that he was angry at the time and that both he and the parent spoke in agitated voices. Delfino testified that Krausen-Ferrer contacted him via telephone during the incident. Delfino directed Krausen-Ferrer to intervene, but she expressed reluctance. The incident with the parent resolved on its own without Krausen-Ferrer's intervention. She left the area after around ten minutes. The group also exited around 4:10 p.m.

4. The Part-Time Teaching Contract

On June 2, 2015, Delfino presented Chu with a part-time teaching contract for the 2015-2016 school year. Chu suggested that he could be hired as an in-house substitute on a part-time basis which, in conjunction with his Physics classes, would qualify him as full-time. In-house substitutes perform office or administrative work for the school until needed as a substitute. At the time, Collins HS, had two in-house substitutes. Delfino said he would consider that option. He also asked that Chu respond by June 8, 2015. The terms of the part-time offer were set to expire in ten days.

On June 8, 2015, Chu informed Delfino that he would not accept the part-time contract. Chu asked Delfino what he thought of his various suggestions to maintain a full-time position and Delfino rejected them all. Chu asked what he was supposed to do next and Delfino said that Chu should provide a letter of resignation. Chu said he had never drafted such a letter before and Delfino offered to provide a template. Delfino e-mailed Chu the template later that day. Chu used the template to produce a letter of resignation, which he then submitted to Delfino.

Chu asked what affect his resignation would have on his eligibility for a summer teaching assignment.[13] Chu and Delfino recall that conversation differently. According to Chu, he said "I told him that I'm assuming that, because I'm resigning, [. . .] it wouldn't be appropriate to teach summer school, to confirm what I thought[.]" According to Chu, "[h]e had a big smile and said, yes." According to Delfino, Chu said that because he was not returning the next year, it made more sense to give his summer assignment to a returning teacher so students could develop a relationship with that teacher. Delfino agreed with that position.

Chu testified that, "it didn't feel right" for him to submit his resignation. He testified "I felt like I lost. I felt like I was defeated, and making me sign a letter of resignation made it sound like I was quitting, which is different from being defeated." He contacted a UTLA organizer for advice and it was suggested that he rescind his resignation. Chu drafted a rescission letter reiterating his desire to retain a full-time position and expressing his belief that Physics education was an essential component of preparing students for science education in college. Chu provided Delfino with the letter on May 9, 2015. During that meeting, Chu stated that he was still unwilling to accept the part-time teaching contract. Delfino forwarded the rescission letter to the Alliance Home Office. Despite the rescission letter, Chu's part-time employment contact for the 2015-2016 school year expired due to his refusal to sign it. He was not offered a full-time position.

Delfino acknowledges that Collins HS students did not perform particularly well on certain AP exams from 2012 through 2014. For example, students taking AP Calculus (AB)

[13] Chu had taught summer school in each of the years he was employed at Collins HS. In April 2015, Delfino had tentatively promised Chu a summer assignment. It is undisputed that teachers who are not returning the following year remain eligible for summer assignments.

passed the exam at a rate of five percent in 2012-2013 and zero percent in 2013-2014. Students taking AP U.S. History passed the exam at a rate of three percent in 2011-2012, two percent in 2012-2013, and zero percent at a rate of 2013-2014. During the one year that AP Biology was offered, no students passed that exam. In 2013-2014, six percent of students taking AP Environmental Science passed the exam. Delfino further acknowledges that passing AP exams provide a great benefit to students because they receive college credit for that course. However, Delfino maintained his belief that students benefit from exposure to college-level coursework even if they do not pass the AP exam. Regarding AP Calculus (AB), Delfino said he wanted to continue offering that class for the highest performing students at Collins HS. Regarding AP U.S. History, Delfino said that he decided to offer that class to all 12th graders.

At the hearing, Delfino explained why he considered Chu's proposals for alternate assignments unworkable. Regarding Chu's offer to teach AP Physics in 2015-2016, Delfino said that Physics was a pre-requisite for the AP class and only one incoming 12th grader had already taken Physics by then. Regarding becoming an in-house substitute, Delfino explained that there was not enough work to retain another substitute. In fact, he said that when one of the two existing in-house substitutes left, there was no need to fill that position. Delfino also disputed Chu's assertion that he had ever made a part-time teacher full-time by assigning in-house substitute work. Regarding teaching MESA, Delfino explained that MESA was offered at Collins as a non-credit afterschool program. He disagreed with Chu's assessment that MESA could be offered for credit. Regarding teaching Integrated Science and Computer Science, Delfino testified that those classes were never offered at Collins HS and offering those classes was not consistent with his class schedule plans.

Delfino admitted that Chu was able to teach a STEM class. Collins HS did, in fact, offer one STEM class in the 2015-2016 school year. But Delfino disagreed with Chu's assertion that he could have offered the STEM class in addition to Chu's three Physics classes. Delfino explained that he only offered STEM as an alternative to Physics after it became clear that Chu was not returning. According to Delfino, the STEM class was offered to the 30 students who had already fulfilled their science graduating requirements. He testified that creating more than one STEM class would not be consistent with his overall Science Department schedule plans.

Delfino testified that he was aware that several teachers at Collins HS supported the AEU organizing effort. He said that he had no aversion to awarding recognitions to teachers who were affiliated with the organizing campaign. He named Ramirez as Special Education Department Chair in the 2015-2016 school year. He named Su as one of the school's two Teacher Advisory Panel representatives. He named Noori as teacher of the month. Although not stated, Delfino also did not remove Clark as the Science Department Chair, even though her name appears on the AEU letter as well.

The Gertz-Ressler HS Website

In April 2014, UTLA Lead Organizer Jessica Foster (Foster) accessed the Gertz-Ressler HS website. Upon arriving at the site, she received a "pop-up" style message with the following statement in both English and Spanish:

> **Our Alliance Community**
>
> Given the recent activity by United Teachers of Los Angeles (UTLA) to organize Alliance teachers into their union and their aggressive outreach in our schools, we feel it is our responsibility to inform out teachers and school community about the potential impact of unionization with UTLA.

The statement is followed by two links, one stating "Okay," the other stating "Read More." Foster tried selecting the "Okay" link and it directed her to the Gertz-Ressler HS homepage. Foster also tried selecting the "Read More" link, and it directed her to the website "www.ouralliancecommunity.com/petition." The text of that page reads:

> **Sign Our Petition!**
>
> I chose Alliance College-Ready Public Schools because of its high expectations for all students, small and personalized learning environment, increased instruction time, parent engagement opportunities, and highly-effective teachers. I am very appreciative of the educational excellence Alliance teachers deliver to students.
>
> I believe that:
>
> - Every decision made by Alliance teachers, staff and leadership should be based on what is best for students.
> - Alliance is doing a great job of educating students and preparing them for college and beyond.
> - Teachers have the right to choose whether or not to unionize without coercion or fear of retaliation by any party.
> - UTLA is on record as opposed to charter schools.
> - I believe that an independent Alliance, free of the UTLA union, is the structure that will best put the needs of students first.

This is followed by the option for visitors to "sign" the petition by filling in text boxes with their first and last name, e-mail address, telephone number, the Alliance site they are affiliated with, and their relationship to Alliance. No evidence was presented about whether any employees saw or completed the petition.

<u>The July 2015 Alliance Summer Conference</u>

Alliance holds an annual Summer Conference for employees from all Alliance affiliated charter schools in advance of the upcoming school year. There are around 600 to 700 attendees. The conference consists of motivational speeches, followed by the opportunity for staff and administrators from each school to meet on an individual basis. Then, certificated personnel and administrators may participate in professional development sessions. Participants are paid for their time provided that they sign in and out.

In 2015, Christopher Corraggio (Corraggio), a Common Core Math Coach at the Alliance Home Office, was the lead organizer of the Summer Conference. Other Alliance Home Office employees were asked to help with the logistics of the event, such as coordinating transportation for attendees, staffing sign-in/sign-out tables, and handing out event programs and food. Typically, employees working at the conference wore distinctive orange t-shirts. No local school site employees were used. The conference began on July 27, 2015.

Gertz-Ressler HS Art Teacher Alisha Mernick (Mernick) attended the 2015 Summer Conference as a participant. Mernick also signed the March 13, 2015 AEU letter. After the conference activities concluded for the day, Mernick and another teacher at an Alliance affiliated school handed out literature regarding Alliance Educators United. Mernick and the other teacher stood just outside the facility where the conference was taking place and interacted with attendees as they left for the day. After around fifteen minutes, Mernick handed a flyer to a new teacher she recognized. The teacher initially took the flyer, but returned it to Mernick shortly afterwards. According to Mernick, the teacher said, "I'm sorry, I cannot take this because my principal is watching." The teacher was not identified and did not testify. At that point, Mernick looked around and noticed what she felt was an unusual number

of administrators from Alliance schools and Alliance Home Office employees "hanging out" at the facility and within her view. She felt that she was being watched. Mernick testified that she found the presence of Alliance Home Office employees unusual because, in her experience, those employees did not attend professional development sessions for a significant amount of time. Corraggio testified that Home Office employees were stationed at the main exit of the facility to pass out snacks and ensure that participants signed out to acknowledge their attendance.

UTLA's September 2015 Leafleting at Neuwirth Academy

In late September 2015, Eric Romann (Romann), a paid organizer from UTLA, distributed leaflets about the Alliance organizing campaign outside Neuwirth Academy. He arrived at approximately 3:45 p.m. Romann stood across the street from the main pedestrian entrance to the campus, near a parking lot used by faculty. Romann spoke to certificated employees about UTLA and provided newsletters and other materials about the campaign. Romann did not wear identification or other means visually identifying himself as part of UTLA or the organizing campaign.

Within a few minutes of arriving, a man identifying himself as Michael Bush (Bush) approached Romann. Bush said that he was associated with the school administration, and asked Romann who he was and if he had a business card. Romann introduced himself and said that he was from Alliance Educators United. He did not offer Bush a business card and Bush did not insist on having one. Bush welcomed Romann to the area and offered him a bottle of water, which Romann declined.[14] According to Romann, Bush said something to the effect of

[14] Bush did not testify, but the parties agreed to admit a declaration from him as part of the evidentiary record. They also stipulated that Bush would have testified consistently with his declaration.

"nice to meet you," and left. Romann saw Bush enter the Neuwirth Academy premises and meet with a group of people Romann considered to be site administrators based on the way they were dressed. He saw the group talking to each other, and did not know what they said to each other. No one from the group took photographs, recorded video, took notes, or otherwise made a record of Romann's presence.

Around ten minutes later, a woman who had been standing with Bush, exited the Neuwirth Academy campus and approached Romann. She identified herself as Sandoval, a Neuwirth Academy Assistant Principal. Romann identified himself as "Eric," but did not explain that he was from UTLA or the organizing campaign. She did not ask for details and left. Sandoval did not testify.

At one point during his visit, Romann was speaking with a teacher while he was walking to the parking lot. When Romann entered the parking lot, a security officer informed Romann that he was not permitted to be there. Romann did not identify himself or the purpose of his visit to the security officer. Instead, he complied and returned to the sidewalk. Romann stayed in the area for around 45 minutes in total and spoke with around ten to twenty people that day.

Afterwards, Romann visited the Neuwirth Academy website. He recognized the photograph of one of the individuals who had been standing with Bush and Sandoval on September 29, 2015, was identified on the website as Neuwirth Academy Principal Miguel Gamboa.

ISSUES

1. Should PERB grant UTLA's motion to reopen the record?

2. Does PERB have jurisdiction over Alliance?

3. Did Respondent(s) retaliate against Chu?

4. Did Respondent(s) unlawfully interfere with protected rights by: (a) ignoring UTLA's March 25, 2015 request to meet and discuss; (b) soliciting or expressing anti-union messages on the Gertz-Ressler HS website; (c) conducting surveillance of organizing or other protected activities; or (d) denying UTLA access to the Neuwirth Academy parking lot?

CONCLUSIONS OF LAW

UTLA's Motion to Reopen the Record

When considering a motion to reopen the record to admit new evidence, the Board applies the standard set forth in PERB Regulation 32410, subdivision (a), for a request for reconsideration based on the discovery of new evidence.[15] (*State of California (Department of Corrections & Rehabilitation)* (2010) PERB Decision No. 2136-S, pp. 2-3, citing *State of California (Department of Parks and Recreation)* (1995) PERB Decision No. 1125-S.) The regulation provides in relevant part:

> A request for reconsideration based upon the discovery of new evidence must be supported by a declaration under penalty of perjury which establishes that the evidence: (1) was not

[15] PERB Regulations governing the conduct of unfair practice proceedings (PERB Regulations 32165 through 32230) do not have a similar regulation for reopening an evidentiary hearing record once the formal hearing has been closed. However, PERB Regulations 32190 and 32170, subdivisions (a), (d), and (f), taken together arguably authorize the ALJ to reopen the hearing to take new evidence. Regardless, it seems unlikely that the ALJ could reopen the hearing under a procedure which is less restrictive than that outlined by the Board for itself in PERB Regulation 32410, subdivision (a). The Board's own procedure, moreover, provides a useful framework form for which ALJs may evaluate requests to consider new evidence, in the absence of more specific guidance from PERB's Regulations or from the Legislature.

> previously available; (2) could not have been discovered prior to the hearing with the exercise of reasonable diligence; (3) was submitted within a reasonable time of its discovery; (4) is relevant to the issue sought to be reconsidered; and (5) impacts or alters the decision of the previously decided case.

UTLA maintains that, after the evidentiary record closed in these cases, Alliance announced plans to further emphasize Physics as part of the science curriculum offered in its affiliated charter schools starting in Winter 2017. According to UTLA, this new evidence undermines the asserted justifications Delfino presented for offering Chu only a part-time teaching contract. However, Delfino made the decision in question in 2015 to apply for the 2015-2016 school year. UTLA makes no showing that the 2017 changes provide any insight into Delfino's decision around two years earlier. For this reason, the proffered evidence is not sufficiently probative of the issues to be decided in this dispute. UTLA's motion is denied

PERB's Jurisdiction Over Alliance

EERA section 3540.1, subdivision (k), enumerates various entities that qualify as a "public school employer" subject to PERB's jurisdiction. Among those entitles are "a charter school that has declared itself to be public school employer pursuant to subdivision (b) of Education Code section 47611.5[.]"[16] Under this definition, Collins HS, Gertz-Ressler HS, and Neuwirth Academy are each public school employers under EERA. CMOs like Alliance, on the other hand, are not listed in this definition. PERB recognizes the principle of statutory construction dictating that "where a statute enumerates things upon which it is to operate, it is to be construed as excluding from its effect all those not expressly mentioned. (*North Orange County Regional Occupational Program* (1990) PERB Decision No. 857, pp. 8-9, citing

[16] Education Code section 47611.5, subdivision (b), correspondingly requires "A charter school charter shall contain a declaration regarding whether or not the charter school shall be deemed the exclusive public school employer of the employees at the charter school for the purposes of Section 3540.1 of the Government Code."

Capistrano Union High School Dist. v. Capistrano Beach Acreage Co. (1961) 188 Cal.App.2d 612, p. 617.)[17]

UTLA acknowledges that CMOs, like Alliance, are not expressly enumerated in EERA section 3540.1, subdivision (k). It argues that PERB should assert jurisdiction over Alliance under the single employer doctrine because Alliance and the Schools operate as a single coordinated enterprise to operate public schools in Los Angeles. Respondents argue that PERB is precluded from asserting the doctrine here because, consistent with Education Code section 47611.5, subdivision (b), each of the Schools has declared itself to be the exclusive public school employer under EERA.[18] In support of this argument, Respondents cite to *Ravenswood City Elementary School District* (2004) PERB Decision No. 1660. There, the issue before the Board was whether an individual charter school, or the school district that authorized the school's charter, was the employer for purposes of EERA. The Board found that the charter school was the proper employer, based on the school's declaration that it was a public school employer under EERA as well as its assertion that it had sole authority over the allegedly unlawful acts at issue in the case. (*Id*. at p. 3.) The parties did not argue, and the Board did not address, whether the charter school could have entered into a single employer relationship with another entity. In *California Virtual Academies* (2016) PERB Decision No. 2484 (*CAVA*), the Board rejected the assertion that a charter school's declaration under

[17] In that case, PERB declined to infer that a joint powers agency, consisting of representatives from multiple school districts, was a public school employer because joint powers agencies were not among the enumerated entities listed in EERA section 3540.1, subdivision (k). EERA was subsequently amended to include joint powers agencies as public school employers.

[18] PERB must take the Charter Schools Act into account when deciding labor relations matters involving charter schools. (Educ. Code, § 47611.5, subd. (d); *Orcutt Union Elementary School District* (2011) PERB Decision No. 2183, pp. 5, 7-8.)

Education Code section 47611.5, subdivision (d), is determinative on the issue of employer status. (*Id*. at pp. 53-55.) It instead found that employer status is decided by analyzing the degree of control an entity exercises over its putative employees. (*Ibid*.) It accordingly found that a network of 11 charter schools, providing remote, Internet-based, instruction to students was a single employer for purposes of EERA, despite the fact that each of the 11 schools declared itself to be a public school employer. (*Id*. at p. 86.) Accordingly, Respondents argument that the Schools' own declarations under Education Code section 47611.5, subdivision (a) precludes application of the single employer doctrine is unpersuasive.

The Board addressed the single employer doctrine in *Plumas Unified School District and Plumas County Superintendent of Schools* (1999) PERB Decision No. 1332 (*Plumas*). In that case, the Board adopted the definition of "single employer," articulated in *NLRB v. Browning-Ferris Industries of Pennsylvania* (3d Cir. 1982) 691 F.2d 1117 (*Browning-Ferris*), as follows:

> A "single employer" relationship exists where two nominally separate entities are actually part of a single integrated enterprise so that, for all purposes, there is in fact only a "single employer."

(*Plumas*, pp. 17-18, quoting *Browning-Ferris*, p. 1122.) The four factors considered under the single employer doctrine are: (a) functional integration of operations; (b) centralized control of labor relations; (c) common management; and (d) common ownership or financial control. (*Ibid*.) Application of the single employer doctrine requires a fact-intensive, case-by-case analysis. The party asserting single employer status need not establish the presence of all four factors. No single factor is determinative, but the first three are considered more important than the fourth. (*CAVA*, *supra*, PERB Decision No. 2484, p. 64, citing *El Camino Hospital*

District (2009) PERB Decision No. 2033-M, p. 19; *The Regents of the University of California* (1999) PERB Order No. Ad-293-H (*UC Regents*), proposed dec., p. 15.)

1. Functional Integration of Operations

In *CAVA*, *supra*, PERB Decision No. 2484, the Board found that the network of eleven Internet-based charter schools were functionally integrated, given that all schools entered into identical contractual relationships with the same private curriculum and management company who established a unified system for payroll, HR, compensation, benefits, and other terms and conditions of employment. (*Id*. at p. 68-69.) In *El Camino Hospital District*, *supra*, PERB Decision No. 2033-M, the Board found integration between a public agency hospital district and a hospital, operating as a non-profit public benefit corporation. There, the hospital district was the sole voting member of the hospital corporation, represented a majority of the hospital's board of directors, owned the land that housed the hospital, and received rent payments from the hospital for the use of that land. (*Id*. at pp. 19-20.)

Alliance has a similar relationship with the Schools. As in *El Camino Hospital District*, *supra*, PERB Decision No. 2033-M, Alliance is the sole member of each of the Schools' corporations. Alliance representatives constitute a majority on each of the School's governing Board of Directors. Alliance Chief of Schools chairs each School's Board. Alliance, through a subsidiary, obtains the land to be used for its affiliate schools and the schools in turn, pay rent to fund Alliance's efforts. Each of the Schools has passed a Rent Equalization resolution designed to distribute each of the School's different rent prices evenly among all participants. And, as in *CAVA*, *supra*, PERB Decision No. 2484, each of the Schools is party to a MSA with Alliance. Under this agreement, the Alliance Home Office operates a single HR department for all of its affiliated schools. The Alliance CFO oversees

the finances for each of the Schools, including providing assistance in developing and monitoring each School's budget and preparing tax filings. Under the circumstances, this factor favors finding a single employer relationship between Alliance and the Schools.

2. Centralized Control of Labor Relations

As explained above, the Alliance Home Office provides HR services to each of the Schools. Certificated employees, for the most part, are placed on the same salary scale and receive the same benefits and leave. Certificated employees are evaluated using the same performance measurement metrics. They also work the same standard work-year of 190 instructional days, set by Alliance. Certificated employees at each of the Schools enter into the same annual employment contracts and their contracts are subject to non-renewal for the same reasons.

Unlike in *CAVA*, *supra*, PERB Decision No. 2484, teachers at Alliance affiliated schools may not freely transfer to another affiliate without separately applying to and being accepted by that school. Individual Principals have the authority to hire and fire certificated personnel. But, at the times relevant to these cases, Alliance's CEO hires each Principal and Alliance personnel supervise and evaluate Principals. Moreover, certificated personnel are subject to termination or non-renewal for the same reasons across each of the Schools. Teachers at each of the Schools enter into substantially similar employment contracts and receive substantially similar employment handbooks, both of which were developed by Alliance. Viewing these facts collectively, the amount of control Alliance has over labor relations across all of the Schools favors finding a single employer relationship.

3. Common Management

As explained above, Alliance is the sole member of each of the School's corporations, and Alliance representatives consist of a majority of each of the School's Board of Directors. In one instance, Chief of Schools Lappin met with LAUSD representatives to facilitate the closure of Middle Academy #7 and the opening of Middle Academy #10 in the same location serving the same students. This plan was publicly announced even before Middle Academy #7's Board of Directors voted to approve the plan.[19]

Although day-to-day operations are handled by school Principals, that position is selected by the Alliance CEO and is supervised by Alliance Area Superintendents. The Board considered similar facts in both *CAVA*, *supra*, PERB Decision No. 2484 and *El Camino Hospital District*, *supra*, PERB Decision No. 2033-M and concluded that the entities at issue shared common management. The same conclusion is reached here.

4. Common Ownership or Financial Control

In assessing this factor, the Board in *CAVA*, *supra*, PERB Decision No. 2484, PERB considered whether the entities in question operated under the control of separate governing boards. PERB suggested that entities with separate budgets and locally elected boards may militate against the finding of a single employer relationship. (*Id*. at p. 74, citing *Paso Robles Union School District, et al.* (1979) PERB Decision No. 85; *Turlock School Districts* (1977) EERB Order No. Ad-18.) However, where one entity has the authority to name the other entities' board members, and is involved in the development of their budgets, this factor suggests a single employer relationship. (*CAVA* at pp. 74-75.)

[19] Whether Alliance has or had a single employer relationship with Middle Academy #7 or Middle Academy #10 is not directly at issue here. These facts are highlighted to show Lappin's authority to act on behalf of individual schools' Board of Directors. He is the Chair of the Board of Directors for each of the Schools.

Here, the Alliance Controller works with local administration at each of the Schools to develop their budget. Although each School's Board of Directors approves that budget and each school is responsible for adhering to its own budget, Alliance appoints a majority of each School's Board. In addition, the Alliance Home Office is primarily responsible for monitoring the budget and will warn a school if it may be exceeding its budget. Alliance also offers the Schools operating loans at favorable interest rates, if needed. Under the circumstances, this factor favors finding a single employer relationship between Alliance and the Schools.

5. Creating a Single Employer Relationship with a Private Entity

In *CAVA*, *supra*, PERB Decision No. 2484, the charter school network argued that PERB cannot use the single employer doctrine to assert jurisdiction over a private entity providing certain services to all member schools. The Board declined to address that question directly, because the union petitioning to organize the schools did not name the private company as an employer in that case. However, in dicta, the Board did describe the charter schools' argument as "good law," but without bearing to the petition at hand. (*Id*. at p. 66, citing *UC Regents*, *supra*, PERB Order No. Ad-293-H.)[20]

In *UC Regents*, *supra*, PERB Order No. Ad-293-H, PERB declined to find a single employer relationship between a public university with a contractual relationship with an independent entity. PERB found no single employer relationship in applying the *Browning-Ferris* factors, described above. (*Id*. at proposed order, p. 15.) It further found that, a finding

[20] The Board in *CAVA* also referred to *Los Angeles Unified School District* (2001) PERB Decision No. 1469 for the concept that PERB cannot assert jurisdiction over a private entity through the single employer doctrine. In that case, the ALJ held that PERB could not apply the single employer factors to take jurisdiction over a private entity because that entity did not fit within the definition of "employer" under EERA. (*Id*. at proposed dec. p. 67.) However, the Board, in its own decision, expressly declined to adopt the ALJ's single employer analysis as part of its own decision. (*Id*. at p. 2, fn. 3.)

of single employer status would preclude PERB from exercising jurisdiction over the matter, because the private entity did not fall within the definition of employer under any statute PERB enforces. (*Id*., citations omitted.) In that case, the Legislature passed a bill that expressly exempted the private entity from coverage under the Government Code. (*Id*. at proposed dec., p. 8.)

El Camino Hospital District, *supra*, PERB Decision No. 2033-M, did not address *UC Regents*, *supra*, PERB Order No. Ad-293-H or specifically discuss PERB's ability to use the single employer doctrine to take jurisdiction over a private entity. Nevertheless, the Board did in fact apply the single employer test and concluded that a public hospital district and a hospital operating as a non-profit public benefit corporation were subject to PERB's jurisdiction under a single employer theory. (*Id*. at p. 22.)

UC Regents, *supra*, PERB Order No. Ad-293-H and *El Camino Hospital District*, *supra*, PERB Decision No. 2033-M appear to reach opposing results. And both decisions were cited favorably by the Board in *CAVA*, *supra*, PERB Decision No. 2484. Under these unusual circumstances, the holding in *El Camino Hospital District* will be followed, since PERB's assertion of jurisdiction over the private entity was centrally at issue in that case. In contrast, that issue was only presented tangentially in *UC Regents*. Furthermore, unlike in *UC Regents*, Alliance was not made exempt from the Government Code through legislation.

In conclusion, all of the *Browning-Ferris* factors weigh in favor of finding that Alliance and the Schools operate as a single integrated enterprise. Based on the holding in *El Camino Hospital District*, PERB may assert jurisdiction over a private entity if it has a single employer relationship with at least one other entity already subject to PERB's jurisdiction. Therefore,

because those conditions exist here, it is found that Alliance and the Schools constitute a single employer and is subject to PERB's jurisdiction.

The Retaliation Against Chu Allegation

The PERB complaint in case number LA-CE-6061-E alleges that Respondents retaliated against AEU supporter Chu. To demonstrate that a public school employer discriminated or retaliated against an employee in violation of EERA section 3543.5, subdivision (a), the charging party must show that: (a) the employee exercised rights under EERA; (b) the employer had knowledge of the exercise of those rights; (c) the employer took adverse action against the employee; and (d) the employer took the action *because of* the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210, pp. 6-8 (*Novato USD*).) If the charging party satisfies all the elements of the prima facie case, the burden shifts to the respondent to prove by a preponderance of the evidence that it would have taken the same course of action even if the charging party did not engage in protected activity. (*Cabrillo Community College District* (2015) PERB Decision No. 2453, p. 12, citing *Martori Bros. Dist. v. Agricultural Labor Relations Board* (1981) 29 Cal.3d 721 (*Martori Bros*.)

1. Chu's Protected Activities

The PERB complaint in case number LA-CE-6061-E alleges that Chu engaged in protected activities by participating in AEU activities such as signing and distributing the March 13, 2015 letter demanding union recognition and by participating in the May 2015 petition effort to continue offering Physics at Collins HS and to retain a full-time position there. EERA section 3543, subdivision (a), protects employees' right to "form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." This necessarily includes

activities in support of a union organizing campaign or petition. (*San Bernardino City Unified School District* (2004) PERB Decision No. 1602, p. 18.) Accordingly, Chu's role in AEU is protected under EERA.

Regarding the May 2015 petition, Chu presented a petition signed by Collins HS teachers recommending that Delfino continue offering Physics at Collins HS, include teachers in curricular decisions, and retain Chu as a full-time employee. PERB recognizes that two or more employees, acting in concert about employment matters qualifies as protected concerted activity. (*Regents of the University of California* (1984) PERB Decision No. 449-H, proposed dec., p. 96, citing *Ohio Oil Co*. (1951) 92 NLRB 1597; but see *San Joaquin Delta Community College District* (2010) PERB Decision No. 2091, pp. 3-4 [holding that a teacher's individual complaints about a reduction in his own teaching assignment was not protected].) In addition, in *Berkeley Unified School District* (2015) PERB Decision No. 2411, the Board held found that a teacher/site representative's complaint regarding the social studies curriculum constituted protected activity under EERA. The Board reasoned that EERA section 3540 gives certificated employees a voice in the formulation of educational policy. (*Id*. at pp. 16-17.)[21] In this case, Chu, along with another teacher, assisted in presenting the petition to the Collins HS administration. The petition was signed by multiple teachers and expressed a position on Delfino's curriculum decisions, questioned whether teachers were adequately involved in curriculum development, and advocated for keeping Chu as a full-time employee. Based on the authorities cited above, this petition also qualifies as protected activity.

[21] The Board also noted that EERA section 3543.2, subdivision (a)(3), gives the exclusive representative of certificated personnel the right to consult over educational objectives and the determination of the content of courses and curriculum. (*Id*. at pp. 16-17.) In this matter, there is no exclusive representative of Alliance teachers.

2. Knowledge of Chu's Protected Activities

The charging party must prove that "at least one of the individuals responsible for taking the adverse action [was] aware of the protected conduct." (*Rio School District* (2015) PERB Decision No. 2449, proposed dec., p. 25, citing *Oakland Unified School District* (2009) PERB Decision No. 2061, pp. 8-9; *California State University (San Francisco)* (1986) PERB Decision No. 559-H, pp. 5-6.) Here, the PERB complaint in LA-CE-6061-E alleges that Delfino was responsible for the alleged adverse acts of reducing Chu's teaching assignment and presenting him with a letter of resignation. There was no allegation or showing that anyone else was responsible for these decisions. At the hearing, Delfino admitted to knowing that Chu was involved with AEU. He acknowledged seeing Chu's name on AEU's March 13, 2015 letter. He also acknowledged knowing about the May 2015 petitions concerning Chu's job. These facts satisfy this element of the prima facie case.

3. Adverse Actions Against Chu

The next element of a prima facie case is whether the charging party suffered an adverse employment action. PERB considers objective criteria when deciding whether an employer has committed an adverse employment action. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) In a later decision, the Board further explained that:

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an *adverse impact on the employee's employment*.

(*Newark Unified School District* (1991) PERB Decision No. 864; emphasis supplied; footnote omitted.)

A reduction in work hours resulting in loss of pay is an adverse employment action. (*Oxnard Union High School District* (2012) PERB Decision No. 2265, warning ltr., p. 4, citation omitted.) The decision to cancel assigned classes is also an adverse employment action where it results in a loss in pay. (*San Mateo County Community College District* (2008) PERB Decision No. 1980, p. 9.) On the other hand, the failure to continue a desired assignment is not an adverse employment action where the employee had no reasonable expectation of continued employment in that assignment. (*Regents of the University of California (San Francisco)* (2014) PERB Decision No. 2370-H, p. 8.)[22]

Here, the PERB complaint in case number LA-CE-6061-E alleges that Respondents took adverse actions against Chu when Delfino only offered Chu a part-time contract for the 2015-2016 school year and when Delfino presented Chu with a sample letter of resignation for Chu to sign. The letter appears to be consistent with an Alliance Home Office HR practice of providing template resignation letters. The record in this case shows that, once hired, teachers at Collins HS had some expectation of being rehired in a similar capacity the following year. The school did not, for example, undergo a new recruitment for teachers each school year. Chu himself was retained for four successive annual full-time contracts from the 2011-2012 school year through the 2014-2015 school year. Chu similarly testified that Collins HD retained most of the teachers in the Science Department after they were initially hired. Respondents provided evidence of only one teacher who was not retained for a full-time position after she was originally hired. Under the circumstances, it is concluded that Chu had a reasonable expectation that he would receive a full-time contract for the 2015-2016 school

[22] PERB has found that employees enjoy an expectation of continued employment where the employee(s) are used as a regular and integral part of the normal workforce. (*Pajaro Valley Unified School District* (1983) PERB Decision No. 363, admin. determ., p. 7, citing *Dixie Elementary School District* (1981) PERB Decision No. 171, p. 5.)

year. On June 2, 2015, Delfino offered Chu only a part-time contract, consisting of three classes. The assignment would have reduced Chu's income by approximately $15,000 from the previous year and would also make him ineligible for health benefits. Chu had the option to either accept the part-time offer, resign, or allow the offer to expire by its own terms later that month.

Respondents argue that there was no adverse action because Delfino had legitimate reasons for eliminating two of the five Physics classes Chu taught in the 2014-2015 school year and because Respondents were not required to offer new classes solely to retain Chu as a full-time teacher. These arguments are better addressed elsewhere in the retaliation analysis where evidence of the employer's motives is more pertinent. For the purpose of an adverse action analysis, a teacher who had been employed full-time for four consecutive years would find it adverse to be offered only a part-time position in his or her fifth year.[23]

4. Circumstantial Evidence of Unlawful Motive

The final element of the prima facie case for retaliation is whether the adverse employment actions were motivated by Chu's protected activities. A respondent's unlawful motive may be proven through either direct or circumstantial evidence or a combination of the two. (*Omnitrans* (2010) PERB Decision No. 2121-M, p. 10 citing *Carlsbad Unified School*

[23] Respondents also argue that there was no adverse action here because Chu was not constructively discharged. A constructive discharge occurs where an employee involuntarily resigns from employment due to working conditions made intolerable by the employer. (*Visalia Unified School District* (2004) PERB Decision No. 1687, proposed dec., p. 23 (*Visalia USD*); see also *State of California (Secretary of State)* (1990) PERB Decision No. 812-S, pp. 9-10.) This doctrine is not readily applicable here because Chu's employment was not terminated by resignation. When Chu refused to accept the part-time offer, he had essentially two choices, resign or allow the part-time contract offer to expire without his signature. Chu initially elected to submit a resignation letter using the template provided to him by Delfino. However, he immediately rescinded that letter and instead allowed the part-time offer to expire according to the terms of that contract.

District (1979) PERB Decision No. 89 (*Carlsbad USD*); *Visalia USD*, *supra*, PERB Decision No. 1687, proposed dec., p. 26, citing same.)

a. Timing as Circumstantial Evidence of Retaliatory Motive

The timing between protected activities and the adverse action is an important circumstantial factor when determining the presence or absence of a nexus. (*North Sacramento School District* (1982) PERB Decision No. 264, proposed dec., p. 23) PERB may infer an unlawful motive from adverse actions taken concurrent with or shortly after an employee's protected activities. On the other hand, this inference is weakened by the passage of time. (*California Teachers Association, Solano Community College Chapter, CTA/NEA (Tsai)* (2010) PERB Decision No. 2096, p. 11 (*Tsai*), citing *Garden Grove Unified School District* (2009) PERB Decision No. 2086 (*Garden Grove USD*).) In either case, timing alone is typically not determinative and other evidence is required to establish a prima facie case. (*Ibid*.)

The adverse action in this matter occurred close in time to Chu's protected activities. For example, Delfino first informed Chu of the 2015-2016 part-time assignment on May 7, 2015. This was less than two months from when AEU publicly distributed its March 13, 2015 letter. Around a month later, Delfino presented Chu with the official offer for part-time employment. This was only a few days after Chu and Rivas presented the May 29, 2015 petition to the Collins HS administration. The close timing of all these events supports UTLA's case that the adverse actions were unlawfully motivated.

b. Delfino's Departure From Established Practices

UTLA argues that Delfino departed from existing practices when deciding to offer Chu a part-time assignment. PERB may infer unlawful motive from a respondent's departure from

existing practices in its dealings with the charging party. (*Garden Grove USD*, *supra*, PERB Decision No. 2086, dismissal ltr., p. 4.) To establish such an inference, the charging party must typically demonstrate what the respondent's practice is and how the respondent deviated from that practice at the case at hand. (*Ibid*.; see also *Los Angeles Unified School District* (2014) PERB Decision No. 2390, pp. 11-12, proposed dec., p. 16.)

Here, UTLA argues that it was "highly unusual" for Delfino to reduce a teacher's class assignments to the point where the teacher is classified as part-time. As UTLA notes, Delfino previously reduced a teacher from five to three classes after the enrollment for the teacher's class was projected to decrease. Delfino likewise testified that he bases the class schedule, in part, on student data and students' projected needs for a particular class. Delfino explained that only around 40 incoming seniors needed a physical science class that year and that an additional 30 more students were eligible to take Physics. Under the circumstances, UTLA has not demonstrated that Delfino departed from any existing practice by only offering three Physics classes with 25 students apiece. Although UTLA argues that Delfino could have established two new classes in order to retain Chu as a full-time teacher, there was no evidence that Delfino had a practice of taking similar actions in the past.

UTLA also argues that Delfino departed from another past practice by declining to make Chu a part-time in-house substitute in order to retain him as a full-time teacher. Chu testified that Delfino had entered into a similar arrangement with another science teacher. However, Delfino flatly contradicted this account and Chu provided no foundation for his knowledge of this arrangement. Furthermore, even if Chu was correct, making one other teacher an in-house substitute is insufficient to demonstrate an established practice. Accordingly, UTLA failed to demonstrate a deviation from existing practices.

UTLA also argues that Delfino's decision to change the Science Department curriculum was itself a departure from established practices because he had never before eliminated classes based on AP exam passage rates. Once again, UTLA failed to establish how Delfino deviated from an existing practice. Delfino testified about increasing the number of AP classes offered at Collins to expose students to college-level coursework and give them the opportunity to receive college credit if they passed the AP exam. During the 2013-2014 school year, Collins HS offered AP Biology, but Delfino replaced that class with AP Environmental Science after students demonstrated poor passage rates on the AP Biology exam. He then reduced the number of Physics classes offered to increase the number of Chemistry courses which is a suggested precursor for AP Environmental Science. This appears to be consistent both with Delfino's stated goals about offering AP classes as well as with the limited evidence that was presented about how the science curriculum was developed. UTLA failed to establish how this departed from an existing practice.

c. Animus Towards Union Activity

UTLA also argues that Respondents have demonstrated animus towards UTLA and the organizing campaign, which is further evidence of a retaliatory motive. Outward expressions of animus towards union or other protected activity may provide evidence of nexus. (*Rocklin Unified School District* (2014) PERB Decision No. 2376, p. 7 (*Rocklin USD*).) However, employers are not expected to remain completely neutral in employment matters, particularly in the context of collective bargaining and concerted activities. (*Bellevue Union Elementary School District* (2003) PERB Decision No. 1561, proposed dec. pp. 37-39.) Statements that are merely critical of a union's positions are permissible examples of employer speech. (*Ibid*.) Employer statements, therefore, shall not constitute or be evidence of an unfair labor practice

unless those statements contain threats of reprisal or force, promises of benefit, or express preference for one employee organization over another. (*City of Oakland* (2014) PERB Decision No. 2387-M, pp. 25-27, citing *Rio Hondo Community College District* (1980) PERB Decision No. 128, pp. 18-20, other citations omitted.)

In *Trustees of the California State University (San Marcos)* (2009) PERB Decision No. 2070-H (*CSU San Marcos*), the Board found management comments involving a union in a transfer of work complaint was "the wrong path" and may prevent promotions to support an inference of retaliation. (*Id*. at p. 11.) The Board reasoned that the comments actively discouraged the pursuit of grievances. (*Id*.; see also *Rocklin USD*, *supra*, PERB Decision No. 2376, pp. 9-10, [finding animus in a superintendent's comments that employees' decision to attend a layoff hearing might result in the school board voting to eliminate their positions].) In *Sonoma County Junior College District* (1991) PERB Decision No. 895 (*Sonoma County JCD*), PERB also inferred animus from, among multiple other factors, a college president's testimony that he was "not pleased" at an ongoing organizing campaign because he felt that the college had an excellent working rapport with faculty and that collective bargaining would change that relationship. (*Id*. at proposed dec., pp. 15-16, 21-22.) More recently, in *City of Oakland*, *supra*, PERB Decision No. 2387-M, the Board found that a manager's expressions of frustration towards criticism from union representatives provides little probative value regarding whether he harbored union animus. (*Id*. at p. 28.)

Here, UTLA contends that Respondents issued numerous documents espousing anti-union views and making disparaging comments about UTLA shows that the assignment offered to Chu was unlawfully motivated. This proposed decision will focus on those communications either authored or transmitted by Delfino to Collins HS employees. Other

Alliance communications are less attributable to Delfino, who was the sole actor in deciding the adverse action here. (See *San Diego Unified School District* (1980) PERB Decision No. 137, p. 7 [holding that statements from one employer representative are not automatically imputed to the employer as a whole].)

Delfino was involved in three communications regarding UTLA and the organizing campaign: (1) a fact sheet sent on March 16, 2015; (2) an e-mail discussing authorization cards sent on March 17, 2015; and (3) an e-mail of an Alliance FAQ document about UTLA sent on March 20, 2015. The first of these documents describes both the recognition and the collective bargaining process, describes UTLA's bargaining history with LAUSD, and expresses that UTLA has historically opposed policies and political candidates who support charter schools. In the second document, Delfino discusses the legal effect of signing a union authorization card and expresses that employees may write to the union about withdrawing their support. He concludes the e-mail by stating that the decision on whether to withdraw support for the union is up to each individual. In the third document, Delfino stresses to employees that they have the right to decide for themselves whether to be represented by a union. He attaches an FAQ sheet which provides some information about UTLA, its positions on charter schools, and suggested that a collective bargaining relationship between UTLA and Alliance replace individual relationships between administrators and teachers in some instances. It also suggests that unions are not legally prohibited from being untruthful when gathering authorization cards.

These communications contain reasonably accurate descriptions of the process for recognizing a union, of the legal effect of signing an authorization card, and of collective bargaining in general. Unlike in *CSU San Marcos*, *supra*, PERB Decision No. 2070-H, and

Rocklin USD, *supra*, PERB Decision No. 2376, the comments here do not reasonably discourage continued participation in organizing or collective bargaining activities. Moreover, there was no showing by UTLA that the e-mails or their associated attachments inaccurately described UTLA's position on charter schools or its relationship with LAUSD at the time. Although one might argue that the communications at issue here were similar to the superintendent's expressed aversion to collective bargaining in *Sonoma County JCD*, *supra*, PERB Decision No. 895, that case is distinguishable. The superintendent in that case testified about his actual feelings regarding collective bargaining. Here, Delfino expressed no antipathy towards UTLA or AEU during his testimony. He instead described instances where he promoted or otherwise rewarded teachers who supported the organizing campaign. Under the circumstances, UTLA has failed to meet its burden of proving that Delfino harbored animus towards Chu's protected activities.

In conclusion, the only circumstantial evidence of unlawful motive here is the close timing between Chu's protected activities and the decision to offer him only a part-time teaching contract. This is not sufficient to establish that Delfino's decision was unlawfully motivated. (*Tsai*, *supra*, PERB Decision No. 2096, p. 11.)

4. Respondents' Burden of Proof

If the charging party proves all of the elements of the prime facie case for retaliation, the burden of proof shifts to the respondent to show that the adverse action occurred for reasons unrelated to the protected activity. (*Chula Vista Elementary School District* (2011) PERB Decision No. 2221, p. 21, citing *Novato USD*, *supra*, PERB Decision No. 210; *Martori Bros.*, *supra*, 29 Cal.3d 721.) In cases where an adverse action appears to have been motivated by both protected and unprotected conduct, the issue is whether the adverse action would have

occurred "but for" the protected acts. (*Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C, p. 22.) This requires the employer to establish both:

> (1) that it had an alternative non-discriminatory reason for the challenged action; and (2) that it acted because of this alternative non-discriminatory reason and not because of the employee's protected activity.

(*Palo Verde Unified School District* (2013) PERB Decision No. 2337, pp. 18-19, citations omitted (*Palo Verde USD*).)

Here, UTLA has not met its burden of establishing a prima facie case for retaliation. Even if it had, it is concluded that Respondents would have met their burden of proving that Delfino offered Chu a part-time teaching contract for non-retaliatory reasons. Delfino gave a detailed explanation for reducing the number of Physics classes offered from five to three. Primarily, Delfino detailed his multi-year plan to increase the number of AP classes offered to Collins HS students. He testified as to his belief that merely exposing students to college-level coursework benefitted those who went on to college. He also acknowledged that college-bound students who passed an AP exam received additional benefits by earning college credit. Accordingly, Delfino wanted to offer incoming 12th graders both AP Environmental Science and AP Chemistry. In prior years, students were offered Biology and Environmental Science, both life science classes, to prepare them for AP Environmental Science. Delfino decided to offer additional Chemistry classes, which are a pre-requisite to AP Chemistry and a suggested pre-cursor to AP Environmental Science.

Adding Chemistry classes meant less need for Physics, because both are physical science classes and only one such class is needed for graduation. In addition, Delfino calculated that there were roughly 40 seniors who needed a physical science class and another 30 top performing students who had already met their science requirement and had more

freedom to pick a class. Those 70 students amounted to a need for only three Physics classes, at the standard class size of 25. This is what Delfino offered to Chu for the 2015-2016 school year. When faced with similar enrollment numbers in AP Spanish Literature and Language for the 2012-2013 school year, Delfino similarly reduced the teacher of that class from five to three classes.

Physics is the only subject Chu is credentialed in. And Delfino had a consistent policy of not assigning teachers to teach classes outside their credential, dating back to a 2013-2014 audit which predates any of Chu's protected activities. This limited Delfino's discretion to assign other classes to Chu.[24] UTLA argues that Delfino gave contradictory explanations for his scheduling decisions, stating at one point that mere exposure to AP classes was beneficial and then at another point that he wanted to increase AP exam pass rates. UTLA also points out that Delfino continues to offer classes such as AP Calculus (AB) and AP U.S. History, even though students have historically had low AP exam pass rates in those subjects. However, no inherent contradiction is found in Delfino's decision to both increase the number of AP classes and attempt to improve students' chances of passing AP exams. The 2015-2016 plan is illustrative. Delfino offered both AP Environmental Science, a life science class, and AP Chemistry, a physical science class to incoming 12th graders. Science classes offered in

[24] UTLA also argues that Delfino should have offered another class to Chu in the 2015-2016 school year because Chu could have passed the exam required to obtain a credential in that subject in the summer preceding that school year. This argument is unpersuasive for multiple reasons. First, there was no evidence of any practice at any Alliance school where an administrator offered class assignments to a teacher based on their mere representation that they would later obtain the necessary credential. Second, Chu never actually represented that he planned on becoming credentialed in another subject despite Delfino's suggestions both before and after offering Chu the part-time contract. Third, it is speculative that Chu would have been successful in any effort to obtain an additional credential. It would not be reasonable for an administrator to make something as important as the school class schedule contingent on a teacher successfully passing a credentialing exam at a later date.

the lower grades, including Biology, Environmental Science, and Chemistry were intended to support those two AP classes and improve AP exam pass rates. Regarding AP Calculus (AB), Delfino said that those classes were always offered, so that the highest performing students at the school would have a chance to further excel. Regarding AP U.S. History, Delfino said that Collins HS had a long history of offering that class to all 12th graders.[25]

Finally, UTLA argues that Delfino unreasonably refused to accept Chu's suggestions for alternate assignments to remain full-time. There was no evidence that Delfino, or any Alliance administrator, ever established new classes in order to maintain a teacher's full-time status. To the contrary, Delfino said that curriculum decisions were made based on the needs of existing students and that he had previously reduced a teacher to part-time because of lack of student need. None of the classes Chu offered to teach had ever been offered at Collins HS before. Delfino credibly testified Chu's offers to teach AP Physics, Integrated Science, and Computer Science were inconsistent with Delfino's Science curriculum plans. Those plans appeared to focus on preparing students for the AP Chemistry and/or AP Environmental Science classes in 12th grade. UTLA presented no evidence from which to doubt those conclusions. Regarding Chu's offer to teach AP Physics, Delfino explained that only one student had taken the pre-requisites necessary for that class before 2015-2016. Regarding Chu's offer to teach MESA, Delfino explained that the MESA program was an extra-curricular activity that was could not be offered for student credit. Chu testified as to his belief that MESA could be made into a course for credit, but UTLA provided no foundation for making that assertion and it is not credited. Regarding Chu's offer to perform in-house substitute work, Delfino explained that there was no need for an additional in-house substitute at the

[25] It is worth noting that had Delfino discontinued AP U.S. History, it likely would have adversely affected the classes taught by Rivas, another known AEU supporter.

time. He also disagreed that he had ever increased a teacher's assignment from part-time to full-time with in-house substitute work.

Respondents concede that Chu could have taught a STEM class. In fact, Collins HS ultimately offered a STEM class through another science teacher after Chu left. However, this class was only offered because of the lack of science classes available due to Chu's departure. According to Delfino, he offered the STEM class to the approximately 30 incoming seniors who had already fulfilled their science graduation requirements. Those were the same 30 students that Delfino had previously earmarked for one of Chu's Physics classes, had he continued his employment. He said it did not make sense, from a curriculum standpoint to offer both STEM and Physics to those students. He also said that offering STEM to other students would not have been consistent with his curriculum plans which, once again, focused on preparing students for AP Environmental Science and AP Chemistry. Whereas reasonable minds might disagree with the approach taken by Delfino, he provided credible non-retaliatory reasons for not accepting Chu's offers for other assignments. It is concluded that Delfino made the decision to only offer Chu a part-time assignment in 2015-2016 for non-retaliatory reasons. Therefore, the retaliation allegation is dismissed.

The Interference Allegations

EERA section 3543, subdivision (a), protects public school employees' right to "form, join, and participate in the activities of employee organizations" in matters concerning employer-employee relations. EERA section 3543.1, subdivision (a), provides employee organizations with the concomitant right to represent their members in employment relations with their employers. PERB's interference test does not require evidence of unlawful motive, only that at least "slight harm" to protected rights results. (*Simi Valley Unified School District*

(2004) PERB Decision No. 1714, p. 17 (*Simi Valley USD*).) The Board described the prima facie standard as follows:

> [I]n order to establish a prima facie case of unlawful interference, the charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under EERA.

(*Ibid*., quoting *State of California (Department of Developmental Services)* (1983) PERB Decision No. 344-S; *Carlsbad USD*, *supra*, PERB Decision No. 89, p. 10.) PERB examines whether the respondent's actions "'reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.'" (*Clovis Unified School District* (1984) PERB Decision No. 389, pp. 14-15 (*Clovis USD*), quoting *NLRB v. Triangle Publications* (3d Cir. 1974) 500 F.2d 597, p. 598.) That "'no one was in fact coerced or intimidated is of no relevance.'" (*Ibid*.) PERB considers the totality of the circumstances when making these determinations. (*Los Angeles Community College District* (1989) PERB Decision No. 748, proposed dec., p. 16.)

If a prima facie case is established, then PERB balances the degree of harm to protected rights against the employer's asserted interests. (*Hilmar Unified School District* (2004) PERB Decision No. 1725, pp. 16, citing *Carlsbad USD*, *supra*, PERB Decision No. 89 at pp. 10-11.) "Where the harm is slight, the Board will entertain a defense of operational necessity and then balance the competing interests." (*Ibid*.) On the other hand, "[w]here the harm is inherently destructive [of protected rights], the employer must show the interference was caused by circumstances beyond its control." (*Ibid*.) The employer bears the burden of proving the necessity of its actions. (*Simi Valley USD*, *supra*, PERB Decision No. 1714, pp. 17-18, citing *Carlsbad USD*.)

1. Alleged Refusal to Meet with Alliance Educators United

The Amended PERB complaint in case number LA-CE-6061-E alleges that Respondents breached its obligation to meet and discuss subjects concerning the employment relationship with UTLA, as a non-exclusive employee organization representative of Respondents' employees. Public school employers' obligation to meet and discuss with non-excusive representatives was discussed in detail in *Los Angeles Unified School District* (1983) PERB Decision No. 285 (*LAUSD*). The Board noted that EERA section 3543.1, subdivision (a), provides non-exclusive representatives with the right to represent employees before an exclusive representative is recognized or certified and that nothing in EERA requires the existence of an exclusive representative. The Board found that, until an exclusive representative is selected, non-exclusive representatives have, at a minimum, "the right to meet and discuss with the public school employer subjects as fundamental to the employment relationship as wages and fringe benefits." (*Id*. at pp. 6-8, citing *State of California* (1980) PERB Decision No. 118-S.) The Board therefore held that a public school employer is obligated to provide a reasonable opportunity to meet and discuss wages, fringe benefits, and other matters of fundamental concern to the employment relationship prior to reaching a decision on such matters. (*Id*. at p. 8, citing *State of California (Franchise Tax Board)* (1982) PERB Decision No. 229-S.)

The duty to meet and discuss has not been fully defined by case law and the Board considers violations of that duty on a case-by-case basis. (*Regents of the University of California* (1984) PERB Decision No. 470-H, proposed dec., p. 5, citing *Regents of the University of California, Lawrence Livermore National Laboratory* (1982) PERB Decision No. 212-H.) Most cases discussing the parameters of this duty do so in the context of an

employer's contemplated changes to employment conditions. In those situations, PERB treats the meet and discuss obligation similar to duty to meet and confer with exclusive representatives prior to enacting a negotiable policy change. The Board considers whether (1) notice of the decision was provided before a final decision was made or implemented; (2) there was reasonable time and opportunity for meeting and discussing; and (3) the employer listened and considered the employee organization's proposals in good faith. (*Regents of the University of California (Los Angeles)* (2009) PERB Decision No. 2084-H (*UCLA*), partial dismissal, p. 2, citing *Regents of the University of California (Davis, Los Angeles, Santa Barbara and San Diego)* (1990) PERB Decision No. 842-H.)[26] Unlike with the meet and confer obligation, employers subject to the meet and discuss obligation are not bound to make a good faith effort to reach agreement with affected organization(s). (*UCLA*, *supra*, PERB Decision No. 2084-H, warning ltr., p. 6-5, citing *San Dieguito Union High School District* (1977) EERB Decision No. 22 (*San Dieguito UHSD*).)[27]

In *California State University, Sacramento* (1982) PERB Decision No. 211-H, found that the employer violated the duty by failing to notify a known employee organization prior to changing its campus access policies. (*Id*., at p. 31-32, citing *State of California*, *supra*, PERB Decision No. 118-S.) The Board reached this conclusion based on its belief that "[a]ccess is an issue of significant concern to employee organizations and employees, especially when, as here, they are in the process of organizing for the first round of elections to establish whether there

[26] Employers subject to a meet and confer obligation must notify exclusive representatives on contemplated negotiable policy changes and provide notice and the opportunity for negotiations prior to implementation. (*Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262, p. 9.)

[27] *San Dieguito UHSD* was overruled on other grounds in *LAUSD*, *supra*, PERB Decision No. 285, p. 3.)

shall be an exclusive representative[.]" (*Id*. at p. 27.) In *Summerville Elementary School District* (1992) PERB Decision No. 956, PERB found no violation of the duty to meet and discuss where the employer notified a non-exclusive employee organization of a proposed salary freeze and benefits contribution cap and discussed its plans in two meetings with the organization. (*Id*. at warning ltr., pp. 1-2.)

In the present matter, UTLA contends that Respondents violated the duty to meet and discuss by failing to respond in any way to its March 25, 2015 request to "sit down to meet for the sole purpose of discussing and reaching agreement on a fair and neutral process to organize." Respondents do not deny that they offered no response to UTLA's request, but instead maintain that they had no duty to respond. No Board decision has discussed an employer's meet and discuss obligations in this context. But, the Board's treatment of a union's demands to meet and confer provides a useful framework from which to understand similar demands under a meet and discuss obligation. This is because, in the most basic terms, both duties require the parties involved to engage one another regarding the employment relationship for represented employees. An employer subject to a meet and confer obligation may not refuse an exclusive representative's demands to bargain over covered subjects. (See *Anaheim Union High School District* (2015) PERB Decision No. 2434, proposed dec., pp. 70-73 (*Anaheim UHSD*) [refusal to meet with a particular negotiator]; *San Mateo County Community College District* (1993) PERB Decision No. 1030, pp. 11-13 [refusal to entertain union's proposals to change the status quo regarding release time].) In addition, the duty to meet and confer in good faith requires an employer faced with a vague proposal or unclear request for negotiations to seek clarification of questionable proposals and voice its reasons for believing that matters are not subject to negotiations. (*City of Palo Alto* (2017) PERB Decision No. 2388a-M, pp. 33-34;

Kern Community College District (1983) PERB Decision No. 372, pp. 11-14; *Kern Community College District* (1983) PERB Decision No. 337, pp. 5-6, 11; *Jefferson School District* (1980) PERB Decision No. 133, pp. 10-11.)

To be clear, Respondents had no duty to meet and confer with UTLA in this situation. Furthermore, no Board decision has defined the extent to which an employer must meet with a non-exclusive representative, upon demand, or the degree to which the employer must seek clarification in the face of an unclear request.[28] However, it is unnecessary to fully resolve these questions because Respondents were not entitled to ignore UTLA's request for discussions entirely. Rather, Respondents should have offered at least some response after considering UTLA's request. Respondents offer no justification for failing to respond other than stating that it was not obligated to do so. Thus, the failure, under the facts of this matter, breaches the duty to meet and discuss under EERA, section 3543.1, subdivision (a), in violation of EERA section 3543.5, subdivisions (a) and (b). (*LAUSD*, *supra*, PERB Decision No. 285, pp. 8-9.)

2. Alleged Soliciting of Anti-Union Sentiment

In general, employers are entitled to express their own views on employment related matters in order to facilitate a full and knowledgeable debate on those subjects. (*Chula Vista City School District* (1990) PERB Decision No. 834, p. 11 (*Chula Vista CSD*), citing *Rio Hondo Community College District*, *supra*, PERB Decision No. 128, pp. 18-20.) Only speech which contains a threat of reprisal or force or promise of benefit will be perceived as a means of violating the EERA, and will therefore lose its protection and constitute strong evidence of

[28] UTLA's March 25, 2015 request is not a model of clarity, but one could reasonably interpret it as expressing a desire to discuss matters such as a union access policy or release time rights for union representatives employed by Respondents.

conduct which is prohibited by section 3543.5 of the EERA. (*Ibid*.) The Board uses an objective standard to determine whether the speech in question constitutes a threat or promise. (*Chula Vista CSD*, p. 12; see also *Saddleback Valley Unified School District* (2013) PERB Decision No. 2333, proposed dec., p. 27.) The Board also places considerable weight on the accuracy of the employer's speech when determining if an interference violation has occurred. (*Ibid*.) Thus, absent language that objectively threatens reprisal or promises a benefit, employers may freely express their view that they do not want a union representing their employees. (*Chula Vista Elementary School District* (2004) PERB Decision No. 1647, proposed dec., p. 23 (*Chula Vista ESD*), citing *Clovis Unified School District* (1978) PERB Decision No. 61.)

Polling or questioning employees about their protected activities or their views about a union may also interfere with protected rights. In those cases, the Board examines the totality of the circumstances to determine whether the questioning had a tendency to be threatening or coercive. (*Clovis USD*, *supra*, PERB Decision No. 389, citing *Blue Flash* (1954) 109 NLRB 591.) The appropriate analysis turns not on the specific words used during the inquiry, but rather whether the employer's questioning conveys disapproval toward the union and creates an expectation that a response to the inquiry is mandatory. (*Id*., citing *PPG Industries, Inc*. (1980) 251 NLRB 1146.) There is no "blanket rule" prohibiting employers from any inquiry into union activities. (*Cook Paint and Varnish Co*. (1981) 258 NLRB 1230, pp. 1231-1232.)

In *Coachella Valley Mosquito & Vector Control District* (2009) PERB Decision No. 2031-M, an employer's general manager said that although employees were free to join the union, the legal actions being pursued by the union could only be deducted from employee salaries and benefits. The Board found that the reasonable interpretation of those statements

was that employees would be subject to layoff unless they either rejected the union or dissuaded it from pursuing its legal actions. (*Id*. at. pp. 22-23.) Likewise, in *Chula Vista ESD*, *supra*, PERB Decision No. 1647, PERB found unlawful interference when a charter school principal asked a teacher how he and other teachers planned on voting in an upcoming charter school election that had implications on whether the incumbent union would continue to represent school site teachers. (*Id*. at proposed dec., pp. 23-24.) The principal pressured the teacher to respond and repeatedly tried to convince him to vote in a manner that would eliminate the union as the representative of site teachers. (*Id*. at proposed dec., pp. 8-9.) The same principal further interfered with protected rights by threatening another teacher with both the loss of her job and with physical violence if she voted in favor of the union. (*Id*. at proposed dec., pp. 24-25.)

In *Compton Unified School District* (2003) PERB Decision No. 1518, PERB found that a principal's questioning of a rank-and-file unit member about who called a union meeting held on school grounds to be unlawfully coercive. (*Id*. at proposed dec., pp. 25-26.) There, the principal asked the question at least twice and then removed the employee from a coveted leadership position after she refused to answer. PERB found under the circumstances that the principal's actions conveyed the employer's disapproval and implied that the meeting was improper activity. (*Id*., citing *Clovis USD*, *supra*, PERB Decision No. 389.) PERB concluded that the questioning caused at least slight harm to employee rights.

In *Clovis USD*, *supra*, PERB Decision No. 389, the Board found that a school administrator's questioning employees about their opinions of an upcoming union election did not cause even slight harm to employee rights. (*Id*. at p. 16.) There, the administrator was "low-key" and well-liked by faculty, and took steps to quell any anxiety among employees that they would face retaliation for their responses. (*Ibid*.)

In this case, UTLA maintains that Respondents interfered with protected rights by including a link from the Gertz-Ressler HS website to the "www.ouralliancecommunity.com/petition" webpage. On that page, visitors may "sign" a petition stating their position that "an independent Alliance, free of the UTLA union, is the structure that will best put the needs of students first." UTLA argues that Respondents' actions were similar to the principal in *Chula Vista ESD*, *supra*, PERB Decision No. 1647. Unlike in that case, there was no evidence of any overt threats or promises to employees based on whether they completed the petition. Nor was there evidence that anyone pressured or urged any employees to complete the petition or express their views on the petition one way or the other. Rather, the webpage was more like the employer's actions in *Clovis USD*, *supra*, PERB Decision No. 389, where employees were asked about their opinions on union election in a "low-key" style and again, nothing on the website indicated that reprisals or benefits would result depending on whether employees completed the petition. Nor was any evidence, from the website or elsewhere, that employees were required to respond to the petition. Based on these facts, Respondents did not engage in unlawful polling or questioning of union sympathies.[29]

Turning next to the language of the webpage itself, there is once again insufficient evidence to establish an interference violation. Employers are free to express their views about a union or unionization so long as those expressions do not contain a threaten reprisals or

[29] UTLA also analogizes the Respondent's website to *City of San Diego (Office of the City Attorney)* (2010) PERB Decision No. 2103-M, where the Board found an employer unlawfully bypassed the exclusive bargaining representative by creating a website that encouraged represented employees to rescind a benefit negotiated for by their representative. (*Id*. at p. 8.) Those facts are distinguishable from this situation both because the bypass analysis is inappropriate in cases like this one where there is no exclusive representative (see *City of San Diego*, p. 12, citing *Rio Hondo Community College District*, *supra*, PERB Decision No. 128), and because the webpage in question here did not solicit employees to rescind a negotiated benefit.

promise benefits. Here, the "www.ouralliancecommunity.com/petition" webpage does neither. Accordingly, this allegation is dismissed.

3. Alleged Surveillance of Organizing Activity

The PERB complaint in case number LA-CE-6061-E alleges that Respondents conducted unlawful surveillance of UTLA's organizing activities. The PERB complaint in case number LA-CE-6073-E alleges two additional instances of unlawful surveillance. The Board has interpreted EERA sections 3543, subdivision (a), and 3543.1, subdivision (a), as creating a protected right for employees and employee organizations to picket peacefully, distribute literature, and other concerted activities to solicit support from employees and the public. (*Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, p. 43 (*Petaluma City ESD/JUHSD*).) PERB recognizes that surveillance or record-keeping of such activities may interfere with protected rights under EERA. (See *Lake Tahoe Unified School District* (1999) PERB Decision No. 1361, warning ltr., p. 2 (*Lake Tahoe USD*), citing *F.W. Woolworth Co*. (1993) 310 NLRB 1197 (*Woolworth*).) A violation may also be found where the employer creates the impression of surveillance. (*NLRB v. Simplex Time Recorder Co*. (1st Cir. 1968) 401 F.2d 547, p. 548.) However, the employer's actions must go beyond "mere observation of open, public union activity on or near the employer's property[.]" (*Lake Tahoe USD*, citing *National Steel & Shipbuilding Co*. (1997) 324 NLRB 499.) In most cases, evidence of photographing, taking video, or other types of record-keeping is necessary to support a violation. (*Ibid*.)

In *Woolworth*, *supra*, 310 NLRB 1197, the NLRB found that an employer interfered with protected rights when it photographed and video-recorded employees leafletting during a labor dispute in the streets outside the employer's stores. The NLRB reasoned that the

recordings of concerted activities violated the Act because of the tendency intimidate the employees involved. (*Id*. at p. 1197, citing *Waco, Inc*. (1984) 273 NLRB 746, p. 747.) The NLRB in that case also distinguished the matter from lawful "mere observation" of union activity in a public place because "pictorial recordkeeping tends to create fear among employees of future reprisals." (*Ibid*.)

a. Alleged Surveillance at Collins HS

The PERB complaint in case number LA-CE-6061-E alleges that Respondent engaged in unlawful surveillance of UTLA activities on May 29, 2015. That day, AEU representatives Chu and Rivas met outside Collins HS with UTLA organizer Cendejas and some Alliance students to present a petition regarding Chu's employment at Alliance. The meeting took place shortly after the school-day ended and Collins HS Vice Principal Krausen-Ferrer saw the group and observed them for a brief period while standing near the main exit. This is insufficient to establish unlawful surveillance. Although UTLA maintains that Krausen-Ferrer occasionally spoke to an unknown person via walkie-talkie, it failed to establish that she, or anyone else took pictures, made video, or otherwise recorded any UTLA or AEU activities that day. Moreover, her presence at the main exit at the end of the school day was not unusual given the undisputed evidence that Principal Delfino regularly assigns administrators, including himself, to observe students and employees exiting the campus at the end of the day. Delfino further confirmed that he assigned Krausen-Ferrer to watch the main exit for that purpose on May 29, 2015. Her mere observation of UTLA's meeting in a public area during the times she was assigned to watch the area is insufficient to establish a violation. UTLA argues that Krausen-Ferrer had no business to be in the area, relying on Rivas's testimony that she remained there even after Rivas no longer saw any students present. However, he admitted that at least one parent was around the

exit and even engaged in a discussion with UTLA's group at that time. Thus, UTLA's assertion is unpersuasive. This allegation is therefore dismissed.

b. Alleged Surveillance at the Alliance Summer Conference

The PERB complaint in case number LA-CE-6073-E first alleges that Respondents conducted unlawful surveillance of Alliance teacher Mernick on July 27, 2015. That day, Mernick was distributing organizing campaign information outside an Alliance campus just after the Alliance Summer Conference. Mernick testified that she recognized some Alliance school administrators and Alliance Home Office employees and felt that some of them were watching her. She also testified that a teacher returned UTLA literature to her, expressing fear that the teacher's principal was watching. This record is inconclusive as to whether any of Respondents' agents were actually observing Mernick's activity. Mernick was positioned just outside the main entrance of the school site when approximately 600 conference participants exited. It would not be out of the ordinary for attendees to be present and observe this occurring. Moreover, event planner Corraggio credibly testified that Alliance Home Office employees were asked to help with the logistics of the conference, including ensuring that attendees signed out for the day and exited in an orderly way. That Mernick saw some of Respondents' personnel and believed that they saw her too is inadequate to establish any concerted effort by Respondents to surveil her organizing activity.[30]

Even if it were proven that agents of Respondents were watching Mernick, their mere observation of her organizing activity is insufficient to establish an interference violation.

[30] UTLA argues that an unidentified teacher said that her principal was watching her interact with Mernick. However, Mernick's hearsay account of the teacher's statement is insufficient to establish either that an Alliance principal was watching or that the teacher felt subjectively afraid of repercussions. (See PERB Regulation 32176; *Palo Verde USD*, *supra*, PERB Decision No. 2337, p. 19.)

Mernick was in an open area just outside of an Alliance school site. There was no evidence that anyone photographed, took video, or recorded her activities in any way. Such observations of open union activity, without more, does not constitute unlawful surveillance.

UTLA suggests that Respondents' increased the presence of Alliance employees at the conference in order to conduct greater supervision of any organizing activity. This argument is unpersuasive for the same reasons already discussed above. UTLA's assertion that Alliance increased the number of its employees at the conference was based solely on Mernick's own observations. Her testimony in this area was not fully developed for the record. For instance, it remains unclear as to what extent Mernick could identify Alliance Home Office employees at prior conferences. It was also not established whether Mernick took the time to observe the presence or absence of such employees at times similar to the ones described in the PERB complaint, or whether Alliance employees could have been positioned in places that Mernick did not observe. It accordingly remains unclear how useful Mernick's comparisons are to resolving the allegations in this matter. Moreover, as explained above, Corraggio's testimony provides a plausible explanation for the number of Alliance employees present there. Under the circumstances, UTLA has not demonstrated that the number of Alliance home office personnel present at the Conference supports the allegation that Respondents unlawfully surveilled Mernick's public organizing activity. Accordingly, this allegation is dismissed.

c. Alleged Surveillance at Neuwirth Academy

The PERB complaint in case number LA-CE-6073-E also alleges that Respondents engaged in unlawful surveillance of UTLA organizer Romann's organizing activity on September 29, 2015. Romann distributed leaflets and engaged prospective unit members across the street from the main entrance at Neuwirth Academy for around 45 minutes starting at around 3:45 p.m. Unlike in Mernick's case, it was clear that site administrators saw Romann. However, this conduct is not unusual under the circumstances. Romann arrived at the end of the school day when students and teachers were exiting the school site. Once again, it is not out of the ordinary for administrators to observe this process in order to ensure that the campus is emptied in an orderly fashion. Nor is it especially remarkable that administrators would observe, and even engage someone they did not recognize who was interacting with site employees. There was no evidence that anyone photographed, took video, or otherwise recorded Romann's activities. Nor was there evidence that those who approached Romann conducted themselves in a manner that might intimidate, obstruct, or otherwise discourage him from what he was doing. Their mere observation of Romann openly engaging in organizing activity just outside of an Alliance school site is insufficient to constitute unlawful surveillance. This allegation is accordingly dismissed.

4. Alleged Denial of Access to the Neuwirth Parking Lot

The PERB complaint in case number LA-CE-6073-E also alleges that Respondents' violated EERA by denying UTLA organizer Romann access to the Neuwirth parking lot. EERA section 3543.1, subdivision (b), states:

> Employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes, and other means of communication, subject to reasonable regulation, and the right to

> use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this chapter.

The Board has interpreted this language as creating a presumptive right of access for both employees and non-employee representatives to the employer's facilities for union business. (*Long Beach Unified School District* (1987) PERB Decision No. 608, pp. 25-26, proposed dec., p. 69, citing *The Regents of the University of California, University of California at Los Angeles Medical Center* (1983) PERB Decision No. 329-H; see also *Petaluma City ESD/UHSD*, *supra*, PERB Decision No. 2485, p. 44.) Under this standard, the burden is on the employer to establish that access restrictions or regulations are reasonable and necessary to prevent disruption of its operations. (*Regents of the University of California* (2012) PERB Decision No. 2300-H, p. 20, fn. 8, citation omitted; see also *Regents of the University of California* (2004) PERB Decision No. 1700-H, proposed dec., p. 45.) Under that framework, a neutrally-applied requirement that visitors sign-in before visiting an employer's facility was a reasonable access regulation. (*Id*., at proposed dec., p. 45.) But, facially neutral access restrictions which are either enforced in a discriminatory manner or promulgated in response to protected activity do not pass muster. (*Petaluma City ESD/UHSD*, p. 49, citations omitted.)

In this case, Romann entered a parking lot presumably operated by Neuwirth Academy. He was stopped by on-site security and complied with the security officer's directive to leave the parking lot. These facts are insufficient to establish any access rights violation. Romann never identified himself as part of UTLA or Alliance Educators United. He acknowledges not having visible identification or wearing anything that would indicate his role in the organizing campaign. He never reported the incident to anyone at Alliance. Under the right circumstances, it might be reasonable to infer that the security officer knew of Romann's role in

the organizing campaign, but those circumstances are not present here. There was no evidence that the officer knew or should have known that Romann was an organizer. Based on the evidence presented, UTLA has not established that the security officer was doing more than applying a neutral access protocol for handling unfamiliar persons. And because Romann never explained that he was an organizer, it remains unclear whether the security officer would have continued to take this position had he understood that Romann had a legitimate purpose to be on the premises. Based on this record, there is insufficient evidence to conclude either that a reasonable person in that situation would have construed the security officer's actions as a limitation on protected activity or that the security guard took the position he did in response to protected activity. This allegation is accordingly dismissed.

REMEDY

PERB has broad remedial powers under EERA section 3541.5, subdivision (c), including:

> 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.

In cases where an employer's instructions to employees were found to interfere with protected rights, PERB has ordered the employer to cease and desist from future interference. (*Los Angeles Community College District* (2014) PERB Decision No. 2404, proposed dec., pp. 21-22; *State of California (Employment Development Department)* (2001) PERB Decision No. 1365a-S, pp. 11-12.) These are all appropriate remedies here. Accordingly, Respondents are ordered to cease and desist from failing to respond to UTLA's meet and discuss requests.

Respondents are further ordered to post a notice signed by an authorized representative and incorporating the terms of the order below. The notice posting shall include both a physical posting of paper notices at all places where certificated bargaining unit members are customarily placed, as well as a posting by "electronic message, intranet, internet site, and other electronic means" customarily used by Respondents to communicate with certificated employees. (*Centinela Valley Union High School District* (2014) PERB Decision No. 2378, pp. 11-12, citing *City of Sacramento*, *supra*, PERB Decision No. 2351-M.) The violation in this case involved Respondent's failure to reply to a letter sent by UTLA. However, the impact of that letter would have affected the organizing efforts of UTLA in relation to Alliance and all of its affiliate schools as a single employer. As such, the posting should be distributed to Alliance and all of its affiliate schools.

UTLA requests that PERB order the additional remedies of: (1) providing UTLA with physical access to Alliance schools; (2) e-mail access through Alliances' e-mail system; and (3) a live reading of the notice posting from Alliance CEO Katzir before a group of assembled employees. Each of these requests is denied. Regarding the first two requests, it was not found that Respondents unlawfully denied physical or other access to UTLA. Therefore a remedy ordering such access is not appropriate. Regarding the live reading, UTLA has not identified any case where the Board ordered such a remedy. In the private sector, this remedy is reserved for egregious and widespread misconduct. (*In re: Ishikawa Gasket America, Inc*. (2001) 337 NLRB 175, p. 176.) Such conduct is not present here. The violation involved Respondent's failure to reply to one letter sent by UTLA. UTLA's letter was not distributed widely to Respondent's employees, nor was it made known to employees that Respondent declined to respond. Accordingly, the requested remedy is unwarranted.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in these cases, it is found that Respondents violated Educational Employment Relations Act (EERA), Government Code section 3543.5, subdivisions (a) and (b). Respondents violated EERA by failing to respond to United Teachers Los Angeles's (UTLA's) March 25, 2015 request to meet and discuss a neutral process for organizing a union. All other allegations from both PERB complaints are dismissed.

Pursuant to EERA section 3541.5, subdivision (c), it hereby is ORDERED that Respondents, their governing boards and their representatives shall:

A. CEASE AND DESIST FROM:

1. Failing to meet and discuss in good faith.

2. Interfering with UTLA's right to represent its members.

3. Interfering with employees' right to be represented by UTLA.

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

1. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to certificated employees at Alliance College-Ready Public Charter Schools and all of its affiliate schools are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of Respondents, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. The Notice shall also be posted by electronic message, intranet, internet site, and other electronic means customarily used by Respondents for communicating with certificated employees. Reasonable steps shall be taken

to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.

2. 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. Respondents 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 UTLA.

Right to Appeal

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960
E-FILE: PERBe-file.Appeals@perb.ca.gov

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135, subdivision (d),

provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c), and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)