STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CARPINTERIA ASSOCIATION OF UNITED SCHOOL EMPLOYEES, LOCAL 2216, Charging Party, v. CARPINTERIA UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-6522-E PERB Decision No. 2797 November 16, 2021

Appearances: Bush Gottlieb by Dana S. Martinez and Vanessa C. Wright, Attorneys, for Carpinteria Association of United School Employees, Local 2216; Fagen Friedman & Fulfrost by Jacqueline M. Litra and Vanessa Lee, Attorneys, for Carpinteria Unified School District.

Before Shiners, Krantz, and Paulson, Members.

DECISION

PAULSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on Carpinteria Unified School District's exceptions to the proposed decision of an Administrative Law Judge (ALJ). The ALJ found that the District retaliated against Carpinteria Association of United School Employees, Local 2216 (CAUSE or Union) President Jay Hotchner because of his protected activities, and thereby denied CAUSE its right to represent its members, in violation of

Educational Employment Relations Act (EERA) section 3543.5, subdivisions (a) and (b).[1]

The Board has reviewed the entire record in this matter and considered the parties' arguments in light of applicable law. We affirm the proposed decision's findings of fact and its legal conclusions, as supplemented by the following findings and discussion.

FACTUAL BACKGROUND

Hotchner is a District teacher, a vocal Union activist, and the elected president of CAUSE. On August 28, 2019, District Human Resources Director Diane Zapata issued Hotchner a Notice of Unprofessional Conduct (August Notice). The August Notice addressed three incidents it described as unprofessional conduct: Hotchner's April 13, 2017 classroom knock-knock joke, his conduct at and surrounding June 2019 layoff "bumping" meetings, and his June 7, 2019 interaction with Zapata related to an employee's personnel file review. On October 1, 2019, Zapata issued Hotchner a second Notice of Unprofessional Conduct (October Notice). The October Notice addressed voicemail messages Hotchner left on a parent's phone on June 21, 2019. Though these Notices were a prerequisite to initiating formal discipline, the District did not take further disciplinary action against Hotchner based on the conduct alleged in the Notices.

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

August Notice

A. 2017 Joke

On April 13, 2017, Hotchner told a knock-knock joke in class in front of students. Hotchner said, "knock knock," students replied, "who's there?," and Hotchner responded, "Immigration!," while moving quickly toward a Latino student.[2] One of the students present relayed the joke to their mother, who filed an anonymous complaint. The District investigated. The investigator reported his findings to the Acting Superintendent at that time, and then met with Hotchner and memorialized the discussion with a Conference Summary Memo at the end of April 2017. The Conference Summary Memo warned Hotchner that the joke was unacceptable and that he should not make jokes of that nature again. It also stated, "[a] copy of this memo will not be placed in your personnel file. However, in the event this issue recurs, this memo will be attached to the above written warnings, which will be placed in your personnel file." The investigator understood that to be the end of the disciplinary process and took no further action. In 2018, Hotchner received a positive performance evaluation with no mention of the alleged incident.

B. June 2019 Bumping Meetings

In 2019, the District laid off some classified staff. On June 3, 2019, the District conducted a series of meetings with affected employees about layoff and bumping options. Hotchner and two other elected Union leaders attended these meetings on

[2] Hotchner testified that he had used this joke or something similar every year in his social studies class as a way to arouse student interest before discussing the concept of an organized police state. The District did not call any witnesses who were present when the joke was told.

behalf of CAUSE. Zapata, legal counsel Tina Kannarr, and Payroll and Benefits Technician Lise Main attended for the District. These meetings occurred in the District office boardroom. Hotchner was present during most of the bumping meetings, either to represent employees or to observe the process on behalf of the Union. Hotchner and other Union leaders had one-on-one conversations in the District lobby with bargaining unit members before their individual bumping meetings. He told some members that the District was using fear tactics to scare employees into doing whatever the District wanted. District front office employee Manual Baeza overheard parts of what Hotchner said to his members, and testified that he overheard "a lot of uncomfortable things" that he thought were "not so nice," but did not provide further specifics.

The August Notice alleged that Hotchner engaged in inappropriate and unprofessional conduct at the bumping meetings. It stated that he "repeatedly, inappropriately, and unprofessionally berated [Zapata], Ms. Kannarr, and Ms. Main," and "often raised [his] voice, yelled, and spoke disrespectfully and contemptuously." The Notice also alleged that Hotchner "yelled at numerous people in the lobby [and] publicly berated and made offensive comments about the District."

Despite the strong allegations in the August Notice, the record contains almost no evidence of what Hotchner actually said during the bumping meetings or in the District office lobby on June 3, 2019. During one meeting the personnel file of an employee was requested. When the District refused to provide it, Hotchner said something along the lines of, "it's 20 feet away. Just get it for us." Other than this comment, the record contains no evidence of what Hotchner actually said when he

allegedly “berated” Zapata, Kannarr, and Main, or spoke “disrespectfully and contemptuously.” There also is no evidence in the record of what Hotchner actually said or did when he allegedly “yelled at numerous people in the lobby.”

C. June 2019 File Review

On May 21, 2019, then-Union Vice President Eric Lewis sent Zapata an e-mail requesting a copy of his personnel file. After Lewis failed to get a satisfactory response, Hotchner e-mailed Zapata and asserted Lewis’s contractual right to view his file. After some back-and-forth, Hotchner confirmed that he and Lewis would meet with Zapata on June 7 at 2:20 p.m. to review the file.[3] Hotchner and Lewis went to the District office at that time and waited for Zapata. Zapata met them in the lobby shortly after 2:20 p.m. As Zapata approached them in the lobby, Lewis and Hotchner stood up from their seats. Zapata then told them she was not available at that time.

The parties presented slightly different versions of what happened next. Hotchner testified Zapata seemed surprised they had a meeting; when Hotchner explained they had confirmed the meeting and stated, “its June 7th all day,” Zapata accused Hotchner of berating her and canceled the meeting. Zapata testified that when she explained to Hotchner that she had a meeting with another employee, he became upset and started interrupting her. Zapata asserted that when she closed the lobby door, Hotchner yelled that she “was shirking her duties as an HR person” and said something about removing rights, then repeatedly rang the office bell. Hotchner and Lewis contradicted this testimony. Hotchner noted he was particularly frustrated

[3] Zapata claims she did not see the e-mail confirming the specific date and time to review the file until later.

because he frequently encountered this sort of difficulty representing members. Hotchner was also frustrated because Zapata was relying on a 30-day timeframe from the Education Code to produce a personnel file, when the collective bargaining agreement between the parties and past practice allowed review of a personnel file in a much shorter timeframe. Ultimately, Hotchner and Lewis left the District office that day without reviewing the personnel file.[4]

Regarding this incident, the August Notice alleged that Hotchner "publicly engaged in inappropriate and unprofessional conduct when [Zapata] was unavailable to meet with [him] after [he] failed to confirm the meeting [and that Hotchner] berate[d] [Zapata] in the lobby of the District Office for allegedly failing to know what date [it] was. . . ."

October Notice

On June 21, 2019, Hotchner left two separate voicemail messages on the phone of a parent who had complained about a teacher Hotchner was representing in a discipline case. In both calls, Hotchner spoke as though he was leaving the messages for the teacher he represented rather than for the complaining parent.

The teacher Hotchner was representing received a *Skelly* notice on June 13, 2019, that stated her *Skelly* hearing would be three days later.[5] He met the

[4] A few days later, Hotchner and Lewis returned to the District office and were able to review Lewis' personnel file.

[5] *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194 requires that permanent civil service employees be given notice of significant proposed disciplinary action, the reasons for the action, a copy of the charges and the materials upon which they are based, and an opportunity to respond to the charges either orally or in writing before

teacher at her home on June 14 and took notes during the meeting. At some point during the meeting, the teacher gave Hotchner at least one phone number. Hotchner was noncommittal about whether the Union would take the case all the way and said that he needed to talk to the Union's lawyer to decide if it was worth taking an aggressive strategy. After speaking to the attorney, Hotchner called the teacher several times at one of the phone numbers she had given him, believing it to be her number. When he called the number, there was no greeting, and his calls went straight to voicemail.

As it turns out, the phone number Hotchner called belonged to the parent who had complained about the teacher. The parent reported the voicemail messages to the District. In an investigatory interview about the messages, Hotchner stated he made a mistake and thought he was leaving messages for the teacher. The District alleged in the October Notice that Hotchner "pretended to be calling Teacher to intimidate and frighten Parent."

At hearing, Hotchner explained that at some point on or before June 21, 2019, the teacher called Hotchner on his home phone and left a voice message. Hotchner's home phone, however, did not keep a record of missed phone calls; it only recorded voice messages. Hotchner testified he was uncertain how he had entered the wrong number for the teacher into his cell phone, but described asking the teacher for her

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discipline is imposed. (*Id*. at p. 215.) A "*Skelly* hearing" refers to the employee's opportunity to respond to the charges and essentially results in a determination of whether there are reasonable grounds to believe the charges against the employee are true and support the proposed action. (*Cleveland Bd. Of Education v. Loudermill* (1985) 470 U.S. 532, 545-546.)

contact information during a meeting he described as emotional and chaotic, and the teacher handing him a paper that contained several phone numbers.

PROCEDURAL HISTORY

On November 1, 2019, CAUSE filed an unfair practice charge with PERB alleging that the District issued the August and October Notices because of Hotchner's protected activity. On June 4, 2020, PERB's Office of the General Counsel issued a complaint alleging the District violated EERA section 3543.5, subdivisions (a) and (b) by retaliating against Hotchner and Lewis, and by that same conduct also denied CAUSE its right to represent members.[6] On June 24, 2020, the District filed an answer, denying all substantive allegations and asserting several affirmative defenses. The parties participated in a virtual formal hearing on December 7-11, 2020, and January 5-6, 2021.

The parties spent significant time at hearing discussing their respective obligations to produce subpoenaed documents. Prior to the hearing, the District issued records subpoenas to CAUSE and Hotchner. The subpoena to the Union requested: (1) all of Hotchner's phone records from May 1, 2019, to June 30, 2019; (2) all documents the Union intended to use at hearing; (3) all documents and items relating to the allegation that the District took action because of Hotchner's protected activity; (4) all documents and items relating to allegations that the Notices impacted Hotchner's representational activities; and (5) all other documents relating to any allegations in the complaint. In the subpoena to Hotchner, the District requested all of

[6] CAUSE withdrew the allegations concerning Lewis in advance of the hearing.

Hotchner's phone records between May 1, 2019, and June 30, 2019, showing incoming and outgoing calls and text messages, including telephone numbers.[7]

On December 6, 2020, the Union moved to revoke both subpoenas on various grounds. In addition, the Union attached a declaration from Hotchner stating that after a reasonable search, Hotchner did not have the subpoenaed phone records in his possession or control. At the hearing, both parties had the opportunity to be heard on the Union's motion to revoke. After argument, the ALJ found the declarations indicated that Hotchner made a reasonable effort to locate his requested personal phone records, but that there were no responsive documents. The District did not object to the ALJ's ruling or make a further attempt to compel Hotchner's personal phone records. The ALJ also found that the Union's production of its anticipated exhibits met the production requirement in the request to the Union. As a result, the ALJ neither compelled a further response nor quashed the subpoenas.

On December 8, 2020, based on testimony during the Union's direct examination of Hotchner, the District made an oral motion to compel all notes taken at the bumping meetings. After both parties were heard on this issue, the ALJ ordered the Union to review the bumping notes in its possession and produce them to the District. The Union produced these notes with some redactions. The District made another oral motion to compel production, this time requesting all notes "related to all of the meetings that Mr. Hotchner testified about [on December 8]." The ALJ sought more specificity and requested that the District reduce its motion to writing that

[7] The subpoena to Hotchner sought his personal phone records, which differed from the records maintained by the Union of any Union-issued phone.

evening, so that Union counsel could respond the next morning. The District did not reduce its request to writing, but the parties traded arguments regarding the subpoena on December 9, 2020. The ALJ ultimately issued a limited order requiring CAUSE to produce notes from the Union-designated notetaker for the specific dates Union counsel could recall Hotchner testifying about on December 8. Later that day, the District renewed its oral motions to compel bargaining and committee notes based on Hotchner's testimony on cross-examination. The ALJ denied the District's motion to compel.

Also on December 9, 2020, the District questioned Hotchner regarding his search for the subpoenaed phone records. Hotchner testified he and his wife looked through his files and that he checked his phone company's website and learned that the company only provided records for a three-month period. He also stated that he did not request the records from the phone company.

On January 5, 2021, the District again renewed its motion to compel production of bargaining notes, safety committee notes, and healthcare committee notes; the Union again objected. The ALJ denied the District's oral motion but provided the District the opportunity to submit a specific written motion.

On January 6, 2021, the District made several additional efforts to obtain further documents from CAUSE. First, the District asked the Union to produce the bumping meeting notes the Union provided the District on December 8, 2020, without redactions. The Union agreed to provide an unredacted copy of these notes.

Second, the District made a written motion to compel production, requesting meeting notes from 46 different meetings of various types. Despite the ALJ's prior

direction to do so, the District's motion neither included declarations nor identified specific testimony to support the relevance of the requested notes. The ALJ granted the District's motion to compel the unredacted copies of notes already produced by the Union but denied the remainder of the motion.

Third, the District sent the ALJ another subpoena request but did not submit a copy to the Union.[8] The ALJ instructed the District that if it wanted to discuss this request, it would need to send the request to opposing counsel. The District did not send the subpoena request to the Union, but instead reiterated its request that the ALJ issue the subpoena. The ALJ denied the District's request, stating that it requested "production of a witness on a day for which there is no proceeding." The District requested a recess, after which it concluded its surrebuttal without further discussion of the subpoena. The hearing then concluded after discussion of the briefing schedule.

The case was submitted for decision after the ALJ received closing briefs. The proposed decision issued on May 18, 2021, finding that the District violated EERA section 3543.5, subdivisions (a) and (b) when it retaliated against Hotchner because of his protected activities and thereby denied CAUSE its right to represent its members. The District filed timely exceptions challenging a variety of the ALJ's factual and legal findings, and CAUSE filed a timely response urging the Board to adopt the proposed decision.

[8] The record does not contain a copy of this subpoena, but the District's exceptions brief asserts that it "sought production of notes from bargaining meetings, safety committee meetings, and healthcare committee meetings from January 1, 2017 to the present."

DISCUSSION

Although the Board reviews exceptions to a proposed decision de novo, to the extent exceptions merely reiterate factual or legal contentions resolved correctly in the proposed decision, the Board need not further analyze those exceptions. (*City of Calexico* (2017) PERB Decision No. 2541-M, pp. 1-2.) The Board also need not address alleged errors that would not affect the outcome (*ibid*.), or issues raised for the first time on appeal (*Los Angeles County Superior Court* (2018) PERB Decision No. 2566-C, pp. 11-12; *Colusa Unified School District* (1983) PERB Decision No. 296, p. 4). The majority of the District's exceptions raise arguments the ALJ considered and resolved appropriately. Further, we decline to address exceptions to the factual findings that the District raises without indicating how reversal of these findings would impact the outcome of the case. (*Lake Elsinore Unified School District* (2019) PERB Decision No. 2633, pp. 7-8.)

To demonstrate that an employer discriminated or retaliated against an employee in violation of EERA section 3453.5, subdivision (a), a charging party must prove that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action "because of" the exercise of those rights, which PERB interprets to mean that the protected activity was a substantial or motivating cause of the adverse action. (*City and County of San*

Francisco (2020) PERB Decision No. 2712-M, p. 15; *Novato Unified School District* (1982) PERB Decision No. 210, pp. 6-7 (*Novato*).)[9]

The primary issues raised by the District's exceptions are how much of Hotchner's conduct that formed the basis for the Notices was protected, whether CAUSE established a nexus between Hotchner's protected activity and the Notices, and the sufficiency of the District's affirmative defense. We briefly review and supplement the ALJ's findings on these issues before turning to the District's other exceptions related to its subpoenas and the proposed remedy.

Protected Activity

EERA generally protects union and employee speech related to legitimate labor and employment concerns. (*Chula Vista Elementary School District* (2018) PERB Decision No. 2586, p. 15 (*Chula Vista*).) For instance, an employee is typically protected in criticizing management, working conditions, or union leadership, if the criticism relates to advancing employee interests or is a logical extension of group activity. (*Ibid*.)

Because labor and employment disputes tend to engender ill feelings and strong responses, the parties are afforded wide latitude to engage in "uninhibited,

[9] PERB generally analyzes discrimination claims under two lines of cases, either the *Campbell* or *Novato* frameworks, depending on whether the employer's conduct is facially or inherently discriminatory. (*San Diego Unified School District* (2019) PERB Decision No. 2634, p. 12, fn. 6; *Novato*, *supra*, PERB Decision No. 210, p. 6; *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d. 416, 423-424 (*Campbell*).) Though CAUSE urges the Board to view the matter under *Campbell*, arguing that the entirety of the August and October Notices are facially discriminatory, the *Novato* analysis employed by the ALJ is the appropriate framework to analyze the allegations in this case.

robust, and wide-open debate" during those disputes. (*City of Oakland* (2014) PERB Decision No. 2387-M, p. 23.) Public employees' right to engage in concerted activities therefore permits them some leeway for "impulsive" and "intemperate" behavior, including moments of "animal exuberance." (*Ibid*.) Thus, employee conduct and speech related to a labor and employment dispute is protected unless it is so "opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice" as to substantially disrupt or materially interfere with employer operations. (*Rancho Santiago Community College District* (1986) PERB Decision No. 602, p. 13 (*Rancho Santiago*).)

The *Rancho Santiago* standard encompasses two different tests. (*Chula Vista*, *supra*, PERB Decision No. 2586, p. 19, fn. 9.) The first test, which applies when an employer or union claims that an employee has leveled a false criticism, is largely content-based: the speech only loses protection if it was maliciously false. (*Ibid*.) The second test is conduct-based and analyzes whether the employee engaged in face-to-face communications with a manager or supervisor in a manner that substantially disrupts operations. (*Ibid*.) This fact-intensive inquiry generally considers, at least: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was in any way provoked by the employer's unfair labor practice. (*Mount San Jacinto Community College District* (2018) PERB Decision No. 2605, p. 11 (*San Jacinto*).)[10]

[10] When an employee sends an e-mail, posts on social media, or otherwise engages in speech that is not face-to-face, there tends to be less likelihood of disruption but PERB may adapt the third factor—the nature of the employee's outburst—if one party claims the employee threatened physical harm. (*San Jacinto*, *supra*, PERB Decision No. 2605, p. 12.)

A. August Notice

The ALJ concluded that, at the bumping meetings, Hotchner was spirited in his criticism of the District's strategy, but the District fell far short of showing that his conduct was egregious enough to lose its protected status. We agree. Hotchner attended these meetings in his capacity as a Union representative. The comments the District describes as unprofessional included Hotchner's vocal criticism of the District's processes and decision-making regarding bumping, which were part of his effort to promote and defend employee and union rights. Although the District claims Hotchner berated Zapata, Kannarr, and Main, or spoke disrespectfully and contemptuously to them during the meetings, it presented no evidence of specific instances when Hotchner did so. Nor is there evidence in the record that Hotchner "yelled at numerous people in the lobby." The record does not indicate that Hotchner disrupted operations, and his conduct did not exceed protected if intemperate behavior during zealous advocacy.[11] (See, e.g., *San Jacinto*, *supra*, PERB Decision No. 2605, pp. 9-12 [collecting cases].) Moreover, although Hotchner did not leave when a bargaining unit employee requested he do so, he was there as an observer of the process on behalf of the Union and the represented employees as a whole, and not just as a representative of individual employees.[12]

[11] Though the District alleged that Hotchner's conduct delayed the bumping meetings, the record shows that the bumping meetings were initially scheduled to take two days but concluded on the first day.

[12] The District also failed to present evidence that Hotchner was maliciously untruthful. (Cf. *Chula Vista*, *supra*, PERB Decision No. 2586, pp. 16-17 & fn. 8; see also *County of Riverside* (2018) PERB Decision No. 2591-M, pp. 6-7.)

Another series of allegations in the August Notice includes Hotchner's statements and behavior while helping Lewis attempt to view his personnel file on June 7, 2019. The question again is whether Hotchner's conduct during the protected activity of representing another employee was sufficiently "flagrant, opprobrious or malicious" to lose protection. (See *Rancho Santiago*, *supra*, PERB Decision No. 602, pp. 12-13.) Even crediting Zapata's testimony that Hotchner raised his voice, accused her of "shirking" her duties, and repeatedly rang the office bell, this conduct was at most impulsive and centered on dealing with and commenting on working conditions and management's relationship with the Union. Hotchner also was responding to Zapata's attempt to lengthen the time to provide access to personnel files and thus his alleged outburst was provoked by the District's change to past practice. Though the interaction occurred in the lobby, it was only observed by a few additional people and the record does not suggest that it significantly impaired District operations.

In sum, the evidence shows that the conduct alleged in the August Notice regarding the incidents on June 3, 2019, and June 7, 2019, was protected by EERA because Hotchner was acting in his capacity as Union president in representing bargaining unit members in their relations with the District. The District failed to meet its burden of showing any behavior by Hotchner that was so "opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice as to cause substantial disruption of or material interference [in the workplace]" as to lose statutory protection. (See *Pomona Unified School District* (2000) PERB Decision No. 1375, p. 16 [finding a letter that used "forceful but not abusive" language to describe the author's displeasure with how school administration had represented her employment status to

third parties retained its statutory protection because it was the type of conduct "that labor relations personnel are likely to encounter at least occasionally in the routine course of business"].) We therefore agree with the ALJ that Hotchner's conduct was protected by EERA.

B. October Notice

The ALJ also found that EERA protected the conduct alleged in the October Notice, i.e., Hotchner calling a parent and leaving two voicemails—ostensibly for a teacher he was representing in a discipline matter—that discussed the teacher's case and the parent's claims. The ALJ reasoned that whether Hotchner's conduct was protected turned on whether Hotchner mistakenly called the parent while intending to call the teacher, or, as the Notice alleges, "pretended to be calling Teacher to intimidate and frighten Parent." The ALJ found the former. The District argues that the ALJ reached the wrong conclusion in assessing the facts. We disagree.

The ALJ properly weighed the available evidence, and we concur with the ALJ's inference that Hotchner left the two messages on the parent's voicemail by mistake. We do not find slight variances in Hotchner's attempts to reason how the mistake was made sufficient to undermine the thrust of the messages themselves, which reveal legal strategy and appear on their face to be updates provided to the represented teacher. The District failed to establish the intent necessary to indicate the messages were deliberately left for the parent and thus were not protected as communications to a represented union member about a representational issue.

Nexus

The ALJ found direct evidence of unlawful motive because the August Notice is explicitly based in part on protected activity. He similarly found direct evidence of unlawful motive because the October Notice was based entirely on protected activity. "Where the employer's words or actions reveal that the adverse action was taken in response to the employee's protected activity, such conduct serves as direct evidence of unlawful motive." (*Chula Vista*, *supra*, PERB Decision No. 2586, p. 26.) We thus have no difficulty affirming the ALJ's conclusion that the Union demonstrated sufficient nexus between Hotchner's protected activities and the Notices to establish a prima facie case of retaliation.

Affirmative Defense

If the charging party meets its burden to establish a prima facie case of retaliation, certain fact patterns nonetheless allow a respondent the opportunity to prove, by a preponderance of the evidence, that it would have taken the same action even absent protected activity. This affirmative defense is most typically available when, even though the charging party has established that protected activity was a substantial or motivating cause of the adverse action, the evidence also reveals a non-discriminatory motivation for the same decision. In such "mixed motive" or "dual motive" cases, the question becomes whether the adverse action would not have occurred "but for" the protected activity. (*City of Santa Monica* (2020) PERB Decision No. 2635a-M, pp. 40-41.) To make this determination, we weigh the evidence supporting the employer's justification for the adverse action against the evidence of the employer's unlawful motive. (*Los Angeles County Superior Court*, *supra*, PERB

Decision No. 2566-C, p. 19; *Rocklin Unified School District* (2014) PERB Decision No. 2376, p. 14; *Palo Verde Unified School District* (2013) PERB Decision No. 2337, p. 33 (*Palo Verde*).) As a result, the outcome of a discrimination or retaliation case ultimately is determined by the weight of the evidence supporting each party's position. (See *Novato*, *supra*, PERB Decision No. 210, p. 14 ["[a]fter all the evidence is in, it is a question of the sufficiency of the proof proffered by the various parties"].)

The District argues that it would have issued both the August and October Notices absent Hotchner's protected activity based on his alleged misconduct. However, as found *ante,* all of the conduct in the October Notice was protected, and nearly all of the conduct in the August Notice was protected. Only the August Notice's alleged inappropriate April 13, 2017 classroom knock-knock joke remains as a potential justification for the August Notice.

The District included the 2017 joke in the August Notice nearly two years after it completed its investigation and closed the matter by warning Hotchner that the joke was unacceptable, he should not make jokes of that nature again, and, while the District was not placing its memo in his personnel file, that would change if the issue were to recur. In the nearly two years between the completion of the investigation and the August Notice, Hotchner received a positive performance evaluation with no mention of the alleged incident. While the District claims it had a duty to prevent further incidents like the 2017 joke and that it was still timely under the Education Code to reference the 2017 joke in the August Notice, the District admitted that the issue had not recurred. We thus have no trouble concluding that the District would not

have issued the August Notice but for the protected activity that made up the bulk of the Notice.

The District also contends that the August Notice was supported by Hotchner's alleged abusive conduct toward District employee Monica Thomas on June 3, 2019. According to the District, before the bumping meetings began that day Hotchner "charged" at Thomas in the building lobby and yelled at her, causing Thomas to avoid the lobby area for the rest of the day. Hotchner, on the other hand, testified that his only contact with Thomas that day was a brief interaction in the parking lot where she said "hello" to him and he nodded in return. Moreover, even if these events had occurred as the District now claims, they are not clearly included in the August Notice's vague allegation that Hotchner "yelled at numerous people in the lobby" on June 3, 2019. The District has thus failed to prove that it issued the August Notice in part because of Hotchner's alleged abusive behavior toward Thomas. (See *Palo Verde*, *supra*, PERB Decision No. 2337, p. 31 [to establish its affirmative defense, the respondent must prove "(1) that it had an alternative nondiscriminatory 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," underline in original].) Indeed, "by raising at the hearing for the first time new justifications, the District appears to be attempting to legitimize its decision after the fact," which further supports finding that the August Notice was unlawfully motivated by Hotchner's protected activity. (*Novato*, *supra*, PERB Decision No. 210, pp. 13-14.)[13]

[13] The ALJ found that by retaliating against Hotchner, the District derivatively denied CAUSE its right to represent employees in violation of EERA section 3543.5,

Subpoenas

In its exceptions, the District challenges two aspects of the ALJ's subpoena rulings: the District alleges the ALJ failed to enforce the District's subpoena requesting all documents relevant to CAUSE's allegations and the District's defense; and the District states that the ALJ improperly denied its request for a subpoena seeking notes from bargaining meetings, safety committee meetings, and healthcare committee meetings. After a thorough review of the record and the parties' arguments, we reject the District's exceptions related to its subpoenas.

As to the first issue, we do not disturb the ALJ's well-supported direction to the District to provide more specificity, rather than to subpoena all documents relevant to CAUSE's allegations and the District's defense. A subpoena that merely asks for all documents relevant to a claim or defense is overbroad and must be modified.

The remainder of the District's exception regarding subpoenas focuses on its request for production of bargaining notes and committee meeting notes. While the ALJ ordered CAUSE to produce some of these notes, he did not order the broad production the District sought. The District claims it needed the requested notes in order to rebut testimonial evidence CAUSE presented of the District's conduct during and related to bargaining and committee meetings that allegedly showed anti-union animus. Like the ALJ, we do not rely on the Union's testimonial evidence of bargaining

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subdivision (b). The District's exceptions take issue with this conclusion. However, the ALJ did not include any additional remedy for such interference. We therefore decline to further address the District's exception, particularly in the absence of any exceptions by the Union to the proposed decision's remedy. (See *City of Glendale* (2020) PERB Decision No. 2694-M, pp. 58-59.)

and committee meetings because the August and October Notices themselves are sufficient to establish the District's retaliatory motive. Because we do not rely on the Union's extrinsic evidence of retaliatory motive, a ruling that the ALJ erred by not requiring production of the requested notes would have no impact on the outcome of the case. Absent such a potential impact, we need not consider this exception.[14] (*Lake Elsinore Unified School District*, *supra*, PERB Decision No. 2633, p. 7; *Stanislaus Consolidated Fire Protection District* (2012) PERB Decision No. 2231a-M, pp. 7-8.)

Moreover, to the extent the requested records include notes covering internal union meetings or caucuses in which no District representatives were present, they are subject to a qualified protection. In *Colton Joint Unified School District/Rialto Unified School District/San Bernardino City Unified School District* (1981) PERB Order No. Ad-113 (*Colton*), PERB found that a bargaining party generally need not disclose its internal strategy discussions regarding negotiations or grievance handling. (*Id*. at p. 6, citing *Berbiglia*, *Inc*. (1977) 233 NLRB 1476, 1495; see also *County of Tulare* (2020) PERB Decision No. 2697-M, pp. 14-15, fn. 9; *Cal Fire Local 2881 (Tobin)* (2018) PERB Decision No. 2580-S, p. 4.) Pursuant to this qualified protection, we balance the negotiating party's interest in maintaining confidentiality versus the

[14] The District also challenges the ALJ's ruling that its subpoena on January 6 requested "production of a witness on a day for which there is no proceeding." The subpoena itself is not in the record and was apparently not provided to CAUSE. However, we decline to consider whether the ALJ was correct in interpreting PERB regulations as requiring production on a scheduled hearing day, as the District's exceptions indicate the January 6 subpoena sought the same bargaining, healthcare, and safety committee notes discussed above, and the District's request was untenable in other respects which we detail below.

competing interests in disclosure, if any. (*Colton*, *supra*, PERB Order No. Ad-113, p. 8.) CAUSE's internal notes from bargaining sessions fall under this protection, particularly as the District's tenuous arguments for relevance weigh against disclosure.

Finally, the District has not excepted to the ALJ's ruling on its motion to compel Hotchner to make further efforts to acquire and produce his phone records. The District's exceptions mention Hotchner's failure to provide these records only in an argument as to his credibility. We consider this as a request for an adverse inference. Reviewing Hotchner's answers on cross-examination regarding his phone records, we do not find his subpoena response enlightening as to his credibility. We express no opinion as to whether the ALJ was correct in declining to require Hotchner to take further steps toward obtaining his phone records, as the District simply does not mention the subpoena for phone records in its above-noted exception asking us to reverse two of the ALJ's subpoena rulings.

REMEDY

EERA confers on the Board broad remedial powers, including the authority to issue cease and desist orders and to require such affirmative action as the Board deems necessary to effectuate the policies and purposes of the Act. (EERA, § 3541.3, subd. (i); *Mt. San Antonio Community College Dist. v. Public Employment Relations Bd*. (1989) 210 Cal.App.3d 178, 189.) The customary remedy for discipline imposed in retaliation for protected activity includes a cease and desist order and rescinding the discipline, as ordered by the ALJ here. The District's argument that PERB lacks jurisdiction to rescind lawfully imposed discipline rehashes jurisdictional arguments which were properly resolved by the ALJ, and arguments on the merits which we have

considered and rejected above. Because neither the August nor the October Notices would have issued but for Hotchner's protected activity, recission of the full Notices is the appropriate remedy.[15]

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that Carpinteria Unified School District violated the Educational Employment Relations Act (EERA), Government Code section 3543.5, subdivisions (a) and (b) by issuing Jay Hotchner the August 28, 2019 Notice of Unprofessional Conduct and the October 1, 2019 Notice of Unprofessional Conduct in retaliation for engaging in protected activity. Pursuant to Government Code section 3541.5, subdivision (c), it hereby is ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Retaliating and discriminating against Jay Hotchner because of his exercise of protected rights.

[15] At hearing, Hotchner testified that during a review of his own personnel file, it appeared that his file still contained documents which should have been redacted or purged based on an ALJ's proposed decision and order in *Carpinteria Unified School District* (2010) PERB No. HO-U-982. Though CAUSE did not attempt to litigate compliance with the order in PERB No. HO-U-982 in this proceeding, it remains final and binding on these parties. Should CAUSE raise compliance issues with respect to PERB No. HO-U-982, the District has the burden to prove it complied with the remedial order. (See, e.g., *County of Lassen* (2018) PERB Decision No. 2612-M, p. 8.)

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

1. Rescind the August 28, 2019 Notice of Unprofessional Conduct and the October 1, 2019 Notice of Unprofessional Conduct. Such rescission shall include the removal and destruction of all copies of the Notices from the District's files, including but not limited to Hotchner's personnel file(s).

2. Within 10 workdays of the date this decision is no longer subject to appeal, post at all work locations where notices to employees in Carpinteria Association of United School Employees, Local 2216 (CAUSE) bargaining units customarily are posted, copies of the Notice attached hereto as Appendix A. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays.[16] The Notice shall also be sent to all bargaining unit employees by

[16] In light of the ongoing COVID-19 pandemic, the District shall notify PERB's Office of the General Counsel (OGC) in writing if, due to an extraordinary circumstance such as an emergency declaration or shelter-in-place order, a majority of employees at one or more work locations are not physically reporting to their work location as of the time the physical posting would otherwise commence. If the District so notifies OGC, or if the Union requests in writing that OGC alter or extend the posting period, require additional notice methods, or otherwise adjust the manner in which employees receive notice, OGC shall investigate and solicit input from all relevant parties. OGC shall provide amended instructions to the extent appropriate to ensure adequate publication of the Notice, such as directing the District to commence posting within 10 workdays after a majority of employees have resumed physically reporting on a regular basis; directing the District to mail the Notice to all employees who are not regularly reporting to any work location due to the extraordinary circumstance, including those who are on a short term or indefinite furlough, are on layoff subject to recall, or are working from home; or directing the District to mail the Notice to those employees with whom it does not customarily communicate through electronic means.

electronic message, intranet, internet site, or other electronic means customarily used by the District to communicate with employees in CAUSE's bargaining units. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. The District shall provide reports, in writing, as directed by the General Counsel or designee. All reports regarding compliance with this Order shall be concurrently served on CAUSE.

Members Shiners and Krantz joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. LA-CE-6522-E, *Carpinteria Association of United School Employees, Local 2216 v. Carpinteria Unified School District*, in which all parties had the right to participate, it has been found that the Carpinteria Unified School District violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq., by retaliating against Jay Hotchner because of his protected activities.

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

A. CEASE AND DESIST FROM:

1. Retaliating and discriminating against Jay Hotchner because of his exercise of protected rights.

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

1. Rescind the August 28, 2019 Notice of Unprofessional Conduct and the October 1, 2019 Notice of Unprofessional Conduct. Such rescission shall include the removal and destruction of all copies of the Notices from the District's files, including but not limited to Hotchner's personnel file(s).

Dated: _____ CARPINTERIA UNIFIED SCHOOL DISTRICT

By: _____
Authorized Agent

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