STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

BELLFLOWER TEACHERS ASSOCIATION, Charging Party, v. BELLFLOWER UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-6519-E PERB Decision No. 2796 November 8, 2021

Appearances: California Teachers Association by Stephanie J. Joseph, Attorney, for Bellflower Teachers Association; Law Offices of Eric Bathen by Eric Bathen, Attorney, for Bellflower Unified School District.

Before Banks, Chair; Shiners and Krantz, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by Bellflower Unified School District to a proposed decision by an administrative law judge (ALJ). The complaint in this matter alleges that the District violated its bargaining obligations under the Educational Employment Relations Act (EERA), and derivatively interfered with protected rights, by unilaterally altering the status quo without providing Bellflower Teachers Association notice and an opportunity to meet and negotiate.[1] Specifically, the complaint alleges that the

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

District changed the status quo by requiring employees to attend on-site meetings after the normal on-site workday has ended, without obtaining their consent.

The ALJ found the District liable for the alleged violation. The proposed decision ordered the District, among other things, to compensate nine teachers with one-half hour of extra pay for attending a mandatory on-site meeting that lasted past the end of their normal on-site workday.

We have reviewed the proposed decision, the record, the District's exceptions, and the Association's response. We affirm the ALJ's conclusion that the District violated its bargaining obligations and derivatively interfered with protected rights. However, we partially grant one of the District's exceptions regarding the remedial order, and we direct the Office of the General Counsel (OGC) to determine in compliance proceedings the number and identity of any teachers entitled to monetary compensation.

FACTUAL BACKGROUND

I. Relevant Contractual Provisions

From July 1, 2016 to June 30, 2019, the District and the Association were parties to a collective bargaining agreement (CBA) covering terms and conditions of employment for the District's certificated employees. Article VII of the CBA governs unit members' hours of employment. Section A of Article VII contains general language recognizing that "the varying nature of a unit member's day-to-day professional responsibilities does not lend itself to an instructional day of rigidly established length," and that "fulfillment of a unit member's total professional responsibilities will generally require a work week well in excess of forty (40) hours."

While the District's certificated employees frequently need to work more than 40 hours in a week, the CBA generally protects them from having to work *on-site* for more than a set number of hours. Article VII, Section B.1 defines employees' "normal on-site obligation." The normal on-site workday at elementary schools is seven hours, though schools may start their on-site workdays at different times. For instance, the two schools discussed herein—the Intensive Learning Center (ILC) and Washington Elementary School—have different start times: the on-site workday for ILC teachers begins at 7:30 a.m. and ends at 2:30 p.m., while the on-site workday for Washington Elementary teachers begins at 8:00 a.m. and ends at 3:00 p.m.

Article VII, Section D concerns the scheduling, frequency, timing, and duration of various non-instructional meetings or events, referred to as "adjunct duties." Article VII, Section D.3 specifies that staff at each elementary school "shall agree upon the necessary adjunct duties for the ensuing school year." Section D.1 requires unit members to "attend faculty, departmental, and/or grade level meetings of reasonable frequency and duration," but only "within the normal on-site day." The provision guarantees that unit members shall not be required to participate in night or weekend meetings or activities, except for during Back-to-School Night, Open House, and in two other circumstances, only one of which is relevant here. Specifically, the second paragraph of Section D.1 provides as follows:

> "Any additional teachers' meetings, except for the in-service/staff development meeting scheduled for the 'District/Site In-service' Wednesdays provided in Section E.2.b below, may be scheduled <u>only by mutual agreement of the staff</u>." (Emphasis supplied.)

Article VII, Section E.2 provides for in-service/professional development meetings to be held on Wednesdays. This section states: "The Wednesday of each week shall be a shortened day at all elementary schools." It then specifies how this additional unstructured time on Wednesdays may be used. The provision allows the District to schedule professional development meetings during the additional unstructured time available on Wednesdays by virtue of the shorter instructional day. However, it includes no language extending or altering the start and end times of the seven-hour "normal on-site obligation" established by Section B.1.

Thus, while Sections D.1 and E.2.b of Article VII authorize professional development meetings to be held on Wednesdays, neither these sections nor any other CBA provisions extend or otherwise alter Section B.1's seven-hour on-site obligation. For the exception found in Section D.1 to apply, a mandatory after-hours professional development meeting must be scheduled by "mutual agreement of the staff." Moreover, we credit the unrebutted testimony of Association representative Amy Mustafa and ILC teacher Zoila Sanchez that the parties had in the past interpreted Section D.1 to mean that all impacted teachers must agree to a mandatory meeting beyond the normal on-site workday, or else the meeting becomes voluntary.

II. The District's May 2019 Mandatory On-Site Meeting for Dual Language Teachers

Two District elementary schools feature dual language immersion programs: the ILC and Washington Elementary School. At all relevant times, Beverly Swanson was the principal at ILC and Angela Montelongo was the principal at Washington Elementary. During the 2018-2019 school year, approximately 15 certificated

bargaining unit teachers taught dual immersion classes at ILC. Only one dual language teacher, Ana Fletes, taught at Washington Elementary that year.

Toward the end of the prior school year (2017-2018), Montelongo began working on the dual immersion professional development calendar for 2018-2019. In an initial draft, Montelongo included two consecutive meetings to be held on an unspecified Wednesday in May 2019: a mandatory meeting on writing calibration from 2:00 p.m. to 3:00 p.m., followed by an optional professional development meeting from 3:15 p.m. to 5:00 p.m. Montelongo left the exact meeting date open, and the record does not reveal when May 22 was selected. Montelongo testified that in crafting this draft calendar, she "collaborated" with both Fletes and dual language teachers at ILC. However, Sanchez, the only ILC teacher called as a witness, testified that she never consented to a mandatory meeting time that would go beyond ILC's on-site workday, and that she did not learn of the May 22 meeting—and the fact that it would extend to 3:00 p.m.—until a week beforehand.

There is no direct conflict between Montelongo's testimony and Sanchez's testimony, as Montelongo did not provide specific testimony about any teachers consenting to a meeting outside of their on-site obligation, and in any event, she never claimed that she collaborated with *all* ILC teachers. Indeed, Montelongo specified neither the number of teachers involved nor the names of any such teachers. And she admitted that she e-mailed the draft calendar only to Fletes, who was the sole dual immersion teacher at Montelongo's school, Washington Elementary. In this e-mail, Montelongo asked Fletes to review the calendar and provide feedback within the next

week. The record does not reflect that anyone at the District sent any comparable e-mail to ILC teachers.

To the extent the District's exceptions can be construed as claiming that Montelongo's general testimony about collaboration means that all ILC teachers consented to scheduling a mandatory on-site meeting lasting past the end of the on-site workday, the record does not support such a claim. Indeed, multiple aspects of the record confirm our view of the facts, beyond the non-specific nature of Montelongo's testimony. Most importantly, we credit Sanchez's unrebutted testimony that she did not provide consent. We are also persuaded by Mustafa's testimony that in grievance proceedings over these issues, the District never claimed it had obtained consent from the dual immersion teachers. We credit Mustafa's testimony, particularly given that the District's written response to the grievance confirms her testimony. This testimonial and documentary evidence further persuades us it is more likely than not that the District did not obtain consent from all the impacted teachers.[2]

[2] While the technical rules of evidence do not apply in a PERB formal hearing, where a party timely objects to evidence based on a meritorious hearsay argument, PERB cannot make a material factual finding based solely on such hearsay evidence. (PERB Reg. 32176 [PERB Regulations are codified at Cal. Code Regs., tit. 8, § 31001 et seq.].) Here we make no material findings based solely on evidence regarding the parties' grievance proceedings, and the District raised no hearsay objection to such evidence, nor would such an objection have been meritorious. Mustafa's testimony was not hearsay because she was recounting the statement of a party opponent, while the District's grievance falls under the official records exception to the hearsay rule. (*Bellflower Unified School District* (2014) PERB Decision No. 2385, pp. 9-11.)

On May 15, 2019, the District e-mailed the dual language teachers and notified them of the mandatory meeting a week later, from 2:15 p.m. through 3:00 p.m.[3] The end time was 30 minutes beyond ILC teachers' regular on-site workday.

Although the District styled the May 15 e-mail as a reminder, the ALJ found no evidence that any ILC teacher had received notice, before the May 15 e-mail, that a mandatory meeting would continue past 2:30 p.m. The District asks us to reverse this finding based on Montelongo's testimony that she collaborated with ILC teachers in creating the calendar. We do not disturb the ALJ's determination, for multiple reasons. First, as noted above, Montelongo provided markedly non-specific testimony about her collaboration and admitted that she only e-mailed a single teacher (Fletes) asking her to review and provide feedback on the draft calendar. Furthermore, the record contains no evidence anyone at the District asked ILC teachers to review the calendar, or even sent it to them at any time prior to May 2019. Indeed, Swanson testified that even though she was the ILC principal, she never attempted to obtain any teachers' agreement to going past their on-site end time because she thought "everyone had agreed." Finally, even assuming for the sake of argument that Montelongo's vague testimony about collaboration had persuaded us that some ILC teachers knew about the 3:00 p.m. end time roughly a year before the May 22 meeting occurred, as discussed above the record shows that any such subset of ILC teachers who collaborated with Montelongo on creating the calendar did not include all ILC teachers.

[3] Swanson had asked that the start time be delayed from 2:00 p.m. to 2:15 p.m.

III. The Association's Grievance

The Association filed a grievance asserting that the District scheduled the May 22 mandatory meeting beyond the dual language teachers' on-site workday and without their mutual agreement. The grievance sought compensation for all dual language teachers who attended the meeting, "including, not limited to" 10 named teachers. The District denied the grievance on procedural grounds, and on October 28, 2019, the Association filed this charge.[4]

DISCUSSION

The Board reviews exceptions to a proposed decision using a de novo standard of review. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 5.) However, to the extent that a proposed decision has adequately addressed issues raised by certain exceptions, the Board need not further analyze those exceptions. (*Ibid*.) The Board also need not address alleged errors that would not impact the outcome of the case. (*Ibid*.)

The District challenges both the ALJ's liability analysis and proposed remedy. Although the ALJ adequately addressed those District arguments that could impact liability, in Part I of our discussion we nonetheless address two of the District's primary arguments regarding liability: that it did not intend to change a policy and that its conduct did not have a generalized effect or continuing impact on employment terms

[4] Cases like this one are infrequently filed at PERB, since the respondent can often successfully move to defer such cases to arbitration. Here, however, the District raised procedural defenses to arbitrating the merits of the grievance, preventing PERB from deferring this case to arbitration. The District also failed to plead or argue deferral at multiple levels, thereby waiving the affirmative defense. (*Claremont Unified School District* (2014) PERB Decision No. 2357, p. 17.)

or conditions. As to remedy, the District mainly contends the record does not adequately support providing compensation to nine teachers, as the ALJ did in the proposed decision. In Part II of our discussion, we partially grant one of the District's exceptions regarding the ALJ's proposed remedy, and we direct OGC to determine through compliance proceedings which ILC teachers are entitled to compensation.

I. Liability

A public school employer may not "[r]efuse or fail to meet and negotiate in good faith with an exclusive representative." (EERA, § 3543.5, subd. (c).) A unilateral change to a matter within the scope of representation constitutes a per se violation of the duty to meet and negotiate. (*Lodi Unified School District* (2020) PERB Decision No. 2723, p. 11 (*Lodi*); *Stockton Unified School District* (1980) PERB Decision No. 143, p. 22.) To establish a prima facie case that a respondent employer made an unlawful unilateral change, a charging party union that exclusively represents a bargaining unit must prove: (1) the employer changed or deviated from the status quo; (2) the change or deviation concerned a matter within the scope of representation; (3) the change or deviation had a generalized effect or continuing impact on represented employees' terms or conditions of employment; and (4) the employer reached its decision without first providing adequate advance notice of the proposed change to the union and bargaining in good faith over the decision, at the union's request, until the parties reached an agreement or a lawful impasse. (*County of Merced* (2020) PERB Decision No. 2740-M, pp. 8-9 (*Merced*).)

The District does not dispute the second and fourth elements, and in any event the ALJ was well supported in finding that the District did not provide the Association

with adequate notice and a meaningful opportunity for bargaining, as well as in concluding that employee wages and hours are mandatory subjects of bargaining. We turn now to the other two elements.

A. Deviation from or Change to the Status Quo

There are three primary means of establishing that an employer changed or deviated from the status quo. Specifically, a charging party satisfies this element by showing any of the following: (1) deviation from a written agreement or written policy; (2) a change in established past practice; or (3) a newly created policy or application or enforcement of existing policy in a new way. (*Merced*, *supra*, PERB Decision No. 2740-M, p. 9.)

Here, the District deviated from CBA Article VII when it unilaterally required ILC employees to stay 30 minutes beyond their standard on-site work obligation for the May 22 meeting, without extra pay and without the employees' consent.[5] Alternatively, through this conduct the District enforced existing policy in a new way.

For reasons already discussed, Montelongo's recollection of generally discussing the professional development calendar with ILC teachers in 2018 does not persuade us that the District scheduled the May 22 meeting "by mutual agreement of the staff" within the meaning of CBA Article VII, Section D.1. Indeed, as noted above, the parties had in the past interpreted "by mutual agreement of the staff" to mean that

[5] While teachers commonly work many extra hours from locations of their choosing, the CBA protects teachers from such involuntary on-site work obligations beyond seven hours. This construction gives the intended meaning to each contractual provision in a manner that is consistent with past practice.

all impacted staff must agree, or else the meeting becomes optional.[6] But the District did not obtain consent from all ILC teachers.

The District changed the status quo in several ways. The first two ways are evident from the above discussion: the District deviated from the CBA's protections and took a new or changed position that "mutual agreement" need not include all affected employees. One other deviation from the status quo warrants mention as well: the District adopted a separate new contract interpretation, claiming it can require teachers to attend a meeting even beyond their normal on-site obligation, provided the meeting occurs at a site that is not the school where they normally teach.[7]

The District's primary argument as to the first unilateral change element is that the ALJ allegedly erred by failing to mention "the most important point dealing with unilateral action." According to the District, *Pasadena Area Community College District*

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[6] Past practice can be used to establish the status quo from which we assess an alleged unilateral change, and it can also be used as an interpretive aid in assessing ambiguous written language. In the former instance, a past practice establishes the status quo only if it was "regular and consistent" or "historic and accepted." (*Merced*, *supra*, PERB Decision No. 2740-M, p. 13, fn. 9.) However, the inquiry is fundamentally different when analyzing the parties' past practice to help ascertain the meaning of ambiguous language. (*Antelope Valley Community College District* (2018) PERB Decision No. 2618, p. 21.) In these circumstances, the past practice is but one tool for interpreting the contract, and therefore need not be as definitive as when it is defining the status quo in the absence of a contract term. (*Id*. at p. 22.) Here, the past practice comports with the best reading of the language, and there is no contrary evidence suggesting a different interpretation.

[7] The dissent, citing to one of two times the District put this new interpretation in writing, reads the District's position as nothing more than a mistaken summary of an Association witness's testimony. The record does not support this notion. Rather, both times the District sets forth its new interpretation, it claims it can require ILC teachers to attend in-person meetings beyond 2:30 p.m. if it moves such meetings to Washington Elementary, viz., a site away from ILC.

(2015) PERB Decision No. 2444 (*Pasadena*) requires an employer to have "contemplated a change in policy," i.e., intended to change policy, as a predicate for a unilateral change violation. However, the District waived this argument by failing to raise it prior to filing exceptions to the Board. (*City of Davis* (2018) PERB Decision No. 2582, p. 17.) Moreover, even had the District not waived this argument, we proceed to explain why the District misconstrues PERB precedent, which has long held that intent is not necessary in establishing any of the four elements of a prima facie unilateral change case. (*City of Montebello* (2016) PERB Decision No. 2491-M, p. 10 (*Montebello*).)

In *Pasadena*, the Board found that the employer adopted an academic calendar, which is a mandatory subject of bargaining, without meeting and conferring and participating in statutory impasse procedures with the union. The Board stated: "Whether a unilateral action is the creation, implementation or enforcement of policy, or a change to existing policy as contained in a written agreement, in written employer rules or regulations, or in an unwritten established past practice, our statutes require an employer contemplating a change in policy concerning a matter within the scope of representation to provide the exclusive representative notice and an opportunity to bargain." (*Pasadena*, *supra*, PERB Decision No. 2444, p. 12.) This sentence merely restates the longstanding rule that an employer must give the exclusive representative notice and an opportunity to bargain before making a negotiable policy change. (See, e.g., *Arcohe Union School District* (1983) PERB Decision No. 360, p. 10 ["[p]rior to unilaterally changing a matter within scope, an employer has the obligation to provide

the exclusive representative of its employees with notice of, and a reasonable opportunity to negotiate over, the contemplated change"] (underline in original).)

In arguing that the word "contemplating" in *Pasadena* signifies "intending," the District invites us to upend decades of settled Board precedent by adding a new element to the prima facie case of a unilateral change. *Pasadena* does not stand for such a proposition. As the *Pasadena* Board elaborated, "PERB has always recognized *newly created, implemented or enforced policy* as subject to its unilateral action doctrine." (*Pasadena*, *supra*, PERB Decision No. 2444, p. 12, fn. 6, original italics, citing to *Gonzales Union High School District* (1993) PERB Decision No. 1006, adopting proposed decision at pp. 20-21; *Healdsburg Union Elementary School District* (1994) PERB Decision No. 1033, adopting proposed decision at pp. 16-20; and *San Joaquin County Employees Assn. v. City of Stockton* (1984) 161 Cal.App.3d 813, 819.)

Finally, we note that in *Grant Joint Union High School District* (1982) PERB Decision No. 196 (*Grant*) and in multiple decisions citing to *Grant*, the Board has stated that it "is concerned, therefore, with a unilateral change in established policy which represents a conscious or apparent reversal of a previous understanding, whether the latter is embodied in a contract or evident from the parties' past practice." (*Id.* at p. 8.) While "conscious" suggests awareness and therefore a level of intentionality, this adjective crucially appears as one of two options: "conscious or

apparent." The latter adjective, "apparent," allows for changes that are discernable but not conscious.[8]

Thus, we reaffirm that employer intent is not required to establish the first element of the prima facie unilateral change test. (*Montebello*, *supra*, PERB Decision No. 2491-M, p. 10; *County of Riverside* (2014) PERB Decision No. 2360-M, p. 18 [unilateral changes carry such potential to frustrate negotiations, that they are unlawful "even without evidence of subjective bad faith or malign motive"].)[9]

Although the record shows the District deviated from the parties' CBA and either implemented new policies or enforced existing policies in a new way, such conduct does not establish a prima facie unilateral change unless it also meets the

[8] *Grant* referred to a "reversal of a previous understanding" as part of discussing what we now label as the first unilateral change element. After *Grant*, the Board added another means of establishing that element, for which it does not make sense to discuss a "reversal of a previous understanding." Specifically, as noted above, a charging party can alternatively satisfy the first unilateral change element by showing that an employer established a new policy where there was none before or interpreted an existing policy in a new way.

[9] The District also seeks to exploit an obvious typographical error in the proposed decision. The proposed decision mistakenly described paragraph 4 of the complaint as alleging that "the District scheduled a mandatory professional development [meeting] to extend 30 minutes beyond the normal on-site workday on May 22, 2019 *with* the consent of affected unit members." (Emphasis supplied.) The next sentence, however, makes clear that this was an inadvertent mistake, as it stated that the "issue here is an alleged breach of the Hours of Employment provisions of the parties' CBA, particularly those regarding scheduling mandatory adjunct events outside the normal on-site obligation *without* the consent of affected unit members." (Emphasis supplied.) In any event, the complaint, which tracks the allegations in the unfair practice charge, is sufficient to demonstrate the allegations at issue, and there is no dispute those documents allege the District scheduled the May 22 meeting *without* the teachers' consent.

other three elements. (EERA, § 3541.5, subd. (b) [a contract breach does not constitute an independent EERA violation, and therefore is only actionable at PERB if it would "also constitute an unfair practice."].) We therefore turn to the remaining disputed element.

B. Generalized Effect or Continuing Impact

A contract breach has a "generalized effect or continuing impact"[10] if either: (1) the breach changes a policy or employment term applicable to future situations; or (2) the employer acts unilaterally based upon an incorrect legal interpretation or insistence on a non-existent legal right that could be relevant to future disputes. (*Sacramento City Unified School District* (2020) PERB Decision No. 2749, p. 8 (*Sacramento*); see also *San Bernardino Community College District* (2018) PERB Decision No. 2599, pp. 7-8 (*San Bernardino*); *City of Davis* (2016) PERB Decision No. 2494-M, pp. 20-23 (*Davis*); *Montebello*, *supra*, PERB Decision No. 2491-M, p. 15 [continuing impact or generalized effect found where employer asserts it had a contractual or other right to take the action, essentially asserting a right to repeat the disputed conduct]; *County of Santa Clara* (2015) PERB Decision No. 2431, p. 19 (*Santa Clara*); *Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262, p. 15 [application of zero tolerance provision of drug testing policy had a generalized effect and continuing impact]; *Regents of the University of California* (2010) PERB Decision No. 2101-H, p. 25; *Hacienda La Puente Unified School District* (1997) PERB Decision No. 1186, p. 4 [finding unilateral change because there was

[10] Because the Association satisfies this element by showing a "continuing impact," we frequently use that phrase as a shorthand in this decision.

"no evidence to suggest" that the employer would in the future refrain from taking similar actions].)

In *Davis*, *supra*, PERB Decision No. 2494-M, the Board noted that the proposed decision under review had erroneously assumed that a single deviation from a contract did not have a continuing impact. (*Id*. at pp. 20, 24, 28-29.) The Board explained that such a deviation can have a continuing impact rather than merely constituting an "isolated" breach, if the employer has "imposed its own interpretation" on a contractual provision, created a standard not found in the contract, or interpreted the contract in a manner contrary to its intended meaning. (*Id*. at p. 20 [explaining the Board's holdings in three cases involving Regents of the University of California].) Such conduct has a continuing impact to the extent it suggests that a similar scenario may arise in the future and the employer may then take the same approach. (*Id*. at p. 21.)

Applying these principles, *Davis* found that placing a single employee on a performance improvement plan had more than an isolated effect on employment terms because in doing so, the employer unilaterally asserted a right to implement this new evaluation system on employees, without first bargaining with the employees' union. (*Id.* at pp. 29-32.) In another section of *Davis*, the Board found no violation when the employer denied a vacation request, since the employer had not asserted a new contract interpretation or new right. (*Davis, supra*, PERB Decision No. 2494-M, pp. 24-28.) Along the same lines, the Board cited with approval several earlier decisions in which it found certain employer conduct had only an isolated impact, rather than a

continuing one, because the employer was not asserting a new interpretation or new right. (*Id*. at pp. 22-23.)

The Board applied these principles again in *Sacramento*, *supra*, PERB Decision No. 2749. There, an employer changed policy where it refused to arbitrate a grievance, claiming a non-existent legal right to decide for itself whether a salary schedule agreement was a binding contract and whether related disputes were arbitrable. (*Id*. at p. 9.) While the employer referred to the grievance at issue as "extraordinary," it retained for itself sole discretion to define this category of grievances and when and to what extent it might follow the same interpretation in the future. (*Ibid*.) Thus, the single refusal to arbitrate a grievance supported a unilateral change claim because the employer asserted the right to act similarly in the future. (*Ibid*.; see also *Region 2 Court Interpreter Employment Relations Committee & California Superior Courts of Region 2* (2020) PERB Decision No. 2701-I, p. 54, quoting *County of Riverside* (2003) PERB Decision No. 1577-M, p. 6. ["The failure to properly process even a single grievance has a generalized effect or continuing impact on bargaining unit members' terms and conditions of employment if 'the action is based upon the employer's belief that it had a contractual right to take the action without negotiating with the union.'"]; *San Bernardino*, *supra*, PERB Decision No. 2599-M, pp. 7-8 [decision to use GPS to track a single employee had a continuing impact because employer asserted contractual right to do so]; *Santa Clara*, *supra*, PERB Decision No. 2431-M, p. 19 [decision not to reimburse single employee for tuition expenses could have continuing impact if it reflected employer's assertion of incorrect contractual interpretation that could arise again].)

The dissent apparently believes some of the decisions noted above were off base in certain respects. We disagree, but we decline to relitigate, in a summary format, such fact-sensitive applications of the unilateral change doctrine. There is no substitute for close factual analysis in making the critical determination regarding when a change or deviation from the status quo has a generalized effect or continuing impact, versus when it is at most a one-time mistake that is unlikely to recur. While no single precedent covers enough disparate circumstances to be our touchstone in every case, *Davis* represents the Board's most thorough treatment of the issue, describing both scenarios that have a continuing impact and those that do not.

Here, there is a continuing impact for several reasons. First, the record as a whole shows that the District now claims the CBA allows it to schedule mandatory on-site professional development meetings outside of the seven-hour on-site obligation based on "collaboration" with some subset of affected teachers, rather than by obtaining consent from all affected teachers or making the meeting voluntary. The dissent argues the District never explicitly stated that "'mutual agreement' can include less than all affected employees," and that the Board therefore has "conjured" a generalized effect or continuing impact. This argument goes to the heart of the differing approaches evident in the majority and dissenting opinions. Under our approach, there is a continuing impact because: (1) the District did not attempt to rebut the Association's contention that, prior to this case, a meeting outside the on-site obligation was voluntary unless all affected employees consented; and (2) the District has now applied a new interpretation, under which collaboration with an unknown number of affected employees meets its obligation. We do not turn a blind eye to the

obvious import: the District has reinterpreted the contract's "mutual agreement" requirement in a manner that is likely to recur and therefore impacts the parties' rights and obligations going forward.

The District has also asserted a second new contract interpretation, claiming it can require teachers to attend a meeting even beyond the normal on-site obligation, provided the meeting occurs at a site that is not the school where they normally teach. Both new interpretations have a generalized effect or continuing impact on certificated employees' employment terms by altering the parties' negotiated arrangement, in which teachers may need to perform myriad tasks outside their seven-hour obligation but can choose to work from home and have the right to decide if they want to take on additional on-site obligations beyond seven hours.[11]

As discussed above, there is no cognizable unilateral change when an employer makes a one-time mistake that has no likelihood of prospectively impacting rights or obligations. Significantly, though, it is not only one-time mistakes with no continuing impact that we leave to the parties' contractual grievance and arbitration procedures. Rather, even where a new contract interpretation has a continuing impact, PERB defers to contractual procedures if (1) the dispute arises within a stable

[11] There is another respect in which this case illustrates why a charging party is sometimes able to establish, as here, that a single contract breach has a continuing impact. In a memorandum rejecting the Association's grievance, the District asserted that the Association had in the past declined to proceed to arbitration over another incident in which the District required teachers to work "beyond their normal on-site day and without their mutual agreement," and this prior incident "stands as precedent" for any future similar issue. This memorandum starkly demonstrates the rationale for the above-discussed PERB principles: an employer's insistence on an incorrect contract interpretation in one instance may often have a continuing impact.

collective bargaining relationship; (2) the employer is willing to waive procedural defenses to arbitration and arbitrate the merits of the dispute' (3) the contract and its meaning lie at the center of the dispute; and (4) no recognized exception to deferral applies. (*County of Santa Clara* (2021) PERB Order No. Ad-485-M, pp. 6-7). For that reason, as noted earlier, only a fraction of cases turning on alleged contractual violations are filed at PERB. Most such disputes go to arbitration, as charging parties usually know what circumstances will or will not lead to a successful motion to defer to arbitration. The District could have arbitrated the merits of this matter, but instead it raised a procedural defense to doing so. That decision, combined with the continuing impact of the District's interpretations, led us to where we are today.

Accordingly, the District's exceptions to the ALJ's liability findings do not demonstrate any error impacting the outcome.

II. 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); *Lodi*, *supra*, PERB Decision No. 2723, p. 20.) PERB's customary remedy for an employer's unlawful unilateral change includes directing that the charging party and affected employees be made whole. (*Ibid*.) An order that may require the compliance officer to engage in some approximation is preferable to "permitting the employer to evade liability because of uncertainty caused by the employer's own unlawful conduct, and thus leaving an unfair practice unremedied." (*Id*. at p. 21, fn. 13, citing *City of Pasadena* (2014) PERB Order No. Ad-406-M, pp. 8, 13-14, & 26-27.)

Here, the record included some relevant evidence as to which ILC teachers attended the May 22 meeting, but the parties' litigation to date focused mainly on liability, and we therefore direct OGC to resolve in compliance proceedings which teachers more likely than not attended the meeting past 2:30 p.m. While the ALJ found it efficient to shorten compliance proceedings by ordering reimbursement for nine of the ten ILC teachers specifically named in the Association's grievance (excluding Mayra Garza based on testimony that she left the meeting by 2:30 p.m.), further evidence could reveal that remedy to be underinclusive in some respects and/or overinclusive in other respects. As of May 22, 2019, approximately 15 dual language teachers worked at ILC. Testimony from District witnesses Montelongo and Swanson indicates that most ILC dual language teachers attended the meeting. One or more attendees may have sufficient recollection to provide evidence regarding who did and did not attend. Moreover, the District typically maintains employee sign-in sheets or other attendance records for such meetings, but no such records were offered into evidence. If a sign-in sheet or similar document exists, it could provide evidence regarding who attended.

Compliance proceedings generally should not lead to protracted litigation. (See, e.g., *Sacramento*, *supra*, PERB Decision No. 2749, pp. 19-20.) This principle is particularly apt here, where affected teachers will at most be owed 30 minutes of extra pay, plus 7 percent annual interest.[12] Moreover, it is permissible to estimate

[12] Appendix F of the CBA establishes an "extra hourly assignment" rate. Even if this rate may be intended to cover voluntary rather than involuntary extra assignments, it is useful in that it provides a bilaterally negotiated value for an hour's worth of a teacher's time.

appropriate damages if the exact measure of damages is uncertain. (*Id*. at p. 20.) With these principles in mind, OGC may consider any number of methods to expedite compliance. For instance, the compliance officer could consider accepting sworn declarations or convening a virtual hearing. Any person who was present at the meeting may, depending on the extent of her or his recollection, provide evidence as to who else was present. The Association may subpoena, or the District may agree to produce, any sign-in sheets or other attendance records in the District's possession. Alternatively, the parties may negotiate to resolve all make-whole relief issues, thereby saving further litigation expenses.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the record in the case, it is found that Bellflower Unified School District violated the Educational Employment Relations Act (EERA), Government Code section 3543.5, subdivisions (a), (b), and (c). Specifically, the District unilaterally deviated from the status quo as set forth in the parties' collective bargaining agreement and implemented new policies or enforced existing policies in a new way, when it involuntarily required Intensive Learning Center (ILC) teachers to attend an on-site work meeting lasting beyond the teachers' seven-hour on-site work obligation.

Pursuant to section 3541.5, subdivision (c) of the Government Code, it hereby is ORDERED that the District, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Scheduling mandatory on-site activities for certificated employees beyond their contractual on-site obligation and without the consent of all impacted employees.

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

1. Make whole ILC certificated employees who attended the May 22, 2019 mandatory professional development meeting past 2:30 p.m., as determined in the compliance process, by compensating each of them with one-half hour extra pay at the rate set forth in Appendix F of the parties' 2016-2019 collective bargaining agreement. These amounts shall be augmented by interest compounded at a rate of 7 percent per annum.

2. Within 10 workdays after this decision is no longer subject to appeal, post at all work locations where notices to certificated employees in the District customarily are posted, copies of the Notice attached hereto as an Appendix. In addition to physical posting, the Notice shall be posted by electronic means customarily used by the District to regularly communicate with employees in the bargaining unit. 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. Reasonable steps shall be taken

to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.[13]

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. Respondent 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 the Association.

Chair Banks joined in this Decision.

Member Shiners' dissent begins on p. 25.

[13] In light of the 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 certificated 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 Association requests in writing that OGC alter or extend the posting period, require additional notice methods, or otherwise adjust the manner in which employees receive notice, OGC shall investigate and solicit input from all parties. OGC shall provide amended instructions to the extent appropriate to ensure adequate publication of the Notice, such as directing the District to commence posting within 10 workdays after a majority of certificated employees have resumed physically reporting on a regular basis; directing the District to mail the Notice to all certificated 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 certificated employees with whom it does not customarily communicate through electronic means. (*City of Culver City* (2020) PERB Decision No. 2731-M, p. 29, fn. 13.)

SHINERS, Member, dissenting: The complaint in this case alleged that the Bellflower Unified School District made an unlawful unilateral change in violation of the Educational Employment Relations Act (EERA), and derivatively interfered with protected rights, when, on May 22, 2019, it required certain District teachers to attend a meeting for 30 minutes beyond their contractual on-site workday. In my view, the Bellflower Teachers Association did not meet its burden to prove the complaint allegations by a preponderance of the evidence because the evidence before us shows that the District's conduct did not breach the parties' collective bargaining agreement (CBA) nor does it show that the alleged breach amounted to a change in policy. I accordingly dissent.

DISCUSSION

When resolving exceptions to a proposed decision, the Board applies a de novo standard of review. (*County of Santa Clara* (2019) PERB Decision No. 2629-M, p. 6.) Under this standard, we review the entire record and are free to make different factual findings and reach different legal conclusions than those in the proposed decision. (*City of Milpitas* (2015) PERB Decision No. 2443-M, p. 12.)[14]

A public school employer may not "[r]efuse or fail to meet and negotiate in good faith with an exclusive representative." (EERA, § 3543.5, subd. (c).) A public school employer's unilateral change to a matter within the scope of representation constitutes

[14] The Association argues that we should defer to the administrative law judge's (ALJ) factual findings because his findings "are firmly rooted in the testimony of the District's witnesses and the documentary evidence." But the ALJ made no credibility determinations based on his observation of witness testimony. We thus owe no deference to the ALJ's factual findings. (*State of California (Department of Social Services)* (2019) PERB Decision No. 2624-S, p. 11.)

a per se violation of the duty to meet and negotiate. (*Lodi Unified School District* (2020) PERB Decision No. 2723, p. 11 (*Lodi*); *Stockton Unified School District* (1980) PERB Decision No. 143, p. 22.) To establish a prima facie case that a respondent employer made an unlawful unilateral change, a charging party union that exclusively represents a bargaining unit must prove: (1) the employer changed or deviated from the status quo; (2) the change or deviation concerned a matter within the scope of representation; (3) the change or deviation had a generalized effect or continuing impact on represented employees' terms or conditions of employment; and (4) the employer reached its decision without first providing adequate advance notice of the proposed change to the union and bargaining in good faith over the decision, at the union's request, until the parties reached an agreement or a lawful impasse.[15] (*County of Merced* (2020) PERB Decision No. 2740-M, pp. 8-9.)

[15] I join in the majority's modification of PERB's unilateral change test because it more accurately captures the distinction between the test's first and third elements than our prior formulation, which tended to conflate the two elements. I would go one step further, however, and delete the phrase "generalized effect" from the third element because it suggests that the number of employees affected by the deviation from the status quo is relevant to whether the deviation is a change in policy. As we have long held, a change in policy may be found when the deviation affected only one employee. (*Hacienda La Puente Unified School District* (1997) PERB Decision No. 1186, p. 4.) By the same token, the fact that many employees—or even the entire bargaining unit—was affected by a deviation on one occasion does not mean the deviation amounted to a change in policy. Rather, in both instances the relevant inquiry is whether the deviation may have an impact on bargaining unit members in the future. (See, e.g., *City of Montebello* (2016) PERB Decision No. 2491-M, p. 15; *Regents of the University of California (Davis)* (2010) PERB Decision No. 2101-H, pp. 25-26.) "Continuing impact" thus fully describes the relevant inquiry without the need for the disjunctive "generalized effect" language.

The charging party must prove each of these elements by a preponderance of the evidence. (*City of Montebello*, *supra*, PERB Decision No. 2491-M, p. 17 (*Montebello*); PERB Reg. 32178.)[16] "Proof by a preponderance of the evidence requires a party to convince the trier of fact that the existence of a particular fact is more probable than its nonexistence." (*Los Angeles Unified School District (2014)* PERB Decision No. 2359, p. 25, fn. 22.) The preponderance of the evidence standard focuses on the quality of the evidence presented, not the quantity of evidence produced by either party. (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 324-325.)

The District does not dispute that the alleged change concerned a matter within the scope of representation, i.e., working hours, and that it did not provide the Association with notice or an opportunity to meet and negotiate before making the alleged change. The District argues, however, that the evidence fails to establish that the District breached the parties' CBA or that the alleged breach constituted a policy change rather than an isolated breach. For the following reasons, I agree.

I. Contract Breach

One way to establish the first element of the unilateral change test is to prove that the employer deviated from the status quo set forth in a written agreement between the parties. (*Lodi*, *supra*, PERB Decision No. 2723, p. 11.) Article VII of the parties' CBA governs unit members' hours of employment. Article VII, Section B.1 provides that the "normal on-site obligation" for elementary school teachers, i.e., the

[16] PERB Regulation 32178 provides: "The charging party shall prove the complaint by a preponderance of the evidence in order to prevail."

number of hours each day elementary school teachers must be physically present at their school site, is seven hours. Article VII, Section D.1 allows the District to mandate attendance at "faculty, departmental, and/or grade level meetings of reasonable frequency and duration," but only "within the normal on-site day." With one exception not relevant here, Section D.1 further provides that "[a]ny additional teachers' meetings . . . may be scheduled only by mutual agreement of the staff."

On May 22, 2019, the District required dual-language immersion teachers from Washington Elementary School and the Intensive Learning Center (ILC) to attend a professional development meeting from 2:00 p.m. to 3:00 p.m. The on-site workday for teachers at Washington Elementary School is 8:00 a.m. to 3:00 p.m. The on-site workday for ILC teachers is 7:30 a.m. to 2:30 p.m. Thus, according to Article VII, Section D.1, the District could not schedule—and by extension compel—ILC teachers to attend a meeting after 2:30 p.m. without those teachers' agreement. Whether the District breached Article VII thus turns on whether ILC teachers agreed to schedule the May 22, 2019 meeting from 2:00 p.m. to 3:00 p.m.

Washington Elementary School Principal Dr. Angelica Montelongo testified that the schedule of professional development meetings for the District's dual-immersion teachers is developed and set at the end of the prior school year.[17] Montelongo testified that the professional development meeting schedule for the 2018-2019 school year was developed during several in-person meetings she attended with dual-

[17] ILC Principal Beverly Swanson confirmed this practice. Indeed, the 2019-2020 professional development meeting schedule was discussed at the May 22, 2019 meeting that is in dispute.

immersion teachers from both Washington Elementary School and ILC near the end of the 2017-2018 school year. The 2018-2019 schedule created at that time listed an entry for "05/2019" showing "**District Dual Team Meeting** – Writing Calibration [¶] **Site/District PD 2:00-3:00,** 3:15-5:00*" (bold in original).[18] Montelongo testified she sent an e-mail with the scheduled time to the one dual-immersion teacher at Washington Elementary confirming that the schedule was "designed to meet the needs of the dual program as identified through team dialogue on May 16, 2018." Montelongo specifically testified that the meeting time for the "05/2019" entry was agreed upon in collaboration with ILC dual-immersion teachers. She further testified that they did not set a date for the May 2019 meeting at that time to ensure the meeting did not conflict with subsequently scheduled general professional development meetings the dual-immersion teachers might wish to attend. Swanson testified that although she was not involved in preparing the 2018-2019 professional development meeting schedule, she transferred the information from it onto the ILC staff calendar when she became ILC Principal in August 2018.

Association witness Zoila Sanchez, a dual-immersion teacher at ILC, did not testify about the Spring 2018 meetings, even though she presumably attended them. In fact, she flatly denied ever having been involved in establishing a professional development meeting schedule for dual-immersion teachers. When asked whether she was aware of the May 22 meeting before receiving the May 15 calendar invitation for it, she responded, "I do not recall. I don't remember." She also could not remember

[18] According to Montelongo, the asterisk signified the meeting from 3:15 p.m. to 5:00 p.m. was optional.

whether the May 15 invitation was the first notice she received of the May 22 meeting.[19] Despite her lack of recall on these points, Sanchez unequivocally denied ever having been asked by the District to attend the May 22 meeting.

Neither Montelongo's testimony nor Sanchez's testimony is specific enough in itself to resolve whether the ILC dual-immersion teachers agreed to the 2:00 p.m. to 3:00 p.m. meeting time for the May 22 meeting. But Principals Montelongo and Swanson testified that the schedule of professional development meetings for the District's dual-immersion teachers is developed during meetings with the teachers near the end of the prior school year. Montelongo testified that the District followed this practice in setting the professional development meeting schedule for the 2018-2019 school year, and Swanson testified this practice was followed in setting the professional development meeting schedule for the 2019-2020 school year. In the face of this evidence of a consistent practice, Sanchez's categorical denial of ever having been involved in establishing a professional development meeting schedule for dual-immersion teachers is not credible. Moreover, Montelongo's circulation of the draft professional development meeting calendar at Washington Elementary in June 2018 and Swanson's placement of the meeting dates on the ILC staff calendar in August 2018, were consistent with having obtained the ILC teachers' consent for the May 2019 meeting to take place from 2:00 p.m. to 3:00 p.m.

Unlike my colleagues, I find Sanchez's denial of ever having been asked by the District to attend the May 22 meeting inconclusive. It is possible that the date of the

[19] This testimony does not support the majority's finding that Sanchez did not know about the timing of the May 22 meeting until one week in advance.

meeting was set without her approval, as the meeting schedule created in Spring 2018 did not list a specific date for the May 2019 meeting. But even if this is so, Sanchez's testimony about not being asked to consent to a meeting on the specific date of May 22 is not necessarily inconsistent with her previously having consented to a meeting from 2:00 p.m. to 3:00 p.m. on some day in May 2019.

Weighing Montelongo's and Swanson's corroborating testimony against Sanchez's unpersuasive denial and inconclusive testimony, it is more probable than not that ILC dual-immersion teachers agreed to a 2:00 p.m. to 3:00 p.m. time for the May 2019 meeting.[20] The Association consequently failed to prove by a preponderance of the evidence that the May 22, 2019 meeting breached CBA Article VII. On this ground alone, the complaint and underlying unfair practice charge should be dismissed. (See *City of Davis* (2016) PERB Decision No. 2494-M, p. 19 (*Davis*) ["An employer does not make an unlawful unilateral change if its actions conform to the terms of the parties' agreement"].)

II. Change in Policy

Even if the May 22, 2019 meeting breached CBA Article VII, that breach did not amount to an unlawful unilateral change. PERB does "not have the authority to enforce agreements between the parties." (EERA, § 3541.5, subd. (b).) In recognition of this limitation, "the Board and courts have established in numerous cases that an

[20] The majority claims the District's failure to raise consent as a defense to the Association's grievance over the May 22 meeting shows the ILC dual-immersion teachers did not consent to the 2:00 p.m. to 3:00 p.m. meeting time. But, as the majority recognizes, the District denied the grievance on procedural grounds without addressing the merits. The denial therefore sheds no light on whether the District obtained the ILC teachers' consent to the meeting time.

alleged unlawful change must be more than an isolated breach of contract or practice, but instead must constitute a change of policy that had a generalized effect or continuing impact upon terms and conditions of employment of bargaining unit members." (*Davis*, *supra*, PERB Decision No. 2494-M, pp. 19-20.) As the Board explained in *Grant Joint Union High School District* (1982) PERB Decision No. 196 (*Grant*):

> "This distinction is crucial. A change of policy has, by definition, a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members. On the other hand, when an employer unilaterally breaches an agreement without instituting a new policy of general application or continuing effect, its conduct, though remediable through the courts or arbitration, does not violate the Act. The evil of the employer's conduct, therefore, is not the breaching of the contract per se, but the altering of an established policy mutually agreed upon by the parties during the negotiation process. [Citations.] By unilaterally altering or reversing a negotiated policy, the employer effectively repudiates the agreement. [Citation.]"

(*Id*. at p. 9.)

Following the reasoning in *Grant*, "PERB has found an unlawful policy change, as opposed to an isolated breach of contract, where an employer unilaterally establishes a policy that represents a conscious or apparent reversal of a previous understanding."[21] (*Davis*, *supra*, PERB Decision No. 2494-M, p. 20.) A policy change

[21] I disagree with my colleagues that the "reversal of a previous understanding" language is part of the first element of the unilateral change test, i.e., whether the employer changed or deviated from the status quo. As *Grant* and *Davis* clearly illustrate, this language is integral to the third element of the test because its purpose is to determine whether the alleged change or deviation constitutes an ongoing change in policy or was simply an isolated contract breach.

may be found when the employer asserts a contractual right to make the alleged change without negotiation. (*Hacienda La Puente Unified School District*, *supra*, PERB Decision No. 1186, p. 4.) In such cases, "the interpretation of a contractual provision must be sufficiently clear to establish a breach that amounts to a unilateral change." (*State of California (Departments of Veterans Affairs & Personnel Administration)* (2008) PERB Decision No. 1997-S, p. 19; see *Grant*, *supra*, PERB Decision No. 196, pp. 11-12 [finding "a continuing impact on the bargaining unit" where the employer adopted "a new policy of general application in conflict with the parties' negotiated agreement"].)

In contrast, the Board has not found a policy change in two other scenarios. The first of these is when the employer "did not clearly repudiate any prior understanding, agreement, or practice" but merely disagreed with the exclusive representative about the meaning of ambiguous contract language. (*Eureka City School District* (1985) PERB Decision No. 528, pp. 5-6; accord *State of California (Departments of Veterans Affairs & Personnel Administration)*, *supra*, PERB Decision No. 1997-S, p. 17 ["where the meaning of the relevant contract provision is ambiguous, such that the action in question does not clearly breach the contract, a unilateral change is not established"]; *Trustees of the California State University* (1997) PERB Decision No. 1231-H, p. 3 [employer's maintenance of a consistent legal position based on its interpretation of the relevant contract language did not constitute a unilateral change].)

The second scenario—of particular relevance here—is "[w]here the policy embodied in the contract is not denied by the employer and the dispute involves

disagreement over the application of a contractual provision." (*Fall River Joint Unified School District* (1998) PERB Decision No. 1259, p. 26.) In *Grant*, for instance, the contract provided that after the district's review of certain fund balances, unit members would receive 60 percent of any excess funds, subject to deductions for contingent liabilities and certain reserves. (*Grant*, *supra*, PERB Decision No. 196, pp. 4-5.) A disagreement arose between the parties over what deductions were allowed from the surplus amount. (*Id*. at p. 5.) The district did not dispute its contractual obligation, but claimed it correctly implemented the calculation for determining the relevant surplus. (*Id*. at p. 12.) The Board found this dispute over whether the district correctly calculated the surplus was not a change in policy. (*Ibid*.)

Here, the District has consistently recognized that CBA Article VII does not allow it to schedule meetings outside the "normal on-site day" without teachers' consent. The parties dispute whether the District obtained ILC teachers' consent to hold the May 22, 2019 professional development meeting from 2:00 p.m. to 3:00 p.m. As in *Grant*, this is a dispute over whether the District fulfilled its contractual obligation on one occasion. Accordingly, even if the May 22, 2019 meeting breached CBA Article VII, the breach did not constitute a change in policy that had a generalized effect or continuing impact on bargaining unit members' terms and conditions of employment.

The Association argues that two pieces of evidence show the District asserted a unilateral right to schedule meetings outside teachers' normal on-site workday. First, the Association relies on the following testimony from Montelongo:

> "[Association Counsel]: Can you confirm for me where here, with regard to the May 2019 meeting, where does it indicate that that meeting is a mandatory meeting?
> "[Montelongo]: If you scroll to the bottom, is [*sic*] specifies that – Sorry. It specifies that those with an asterisk are extra hours for a professional development opportunity, which means that the other times are not extra hours, which is within their obligations."

Montelongo's statement was made in the context of explaining a specific exhibit during the hearing: the 2018-2019 professional development meeting schedule. The statement that the mandatory meeting was within the teachers' obligations is true as to dual-immersion teachers at her school, Washington Elementary, but she was never asked whether a meeting from 2:00 p.m. to 3:00 p.m. was within ILC teachers' normal on-site workday. She also had previously testified that the 2:00 p.m. to 3:00 p.m. meeting time for May 2019 was mutually agreed with the ILC teachers in Spring 2018. Based on this testimony, requiring ILC teachers to attend that meeting would not have violated the CBA. Viewed in context, Montelongo's statement was not an assertion that the District can schedule and require ILC teachers to attend meetings after 2:30 p.m. in the future.

Second, the Association relies on a statement in the District's post-hearing brief that "if the meeting had been held at Washington there would have been no alleged violation." This quotation from the brief's Statement of Facts section appears to summarize the following testimony from Association witness Amy Mustafa:

> "[District Counsel]: And do you know what the on-site hours are at Washington as compared with the ILC?
> "[Mustafa]: Yes.
> "[District Counsel]: And what are those hours at Washington?
> "[Mustafa]: Eight a.m. to three p.m.

> "[District Counsel]: Okay. So, this meeting was scheduled until three p.m. for dual immersion teachers, correct?
> "[Mustafa]: Correct.
> "[District Counsel]: And if it was a teacher from Washington attending this meeting, they would still be within their on-site hours, correct?
> "[Mustafa]: Correct."

The statement in the District's post-hearing brief, therefore, was not stating the District's position but rather relaying a point from Mustafa's testimony, albeit inaccurately; this point was repeated in the District's exceptions. But even if this one statement is considered evidence of the District's belief that it could unilaterally schedule meetings outside teachers' normal on-site workday, it is outweighed by numerous statements in the District's post-hearing brief and exceptions that the District recognizes that CBA Article VII does not allow it to schedule meetings outside the normal on-site workday without teachers' consent.

The Association also relies on the District's argument that the May 22, 2019 meeting did not breach the CBA as evidence of the District's belief that it can schedule mandatory meetings outside teachers' normal on-site workday. But allowing a denial of a contract breach to serve that evidentiary purpose would render every alleged contract breach an unfair practice in direct contravention of PERB's longstanding precedent holding that a contract breach violates EERA only when it "represents a conscious or apparent reversal of a previous understanding," thereby evincing a repudiation of the party's bargaining obligation. (*Davis*, *supra*, PERB Decision No. 2494-M, p. 20; *Grant*, *supra*, PERB Decision No. 196, p. 9.)

The Association's argument is not surprising, however, in light of language in recent Board decisions suggesting that a mere disagreement over interpretation of

contract language is enough to satisfy the "generalized effect or continuing impact" requirement. (See, e.g., *Sacramento City Unified School District* (2020) PERB Decision No. 2749, p. 8 [a policy change occurs when "the employer acts unilaterally based upon an *incorrect legal interpretation*"]; *Davis*, *supra*, PERB Decision No. 2494-M, p. 21 ["[i]n the cases where PERB determined that the contract violation also constituted an unfair practice, the employer had unilaterally changed a term and condition of employment by interpreting a contract term that would have waived the union's right to negotiate the change, and *that interpretation was deemed by PERB to be incorrect*"]; *Regents of the University of California* (2014) PERB Decision No. 2398-H, p. 28 ["UC's unannounced application of its *incorrect interpretation* therefore constituted an unlawful repudiation of the policy contained in the MOU"], italics added.) Although this language appears to describe prior situations where a continuing impact was found, it also obscures the distinction between a contract interpretation that amounts to a change in policy because it "represents a conscious or apparent reversal of a previous understanding" (*Davis*, *supra*, PERB Decision No. 2494-M, p. 20), and an interpretation that is merely contrary to the union's, which amounts to a purely contractual dispute (*Eureka City School District*, *supra*, PERB Decision No. 528, pp. 5-6). Unfortunately, the majority opinion perpetuates this confusion by repeatedly referring to "incorrect" contract interpretation as a basis for finding a policy change.[22]

[22] By making this observation, I do not suggest that any prior case was wrongly decided. My point is simply that the Board's improvident use of variations of the phrase "incorrect interpretation" in prior decisions apparently has led parties to perceive that to establish a generalized effect or continuing impact in a unilateral change case it need only show that the respondent's interpretation of the contract was

It is difficult to conceive of a contract interpretation dispute that would not constitute a change in policy according to the majority opinion's application of the "generalized effect or continuing impact" test in this case.[23] The overbreadth of the majority's approach is amply demonstrated by its ability to conjure up two additional bases for finding a generalized effect or continuing impact here. First, the majority finds that the District changed policy by taking "a new or changed position that 'mutual agreement' need not include all affected employees" and also "adopted a separate new contract interpretation, claiming it can require teachers to attend a meeting even beyond their normal on-site obligation, provided the meeting occurs at a site that is not the school where they normally teach." But the record does not establish the District ever took either of these positions. Rather, in its exceptions the District acknowledges that it cannot hold a mandatory meeting beyond the on-site workday without the consent of all impacted teachers.

Second, the majority finds that the District's denial of the Association's grievance established a continuing impact on bargaining unit members' terms and conditions of employment. The reason(s) for denying a grievance may show that the employer believes it has a legal right to make similar changes in the future.

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wrong. That is not—and has never been—the standard for establishing a generalized effect or continuing impact under PERB precedent.

[23] As a member of the National Labor Relations Board remarked about his colleagues' proclivity to treat most every contract breach as a unilateral change: "[t]hey would not only provide the means for parties to reach agreement at the bargaining table, but would follow the parties from the table into the workplace to dictate the implementation of the agreement." (*Detroit Cabinet & Door Co.* (1980) 247 NLRB 1415, 1419 (dis. opn. of Penello, M.)

(*Montebello*, *supra*, PERB Decision No. 2491-M, p. 16.) But the District's grievance denial did not assert that it could mandate teacher attendance at meetings beyond the on-site workday but rather that the Association waived its right to grieve alleged violations of Article VII. While this reason might support finding a unilateral change to the grievance procedure (which was not alleged here), it does not support finding a continuing impact because the District has consistently acknowledged its contractual obligation to obtain all teachers' consent before scheduling a meeting beyond the on-site workday.

PERB's jurisdiction over an unfair practice charge alleging a contract breach cannot turn on whether PERB can formulate some possible way in which the alleged breach could impact employees in the future. Rather, as our decisional law directs, PERB has jurisdiction only if the alleged contract breach amounts to repudiation of a party's bargaining obligation and is not an isolated, run-of-the-mill dispute over proper contract interpretation or application. The distinction between these two types of cases, while at times hard to discern, "is crucial." (*Grant*, *supra*, PERB Decision No. 196, p. 9.) As EERA section 3541.5, subdivision (b) indicates, the Legislature did not intend for PERB to resolve disputes over contract interpretation or compliance that do not also implicate the statutory issue of repudiation of the bargaining process. (*Davis*, *supra*, PERB Decision No. 2494-M, pp. 19-20.) Such pure contract disputes must be left to other forums for resolving contractual disagreements, such as arbitration or the courts. Otherwise, contrary to EERA's plain language and legislative intent, PERB becomes nothing more than an alternative forum for any contract dispute.

The majority appears to embrace the notion of PERB as an alternative forum for all contract disputes by claiming that the District's denial of the Association's grievance on procedural grounds "led us to where we are today." This mistakenly conflates PERB's jurisdiction with its discretion to defer an unfair practice charge to arbitration. PERB will not defer a charge to arbitration when the employer refuses to waive procedural defenses to arbitration. (*County of Santa Clara* (2021) PERB Order No. Ad-485-M, p. 6.) But deferral presumes that the allegations in the charge are subject to PERB's jurisdiction. (See *State of California (Department of Food & Agriculture)* (2002) PERB Decision No. 1473-S, p. 13 [EERA section 3541.5 "ensures a forum for *those disputes also constituting an unfair practice* if the employer is unwilling to waive procedural defenses in the parties' contract and arbitrate disputes", italics added].) In a unilateral change case, PERB's jurisdiction depends on whether the alleged change has a continuing impact on the bargaining unit. (EERA, § 3541.5, subd. (b); *Davis*, *supra*, PERB Decision No. 2494-M, pp. 19-20.) Absent a threshold showing of PERB's jurisdiction over the parties' contract dispute, the respondent's refusal to waive procedural defenses to arbitration is irrelevant.

Here, it appears that after the District asserted in its response to the Step Two grievance that the Association had waived its right to grieve alleged violations of CBA Article VII, the Association gave up on the contractual grievance procedure and filed this unfair practice charge. By suggesting that PERB has jurisdiction to decide a contract dispute whenever an employer denies a grievance on procedural grounds, the majority paves the way for similar forum shopping in the future.

In sum, the Association did not meet its burden to prove by a preponderance of the evidence that the District's alleged contract breach on May 22, 2019, constituted a change in policy that had a generalized effect or continuing impact on bargaining unit members' terms and conditions of employment. Thus, even if the District breached CBA Article VII, Section D.1 on this occasion, the breach did not amount to a repudiation of that provision as required to establish a violation of EERA. (*Grant*, *supra*, PERB Decision No. 196, p. 9.)

CONCLUSION

Because the Association failed to prove that the District breached CBA Article VII, and because it also failed to prove that such a breach would constitute a change in policy, the Association did not meet its burden to prove the unilateral change and derivative interference violations alleged in the complaint. I accordingly would dismiss the complaint and underlying unfair practice charge.

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-6519-E, *Bellflower Teachers Association, CTA/NEA v. Bellflower Unified School District*, in which all parties had the right to participate, it has been found that the Bellflower Unified School District violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq., by unilaterally deviating from policies contained in Article VII in the parties' 2016-2019 Collective Bargaining Agreement, and implemented new policies or enforced existing policies in a new way.

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

A. CEASE AND DESIST FROM:

1. Scheduling mandatory on-site obligations for certificated employees beyond their contractual on-site obligation and without the consent of all impacted employees.

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

1. Make whole Intensive Learning Center (ILC) certificated employees who attended the May 22, 2019 mandatory professional development meeting past 2:30 p.m., by compensating each of them with one-half hour extra pay at the rate set forth in Appendix F of the parties' 2016-2019 collective bargaining agreement. These amounts shall be augmented by interest compounded at a rate of 7 percent per annum.

Dated: _____ Bellflower 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.