STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

PETALUMA FEDERATION OF TEACHERS, LOCAL 1881, Charging Party, v. PETALUMA CITY ELEMENTARY SCHOOL DISTRICT/JOINT UNION HIGH SCHOOL DISTRICT, Respondent.	Case No. SF-CE-3091-E PERB Decision No. 2590 October 22, 2018

Appearances: Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for Petaluma Federation of Teachers, Local 1881; School & College Legal Services of California by Patrick C. Wilson, Attorney, for Petaluma City Elementary School District/Joint Union High School District.

Before Banks, Winslow and Shiners, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by the Petaluma City Elementary School District/Joint Union High School District (District) to the proposed decision (attached) of an administrative law judge (ALJ). Following remand to the Office of the General Counsel, as ordered by the Board in *Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485 (*Petaluma*), and a formal hearing, the ALJ found that the District interfered with employee and organizational rights, in violation of Educational Employment Relations Act (EERA)[1] section 3543.5, subdivisions (a) and (b), by: (1) prohibiting employees

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

represented by the Petaluma Federation of Teachers, Local 1881 (Local 1881) from distributing literature "of a political or union nature" on the District's premises, including during non-work time and in non-work areas; and (2) by directing employees to refrain from distributing pamphlets "during the workday," without regard to employee breaks or other non-work time. The ALJ also found that the District breached its duty to meet and negotiate in good faith and further interfered with employee and organizational rights, in violation of EERA section 3543.5, subdivisions (a), (b), and (c), by unreasonably delaying for approximately six weeks the provision of presumptively relevant information, which Local 1881 had requested for contract negotiations. In relevant part, the ALJ's proposed order directed the District to cease and desist prohibiting employees from distributing union-related literature anywhere on the District's premises, including during non-duty time and in non-working areas and from categorically prohibiting employees from handing out pamphlets or otherwise engaging in union or other concerted activities at any time during the workday.

The District has excepted to the ALJ's factual findings and legal conclusions as to each interference violation. It argues that the evidence produced at hearing was insufficient to establish that the District's September 5, and October 10, 2014 e-mail messages, which were alleged in the complaint to have prohibited employees and Local 1881 from engaging in protected conduct, were ever received, opened, and read by employees, or understood to prohibit union or other protected activities. It also argues that no evidence was presented to show that employees were deterred from exercising protected rights. Local 1881 argues that

the District's exceptions misstate the record and misconstrue PERB precedent, and urges PERB to adopt the ALJ's proposed decision.[2]

We have reviewed the formal hearing record, and considered the issues raised in the District's exceptions and Local 1881's response thereto in light of applicable law. Based on this review, we have determined that the ALJ's factual findings are adequately supported by the record as a whole and her legal conclusions are well reasoned and in accordance with applicable law. Accordingly, with the exception of the ALJ's treatment of the failure/refusal to provide information allegation,[3] the Board hereby adopts the proposed decision as the decision of the Board itself, as supplemented by the following discussion of the District's exceptions.

DISCUSSION

EERA makes it unlawful for a public school employer to "interfere with, restrain, or coerce employees" because of their exercise of protected rights, and to "[d]eny to employee

[2] The District has also filed with the Board a reply to Local 1881's response. Although PERB Regulations neither expressly provide for nor preclude filing reply briefs on appeal, the Board has ruled that it has discretion to consider reply briefs when doing so would "aid the Board in its review of the underlying dispute," such as when an opposition to the appeal has raised a new issue, discussed new case law or formulated new defenses to an allegation. (*Beverly Hills Unified School District* (2008) PERB Decision No. 1969, p. 7.) The Board has also considered a reply when it clarifies the issues on appeal by narrowing their number or scope. (*City of San Luis Obispo* (2016) PERB Order No. Ad-444-M, pp. 4-5.) The District's reply identifies no new issue, case law or defense raised by Local 1881's opposition, nor clarifies the issues by narrowing their number or scope. Accordingly, we have not considered the District's reply.

[3] The District has not excepted to the ALJ's findings and conclusions regarding the complaint's failure/refusal to provide information allegation. Because we find no prejudicial error or serious mistake of law in the proposed decision's treatment of this issue, we decline to disturb it. The proposed decision's ruling on this issue is therefore binding on the parties, but not precedential with respect to other cases. (PERB Regs. 32215 and 32300, subd. (c); *City of Torrance* (2009) PERB Decision No. 2004, p. 12; cf. PERB Reg. 32320, subd. (a)(2); *State Employees Trades Council United (Ventura, et al.)* (2009) PERB Decision No. 2069-H, pp. 6-7; *Morgan Hill Unified School District* (1985) PERB Decision No. 554, pp. 21-22, fn. 13.) PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

organizations rights guaranteed to them by [EERA]." (§ 3543.5, subds. (a), (b).) A prima facie case of interference, coercion or restraint is established if the employer's conduct would reasonably tend to or does in fact result in harm to protected rights. (*Carlsbad Unified School District* (1979) PERB Decision No. 89 (*Carlsbad*), pp. 10-11; *County of Riverside* (2010) PERB Decision No. 2119-M, pp. 16-23; *Jurupa Unified School District* (2012) PERB Decision No. 2283, p. 29.) The inquiry is an objective one which asks whether, under the given circumstances, an employer's conduct has discouraged, *or reasonably would discourage*, employees from engaging in present or future protected activity. (*Hartnell Community College District* (2015) PERB Decision No. 2452, p. 24; *Alisal Union Elementary School District* (1998) PERB Decision No. 1248, adopting proposed decision, p. 11, fn. 4; *Sacramento City Unified School District* (1982) PERB Decision No. 214, pp. 14-16; *Santa Monica Community College District* (1979) PERB Decision No. 103, pp. 19-20, affirmed by *Santa Monica Community College Dist. v. Public Employment Relations Bd*. (1980) 112 Cal.App.3d 684.) There is thus no requirement under *Carlsbad* that any employee felt subjectively threatened or intimidated, nor that any employee actually participated in protected activity, or was in fact discouraged from doing so. (*Los Angeles County Superior Court* (2018) PERB Decision No. 2566-C, p. 24, fn. 17; *Clovis Unified School District* (1984) PERB Decision No. 389, pp. 14-15.)

Applying these principles, PERB has repeatedly held that, regardless of its actual enforcement, an employer's promulgation or maintenance of a rule governing employee conduct may interfere with protected rights, if the rule's ambiguity is reasonably susceptible to a broad interpretation that would chill protected activity. (*Los Angeles Community College District* (2014) PERB Decision No. 2404 (*Los Angeles CCD*), p. 9; S*antee Elementary School*

District (2006) PERB Decision No. 1822 (*Santee*), p. 11; see also *Los Angeles County Federation of Labor v. County of Los Angeles* (1984) 160 Cal.App.3d 905, 908-909.) In *Los Angeles CCD*, *supra*, PERB Decision No. 2404, we noted that "[i]n the area of employer rules and directives, PERB does not look favorably on broad, vague directives that might chill lawful speech or other protected conduct." (*Id*. at p. 6, citing *State of California (Employment Development Department*) (2001) PERB Decision No. 1365a-S, p. 10.) In our prior decision in this case, we also explained that an employer rule banning a general category of conduct, which includes both protected and unprotected activity, is presumptively unlawful, because its ambiguity is likely to chill protected conduct. (*Petaluma*, *supra*, PERB Decision No. 2485, pp. 46-47; see also *Santee*, *supra*, PERB Decision No. 1822, p. 11; *County of Sacramento* (2014) PERB Decision No. 2393-M, p. 20.)

Following remand and a formal hearing in this case, the ALJ concluded that the District interfered with protected rights, as alleged in the complaint, when, on September 5, and October 10, 2014, its agents sent e-mail messages prohibiting employees from distributing "flyers of a political or union nature" and from "handing out pamphlets" anywhere on the District's premises at any time during the workday, without regard to non-duty time, such as employee breaks, or to unofficial "downtime" to the extent the District authorizes or permits limited employee solicitation for other non-work-related causes during worktime. (See, *Petaluma*, *supra*, PERB Decision No. 2485, pp. 50-51.) In finding liability on both counts of interference, the ALJ relied, in part, on uncontested testimony from Local 1881-represented employees that they had received the District's September 5, 2014 and October 10, 2014 e-mail messages.

With respect to the first message, kindergarten and first grade teacher Carrie Yu Caudle (Caudle) testified that, on or about the afternoon of September 5, 2014, she both received and saw an e-mail message of the same date which originated from Human Resources Executive Assistant Christy Defanti (Defanti) and which was forwarded to Caudle by Fran Hansell, the principal at the District's Mary Collins School where Caudle works. Caudle testified that she periodically received messages from Defanti, who works as an assistant in the District's office, and that, because of Defanti's position, Caudle understood such messages to be explaining or disseminating information from the Superintendent or other high-level District administrators. The September 5, 2014 message from Defanti purports to summarize the District's policy as prohibiting teachers from handing out flyers "before school," or on school property, including a driveway or walkway on the school's campus, and from "hand[ing] out flyers of a political or union nature." Following Caudle's testimony, Defanti's September 5, 2014 e-mail message was admitted into evidence without objection and the District did not cross-examine Caudle.

With respect to the second message referenced in the complaint, Paul Steffens (Steffens), a special education resource teacher who has worked primarily at the District's Grant Elementary School, testified that he and other teachers received the October 10, 2014 e-mail message from Grant Elementary School Principal Catina Haugen (Haugen). The message begins and ends by indicating that handing out pamphlets is only permitted "outside of your work day" and makes no reference to employee breaks or other non-duty time during the work day.

Steffens testified that he had handed out pamphlets at Grant Elementary School to parents at or about the time he and other teachers received Haugen's message.[4] Although not certain, Steffens believed the pamphlets concerned the status of Local 1881's contract negotiations with the District, and Steffens testified that he had distributed these materials at the request of a Local 1881 site representative. Steffens testified that he understood Haugen's message as reflecting District policy regarding "when [employees] could and could not hand out" pamphlets, and that, to his knowledge, Haugen's prohibition on handing out pamphlets at any time "during the workday" had never been withdrawn and therefore remained in place at the time of the hearing. Haugen's e-mail message was admitted into evidence without objection, Haugen was not called as a witness, and the District's cross-examination of Steffens was limited to establishing that he had only ever handed out pamphlets to parents after 2:50 p.m., when Steffens' school day had ended.

In the proposed decision, the ALJ found no facts demonstrating that the District had attempted to retract either of the two e-mail messages at issue. The District's answer to the complaint asserted no operational necessity or similar defense and the ALJ found no evidence that the restrictions on protected activity included in the September 5, and October 10, 2014 e-mail messages were necessitated by emergency circumstances, or that the District had considered any alternatives before banning the distribution of union flyers and pamphlets anywhere on District property at any time during the workday.

The District's first exception contends that the record does not support the ALJ's findings and conclusions regarding the September 5, 2014 message because, according to the

[4] Steffens did not specifically identify 2014 as the year, but estimated that he had handed out pamphlets approximately "2-1/2 years ago," which, from date of the hearing would have been sometime in late 2014.

District, "Caudle did not testify that she ever read [the message]; she merely 'received' it, and no other evidence was offered on this issue." In the District's view, the evidence was thus "insufficient to show that the e-mail interfered with anyone's rights, or that the e-mail caused any harm, slight or otherwise." We disagree.

When asked whether she had received Defanti's message, Caudle answered that she had. She further testified that she received it on or about the date it was sent, September 5, 2014. Because the inquiry under *Carlsbad* (*Carlsbad*, *supra*, PERB Decision No. 89) is an objective one which asks not whether any employee felt subjectively threatened or intimidated or was actually discouraged from engaging in protected activity, but whether, under the given circumstances, the employer's conduct has discouraged, *or reasonably would discourage*, employees from engaging in present or future protected activity, Caudle's testimony that she received and saw Defanti's message by way of the principal at Caudle's workplace and her testimony that she recognized the document is sufficient to support the ALJ's finding and conclusions that the message interfered with protected rights. Although our cases require that employees or union representatives hear, see, read, or otherwise perceive an employer's allegedly coercive statement to establish the prima facie case of interference (*County of Riverside*, *supra*, PERB Decision No. 2119-M, pp. 18-19; *Los Angeles County Superior Court*, *supra*, PERB Decision No. 2566-C, pp. 25-27), absent some evidence to the contrary, there is a presumption that a properly-addressed e-mail message sent by an employer to its employees has been received *and read*. Because the District neither attacked Caudle's credibility through cross-examination, nor put on evidence to rebut Caudle's testimony that she received the September 5, 2014 message, we have no reason to disturb the ALJ's factual findings and legal conclusions, and therefore deny the District's exception.

The District's other exception focuses on the fact that, while Haugen's message prohibits handing out pamphlets during the workday, it nowhere expressly prohibits or even mentions "union" pamphlets. Under our precedents, an employer need not explicitly restrict protected conduct to interfere with protected rights. (See, e.g., *City of Oakland* (2014) PERB Decision No. 2387-M, p. 25, fn. 5 and cases cited therein.) As noted in our prior *Petaluma* decision, an employer rule that does not explicitly restrict protected activity may nonetheless be found unlawful, if, under the circumstances, employees would reasonably construe the rule to prohibit protected activity; if the rule was promulgated in response to protected activity; or if the rule has been applied to restrict the exercise of protected rights, and if the employer establishes no legitimate and substantial business justification that outweighs the infringement on protected rights. (*Petaluma*, *supra*, PERB Decision No. 2485, p. 49, fn. 13, citing *Los Angeles CCD*, *supra*, PERB Decision No. 2404, p. 6; see also *Trustees of the California State University* (2017) PERB Decision No. 2522-H (*Trustees of CSU*), pp. 20-22.)

The District argues, however, that the evidence presented at hearing was insufficient to prove that the purpose or effect of Haugen's message was to restrict handing out *union* pamphlets, or that Steffens' activities even related to *union* activities. Steffens' testimony was thin on details and generally tentative and, as the District notes, no other witness testified regarding Haugen's directive. However, given that Haugen's message came soon after Defanti's message, and that it occurred at or about the time Steffens was handing out pamphlets regarding Local 1881's contract negotiations with the District, the ALJ might have inferred either that Haugen had issued her directive in response to protected activity, or that, under the circumstances, it had been applied to restrict the exercise of protected rights. However, we need not decide the issue as framed in the District's exception, because there is

another, more fundamental basis for affirming the ALJ's finding of liability with respect to Haugen's e-mail message.

PERB has long recognized that the rights of employees to "join, form and participate" in the activities of an employee organization guaranteed by our statutes logically presuppose and necessarily include a right to engage in concerted action for mutual aid and protection, regardless of whether the concerted action involves or has as its immediate purpose the formation of or participation in an employee organization. (*State of California, Department of Transportation* (1982) PERB Decision No. 257-S, pp. 6-7; *Modesto City Schools* (1983) PERB Decision No. 291 (*Modesto*), p. 62; *Barstow Unified School District* (1996) PERB Decision No. 1164, proposed decision at pp. 22-23.) Thus, employee-to-employee activity aimed at providing mutual aid or protection is statutorily protected, notwithstanding its informal and spontaneous nature. (*Modesto*, *supra*, PERB Decision No. 291, p. 62; see also *McPherson v. Public Employment Relations Bd*. (1987) 189 Cal.App.3d 293, 311.) The rationale for this construction of the statute is simple: if individual employees are not free to act together informally and spontaneously to provide mutual aid or protection to one another, then it is unlikely that they may ever exercise their right to form or join, much less to participate in the activities of, an employee organization. (*Trustees of CSU*, *supra*, PERB Decision No. 2522-H, p. 16.)

It follows that the employee rights provisions of our statutes protect not only *union-related* speech, but broader categories of employment-related speech, including employees' communications with one another about their wages, hours and working conditions. (*Petaluma, supra*, PERB Decision No. 2485, pp. 43-44; see also *Jeannette Corp. v. NLRB* (3d Cir. 1976) 532 F.2d 916, 918.) For example, employee criticism of an employer policy or

supervisor is protected when its purpose is to advance other employees' interests or when the supervisor's conduct affects collective working conditions. (*Berkeley Unified School District* (2015) PERB Decision No. 2411, p. 18; *Walnut Valley Unified School District* (2016) PERB Decision No. 2495 (*Walnut Valley*), pp. 9-12; *Trustees of CSU*, *supra*, PERB Decision No. 2522-H, pp. 15-16; *Napa Valley Community College District* (2018) PERB Decision No. 2563, pp. 11-12.) Indeed, our prior decision in this case affirmed long-standing PERB precedent that a public employer cannot extinguish substantially all employee rights to communicate with one another in the workplace, including their rights to solicit one another and to distribute literature, even when it purports to do so with the consent of the exclusive representative, and in subsequent decisions, we have reiterated our view that the right of employees to communicate freely with one another about their employment relations is a bedrock principle under our statutes. (*Petaluma*, *supra*, PERB Decision No. 2485, p. 40, fn. 11, citing *Long Beach Unified School District* (1987) PERB Decision No. 608, pp. 15-17; *NLRB v. Magnavox Co. of Tennessee* (1974) 415 U.S. 322, 326-327; see also *Walnut Valley*, *supra*, PERB Decision No. 2495, pp. 9-12; *Trustees of CSU*, *supra*, PERB Decision No. 2522-H, pp. 20-22; *County of San Bernardino* (2018) PERB Decision No. 2556-M, p. 18.)

We conclude that it was unnecessary for Local 1881 to prove, or for the ALJ to infer, that the purpose or effect of Haugen's e-mail message was to restrict only *union* speech. Because the message included an unqualified prohibition against handing out pamphlets at any time "during the workday," it was, on its face, an overly broad prohibition against employee-to-employee communications about their working conditions or other matters of legitimate interest to employees. An employer rule banning a general category of conduct, which includes both protected and unprotected activity, is presumptively unlawful, because

"employees should not have to decide at their own peril what information is not lawfully subject to such a prohibition." (*Los Angeles CCD*, *supra*, PERB Decision No. 2404, p. 7, citing *Hyundai America Shipping Agency, Inc.* (2011) 357 NLRB No. 80, slip op. at p. 12; see also, *Petaluma*, *supra*, PERB Decision No. 2485, pp. 46-47.)

The District also contends that Steffens gave no testimony suggesting that he had been deterred from engaging in protected activity during the workday but on non-duty time, or that he had even contemplated handing out pamphlets at any time other than after 2:50 p.m. when his official workday had ended. This argument is essentially the same as the one put forward regarding the September 5, 2014 e-mail message and, for reasons explained above, is equally unpersuasive. Because the *Carlsbad* (*Carlsbad*, *supra*, PERB Decision No. 89) analysis does not require showing that any employee engaged in protected activity or was actually deterred from doing so, whether Steffens handed out pamphlets in apparent violation of Haugen's directive, or whether he was effectively deterred from doing so is not germane to whether Local 1881 established a prima facie case of employer interference with protected rights.

Because the District asserted no operational necessity or other defense in its answer to the complaint and no evidence presented at the hearing established such a defense, we deny the District's exceptions and adopt the proposed decision as the Decision of the Board itself.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, the Public Employment Relations Board (PERB) finds that the Petaluma City Elementary School District/Joint Union High School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5, subdivisions (a) and (b), by: (1) issuing an unqualified prohibition on September 5, 2014, against distributing

literature of a "union nature" anywhere on the District's premises, including in non-work areas and during non-work time; (2) issuing an unqualified prohibition on October 10, 2014 of handing out pamphlets of any nature anywhere on the District's property and at any time during the workday; and further violated EERA section 3543.5, subdivisions (a), (b), and (c), by unreasonably delaying for approximately six weeks before providing presumptively relevant information in response to a request from the Petaluma Federation of Teachers Local 1881 (Local 1881).

Pursuant to EERA 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. Prohibiting employees from distributing union-related literature on District premises while employees are not on duty and in non-working areas;

2. Prohibiting employees from distributing pamphlets concerning employment matters or any other protected subject on District premises while employees are not on duty and in non-working areas.

3. Unreasonably delaying, without contemporaneous explanation, the provision of presumptively relevant information pursuant to a valid request by an exclusive representative.

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

1. Upon request, provide Local 1881 any and all information outstanding from its multiple July 2, 2014 requests for information.

2. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all work locations where notices to employees in the certificated

bargaining unit customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating its willingness to comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the District to communicate with its employees in the certificated bargaining unit. (*City of Sacramento* (2013) PERB Decision No. 2351-M.) 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 PERB, or the General Counsel's designee. The District shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on the Petaluma Federation of Teachers Local 1881.

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. SF-CE-3091-E, *Petaluma Federation of Teachers, Local 1881 v. Petaluma City Elementary School District/Joint Union High School District* in which all parties had the right to participate, it has been found that the Petaluma City Elementary School District/Joint Union High School District violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq.

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

A. CEASE AND DESIST FROM:

1. Prohibiting employees from distributing union-related literature on District premises while employees are not on duty and in non-working areas;

2. Prohibiting employees from distributing pamphlets concerning employment matters or any other protected subject on District premises while employees are not on duty and in non-working areas.

3. Unreasonably delaying the provision of relevant information to Local 1881.

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

1. Upon request, provide Local 1881 any and all information outstanding from its multiple July 2, 2014 requests for information.

Dated: _____

Petaluma City Elementary School District/Joint Union High School District

By: _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

PETALUMA FEDERATION OF TEACHERS, LOCAL 1881, Charging Party, v. PETALUMA CITY ELEMENTARY SCHOOL DISTRICT/JOINT UNION HIGH SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. SF-CE-3091-E PROPOSED DECISION (January 31, 2018)

Appearances: Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for Petaluma Federation of Teachers, Local 1881; School and College Legal Services of California by Patrick C. Wilson, Attorney, for Petaluma City Elementary School District/Joint Union High School District.

Before Alicia Clement, Administrative Law Judge.

PROCEDURAL HISTORY

The above-captioned charge was filed on August 1, 2014. In it, Petaluma Federation of Teachers, Local 1881 (Union or Federation or Charging Party) asserted a number of violations of Educational Employment Relations Act (EERA)[1] arising from interactions between the parties during negotiations for a successor to the 2012-2015 collective bargaining agreement. The Union filed a First Amended Charge on October 23, 2014. A Second Amended Charge was filed on January 26, 2015. The Petaluma City Elementary School District/Joint Union High School District (District) filed responses to each of the charges and, on April 7, 2015, PERB's Office of the General Counsel dismissed the charge.

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

The Union appealed the Dismissal on April 29, 2015. The District's Opposition to the Appeal was filed on May 15, 2015. On June 30, 2016, the Board affirmed in part and reversed in part the OGC's Dismissal, remanding the matter to the OGC for issuance of a complaint consistent with its findings.

On July 20, 2016, the OGC issued a Complaint asserting two counts of interference and one count of failure to meet and confer in good faith, arising from the District's issuance of several directives to staff about leafletting and its alleged failure to respond to information requests in a timely fashion. Respondent's Answer to the Complaint was filed on August 15, 2016, denying any violation of EERA. An informal settlement conference was held on October 18, 2016, but the matter was not settled.

A formal hearing was held on March 28, 2017, and on May 4, 2017, the matter was fully briefed and submitted for determination.

FINDINGS OF FACT

Petaluma Federation of Teachers, Local 1881 is the exclusive representative of the certificated bargaining unit at the Petaluma City Elementary School District/Joint Union High School District. During the summer of 2014, the parties were in reopener negotiations, which included such issues as early retirement and a reduced work program.

Leafletting

On September 5, 2014, the District circulated a memo to school administrators advising them of the "rules for staff handing out flyers." According to this e-mail, which was sent by Human Resources Executive Assistant Christy Defanti,

> Teachers may hand out flyers after school when they finish their work obligations. They may not hand them out before school as they are to be in their classroom 30 minutes prior to school

> starting. They cannot hand out flyers of a political or union nature.
>
> They must be off school property when they hand out flyers, not in a driveway or walkway on school campus. The sidewalk in front of a school is public property and they may hand them out there.

Although the initial recipients of this e-mail message appear to have been school administrators, Teacher Carrie Caudle (Caudle) testified that she received a copy of the e-mail on September 5, 2014, from Fran Hansell (Hansell), the Principal of her school.[2]

On October 10, 2014, Catina Haugen (Haugen), Principal of Grant Elementary School sent an e-mail message to Teacher Paul Steffens (Steffens) and others with the subject line, "handing out pamphlets." The e-mail states, in relevant part:

> It is my understanding that handing out pamphlets can only happen outside of your work day. I know the long hours you all put in and that an official 'work day' is not defined. Since an official teacher duty begins at 7:55, we can safely call that the start of your work day. And at the end of the day, the final teacher duty ends around 2:45 so that can be considered the end of your work day.
>
> Please hand out pamphlets outside of your work day.

Steffens, who had been active in handing out pamphlets to parents, understood this e-mail to be a directive from his supervisor, Haugen. Steffens had only handed out pamphlets in the afternoon at approximately 2:50 p.m.

Requests for Information

Sandra Larsen (Larsen) is an elementary school teacher in the District and, at the time relevant to this charge, the Federation's Chief Negotiator. On July 2, 2014, Larsen sent two letters to then-District Superintendent Steve Bolman (Bolman) seeking information about

[2] A copy of the e-mail from Hansell to Caudle was not produced.

salary and budget. The first letter sought the following information regarding "Management Compensation":

> 1. Does the base salary listed for management positions include health and welfare benefits?
>
> 2. Will you explain the Community Relations Expense?
>
> 3. Your contract states that you will be provided money for tech support. Is that indicated anywhere in the information you provided.
>
> 4. After five years of service, your contract gives you and your wife health and welfare benefits upon retirement until you reach 65 years of age. What cost do you associate with said benefit?

The second July 2, 2014 letter sought the following information which had been the subject of a prior request:

> We are requesting the actual cost of step and column increases for certificated staff of the 2014/2015 school year. We would also like a list of the new hires and their beginning salaries please include any other costs associated there with [*sic*]. We are additionally asking for a final list of certificated employees that retired this year. Please indicate the SERP each employee received.
>
> In addition, as the physical [*sic*] year is closing on June 30, what will be the beginning balance (carry over) on July 1, 2014?

Larsen requested that this information be provided no later than July 7, 2014. Notably, July 2, 2014, was a Wednesday. Because July 4 was a holiday, that left only one business day for Bolman to compile the information prior to the Monday, July 7 "deadline."

On August 13, 2014, Bolman sent Larsen the following e-mail message containing the "answer to your followup [*sic*] questions on the Management Compensation," which is quoted verbatim:

> 1. No the base salary does not include management health and welfare benefits. Management health and welfare benefits are the

same as the certificated and classified bargaining units with the monthly contributions being: $1,070.13 cap on health insurance; cap of $137 for dental; $29 cap on VSP; $5.55 towards life insurance. Under the Superintendent's Contract, a supplemental life insurance plan is provided at a cost of $97.50 per month.

2. The Superintendent is expected to attend and represent the District at a number of events and participate as a member with outside organizations like the Boys and Girls Club. The $300 per month is the District's contribution towards the cost of attending numerous events and belonging to non-profit boards.

3. The Superintendent's Contract states that the Superintendent is provided a home computer, printer, scanner, fax, copier, palm pilot, appropriate software, and network linkage to the District Office. I currently have a District computer and printer in my home office. I do not receive any funds towards network linkage to the District Office.

4. No value has been placed on the Retention Incentive component of my contract in that it does not go into affect [*sic*] until July 1, 2017.

In addressing Kim's memo to me on the District Letter dated August 4, 2014 I acknowledge the fact that I did not have the "fair and equitable increase…" language on the chart.

On the employee benefit increase, at negotiations we failed to take into account that the District changed how health insurance costs are charged to the employee. In 2012/13 the District began annualizing the increased cost of health insurance to lessen the impact on employees. The rate charged for insurance, beginning with the first payroll of the year, includes the anticipated cost of insurance for the entire school year. If we resume negotiations and settle on a onetime in lieu amount for health and welfare, the District would be willing to include it on the earliest payroll possible to benefit employees.

We are willing and ready to begin negotiations between the two teams. If you continue to insist on the condition of negotiations being an open meeting, we will wait for PERB to rule on the Unfair(s) to resolve our issues before we resume negotiations.

Larsen read this response as related only to the first July 2, 2014 request for information.

ISSUES

1. Did the District interfere with the rights of employees to engage in protected activity when it sent the September 5, 2014 e-mail message prohibiting leafletting on District property?

2. Did the District interfere with the rights of employees to engage in protected activity when it sent the October 10, 2014 e-mail message prohibiting leafletting during the official "work day" from 7:55 a.m. until 2:45 p.m.?

3. Did the District refuse to meet and confer in good faith when it delayed its response to a July 2, 2014 information request until August 13, 2014?

CONCLUSIONS OF LAW

Because this matter comes to me in the procedural form of a remand from a dismissal, the issues are closely defined by the Board's decision *Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485. Accordingly, in order to ensure fidelity to the issues and the applicable law, I quote the Board's decision extensively in this Proposed Decision. In its decision, the Board recites the facts alleged in the Second Amended Charge, states the applicable legal standard and finds that, if proven at a hearing, a violation will be found. In some cases, the Board acknowledged that there may be a valid defense or affirmative defense to the allegations, and notes that it is for the Respondent to assert and prove those defenses at hearing.

The applicable law is not in question, and my task is simply that of making factual findings based on the presentation of evidence at the hearing. If the Charging Party has established the facts alleged in the Complaint, a violation will be found unless the Respondent establishes a valid defense. Thus, my task is to determine first whether the Federation has

proven the facts alleged in the Complaint by a preponderance of the evidence, and second whether the employer has established a valid defense.

1. The District's September 5, 2014 E-mail Interfered with the Rights of Employees to Engage in Protected Activity

The Board provided extensive discussion of what conduct constitutes interference with employees' protected rights to distribute union information in *Petaluma City Elementary School District/Joint Union High School District*, *supra*, PERB Decision No. 2485, pp.42-52. In particular, the Board stated:

> …our precedents are clear that a rule prohibiting distribution of literature anywhere on the employer's premises is presumptively unlawful because it applies even when employees are not on duty or are in non-working areas. (*State of California (Employment Development Department)* (2001) PERB Decision No. 1365a-S, p. 2; *Richmond Unified School District/Simi Valley Unified School District* (1979) PERB Decision No. 99, pp. 17-18; see also *Delano Union Elementary School District* (2007) PERB Decision No. 1908, p. 17 [(*Delano*)]; *Republic Aviation Corp. v. NLRB*[(1945)] 324 U.S. 793, 801-03.) Although worktime is for work, "time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he [or she] wishes without unreasonable restraint, although the employee is on company property." (*Peyton Packing Co., Inc*. (1942) 49 NLRB 828, 843, enforced (5th Cir. 1944) 142 F.2d 1009, cert. denied (1944) 323 U.S. 730; *Delano*, *supra*, at p. 17.) Thus, restrictions on employee solicitation, including the distribution of union literature during non-work time and in non-work areas are invalid, unless the employer shows that special circumstances make such rules necessary to maintain production or discipline. (*State of California (EDD)*, *supra*, at p. 2; *Long Beach Unified School District* (1980) PERB Decision No. 130 (*Long Beach)*, pp. 7-8; *Eastex, Inc. v. NLRB* (1978) 437 U.S. 556, 574; *Beth Israel Hosp. v. NLRB* (1978) 437 U.S. 483, 492-493; cf. *Baylor University medical Center v. NLRB* (D.C. Cir. 1981) 662 F.2d 56, 65.)
>
> […]
>
> Thus, even accepting the District's contention that employees are on duty 30 minutes before the start of school and may lawfully be

prohibited from distributing flyers at that time, on its face, the District's blanket restriction on union or other concerted activities at any time during the workday constitutes a prima facie case of interference with protected employee rights. (*Long Beach*, *supra*, at p. 9.)

[…]

…according to the charge and supporting materials, the District has not simply promulgated a facially-neutral policy in response to protected conduct or enforced a facially-neutral policy in a discriminatory fashion. Rather, it has allegedly advised employees of a policy that *singles out only* "political or union" content for prohibition anywhere in the workplace. Under the circumstances alleged by the Federation, the *inherently destructive* prong of *Carlsbad* is the appropriate standard. When an employer policy expressly bans "union" activity, requiring it to show operational *necessity* or that *no alternative* was available is consistent with well-settled constitutional and labor law principles governing content-based restrictions. (*Long Beach*, *supra*, PERB Decision No. 130, p. 23; *Lafayette Park Hotel* (1998) 326 NLRB 824, 825 and *Lutheran Heritage Village*, *supra*, 343 NLRB No. 75, slip op. at p. 2 [employer rule that explicitly restricts protected activity is per se unlawful].) While unlawful intent is not required for proving employer interference, the natural and probable consequence of an employer rule that singles out for prohibition "union" materials is the denial of employee rights attributable to an unlawful motivation, purpose or intent. (*Carlsbad*, *supra*, PERB Decision No. 89, pp. 10-11.)

The District' position statements have pointed to no operational necessity or circumstances beyond its control nor even articulated any compelling interest for imposing a blanket ban on leafletting during non-work time in non-work areas or for banning leaflets of a "union nature." Nor has the District offered any information to suggest that these prohibitions are the least restrictive means available, as is required under the constitutional *strict scrutiny* standard applied to content-based restriction. (*International Society for Krishna Consciousness of California, Inc. v. City of Los Angeles* (2010) 48 Cal.4th 446, 456-457.)

Although the charge indicates that the District's superintendent later "clarified" to a Federation representative that the e-mail "was sent to Principals to address their questions regarding flyers that were being handed out to parents" and "was not intended to be shared with staff," the District has never publicly and

> unequivocally disavowed either any inadvertent distribution of the message to teachers (see *Jurupa Unified School District* (2015) PERB Decision No. 2458, pp. 12-13, adopting NLRB standards in *Passavant Memorial Area Hospital* (1978) 237 NLRB 138, 138-139) or its enforcement by Haugen. Moreover, because this case comes before the Board on appeal from a dismissal, we are precluded from affirming the dismissal on the basis of an affirmative defense not raised during the investigation of the charge.

Paragraph 3 of the Complaint states:

> On or about September 5, 2014, Respondent sent bargaining unit members a message stating, in relevant part:
>
> Teachers may hand out flyers after school when they finish their work obligations. They may not hand them out before school as they are to be in their classrooms 30 minutes prior to school starting. They cannot hand out flyers of a political or union nature. They must be off school property when they hand out flyers, not in a driveway or walkway on school campus. The sidewalk in front of a school is public property and they may hand them out there.

At the hearing, the Federation presented evidence that, on September 5, 2014, Executive Assistant Christy Defanti sent an e-mail message to school administrators containing the above-quoted language. Uncontested testimony by Teacher Caudle established that her Principal, Hansell, forwarded the above-quoted email to her on September 5, 2014.

The District did not provide any facts demonstrating that it retracted or even that it attempted to retract the language in the September 5, 2014 e-mail. The District did not present facts demonstrating that operational necessity dictated that the distribution of union material be curtailed, or that it had no alternative other than to ban distribution of union material on District property.

Accordingly, I find that the facts alleged in paragraph 3 of the Complaint have been proven by a preponderance of the evidence adduced at the hearing. Based on the legal findings

made by the Board in its decision *Petaluma City Elementary School District/Joint Union High School District*, *supra*, PERB Decision No. 2485, a violation of EERA has been found.

2. The District Interfered with the Rights of Employees to Engage in Protected Activity when it Sent the October 10, 2014 E-mail Message Prohibiting Leafletting During the Official "Work Day" from 7:55 a.m. until 2:45 p.m.

Paragraph 6 of the Complaint states:

> On or about October 10, 2014, Respondent, acting through its agent, Catina Haugen, sent bargaining unit members at Grant Elementary School an e-mail message stating, in relevant part:
>
> It is my understanding that handing out pamphlets can only happen outside of your work day. I know the long hours you all put in and that an official 'work day' is not defined. Since an official teacher duty begins at 7:55, we can safely call that the start of your work day. And at the end of the day, the final teacher duty ends around 2:45 so that can be considered the end of your work day.
>
> Please hand out pamphlets outside of your work day.

At the hearing, the Federation presented uncontested testimony by Steffens that Haugen sent him a copy of the above-quoted e-mail message on October 10, 2014. The District did not provide any facts demonstrating that it retracted the language in the October 10, 2014 e-mail message. Also, the District did not present facts demonstrating that it was operationally necessary to ban the distribution of literature during breaks or non-working times between 7:55 a.m. and 2:45 p.m., or that there was no alternative to its blanket ban on the distribution of union materials between 7:55 a.m. and 2:45 p.m.

Accordingly, I find that the allegations in paragraph 6 of the Complaint have been proven by a preponderance of the evidence adduced at the hearing. Based on the legal findings made by the Board in its decision *Petaluma City Elementary School District/Joint Union High School District*, *supra*, PERB Decision No. 2485, a violation of EERA has been found.

3. The District Refused to Meet and Confer in Good Faith when it Delayed Its Response to a July 2, 2014 Information Request until August 13, 2014

After finding that "[e]ach of the requested categories of information [from the July 2, 2014 request] pertains immediately to mandatory subjects of bargaining and is therefore relevant," the Board made the following findings in *Petaluma City Elementary School District/Joint Union High School District*, *supra*, PERB Decision No. 2485, pp. 21-25:

> Although the parties exchanged correspondence several times in the weeks after the Federation made its request, the District asserted no objection or privilege to the subject or scope of the request nor advised the Federation that the requested information was unavailable or that its production would be unduly burdensome, costly or time-consuming. In its September 3, 2014 position statement to PERB, the District asserted – apparently for the first time – that some of the requested information was not immediately available at the time of the Federation's request, though the District has not identified what information was unavailable nor when it became available. The District asserts that it intended to discuss the Federation's requests and the unavailability of some of the requested information at the parties' next bargaining meeting, which was scheduled for July 7, 2014, but that, because of their dispute over the presence of employee observers at negotiations, that meeting was cancelled. Approximately 6 [*sic*] weeks after the July 2 request, the District provided the requested information.
>
> […]
>
> …In the absence of *any* contemporaneous explanation by the District for its delay in providing presumptively relevant and necessary information, the only issue is whether the Federation has alleged sufficient facts to indicate that six weeks constituted unreasonable delay under the circumstances. (*The Colonial Press, Inc*. (1973) 204 NLRB 852, 861.) We conclude that it has.
>
> […]
>
> By alleging that the District failed to say *anything* on the subject for six weeks, the Federation has stated a prima facie case that the District has not exercised the same diligence and thoroughness as [it] would in other business affairs of importance. (*Compton*, *supra*, PERB Decision No. 790, adopting proposed [D]ec. at p.

> 29; *NLRB v. Truitt Mfg. Co*., *supra*, 351 U.S. 149, 153-154.) The Office of the General Counsel erred by requiring the Federation to show prejudice for information whose relevance and necessity to ongoing negotiations had never been challenged.

Paragraph 9 of the Complaint states:

> On or about July 2, 2014, Charging Party requested the following information that is relevant and necessary to Charging party's discharge of its duty to represent employees: information regarding the step and column increases for the 2014-2015 school year; new hires; retirees; the District's beginning balance for the 2014-2015 fiscal year; and a list of certificated employees who had retired in the 2013-2014 school year.

Paragraph 10 of the Complaint states: "Respondent did not respond to the request described in paragraph 9 until August 13, 2014, when it provided information responsive to the request."

At the hearing, the Federation presented uncontested testimony by Larsen that despite several e-mail exchanges with Bolman, she received some, but not all, of the information in response to her July 2, 2014 request on or about August 13, 2014.

The District did not present any evidence to establish that it notified the Federation at any time prior to August 13 that the July 2 request for information sought information that was unavailable, unduly burdensome, costly or time-consuming to produce, or any other contemporaneous explanation for its six-week delay in providing presumptively relevant and necessary information.

Accordingly, I find that the allegations in paragraph 9 and 10 of the Complaint have been proven by a preponderance of the evidence adduced at the hearing. Based on the legal findings made by the Board in its decision *Petaluma City Elementary School District/Joint Union High School District*, *supra*, PERB Decision No. 2485, a violation or EERA has been found.

REMEDY

Government Code section 3541.3 vests PERB with broad remedial authority to effectuate the purpose of the Act. A properly designed remedial order seeks a restoration of the situation as nearly as possible to that which would have obtained but for the unfair labor practice. (*Modesto City Schools* (1983) PERB Decision No. 291.)

Where an employer has interfered with the Union's right to represent its employees, an order to cease and desist is the appropriate remedy. (*State of California (Department of Corrections)* (1995) PERB Decision No. 1104-S; *State of California (Departments of Personnel Administration, Developmental Services, and Mental Health)* (1986) PERB Decision No. 601-S.)

Where an employer has failed and refused to provide relevant information pursuant to a valid request, it is appropriate for PERB to order affirmative relief in the form of an order to provide the requested information. (*Modesto City Schools and High School District* (1985) PERB Decision No. 518.) However, where the issue of affirmative relief has become moot by the subsequent actions of the parties, such relief is not warranted. In this case, *Petaluma City Elementary School District/Joint Union High School District*, *supra*, PERB Decision No. 2485 found that, "Approximately 6 weeks after the July 2 request, the District provided the requested information." As noted above, however, there were two requests for information made on the same July 2 date; according to the facts presented at the hearing, some, but not all of the requested information was provided on August 13, 2014. Thus, it is appropriate to order the District to produce any and all information pursuant to both July 2, 2014 requests that it has not already made available to the Union, as well as to order a posting that the District unreasonably delayed in the provision of all the information requested on July 2, 2014.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Petaluma City Elementary School District/Joint Union High School District violated the Educational Employment Relations Act (EERA)[3] (Act), Government Code section 3543.5, subdivisions (a) and (b), by: (1) issuing a categorical prohibition on September 5, 2014, against distributing union-related literature anywhere on the employer's premises even when employees are not on duty or are in non-working areas; (2) issuing a blanket restriction on October 10, 2014, on union or other concerted activities at any time during the workday; and Government Code section 3543.5, subdivisions (a), (b), and (c), by unreasonably delaying for a period of approximately six weeks its provision of presumptively relevant information in response to a request from the Petaluma Federation of Teachers.

Pursuant to section 3541.5, subdivision (c), of the Government Code, it hereby is ORDERED that the Petaluma City Elementary School District/Joint Union High School District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Prohibiting employees from distributing union-related literature on District premises while employees are not on duty and in non-working areas;

2. Issuing blanket restrictions on concerted activities by employees during the workday and/or on District premises; and

3. Unreasonably delaying, without contemporaneous explanation, the provision of presumptively relevant information pursuant to a valid request by an exclusive representative.

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

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

1. Upon request by the Petaluma Federation of Teachers, provide to the Federation any and all information outstanding from its multiple July 2, 2014 requests for information.

2. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the certificated bargaining unit customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the Petaluma City Elementary School District/Joint Union High School District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (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.

In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the District to communicate with its employees in the certificated bargaining unit. (*City of Sacramento* (2013) PERB Decision No. 2351-M.)

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

Right to Appeal

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

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

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

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135, subdivision (d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c), and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 and 32130.)

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