STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ANAHEIM UNION HIGH SCHOOL DISTRICT, Charging Party, v. AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 3112, Respondent.	Case No. LA-CO-1451-E
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 3112, Charging Party, v. ANAHEIM UNION HIGH SCHOOL DISTRICT, Respondent.	Case No. LA-CE-5535-E PERB Decision No. 2434 June 19, 2015

Appearances: Pete Schnaufer, Business Representative, for American Federation of State, County and Municipal Employees, Local 3112; Stutz Artiano Shinoff & Holtz by Jack M. Sleeth Jr., Attorney, and Parker & Covert by Spencer E. Covert, Jr., Attorney, for Anaheim Union High School District.

Before Martinez, Chair; Winslow and Banks, Members.

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by American Federation of State, County and Municipal Employees, Local 3112 (AFSCME) and cross-exceptions filed by Anaheim Union High School District (District) to a proposed decision (attached) by a PERB administrative law judge

(ALJ). In two cases consolidated for the formal hearing, the District and AFSCME charge each other with multiple violations of the duty to negotiate in good faith pursuant to sections 3543.5, subdivision (c), and 3543.6, subdivision (c), of the Educational Employment Relations Act (EERA).[1] In addition, AFSCME alleges unlawful retaliation by the District against its Vice-President and bargaining team member Dan Clavel (Clavel) pursuant to EERA section 3543.5, subdivisions (a) and (b). After a hearing conducted over 11 days, the ALJ issued a proposed decision concluding that both sides violated their duty to negotiate in good faith. The retaliation claim was dismissed.

The Board itself has reviewed the formal hearing record in its entirety and considered the parties' respective exceptions and responses thereto. The record as a whole supports the factual findings. The proposed decision is well-reasoned and consistent with applicable law. Accordingly, the Board hereby affirms the ALJ's rulings, findings and conclusions and adopts the proposed decision as the decision of the Board itself subject to the following discussion.

DISCUSSION

The exceptions are limited in number and scope. The attached 106-page proposed decision is thorough in its coverage of the procedural history of this case, the factual background of the parties' various disputes, the issues raised by the unfair practice complaint, and the legal analysis supporting the outcome reached. Therefore, the substance of the proposed decision is not repeated here, except as necessary to provide factual context for the discussion.

[1] EERA is codified at Government Code section 3540 et seq. Undesignated code sections are to the Government Code.

The proposed decision reaches three legal conclusions. The first conclusion (proposed dec., pp. 46-65) is that AFSCME violated its duty to negotiate in good faith.[2] No exceptions were taken to this conclusion. The second conclusion (proposed dec., pp. 65-78) is that the District violated its duty to negotiate in good faith.[3] Although the District did not except to this conclusion or to the corresponding proposed remedial order, it did except to the

[2] The proposed decision states:

> After examining the totality of the parties' bargaining conduct, in particular Local 3112's conduct after the parties reached Tentative Agreement, it is concluded that Local 3112 violated the duty to negotiate in good faith. Its disinterested approach to finalizing the parties' agreement, together with its attempt to introduce new issues into bargaining after the Tentative Agreement, and its false communications to its members collectively indicate an attempt to entangle and even subvert progress made in negotiations. Evidence of Local 3112's delays in making its initial proposal is consistent with this conclusion and is further evidence of bad faith under the circumstances. Therefore, Local 3112's bargaining conduct violated EERA section 3543.6(c).

(Proposed dec., p. 65.)

[3] The proposed decision states:

> After reviewing the parties' bargaining conduct as a whole, including the District's multiple per se bargaining violations, its failure to adequately work with Local 3112 in finalizing the parties' Tentative Agreement, and its premature imposition of the July 2010 layoff, the record shows that the District lacked the intent to bargain with Local 3112 in good faith. Under the specific circumstances in this dispute, this conduct violates EERA section 3543.5(c) under a "totality of the bargaining conduct" theory. [fn. 38: The mere existence of per se violations does not necessarily also equate to a surface bargaining violation. (*Chula Vista City School District, supra,* PERB Decision No. 834, pp. 72-73.)] This conduct also amounts to derivative violations of EERA sections 3543.5(a) and (b). (*Oakland Unified School District* (1985) PERB Decision No. 540, p. 25.)

(Proposed dec., pp. 77-78.)

following intermediary conclusion leading to the overall conclusion. The ALJ concluded that the District's refusal to meet with AFSCME's bargaining team so long as it included Clavel was a per se violation of the District's duty to negotiate in good faith. The third conclusion (proposed dec., pp. 78-99) is that although AFSCME established all of the elements of a prima facie case for retaliation, the District met its burden of proving that the District would have dismissed Clavel even had he not engaged in protected activity. AFSCME's three exceptions concern the retaliation analysis.

We begin with AFSCME's three exceptions to the retaliation analysis, and conclude with the District's single exception to the analysis of the District's violation of its duty to negotiate in good faith.

AFSCME's Exceptions[4]

First, AFSCME asserts that the ALJ misconstrued the phrase "reckoning period," as used in the District's progressive discipline policy set forth in District Board of Trustees Policy (Board Policy) 6417.02. Second, AFSCME excepts to the ALJ's discussion of Clavel's 2009 performance evaluation. Last, AFSCME takes issue with the ALJ's discussion of a "secret or side file" maintained on Clavel by the District.

I. *The Reckoning Period*

District Board Policy 6417.02 governs the District's policy of progressive discipline for classified employees. (Joint Exhibit III (part 1 of 2), exh. 76.) It states that disciplinary action

[4] AFSCME requests the right to appear before the Board itself, which we construe as a request for oral argument under PERB Regulation 32315. Historically, the Board has denied requests for oral argument when an adequate record has been prepared, the parties have had an opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear to make oral argument unnecessary. (*Los Angeles Community College District* (2009) PERB Decision No. 2059.) That is the case here. Accordingly, AFSCME's request is denied.

for a minor offense is for the purpose of correction. Corrective (progressive) discipline is not utilized for major offenses because the "purpose of discipline in these matters is of deterrence, which justifies the severe penalty even though an employee's past record may be exemplary." (*Ibid.*) Progressive discipline is explained as follows:

> The concept of progressive discipline recognizes that as violations reoccur, without correction, despite disciplinary action, the severity of the disciplinary measures taken must increase. It also provides that as the seriousness of the violation increases, the seriousness of the disciplinary action taken must also increase.

(*Ibid.*)

Under the District's system of progressive discipline, first level offenses, such as frequent unexcused absence or tardiness, warrant discipline ranging from a verbal warning for the first infraction to 15 working days suspension without pay, demotion or discharge for the sixth infraction. For first level offenses, there is a one year "reckoning period." Second level offenses, such as threatening, intimidating, coercing or interfering with other employees or supervisors, will draw discipline ranging from a written warning/reprimand for the first infraction to 15 working days suspension without pay, demotion or discharge for the third infraction. For second level offenses, there is also a one year "reckoning period." Third level offenses, such as dishonesty or theft, draw the highest level of discipline, 15 days suspension without pay, suspension or discharge, for the first infraction. There is no "reckoning period" for third level offenses.

Limited evidence was presented at the formal hearing about the meaning of "reckoning period." AFSCME President Gerald Adams (Adams) testified at Clavel's dismissal hearing

before the District's Personnel Commission[5] that reckoning period means "after one year, that issue will be gone." District Assistant Superintendent of Human Resources Russell Lee-Sung (Lee-Sung) testified at the PERB formal hearing that reckoning period means that an employee may request that discipline be removed from his or her personnel file, at the District's discretion, if there are no similar offenses of the same type after one year. The ALJ credited Lee-Sung's testimony over Adams' testimony on the grounds that Lee-Sung's testimony was more detailed and also that it was more consistent with the District's progressive discipline policy.

In analyzing the issue whether the District met its burden of proof on its affirmative defense in the retaliation claim, the ALJ noted that there was no evidence Clavel requested removal of any of his discipline for first and second level offenses pursuant to the reckoning periods set forth in Board Policy 6417.02. The proposed decision then goes on to say, "Clavel's latest examples of harassing behavior constitute his sixth Second Level offense which, under Board Policy 6417.02, warrants the most serious discipline."

AFSCME argues that the ALJ erred in crediting the testimony of Lee-Sung over the testimony of Adams on the meaning of "reckoning period." According to AFSCME, the phrase carries a more logical meaning in the context of progressive discipline than the meaning attributed to it by Lee-Sung. According to AFSCME, the reckoning period is "the time period over which the penalties for unacceptable employee behavior for minor offenses are to become more severe." Based on our reading of Board Policy 6417.02, AFSCME's argument has some merit. The one year reckoning period for first and second level offenses appears to refer to that

[5] The parties stipulated to the admission of the record from Clavel's 16-day Personnel Commission dismissal hearing, including the testimony and the exhibits. The parties agreed that the testimony would be treated as though it were produced during the course of the PERB formal hearing for admissibility and hearsay purposes.

time period "in which penalties for unacceptable employee behavior become progressively more severe in accordance with progressive seriousness of the infraction(s)." (Joint Exhibit III (part 1 of 2), exh. 76.) If the one year reckoning period passes without a recurrence of the same level of offense, presumably a new reckoning period takes effect.[6] There is no requirement contained in Board Policy 6417.02 that the employee request removal of the discipline after a year free of similar offenses lest the reckoning period continue in perpetuity.[7]

Building on what it contends is the correct meaning of reckoning period, AFSCME asserts that the ALJ erred in "treat[ing], as fresh, charges about events which occurred in 2002, 2003, 2005, and 2006." AFSCME appears to argue that the reckoning period serves as a time limit for taking adverse action, and that the ALJ erred in considering incidents of misconduct that occurred outside the one year reckoning period in his analysis of the District's affirmative defense. The District counters that AFSCME conflates the *reckoning period* with a *limitations*

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[6] This interpretation comports with the dictionary definition of "reckoning": "the time when your actions are judged as good or bad and you are rewarded or punished." (Merriam-Webster Dictionary at <http://www.merriam-webster.com/dictionary/reckoning> [as of May 29, 2015].) (See *Hammond v. Agran* (1999) 76 Cal.App.4th 1181, 1189 ["[I]n the absence of specifically defined meaning, a court looks to the plain meaning of a word as understood by the ordinary person, which would typically be a dictionary definition."].)

[7] As Hearing Officer Terri Tucker (Tucker), who presided over Clavel's Personnel Commission dismissal hearing, explained in her Findings and Recommendation sustaining the penalty of dismissal:

> Loosely put, in many employers' statements of disciplinary policy, there is a reckoning period that refers to a period of time during which an employee who does not repeat his or her offense during the reckoning period, will, at the end of the reckoning period, begin again as if there had been no earlier first offense. If there are additional instances of the same category of misconduct, the discipline increases progressively and with appropriate consequences, and is intended as a way of addressing repeated misconduct within a relatively short period of time.

(District Exhibit, exh. 48, p. 5, fn. 2.)

period. We agree with the District on this point. The reckoning period under Board Policy 6417.02 refers to the timeframe in which an employee's conduct is evaluated for purposes of applying progressive discipline. A limitations period, in this context, refers to the time limit for bringing a personnel action based on the date when the misconduct occurred.[8] A reckoning period is not a limitations period. They are distinct in nature and purpose.[9]

Moreover, whether the ALJ used the correct timeframe in counting a particular instance of misconduct as the first or the sixth infraction, as contemplated by Board Policy 6417.02 for the purpose of applying progressive discipline, is immaterial to the issue before the Board, which is whether the District would have dismissed Clavel even had he not engaged in protected activity. We conclude, along with the ALJ, that the District carried its burden of proof on this issue. As the ALJ found, Clavel had a long history of disciplinary problems pre-dating his protected activity and continuing throughout his employment. Leaving aside the first and second level offenses, Clavel committed multiple third level offenses, for which reckoning periods do not apply, and which, according to Board Policy 6417.02, justify "the severe penalty even though an employee's past record may be exemplary." (Joint Exhibit III (part 1 of 2), exh. 76.)

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[8] See, e.g., STATUTE OF LIMITATIONS, Black's Law Dictionary (10th ed. 2014).

[9] Tucker similarly observed in her Findings and Recommendation:

> Appellant [Clavel] alleges that there is a "one year 'reckoning period' beyond which earlier minor discipline – or lack of discipline – cannot extend" and that this "is the outward, outward limit on any statute of limitations." Yet Appellant dos not provide authority to establish that a "reckoning period" is the equivalent of a statute of limitations upon the imposition of discipline.

(District Exhibit, exh. 48, pp. 4-5, fn. 2.)

II. *Clavel's 2009 Evaluation*

Clavel began employment with the District in or around 1989 and was dismissed effective August 5, 2010. In or around June 2007, Clavel was transferred from Savanna High School to Western High School. In May 2009, Principal Paul Sevillano (Sevillano) issued Clavel a performance evaluation with an overall rating of "Requires Improvement." Clavel was rated as "Not Satisfactory" in the area of contact with other employees and coordinating his work; and he was rated as "Requires Improvement" in the area of accepting direction and responsibility. Clavel was rated as "Effective – Meet Standards" in areas including attendance, compliance with rules, quality of work and care for equipment.

AFSCME's exception takes issue with statements in the following passage in the proposed decision, discussing:

> [T]he deficiencies identified in the nexus analysis, above, do not detract from the seriousness of the above-referenced offenses. For example, none of the [dismissal] charges identified here were inconsistent with Clavel's 2009 evaluation. Principal Sevillano did not appear to know about Clavel's falsification of documents, the e-mail message about [Jose] Vazquez, or the damage to the baseball field. Sevillano specifically rated Clavel as "Not Satisfactory," the lowest possible rating in contact with employees and coordinating his work with others.

(Proposed decision, p. 98.)

The reference to the falsification of documents in the above quote refers to forms signed by Clavel in March 2008 claiming union leave for days in which he had been incarcerated in Arizona for a misdemeanor conviction of interfering with a judicial proceeding. The reference to an e-mail message about Jose Vazquez (Vazquez) refers to a message sent by Clavel to a television news organization using his District e-mail account on or around July 1, 2008, referring to a former supervisor as a "sexual predator" and suggesting that he might be

sexually harassing students. The reference to damage to the baseball field appears to refer to an incident in which Clavel overwatered the field, and thereby unnecessarily delayed the work of his co-workers in chalking the baselines before a game.

AFSCME asserts that there is no evidence the baseball field was *damaged* by the overwatering or that the game was delayed. AFSCME misses the ALJ's point. The point is that, without knowledge of the overwatering incident and the fact that it caused a delay in the work to be performed by his co-workers, Sevillano independently rated Clavel as Not Satisfactory in contact with employees and coordinating his work with others consistent with Clavel's dismissal charges.

AFSCME also argues that Sevillano had to have known about the overwatering of the baseball field because it occurred six weeks prior to the 2009 evaluation and because the Athletic Director must have reported it to him. Alternately, AFSCME argues that if Sevillano did not know about the overwatering incident it is because the Athletic Director thought it too insignificant to report. As AFSCME summarized: "If she reported it, they [Sevillano and the Assistant Principal] knew about it. If she didn't, it was inconsequential."

AFSCME's detailed examination of the overwatering incident is in service of its broader argument that the incident does not qualify as a second level offense. As stated above, the overwatering incident was just one of many incidents involving Clavel and the baseball field. Moreover, the PERB formal hearing is not an opportunity to retry the issue before the Personnel Commission at Clavel's dismissal hearing, i.e., whether the District had reasonable cause to dismiss Clavel. (Findings and Recommendations, pp. 1-2, District Exhibit, exh. 48.) Regardless of whether the overwatering incident qualifies as a second level offense under Board Policy 6417.02, the ALJ relied on a long history of disciplinary events pre-dating

Clavel's protected activity and continuing throughout his employment to conclude that the District met its burden of proving that it would have dismissed Clavel even in the absence of protected activity.

For the District to prevail, it must prove that it had both an alternative non-discriminatory reason for dismissing Clavel, and that it acted because of this alternative non-discriminatory reason and not because of Clavel's protected activity. *(Palo Verde Unified School District* (2013) PERB Decision No. 2337.) When analyzing the employer's affirmative defense in a retaliation case, PERB weighs the employer's justifications for the adverse action against the evidence of the employer's retaliatory motive. *(Chula Vista Elementary School District* (2011) PERB Decision No. 2221, p. 21.) When evaluating the employer's justification, the question is whether the justification was "honestly invoked and was in fact the cause of the [adverse] action." (*Ibid.* quoting *The TM Group, Inc. and Kimberly Grover* (2011) 357 NLRB No. 98.)

Notably absent from AFSCME's first or second exception to the ALJ's analysis of the District's affirmative defense is the proffer of any argument or citation to the evidentiary record meant to persuade us that, in taking adverse action against Clavel, the District was motivated by anti-union animus or protected activity, rather than Clavel's disciplinary history. Clavel's disciplinary problems predate his protected activity. Prior to Clavel's protected activity, he received multiple counseling memoranda, a demotion, multiple written reprimands, a suspension, and placement on administrative leave. The problems that led to Clavel's dismissal follow a familiar pattern unrelated to Clavel's union activities. At the PERB formal hearing, the District moved to dismiss the retaliation claim on the grounds that such claim had already been decided at the Personnel Commission dismissal hearing. Citing the differences in

jurisdiction between the Personnel Commission dismissal hearing and the PERB formal hearing, the ALJ denied the District's motion, ruling that the Personnel Commission's finding should not be given collateral estoppel effect. We do not disturb that ruling here. (See, e.g., *State of California (Department of Corrections)* (2001) PERB Decision No. 1435-S, adopting proposed dec. at p. 43, fn. 20.) We note, however, that these two adjudicative bodies, the Personnel Commission and PERB, independently arrived at conclusions regarding Clavel's dismissal that are consistent in material respects. In her Findings and Recommendations, Personnel Commission Hearing Officer Tucker stated:

> Although Appellant [Clavel] relied at least in part upon a theory that his Union affiliation was a motivating factor in his dismissal, there is not the slightest hint in the record that *anyone* in the District's administration ever took an action or made a decision that was motivated by protected activity, or anti-union animus.

(District Exhibit, exh. 48, p. 6, italics in the original.)

The ALJ's point in the portion of the proposed decision to which AFSCME objects is that Sevillano's impressions about Clavel's contact with employees and coordination of his work with others, as reflected in the 2009 evaluation, is consistent with the charges that led to Clavel's dismissal. We agree with the ALJ that this point supports the conclusion that the justification given by the District for Clavel's dismissal was "honestly invoked."[10]

[10] In this exception, AFSCME also asserts that Sevillano must have known about the incident involving the falsification of documents. AFSMCE argues, "Dr. Sevillano knew, because his secretary was pursuing the issue." Whether this is a valid conclusion or deductive fallacy cannot be resolved on this record. Either way, its relevance is lacking. AFSCME's argument lacks merit for similar reasons AFSCME's argument regarding the overwatering of the baseball field lacks merit. First, the ALJ hedged his point by stating that Sevillano "*did not appear to know about*" the falsification of documents, the e-mail message to Vazquez or the damage to the baseball field. (Proposed dec., p. 98, italics added.) But the broader point is that the deficiencies noted by Sevillano in the 2009 evaluation are consistent with the charges that led to Clavel's dismissal. And, again, AFSCME's argument is not tethered to the key issue here, i.e., whether the justification given by the District for Clavel's dismissal was

III. *The Secret or Side File*

The proposed decision states:

> The Dismissal Charges also referenced documents not contained in Clavel's personnel file such as records of when Vazquez or Oatman called the police. Some of these documents were located in what was referred to in the record as a "site file," or files maintained by school site administration. During the PERB hearing, Clavel admitted to knowing that about his site files. He said he never asked to review those files.

(Proposed dec., p. 45.)

In the analysis of nexus, the fourth element of the prima facie retaliation case, the proposed decision discusses AFSCME's argument that the District failed to follow its disciplinary procedures by relying on documents not contained in Clavel's official personnel file. Relying on Board precedent,[11] the ALJ concluded that AFSCME did not establish that the District's maintenance or use of the District's *site files*, which were maintained on Clavel separate from Clavel's official *personnel file*, was evidence of nexus. As stated in the proposed decision, the District's site files were not secret, nor were they hidden from Clavel. Clavel testified that he knew about the District's site files and never asked to review them. The District had complied with AFSCME's request to inspect material reviewed by a private investigator hired by the District to conduct the personnel investigation, and even delayed the

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honestly invoked or, rather, either a pretext for retaliating against Clavel based on his union activity or not the real motivating cause for his dismissal. AFSCME's exceptions quibble with perceived slights in the proposed decision, but as noted above, do not engage on this key issue.

[11] See *Novato Unified School District* (1982) PERB Decision No. 210 in which the Board held that a "secret file" maintained at an employer's school site suggested retaliatory motive where employee was never informed of the file and maintenance of the file appeared to violate the employer's personnel practices. See also *Woodland Joint Unified School District* (1987) PERB Decision No. 628, in which the Board held that a "working file" maintained separate from an employee's personnel file is not evidence of retaliatory motive if consistent with personnel practices, but the employer's failure to provide the content of the file to an employee on request is evidence of retaliatory motive absent a reasonable explanation.

disciplinary proceedings to allow sufficient time for AFSCME's review. Implicitly, based on that example, there is no reason to conclude that the District would have responded any differently to a request by AFSCME to review the content of the District's site files.

In its exception, AFSCME argues that the District's use of the site files violates "Education Code section 44103 [sic]," the Labor Code and "Chino State case law and its progeny." Education Code section 44031, subdivision (a) (and its Labor Code equivalent, section 1198.5) generally provides that employees have the right to inspect their personnel records. Subdivision (b) provides that derogatory information shall not be entered into a school district employee's records unless and until the employee is given notice of the information and opportunity to comment. The California Supreme Court in *Miller v. Chico Unified School Dist. Board of Education* (1979) 24 Cal.3d 703 held that a school district employer must comply with the requirements of subdivision (b) prior to reaching any decision affecting the employee's employment status. School districts may not avoid the requirements of this statute by placing derogatory written material in a file not designated as the employee's official personnel file. (*Ibid.*)

Apart from critiquing the ALJ for referring to the files as "site files" rather than "side files," AFSCME fails to state the specific issues of procedure, fact, law or rationale to which this exception is taken, as required by PERB Regulation 32300, subdivision (a)(1). While PERB has no authority to enforce provisions of the Education Code (*Whisman Elementary School District* (1991) PERB Decision No. 868, p. 13), AFSCME does not argue that the District denied Clavel the right to inspect his personnel records upon request regardless of their location. Nor does AFSCME argue that Clavel was deprived notice of, and opportunity to comment on, derogatory written material that the District used as a basis for dismissal.

Moreover, although the ALJ found that the maintenance and use of the files is not evidence of retaliatory motive for purposes of establishing the nexus element of the prima facie case, the ALJ ultimately concluded that AFSCME had nonetheless established the nexus element based on other facts. Therefore, even if the ALJ had concluded that the maintenance or use of such files is evidence of nexus, the outcome of this case would be no different. The outcome was determined by the District's success in prevailing on its affirmative defense despite AFSCME's success in establishing its prima facie case.

The District's Cross-Exception[12]

By way of factual background to this exception, AFSCME and the District were signatories to a collective bargaining agreement in effect at all times relevant to the parties bargaining claims. Consistent with that agreement, the parties reopened negotiations on wages, benefits and other items during both the 2006-2007 year and the 2007-2008 year. Neither party requested reopener negotiations for the 2008-2009 year. In or around September 2009, Lee-Sung sought to commence bargaining for the 2009-2010 year, and requested that AFSCME submit its initial proposal. On November 5, 2009, the District submitted its initial proposal, and on December 9, 2009, AFSCME submitted its initial proposal. The parties commenced negotiations on January 26, 2010. They reached a tentative agreement, a "handshake" deal, on July 29, 2010. On the evening of August 5, 2010, the District Board of

[12] AFSCME filed a response to the District's cross-exception pursuant to PERB Regulation 32310, which included argument more directly related to the issue of retaliation than to the limited issue raised in the District's cross-exception regarding the District's refusal to negotiate with AFSCME's bargaining team so long as it included Clavel. The Board declines to review that portion of AFSCME's response that is not directly related to the District's cross-exception. Allowing AFSCME a second opportunity to argue in support of its exceptions to the retaliation analysis under the guise of responding to the District's cross-exception is not contemplated by our regulatory scheme. (See, e.g., *County of Santa Clara* (2012) PERB Decision No. 2267-M, p. 2, fn. 3.)

Trustees held a special meeting to approve a draft three-year agreement. At a regular meeting, which followed the special meeting, the Board of Trustees voted to approve Clavel's dismissal.

Clavel had been placed on administrative leave on October 12, 2009, but continued to participate in negotiations for the 2009-2010 year. Although the parties reached a tentative agreement, there was no final agreement in place as of the August 5, 2010, meeting of the District Board of Trustees. Following the meeting, AFSCME suggested that the parties reconvene their bargaining teams, but Lee-Sung refused to meet with AFSCME's bargaining team so long as it included Clavel. Lee-Sung said that he was concerned about Clavel's presence because multiple employees had filed complaints against him and would likely testify against him at his Personnel Commission dismissal hearing.[13] To address Lee-Sung's concerns, AFSCME offered to meet at the union offices, but Lee-Sung found that suggestion unacceptable. Lee-Sung also questioned the need for the bargaining teams to meet because he felt the parties already had reached agreement.

In general "EERA gives the parties the right to appoint their own negotiators and forbids either side from dictating who their opposing representatives may be." (*Yolo County Superintendent of Schools* (1990) PERB Decision No. 838, proposed dec. at p. 33, citing *San Ramon Valley Unified School District* (1982) PERB Decision No. 230.) In *Yolo County Superintendent of Schools*, the Board held that an employer committed a "per se" violation of the duty to bargain by demanding that a union remove a particular member from its bargaining team in the middle of negotiations. The ALJ relied on this authority to conclude that the District's refusal to meet with AFSCME's bargaining team with Clavel violated its duty to bargain in good faith pursuant to EERA section 3543.5, subdivision (c).

[13] The Personnel Commission dismissal hearing took place over 16 days beginning on October 3, 2011, and ending on November 27, 2012.

In the proposed decision, the ALJ addressed two arguments raised in the District's closing brief. Relying on *Savanna School District* (1982) PERB Decision No. 276, which sets forth a test for determining the legality of "coordinated bargaining,"[14] the District argued that there is an exception to the general rule that a union has the right to select its negotiators where the employer can show a "clear and present danger to the bargaining process." (*Ibid.* quoting *General Electric Co. v. NLRB* (2d Cir. 1969) 412 F.2d 512, 517.) Unless the employer can show concrete examples of actual disruption to the bargaining process or evidence of an ulterior motive by the union to undermine bargaining, the union will not be found to have violated its duty to bargain in good faith by engaging in coordinated bargaining. (*State of California (Department of Personnel Administration)* (1998) PERB Decision No. 1305-S.)

The ALJ concluded that the District did not establish that the test for determining the legality of coordinated bargaining even applied to the facts in this case given that the bargaining process engaged in by the parties did not involve coordinated bargaining. The ALJ also concluded that, even if the test applied, the District did not establish that Clavel's continued participation in negotiations presented a "clear and present danger" to the bargaining process. As the proposed decision states:

> There was no evidence, for example, that Clavel was disruptive, threatening, intimidating, or otherwise unproductive during negotiations. Nor was evidence presented that any employees that had filed complaints against Clavel would be present or even nearby during the parties' negotiations. Lee-Sung was the only member of the District's negotiating team that testified against Clavel in his dismissal hearing. He never expressed any fear of

[14] With coordinated bargaining, employees who are not part of a union's bargaining unit are allowed to serve on that union's negotiating team. (*Savanna School District, supra,* PERB Decision No. 276, proposed dec. at p. 3.)

> Clavel. Local 3112 even offered to ameliorate the District's stated concerns by meeting at the AFSCME offices. The District offered no explanation for rejecting that proposal.

(Proposed dec., p. 72.)

The second issue raised in the District's closing brief to the ALJ concerned the necessity of additional bargaining sessions. The District asserted that the parties were no longer negotiating after July 29, 2010. The ALJ rejected this argument, relying on the principle that the parties' mutual duty to negotiate in good faith includes the obligation to cooperate in preparing the final written agreement. (EERA, § 3540.1, subd. (h); *NLRB v. Auciello Iron Works, Inc.* (1st Cir. 1992) 980 F.2d 804, 808; *Albertson's, Inc.* (1993) 312 NLRB 394, 397.)

In its exception, the District continues to contend that its refusal to meet with AFSCME's bargaining team so long as it included Clavel was not a violation of its duty to negotiate in good faith. In support of its exception, the District relies on Lee-Sung's testimony at the PERB formal hearing that transferring Clavel to another site was not an option because Lee-Sung had determined that Clavel created a hostile work environment at Western High. (PERB formal hearing, Reporter's Transcript, vol. X, pp. 120:27-121:8.) Each of the District's arguments in support of its exception is addressed next.

First, the District argues that the ALJ misapplied authority regarding coordinated bargaining. The District, not the ALJ, first raised PERB precedent on coordinated bargaining in its closing brief to the ALJ. The ALJ questioned the applicability of the precedent to a case not involving coordinated bargaining, but in response to the District's argument, faithfully applied the test and concluded appropriately that the District had not established that Clavel's continued participation in negotiations presented a "clear and present danger" to the bargaining

process. Contrary to the District's contention, Clavel's "voluminous disciplinary record" does not ipso facto make Clavel's presence or participation a "clear and present" danger to the bargaining process. No concrete examples of actual disruption to the bargaining process were provided by the District in support of its argument. Nor did the District point to any evidence that AFSCME had an ulterior motive to undermine the bargaining process in its inclusion of Clavel on the bargaining team after his dismissal. (*Savanna School District, supra,* PERB Decision No. 276; *State of California (Department of Personnel Administration), supra,* PERB Decision No. 1305-S.)

The District is incorrect in asserting that the ALJ "misconstrued the 'clear and present danger'" as only applying if members of the District's bargaining team were intimidated by or fearful of Clavel. The ALJ correctly construed the phrase to focus on danger to the *bargaining process* posed by Clavel's presence or participation. In pointing out that Lee-Sung, the only member of the District's negotiating team to testify against Clavel at his dismissal hearing, never expressed any fear of Clavel, the ALJ was merely using that fact as *further* support for his conclusion that Clavel's inclusion on AFSCME's bargaining team did not present a clear and present danger to the bargaining process. It is true that the decisional law concerning coordinated bargaining does not predicate a finding of clear and present danger on evidence of fear or intimidation on the part of specific negotiating team members, as the District asserts. It is also true, under the decisional law, that the production of a "voluminous disciplinary record" does not prove a clear and present danger to the bargaining process. While the District correctly asserts that danger to the bargaining process is the proper focus of the inquiry in coordinated bargaining cases, it then incorrectly asserts that "there was ample evidence presented in this case during Clavel's termination hearing." Clavel's termination hearing

concerned an unrelated issue, i.e., whether the District had reasonable cause for dismissal. Reasonable cause for dismissal is not the same as a clear and present danger to the bargaining process.

After initially raising the coordinated bargaining cases to the ALJ, the District next contends that "this should not be the test." The District argues that the ALJ failed to consider the applicable test as set forth in National Labor Relations Board (NLRB) authorities, *Fitzsimons Mfg. Co.* (1980) 251 NLRB 375, enfd. (6th Cir. 1982) 670 F.2d 663 and *KDEN Broadcasting Co.* (1976) 225 NLRB 25 (*KDEN*)). Both cases acknowledge the general rule that employees may choose whomever they desire to represent them in formal negotiations with the employer. These cases stand for the principle that a limitation or exception to this rule will only be found where there is "*persuasive evidence* that the presence of the particular individual would create ill will and make good-faith bargaining impossible." (*KDEN, supra,* 225 NLRB 25, 35, italics in the original.) Where the limitation or exception applies, the other party is relieved of its duty to deal with that particular individual. (*Fitzsimons Mfg. Co., supra,* 251 NLRB 375, 379.)

In *KDEN*, the employer refused to negotiate with the union's bargaining team so long as it included a particular individual who had been discharged for a course of conduct on his final day of employment that was embarrassing to the president of the company and amounted to insubordination. The NLRB found that the circumstances surrounding the discharge were "hardly persuasive evidence that he could not fruitfully participate on the Union's negotiating team." (*Id.* at p. 35.) The NLRB stated that the employer's position was "purely anticipatory and speculative." (*Ibid.*) The NLRB held that the employer violated its good faith bargaining

obligation by refusing to meet with the duly certified collective bargaining representative of an appropriate bargaining unit for purposes of bargaining.

The NLRB reached the opposite result in *Fitzsimons Mfg. Co., supra,* 251 NLRB 375, the other NLRB authority cited by the District. That case involved a fifth-step grievance meeting between representatives of the employer and the union's international servicing representative and bargaining team. At the meeting, the following occurred:

> Mastos then said that he would punch Vogel in the mouth and knock him on his ass if the subject was brought up again.
>
> The bargaining committee then reentered the room, and Vogel said, "I have one comment to make about. . . ." Mastos interrupted Vogel, reached across the desk, grabbed Vogel by his tie, and pulled upwards. Vogel came to his feet. Foltz then separated Mastos and Vogel, and Mastos challenged Vogel to come outside to the parking lot. . . .
>
> [¶ . . . ¶]
>
> At sometime following the June 29 incident, Vogel was treated at a hospital for alleged back pains. Vogel filed a lawsuit against Mastos and the Union alleging assault and battery, negligence, and personal injuries. Mastos countersued Vogel for intentional and negligent infliction of emotional distress and for breach of an oral contract of confidentiality.

(*Id.* at pp. 376-377.)

The NLRB concluded that Mastos's unprovoked physical assault was sufficiently egregious to make bargaining impossible. The NLRB cited to the fact that the conduct occurred at a grievance session and took place in the presence of the bargaining unit's bargaining committee, whose members looked to Mastos for leadership. As the NLRB concluded: "The nature of the attack involved here – sudden, unprovoked, and in the presence of both management and union officials – is a sufficient foundation for concluding that the presence of Mastos in future bargaining sessions would create such an atmosphere as to render

good-faith bargaining *impossible*." (*Fitzsimons Mfg. Co., supra,* 251 NLRB 375, 380, emphasis added.)

Relying on the general principles set forth in the above NLRB authority, the District asserts that "Clavel's contentious, lengthy termination proceeding clearly establishes that good faith bargaining would be impossible with his continued presence on the Local 3112 bargaining team." To the contrary, the District's assertion of impossibility is far from clearly established by such evidence. First, the "lengthy" disciplinary proceeding itself did not begin until October 3, 2011, over a year after Clavel's dismissal. Second, the District presented no evidence that bargaining would be rendered *impossible* with Clavel's continued presence on AFSCME's bargaining team. Simply proffering Clavel's voluminous disciplinary record and lengthy disciplinary proceedings is not sufficient to meet that bar. There must be persuasive evidence of its *effect* on the bargaining process. The District presented no such evidence.

"[I]mpossible" is a high bar to reach for a party that refuses to deal with the selected representative of the other party to a collective bargaining relationship, as it should be. A bargaining unit cannot be deprived of its most fundamental right to select a representative of its own choosing for purposes of collective bargaining unless bargaining is *in fact* rendered impossible. (*Yolo County Superintendent of Schools, supra,* PERB Decision No. 838, proposed dec. at p. 33, citing *San Ramon Valley Unified School District, supra,* PERB Decision No. 230.) As was true in *KDEN*, the District's position here is "purely anticipatory and speculative."

The Board's conclusion on this issue finds further support in a more recent NLRB authority, *Neilmed Products, Inc.* (2012) 358 NLRB No. 8 (*Neilmed Products*). In that case, the NLRB found that the employer unlawfully refused to allow the union's business agent

access to the employer's facility on the grounds that the employer failed to prove that the presence of the business agent, a former employee terminated for a picket-line incident,[15] would create ill-will and make good-faith bargaining impossible. As the NLRB stated:

> [T]he Respondent failed to present any evidence establishing that the Union acted in bad faith in appointing Cisneros as business agent. That the Respondent had terminated Cisneros and refused to reinstate him does not establish bad faith, as such actions would not serve to disqualify Cisneros from serving as a bargaining representative. See, e.g., *Caribe Staple Co.*, 313 NLRB 877, 889 (1994) (finding that an employer may not insist that a bargaining representative be excluded from negotiations solely because that individual has been terminated.)

(*Neilmed Products, supra,* 358 NLRB No. 8, p. 2, fn. 2.)

The employer in *Neilmed Products* made the same argument before the NLRB that the District makes here. The employer in *Neilmed Products* contended that it could not allow Cisneros into its facility because employees feared him. But, as stated in *Neilmed Products*, "requiring persuasive evidence of ill will and making good-faith bargaining impossible, subsumes the single issue of workplace safety." (*Neilmed Products, supra* 358 NLRB No. 8, ALJ decision at p. 28.) The NLRB concluded that Cisneros's actions did not constitute persuasive evidence that his presence at the employer's facility to negotiate and to administer the contract would create ill will and make good faith bargaining impossible. Although the employer in *Neilmed Products* presented evidence that some of the employees were frightened by Cisneros, more relevant was the fact that none of these employees were involved in

[15] Cisneros, while on the picket line, broke a windshield with his fist, yelled at employees crossing the picket line and stood in front of the cars of some employees as they drove across the picket line. (*Neilmed Products, supra* 358 NLRB No. 8, p. 29.) Throughout his suspension and after his termination, Cisneros continued to serve as picket captain during the strike and an elected member of the bargaining unit's bargaining committee. At the time the employer denied Cisneros further access to the employer's facility, he had been named business agent for the union and was on the employer's premises to discuss a grievance.

negotiations and the conduct that led to Cisneros's discharge was not directed toward the bargaining process. (*Neilmed Products, supra,* 358 NLRB No. 8, ALJ decision at p. 31.)

Third, the District argues that it never "refused" to continue bargaining with Clavel because AFSCME discontinued including Clavel in negotiations following Clavel's dismissal on August 5, 2010. The employer in *Neilmed Products* made a similar argument, asserting that the ALJ erred in failing to consider its assertion that the union did not have a "superseding need" for Cisneros to be its business agent. We reject the District's argument for the same reason that the employer's argument in *Neilmed Products* was rejected:

> [S]uch evidence is irrelevant because the Board does not require a party to demonstrate a particular need for its chosen bargaining representative. See *Fitzsimons Mfg. Co.*, 251 NLRB 375, 378-379 (1980) (reciting the general rule that each party may select whomever it wishes to be its bargaining representative and the other party has a duty to bargain with that individual), enfd. 670 F.2d 663 (6th Cir. 1982).

(*Neilmed Products, supra,* 358 NLRB No. 8, p. 2, fn. 2.)

Last, the District argues that it had an affirmative legal obligation to prevent discrimination and harassment from occurring under section 12940, subdivisions (j) and (k) of the California Fair Employment and Housing Act. While PERB does not enforce anti-discrimination laws found in other statutory schemes (*San Bernardino City Unified School District* (2012) PERB Decision No. 2278), the District put on no evidence that it was mandated by law to exclude Clavel from negotiations lest it be found liable under the state's anti-discrimination laws. Even if the District believed that Clavel should not be present at any of the campuses where complaining employees worked, that does not explain why negotiations could not take place at union offices, as AFSCME had offered in attempting to address the District's concerns, or anywhere else the complaining employees did not work. The District

also presented no evidence that Clavel ever engaged in discriminatory or harassing conduct toward an employee at a bargaining session, which might reasonably lead the District to be concerned about the possibility of recurrence in this otherwise controlled and structured setting.

There is a certain irony in the District's position on appeal. The District placed Clavel on administrative leave on October 12, 2009. Clavel continued to participate in the bargaining process all the way up to the August 5, 2010, meeting of the District Board of Trustees to first approve an agreement Clavel helped negotiate, and then to approve Clavel's dismissal. Clavel presented no greater risk to the complaining employees and no greater harm to the bargaining process after the District's Board of Trustees voted to approve his dismissal than he did during the preceding ten months on administrative leave while negotiating the new agreement.

Less than a week prior to the August 5, 2010, vote of the District's Board of Trustees, Clavel and Lee-Sung exchanged the following e-mail messages:

> Hello, Russell,
>
> If you don't mind, I really need to get this notification of our ratification out to all our members. I will need to post and hand deliver these flyers to our members.
>
> It's important to have all our members notified of this tentative agreement, and be given a vote to ratify, we hope.
>
> I also have others helping with this task.
>
> If you have any questions, my cell number is [deleted].
>
> Thank you,
>
> Daniel Clavel,
> Chief Steward,
> AFSCME 3112

Clavel sent Lee-Sung that message at 9:22 a.m. on Friday, July 30, 2010. Lee-Sung responded at 12:07 p.m. on Saturday, July 31, 2010, as follows:

> Dan,
>
> Getting the message out is important. Please have other AFSCME officers deliver notices to Western and Savanna. You are free to visit other campuses as necessary.
>
> Russell

(AFSCME Exhibit, exh. V.)

Clavel and Lee-Sung's exchange is telling for a variety of reasons. At the time of the events in question, Lee-Sung did not consider Clavel's presence on District premises as posing any liability issues for the District as a general matter. There were only two schools, Savanna and Western, which Lee-Sung asked Clavel not to visit, presumably because the complaining employees worked at those schools.

More importantly, Lee-Sung did not view Clavel's participation as a clear and present danger to the bargaining process; nor did Lee-Sung view Clavel's presence as creating ill will or making good-faith bargaining impossible. Lee-Sung may have wanted to portray Clavel in a different light two years later at the PERB formal hearing, but this e-mail exchange between Lee-Sung and Clavel on July 30 and 31, 2010, represents far more reliable evidence of Lee-Sung's estimation of Clavel at the relevant time in question. In sum, the District's exception fails both on the facts and the law.

ORDERS

I. Order in Case No. LA-CO-1451-E

Upon the foregoing findings of fact and conclusions of law, and the entire record in Case No. LA-CO-1451-E, *Anaheim Union High School District v. American Federation of*

State, County and Municipal Employees, Local 3112, it is found that the American Federation of State, County and Municipal Employees (AFSCME) violated the Educational Employment Relations Act (EERA), Government Code section 3543.6(c). AFSCME violated EERA by negotiating with the Anaheim Union High School District (District) in bad faith. All other claims are dismissed.

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

A. CEASE AND DESIST FROM:

Negotiating with the District in bad faith.

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

1. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees in AFSCME's bargaining unit customarily are posted, copies of the Notice attached hereto as Appendix A. The Notice must be signed by an authorized agent of AFSCME, 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 the physical posting requirement, the Notice shall be posted by electronic message, intranet, internet site and any other electronic means customarily used by AFSCME to regularly communicate with employees in the 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 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 District.

II. Order in Case No. LA-CE-5535-E

Upon the foregoing findings of fact and conclusions of law, and the entire record in Case No. LA-CE-5535-E, *American Federation of State, County and Municipal Employees, Local 3112 v. Anaheim Union High School District*, it is found that the Anaheim Union High School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5, subdivisions (a), (b), and (c). The District violated EERA by negotiating with the American Federation of State, County and Municipal Employees (AFSCME) in bad faith, including unilaterally imposing unpaid furloughs on AFSCME's bargaining unit. All other claims are dismissed.

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

A. CEASE AND DESIST FROM:

1. Negotiating with AFSCME in bad faith;

2. Refusing to meet with AFSCME's chosen negotiators in bargaining;

3. Unilaterally implementing policies within the scope of representation;

4. Interfering with AFSCME's right to represent its members;

5. Interfering with employees' right to be represented by AFSCME.

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

1. Bargain with AFSCME, upon demand, over the language and format of the furlough and layoffs agreement at issue in the parties' 2009-2010 negotiations. AFSCME

must demand to bargain over this issue within ten (10) days from a final decision in this matter.

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 AFSCME's bargaining unit customarily are posted, copies of the Notice attached hereto as Appendix B. 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 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 the physical posting requirement, the Notice shall be posted by electronic message, intranet, internet site and any other electronic means customarily used by the District to regularly communicate with employees in the bargaining unit represented by AFSCME. (*City of Sacramento* (2013) PERB Decision No. 2351-M.)

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 his/her designee. All reports regarding compliance with this Order shall be concurrently served on AFSCME.

Members Winslow and Banks joined in this Decision.

APPENDIX A

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

After a hearing in Unfair Practice Case No. LA-CO-1451-E, *Anaheim Union High School District v. American Federation of State, County and Municipal Employees, Local 3112* in which all parties had the right to participate, it has been found that the American Federation of State, County and Municipal Employees violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq., by negotiating with the Anaheim Union High School District (District) in bad faith.

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

A. CEASE AND DESIST FROM:

Negotiating with the District in bad faith.

Dated: _____

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
LOCAL 3112

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.

APPENDIX B

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

After a hearing in Unfair Practice Case No. LA-CE-5535-E, *American Federation of State, County and Municipal Employees, Local 3112 v. Anaheim Union High School District* in which all parties had the right to participate, it has been found that the Anaheim Union High School District violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq., by negotiating with the American Federation of State, County and Municipal Employees (AFSCME) in bad faith, including unilaterally imposing unpaid furloughs on AFSCME's bargaining unit.

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

A. CEASE AND DESIST FROM:

1. Negotiating with AFSCME in bad faith;

2. Refusing to meet with AFSCME's chosen negotiators in bargaining;

3. Unilaterally implementing policies within the scope of representation;

4. Interfering with AFSCME's right to represent its members;

5. Interfering with employees' right to be represented by AFSCME.

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

Bargain with AFSCME, upon demand, over the language and format of the furlough and layoffs agreement at issue in the parties' 2009-2010 negotiations. AFSCME must demand to bargain over this issue within ten (10) days from a final decision in this matter.

Dated: _____ ANAHEIM 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

ANAHEIM UNION HIGH SCHOOL DISTRICT, Charging Party, v. AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, LOCAL 3112, Respondent.	UNFAIR PRACTICE CASE NO. LA-CO-1451-E;
AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, LOCAL 3112, Charging Party, v. ANAHEIM UNION HIGH SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA–CE–5535–E **PROPOSED DECISION (03/19/2014)**

Appearances: Parker & Covert, LLP, by Spencer Covert, Attorney, and Stutz, Artiano, Shinoff & Holtz, by Jack M. Sleeth, Jr., Attorney, for Anaheim Union High School District; Pete Schnaufer, Business Representative, for American Federation of State, County, and Municipal Employees, Local 3112.

Before Eric J. Cu, Administrative Law Judge.

PROCEDURAL HISTORY

In these two cases, a public school employer and an exclusive representative accuse each other of multiple violations of the duty to negotiate in good faith under the Educational Employment Relations Act (EERA).[1] The exclusive representative also alleges unlawful retaliation against one of its officers. Each party denies that it has violated EERA.

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

I. The Pre-Hearing History

On September 27, 2010, the Anaheim Union High School District (District) filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) asserting that American Federation of State, County, and Municipal Employees, Local 3112 (Local 3112 or AFSCME) violated the duty to negotiate in good faith contained in EERA section 3543.6(c) under multiple theories. The District's charge against Local 3112 was based on the parties' negotiations for the 2009-2010 and 2010-2011 years. The PERB Office of the General Counsel assigned this matter PERB case number LA-CO-1451-E.

On January 28, 2011, Local 3112 filed its own unfair practice charge concerning the District's bargaining conduct during the same time period. Local 3112 alleged that the District's conduct violated the duty to negotiate in good faith under EERA section 3543.5(c) and also violated EERA section 3543.5(d). Local 3112 also alleged that the District retaliated against one of its bargaining team members in violation of EERA sections 3543.5(a) and (b). The General Counsel's Office assigned this matter PERB case number LA-CE-5535-E.

On July 3, 2012, the General Counsel's Office of PERB issued a complaint in case number LA-CO-1451-E, alleging that Local 3112 violated the duty to negotiate in good faith both by individual acts and by the totality of its conduct. On July 13, 2012, Local 3112 withdrew the claim that the District violated EERA section 3543.5(d). That day, the General Counsel's Office issued a complaint in case number LA-CE-5535-E, alleging that the District unilaterally adopted policy changes and additionally violated the duty to negotiate in good faith both by individual acts and by the totality of its conduct. The complaint also alleged that the District terminated Local 3112 Officer Dan Clavel in retaliation for his role in AFSCME.

On July 20, 2012, Local 3112 filed an answer to the PERB complaint in LA-CO-1451-E, denying the substantive allegations and asserting multiple affirmative defenses. On August 3, 2012, the District filed an answer to the PERB complaint in LA-CE-5535-E, also denying the substantive allegations against it and asserting multiple affirmative defenses. The District did not argue in its answer that some or all of the claims in the LA-CE-5535-E complaint should be deferred to the parties' grievance arbitration process.

The two cases were consolidated for further proceedings. An informal settlement conference was held on September 18, 2012, but the disputes were not resolved. The matter was then set for formal hearing.

II. The Formal Hearing

The PERB formal hearing took place over 11 days between February 11 and August 12, 2013. There were multiple motions and stipulations during the hearing process.

A. The District's Motion for Deferral to Arbitration

Prior to the commencement of the hearing on February 7, 2013, the District filed a motion to defer the retaliation claims in the LA-CE-5535-E complaint to the parties' grievance arbitration process. Local 3112 filed its opposition to the motion on February 11, 2013, the first day of hearing. The Administrative Law Judge (ALJ) denied the motion on the grounds that the District failed to assert that defense in its answer to the PERB complaint. He noted that PERB Regulation 32644(b)(6)[2] requires that a respondent's answer include "[a] statement of any affirmative defense" applicable to the case. PERB has held that deferral to arbitration is an affirmative defense that must be timely raised or else it is waived. (*East Side Union High School District* (2004) PERB Decision No. 1713.)

[2] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

B. The District's Motion to Admit Evidence From Clavel's Dismissal Hearing Before the District Personnel Commission

On the first day of hearing, the District also moved to admit the transcripts from a 16-day hearing before the District's Personnel Commission concerning Clavel's dismissal (Clavel's Dismissal Hearing). The issue before the Personnel Commission was whether the District had good cause to dismiss Clavel. The District's request was that the testimony and exhibits from Clavel's Dismissal hearing be treated, for all evidentiary purposes, as though it were produced during the course of the PERB hearing. The ALJ denied the District's motion due to opposition from Local 3112.

C. The District's Motion to Dismiss Claims From the LA-CE-5535-E Complaint

On July 30, 2013, which was not a hearing day, the District filed a motion to dismiss the retaliation allegations on the grounds that those claims were already decided at Clavel's Dismissal Hearing before the Personnel Commission. On August 1, 2013, which was a hearing day, the ALJ issued a Tentative Order denying the District's motion and gave both parties the opportunity to argue the matter further on the next scheduled hearing date, August 5, 2013.

On August 5, 2013, each party submitted additional documents regarding the District's motion. After hearing oral argument, the ALJ issued a written Order denying the District's motion. The ALJ reasoned that the District's Personnel Commission lacked jurisdiction to address whether the District retaliated against Local 3112's bargaining team member because of his union activity. The ALJ accordingly found that the Personnel Commission's findings in that area should not be given collateral estoppel effect.

D. The Parties' Stipulation Regarding Clavel's Dismissal Hearing Transcripts

On August 12, 2013, the last day of the hearing, the parties stipulated to the admission of the record from Clavel's 16-day Dismissal Hearing, including both testimony and exhibits. As part of that stipulation, the parties agreed that the testimony produced during Clavel's Dismissal Hearing would be treated as though it were produced during the course of the PERB hearing for admissibility and hearsay purposes. The parties further agreed that each party could raise objections to evidence presented before the Personnel Commission and that the ALJ would rule on any objections, where necessary, in his proposed decision.[3]

III. The Closing Briefs

The parties filed closing briefs on or before November 12, 2013. Neither party objected to any evidence presented at Clavel's Dismissal Hearing. Thereafter, the record was closed and the matter was submitted for decision.

FINDINGS OF FACT[4]

I. Factual Findings Related to the Parties' Bargaining Claims

A. The Parties

The District is a public school employer within the meaning of EERA section 3540.1(k). Local 3112 is an exclusive representative within the meaning of EERA section

[3] The transcripts from Clavel's Dismissal Hearing were admitted into the PERB record as Joint Exhibit I. The exhibits were admitted as follows: joint exhibits from the Personnel Commission hearing were admitted as Joint Exhibit II; the District's exhibits were admitted as Joint Exhibit III; and Local 3112's exhibits were admitted as Joint Exhibit IV.

[4] The factual record in these two cases is immense. For ease of discussion concerning the issues raised by the two PERB complaints, the ALJ's findings of fact will be separated into two main sections: (I) facts related to both parties' bargaining claims; and (II) facts related to Local 3112's retaliation claim. This division results in some events being discussed out of chronological order and some findings discussed more than once but represents the most effective way to present the factual findings cohesively.

3540.1(e). Local 3112 is one of two classified bargaining units at the District. It represents a bargaining unit of operations and support personnel at the District, commonly referred to as the "blue collar unit." The other classified unit was not described in detail for the record, but it appears to consist of various office and technical positions. That unit is represented by a chapter of the California School Employees Association (CSEA).

Prior to his termination, Clavel was a public school employee of the District within the meaning of EERA section 3540.1(j) and, except for a brief stint as a supervisory employee, was a part of the blue collar unit throughout his employment. At all times relevant to the parties' bargaining claims, Clavel was Vice President of Local 3112 and served on its bargaining team.

B. The Collective Bargaining Agreement

The parties were signatories to a Collective Bargaining Agreement (CBA) that remained in effect at all times relevant to the parties' bargaining claims. Consistent with the terms of that agreement, the parties reopened negotiations on wages, benefits, and other items during both the 2006-2007 year and the 2007-2008 year. Agreements were reached in each of those years and the parties' memorialized those agreements by drafting and executing Memoranda of Understanding (MOUs) on the new agreements and renewing the remainder of the negotiated terms in the CBA for a new duration. According to Local 3112 President Gerry Adams and AFSCME Business Representative Pete Schnaufer,[5] the parties have a consistent practice of executing an MOU prior to any new agreement taking effect. This testimony was undisputed. Neither party requested reopener negotiations for the 2008-2009 year.

[5] Schnaufer is employed by Local 3112's regional affiliate and, unlike all other Local 3112 officers, is not employed by the District.

C. Commencing Bargaining in the 2009-2010 Year

In or around May 2009, the parties were negotiating over the effects of certain blue collar unit layoffs. Local 3112's chief negotiator and spokesman was Schnaufer. The District's chief negotiator and spokesman was Assistant Superintendent of Human Resources, Russell Lee-Sung. During one negotiation session, in or around June 2009, Lee-Sung raised three cost saving ideas not directly related to the ongoing negotiations. The two sides discussed those issues, but no resolution was immediately reached.

That Summer, then-Superintendent Dr. Joseph Farley began discussing with Local 3112 President Adams the need for furlough days to avoid "devastating" layoffs. Adams agreed that furloughs were preferable to layoffs. Neither side talked in specifics at the time.

In or around September 2009, Lee-Sung informed Adams and Clavel that the District sought to reopen bargaining for the 2009-2010 year. Lee-Sung requested that Local 3112 submit its initial proposal as soon as possible so it could be "sunshined" at the District's governing Board of Trustees October meeting.[6] Neither Adams nor Clavel objected to negotiating with the District but neither took any action on the District's request for a proposal. Lee-Sung did not mention his request to Schnaufer at the time. Around the same time, Lee-Sung had been meeting with representatives from all District bargaining units about looming budget concerns. He stressed the need for negotiations because the District expected a "major budget crisis" in both the 2009-2010 and 2010-2011 fiscal years due to "a structural deficit" where expenses exceeded revenue.

[6] The term "sunshining" in this proposed decision refers to the parties' obligation under EERA section 3547 to provide public notice of their initial bargaining proposals prior to commencing negotiations.

On November 5, 2009, the District drafted its initial proposal for the 2009-2010 year. By then, all unions except Local 3112 submitted initial bargaining proposals. That month, the District reached agreements with those three unions providing for no furlough days, but also including "contingency language" to revisit the issue if the District's finances deteriorated further. The District made the same offer to Local 3112.

On November 13, 2009, Lee-Sung sent Adams a memorandum again requesting Local 3112's initial proposal for the 2009-2010 year. In the memorandum, Lee-Sung intimated that the District would later also seek reductions for the 2010-2011 year. Shortly afterwards, Lee-Sung met with Schnaufer and asked him for Local 3112's initial proposal. Neither Adams nor Clavel told Schnaufer about the District's earlier requests.

Local 3112 submitted its initial proposal on December 9, 2009. The proposal was sunshined at the December 10, 2009 Board of Trustees meeting. The parties commenced negotiation on January 26, 2010.

D. Superintendent Farley's Layoffs/Furloughs Informational Meeting

On February 22, 2010, Farley held a meeting with the leadership of all four unions, including Local 3112. At the beginning of the meeting, Adams conveyed Local 3112's position that it would "discuss any proposed wage reductions only at the bargaining table with our full negotiating teams."

During the meeting, Farley said that the District was planning layoffs for the 2010-2011 fiscal year, but that layoffs could be reduced if the various groups agreed to furlough days. Farley estimated that around six or seven furlough days would reduce the need for layoffs. Farley expressed his hope that the various groups would "pre-agree," meaning that they would present the idea favorably to their respective membership before formal negotiations began.

Schnaufer said that Local 3112 would not agree to furloughs without first receiving approval from its membership.

E. The Parties' Negotiations Over Financial Issues

Starting in or around March 2010, the parties began discussing financial proposals in greater detail. On March 9, 2010, the District proposed, among other things, increasing health benefits co-pay amounts, temporarily suspending the right to personal necessity days, and a salary re-opener if the District's budget deteriorated.

1. The District's Layoffs/Furloughs Proposal

Later in March 2010, Lee-Sung met privately with Adams and another Local 3112 bargaining team member, Jack Janec, and told them that the District would be proposing two layoff lists; one list if Local 3112 agreed to furlough days in negotiations and a second, longer list, without a furlough agreement.

On April 1, 2010, the District submitted its initial proposal for the 2010-2011 year, including seven furlough days and the right to reopen negotiations if the District's budget worsened. There were no layoffs included in the text of its proposal.

2. Local 3112's "Package Proposal"

In April 2010, Local 3112 held a membership meeting to discuss the union's bargaining position. A majority of members favored trying to eliminate the layoffs completely through negotiated concessions. The membership directed Local 3112's bargaining team to pursue that as an option.

Local 3112 made a "package" proposal at the April 29, 2010 bargaining session. Local 3112 accepted the District's proposal to increase medical co-pay amounts, proposed changes to the District's investigation and evaluation procedures, and proposed 12 furlough days for all

full-time employees, with fewer days for others. In exchange, Local 3112 sought the District's assurance that it would not lay off any unit members during the 2010-2011 school year. Local 3112 also proposed that both sides withdraw all other proposals for the 2009-2010 year. This proposal included the following statement:

> THIS IS A PACKAGE ONLY: (and includes mandatory and non-mandatory subjects of bargaining – please be advised that the subject of furlough days are not being included, formally or informally, into bargaining between the parties, this is just an exploratory attempt by AFSCME to induce the District into reversing course and laying off no District employees represented by AFSCME).

3. The District's 2010 Layoff Resolution

Concurrent with the parties' April 2010 negotiations, the District's Board of Trustees approved a resolution eliminating several positions from both classified bargaining units, including 26 full-time Custodians, 2 Equipment Operators, 2 Maintenance Service Workers, and 1 Auditorium Operations Technician from the blue collar unit. The effective date of the layoff was July 1, 2010. According to Lee-Sung, the District needed to approve the layoff resolution by April 29, 2010 in in order to satisfy Education Code requirements for notifying employees of their layoff sufficiently in advance of July 1, 2010.

The text of the layoff resolution referenced the District's unfavorable financial outlook and the need to cut expenses. However, there was no evidence presented about the need to enact the layoffs on July 1, 2010 as opposed to some later date. By this time, the District had reached agreements with all other units for between six and seven furlough days for 2010-2011. The agreed-upon furloughs with those groups lessened, but did not eliminate layoffs for each of those units.

The Custodian position is generally the lowest paid position in the blue collar unit and is often an entry-level position. As a result, when a higher-level position, such as an Equipment Operator, is eliminated in a layoff, the incumbent in that position often has the right to displace, or "bump" back into a Custodian position if he or she held that position before and was more senior than another Custodian employee.

Around the time of the layoff resolution, the District began referring to its proposed layoff plans as having two "Phases." The "Phase I" layoff included 18 Custodian positions. The "Phase II" layoff included eight additional Custodian positions, two Equipment Operators, two Maintenance Service Workers, and one Auditorium Operations Technician. The District's initial position was that the Phase II layoffs could be mitigated or eliminated by negotiated concessions, but that the Phase I layoffs were necessary regardless of negotiations. At some point prior to July 1, 2010, the District voluntarily rescinded the two Maintenance Service Worker positions from the Phase II layoffs.

On May 20, 2010, the District continued to propose seven furlough days for full-time staff in the 2010-2011 year along with reopeners. It agreed to Local 3112's proposal for a three-year contract term. The District's written proposals did not express any link between its furlough proposal and its planned layoffs, but it was generally understood that the District would cancel the Phase II layoffs if Local 3112 agreed to take seven furlough days. This was, essentially, the same agreement reached with other District bargaining units.

4. The Parties' Common Understanding About Financial Issues

Later in May 2010, Local 3112 requested information about the anticipated savings from both the District's furlough proposal as well as its layoff plans. The District responded and the parties subsequently reached a common understanding that the cost of one custodian

position was roughly $65,000 and the savings from one furlough day for unit members was around $53,000.

By June 2010, Local 3112 began to accept that it "would be too rich for the District's purse" to cancel all of both layoff phases in the blue collar unit. It decided to focus on eliminating all of the Phase II layoffs and at least a portion of the Phase I layoffs.

5. Local 3112's "PLAN B" Proposal

That month, Local 3112 sent the District a document entitled "PLAN B," which proposed a combination of seven furlough days and salary cuts in exchange for canceling all the Phase II layoffs and reducing the number of Custodian *employees* eliminated from the Phase I layoffs from 18 to 15. Local 3112 modified its proposal a few days later seeking to reduce the Phase I layoffs from 18 to 10 Custodian *employees*. The proposals, as revised, included the statement that "THIS IS NOT NEGOTIATIONS, WE ARE NOT NEGOTIATING. (PACKAGE ONLY. AFSCME HAS A RIGHT TO WITHDRAW THIS PLAN AT ANY MOMENT.)"

On June 30, 2010, the District made a counter-proposal to Local 3112's "PLAN B" document, but no agreement was reached. The classified layoffs took effect, as scheduled, on July 1, 2010. Again, there was no evidence of an immutable need or deadline for implementing the layoffs on July 1, 2010.

6. Local 3112's "PLAN C" Proposal

On July 14, 2010, submitted a document entitled "PLAN C." Like "PLAN B," this document was a comprehensive package covering both the parties' CBA negotiations, 2010 layoffs, and furloughs. Local 3112 proposed accepting 12 furlough days for full-time employees in 2010-2011, with fewer days for those employees working less than full-time. In

exchange, Local 3112 proposed that the District recall all of the employees laid off from the Phase II layoffs and "reduce the number of custodian [employees from Phase I] from 18 to 10."

To help achieve this reduction in employees laid off under Phase I, Local 3112 proposed giving the District up to five "credits" for certain types of attrition. For example, it was expected that the two Equipment Operator *employees* (from the Phase II layoff) recalled from layoff would vacate two additional Custodian *positions*. If the District filled those two Custodian *positions* with laid off *people*, it would receive "credit" for restoring two additional *people* to work, without restoring any new Custodian *positions*. Similarly, if the District filled vacancies created by three Custodian *employees* known to be retiring around the time of negotiations, with laid-off *people*, the District would receive three additional "credits" without restoring additional Custodian *positions*.

Schnaufer made it clear in negotiations that Local 3112's goal was to minimize the number of *people* left without a job, such that only the last 10 *people* on the District's custodian seniority list would remain laid off. As stated in Local 3112's proposal, "[t]o go right to the point, the District commits through this Memorandum of Agreement that not more than ten (10) custodians – no. 1 through 10 [from the District's Custodian employee seniority list]– will be laid off." It was understood that Local 3112's "credits" proposal was attractive to the District because it allowed Local 3112 to receive acknowledgement for returning laid-off *people* to work without the need to restore additional Custodian *positions*.

7. The July 15, 2010 Board of Trustees Meeting

Schnaufer spoke during the public portion of the District Board of Trustees' July 15, 2010 meeting. He spoke about a variety of issues involving the blue collar unit. Relevant to

the present dispute is his statement that "[w]e have 11 employees being held hostage so that AFSCME will accept the furlough plan." Schnaufer later said the "11 employees" referenced the eight Custodians, two Equipment Operators, and one Auditorium Operations Technician from the Phase II layoffs. At the end of his comments, Schnaufer invited anyone to come and speak with him for more details, but there was no evidence that anyone did so. Lee-Sung testified that a District employee, Sylvia Dominguez, said that Adams was at the meeting and distributed copies of Local 3112's "PLAN C" document to everyone at the meeting. Schnaufer and Adams deny this. Dominguez did not testify.

F. The Parties' Tentative Agreement

On July 29, 2010, the parties met for another negotiation session. After some discussion about the negotiability of the District's proposal to reduce layoffs through furloughs and about the possibility of impasse, the parties separated for a private caucus. When negotiations resumed, the two sides began discussing "PLAN C" in greater detail. Late that evening, the parties reached an agreement in principle over a successor CBA, furloughs, and the 2010 layoffs (Tentative Agreement). Germane to the instant dispute is that the parties agreed to 12 furlough days for all full-time unit members, a proportionate number of furloughs for other employees, recalling all the *employees* laid off in Phase II, and reducing the Custodian *employees* laid off in Phase I from 18 to 10. There was also an understanding that the District would fill newly vacated custodian *positions* with *people* from the Custodian layoff list in seniority order. Those ideas were written on a white board but not finalized at the time. Both parties characterized it as a "handshake" deal that evening.

The parties did not discuss the final format or language of the final agreement at the time. Nor did the parties discuss how many Custodian *positions* the District needed to restore to recall the number of *people* under the Tentative Agreement.

G. The District's Draft Agreement

On August 2, 2010, Lee-Sung provided Local 3112 with a draft of the parties' July 29, 2010 Tentative Agreement, as he understood it (August 2, 2010 Draft). Lee-Sung mentioned that some of the terms might need to be part of a separate MOU as opposed to part of the CBA. Lee-Sung included some sample MOUs between the District and other unions, none of which involved terms similar to the Tentative Agreement.

Lee-Sung did not specify which parts of the Tentative Agreement he thought should be included in the MOU. Nor did he mention the possibility that the either the *positions* or the *people* being recalled from layoff would not be referenced in the final agreement. At the end of his draft, Lee-Sung included two sections with the headings "Effects of Layoffs" and "Layoff Reinstatements." He did not explain how those headings would be incorporated into the final agreement.

The "Effects of Layoffs" section included various agreements for conditions and benefits for those laid off. The "Layoff Reinstatements" section listed the eight Custodians, two Equipment Operators, and one Auditorium Operations Technician from the Phase II layoff. In an apparent reference to Custodian employees from the Phase I layoffs the parties agreed to recall, the "Layoff Reinstatements" also included the statement that the District would "[r]educe the number of custodians to be laid off from 18 to 10 taking into account attrition and restored positions." Nothing in the July 29, 2010 Draft Agreement expressly

referenced the Phase I layoffs or the agreement to fill future Custodian *position* vacancies with laid-off Custodian *employees*.

H. Schnaufer's August 4, 2010 E-Mail Message

On August 4, 2010, Schnaufer informed Lee-Sung by e-mail that the Local 3112 membership voted to ratify the Tentative Agreement and that "you may consider this our official word." (Emphasis in original.) Schnaufer also suggested to meet to "make sure any language problems are resolved" and indicated that he had "a few informal suggestions" for modifying Lee-Sung's draft. During the hearing, Schnaufer admitted that he did not present Lee-Sung's August 2, 2010 Draft during the ratification vote. He instead used a modified version of Local 3112's "PLAN C" proposal. A Board of Trustees meeting was scheduled for August 5, 2010, to, among other things, approve the parties' agreements.

I. The August 5, 2010 Board of Trustees Meeting

On the morning of August 5, 2010, Schnaufer presented some changes to the July 29, 2010 Draft Agreement to Lee-Sung. The proposals relevant to the present dispute concern changes to the "Effects of Layoffs" section. Schnaufer proposed expressly referencing the Phase I layoffs including the eight Custodian *employees* being recalled. He also proposed language changing the description of the "credits" agreement.[7] Schnaufer also added a new provision referencing the parties' agreement to fill future Custodian vacancies with laid off Custodian employees.

Like Lee-Sung, Schnaufer did not specify which provisions of the Tentative Agreement should be part of the CBA, an MOU or some other document. In a telephone conversation that day, Lee-Sung agreed to all of Schnaufer's proposed changes without significant discussion.

[7] It is undisputed that this change did not alter the substance of the "credits" term from the Tentative Agreement.

Neither side presented the other with final drafts of the written agreement. Neither side discussed which aspects of the Tentative Agreement should be incorporated into the CBA, an MOU or some other document.

Lee-Sung said that it was a challenge to incorporate all of Schnaufer's changes into the final agreement documents because the Board of Trustees meeting was scheduled for that evening. However, he knew that everyone was eager to implement the terms of the Tentative Agreement, including recalling laid-off employees as soon as possible. That afternoon, Lee-Sung produced a three-year agreement including the agreed-upon changes to the CBA, a 2010-2011 Effects of Layoffs MOU (collectively, the August 5, 2010 Draft), and a Board of Trustees resolution modifying the July 1, 2010 layoff to restore blue collar unit positions (the August 5, 2010 Resolution). The August 5, 2010 Draft included a space for both parties to sign the documents. The August 5, 2010 Resolution did not. Lee-Sung did not provide any of these documents directly to Local 3112.

On the evening of August 5, 2010, the District Board of Trustees held both a regular and a special meeting. The purpose of the special meeting was to approve the August 5, 2010 Draft and the August 5, 2010 Resolution. A copy of each of those documents was available to the public immediately before the meeting. Schnaufer and Adams reviewed the documents. They found no significant issues regarding the successor CBA relevant to the present matter.

Regarding the Effects of Layoff MOU, Schnaufer noticed that Lee-Sung adopted his suggested reference to the Phase I layoff. However, the draft MOU did not reference the Phase II layoffs as Schnaufer had expected. In fact, nothing in the August 5, 2010 Draft included anything from the "Layoff Reinstatements" section of Lee-Sung's earlier August 2, 2010 Draft.

The August 5, 2010 Resolution modified the July 1, 2010 layoff already in effect. That document restored 12 Custodian *positions*, 2 Equipment Operator *positions*, and 1 Auditorium Operations Technician *position*. The document did not reference the number of *people* returning to work as a result of the changes. The resolution also did not use the terms "Phase I" or "Phase II" layoff. The parties never previously discussed the number of Custodian *positions* needed in order to recall the agreed-upon 16 Custodian *employees*. However, the evidence showed that the August 5, 2010 Resolution was accurate; because of attrition and bumping, the District only needed to restore 12 Custodian *positions* to recall 16 Custodian *employees*, as per the Tentative Agreement.

Schnaufer concluded that there was a problem with the documents and Local 3112 refused to sign them. The District Board of Trustees approved both the August 5, 2010 Resolution and the August 5, 2010 Draft without Local 3112's approval.

The August 5, 2010 regular Board of Trustees meeting immediately followed the special meeting. Relevant to the present dispute, the Board of Trustees voted to approve Vice President Clavel's termination from employment for cause by a vote of three to two.[8]

J. Local 3112's Proposed Letter of Understanding

The next day, August 6, 2010, Schnaufer sent Lee-Sung a document entitled "Letter of Understanding." The document stated that the parties agree that the Board of Trustees' actions from the day before caused all of the Phase II layoffs to be rescinded. The document included space for both Local 3112 and the District to sign. Lee-Sung said he heard from then-Interim Superintendent Dr. Sandra Barry that Schnaufer delivered a copy of the Letter of Understanding to her as well. Schnaufer denies this and Barry did not testify.

[8] The circumstances regarding Clavel's termination will be discussed in more detail below.

Lee-Sung met with Schnaufer and Adams to discuss the Letter of Understanding on or around August 8, 2010. Lee-Sung said that referencing the Phase II layoffs was unnecessary because he thought it was already clear that the Custodians were being reinstated because of the furlough agreement. He reiterated that position at the PERB hearing. Lee-Sung further stated that the District was already in the process of returning displaced employees back to work. Lee-Sung said he was wary of engaging in further negotiations with Local 3112 without authorization from the Board of Trustees. Schnaufer disagreed and felt that reference to the layoffs being undone was important.

Schnaufer also raised new issues not previously discussed during subsequent meetings with Lee-Sung. First, he raised concerns over the enforceability of the Effects of Layoff MOU. At the PERB hearing, Schnaufer said that, in prior negotiations, he had crafted language about enforcing MOUs through the grievance process. He did not explain why something similar was not proposed earlier in bargaining in this dispute. Second, Schnaufer expressed concerns about the accuracy of the District's Custodian employee seniority list, which had been the basis for multiple proposals from the parties. Ultimately, the District never signed the Letter of Understanding and Local 3112 never signed any documents from the August 5, 2010 Draft.

K. The Recall of Employees From Layoff

Starting August 9, 2010, the District reinstated 16 Custodian *employees*, 2 Equipment Operator *employees* and 1 Auditorium Operations Technician *employee*. This was consistent with what the parties had agreed to on July 29, 2010. Ten of the original 26 Custodian *employees* remained laid-off. On August 10, 2010, the District reinstated a 17th Custodian *employee* because of a vacancy created by a retirement.

Local 3112 asserted that if the District intended to implement the Tentative Agreement, it should have recalled additional *employees* from layoff. Schnaufer and Lee-Sung both testified that Custodian Miguel Soto filled Clavel's vacated position after August 5, 2010. Schnaufer said he thought the District left Soto's vacated Custodian *position* empty, but he never confirmed this fact. Schnaufer also said he thought another unit member, Roger Castaneda, vacated another Custodian *position*, not filled by the District. Based on this record, there was insufficient evidence about whether there were additional Custodian *position* vacancies created after August 5, 2010.

The District also implemented the furlough days for the blue collar unit starting in September 2010. The implemented furloughs were consistent with the Tentative Agreement.

L. The District's Refusal to Meet With Clavel After August 5, 2010

The parties engaged in further discussions about resolving their dispute. At some point, Schnaufer suggested that the parties reconvene their full bargaining teams. Lee-Sung refused to meet with Local 3112's team if Clavel was present. He said that he was concerned because multiple employees filed complaints against Clavel and would likely testify against him. Lee-Sung also questioned the need for the bargaining teams to meet because he felt the parties already reached agreement. Schnaufer offered to meet at Local 3112's offices, but that suggestion was unacceptable.

M. The Parties' September 2010 Conduct

The District's imposed furloughs took effect starting September 2010. Local 3112 began circulating communications that the District was violating the terms of the Tentative Agreement because it restored 12, not 16 Custodian *positions*.

On September 3, 2010, Lee-Sung sent Schnaufer an e-mail message stating his concerns about Local 3112's misrepresenting the Tentative Agreement to its members. He also said that the District believed that there was a valid agreement and that further negotiations over the issues from the Tentative Agreement were not appropriate.

II. Factual Findings Related to Local 3112's Retaliation Claim

The following is a statement of relevant facts relating to Local 3112's retaliation claims.

A. The Parties' CBA

As explained in Section I(B) of these factual findings, Local 3112 and the District are parties to a CBA that was in effect at all times relevant to this dispute. The CBA contains a grievance procedure for the resolution of contract violations. The final step of the grievance procedure is binding arbitration. The CBA does not contain another procedure for reporting unit members' complaints about their supervisors.

B. The District's Disciplinary Process

The District's disciplinary process is governed primarily by Board of Trustees Policy (Board Policy) 6417.02. That policy emphasizes the concept of progressive discipline for most types of misconduct, meaning the District imposes discipline in increasing severity for continuous violations. It also denotes that greater discipline may be imposed for more serious misconduct. The policy also stresses the corrective nature of most discipline, stating that employees should be given the opportunity to modify their behavior after discipline.

One important exception to the District's progressive discipline policy is for "major offenses." According to Board Policy 6417.02 "[c]orrective or progressive discipline is

generally not utilized for so-called major offenses such as theft, gross insubordination, assault or sabotage." Rather, "the penalty for major offenses is discharge."

Board Policy 6417.02 also categorizes different types of misconduct into three levels based on severity. Offenses such as inattention to duty, insubordination, discourteous treatment of others, and disregarding safety procedures are considered First Level offenses, which generally require multiple counselings and/or written warnings prior to more severe discipline such as demotion, suspension, or dismissal. Second Level offenses include, as relevant to this case, threatening, intimidating, coercive, or interfering conduct towards coworkers. As with First Level offenses, discipline is generally progressive, requiring warnings before proceeding to more serious discipline. However, employees are subject to demotion, a significant suspension, or discharge, upon a third Second Level offense.

Third Level offenses include, as relevant to this dispute, dishonesty, theft, falsifying personnel records, and intentional destruction of District property. No warnings are necessary before the employee is subject to suspension, demotion, or dismissal.

Board Policy 6417.02 also refers to a one-year "reckoning period" for First and Second Level offenses, but does not define that term. Only limited evidence was presented about the reckoning period. Local 3112 President Adams testified at Clavel's Dismissal Hearing that the reckoning period means "after one year, that issue will be gone." He did not elaborate further. Lee-Sung testified at the PERB hearing that the term means that an employee may request that discipline be removed from his or her personnel file if there are no similar offenses of the same type after one year. Removal of the disciplinary records remains at the District's discretion. Lee-Sung's testimony is credited over Adams's in this instance because he provided greater detail and his explanation appears to be more consistent with the progressive and corrective

nature of the District's discipline process as a whole. It is undisputed that there is no reckoning period for Third Level offenses. For those offenses, according to Adams, "you can go right to whatever [discipline] you want as far as administration is concerned."

C. Clavel's Initial Employment With the District

Clavel began working for the District as a substitute Custodian in or around 1989. According to District personnel records, in 1995, Clavel received a probationary performance evaluation rating him as "Not Satisfactory," the lowest possible rating.[9] The evaluation rated Clavel as "Needs Improvement" in 11 of 22 rating categories. His supervisor at the time, Head Custodian Ceferino Gonzalez, did not testify at either the PERB hearing or at Clavel's Dismissal Hearing. According to personnel records, Clavel submitted a rebuttal to this evaluation where he admitted to allowing a student to operate a District golf cart. He acknowledged that doing so was improper and unsafe. Clavel received a subsequent performance evaluation that year with an overall rating of "Effective-Meets Standards." Clavel was hired into a permanent Custodian position in or around 1996.

D. Clavel's Head Custodian Assignment

In or around 1997, Clavel was promoted to Head Custodian at Cypress High School. At this point, he was considered supervisory and not part of the blue collar unit. He later transferred to Walker Junior High School, in the same position. According to personnel records, Clavel received a performance evaluation that year rating him as "Exceeds Expectations" by his supervisor.

[9] The District's performance evaluation rating system includes the following ratings from the best to worst score: (1) Exceeds Standards; (2) Effective- Meets Standards; (3) Requires Improvement; and (4) Not Satisfactory. Employees are rated on 22 individual categories as well as a "Summary Evaluation" rating, with the same four possible scores.

Subsequent to this evaluation, however, Principal Ken Fox issued Clavel four counseling memoranda for removing District property (lumber) without permission, failing to report the incarceration of an employee Clavel supervised, disregarding a directive not to take a particular day off from work, and bringing a female non-District employee onto campus for sexual activity.

Fox's counseling documents became the basis for District charges against Clavel to demote him from Head Custodian. After a hearing before the District's Personnel Commission in June 2000, the District upheld its decision to demote Clavel back to Custodian.

E. Clavel's Assignment to Oxford Academy

After the demotion back to Custodian, the District assigned Clavel to the night crew at Oxford Academy. His supervisor there was Head Custodian Jose Vazquez. Clavel admitted during the PERB hearing that he had frequent conflicts with Vazquez, stating "[t]here was an ongoing situation with the head custodian, Jose Vazquez." Vazquez claimed that in 2002 Clavel had threatened him, grabbed him by the neck, and called him derogatory names. According to personnel records, Assistant Principal George Triplett observed Clavel grabbing Vazquez. However, Triplett did not testify at either the PERB hearing or Clavel's Dismissal Hearing. Vazquez testified at Clavel's Dismissal Hearing.

Vazquez also claimed that Clavel refused to perform certain job duties consistent with his job description unless he received overtime. Vazquez also complained that Clavel called him derogatory names like "pepito."[10] Vazquez also claimed that Clavel challenged him to a fight, stating "let's go across the street," after an argument over a work assignment. Vazquez

[10] Clavel admitted calling Vazquez "pepito" during his testimony at his Dismissal Hearing, but denied using that name during his testimony at the PERB hearing.

testified consistently about these events at Clavel's Dismissal Hearing. Vazquez rated Clavel as "Requires Improvement" in his 2002 performance evaluation.

Another Oxford Academy employee, baseball coach Dana Bedard, also complained about threatening statements from Clavel. Bedard did not testify at either the PERB hearing or Clavel's Dismissal Hearing. The claims by Vazquez and Bedard became the basis for a written reprimand, dated November 19, 2002.

After receiving other complaints from Vazquez about Clavel, the District issued Clavel a one-day suspension on or around June 5, 2003. That suspension was upheld at a hearing before the Personnel Commission on or around September 9, 2003. Clavel said that he never served the one-day suspension, but his explanation was based entirely on uncorroborated hearsay.

In his two subsequent evaluations between 2003 and 2004, Vazquez rated Clavel as "Effective-Meets Standards." Vazquez commented about Clavel's need to complete job duties and avoid conflicts with others, but he also noted that Clavel had made effort to improve his relationship with Vazquez. Clavel's 2005 evaluation was administered by Vice Principal Triplett. He was again rated as "Effective-Meets Standards." Among the comments made in the evaluation were that "Danny is always searching for ways to improve. I have seen a significant turn around." The employee's signature line was signed with the name "George Washington." It is unclear at what point the District became aware of this discrepancy on the evaluation.[11]

[11] There were some notations from District Human Resources personnel about the signature line on the 2005 evaluation, but those notes are uncorroborated hearsay.

F. Clavel's Promotion and Transfer to Savanna High School

In 2005, the District promoted Clavel to Athletic Facility Worker II (AFW II), a position he held until his termination. The AFW II position is responsible for cleaning and maintaining athletic facilities including locker rooms, gyms, fields, and stadiums. The District has a practice of assigning three AFW IIs to most of its high schools. One male AFW II works primarily in the boys' locker room. One female AFW II works in the girls' locker room. A third AFW II, the "fieldman," tends primarily to the school's athletic fields. AFW IIs must sometimes work collaboratively on projects such as repairing sprinklers and preparing fields for student sport events. In addition, the male and female AFW IIs sometimes cross paths when working on areas that adjoin the two locker rooms such as the gym or the weight room.

Clavel's first assignment as AFW II was at Savanna High School. According to personnel records, Clavel received multiple letters of reprimand from Savanna High School Principal Marsha Wagner, who did not testify at either the PERB hearing or Clavel's Dismissal Hearing. For instance, Clavel received a September 5, 2005 letter for making "loud and demeaning comments" about student athletes at another District high school as well as inappropriate statements about that school's staff. He also received a September 29, 2005 letter for an argument with fellow AFW II, Steve Oatman, two letters on December 14, 2005 for failing to report an absence and unauthorized use of leave time, and a February 7, 2007 letter for a "verbal confrontation" with Oatman that almost escalated into physical violence. Oatman and Clavel briefly pursued legal action against each other but, apparently, nothing became of either person's efforts. As a result of their frequent clashes, Clavel and Oatman were each placed on administrative leave at alternating times for around two months total.

G. Clavel's Position With Local 3112

Starting in 2006, Clavel was elected as Vice President of Local 3112. He was also appointed Chief Steward. Clavel's responsibilities in those roles included serving on Local 3112's negotiating team, standing in when Local 3112 President Adams was unavailable, filing and pursuing grievances, and representing unit members in other capacities. Clavel maintained these positions until his dismissal was upheld by the Personnel Commission.

H. Clavel's Transfer to Western High School

In or around June 2007, Clavel was transferred to Western High School. He was assigned to work primarily in the boys' locker room. AFW II Debbie Camara worked in the girls' locker room and AFW II Daniel Cassella was the fieldman.

During the first week of August 2007, Clavel was scheduled to take leave to attend an international AFSCME conference. However, AFW IIs typically used that week to conduct a "deep cleaning" of athletic facilities including resurfacing gym floors because those facilities were usually in use other times during the year. This was acknowledged to be a difficult assignment and, according to Cassella, there was an "unwritten rule" that AFW IIs should not take time off that week. Clavel, who had no authority to reschedule the conference, attended. A Custodian took his place on the deep cleaning assignment that year.

I. Unit Member's Complaint About Vazquez

At some point later in 2007, Oxford Academy Custodian Frank Ureno approached Local 3112 about complaints against Vazquez, still the Head Custodian. Local 3112 filed a complaint with the District on Ureno's behalf. Then-Assistant Superintendent of Human Resources Denise Selbe began an investigation, including interviews of District staff. The District and Local 3112 agreed that Clavel should not be directly involved in the investigation

because of Clavel's prior history of strife with Vazquez. Accordingly, Adams accompanied Selbe on interviews of any blue collar unit members.

Clavel reported that during his time at Oxford Academy he observed Vazquez urinating publicly and making sexual comments. Ureno said that Vazquez harassed him by frequently questioning him about his sex life with his girlfriend. Another Oxford Academy Custodian, Jose Cardenas, said in his interview that he observed Vazquez in a sexual act, alone in a classroom one evening. Vazquez denied all these claims and said that Ureno volunteered information about his private life without being asked. Clavel and Cardenas repeated their claims during testimony at Clavel's Dismissal Hearing. Vazquez repeated his denials during his own testimony. Ureno did not testify.

Selbe retired from her position before completing the investigation. She was replaced in 2008 by Russell Lee-Sung. After reviewing Selbe's investigation materials, Lee-Sung concluded that there was insufficient evidence to accuse Vazquez of wrongdoing. In or around February 2009, Lee-Sung issued both Ureno and Vazquez directives about appropriate conduct in the workplace. By that time, Ureno had transferred to a different school site.

J. Clavel's July 1, 2008 E-Mail Message

Prior to the resolution of the Ureno/Vazquez investigation, on or around July 1, 2008, Clavel sent an e-mail message to a television news organization describing Vazquez's conduct at Oxford Academy. Clavel repeated Ureno's complaints as well as Castaneda's account of Vazquez's inappropriate conduct. Clavel questioned in his e-mail why the District was not taking greater action in response to the complaints against Vazquez. Clavel also referred to Vazquez as a "sexual predator" and suggested that he might be sexually harassing students.

Clavel sent the e-mail message using his District e-mail account. It is unclear when the District discovered this e-mail message.

K. The Western High Overtime Schedule

AFW II Cassella took a medical leave of absence from October 2008 to May 2009. During that time, Custodian Bob Aguilera replaced him in a temporary out-of-class assignment. Although Aguilera was available to perform most of the fieldman duties, he could not work overtime during basketball season because he worked as a coach at another school site.[12] The CBA includes a provision for rotating overtime shifts among AFW IIs. If an AFW II declines an overtime assignment, that person is skipped until the next time his or her name comes up in the rotation.

After the 2009 basketball season ended, Western High Athletic Director, Annette Quintana,[13] assigned Aguilera an inordinate amount of overtime to "catch him up" on missed opportunities. Clavel complained to Principal Paul Sevillano that Quintana's overtime assignment calendar did not comply with the CBA. He also filed a grievance. Eventually, the assignment calendar was corrected to comply with the CBA.

L. The District's AFW II Layoff Plans

In 2009, the District began the process of laying off some AFW IIs. Typically, layoffs in the blue-collar unit were in reverse-seniority order, meaning the most senior employees in a position were the most likely to be insulated from layoff. However, some AFWs were concerned that a seniority-based layoff could jeopardize the District's practice of placing a

[12]Aguilera received a stipend for his coaching duties.

[13] The Athletic Director is a certificated position at the District. The position teaches Physical Education (P.E.) and coordinates athletic events at the school site. It is not technically supervisory or management, but the position has the authority to assign work to the AFW II position. Evaluations are performed by the site Principal or Assistant Principal.

female AFW II in the girls' locker rooms because some females had low seniority. Local 3112's negotiating team supported using seniority as the only means to determine the layoff. The female AFWs demanded a seat on Local 3112's negotiating team. Local 3112 complied, but some female AFW IIs were not satisfied with the selected representative. That person did not attend meetings or actually participate in negotiations.

A group of female AFW IIs, including one named Carolyn Castro, went to the District Personnel Commission to explain their position. Castro made some unflattering comments about the female bargaining team member at the meeting, which Local 3112 recorded. Clavel played the recording of Castro's comments to Cassella and "anyone who asked." Eventually, the layoff issue became moot because the District reduced the number of positions slated for layoff to the point where no female AFW IIs would be laid off, even when based on seniority.

M. Examples of Conflict Between Clavel and Other Western High Staff[14]

There was tension between Clavel and other Western High athletics staff almost from the very beginning. From Clavel's perspective, Aguilera, Camara, Cassella, and Quintana resented him because of his efforts to enforce the CBA, the positions Local 3112 took in negotiations, and because he was sometimes away from campus on union business.

Those four employees, in turn, felt that Clavel harassed them, had poor attendance, did not follow rules, misused equipment, and generally did not work as hard as others. Quintana in particular had difficulties with Clavel, in part because of his complaints regarding her overtime schedule. Quintana's resentment was apparent during a time when she saw him at a local restaurant after work hours. Quintana made an obscene gesture towards Clavel and, according

[14] Some of the issues in this section were discussed out of chronological order for ease of understanding the record as a whole.

to Clavel, also swore at him. While at work, Quintana refused to speak directly to Clavel, preferring instead to communicate through Western High administrators.

1. Clavel's Work Relationship With Other AFW IIs

Aguilera, Camara, and Quintana all testified at Clavel's Dismissal Hearing that it was frustrating working with Clavel because he communicated poorly with them and was regularly not at his primary assigned worksite, the boys' locker room. Principal Sevillano and Vice Principal Bob Juaregui both testified that they felt the athletics department had poor communication and did not work well together or coordinate ever since Clavel's transfer to Western High. They met regularly with the athletics staff about improving communication and completing assignments.

Local 3112 accuses Aguilera, Camara, Quintana, Sevillano, and Juaregui of bias and anti-union animus, but their testimony was supported by the substantial evidence in the record, including witnesses that Local 3112 did not accuse of bias. For example, Night Custodian Supervisor Roman Mejia testified at Clavel's Dismissal Hearing that Clavel was supposed to clean the boys' locker room during the day, but that he frequently found that work was not done. This created more work for his night crew. Mejia demonstrated no discernible bias against either Clavel or Local 3112 during testimony, nor did he appear predisposed to favor the witnesses testifying adverse to Clavel. He supervised Aguilera and described him as just "an okay worker" saying that Aguilera could be more effective in his own work as well. Likewise, Vice Principal Ken Nease, who also was not accused of bias against Local 3112, testified that he directed Clavel to spend more time working in the boy's locker room. He also said he regularly found that the boys' locker was not properly cleaned or secured.

2. Accusations About Clavel's Handling of Equipment

Clavel was also accused of damaging, misusing, or stealing District equipment.

a. The Floor Cleaning Machine

Camara testified Western High has an industrial strength floor cleaning machine for cleaning the gym floor. She said Clavel used the machine in areas it was not designed for resulting in damage. She also said that Clavel failed to clean the water from the machine after using it, causing further damage. In another instance, the batteries on the floor machine were damaged while Clavel used it, rendering it useless.

Clavel admitted being instructed not to use the floor machine for other surfaces besides the gym floor but said he sought and received permission to do so from Principal Sevillano. Clavel did not deny damaging or failing to clean the floor machine. He also did not deny the incident with the batteries.

b. The Western High Golf Cart

Cassella accused Clavel of improperly using a golf cart as a mode of transportation to pick up supplies and mail. Cassella said that the cart was old and was to be used only for doing work on athletic fields. During his Dismissal Hearing, Clavel said that the cart could be used for transportation and picking up equipment. However, during the PERB hearing, he admits that he was instructed by Camara, Cassella, and Quintana to only use the cart on athletic fields, not around campus. In a related allegation, Aguilera claimed that Clavel allowed a student to drive the cart, something that was unsafe and not allowed. When Aguilera confronted Clavel about the incident, he laughed. Clavel denied ever leaving the cart unattended but did not specifically deny allowing a student to use the cart. Clavel had previously admitted to improperly allowing a student to operate a District golf cart.

d. The Loaner Clothes Issue

Quintana also complained that Clavel failed to follow existing procedures regarding distributing loaner clothes to students. P.E. students must wear special clothes for class and cannot participate in class without the proper attire. District school sites hand out loaner clothes for students who forget or do not own P.E. clothes. Clavel was responsible for passing out loaner clothes in the boys' locker room. To ensure that the loaned clothes are returned, Quintana directed Clavel to take a student identification card, book, or other item from the student until the clothes are returned.

Clavel testified during his Dismissal Hearing that he frequently ran out of loaner clothes because either the clothes became tattered and useless over time or because P.E. teachers handed out the clothes without following the proper procedure. As a result, he needed additional loaner clothes multiple times during the school year.

Quintana complained that Clavel was not following the proper procedures for handing out loaner clothes. However, she never testified as to actually knowing whether or not Clavel followed her instructions. Instead, she said she assumed he did not follow the procedure because he regularly needed additional clothes. The District did not present any evidence disputing Clavel's account about why he needed additional loaner clothes.

e. Other Equipment

Employees also accused Clavel of damaging the athletic department's chainsaw and air compressor, borrowing a lawn mower for an extended period of time, using the Western High trailer to tow a personal vehicle, and stealing a microwave oven. The record shows that those items were damaged or missing, but the record is inconclusive as to Clavel's involvement.

3. Clavel's Attendance Issues

There were also multiple instances where Clavel did not follow the protocol for reporting his absences, causing difficulty locating him. Western High employees attend mandatory training sessions about attendance policy at least twice per year. District records show that Clavel attended a training on attendance policies in 2007 and that he was absent without explanation from multiple other subsequent trainings.

a. The Sign-Out Sheet

Western High maintains a sign-in/out sheet for reporting absences of less than one full day. The sign-out sheet is located in the Western High office, by the desk of Senior Administrative Analyst Linda Maher. School policy dictates that employees sign out and in for every partial day absence so employee time can be recorded properly. It is not clear whether this was a District-wide policy. Some evidence was presented that union representatives not assigned to a single school site, such as electricians, follow different procedures.

During his Dismissal Hearing, Clavel admitted to not following the Western High sign-out procedure "many times." He said it was sometimes difficult to sign out before leaving because he was not close to the office. He also said that he could not sign out because Maher was not at her desk. However, during his testimony at his Dismissal Hearing, he admitted to signing out at least one time even though Maher was not present. He also said that signing out or in was sometimes difficult because, once off campus, he had multiple stops to make before returning. It is not clear how the need to make multiple stops off campus affected his ability to sign out/in.

In or around May 2008, Principal Sevillano issued Clavel a performance evaluation including comments about Clavel's failure to follow sign-out procedures and his failure to adequately inform others about his absence. Around the same time, Sevillano issued other memoranda and communications counseling Clavel about sign-out procedures. Clavel filed a grievance alleging that both the evaluation and the counseling documents were issued to him because of his Local 3112 activities. In October 2008, Local 3112 and the District settled that grievance by agreeing to excise both the 2008 evaluation and the counseling documents from its files. Nothing in the terms of the settlement agreement exempted Clavel from following the sign-out procedure in the future and Clavel continued to leave campus without signing out after the settlement.

b. The March 14, 2008 Absence Form

On March 3, 2008, Clavel was scheduled to testify in Arizona pursuant to a subpoena in a legal matter involving his cousin. During that proceeding, Clavel made what he described as "an outburst" in court and he was taken into custody by order of the presiding judge. He subsequently pled guilty to interfering with a judicial proceeding, which is a misdemeanor under Arizona law. He was sentenced to serve 11 days in jail, March 3 through March 14, 2008. During his incarceration, Clavel contacted Local 3112 President Adams and told him to report what had happened to the District. Adams reported the matter to then-Assistant Superintendent of Human Resources Selbe.

Clavel returned on March 14, 2008. He said he went to the District office and Selbe suggested that he take the remainder of that day off. He said he did not go to Western High that day. Clavel later submitted absence report forms regarding how his absence should be recorded for payroll purposes. He requested that March 4, 5, 12-14, and 17, 2008 be counted

as vacation days. That request was dated March 18, 2008. He also submitted a second request, dated March 14, 2008, asking that the three work days between March 6 and 10, 2008, be counted as union leave. The result of this request would have been that Clavel be paid for those days without it being charged against any of his own personal leave balances. It is undisputed that Clavel was not performing union business while in jail.

Clavel testified during his Dismissal Hearing that Maher filled out those forms and he signed them without reviewing them. It is undisputed that Maher sometimes filled out absence forms for employees to sign so she can reconcile attendance records for payroll purposes. Maher contradicted Clavel's testimony about the March 2008 forms stating that she had been instructed by the District to report Clavel's absence during that time as vacation days, but Clavel wanted certain days reported as union business. Clavel did not repeat his claim that Maher filled out the March 14, 2008 absence report form during his testimony at the PERB hearing. Instead, Clavel was unable to explain why he would sign a form claiming union leave on those days.

Clavel's testimony that he did not fill out the March 14, 2008 absence report form is not credited. Multiple factors support this conclusion. First, the handwriting on the March 14, 2008 form differs from other examples Maher's handwriting in the record. In multiple places, including other absence slips completed by Maher and training session sign-in sheets she said she wrote on, Maher had a distinct way of printing the lowercase form of the letter "a" with an arc overhead as it appears in between the quotation marks in this sentence.[15] In contrast, on the March 14, 2008 absence report form, the writer depicted the letter "ɑ" as it appears in the

[15] Examples of Maher's use of the printed lowercase "a" are, among other places, at Joint Exhibit III (Exhibits 51 (Maher's written notes) and 56 (Maher's comments on a training sign-in sheet)) and Joint Exhibit IV (Exhibits 37 and 38 (other absence report forms)).

quoted portion of this sentence, with no arc overhead.[16] The handwriting in that absence form more closely resembles samples of Clavel's writing in the record, such as grievance forms he admitted to filling out and job application materials in his personnel file.[17]

Second, Clavel said he went to the District office on March 14, 2008, not the Western High campus. Thus, Maher could not have given him a form on March 14, 2008. Third, it is suspicious that Clavel mentioned Maher's role in filling out the absence form during his Dismissal Hearing and not the PERB hearing. This also casts doubt on his testimony. Fourth, Clavel's account of what happened is inherently implausible. During the Dismissal Hearing, Clavel said that no one at Western High knew of his incarceration until a later date. If Clavel believed that Maher was unaware of his whereabouts, it is unlikely that he would assume that the absence form she completed for him was accurate. It is furthermore unreasonable to believe that he would sign the form she provided to him without reviewing it beforehand.

Based on the foregoing, Clavel's claims about the March 14, 2008 absence form are not credited. The more likely scenario is that Clavel believed that he could misreport his time undetected and retain three days of vacation time. Thus, it is concluded that by submitting the March 14, 2008 absence form, Clavel intentionally and falsely reported three of the days that he was incarcerated as union leave. Because absence report forms are payroll documents and neither Maher nor the payroll department are involved in employee discipline, it is unclear when Assistant Superintendents of Human Resources Selbe or Lee-Sung were made aware of the false absence report form.

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[16] The March 14, 2008 absence report form is located, among other places, at District Exhibit 140. All uses of the letter "a" on the form are lowercase and printed.

[17] Examples of Clavel's writing are, among other places, at Joint Exhibit II (his personnel file), Joint Exhibit IV (Exhibit 79 (a grievance)), and AFSCME Exhibit GGG (a grievance).

c. The Comp Time Policy

Vacation and "comp time" requests should be made at least five days in advance.[18] Clavel admitted to not following these procedures.

4. Clavel's Alleged Harassment of Others

Aguilera, Camara, Cassella, and Quintana also felt that Clavel harassed them at work. Camara testified during Clavel's Dismissal Hearing that Clavel sometimes snuck up on her and frightened her in the gym or weight room. Clavel admitted that sometimes Camara did not see him and appeared startled but he denied scaring her on purpose. Camara also said that Clavel sometimes sat and watched her and Aguilera working on a field, smiling at them but not offering assistance. Aguilera had a similar complaint, testifying during Clavel's Dismissal Hearing that Clavel sometimes watched them working while laughing at them.

Both Camara and Aguilera also said Clavel took the Western High athletic department truck while they were using it, causing delays to their work. Around the same time, they said they saw the sprinkler system over-watering the baseball field to the point that it was unusable. This delayed their work on the field and a scheduled baseball game had to be delayed as well. They also observed Clavel near the sprinkler controls. Only Clavel and the fieldman, Aguilera at the time, had access to the sprinkler controls.

Clavel disputes these claims, and Local 3112 asserts that they were misrepresenting the truth. It is true that both Aguilera and Camara had a motive to lie about Clavel. It was Clavel's grievances and complaints that caused Aguilera to lose overtime opportunities after he returned from his coaching duties. And Camara is related to Savanna AFW II Oatman, with whom Clavel had a poor working relationship. Those facts notwithstanding, their testimony is

[18] "Comp time" refers to compensated time off earned in lieu of overtime.

credited over Clavel's here. Clavel also has a significant motive to testify falsely and he gave contradictory, false, or unbelievable testimony multiple times in the record. Examples of his testimony include admitting to and then denying calling Vazquez "pepito," contradicting himself about whether he was permitted to use the Western High golf cart as a mode of transportation around campus, giving inherently unbelievable reasons for not following the Western High sign-out procedure, and testifying falsely about the March 14, 2008 absence report form. These and other inconsistencies in his testimony weigh against his credibility.

Furthermore, another witness at Clavel's Dismissal Hearing, baseball coach Lonnie Smith testified similarly to Aguilera and Camara. He said Clavel mistreated the baseball field multiple times, including cutting the grass right after they seeded the lawn, driving a truck over the grass, and using weed killer on the infield grass. Clavel was previously instructed not to do these things because it damaged the field. Smith said that Cassella also used to drive a truck onto the field but discontinued that practice after being instructed to stop. For these reasons, it is concluded that Clavel intentionally harassed Aguilera and Camara and damaged the baseball field on purpose.

During Clavel's dismissal hearing, Quintana said she saw Clavel sitting around and watching her class exercising. Clavel admits doing so, but said that she requested that he come to provide loaner clothes to two of her students and he was waiting to speak with her about that matter. Once again, Clavel's testimony is not credited here. Quintana's account was consistent with Clavel's behavior with Aguilera and Camara. In addition, it is undisputed that around the time of this incident Quintana refused to communicate directly with Clavel, preferring to give direction through Principal Sevillano or another administrator. It is unlikely that she would contact Clavel directly about the loaner clothes matter. Therefore, it is

concluded that Clavel's actions were deliberate and that he intended to harass Quintana or make her feel uncomfortable.

N. Clavel's May 2009 Performance Evaluation

In May 2009, Principal Sevillano issued Clavel a performance evaluation with an overall rating of "Needs Improvement." He was rated as "Not Satisfactory" in contact with other employees and coordinating his work. He was also rated as "Requires Improvement" in accepting direction and responsibility.

At the same time, Sevillano rated Clavel as "Effective-Meets Standards" in areas including attendance, compliance with rules, quality of work, and care for equipment. Vice Principal Juaregui, who assisted Sevillano with the evaluation, said he made sure to be "extra fair" with Clavel because of his role in Local 3112 and the grievance over his 2008 evaluation.

O. Clavel's Request for a Harassment Investigation

In or around June 2009, Clavel complained to Lee-Sung that he was being harassed by Athletic Director Quintana and Assistant Principal Juaregui. Lee-Sung said that he decided to hire a private investigator because Clavel's complaints were serious and involved a Western High administrator. He hired Robert Price from ESI International, Inc. (ESI), to conduct the investigation.[19] Lee-Sung did not give Price specific instructions about how to conduct the investigation.

Price interviewed staff, including Clavel, and reviewed documents as part of his investigation. He then inquired whether the interviewees had any suggestions for further interviews or documents to review. He did not interview two teachers, identified by Clavel as

[19] Neither party addressed whether the "ESI" name were initials for some other name.

having pertinent information, because they were, apparently, unreachable during the Summer months. Price did not testify at either the PERB hearing or Clavel's Dismissal Hearing.

Price produced a written report of his findings to the District on July 17, 2009. He concluded that the vast majority of Clavel's complaints were unsubstantiated and that, to the contrary, Clavel was a significant contributing factor to the discord at Western High because of his own harassing behavior, his failure to follow procedures, and his failure to coordinate his schedule with others. Neither Clavel nor Local 3112 were issued a copy of the report at the time it was produced.

P. Incidents in August 2009

Early August is when District high schools distribute football equipment and uniforms for their student football players. This is known colloquially as "hell week" among athletics staff because it is typically a busy time of year. Cassella testified that in August 2009, Clavel was assigned to assist students during "hell week," but was not there. Maher testified consistently with this, stating that she attempted unsuccessfully to locate Clavel. She contacted other athletics staff and Western High administrators but no one could verify Clavel's whereabouts. Maher testified this was not the first time she had difficulty finding Clavel, describing other's requests to locate him as an "almost daily" occurrence. Clavel never denied failing to perform assigned duties during "hell week," but said no one told him that they were unable to find him during that time period.

Sometime in Fall 2009, Western High baseball coach Smith reported a box of missing baseballs bearing a distinctive logo from a major league baseball team. He testified during Clavel's Dismissal Hearing that only he, Clavel, Aguilera, and Cassella had access to the balls. He said that Cassella was on leave at the time and that he did not think Aguilera would take

them. Smith also said he saw similar distinctive looking baseballs in use during a game involving a little league Clavel volunteered with. Clavel denied taking the balls and said that his little league received similar baseballs as a donation. The record remains inconclusive as to whether Clavel took the baseballs. Smith never explained why he thought Aguilera would not take the baseballs and his testimony about Cassella being on leave is inaccurate. Cassella said he returned from leave in May 2009, before Smith said the balls went missing.

Q. Employees' Requests for a Harassment Investigation About Clavel's Conduct

In September 2009, Aguilera, Camara, and Quintana all filed harassment complaints with the District against Clavel. Aguilera and Camara submitted complaints on the same day, September 10, 2009. Quintana submitted her own complaint the next day, September 11, 2008. Camara said she knew about Quintana's intent to file a complaint but all three denied any coordinated effort. Lee-Sung decided to use the same private investigation firm, ESI, because Price had some familiarity with the situation. However, Lee-Sung also admitted knowing that Price already believed that Clavel was the source of some of the conflict at Western High.

R. Clavel's Placement on Administrative Leave

Based on the nature of the complaints against Clavel and his prior history of discipline and conflict with others, Lee-Sung decided to place Clavel on paid administrative leave during the latest investigation. Lee-Sung met with Clavel on October 12, 2009 to inform him of the administrative leave. A Local 3112 representative was also there. Lee-Sung gave Clavel what he described as "standard" instructions when placing an employee on administrative leave. This included the directive to not speak with District personnel or access District property. Lee-Sung modified these directives in two ways: (1) he allowed Clavel to access the District

school sites where his children attended; and (2) his directive not to speak with other staff did not apply to union-related matters.

S. Clavel's Connecting His Computer to the District Network

Shortly before beginning his administrative leave, Clavel admitted to connecting his personal computer to the District's network at Western High without permission. Clavel said that his District-issued computer malfunctioned and he used his own device while the official computer was being repaired.

The District's Information Technology Acceptable Use Agreement requires employees to notify the District prior to connecting any personal devices to the District's network. The employee must allow inspection of the personal device for issues such as proper software licensing, updates to the device's operating system, and the presence of adequate anti-virus software. According to Network Technician James Cooper, who testified at Clavel's Dismissal Hearing, this process protects the safety of the District's network.

T. Clavel's Entering Western High While on Administrative Leave

While on administrative leave, Clavel contacted Lee-Sung about the proper procedure for approving flyers from Clavel's little league organization for posting at Western High. Lee-Sung informed Clavel about the approval process. Clavel testified that Lee-Sung later granted him permission to drop off the flyers at Western High. He delivered the flyers on November 6, 2009. Lee-Sung denies ever granting Clavel permission to enter the Western High campus. Clavel's testimony on this issue is not credited. As explained above, Clavel was not a credible witness. Moreover, it is highly unlikely that Lee-Sung granted Clavel's request to enter the Western High campus during the investigation. Under the facts presented, it is concluded that Clavel entered the Western High campus against Lee-Sung's directive.

U. The ESI Investigation and Report

Price followed the same basic principles in his second investigation at Western High. This time, his investigation covered Clavel's entire employment history with the District. Price concluded that Clavel had committed multiple violations of various attendance policies and practices, harassed other employees including Vazquez, Oatman, Aguilera, Camara, Quintana, and Castro, was insubordinate and disobeyed orders, and misused, mistreated, or stole District property.

Price reported about Clavel's reference to "George Washington" in his 2005 performance evaluation, the false March 14, 2008 absence report form, and Clavel's July 1, 2008 e-mail message to the news organization about Vazquez.

Price also uncovered records of Clavel's 1998 conviction for being under the influence of an illegal substance. Price noted that Clavel was able to withdraw his guilty plea and have the case dismissed after successfully completing a drug diversion and treatment program. Price noted that Clavel did not report his criminal conviction to the District.

In or around February 10, 2010, Price produced a report which was not produced for the record in its entirety. Lee-Sung said that the final report was "thousands of pages long." Price also produced a summary of the report, including references to key documents such as prior discipline, performance evaluations, attendance information, and e-mail messages from or about Clavel. Neither the report nor the summary mentioned any of Clavel's positive evaluations or promotions during his employment.

V. The Dismissal Proceedings

Lee-Sung reviewed the ESI report and concluded that dismissing Clavel from employment was warranted. On or around March 22, 2010, Lee-Sung issued Clavel a

statement of charges (Dismissal Charges) based largely on the investigative report. The charges outlined the accusations against Clavel by his coworkers at Western High, his alleged failures to follow existing policy, his alleged misuse and theft of District property, and his history of discipline and negative evaluations. The Dismissal Charges also accused Clavel of failing to disclose material facts regarding his criminal records. In addition, according to the charges, "Clavel has disregarded all District attempts to discipline him, reprimand him, or otherwise correct his behavior."

The Dismissal Charges also referenced other conduct such as Clavel's use of pejorative nicknames in e-mail messages to and about his coworkers. For example, Clavel was accused of intentionally referring to Steve Oatman as "Goatman," and Robert Aguilera as "Aguiliar." Some other misspellings were arguably more profane. In some of the e-mail messages identified in the charges, the target of the alleged ridicule was not among the list of recipients. None of the people misnamed in Clavel's e-mail messages testified as to feeling harassed or uncomfortable by the epithets. In fact, most appeared not to have noticed until questioned about the e-mail messages at Clavel's Dismissal Hearing.

The Dismissal Charges also referenced documents not contained in Clavel's personnel file such as records of when Vazquez or Oatman called the police. Some of these documents were located in what was referred to in the record as a "site file," or files maintained by school site administration. During the PERB hearing, Clavel admitted to knowing that about his site files. He said he never asked to review those files.

Clavel participated in a *Skelly* hearing[20] over the course of four days between May 5 and July 28, 2010. The assigned *Skelly* hearing officer affirmed the District's discipline. Thereafter, Lee-Sung notified Clavel of the District's decision to address the matter at the District's August 5, 2010 Board of Trustees meeting. At that meeting, the Board of Trustees voted to approve the dismissal by a vote of three to two. At that point, Clavel's dismissal became effective. Clavel later appealed that determination and the matter was heard at Clavel's Dismissal Hearing before the District's Personnel Commission. The Personnel Commission upheld the dismissal by a decision dated March 10, 2013.

W. Clavel's Exclusion From Bargaining

As explained in more detail in section I.L. of the factual findings in this proposed decision, the District refused to meet with Clavel at the negotiating table after August 5, 2010. (*Ante*, p. 29.)

ISSUES[21]

I. Did the District and/or Local 3112 negotiate in bad faith?

A. The District's claims against Local 3112

1. Did Local 3112 violate the duty to negotiate in good faith by refusing to sign the Tentative Agreement?

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[20] The term *Skelly* hearing refers to a pre-disciplinary hearing that complies with the due process requirements set forth in *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194. This hearing allows public employees to challenge the sufficiency of the evidence in certain proposed discipline. (*City of Modesto* (2008) PERB Decision No. 1994-M, p. 2, fn. 3.)

[21] This proposed decision will address the parties' claims in a different order from what was presented in the two PERB complaints for clarity and ease of discussion. Section I will address both parties' bargaining charges. (*Post*, p. 47.) Section I.A. will address the District's bargaining claims against Local 3112. (*Post*, p. 48.) Section I.B. will address Local 3112's bargaining claims against the District. (*Post*, p. 65.) Finally, section II will discuss Local 3112's retaliation claim against the District. (*Post*, p. 78.)

2. Did Local 3112 violate the duty to negotiate in good faith by presenting proposals directly to the District's Board of Trustees?

3. Did Local 3112 violate the duty to negotiate in good faith based on the totality of its bargaining conduct?

B. Local 3112's claims against the District

1. Did the District violate the duty to negotiate in good faith by unilaterally imposing furlough days in September 2010?

2. Did the District violate the duty to negotiate in good faith by refusing to meet with Clavel after his termination on August 5, 2010?

3. Did the District violate the duty to negotiate in good faith on September 3, 2010, by refusing to negotiate further over the terms of the Tentative Agreement?

4. Did the District violate the duty to negotiate in good faith by the totality of its bargaining conduct?

II. Did the District terminate Clavel in retaliation for his Local 3112 activities?

CONCLUSIONS OF LAW

I. The Parties' Bargaining Charges

In this matter, each party accuses the other of multiple bargaining violations. PERB evaluates bargaining claims under either the "per se" or "totality of the conduct" test, depending on the conduct involved and the effect of that conduct on negotiations. (*Stockton Unified School District* (1980) PERB Decision No. 143, p. 21.) Certain actions, such as unilateral policy changes, completely frustrate the bargaining process and therefore violate the duty to negotiate without the need for further evidence. (*Regents of the University of*

California (2010) PERB Decision No. 2105-H, p. 6;[22] *Sierra Sands Unified School District of Kern County* (2001) PERB Decision No. 1425, dismissal letter, p. 2.) In most other cases, "PERB considers the totality of the bargaining conduct," to ascertain whether the parties' possessed the subjective intent to move toward agreement where possible. (*Id.*, warning letter, p. 3.) In those types of "surface bargaining" cases, PERB examines the parties' overall bargaining conduct to determine a violation.

In the present dispute, both parties allege numerous violations under both theories. The conduct at issue spanned from around September 2009 through September 2010. Each individual claim will be addressed separately below.

A. The District's Bargaining Claims Against Local 3112 (LA-CO-1451-E)

The District accuses Local 3112 of committing multiple per se violations of the duty to negotiate in good faith. It also alleges that Local 3112 engaged in unlawful surface bargaining.

1. Local 3112's Refusal to Execute the August 5, 2010 Draft

The District claims a per se violation of the duty to bargain by refusing to sign the August 5, 2010 Draft. The thrust of this claim is that the parties reached a valid Tentative Agreement on restoring layoffs in exchange for furlough days, but Local 3112 repudiated that deal. The EERA definition of "meeting and negotiating" includes, in part, "the execution, if requested by either party, of a written document incorporating any agreements reached." (EERA, § 3540.1(h).) Interpreting substantially similar language from the NLRA,[23] courts and

[22] When interpreting statutes under its jurisdiction, it is appropriate for PERB to take guidance from cases interpreting the National Labor Relations Act (NLRA) and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, pp. 615-616.)

[23] The NLRA is codified at 9 USC 151, et seq. The NLRA definition of the "duty to bargain collectively" includes "the execution of a written contract incorporating any agreement reached if requested by either party[.]" (29 USC 158(d).)

the National Labor Relations Board (NLRB) have concluded that a party violates the duty to meet and confer in good faith, "by refusing to sign a written contract incorporating agreed-upon terms or by otherwise repudiating an oral agreement." (*NLRB v. Auciello Iron Works, Inc.* (1st Cir. 1992) 980 F.2d 804 (*Auciello Iron*), p. 808; see also *Torrington Extend-a-Care Employees Association v. NLRB* (2nd Cir. 1994) 17 F.3d 580, p. 595.) Thus, in *Waste Systems Corp.* (1988) 290 NLRB 1214 (*Waste Systems*), the NLRB found an employer violated the duty to bargain by refusing to sign and implement the parties' tentative agreement. The NLRB rejected the argument that the parties lacked a final agreement where the union made only minor suggestions over "typographical omissions" to the employer's draft. (*Id.* at p. 1219; see also *Hempstead Park Nursing Home* (2004) 341 NLRB 321, 329.) On the other hand, there is no violation where a party refuses to execute an agreement substantively inconsistent with what was discussed in bargaining. (*Transit Service Corporation* (1993) 312 NLRB 477 (*Transit Service*), p. 483.)

Here, the record shows that the August 5, 2010 Draft did not include key points from the parties' July 29, 2010 Tentative Agreement. The Tentative Agreement included, as relevant to this discussion, that most blue collar unit members would take 12 furlough days in exchange for recalling all the employees laid off in the Phase II layoffs as well as eight Custodian employees from the Phase I layoffs. The August 5, 2010 Draft only referenced the Phase I layoffs. It did not mention the Phase II layoffs at all.

Unlike in *Waste Systems, supra*, 290 NLRB 1214 and *Hempstead Park, supra*, 341 NLRB 321, the changes here were significant because Local 3112 was clearly seeking the greatest achievable layoffs reduction in negotiations. Such a sentiment was expressly referenced in negotiations and it is undisputed that the main logjam in bargaining was

determining how many employees Local 3112 could to return to work by accepting furloughs. The District's failure to reference the Phase II layoffs in the August 5, 2010 Draft Agreement omitted a fundamental aspect of the parties' Tentative Agreement.

The District argued that mentioning the recalled *employees* in the August 5, 2010 Draft was unnecessary because the August 5, 2010 Resolution already referenced the *positions* being recalled. It also maintains that it was common knowledge that the furloughs were taken to reduce layoffs. These arguments are rejected under the facts presented. In *Amalgamated Clothing Workers of America v. NLRB* (2nd Cir. 1963) 324 F.2d 228 (*Amalgamated Clothing*), the court found persuasive the union's arguments that it had the right to receive written acknowledgment of what it perceived as success in bargaining and that written evidence of the agreement would clarify any future ambiguity over the agreement in the event of a dispute. (*Id.* at p. 231.) That same reasoning applies here. The record shows that Local 3112's membership directed the negotiating team to reduce the July 1, 2010 layoffs as much as possible, even at the cost of other negotiated concessions. The District's August 5, 2010 Draft referenced the concessions Local 3112 accepted, but not all of the achievements. This deprived Local 3112 of its ability to convey some semblance of victory in negotiations to its membership.

Furthermore, as in *Amalgamated Clothing*, *supra*, 324 F.2d 228, the failure to exclude certain aspects of the parties' agreement in writing created unnecessary ambiguity. It is true that the August 5, 2010 Resolution restored eliminated *positions*, but there was no document referencing the agreed-upon number of *people* subject to recall. It is undisputed that the focus of both the negotiations and the Tentative Agreement was about *people*, not *positions*. Thus, the August 5, 2010 Resolution did not adequately describe the Tentative Agreement. Indeed,

this became a point of contention between the parties when they later disagreed over the number of *positions* needed to recall the 16 *people* identified during bargaining. Describing these issues in the context of a written and signed agreement could have reduced the issues in dispute or, at the very least, properly framed the dispute for resolution through the parties' grievance procedure.[24] Instead, the District's omission of any reference to the Phase II layoffs contributed to the confusion.

In addition, the District acted inconsistently with its position. Lee-Sung agreed to reference the Phase I layoffs in the August 5, 2010 Draft. Therefore, even if the District would have been justified in excluding all references to the restored layoffs in writing, the District's willingness to describe some, but not all of the laid-off employees being recalled is simply confusing. The District's conduct also inaccurately suggests that one aspect of the layoffs was reduced through negotiations, but the other was not. This, arguably, undermines Local 3112's role in the decision to reverse the layoffs.

Therefore, because the August 5, 2010 Draft was substantially inconsistent with the July 29, 2010 Tentative Agreement, Local 3112 did not violate the duty to negotiate by refusing to sign those documents. This claim is therefore dismissed.

2. Presenting Proposals Directly to the District's Board of Trustees

The District also accuses Local 3112 of sidestepping its bargaining team and presenting proposals directly to its Board of Trustees or its interim Superintendent. The duty to bargain in good faith includes the obligation to engage with an opposing party's chosen negotiators. "Bypassing the authorized negotiators, for example, by going straight to the school board of

[24] "EERA clearly indicates that the Legislature intended the grievance procedure to be the preferred method of settling job disputes and improving labor relations." (*Chaffey Joint Union High School District* (1982) PERB Decision No. 202, p. 8, citing EERA, § 3541.5(a).)

trustees with proposals or concessions, would subvert the statutory scheme and arguably violate the good-faith obligations of collective bargaining." (*San Ramon Valley Unified School District* (1982) PERB Decision No. 230 (*San Ramon Valley USD*), p. 16.) The Board elaborated upon that position in *Westminster School District* (1982) PERB Decision No. 277 (*Westminster SD*), concluding that union representatives may not side-step the employer's negotiators and bargain directly with the school board. (*Id.* at p. 9.) On the other hand, a union's "mere advocacy" of its bargaining position to the board is permissible. (*Ibid.*) The Board found no bypass in *Westminster SD* because the union representatives' comments during a public board meeting merely summarized the union's position and expressed an interest in continuing negotiations. (*Id.* at pp. 10-11.) Likewise, in *Trustees of the California State University* (2006) PERB Decision No. 1871-H (*CSU Trustees*), the Board found no unlawful bypass in an employer's comments about negotiations directly to employees. Even though the employer had uncomplimentary things to say about the union's negotiating position, the Board found that the comments were a lawful expression of the employer's "spin" on the state of bargaining. (*Id.* at dismissal letter, p. 3.)

In the present case, the District claims that three incidents support its bypass claim. The first incident was during the July 15, 2010 Board of Trustees meeting where Schnaufer described the 11 employees implicated in the Phase II layoffs as "hostages" to the District's furlough proposal. The District has not shown that these comments, viewed either separately or in conjunction with other Local 3112 activity, was more than mere advocacy of AFSCME's opposition to the proposed layoffs. By that point in negotiations, it was clear that Local 3112 opposed both phases of the layoffs and sought to keep as many unit members employed as possible. Schnaufer's comments were merely a forceful expression of that position and did not

indicate an intent to negotiate directly with the Board of Trustees.[25] (See *CSU Trustees*, *supra*, PERB Decision No. 1871-H; *United Technologies Corp.* (1985) 274 NLRB 1069.)

The District further asserts that Local 3112 twice delivered proposals directly to District representatives who were not on their negotiating team. According to the District, Local 3112 distributed its "PLAN C" document during the July 15, 2010 Board of Trustees meeting. That document was AFSCME's most recent proposal, conveyed to the District's negotiators the day before. The District also contends that, on August 6, 2010, Schnaufer attempted to give a copy of the Letter of Understanding directly to the District Interim Superintendent. The Letter of Understanding was Local 3112's attempt to correct the deficiencies in Lee-Sung's August 5, 2010 Draft Agreement. Neither of these claims are sufficient to establish unlawful direct dealing. It is undisputed that Local 3112 presented both of these documents to the District's chief negotiator, Lee-Sung. Furthermore, no evidence was presented that anyone from Local 3112 sought to meet with or met with either the Board of Trustees or the Interim-Superintendent. Rather, the record plainly shows that the "PLAN C" document was discussed by both negotiating teams during bargaining and the Letter of Understanding was discussed during a meeting with Lee-Sung on or around August 8, 2010. Under these circumstances, the District has not met its burden of proving that Local 3112 unlawfully bypassed the District's negotiators.[26] The claim that Local 3112 unlawfully bypassed the District's negotiating team is dismissed.

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[25] Schnaufer also invited others to speak with him after the meeting, but there was no evidence of this happening.

[26] In addition, the substance of these allegations was supported entirely by hearsay. Lee-Sung testified that District employee Dominguez said that the "PLAN C" document was passed out during the Board of Trustees meeting. Dominguez did not testify at the PERB hearing. Lee-Sung similarly testified that interim-Superintendent Barry told him about receiving the Letter of Understanding. She did not testify either. Adams and Schnaufer denied

3. The District's Surface Bargaining Claim

The District also contends that Local 3112's overall bargaining conduct demonstrated a subjective lack of intent to reach an agreement under the "totality of the bargaining conduct" test. The essence of surface bargaining is that a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement. (*Muroc Unified School District* (1978) PERB Decision No. 80, p. 13 (*Muroc USD*).) Thus, the Board weighs the record as a whole to determine whether the conduct at issue "indicates an intent to subvert the negotiating process or is merely a legitimate position adamantly maintained." (*Oakland Unified School District* (1982) PERB Decision No. 275, p. 15.) Here, the record shows that the parties bargained for several months. During the course of negotiations, each party made concessions as the parties moved slowly to Tentative Agreement. Although one might argue that the existence of a Tentative Agreement forestalls any finding of bad faith, Local 3112's conduct before and during negotiations warrants examination for bad faith.

a. Delays in "Sunshining" Local 3112's Initial Proposal

The District alleges that Local 3112 unreasonably delayed presenting its initial proposal to commence bargaining. Lee-Sung initially requested Local 3112's initial proposal from Adams and Clavel in around September 2009. Local 3112 did not submit its initial proposal until three months later, in December 2009.

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both allegations. "Although admissible, hearsay testimony and documents are insufficient to support a [factual] finding." (*Palo Verde Unified School District, supra*, PERB Decision No. 2337, citing PERB Regulation 32176.)

i. Timeliness of the Claim

As a threshold matter, EERA section 3541.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." Allegations of misconduct occurring outside of the six month statute of limitations are normally subject to dismissal. (*Charter Oak Unified School District* (2011) PERB Decision No. 2159, warning letter, pp. 3-4; see also *State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2017-S, warning letter, p. 8.) [holding that surface bargaining claims based solely upon bargaining conduct outside the statute of limitations period did not state a prima facie case].)

However, conduct older than six months "may nonetheless be considered as background evidence of the [respondent's] motive." (*Garden Grove Unified School District* (2009) PERB Decision No. 2086, p. 4, fn. 3, citing *Trustees of the California State University* (2008) PERB Decision No. 1970-H, *California State University, Hayward* (1991) PERB Decision No. 869-H, *North Sacramento School District* (1982) PERB Decision No. 264 (*North Sacramento SD*).)[27]

The Board's position on "background evidence" finds support in U.S. Supreme Court precedent. In *Local Lodge No. 1424, International Association of Machinists v. NLRB* (1960) 362 U.S. 411 (*Bryan Manufacturing*), the Court described the two basic contexts in which evidence from outside the statute of limitations may arise.

> The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events

[27] Each of those cases concern PERB's ability to consider conduct from outside the statute of limitations period to ascertain whether a respondent possessed the unlawful intent to retaliate against an employee. Intent is a key factor in both PERB's retaliation analysis and its surface bargaining analysis.

> may be utilized to shed light on the true character of matters occurring within the limitations period[.]

(*Id.* at pp. 416-417.) On the other hand:

> where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice.

(*Ibid.*) In other words, untimely allegations may "shed light" on the nature of already timely claims, but may not be considered where the claims at issue must rely on the untimely claims to demonstrate a violation. Untimely evidence in the latter circumstances is inadmissible to prevent "reviving a legally defunct unfair practice charge." (*Ibid.*)[28] The NLRB has subsequently applied these concepts to consider conduct outside the statute of limitations period as background evidence in a variety of surface bargaining cases. (See e.g., *Regency Service Carts, Inc.* (2005) 345 NLRB 671, p. 672, fn. 3; *Teamsters Local Union No. 122 (August A. Busch & Co.)* (2001) 334 NLRB 1190, p. 1251; *Sparks Nugget, Inc.* (1990) 298 NLRB 524, fn. 5, p. 550; *Houston County Electric Cooperative* (1987) 285 NLRB 1213, p. 1222.)

PERB has expressly acknowledged *Bryan Manufacturing, supra*, 362 U.S. 411, when considering background evidence outside the statute of limitations. (See e.g., *Service Employees International Union, Local 1021 (Sahle)* (2012) PERB Decision No. 2261-M, p. 7,

[28] *Bryan Manufacturing, supra*, 362 U.S. 411, concerned the enforceability of a union security clause. The Court rejected that the employer's argument that the clause was unenforceable because the union lacked majority status at the time the agreement was reached. (*Id.* at p. 415.) The Court reasoned that the employer's argument fell into the second, inadmissible category of anterior events, because majority status had been decided at a time outside the statute of limitations and there was no claim that the agreement was invalid absent relation to that untimely event. (*Id.* at p. 417.)

fn. 5; *Azusa Unified School District* (1977) EERB Decision No. 38, pp. 5-6.)[29] Without citing directly to *Bryan Manufacturing*, the Board has also suggested, but did not directly hold, that evidence of a respondent's conduct beyond the six-month statute of limitations period may be considered as background evidence in a surface bargaining claim. (*Santa Monica Community College District* (2012) PERB Decision No. 2243 (*Santa Monica CCD*), dismissal letter, p. 2.)[30] Neither party addressed the timeliness of the District's allegation in closing briefs.

The District here alleges that conduct from between September and December 2009 supports its bad faith bargaining claim. However, it did not file its charge until September 27, 2010, around nine months after December 2009.[31] Normally, claims of misconduct dating that far back cannot form the basis of an unfair practice charge. However, multiple factors warrant consideration of this allegation under the circumstances. First, as will be discussed in greater detail below, the District has demonstrated a prima facie case for surface bargaining based solely on events within the statute of limitations period. Thus, under the principles from *Bryan Manufacturing*, *supra*, 362 U.S. 414, the otherwise untimely evidence of Local 3112's conduct

[29] Once again, those cases involved retaliation allegations.

[30] The charge in that case suffered from multiple defects, chiefly that the only alleged indicator of surface bargaining took take place outside the statute of limitations. The Board focused its discussion on whether the continuing violation doctrine applied to that single indicator of bad faith. (*Santa Monica CCD*, *supra*, PERB Decision No. 2243, pp. 4-5.) The Board concluded that the doctrine did not apply, and even if it did, that one indicator was insufficient to demonstrate surface bargaining under those facts. (*Id.* at p. 5; but see *City of San Jose* (2013) PERB Decision No. 2341-M, pp. 18-19.) The Board in *Santa Monica CCD*, also cited the board agent's analysis with general approval. (*Santa Monica CCD* at p. 2.) As explained above, the board agent considered the untimely conduct for background purposes. (*Id.* at dismissal letter, p. 2.)

[31] Using September 2010 as the starting point, the statute of limitations extend back until around March 2010.

may be used to "shed light on the true character" of Local 3112's good or bad faith during the bargaining process. (See *Id.* at pp. 416-417.)

In addition, consideration of this conduct is warranted here because the parties' negotiations spanned more than six months. (See *Regency Service Carts, Inc.*, *supra*, 345 NLRB at p. 672 [reviewing the 32 months of negotiations in determining a surface bargaining claim].) Artificially removing from consideration any bargaining conduct older than six months for any purpose is antithetical to the "totality of the bargaining conduct" analysis and would, in this dispute, exclude almost half of the parties' bargaining conduct.

For these reasons, evidence that Local 3112 delayed presenting its initial bargaining proposal between September and December 2009, will be considered, not as a separate violation of EERA, but to "shed light" on Local 3112's motives during bargaining.[32]

ii. Evidence of Bad Faith

In *Professional Eye Care* (1988) 289 NLRB 1376, the NLRB concluded that the employer failed to take its bargaining obligations seriously after finding that it declined to either return the union's telephone calls or submit written proposals, and did not consult with its own leadership during negotiations. (*Id.* at p. 1392.) PERB has similarly held that a union's refusal to commence negotiations for the entire summer indicated bad faith bargaining.

[32] In *Gavilan Joint Community College District* (1996) PERB Decision No. 1177, however, the Board held that a charging party failed to demonstrate the relationship between a respondent's allegedly misleading statements while the parties were in factfinding and older pre-impasse bargaining conduct that was the subject of a prior unfair practice charge. The Board's holding focused on the relevancy of the evidence, not the admissibility, concluding that "the fact that the District was found to have engaged in surface bargaining more than a year prior to the conduct at issue here does not lend support to the instant unfair practice charge." (*Id.* at pp. 5-6.) In *San Mateo County Community College District* (1993) PERB Decision No. 1030, the Board found it appropriate to review refusal to bargain claims occurring more than six months before the charge was filed under a continuing violation theory because the respondent engaged in similar conduct at impasse. (*Id.* at p. 12, fn. 7, citing *San Dieguito Union High School District* (1982) PERB Decision No. 194.)

(*Gonzales Union High School District* (1985) PERB Decision No. 480, proposed decision, p. 40.)

In the present dispute, Local 3112's failure to respond to the District's request for an initial proposal delayed the start of negotiations for three months and also suggests that Local 3112 did not take its bargaining obligations seriously. The District was upfront about its deficit and the need to address financial problems for the 2010-2011 fiscal year. Yet, neither Adams nor Clavel ever conveyed the District's interest in starting negotiations to its bargaining team. Chief negotiator Schnaufer had no idea of the District's request until November 2009, when Lee-Sung approached him two months later. This inaction suggests an attempt to delay bargaining.

Local 3112 defends its conduct by stating that Schnaufer, not Adams or Clavel, was Local 3112's chief negotiator, but this argument is unpersuasive under the facts presented. Both Adams and Clavel knew about the District's perceived urgency to begin negotiations but they did not either discuss the matter with their own team or inform Lee-Sung that he should be communicating with Schnaufer instead. Their decision to do nothing in the face of Lee-Sung's request suggests an attempt to delay what they knew would be concessionary bargaining. This is evidence that Local 3112 lacked the subjective good faith to participate in bargaining.

b. Discussion of Grievances During Negotiations Sessions

The District also maintains that Local 3112 demonstrated bad faith by discussing pending grievances during negotiation sessions. Schnaufer admitted to mentioning grievance and other personnel matters during bargaining, but said he discontinued those talks upon request. No District witness disputed those facts and the District did not present any additional

evidence about how Schnaufer's conduct affected negotiations. Moreover, the record also shows that it was common for the parties to raise other issues during negotiations. In earlier negotiations in June 2009, Lee-Sung raised issues unrelated to the parties' negotiations. There was no showing that these brief deviations from either party adversely affected negotiations or demonstrated the intent to subvert the negotiations process. (See *Muroc USD*, *supra*, PERB Decision No. 80, pp. 18-19 [holding no evidence of bad faith where one parties' conditions on bargaining had no discernible impact on the negotiations].)

c. Local 3112's Layoff/Furlough Proposals

The District also contends that Local 3112's bargaining posture regarding furlough days and layoffs was further evidence of bad faith for two reasons. First, the District argues that Local 3112's insistence on presenting package proposals evidenced a "take it or leave it" attitude towards bargaining. Second, the District asserts that it was improper for Local 3112 to condition agreement on negotiable subjects, such as furloughs, on non-mandatory subjects of bargaining, such as layoffs.

Regarding Local 3112's use of package proposals, PERB has examined the substance of a party's proposals, not the mere fact that a party makes package proposals, that may indicate bad faith. In *City of Fresno* (2006) PERB Decision No. 1841-M, the Board affirmed the dismissal of a charge claiming surface bargaining. There, among other findings, the Board concluded that both parties "offered several unique proposals" that the other side simply could not agree to. The fact that the employer made "only package proposals" did not change the Board's conclusion. (*Id.*, at warning letter, pp. 1, 7; see also *Ventura County Community College District* (1998) PERB Decision No. 1264, dismissal letter, p. 3 [holding that PERB must examine an employer's entire package of proposals to ascertain evidence of bad faith].)

Here, the District has not shown either that Local 3112's use of package proposals, or the content of those proposals, hindered the parties' negotiations. In fact, starting with Local 3112's first package proposal in April 2010, each of Local 3112's successive proposals brought the parties closer to agreement. Local 3112's "PLAN C," another package proposal, became the basis for the July 29, 2010 Tentative Agreement. Under these facts, Local 3112's use of package proposals does not evidence bad faith.

The District also accuses Local 3112 of conditional bargaining because it insisted on tying Local 3112's agreement on furloughs to the District's agreement to reduce layoffs, and because Local 3112 described its proposals on these issues as "discussions" or "not negotiations." The Board recognized that "conditional bargaining" may evidence bad faith where, for example, one party "refused to bargain or submit proposals concerning monetary issues until complete agreement had been reached on non-economic issues." (*State of California (Department of Personnel Administration)* (1998) PERB Decision No. 1249-S, warning letter, p. 5, citations omitted.) The District's application of that principle to the present case is misplaced for at least two reasons. First, it is undisputed that both parties sought to use furloughs to stave off layoffs. This point was made clear in February 2010, when then-Superintendent Farley told all four unions that they could reduce planned layoffs by accepting furlough days. Thereafter, both parties linked the two issues together in bargaining. For example, on May 29, 2010, the District proposed that Local 3112 accept seven furlough days "in order to reduce district expenditures on AFSCME members' salaries and to reduce layoffs of AFSCME employees." These facts show that Local 3112 was not refusing to bargain over economic issues until other issues were resolved. Rather, both parties engaged in

the furlough and layoffs negotiations voluntarily and simultaneously. The duty to bargain in good faith does not prohibit this conduct.

Under the facts presented here, Local 3112's insistence on calling its proposals "discussions," as opposed to "negotiations" also does not demonstrate bad faith. Schnaufer explained that they took that position only to preserve Local 3112's legal ability to "insist that furloughs as an alternative to layoffs is a non-mandatory subject of bargaining and is not subject to [EERA] impasse procedures[.]" Regardless of whether Local 3112's legal analysis in this area was correct,[33] the District has not established that these disclaimers actually affected the parties bargaining. Both sides continued to meet, exchange substantive proposals, and reach agreement where possible. Without any showing that Local 3112's conduct impeded negotiations, this does not support the District's surface bargaining claim. (*Muroc USD*, *supra*, PERB Decision No. 80, pp. 18-19.)

d. Local 3112's Failure to Assist With Finalizing the Agreement

Local 3112's conduct after the parties reached Tentative Agreement also suggests bad faith. As explained above, the duty to meet and confer in good faith requires the parties to prepare and execute a written agreement. (EERA, § 3540.1(h); *Auciello Iron*, *supra*, 980 F.2d, at p. 808.) That duty also includes "the obligation to assist in reducing the agreement reached to writing." (*Albertson's, Inc.* (1993) 312 NLRB 394 (*Albertson's*), p. 397; see also

[33] It is worth noting that PERB has found that parties "may bargain over a permissive and nonmandatory subject of bargaining without waiving the right thereafter to take a position that it is a nonmandatory subject." (*Chula Vista City School District* (1990) PERB Decision No. 834, p. 23, citing *Poway Unified School District* (1988) PERB Decision No. 680.) Even where parties have previously reached agreements on such subjects, "a permissive subject does not become mandatory by virtue of such an agreement." (*Chula Vista* at pp. 23-24.) If one party subsequently expresses its opposition to include specific nonmandatory proposals into an agreement, the other party may not lawfully insist to impasse upon retaining those proposals. (*Id.* at p. 24.)

Amalgamated Clothing, supra, 324 F.2d at pp. 230-231; *Kennebec Beverage Co., Inc.* (1980) 248 NLRB 1298 (*Kennebec*).) The failure to cooperate in incorporating oral agreements into a written contract violates the duty to negotiate in good faith. (*Amalgamated Clothing* at p. 230, citing *H.J. Heinz Co. v. NLRB* (1941) 311 U.S. 514.)

In the present dispute, Local 3112 failed to adequately assist with finalizing the parties' agreement. In fact, neither party ever discussed the final language and format of the agreement to any significant degree. Lee-Sung and Schnaufer briefly discussed creating an Effects of Layoff MOU, but neither mentioned what he thought that document should include.[34] Lee-Sung's August 2, 2010 Draft included sections for "Effects of Layoffs" and "Layoff Reinstatements," and Schnaufer never inquired how Lee-Sung intended on incorporating those sections into the final agreement. Instead, Schnaufer apparently assumed without asking that both sections would be included in the final agreement. Although Schnaufer proposed some changes to Lee-Sung's August 2, 2010 Draft, he never requested a draft of the final documents or produced such a draft himself. This inaction contributed to substantial confusion on August 5, 2010, when both parties expected to execute the agreement. It was only then that Local 3112 realized that the parties had different understandings of the format and language of the final agreement. As with its apparent reluctance to present an initial proposal, Local 3112's failure to work with the District in finalizing the agreement suggests that it was not taking an important aspect of its duty to meet and confer in good faith seriously.

[34] The District's own obligations to work with Local 3112 in producing the final draft agreement documents will be discussed below.

e. Local 3112's Communications With the District After August 5, 2010

Local 3112's conduct after August 5, 2010, further suggests bad faith. When Lee-Sung sought to determine why Local 3112 was refusing to sign the August 5, 2010 Draft, Schnaufer raised new issues not previously raised in bargaining. One issue raised for the first time on or around August 8, 2010, was how the final agreement could be enforced. Another issue raised around the same time was the accuracy of the District's Custodian employee seniority list.

Regarding enforceability, Schnaufer admitted to drafting language on this issue in the past, but he did not explain why Local 3112 never raised this issue during the negotiations at the center of this dispute. Regarding the seniority list, both parties used that list extensively in negotiations. Some of Local 3112's proposals, including its "PLAN C," were expressly linked to that list. In other words, Local 3112 had ample time to raise these issues during negotiations but chose not to do so until after the parties reached Tentative Agreement and were in the midst of tense discussions about whether the agreement could be finalized. Raising these known issues for the first time at this point suggests an attempt to achieve what it could not get in earlier negotiations. Under the circumstances presented here, this conduct also suggests bad faith.

f. Local 3112's Communications With its Members

Local 3112's inaccurate communications with its membership after August 5, 2010 also suggests bad faith. Once the parties reach a tentative agreement on all issues, the duty to bargain in good faith implies that "the negotiators will not 'torpedo' the proposed collective bargaining agreement or undermine the process that has occurred." (*Alhambra City and High School Districts* (1986) PERB Decision No. 560 (*Alhambra CHSD*), p. 14; see also *State of California (Department of Personnel Administration)* (2003) PERB Decision No. 1516-S, p.

6.) Here, after August 5, 2010, Local 3112 began falsely reporting that the District reneged on the deal because the August 5, 2010 Resolution only reinstated 12 as opposed to 16 custodian *positions*. The record shows that the parties only agreed to recall 16 Custodian *employees*. Both Schnaufer and Adams acknowledge that the Tentative Agreement did not obligate the District to reinstate 16 Custodian *positions*. In fact, it was Local 3112 that proposed to give the District "credit" for regular attrition such as retirements and bumping precisely so the District would not have to reinstate 16 Custodian *positions*. Although Local 3112 may have the protected right to communicate, even inaccurately, about the parties' negotiations (see *CSU Trustees*, *supra*, PERB Decision No. 1871-H, warning letter, p. 2), Local 3112's false statements here suggests that Local 3112 sought to undermine, not salvage, the parties' Tentative Agreement. This is evidence of bad faith.

After examining the totality of the parties' bargaining conduct, in particular Local 3112's conduct after the parties reached Tentative Agreement, it is concluded that Local 3112 violated the duty to negotiate in good faith. Its disinterested approach to finalizing the parties' agreement, together with its attempt to introduce new issues into bargaining after the Tentative Agreement, and its false communications to its members collectively indicate an attempt to entangle and even subvert progress made in negotiations. Evidence of Local 3112's delays in making its initial proposal is consistent with this conclusion and is further evidence of bad faith under the circumstances. Therefore, Local 3112's bargaining conduct violated EERA section 3543.6(c).

B. Local 3112's Bargaining Claims Against the District

Local 3112 also accuses the District of violating the duty to bargain in good faith under multiple theories.

1. The Imposition of Furlough Days in September 2010

Local 3112 also accuses the District of unilaterally imposing furlough days on its bargaining unit. A unilateral policy change is a "per se" violation of the duty to bargain in good faith if certain criteria are met. To establish a prime facie case for an unlawful unilateral change, the charging party must show that: (1) the employer took action to change existing policy; (2) the policy change concerned a matter within the scope of representation; (3) the action was taken without giving the exclusive representative notice or opportunity to bargain over the change; and (4) the change has a generalized effect or continuing impact on terms and conditions of employment. (*Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262, p. 9, (*Fairfield-Suisun USD*) citing *Grant Joint Union High School District* (1982) PERB Decision No. 196, p. 10; *Walnut Valley Unified School District* (1981) PERB Decision No. 160, p. 5.)

In the present dispute, the only significant dispute is over the third element of this test. The District unquestionably changed unit members' working conditions by implementing new unpaid furlough days in September 2010. The 12 furlough days changed employees' wages and hours, both of which are expressly included as being within the "scope of representation." (EERA, § 3543.2(a); see also *County of Fresno* (2010) PERB Decision No. 2125-M, warning letter, p. 3 ["Furloughs are, in essence, a reduction in hours and thus are generally negotiable."].)

Regarding the third element of the unilateral change test, the duty to negotiate in good faith continues until the parties reach either agreement or impasse. (*Redwoods Community College District* (1996) PERB Decision No. 1141 (*Redwoods CCD*), proposed decision, p. 11,

citing *Moreno Valley Unified School District v. PERB* (1983) 142 Cal.App.3d 191.)[35] The District argues that Local 3112 has not satisfied the third element of the unilateral change analysis because the parties, in fact, reached agreement on furloughs. Although not fully clear, it appears as though the District argues that the parties reached a final and enforceable agreement based on either the July 29, 2010 Tentative Agreement in principle or Schnaufer's August 4, 2010 e-mail message. Neither argument is persuasive under the circumstances here.

a. The July 29, 2010 Tentative Agreement

Regarding the July 29, 2010 Tentative Agreement, PERB has consistently found that tentative agreements are not binding on the parties. (*Temple City Unified School District* (2008) PERB Decision No. 1972, p. 12, citing *Alhambra CHSD, supra*, PERB Decision No. 560.) However, as explained above, both parties have the obligation not to undermine the negotiations process or "torpedo" the proposed agreement. (*Id.* at p. 14, citing *Wichita Eagle and Beacon Publishing Co., Inc.* (1976) 222 NLRB 742; see also *State of California (Department of Personnel Administration), supra*, PERB Decision No. 1516-S, p. 6.) If, on the other hand, a party rejects the tentative agreement in good faith, the duty to bargain is revived. (*Alhambra CHSD* at p. 14, fn. 10.) In the present dispute, as in *Alhambra CHSD*, the July 29, 2010 Tentative Agreement was not binding on the parties and was not a final agreement.

b. Schnaufer's August 4, 2010 E-Mail Message

The District also argues that final valid agreement was established by Schnaufer's August 4, 2010 e-mail message informing Lee-Sung that the Local 3112 membership ratified the Tentative Agreement and that "you may consider this our official word." This communication was not sufficient to establish a final agreement based on the record presented

[35] It is undisputed that the parties never reached impasse in negotiations.

for at least two reasons. First, the record shows that the parties had not completed meet and confer obligations at the time Schnaufer sent the e-mail message. When assessing the status of a collectively bargained agreement, "[t]he essential question to be determined is whether the parties reached a meeting of the minds on all material and substantive terms of a collective bargaining agreement." (*Transit Service, supra*, 312 NLRB at p. 481, citing *Ebon Services, Inc.* (1990) 298 NLRB 219, 224; see also *Sharon Hats, Inc.* (1960) 127 NLRB 947, 954, enfd. 289 F.2d 628; see also *Mercedes-Benz of North America, Inc.* (1981) 258 NLRB 803.) PERB has likewise held that there was no "meeting of the minds," and thus no agreement, over issues not discussed in bargaining. (*Trustees of the California State University* (2006) PERB Decision No. 1842-H, proposed decision, p. 12 [no agreement reached over bargaining location]; see also *Fremont Unified School District* (1997) PERB Decision No. 1240, proposed decision, pp. 24-26.)

As explained above, the record here shows that the parties never reached agreement on the language and format of the final written agreement. That is an integral part of the parties' duty to meet and confer in good faith. (See EERA, § 3540.1(h); *Amalgamated Clothing, supra*, 324 F.2d at pp. 230-231; *Albertson's, supra*, 312 NLRB, at p. 397; *Kennebec, supra*, 248 NLRB at p. 1298.) As it turned out, the parties had diametrically opposing positions over whether the agreement should reference the Phase II layoffs. Without commenting on whose approach was more prudent, clearly, this issue was not resolved through negotiations and the parties' mutual duty to meet and confer had not yet ended. The parties' failure to reconcile their differences over the content of the final written agreement precludes PERB from finding that the parties ever reached a "meeting of the minds on all material and substantive terms of a collective bargaining agreement." (See *Transit Service, supra*, 312 NLRB at p. 481.)

Moreover, the record in this matter provided further indication that the District knew or should have known that Schnaufer's August 4, 2010 e-mail message did not signify Local 3112's final assent to be bound to an agreement. One such indicator was that Schnaufer continued to propose changes to the agreement. In fact, in that same e-mail message, Schnaufer told Lee-Sung that there were remaining "language problems" requiring resolution and that he would suggest some solutions to those issues. Another indicator was the parties' bargaining history, which shows that the parties had historically signified assent to a final agreement by signing a document stating their agreement. Adams and Schnaufer both testified credibly, and without dispute, that the parties always signed such a document before any prior agreement became effective.[36] This never occurred here. For all of these reasons, Schnaufer's August 4, 2010 e-mail message did not establish a final and binding agreement between the parties.

c. Local 3112's Bad Faith Bargaining as an Affirmative Defense

Local 3112's own bad faith conduct in the negotiations also does not justify unilateral imposition of the furlough days. In *County of Santa Clara* (2010) PERB Decision No. 2120-M, PERB has rejected the "self-help" approach to negotiations. (*Id.* at p. 15.) There, PERB found that an employer's suspicion that a union was negotiating in bad faith did not justify unilateral action. Rather, PERB held that "when a party believes its counterpart is not

[36] According to the District, Adams testified that prior agreements took effect even before being signed by the parties. This assertion misstates his testimony. Adams said that he reviewed every agreement and that "every time we signed an agreement." He said sometimes smaller agreements were not immediately incorporated into a fully-integrated CBA. One possible source of confusion from Adams' testimony was that he also said that the parties periodically incorporated negotiated changes to the CBA, such as reopener agreements or agreed-upon date changes, into a fully-integrated CBA, but that he did not always place a priority on signing those master agreements. However, neither Adams nor any other witness ever said that agreements between the parties ever took effect without a signature from both sides.

conducting its negotiations in good faith, the party may file an unfair practice charge." (*Id.*, citing *Palo Verde Unified School District* (1987) PERB Decision No. 642.) Similarly in the present dispute, Local 3112's bad faith conduct during negotiations does not entitle the District to forgo bargaining and implement new policy on negotiable subjects unilaterally. Rather, its recourse was through the unfair practice charge process.

After reviewing the record as a whole, it is concluded that the parties did not reach either impasse or a final agreement over furlough days for the 2010-2011 school year. The District's decision to impose furlough days on Local 3112's bargaining was therefore unlawful under EERA, section 3543.5(c). (*Redwoods CCD, supra*, PERB Decision No. 1141, proposed decision, p. 11.) This conduct also amounts to derivative violations of EERA sections 3543.5(a) and (b). (*Fairfield-Suisun USD, supra*, PERB Decision No. 2262, p. 18.)

2. The District's Refusal to Meet With Clavel After August 5, 2010

Local 3112 alleges that the District violated the duty to negotiate in good faith by refusing to meet with Clavel after his termination date on August 5, 2010. In general, "EERA gives the parties the right to appoint their own negotiators and forbids either side from dictating who their opposing representatives may be." (*Yolo County Superintendent of Schools* (1990) PERB Decision No. 838 (*Yolo CSS*), proposed decision, p. 33, citing *San Ramon Valley USD, supra*, PERB Decision No. 230) In *Yolo CSS*, the Board held that an employer committed a "per se" violation of the duty to bargain by demanding that a union remove a particular member from its bargaining team in the middle of negotiations. (*Ibid.*)

In the present dispute, Clavel was part of Local 3112's negotiating team since the beginning of the 2009-2010 negotiations. Although the parties reached a Tentative Agreement before August 5, 2010, the record shows that there was no final agreement in place by that

time. The District's refusal to meet with Clavel was tantamount to dictating who Local 3112 selected as its negotiator as the parties worked through their remaining issues.

The District acknowledges a union's right to select its negotiators in its closing brief but asserts that an exception to this general rule applies, citing to *Savanna School District* (1982) PERB Decision No. 276 (*Savanna SD*). There, the Board set forth a test for determining the legality of "coordinated bargaining," i.e., allowing employees not part of a union's bargaining unit to serve on that union's negotiating team. (*Id.* at proposed decision, p. 3.) The Board held that such "mixed-union negotiating committees" are unlawful when the employer can show "a 'clear and present danger to the bargaining process.'" (*Id.*, quoting *General Electric Co. v. NLRB* (2nd Cir. 1969) 412 F.2d 512, 517.) The Board in that case concluded that the employer failed to establish any danger to the bargaining process because it did not assert "any concrete examples of disruptions to the process" or demonstrate that the union had an ulterior motive to undermine bargaining when establishing its negotiating team. (*Savanna SD*, proposed decision, p, 5.) In *State of California (Department of Personnel Administration)* (1998) PERB Decision No. 1305-S, the Board applied that same standard in a dispute over whether it was unlawful for the employer to insist on bargaining an issue by individual State department, as opposed to a single statewide bargaining table. As in *Savanna SD*, the Board in that case found no concrete examples of actual disruption to the bargaining process and no evidence of an ulterior motive by the employer. The Board accordingly found no violation of the duty to bargain in good faith. (*Id.* at p. 11.)

In the present dispute, the District has not established that the test for coordinated bargaining should even apply to this situation. Even if it did, the District has not established that Clavel's continued participation in negotiations presents a "clear and present danger to the

bargaining process." (See *Savanna SD*, *supra*, PERB Decision No. 276, p. 3.) The District contends that Clavel was excluded because certain employees filed complaints and felt threatened by him. As in *Savanna SD*, the District has failed to provide any concrete examples of how Clavel's presence in negotiations after August 5, 2010 adversely affected negotiations or demonstrated bad faith by Local 3112. There was no evidence, for example, that Clavel was disruptive, threatening, intimidating, or otherwise unproductive during negotiations. Nor was evidence presented that any employees that had filed complaints against Clavel would be present or even nearby during the parties' negotiations. Lee-Sung was the only member of the District's negotiating team that testified against Clavel in his dismissal hearing. He never expressed any fear of Clavel. Local 3112 even offered to ameliorate the District's stated concerns by meeting at the AFSCME offices. The District offered no explanation for rejecting that proposal.

The District also asserts that Clavel's presence was unnecessary because the parties were no longer negotiating after July 29, 2010. This argument is rejected because the parties' mutual duty to meet and confer in good faith continued to include the obligation to cooperate in preparing a final written agreement. (EERA, § 3540.1(h); *Auciello Iron*, *supra*, 980 F.2d at p. 808; *Albertson's*, *supra*, 312 NLRB at p. 397.) That process was not complete by August 5, 2010. Thus, the District's refusal to meet with Clavel deprived Local 3112 of having one of its chosen negotiators for an important part of the bargaining process. This conduct violates EERA, section 3543.5(c). (*Yolo CSS*, *supra*, PERB Decision No. 838, proposed decision, p. 33.) This conduct also amounts to derivative violations of EERA sections 3543.5(a) and (b). (*Yolo CSS*.)

3. The District's September 3, 2010 Refusal to Bargain Over the Terms of the July 29, 2010 Tentative Agreement

The PERB complaint also alleges that the District committed an additional per se violation of the duty to bargain in good faith by refusing, on September 3, 2010, "to negotiate further over the terms of the tentative agreement reached between the parties on or about July 29, 2010." In general, a party's outright refusal to commence or continue bargaining over negotiable issues violates the EERA. (*Sierra Joint Community College District* (1981) PERB Decision No. 179, p. 7.) On the other hand, the Board in *Alhambra CHSD*, *supra*, PERB Decision No. 560 recognized that once the parties reach tentative agreement, "[a]bsent some extenuating circumstance, such as discovered illegality of a contract term, either side can lawfully refuse to reopen negotiations pending ratification." (*Id.* at p. 14, citing *Wichita Eagle and Beacon Publishing Co., Inc.* (1976) 222 NLRB 742.) In *Alhambra CHSD*, the parties reached tentative agreement on all outstanding issues in negotiations but the employer proposed, then subsequently withdrew, a new proposal for a retirement incentive. The Board held that because the parties had reached a lawful tentative agreement on all subjects in negotiations, neither party was obligated to entertain new proposals. (*Id.* at p 15.) It accordingly concluded that the employer did not restart the duty to bargain over the covered issues by making a subsequent proposal. (*Ibid.*)

The Board reached a contrary conclusion under different facts. In *Chino Valley Unified School District* (1999) PERB Decision No. 1326, pp. 5-6, the parties reached tentative agreements on 16 of the 19 issues in ongoing negotiations. (*Id.* at p. 3.) In meetings to address the remaining three issues, the employer changed the terms of the prior tentative agreements. (*Ibid.*) The Board found that the employer's conduct evidenced regressive bargaining, which suggested bad faith under a totality of the circumstances analysis. (*Id.* at p. 5.)

The facts regarding this allegation are somewhat unique. It is undisputed that the parties reached a Tentative Agreement on all substantive terms discussed at the table including, as relevant here, the number of employees to be recalled from work from layoff in exchange for furlough days. The governing authority from both parties (i.e., Local 3112's membership and the District's Board of Trustees) even approved those terms. And yet, because the parties never committed that Tentative Agreement fully to writing, their mutual duty to meet and confer was not complete.

The Board's holding in *Alhambra CHSD, supra*, PERB Decision No. 560 best applies to the facts at issue here. It would be improvident to conclude that Local 3112 could recommence bargaining over issues that the parties agree were addressed comprehensively in the Tentative Agreement simply because that agreement had not yet been fully reduced to writing. Thus, although the duty to bargain in good faith was still present, it did not obligate the District to revisit, on September 3, 2010, the parties' comprehensive Tentative Agreement from July 29, 2010. Rather, the only remaining aspect of the duty to negotiate that remained was the parties' mutual obligation to draft and execute the final agreement. Therefore, this allegation in the PERB complaint, even if true, does not demonstrate a violation of the duty to bargain in good faith. It is accordingly dismissed.

4. Local 3112's Surface Bargaining Claim Against the District

Local 3112 also alleges that the sum-total of the District's bargaining conduct, already described above, also constitutes a violation of the duty to bargain in good faith under a "totality of the bargaining conduct" analysis. That conduct includes the unilateral implementation of furlough days, the refusal to meet with bargaining team member Clavel

after August 5, 2010, and excluding any reference to the Phase II layoffs in its final draft agreement documents.

a. The District's Per Se Violations of EERA Section 3543.5(c)

Regarding the unilateral implementation of furloughs, in *Newark Unified School District* (2007) PERB Decision No. 1895, the Board recognized that unilateral policy changes concerning negotiable subjects may be evaluated as violations of the duty to bargain in good faith under both a "per se" theory, as well as under the "totality of bargaining conduct" test. (*Id.* at proposed decision, pp. 20-21, citing *Stationary Engineers v. San Juan Suburban Water District* (1979) 90 Cal.App.3d 796, 802.) A similar approach is appropriate here because the District's decision to act unilaterally suggests that the District's negotiators lacked the subjective intent to resolve issues through bargaining.

The same is true of the District's refusal to meet with Clavel. After August 5, 2010, the parties still had the obligation to work together in preparing the final written agreement. Declining to meet with Local 3112's chosen negotiators supports the claim that the District did not intend to fulfill its bargaining obligations.

b. The District's Failure to Assist With Finalizing the Agreement

This proposed decision has already addressed how Local 3112's inaction regarding the drafting of the final agreement suggested a lack of intent to complete its bargaining obligations. The District's own role with these draft documents cannot be overlooked. The District did not deliver the August 5, 2010 Draft, what would be the final draft, until the moment the agreement was to be signed. Although Lee-Sung sent Schnaufer some notes about the agreement, his communication was ambiguous. Lee-Sung never explained how the two sections, "Effects of Layoff," and "Layoff Reinstatements," would be incorporated into the

final draft. The District exacerbated this ambiguity by subsequently refusing to meet with Local 3112 over this issue when the parties' mutual duty to bargain over language and format still existed. Viewed overall, this conduct suggests that the District lacked the good faith intent to reach agreement on the content and format of the final draft agreement documents.

c. The Implementation of the July 1, 2010 Layoffs

Additional evidence of bad faith is found in the District's July 1, 2010 decision to implement classified layoffs, despite the fact that layoff effects bargaining had not yet concluded. In *Compton Community College District* (1989) PERB Decision No. 720 (*Compton CCD*), the Board described the limited circumstances under which an employer may implement a non-negotiable decision, such as a layoff, prior to completing effects bargaining. Those circumstances were outlined in the following three-part test:

> 1. The implementation date is not an arbitrary one, but is based upon either an immutable deadline (such as one set by the Education Code or other laws not superseded by EERA) or an important managerial interest, such that a delay in implementation beyond the date chosen would effectively undermine the employer's right to make the nonnegotiable decision;
>
> 2. notice of the decision and implementation date is given sufficiently in advance of the implementation date to allow for meaningful negotiations prior to implementation; and
>
> 3. the employer negotiates in good faith prior to implementation and continues to negotiate in good faith after implementation as to those subjects not necessarily resolved by virtue of the implementation.

(*Id.* at pp. 14-15, citing *Lake Elsinore School District* (1988) PERB Decision No. 696, pp. 23-24 (dis. opn. of Craib, Member).) In *Compton CCD*, the employer notified the union of contemplated layoffs in May and June to be effective the end of July and September. (*Id.* at p. 15.) The Board found that those dates were warranted because of the employer's constitutional

requirement to pass a balanced budget by September 6. It further found that the employer was willing to bargain over negotiable effects, but that the union failed to ever pursue negotiations. (*Id.* at p. 15-16.) The Board in that case concluded that the implementation of the layoffs did not violate the duty to bargain. (*Ibid.*) That holding was reaffirmed in subsequent cases. (See e.g., *Palos Verdes Faculty Association (Stever)* (2012) PERB Decision No. 2289, pp. 16-17.)

In the present dispute, the undisputed record shows that the District implemented layoffs prior to completing effects bargaining. The record further shows that the District did not meet the first element of the *Compton CCD*, *supra*, PERB Decision No. 720 analysis. Lee-Sung explained that in order to conduct the planned layoffs on July 1, 2010, the District was required to notify affected employees of the layoff in May 2010 because of Education Code notice requirements. However, unlike in *Compton CCD*, there was no showing here that July 1, 2010 was an immutable deadline or that a later implementation date would have frustrated the District's ability to conduct the layoffs or achieve the vanguard of its sought-after savings. For these reasons, the District was not privileged to implement the July 1, 2010 classified layoff prior to completing effects bargaining. Its decision to nevertheless do so demonstrated an intent to subvert the bargaining process and, under the circumstances here, is further evidence of bad faith.[37]

After reviewing the parties' bargaining conduct as a whole, including the District's multiple per se bargaining violations, its failure to adequately work with Local 3112 in finalizing the parties' Tentative Agreement, and its premature imposition of the July 2010

[37] The PERB complaint against the District did not allege the implementation of the layoff as an independent violation of EERA. Local 3112 made no effort to amend the complaint to include such an allegation and it was not addressed in its closing brief. Furthermore, raising that issue now would be untimely. Therefore, this proposed decision will not address whether this same conduct was an independent violation of the duty to bargain.

layoff, the record shows that the District lacked the intent to bargain with Local 3112 in good faith. Under the specific circumstances in this dispute, this conduct violates EERA section 3543.5(c) under a "totality of the bargaining conduct" theory.[38] This conduct also amounts to derivative violations of EERA sections 3543.5(a) and (b). (*Oakland Unified School District* (1985) PERB Decision No. 540, p. 25.)

II. Local 3112's Retaliation Claim

Local 3112 alleges that the District terminated Clavel's employment in retaliation for his Local 3112 activity. To demonstrate that an employer discriminated or retaliated against an employee in violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action *because of* the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210, pp. 6-8 (*Novato USD*).)

A. Protected Activity With the District's Knowledge

The record is clear that Clavel engaged in extensive protected activity including serving as an active Local 3112 officer, pursuing grievances and other complaints on behalf of unit members, insisting that the District adhere to the CBA, and participating in bargaining. These activities are protected under EERA. (*Klamath-Trinity Joint Unified School District* (2005) PERB Decision No. 1778, p. 2.) The record is equally clear that virtually everyone involved with Clavel's employment, from his coworkers to the highest levels of the District's

[38] The mere existence of per se violations does not necessarily also equate to a surface bargaining violation. (*Chula Vista City School District*, *supra*, PERB Decision No. 834, pp. 72-73.)

administration, were aware of these activities. These facts were not disputed by the District in its closing brief.

Although not expressly discussed in either party's brief, there is some dispute as to whether Clavel's July 1, 2008 e-mail message to a local television news organization was protected under EERA.[39]

PERB has long recognized that public advocacy about employee working conditions is protected under the EERA. (*San Ramon Valley USD, supra*, PERB Decision No. 230, pp. 15-18.) Even speech criticizing the employer or speech containing inaccuracies or exaggerations may still be protected. (*Oakland Unified School District* (2007) PERB Decision No. 1880, p. 21, citing *Trustees of the California State University (Sonoma)* (2005) PERB Decision No. 1755.) Under this principle, an employee's reporting of unsafe working conditions is protected. (*Los Angeles Unified School District* (1995) PERB Decision No. 1129, proposed decision, p. 8.) In contrast, an employee's speech intended to "humiliate" his supervisor in furtherance of a "personal grudge" unrelated to protected activity is not protected. (*State of California, Department of Transportation* (1982) PERB Decision No. 257-S, pp. 6-7

[39] Both parties addressed whether the e-mail message qualified for protection under the First Amendment to the U.S. Constitution, something PERB generally lacks jurisdiction to enforce. (*Kern High Faculty Association, CTA/NEA (Maaskant)* (2007) PERB Decision No. 1885, dismissal letter, p. 2.) However, PERB does have the authority to address whether the same speech is protected under EERA, even when not specifically alleged in the PERB complaint. Consideration of unalleged protected activity is appropriate where the respondent has adequate notice that the conduct would be at issue, the activity is intimately related to issues in the existing PERB complaint, and the activity is fully litigated at the hearing such that both parties had the opportunity to examine the pertinent evidence. (*Lake Elsinore Unified School District* (2012) PERB Decision No. 2241, pp. 8-9, citations omitted.) All of those conditions are met here. The July 1, 2008 e-mail message was listed among in the Dismissal Charges as part of the justification for terminating Clavel's employment. Each party presented evidence about the e-mail and the claims underlying the e-mail at both the PERB hearing and Clavel's Dismissal Hearing. The District had ample notice of Local 3112's belief that the e-mail message was not a proper basis for discipline. Based on these facts, consideration of the July 7, 2008 e-mail message as protected activity is warranted.

(*Department of Transportation*).) Likewise, employee statements that are "made maliciously and are untrue, or with reckless disregard for truth or falsity" are not protected. (*State of California (Department of Transportation)* (1983) PERB Decision No. 304-S, proposed decision, p. 33.)

In *Oakdale Union Elementary School District* (1998) PERB Decision No. 1246 (*Oakdale UnESD*), an employee attempted to report unsafe working conditions to her supervisor pursuant to a provision in the negotiated agreement between her union and her employer. When the employer took no action on that complaint, the employee reported the same concerns to a third party investigator who looked into the matter. (*Id.* at pp. 16-17.) PERB concluded that the employee's complaints were protected under the circumstances even though made to an outside entity. (*Id.* at p. 18.) The Board reasoned that her complaints were consistent with the contract-based safety complaint process and were essentially an extension of her attempt to resolve the matter together with her union and her employer. (*Ibid.*)

The Board reached a different conclusion in *Marin County Law Library* (2004) PERB Decision No. 1655-M (*Marin Law Library*) than in *Oakdale UnESD*, *supra*, PERB Decision No. 1246. In *Marin Law Library*, the Board found that a library employee's complaints to patrons about working conditions were not protected where there was no showing that her actions were part of an effort to engage her employer on those issues. (*Marin Law Library* at dismissal letter, p. 4.) In *Regents of the University of California* (1998) PERB Decision No. 1263-H (*UC Regents*), an employee publicly commented that the employer's new sick leave policy could force employees to work while sick, which would infect the employer's laboratory animals with disease. Although the employee had a protected right to criticize the sick leave policy, his comments "crossed the line of reasonableness" and were "reckless and

inflammatory," because there was no evidence either that employees worked while sick or that human illness could transfer to the laboratory animals. (*Id.* at proposed decision, pp. 46-47.) The Board found that those comments lost protected status. (*Ibid.*)

Here, Clavel's July 1, 2008 e-mail message included some commentary on workplace issues such as Head Custodian Vazquez's treatment of his subordinates and the District's employee complaint investigation practices. Those facts notwithstanding, Clavel's e-mail message lost any protected status it had because of his intentionally inflammatory word choice. As in in *UC Regents, supra*, PERB Decision No. 1263-H, Clavel's characterization of Vazquez as a "sexual predator" was essentially describing Vazquez, without basis, as a sexually violent criminal. (See Penal Code, § 6600(a); *People v. Roberge* (2003) 29 Cal.4th 979, p. 984.) Nothing in the record even remotely suggests that Vazquez fits that description. Even if Clavel was not aware, per se, of the criminal and violent implications of the words he used, it is certainly true that comment was made with reckless disregard for the truth. Moreover, Clavel's history of physical confrontations with Vazquez suggests that Clavel chose those words for personal reasons and not to advance working conditions.

Unlike in *Oakdale UnESD, supra*, PERB Decision No. 1246, Clavel's e-mail message could not be viewed as an extension of any contractual or union-initiated complaint process. Although some of the content in the e-mail related to an ongoing complaint by Local 3112, as in *Marin Law Library, supra*, PERB Decision No. 1655-M, Clavel's e-mail message does not appear to be an attempt to engage the District on this issue. In fact, the District and Local 3112 had already agreed that Clavel should not be part of the investigation because of Clavel's past history with Vazquez. Clavel's e-mail appears to be an attempt to undermine this agreement

and reinsert himself back into the process. Under these circumstances, Clavel's e-mail message to the news organization was not protected under EERA.

B. Adverse Action

It is undisputed that the District dismissed Clavel from employment on August 5, 2010. This is an adverse employment action. (*County of Orange* (2013) PERB Decision No. 2350-M, p. 5, proposed decision, pp. 14-15.)

C. Nexus

The main element of Local 3112's prima facie case in dispute is whether there is any causal connection, or nexus, between Clavel's protected union activity and the District's decision to dismiss him. Direct evidence of an employer's motives is rare, so the required nexus is typically established circumstantially. (*Alisal Union Elementary School District* (1998) PERB Decision No. 1248, p. 6.) Relevant factors concerning nexus are discussed below.

1. Timing as Circumstantial Evidence of Nexus

PERB considers the timing between protected activities and the adverse action an important circumstantial factor when determining the presence or absence of nexus. (*North Sacramento SD*, *supra*, PERB Decision No. 264, proposed decision, p. 23) Adverse actions occurring shortly after an employee's protected activities imply an unlawful motive. On the other hand, the passage of a significant amount of time weakens any inference of nexus. (*Los Angeles Unified School District* (1998) PERB Decision No. 1300, dismissal letter, p. 1.) In either case, timing alone is usually not determinative and other evidence is required to establish a prima facie case. (*North Sacramento SD*, at proposed decision, p. 23.)

Here, timing supports Local 3112's retaliation claim. Clavel engaged in Local 3112 activity close in time to significant actions regarding the District's effort to dismiss him from employment. For example, Clavel was an active member of Local 3112's bargaining team in the then-ongoing negotiations over a furlough and layoff agreement. When Lee-Sung issued the March 22, 2010 Dismissal Charges, the parties had just begun discussing financial details more carefully in negotiations. Similarly, the District Board of Trustees approved Clavel's dismissal on August 5, 2010, just days after the parties' respective negotiating teams met in bargaining and reached Tentative Agreement. Clavel's dismissal date was the day scheduled for ratifying the parties' agreement.

The District argues that the timing of events in this matter do not support Local 3112's prima facie case because Clavel began his union activity in 2006 and the District did not terminate his employment until four years later in 2010. This argument is unpersuasive because it ignores Clavel's extensive protected activity after 2006 and continuing up until the very day of his termination. The District provides no legal authority supporting this limited view and it is accordingly rejected. That said, temporal proximity alone is not sufficient to establish nexus and other circumstantial factors will be discussed below.

2. Shifting Justifications for Charges

The record includes contradictory statements about some of the allegations in the Dismissal Charges. Inconsistent or shifting justification for an adverse action may be evidence of nexus. (*Oakland Unified School District* (2003) PERB Decision No. 1529, p. 19, citing *State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S.) In *Sacramento City Unified School District* (2010) PERB Decision No. 2129 (*Sacramento City USD*), the Board found evidence of nexus where an employer showed no apparent concern for

an employee's tardiness, but later used that as a basis for removing him from an active substitute teacher's list. The Board viewed this as "'attempting to legitimize its decision after the fact.'" (*Id.* at p. 12, quoting *San Diego Community College District* (1983) PERB Decision No. 368; *Novato USD*, *supra*, PERB Decision No. 210.)

Here, the District identified Clavel's poor attendance, his misuse of District equipment, and his poor work record as partial basis for the Dismissal Charges. However, in Clavel's most recent performance evaluation, dated May 2009, the District rated Clavel as "Effective-Meets Expectations" in all of these categories.[40] As in *Sacramento City USD*, *supra*, PERB Decision No. 2129, the District's apparent lack of concern for these issues at the time of Clavel's performance evaluation is cause for suspicion. Vice Principal Juaregui's explanation for this apparent discrepancy was also suspicious. He said he wanted to be "extra fair" to Clavel because of his role in Local 3112 and because of Clavel's grievance over a prior evaluation. This testimony indicates an intent to misrepresent the truth and, under the circumstances, is evidence of nexus.

In addition, the Dismissal Charges include the claim that Clavel had a "[r]ecord of one or more misdemeanor convictions which indicates that he is a poor employment risk." He was also accused of failing to disclose material facts regarding his criminal record. There was some evidence presented about two of Clavel's prior criminal convictions. The first was a 1998 conviction for being under the influence of an illegal substance. The second was a 2008 conviction in Arizona for interfering with a judicial proceeding.

The District admitted in its closing brief that it "did not charge Clavel with any misconduct in being arrested in Arizona." The remaining conviction was not a proper basis for

[40] It should be noted that Clavel's overall score in that evaluation was "Needs Improvement" due to other deficiencies.

disciplinary action. Labor Code section 432.7(a) states, in relevant part, that "[n]o employer, whether a public agency or private individual or corporation, shall . . . utilize, as a factor in determining any condition of employment including hiring, promotion, termination . . . any record of regarding a referral to, and participation in, any pretrial or posttrial diversion program, or concerning a conviction that has been judicially dismissed[.]" Courts have determined that Labor Code section 432.7(a) applies to school districts in their capacity as employers. (See *Martin v. Santa Clara Unified School Dist.* (2002) 102 Cal.App.4th 241, p. 257; see generally *Faria v. San Jacinto Unified School Dist.* (1996) 50 Cal.App.4th 1939, p. 1943.) In the present case, the undisputed evidence shows that Clavel's 1998 conviction was judicially dismissed in 2006 and, under Labor Code section 432.7(a), could not be a valid basis for determining his termination. Thus, the portion of the Dismissal Charges referencing Clavel's criminal convictions were based either on something that it later said was not the basis of its dismissal action or something the District was precluded from considering under State law. In either case, the District's actions are evidence of nexus. (See *Los Angeles Unified School District* (2012) PERB Decision No. 2244, p. 11 [holding an employer's admission that its stated reasons for an adverse action were not the true reason for that action was evidence of nexus].)

3. Exaggerations in the Dismissal Charges

Local 3112 asserts that the District exaggerated the scope of Clavel's misconduct in its Dismissal Charges. PERB has found that an employer's exaggerated explanation for an adverse action may cast suspicion on its true motives. (*Coachella Valley Mosquito & Vector Control District* (2009) PERB Decision No. 2031-M, p. 17-19.) On the other hand, merely lacking good cause for all the disciplinary charges against an employee does not, without

more, establish that the discipline was retaliatory. (*Regents of the University of California* (2004) PERB Decision No. 1585-H, p. 8.)

Here, the District included trivial allegations in the Dismissal Charges. The District claimed that Clavel purposefully misspelled his coworkers' names in e-mail messages to harass them. For example, Clavel referred to former colleague Steve Oatman as "Goatman." There was no evidence that Clavel's misspellings were intentional or that any employees felt harassed by this conduct. To the contrary, most seemed not to have noticed. No one complained about this issue. In fact, in some cases, the alleged target of the harassment did not even receive the offending e-mail message. This suggests an attempt to manufacture controversy where there was none.

The District also understated some improvements in Clavel's behavior in response to criticism from supervisors. The Dismissal Charges assert that Clavel completely disregarded any effort to correct his behavior, but this misstates the portion of the record indicating some improvements in Clavel's behavior. For example, the record shows that Clavel had a history of improving his behavior after receiving a poor evaluation. Clavel was rated as "Needs Improvement" in his first performance evaluation in 1995. In a subsequent evaluation that same year, he was rated as "Effective-Meets Expectations." Two years later, he was rated as "Exceeds Expectations." Likewise, after Clavel was disciplined and evaluated poorly in 2002, Clavel had three consecutive years of positive evaluations. In his 2005 evaluation, Oxford Academy Vice Principal Triplett, reported seeing a "significant turn around" in Clavel's behavior. Although there were later concerns about Clavel's behavior, the characterization that Clavel totally disregarded all attempts at remediation is exaggerated.

The District's exaggerated statements, when viewed in totality, portray a skewed account of Clavel's employment. This hyperbole suggests an intent to conceal facts favorable to Clavel and is evidence of nexus.

4. The District's Suspicious Investigation Practices

Local 3112 also alleges that the District did not fully and properly investigate the claims against Clavel before including them in the Dismissal Charges. PERB has held that an employer's "suspect" investigation may be evidence of nexus. (*Ventura County Community College District* (2003) PERB Decision No. 1547, p. 16.) However, where the employer has delegated the responsibilities of the investigation to another, the "decisionmaker's reliance on reports by [the other entity or individual] does not constitute a cursory investigation unless the decisionmaker had reason to believe the reports to be biased or inaccurate." (*County of Riverside* (2011) PERB Decision No. 2184-M, p. 16, citing *Escondido Union Elementary School District* (2009) PERB Decision No. 2019.)

a. Suspicions Regarding the ESI Investigation

The principal investigation of Clavel's misconduct was conducted by an independent company, ESI. This was the same company that the District used to investigate Clavel's earlier complaints against the Western High administration. Lee-Sung said he used this company because its primary investigator, Price, was familiar with the personnel at Western High. However, Lee-Sung also admitted knowing that Price already concluded that Clavel had violated work rules and failed to treat his coworkers respectfully during his earlier investigation. These conclusions indicate that Price was predisposed to a particular conclusion even before he began the second investigation. Lee-Sung's decision to continue using ESI in

spite of Price's apparent bias suggests that the District was not seeking a wholly objective investigation.

Price's propensity to conclude that Clavel had violated District policy appears to have influenced the outcome of the investigation report. In one instance, Price concluded that Clavel violated the policy for issuing loaner clothes to students, but the only evidence of that finding was Athletic Director Quintana's assumption based on Clavel's frequent requests for more clothes.

In another example, Price concluded that Clavel stole some baseballs reported missing by baseball coach Smith. The only evidence supporting that finding was that Clavel was one of four people (the others being Aguilera, Cassella, and Smith) with access to the baseballs and that Smith saw Clavel's community baseball team with similar balls. Neither the baseball coach nor Price included credible reasons for excluding Aguilera or Cassella (or the coach himself for that matter) as suspects. The District included both the loaner clothes and the baseball issue in its Dismissal Charges. Merely including unproven claims in discipline does not necessary demonstrate nexus, but the record here collectively shows that the ESI investigation was biased.

b. The District's Use of Site Files

Local 3112 also questions the District's investigation practices for using documents not contained in Clavel's official personnel file as partial basis for the Dismissal Charges. In *Novato USD*, *supra*, PERB Decision No. 210, the Board concluded that a "secret file" maintained at an employee's school site suggested a retaliatory motive where the employee was never informed of the file and it appeared to violate the employer's own personnel practices. (*Id.* at pp. 20-21.) The Board addressed this issue again in *Woodland Joint Unified*

School District (1987) PERB Decision No. 628 (*Woodland JtUSD*). There, the Board stated that the existence of a "working file" separate from an employee's personnel file was not evidence of nexus if consistent with personnel practices. (*Id.* at p. 44, fn. 21.) However, the employer's failure to provide the content of that file to an employee upon request so she could timely and intelligently respond to discipline was evidence of nexus, absent a reasonable explanation. (*Id.* at p. 43.)

Here, the evidence showed that some of the documents used to support the Dismissal Charges were housed in "site files" separate from Clavel's official personnel file. Unlike in *Novato USD, supra*, PERB Decision No. 210 and *Woodland JtUSD, supra*, PERB Decision No. 628, the District's site files were not secret and were not hidden from Clavel. Clavel admitted during his testimony at the PERB hearing that he knew about the District's site files and never asked to review them. The record here also shows that the District provided Local 3112 with everything ESI reviewed during its investigation upon request and even delayed its disciplinary proceedings so Local 3112 could review that material. Under these facts, Local 3112 has not established that the District's maintenance or utilization of site files on Clavel was evidence of nexus.

5. Failure to Follow Procedures

Local 3112 also argues that the District failed to follow its disciplinary procedures when deciding to dismiss Clavel. The basis for this position is that District Board of Trustees Policy 6417.02 requires, among other things, that the District conduct "a careful investigation" when deciding the type of discipline to impose. Certain aspects of this argument are redundant based on the discussion about other nexus factors, above. But the thrust of Local 3112's position is that the District failed to conduct "a careful investigation" because Price did not

review certain e-mail messages, did not interview certain people, and generally did not uncover enough exculpatory evidence regarding Clavel's conduct. This argument is unpersuasive under the record presented here. The term "careful investigation" is far too subjective to conclude that existing policy required particular actions during the investigation. In *City of Santa Monica* (2011) PERB Decision No. 2211-M, the charging party alleged that there was evidence of nexus because his employer did not interview him prior to releasing him from probation. The Board found no evidence of nexus in that case because the employer reviewed video footage of the incident giving rise to his release and there was no evidence that the District had a practice of interviewing or conducting its investigation in a particular way. (*Id.* at p. 15, citing *County of Riverside*, *supra*, PERB Decision 2184-M, *State of California (Department of Health Services)* (1999) PERB Decision No. 1357-S.) Here, Local 3112 provided no evidence about how the District has interpreted the "careful investigation" clause in Board of Trustees Policy 6417.02. Thus, the District's investigative practices are only evidence of nexus to the extent already discussed above.

6. Evidence of Anti-Union Animus

Local 3112 also accuses the District of animus toward Clavel's union activity or against Local 3112 in general. Such animosity, if proven to be true, may be evidence of nexus. (*Golden Plains Unified School District* (2002) PERB Decision No. 1489, p. 8 (*Golden Plains USD.*) In *Golden Plains USD*, a teacher sought the assistance of her exclusive representative regarding what she perceived to be a violation of the negotiated parent complaint procedure. (*Id.* at p. 3.) The teachers' union requested information about a meeting where the alleged violations occurred, but received no response. The Board recognized that the individual lacked standing to allege bargaining violations, such as the failure to respond to information requests,

but concluded that the employer's actions could nevertheless be relevant to her retaliation claim because it suggested anti-union animus. (*Id.* at p. 9, fn. 12.)

a. Clavel's Exclusion From Bargaining Sessions

Here, as explained in section I.B. of the conclusions of law in this proposed decision, the District committed multiple violations of the duty to bargain with Local 3112, including unlawfully excluding Clavel from negotiations after August 5, 2010. (*Ante*, p. 65.) And as stated above, the District's asserted reasons for Clavel's exclusion were unpersuasive. This violation suggests that the District harbored animus toward Local 3112 and its bargaining representatives, which is further evidence of nexus.

b. Animus by Western High Staff

Local 3112 also maintains that there is further evidence of animus from Western High staff, such as Custodian Aguilera, AFW IIs Camara and Cassella, and Athletic Director Quintana. Assuming for the purposes of discussion that each of those individuals had some anti-union animus, it still would not support Local 3112's retaliation claim under the circumstances. The evidence shows that it was Lee-Sung who decided to terminate Clavel's employment. He also drafted the Dismissal Charges. No one from Western High was involved. Moreover, according to PERB's subordinate bias liability doctrine, a subordinate employee's anti-union animus is not imputed to a decision-maker unless: (1) the subordinate makes a recommendation, report, or evaluation to the decision-maker because of an employee's protected conduct; (2) the subordinate intended his or her conduct to result in an adverse action for the employee; and (3) the subordinate's conduct was a motivating factor or proximate cause for an adverse action against the employee. (*Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M, p. 33, citing *State of California (Department of*

Corrections) (2001) PERB Decision No. 1435-S, other citation omitted.) Subordinate liability will not be found where the lower-level employee provides the decision-maker with accurate information. (*Id.* at p. 34.) Rather, there must be a showing that the subordinate tainted the decision-making process with biased, inaccurate, or incomplete information. (*Ibid.*)

In this matter, Aguilera, Camara, and Quintana all complained to Lee-Sung about Clavel. However, even if those complaints were motivated by animus, the record shows that their substance was essentially true. The record showed, as those employees contended, that Clavel did not complete his work, was regularly absent without following reporting procedures, and harassed others by doing things like sneaking up on his coworkers, or watching them work for extended periods during the workday.

To the extent that Clavel claims that either Principal Sevillano or Vice Principal Juaregui harbored anti-union animus when they drafted his 2009 evaluation, the record again shows that many of the concerns they identified were basically true. They rated Clavel as needing to improve on interacting with his coworkers and taking direction from others. Clavel's shortcomings in these areas were demonstrated in the record. For these reasons, Local 3112 has not proven that any animus by Clavel's coworkers impacted his dismissal. Therefore, Local 3112's argument is unpersuasive.

Nevertheless, after reviewing the record as a whole, there is sufficient circumstantial evidence of nexus. Therefore, Local 3112 has established all of the elements of a prima facie case for retaliation.

D. The District's Burden of Proof

Because Local 3112 met all the elements of a prima facie case, the District now bears the burden of proving that it would have dismissed Clavel even if he did not engage in any

protected activity. (See *Chula Vista Elementary School District* (2011) PERB Decision No. 2221, p. 21, citing *Novato USD, supra*, PERB Decision No. 210; *Martori Bros. Dist. v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721.) In cases where an adverse action appears to have been motivated by both protected and unprotected conduct, the issue is whether the adverse action would have occurred "but for" the protected acts. (*Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C, p. 22.) This requires the employer to establish both:

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

(*Palo Verde Unified School District* (2013) PERB Decision No. 2337, pp. 18-19, citations omitted; see also *County of Orange, supra*, PERB Decision No. 2350-M, p. 16.)

In *Riverside Unified School District* (1987) PERB Decision No. 639 (*Riverside USD*), PERB found that had an employee stated a prima facie case for retaliation, the employer would have met its burden of proving that his protected activity (grievances and unfair practice charges) was not the true motivation for its decision to dismiss him. The Board noted that the employer had followed a "moderate course of progressive discipline" without sustained improvement from the employee in the areas of following attendance policies and adhering to his supervisor's instructions. (*Id.* at proposed decision, p. 22.) The employee had previously received counseling, written warnings, and a suspension for the same types of misconduct. PERB concluded that the record supported that employee's termination. (*Ibid.*) In a similar case, *City of Santa Monica, supra*, PERB Decision No. 2211-M, the Board found no retaliation after noting that numerous people complained about the employee and he was advised repeatedly about his performance deficiencies even before any of his protected activity. (*Id.* at

p. 17.) In *County of Orange, supra*, PERB Decision No. 2350-M, the Board found that an employer's decision not to promote an employee was not retaliatory, but due to his poor attitude and failure to do his job properly. (*Id.* at p. 17, proposed decision, pp. 23-24.)

In *County of San Joaquin (Health Care Services)* (2004) PERB Decision No. 1649-M (*County of San Joaquin*), the Board found that an employer successfully carried its burden of justifying the termination of an employee despite evidence of employer animus toward a union organizing campaign. There, the record showed that members of the public and coworkers complained about the employee's poor job performance, such as sitting in his chair and resting during duty time and failing to respond to calls for assistance. (*Id.* at proposed decision, p. 41.) The employee also engaged in offensive and harassing behavior such as whistling the tune of "Popeye the Sailor Man" in the presence of a coworker who was a retired naval officer, and comparing another coworker to the perpetrators of the September 11, 2001 terrorist attack. (*Id.* at proposed decision, pp. 28-29, 43.) The Board noted that employee's behavior as "unprofessional, divisive, and corrosive on morale," and was different from the tenor of any other aspect of the union's organizing campaign. It also noted that the employee's conduct predated his involvement with his union. (*Id.* at proposed decision, p. 43.)

In *Baker Valley Unified School District* (2008) PERB Decision No. 1993 (*Baker Valley USD*), an employer stated that it decided against renewing the employment of a probationary teacher "because of problems with student engagement in the classroom." The Board found that explanation to be pretext for retaliation because there was no commentary about problems in that teacher's performance evaluations and there was no record of any counseling or discipline in his personnel file. (*Id.* at p. 13, citing *Simi Valley Unified School District* (2004) PERB Decision No. 1714.) The Board concluded that the employer in that case failed to carry

its burden of proving that it would have made the same decision even if the teacher did not engage in any union activity. (*Id.* at p. 14.) In *Jurupa Community Services District* (2007) PERB Decision No. 1920-M (*Jurupa CSD*), the Board similarly found pretext where the employer's notice of termination included trivial incidents such as slamming doors, technical violations of the employer's sick leave policy, and exaggerated statements of verbal abuse. (*Id.* at proposed decision, pp. 17-19.) The employee in that case was also accused of altering his time card, but no witnesses testified about that incident during the PERB hearing. (*Id.* at proposed decision, p. 19.) Under those circumstances, the Board found that the employer did not meet its burden of proof and concluded that the employee's termination was retaliatory. (*Id.* at p. 4.)

Applying the above precedent to the present dispute is a challenging task. The District's handling of Clavel's discipline was highly suspicious for the reasons outlined in the nexus analysis, above. As in *Baker Valley USD*, *supra*, PERB Decision No. 1993, some of the misconduct alleged in the Dismissal Notice was contradicted by Clavel's most recent performance evaluation. And like *Jurupa CSD*, *supra*, PERB Decision No. 1920-M, the Dismissal Charges included trivial transgressions, such as Clavel's misspellings in e-mail messages, as well as claims of misconduct unsupported by any witnesses at either the PERB hearing or Clavel's dismissal hearing. Multiple claims in the Dismissal Charges were not substantiated by evidence in the record.

Ultimately, however, this issue is resolved in favor of the District due to the sheer number of serious violations Clavel committed while at Western High. During his time there, Clavel committed at least three offenses defined as Third Level infractions under Board Policy 6417.02. First, he submitted the March 14, 2008 absence slip, falsely claiming that he was on

union business during the time he was incarcerated. This conduct amounts to falsifying personnel records and dishonesty, bothThird Level offenses. Clavel had previously falsified personnel records, signing his 2005 Oxford Academy performance evaluation with the name "George Washington."

Second, Clavel's July 1, 2008 e-mail message to a local television news organization claimed, falsely, and without basis, that Oxford Academy Head Custodian Vazquez was a "sexual predator." This too qualifies as dishonesty, a Third Level offense.

Third, Clavel deliberately overwatered the Western High baseball field rendering it unusable and potentially dangerous. A Western High baseball game was delayed because of his conduct. This was not the first time Clavel deliberately damaged the baseball field. He drove a truck over the field and used weed killer on the grass after being told not to do so. Clavel's intentional damaging of District property is another Third Level violation.

Clavel had already been suspended and demoted for prior misconduct. Under Board Policy 6417.02, dismissal was warranted for these new offenses. In addition, by falsely claiming union business on the March 14, 2008 absence form, Clavel sought to charge a portion of his jail time to the District, as opposed to charging his own personal leave balance. This is essentially theft, which is a "major offense" under Board Policy 6417.02. That policy states unequivocally that "the penalty for major offenses is discharge."

In addition to those Third Level offenses, Clavel also committed multiple Second Level offenses, which includes threatening, intimidating, coercive, or interfering conduct. The record showed that Clavel would watch and laugh at his coworkers during the workday instead of doing his own work in the boys' locker room. There was also evidence that Clavel snuck up on Camara to intentionally frighten her. Clavel also moved the school site truck even though

he knew Aguilera and Camara were using it and retrieving it would delay their work. Clavel's over-watering of the baseball field was also an intentional attempt to interfere with Aguilera and Camara's work. These actions were factually similar to *County of San Joaquin*, *supra*, PERB Decision No. 1649-M, where an employee's harassing behaviors were part of the employer's legitimate non-retaliatory reason for his discharge. (*Id.* at proposed decision, pp. 28-29, 43.) As in that case, the employees at Western High also complained about Clavel's job performance.

Clavel's harassment of his coworkers was, perhaps, even more troubling than his Third Level offenses because he had been disciplined on multiple prior occasions about similar behavior. As in *City of Santa Monica*, *supra*, PERB Decision No. 2211-M, much of that discipline predated any of Clavel's union or other protected activity. And as in *Riverside USD*, *supra*, PERB Decision No. 639, that discipline was moderate and designed to be corrective.

While at Oxford Academy, Clavel was issued a letter for reprimand on November 19, 2002, for harassing behavior towards his coworkers, including grabbing Head Custodian Vazquez and challenging him to a fight. On June 5, 2003, Clavel was issued a one-day suspension for further harassing Vazquez.

When Clavel transferred to Savanna High, he was issued a letter of reprimand on September 5, 2005, for loudly criticizing student athletes and coaches from the another school site. On September 29, 2005, Clavel was issued a letter of reprimand for arguing with AFW II Oatman. On February 7, 2006, he was issued another letter of reprimand for a "verbal confrontation" with Oatman that almost escalated into physical violence.[41] Clavel's role with

[41] Clavel received other discipline during this time as well. However, only the discipline relating to his harassing behaviors is referenced here.

Local 3112 did not begin until sometime in 2006. There was no evidence that Clavel requested removal of any of this discipline pursuant to the reckoning period in Board Policy 6417.02. Clavel's latest examples of harassing behavior constitute his sixth Second Level offense which, under Board Policy 6417.02, warrants the most serious discipline.

In addition to the Second Level offenses, the record also shows that Clavel was insubordinate and failed to follow District directives. This includes Clavel's decision to connect his computer to the District's network in violation of District policy and his decision to visit the Western High campus after being directed not to enter District property.

Each of these actions was described in the Dismissal Charges. And although there were shortcomings in both the District's investigation practices and its Dismissal Charges, the District proved each of these offenses at PERB by a preponderance of the evidence. Moreover, the deficiencies identified in the nexus analysis, above, do not detract from the seriousness of the above-referenced offenses. For example, none of the charges identified here were inconsistent with Clavel's 2009 evaluation. Principal Sevillano did not appear to know about Clavel's falsification of documents, the e-mail message about Vazquez, or the damage to the baseball field. Sevillano specifically rated Clavel as "Not Satisfactory," the lowest possible rating in contact with employees and coordinating his work with others. For obvious reasons, Sevillano did not comment about Clavel's insubordination occurring after the evaluation.

Regarding the District's apparent effort to downplay the positive aspects of Clavel's employment, his personnel records speak for themselves. Those records show that he was disciplined multiple times, starting in 1998. He showed some improvement between 2003 and 2005, but received additional discipline starting in 2005 and continuing into 2006. The above-referenced offenses began in 2008, during his time at Western High. Thus, although there was

substantial evidence of nexus, the mere presence of that evidence is not determinative in retaliation cases. (*Bellevue Union Elementary School District* (2003) PERB Decision No. 1561, proposed decision, p. 37.) PERB has found adverse actions, including dismissal, may be warranted even in the face of direct evidence of nexus. (*Regents of the University of California* (2012) PERB Decision No. 2302-H, p. 4.)

In *Healdsburg Union High School District* (1997) PERB Decision No. 1185, the Board found that, notwithstanding evidence of improper investigatory practices, the final termination charges against the employee were "for the most part true." (*Id.* at proposed decision, p. 67.) The same reasoning applies here. Notwithstanding the problems with the District's investigative process and its Dismissal Charges, Clavel, in fact, committed the most serious offenses he was accused of. He had been warned about committing similar misconduct before any of his protected activity. And dismissal was appropriate under Board Policy 6417.02, given the nature of Clavel's wrongdoing and his history of discipline. Under these circumstances, it is concluded that the District would have dismissed Clavel even had he not engaged in any protected activity. Local 3112's retaliation claim is dismissed.

REMEDIES

There were bargaining violations in both Case Numbers LA-CO-1451-E and LA-CE-5535-E. PERB has broad remedial powers to effectuate the purposes of the EERA. EERA section 3541.5(c) states:

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

I. Remedies for Violation in Case No. LA-CO-1451-E

Local 3112 violated the duty to negotiate in good faith under a surface bargaining theory. In similar cases, PERB has previously ordered that the respondent cease and desist from violating the law and bargain with the charging party upon demand. (*Stockton Unified School District, supra*, PERB Decision No. 143, pp. 33-34.) PERB also ordered that the respondent publicly post a notice of the violation. (*Ibid.*) Those remedies are warranted here. Therefore, Local 3112 is ORDERED to cease and desist from negotiating in bad faith with the District. Local 3112 is further ORDERED to post a notice of this violation.

II. Remedies for Violations in Case No. LA-CE-5535-E

The District also violated its duty to bargain in good faith with Local 3112. Because most of the violations by the District were generally similar to the violations by Local 3112, similar remedies are warranted here as well. Accordingly, the District is ORDERED to cease and desist from: (1) negotiating in bad faith with the Local 3112; (2) refusing to meet with Local 3112's chosen negotiators; (3) unilaterally changing policies within the scope of representation. The District is further ORDERED to cease and desist from interfering with protected rights and to post a notice of this violation.

The District also violated EERA by enacting a unilateral policy change. One of the typical remedies in unilateral change cases is a rescission of the unilaterally adopted policy and a return of the affected employees to the status quo before the change. (*County of Sacramento* (2009) PERB Decision No. 2045-M, p. 3.) In other cases, PERB has found that a return to status quo did not effectuate the purposes of the collective bargaining laws at issue. In *Nevada Joint Union High School District* (1986) PERB Decision No. 557 (*Nevada JtUnHSD*), the Board found that the employer unilaterally changed a monthly payment schedule. (*Id.* at p.

12.) The Board declined to rescind that policy because it would result in overall worse conditions for unit members. (*Id* at p. 13.) In *Laguna Salada Union School District* (1995) PERB Decision No. 1103 (*Laguna Salada USD*), the parties stipulated that "Charging Party shall not request, or shall PERB order, 'make whole' relief in this case[.]" (*Id.* at pp. 4, 17.) The Board found that it was not constrained by the parties' stipulation as to remedy but concluded it best effectuated the purposes of EERA to defer to the charging party's request and not order a return to status quo. (*Id.* at p. 18.)

An approach similar to *Laguna Salada USD*, *supra*, PERB Decision No. 1103 is warranted here. As in that case, Local 3112 did not request to rescind the 2010-2011 furloughs or otherwise make the employees who took furlough days during that time whole.[42] Instead, it essentially has acknowledged that the terms of the parties' July 29, 2010 Tentative Agreement represents an acceptable state of affairs. In addition, as in *Nevada JtUnHSD*, *supra*, PERB Decision No. 557, there may be practical reasons for avoiding the typical remedy here. The evidence shows that the furloughs implemented, the *positions* restored, and the *people* recalled were all consistent with the Tentative Agreement. It is undisputed that agreed-upon furlough days were preferable to layoffs. Because the issue of furloughs and layoffs were so deeply intertwined in the parties' negotiations, the undoing of the furloughs would also undo the progress the parties made toward avoiding layoffs or other types of reductions.

For these reasons, it is concluded that rescission of the unilaterally implemented furloughs does not best effectuate the purposes of EERA and that remedy will not be ordered in this case. However, because the District implemented the terms of the Tentative Agreement

[42] Local 3112 did make such requests in its original unfair practice charge, but those requests are deemed to be superseded by Local 3112's subsequent stated position in the matter, as expressed in its closing brief.

prior to satisfying its duty to bargain with Local 3112 over the language and format of the final written agreement, it is ORDERED to bargain over those issues with Local 3112, immediately upon request. Local 3112 must make its demand to bargain over these remaining issues within 10 days of when this proposed decision becomes final.[43]

Local 3112 also seeks enforcement of the Tentative Agreement. It asserts that the terms of that agreement require the District to recall additional Custodian employees to fill vacant Custodian positions. According to Local 3112, the person that filled Clavel's AFW II position and another employee vacated two Custodian positions that, per the Tentative Agreement, should be filled with laid-off employees. However, these claims were not proven at hearing. Schnaufer testified that he believed, but never confirmed, whether there were any additional vacant Custodian positions. Thus, its request to recall two laid-off Custodians is too speculative. However, if and when the parties finalize their agreement, nothing in this proposed decision should be interpreted as preventing either party from seeking enforcement of any rights emanating from the deal.

PROPOSED ORDERS

I. Order in Case No. LA-CO-1451-E

Upon the foregoing findings of fact and conclusions of law, and the entire record in case *Anaheim Union High School District (District) v. American Federation of State, County, and Municipal Employees, Local 3112 (Local 3112)*, it is found that Local 3112 violated the Educational Employment Relations Act (EERA), Government Code section 3543.6(c). Local

[43] The 10-day timeframe for this bargaining order finds support in PERB's case law concerning remedies in effects bargaining cases. In those cases, as here, the employer is not required to rescind the unilaterally adopted changes. (*Placentia Unified School District* (1986) PERB Decision No. 595, pp. 11-12.) As in effects bargaining cases, the time limit here serves to prevent the District's bargaining obligation over this issue from remaining open indefinitely.

3112 violated EERA by negotiating with the District in bad faith. All other claims are dismissed.

Pursuant to section 3541.5(c) of EERA, it hereby is ORDERED that Local 3112, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

Negotiating with the District in bad faith.

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

1. Within 10 workdays of the service of a final decision in this matter, post at all work locations where notices to employees in Local 3112's bargaining unit customarily are posted, copies of the Notice attached hereto as Appendix A. The Notice must be signed by an authorized agent of Local 3112 , 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.

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 District.

II. Order in Case No. LA-CE-5535-E

Upon the foregoing findings of fact and conclusions of law, and the entire record in case *American Federation of State, County, and Municipal Employees, Local 3112 (Local*

3112) v. Anaheim Union High School District (District), it is found that the District violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b), and (c). The District violated EERA by negotiating with Local 3112 in bad faith, including unilaterally imposing unpaid furloughs on Local 3112's bargaining unit. All other claims are dismissed.

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

A. CEASE AND DESIST FROM:

1. Negotiating with Local 3112 in bad faith;

2. Refusing to meet with 3112's chosen negotiators in bargaining;

3. Unilaterally implementing policies within the scope of representation;

4. Interfering with Local 3112's right to represent its members;

5. Interfering with employees' right to be represented by Local 3112.

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

1. Bargain with Local 3112, upon demand, over the language and format of the furlough and layoffs agreement at issue in the parties' 2009-2010 negotiations. Local 3112 must demand to bargain over this issue within 10 days from a final decision in this matter.

2. Within 10 workdays of the service of a final decision in this matter, post at all work locations where notices to employees in Local 3112's bargaining unit customarily are posted, copies of the Notice attached hereto as Appendix B. 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.

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 (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 Local 3112.

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(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).)

APPENDIX A

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

After a hearing in Unfair Practice Case No. LA-CO-1451-E, *Anaheim Union High School District (District) v. American Federation of State, County, and Municipal Employees, Local 3112 (Local 3112)* in which all parties had the right to participate, it has been found that Local 3112 violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq., by negotiating with the District in bad faith.

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

A. CEASE AND DESIST FROM:

Negotiating with the District in bad faith.

Dated: _____

American Federation of State, County, and Municipal Employees, Local 3112

By: _____
Authorized Agent

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

APPENDIX B

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

After a hearing in Unfair Practice Case No. LA-CE-5535-E, *American Federation of State, County, and Municipal Employees, Local 3112 (Local 3112) v. Anaheim Union High School District (District)* in which all parties had the right to participate, it has been found that the District violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq., by negotiating with Local 3112 in bad faith, including unilaterally imposing unpaid furloughs on Local 3112's bargaining unit.

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

A. CEASE AND DESIST FROM:

1. Negotiating with Local 3112 in bad faith;

2. Refusing to meet with 3112's chosen negotiators in bargaining;

3. Unilaterally implementing policies within the scope of representation;

4. Interfering with Local 3112's right to represent its members;

5. Interfering with employees' right to be represented by Local 3112.

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

Bargain with Local 3112, upon demand, over the language and format of the furlough and layoffs agreement at issue in the parties' 2009-2010 negotiations. Local 3112 must demand to bargain over this issue within 10 days from a final decision in this matter.

Dated: _____ Anaheim Union High 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.