



**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

CONSOLIDATED IRRIGATION DISTRICT,

Employer,

and

GROUP OF EMPLOYEES,

Petitioner,

and

OPERATING ENGINEERS LOCAL 3, AFL-
CIO,

Exclusive Representative.

Case No. SA-DP-284-M

Administrative Appeal

PERB Order No. Ad-504-M

August 14, 2023

Appearances: Sagaser, Watkins & Wieland by Howard A. Sagaser and Charles P. Hamamjian, Attorneys, for Consolidated Irrigation District; Gening Liao, House Counsel, for Operating Engineers Local 3, AFL-CIO.

Before Banks, Chair; Paulson and Nazarian, Members.

DECISION

PAULSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on Consolidated Irrigation District's appeal of the attached administrative determination (AD) by PERB's Office of the General Counsel (OGC). In November 2021, Operating Engineers Local 3, AFL-CIO (OE3), was certified as the exclusive representative of employees in the District's Water Irrigation Specialist Unit (Unit). In January 2023, before OE3 had negotiated a first contract with the District, a group of employees (Petitioner) filed a petition to decertify OE3 as the Unit's exclusive representative. In March 2023, OE3 filed an unfair practice charge, Case No. SA-CE-

1231-M (“blocking charge”¹) alleging that the District violated the Meyers-Milias-Brown Act (MMBA) and the Prohibition on Public Employers Deterring or Discouraging Union Membership (PEDD)² by: (1) facilitating the circulation and submission of the decertification petition through Assistant Foreman Ricardo Cavazos, (2) instructing Cavazos and Unit member Brian Slaven to circulate the decertification petition, (3) promising benefits in exchange for decertifying OE3, and (4) refusing to negotiate with OE3 pending the resolution of the decertification proceedings. OE3’s blocking charge included a request that PERB stay the decertification election pending resolution of the charge, alleging that the District’s conduct, if true, would likely interfere with employee free choice and influence employees in their vote. OGC agreed and stayed the election. The District timely appealed the AD, and OE3 filed a timely opposition urging us to uphold the stay.

We have reviewed the AD, the files in this case and the blocking charge,³ and relevant legal authority in light of the parties’ submissions. Applicable law and the

¹ A charge alleging “unlawful conduct [that] would so affect the election process as to prevent the employees from exercising free choice’ is commonly called a ‘blocking charge’ because it prevents, or ‘blocks,’ an election until the charge is resolved.” (*Gompers Preparatory Academy* (2020) PERB Order No. Ad-481, p. 3, fn. 3 (*Gompers*), quoting *City of Fremont* (2013) PERB Order No. Ad-403-M, p. 6, fn. 11, & p. 8.)

² The MMBA is codified at Government Code section 3500 et seq. PEDD is codified at Government Code section 3550 et seq. All further undesignated statutory references are to the Government Code. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

³ PERB may take official notice of its own records and files. (*Bellflower Unified School District* (2017) PERB Decision No. 2544, p. 6.)

unfair practice allegations support the AD's analysis, including the AD's findings that the District's alleged conduct is likely to impact employee free choice. Accordingly, we adopt the AD as the decision of the Board itself, subject to the following discussion.

BACKGROUND⁴

OE3 was certified as the exclusive representative of employees in the Unit on November 22, 2021. The District and OE3 have not reached an agreement on a first contract. On January 5, 2023, Cavazos, on behalf of Petitioner, filed a petition with PERB seeking to decertify OE3 as the exclusive representative of the Unit.⁵ On February 2, OGC informed the parties that since the District had not adopted local rules concerning employee representation petitions, pursuant to PERB Regulation 61000, PERB would conduct representation proceedings under the MMBA. On February 27, OE3 advised that it intended to file a blocking charge and requested a stay of the election. On March 1, the District opposed OE3's request to stay the election. On March 13, OGC issued a letter notifying the parties that Petitioner's proof of support was sufficient to satisfy PERB Regulation 61350, subdivision (b), and indicated its intent to proceed with conducting an election. On March 14, OE3 filed its blocking charge, which requested that PERB stay the decertification election pending the resolution of the charge.⁶

⁴ As we address further *post* in response to the District's appeal, in this procedural posture, the Board assumes the essential facts alleged in the charge are true. (*Children of Promise Preparatory Academy* (2015) PERB Order No. Ad-428, p. 9 (*Children of Promise I*).)

⁵ All further undesignated dates are in 2023.

⁶ On March 16, OE3 filed an amended blocking charge.

The blocking charge, as amended, alleges that the District interfered with employees' exercise of free choice, interfered with OE3's right to represent Unit members, and failed to bargain in good faith, in violation of the MMBA and the PEDD. Specifically, OE3 alleges that when Cavazos circulated the decertification petition on behalf of Petitioner, he did so as an agent of District management, and at the direction of District management. OE3 contends that in or around December 2022, District management held meetings with Cavazos and Slaven involving the decertification petition. During these meetings, the District instructed Cavazos and Slaven how to solicit Unit member support for decertifying OE3 as the exclusive representative, including promising Unit members a pay raise in exchange for decertifying OE3. Cavazos then circulated a decertification petition and informed Unit members that they would receive a raise in exchange for signing the petition. OE3 subsequently attempted to continue with contract negotiations, including scheduling a session for March 15. OE3's Business Agent, Allen Dunbar, repeatedly requested contract proposals prior to the session, but the District did not provide any. During the March 15 session, the District declared that it would not continue with contract negotiations until the decertification process was completed. The District has since refused to engage with OE3 on outstanding matters.⁷

On March 15, OGC provided until March 27 for Petitioner and the District to file a response to OE3's stay request. On March 27, the District submitted a position

⁷ The District disputes the truth of many of the facts alleged in the blocking charge. (See AD at pp. 5-6.) Because here we assume the essential facts in the charge are true (*Children of Promise I, supra*, PERB Order No. Ad-428, p. 9) we do not again recount the District's version of facts here.

statement in response to the blocking charge, which disputed OE3's allegations and opposed the stay request. Petitioner did not file a response to the request to stay. On March 29, OGC issued a complaint regarding the allegations in the blocking charge. On April 18, the District and OE3 participated in an informal conference on the blocking charge but were not able to reach a resolution. On April 20, OGC issued the attached AD, granting OE3's request to stay the election pending resolution of the blocking charge. The District timely appealed the AD, and OE3 filed a timely opposition, urging us to uphold the stay.

DISCUSSION

In an appeal from an administrative determination, the appellant must demonstrate how or why the challenged decision departs from the Board's precedents or regulations. (*Children of Promise Preparatory Academy* (2018) PERB Order No. Ad-470, p. 4 (*Children of Promise II*)). In an appeal concerning a stay of a decertification election, "the inquiry on appeal is whether the OGC abused [its] discretion." (*Imagine Schools at Imperial Valley* (2016) PERB Order No. Ad-431, p. 6 (*Imagine*)). "The Board has described this standard of review as whether 'the conclusions [in the determination are] supported by facts developed during the course of a properly conducted investigation.'" (*Gompers, supra*, PERB Order No. Ad-481, p. 4; *Children of Promise I, supra*, PERB Order No. Ad-428, p. 8.)

However, in determining whether an election stay is warranted, PERB "does not resolve factual disputes" and "assumes that the essential facts alleged in the charge are true." (*Children of Promise I, supra*, PERB Order No. Ad-428, p. 9.) If the Board agent's investigation reveals conflicting issues of material fact, the conflict must be

resolved at the formal hearing; the Board agent may not resolve the conflict at the investigation stage. (*Id.* at p. 10.) Each stay request is to be investigated and evaluated on its merits rather than disposed of by rote application of the blocking charge rule. (*Jefferson School District* (1979) PERB Order No. Ad-66, p. 6.) Blocking charge allegations must be evaluated based upon the factual contexts in which they arise. (*Children of Promise I, supra*, PERB Order No. Ad-428, adopting administrative determination at p. 16; *State of California (Department of Personnel Administration)* (1985) PERB Order No. Ad-151-S, p. 3.)

Because OGC makes no factual findings in deciding whether to stay an election, the Board's inquiry on appeal is whether the determination to stay the election is supported by the allegations in the blocking charge. (*Gompers, supra*, PERB Order No. Ad-481, p. 4.) The role of the Board on appeal is not to reweigh facts, but to ensure that the facts support the administrative determination. (*Id.* at p. 7; *Children of Promise I, supra*, PERB Order No. Ad-428, p. 9.) Where OGC "came to a logically reasoned conclusion in its administrative determination," the Board will affirm the determination. (*Regents of the University of California* (2016) PERB Order No. Ad-435-H, p. 6.)

The District does not contend that the AD is unsupported by the allegations in the charge or incorrectly applied existing law to those allegations. Instead, the District primarily challenges the truth of the allegations in OE3's blocking charge, and the lack of evidence provided in support of those allegations.⁸

⁸ To the extent the District also alleges OGC did not accurately recount the procedural history in the AD, it fails to explain how such alleged errors could have any impact on the outcome of the instant appeal.

In the attached AD, OGC properly begins its analysis with PERB Regulation 61190, which governs election stays under the MMBA. PERB Regulation 61190 provides, in relevant part:

“The Board may stay an election pending the resolution of an unfair practice charge relating to the voting unit upon an investigation and a finding that alleged unlawful conduct would so affect the election process as to prevent the employees from exercising free choice.”

OGC then notes the proper standard for whether to stay an election pending a blocking charge: “the Board agent must analyze whether the conduct alleged ‘is of such character and seriousness that, if it were proven to have occurred, it would be reasonable to infer that it would contribute to employee dissatisfaction and hence prevent a fair election.’” (AD at p. 7; *Regents of the University of California* (1984) PERB Decision No. 381-H, p. 6.) Further, the AD correctly explains “[t]he only relevant issue is whether the employer’s conduct, as alleged in the complaint, will so taint the election process as to interfere with employee free choice.” (AD at pp. 7-8, quoting *Imagine, supra*, PERB Order No. Ad-431, p. 13.)

OGC goes on to assess OE3’s allegations under this standard, finding that the District’s alleged interference, domination, deterrence or discouragement of employee free choice, and refusal to bargain were each of the character and seriousness that rendered them likely to impact employee choice in the decertification election. We agree.

Contrary to the District’s arguments, the grounds to challenge an administrative determination staying an election do not include a dispute about the facts. A determination to stay an election is not intended to involve adjudication of the unfair

practice charge itself. (*Children of Promise I, supra*, PERB Order No. Ad-428, adopting administrative determination at p. 15.) “It is neither the Board agent’s obligation nor function to resolve disputed facts or venture into a pre-judgment of the merits of the unfair practice complaint.” (*Grenada Elementary School District* (1984) PERB Decision No. 387, p. 13 (*Grenada*), quoting *Pleasant Valley Elementary School District* (1984) PERB Decision No. 380, p. 7.) Nor shall the Board agent resolve defenses and answers on the merits of the complaint, because those matters must be addressed in the unfair practice hearing. (*Gompers, supra*, PERB Order No. Ad-481, adopting administrative determination at p. 15.) The District’s arguments that OE3 cannot prove its allegations are thus immaterial to OGC’s assessment of the stay request, and do not provide a reason to overturn OGC’s determination granting the stay.

Likewise, while the District also argues that OE3 presented insufficient evidence to support its allegations, the proper time for the parties to present evidence and testimony is at the formal hearing. (See PERB Regs. 32178 & 32680.) At this stage of the case we cannot determine whether employer misconduct actually occurred, and, if it did occur, whether it tainted the decertification petition; it is the possibility of such an effect that requires us to stay the decertification election until the Board resolves those issues through its adjudicative process. (*Gompers, supra*, PERB Decision No. Ad-481, p. 8.)

While some of the parties’ arguments, and thus OGC’s analysis, focus on Cavazos’s alleged status as an agent of the District, we note that several of the allegations related to him are of such a nature that they are likely to taint the election

process even if Cavazos is not a District agent. To the extent the District instructed Cavazos and Slaven to circulate a decertification petition, and gave them leeway to promise benefits in exchange for decertifying OE3, the District's conduct would likely impact employee free choice, whether or not OE3 can establish Cavazos's actual or apparent agency.

Further, while the AD fully and appropriately addresses the alleged PEDD violations as they relate to the election stay, we note that the Board itself has not reviewed an administrative determination staying an election based in part on an alleged PEDD violation since it announced its standard for assessing PEDD violations. PEDD section 3550 provides that “[a] public employer shall not deter or discourage public employees or applicants to be public employees from becoming or remaining members of an employee organization, or from authorizing representation by an employee organization, or from authorizing dues or fee deductions to an employee organization.” In *Gompers*, the Board found to the extent that employer communications were shown later at hearing to deter and discourage union membership in violation of the PEDD, those communications would also, “in all likelihood’ contribute to employee dissatisfaction.” (*Gompers, supra*, PERB Order No. Ad-481, adopting administrative determination at pp. 26-27, quoting *Jefferson School District* (1980) PERB Order No. Ad-82, pp. 5-6.) When the Board issued *Gompers, supra*, PERB Order No. Ad-481, the PEDD had been enacted but not yet interpreted by the Board. Then, in *Regents of the University of California* (2021) PERB Decision No. 2755-H, PERB held that “‘deter or discourage’ means to tend to influence an employee’s free choice regarding whether or not to (1) authorize union

representation, (2) become or remain a union member, or (3) commence or continue paying union dues or fees.” (*Id.* at p. 21.) To establish a prima facie case of a section 3550 violation, the charging party need only show that the challenged conduct or communication is reasonably likely to deter or discourage employee free choice, not that the conduct actually did deter or discourage employees. (*Id.* at p. 24.) In cases that involve union organizing, section 3550 leaves it to employees on opposite sides of the organizing debate to lobby their colleagues without the employer’s involvement.⁹ (*Clovis Unified School District* (2021) PERB Order No. IR-63, p. 30, citing *Alliance*, *supra*, PERB Decision No. 2795, pp. 70-71 [judicial appeal pending].) While the PEDD protects a narrow set of employee prerogatives, because conduct that violates the PEDD specifically tends to influence employee free choice, such conduct is especially likely to impact an election and thus necessitates a stay. OGC properly concluded that the District’s conduct which allegedly deters or discourages employee free choice—offering a raise to Unit members in exchange for decertifying OE3 and directing an employee perceived by Unit members as an agent of the District to collect signatures in support of decertification—is likely to encourage employees to vote in favor of decertification, and therefore likely to affect the outcome of the election.

⁹ In certain circumstances, an employer may assert an affirmative defense that a business necessity compels the employer to take some action that may also incidentally influence employee free choice. (*Alliance Marc & Eva Stern Math & Science High School et. al.* (2021) PERB Decision No. 2795, pp. 70-71 [judicial appeal pending] (*Alliance*).) But such an affirmative defense is not part of OGC’s assessment when deciding whether to grant a stay. (*Gompers*, *supra*, PERB Order No. Ad-481, adopting administrative determination at p. 15.)

Finally, the District's alleged refusal to negotiate pending the resolution of decertification proceedings independently supports staying the election. "[A]n election may properly be blocked where there has been a failure to bargain in good faith, since that conduct by its very nature undercuts support for an individual union or unions in general, and renders a fair election impossible." (*Grenada, supra*, PERB Decision No. 387, p. 9; accord *Clovis Unified School District* (1984) PERB Decision No. 389, p. 25 [an employer, by "obstructing negotiations with the exclusive representative," had "interfere[d] with employees['] right to select an exclusive representative to meet and negotiate with the employer on their behalf"].) The District's alleged unfair practices occurred before OE3 and the District successfully negotiated a first contract.

As the Board explained in *Gompers*:

"Because during first-contract bargaining 'management has very strong incentives to violate the duty to bargain in good faith because it can defeat the union entirely' (*Fisk & Pulver, [First Contract Arbitration and the Employee Free Choice Act* (2009)] 70 La. L.Rev. at p. 54), labor boards 'should be especially sensitive to claims that bargaining for a first contract has not been in good faith' (*APT Medical Transportation* (2001) 333 NLRB 760, fn. 4; *id.* at p. 760 (conc. opn. of Liebman, M.), quoting *NLRB v. Katz* (1962) 369 U.S. 736, 747 ['The Board should therefore exercise special care in monitoring the first contract bargaining process and closely scrutinize behavior which "reflects a cast of mind against reaching agreement."']).")

(*Gompers, supra*, PERB Order No. Ad-481, p. 6.) Here, OE3 alleges that the District completely refuses to bargain pending resolution of the decertification petition. The Board has consistently held that where a duty to bargain exists, an employer's outright refusal to bargain with a recognized employee organization violates the duty to

bargain in good faith. (*City of Fremont* (2013) PERB Order No. IR-57-M, p. 22; see also *Region 2 Court Interpreter Employment Relations Committee & California Superior Courts of Region 2* (2020) PERB Decision No. 2701-I, p. 42.) Whether the District's alleged bad faith bargaining predates the decertification petition is immaterial; it is the alleged bargaining violation's contemporaneous potential to sway employee free choice, during the period before OE3 has been able to establish itself, which necessitates the stay.

For these reasons, and we affirm and adopt OGC's attached AD staying the decertification election in Case No. SA-DP-284-M, pending resolution of the blocking charge in *Operating Engineers Local Union No. 3, AFL-CIO v. Consolidated Irrigation District*, Unfair Practice Charge No. SA-CE-1231-M.

ORDER

The administrative determination staying the decertification election in Case No. SA-DP-284-M is AFFIRMED.

Chair Banks and Member Nazarian joined in this Decision.



**STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD**

CONSOLIDATED IRRIGATION
DISTRICT,

Employer,

and

OPERATING ENGINEERS LOCAL UNION
NO. 3, AFL-CIO,

Exclusive Representative,

and

GROUP OF EMPLOYEES,

Petitioner.

REPRESENTATION
CASE NO. SA-DP-284-M

ADMINISTRATIVE DETERMINATION
April 20, 2023

Appearances: Sagaser, Watkins & Wieland PC by Charles P. Hamamjian, Attorney for Consolidated Irrigation District; Gening Liao, House Counsel for Operating Engineers Local Union No. 3; Ricardo Cavazos, Representative for Group of Employees.

Before Fernando A. Reyes, Regional Attorney.

INTRODUCTION

The incumbent union, Operating Engineers Local Union No. 3, AFL-CIO (OE3), requests that the Public Employment Relations Board's (PERB) Office of the General Counsel (OGC) stay the decertification election pending resolution of its unfair practice charge in *Operating Engineers Local Union No. 3, AFL-CIO v. Consolidated Irrigation District*, Case No. SA-CE-1231-M ("blocking charge"). For the reasons discussed below, OE3's request to stay the decertification election pending resolution of the blocking charge is **GRANTED**.

BACKGROUND

OE3 was certified as the exclusive representative of employees in the Water Irrigation Specialist Unit (Unit) of the Consolidated Irrigation District (District) on November 22, 2021. The parties have not reached an agreement on an initial collective bargaining agreement (CBA).

On January 5, 2023,¹ Ricardo Cavazos (Cavazos), on behalf of a group of employees (Petitioner), filed a petition with PERB seeking to decertify OE3 as the exclusive representative of the Unit. The matter was assigned to the OGC for further processing and investigation.

On February 2, the OGC informed the parties that since the District had not adopted local rules concerning employee representation petitions, pursuant to PERB Regulation 61000, PERB would conduct representation proceedings under the Meyers-Milias-Brown Act (MMBA) in accordance with its regulations.² The District posted the notice of decertification petition for the requisite period of time, and no intervening employee organizations filed with PERB a petition to represent the Unit.

On February 27, OE3 advised that it intended to file a blocking charge and requested a stay of the election.

On March 1, the District opposed OE3's request to stay the election.

¹ All dates are in 2023, unless otherwise specified.

² The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and PERB regulations may be found at www.perb.ca.gov.

On March 13, the OGC issued a letter notifying the parties that the proof of support submitted by Petitioner was sufficient to satisfy PERB Regulation 61350, subdivision (b), and indicated its intent to proceed with conducting an election.

On March 14, OE3 filed its blocking charge, which requested that the decertification election be stayed pending the resolution of the blocking charge. The blocking charge alleges that the District interfered with employees' exercise of free choice and interfered with OE3's right to represent Unit members by: (1) facilitating the circulation and submission of the decertification petition through Cavazos, (2) instructing Cavazos and Unit member Brian Slaven (Slaven) to circulate the decertification petition, (3) promising benefits in exchange for decertifying OE3, and (4) refusing to negotiate with OE3 pending the resolution of the decertification proceedings.

On March 15, the OGC issued a letter regarding OE3's stay request, and provided until March 27 for Petitioner and the District to file a response to OE3's request.

On March 27, the District submitted a position statement in response to the blocking charge, which disputed OE3's allegations and opposed the stay request. Petitioner did not file a response to OE3's stay request.

On March 29, the OGC issued a Complaint regarding the allegations in the blocking charge.

On April 18, the parties participated in an informal conference, but were not able to reach a resolution.

BLOCKING CHARGE

In its blocking charge, OE3 alleges that “the District’s conduct is likely to interfere with employee free choice and influence employees in their vote regarding a decertification petition, [and] requests that the related decertification petition. . . be stayed pending the resolution of [the blocking] charge.” OE3’s specific allegations in its blocking charge are described below.

Cavazos occupies an Assistant Foreman position, is responsible for supervising the shop, and serves as manager in the absence of Foreman Richard Lopez. OE3 contends that Unit members perceive Cavazos as a member of management because he “sits in an office all day, does not conduct the duties of other Irrigation Specialists, has a company truck, and lives in company housing on property.” No other Unit member has a company truck. Cavazos supervises Unit members’ work, recommends discipline, and completes performance evaluations. Additionally, during a meeting with all Unit members before or around November 2021,³ District Operations Manager Walt Frost announced that “Rick [Cavazos] has been given full authority to give people jobs if he sees people not working.” Further, during the first session of contract negotiations, OE3 and the District agreed to exclude Cavazos from the Unit because he was a supervisor.

In or around December 2022, District management, including Assistant General Manager Michael Carbajal (Carbajal) and Human Resources Manager Tanya Ruiz

³ The blocking charge states the alleged meeting in question took place “sometime before November 2022. . . after the employees first contacted the union.” In reviewing the information provided by the District in its position statement to the blocking charge and the date that OE3 was first certified, it appears the meeting was held before or around November 2021.

(Ruiz), held meetings with Cavazos and Unit member Slaven involving a decertification petition. During these meetings, the District instructed Cavazos and Slaven how to solicit Unit member support for decertifying OE3 as the exclusive representative, including promising Unit members a pay raise in exchange for decertifying OE3.

Subsequently, Cavazos circulated a decertification petition and informed Unit members that they would receive a raise in exchange for signing their support for the petition.

Since the decertification petition was filed, OE3 has attempted to continue with contract negotiations, including scheduling a session for March 15. OE3 Business Agent, Allen Dunbar, repeatedly requested contract proposals prior to the session, but the District did not provide any proposals. During the March 15 session, the District declared that it would not continue with contract negotiations until the decertification process was completed. The District has since refused to engage with OE3 on outstanding matters.

THE DISTRICT'S POSITION

The District opposes the stay request. Additionally, the District disputes OE3's contention that Cavazos acted as the District's agent, and contends that he is not in a supervisory or management role. The District also contends that it never discussed excluding Cavazos from the Unit with OE3, nor did the District indicate that Cavazos was a supervisor during a meeting with Unit members. Further, the District contends that Cavazos' involvement in collecting signatures in support of the decertification

petition, even if he were determined to be a supervisor, would not invalidate the petition.

The District also denies OE3's allegations that in or around December 2022, District agents Carbajal and Ruiz met with and instructed Slaven and Cavazos how to solicit Unit member support for decertifying OE3, and disputes that it promised a raise to Unit members if OE3 was decertified.

Regarding the alleged refusal to bargain, the District contends that it never refused to bargain with OE3 prior to the filing of the decertification petition, and that OE3 pushed for a meeting to bargain a potential contract only after the decertification petition was filed with PERB. The parties agreed to meet on March 15, during which meeting the District reiterated the terms of its last offer and OE3 did not offer a response. The District contends that it was the only party that discussed the terms of an offer for an initial CBA during the March 15 meeting, while OE3 did not offer any proposals, counters, or comments to the District's proposal.

ISSUE

Whether the alleged unlawful actions described in the blocking charge would so affect the election process as to prevent Unit members from exercising free choice.

DISCUSSION

The primary goal of the MMBA is to provide a uniform basis for recognizing the right of employees to join organizations of their own choice. (Gov. Code, §§ 3500 & 3502.)

PERB Regulation 61190 governs blocking charges and requests to stay elections administered by PERB under the MMBA. It provides in relevant part:

“The Board may stay an election pending the resolution of an unfair practice charge relating to the voting unit upon an investigation and a finding that alleged unlawful conduct would so affect the election process as to prevent the employees from exercising free choice. . . .”

“The proper focus of the [OGC’s] inquiry is an objective evaluation of the probable effect of the conduct alleged and the possibility of a free election.” (*Imagine Schools of Imperial Valley* (2015) PERB Order No. Ad-431, at p. 10 (*Imagine*).) In making this determination, the OGC is “obligated to presume the allegations in the blocking charge are true.” (*Children of Promise Preparatory Academy* (2015) PERB Order No. Ad-428, adopting administrative determination, p. 15; see *Grenada Elementary School District* (1984) PERB Decision No. 387, p. 14 (*Grenada*) [in evaluating whether to block an election, the Board agent must presume the facts alleged in the complaint are true].) Accordingly, the determination to stay an election is not intended to involve adjudication of the unfair practice charge itself.

The Board has held that the Board agent must analyze whether the conduct alleged “is of such character and seriousness that, if it were proven to have occurred, it would be reasonable to infer that it would contribute to employee dissatisfaction and hence prevent a fair election.” (*Regents of the University of California* (1984) PERB Decision No. 381-H, p. 6.) The only relevant issue is whether the employer’s conduct, as alleged in the complaint, will so taint the election process as to interfere with employee free choice. (*Imagine, supra*, PERB Order No. Ad-431, at p. 13.) Although the truth of all relevant allegations contained in the charges must be assumed, the allegations are not evaluated separately and without regard to the factual contexts in

which they arose. (*Children of Promise Preparatory Academy, supra*, PERB Order No. Ad-428, adopting administrative determination at p. 16.)

In the present case, OE3 asserts that the District's conduct is likely to interfere with and influence employees' exercise of free choice to vote in a decertification election. OE3's specific allegations in favor of staying the decertification election are addressed below.

Interference

The MMBA expressly grants employees the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations (Gov. Code, § 3502), and prohibits public agencies from interfering with, intimidating, restraining, coercing, or discriminating against covered public employees because of their exercise of these rights. (Gov. Code, §§ 3506 & 3506.5, subd. (a).) The MMBA also grants employee organizations the right to represent members in their employment relations with public agencies, and prohibits public agencies from denying that right. (Gov. Code, §§ 3503 & 3506.5, subd. (b).) A charging party must show that the employer's conduct tends to or does result in some harm to employee or employee organization rights. (*City of San Diego* (2020) PERB Decision No. 2747-M, p. 36.) This standard applies in cases where the employer is alleged to have interfered with the rights of employees or restrained or coerced employees in their exercise of rights. (*Novato Unified School District* (1982) PERB Decision No. 210, p. 5, n. 7.)

Although the MMBA does not specifically include "agent" in the definition of "employer," PERB applies common law principles of agency authority to cases arising

under the MMBA. (*Inglewood Unified School District* (1990) PERB Decision No. 792, pp. 19-22, *affd. sub nom. Inglewood Teachers Assn. v. Public Employment Relations Bd.* (1991) 227 Cal.App.3d 767, 780.) Agency may be established by showing: (1) the purported agent had actual authority to act on behalf of the employer; (2) the purported agent had apparent authority to act on behalf of the employer; or (3) the employer ratified the purported agent's conduct. (*City of San Diego* (2015) PERB Decision No. 2464-M, adopting proposed decision, pp. 38-39, *affd. sub nom. Boling v. Public Employment Relations Bd.* (2018) 5 Cal.5th 898.)

At issue is whether Cavazos is an agent of District management, and/or acted with actual or apparent authority from the District. Assuming the allegations in the charge are true, District management held meetings with and instructed Cavazos and Slaven on a strategy for gathering Unit member support for decertifying OE3, namely promising Unit members would receive a raise if they decertified OE3. Cavazos—acting as an agent of the District and/or at the direction of the District—then solicited signatures from Unit members showing support for the decertification petition, informed Unit members that they would receive a pay raise in exchange for decertifying OE3, and submitted the petition to decertify OE3.

Because Cavazos was directed by the District to facilitate the decertification petition, his actions may be attributed to the District for the purpose of determining whether the District's conduct is likely to interfere with employee free choice, and thus, affect the outcome of the election. (*Imagine, supra*, PERB Order No. Ad-431, at p. 13.)

Offering a pay raise to Unit members in exchange for decertifying OE3 is coercive and interferes with employee and employee organization rights because it makes a promise of a benefit to Unit members if they decertify their exclusive representative. (See *City of Arcadia* (2019) PERB Decision No. 2648-M, pp. 28-30.) Similarly, Cavazos impliedly threatened that continued representation by OE3 would result in an outcome where Unit members would not receive pay raises. (See *Coachella Valley Mosquito & Vector Control District* (2009) PERB Decision No. 2031-M, pp. 21-23, overruled in part on other grounds in *City of Roseville* (2016) PERB Decision No. 2505-M.)

The District's instruction to Cavazos to facilitate the decertification petition and Cavazos' conduct in collecting signatures and promising raises to Unit members if OE3 is decertified, interfere with and constrain Unit employee and employee organization rights, and is likely to affect employee free choice in an election.

Unlawful Domination

The District may not "dominate or interfere with the formation or administration of any employee organization, contribute financial or other support to any employee organization, or in any way encourage employees to join any organization in preference to another" (Gov. Code, § 3506.5, subd. (d)), and is prohibited from actions that tend to influence employee free choice or provide stimulus in one direction or the other (*Santa Monica Community College District* (1979) PERB Decision No. 103, p. 22). Assuming the allegations in the charge are true, the District instructed Cavazos about how to solicit Unit member signatures and garner support for the decertification petition, and Cavazos promised Unit members a raise if they decertified OE3. These

purported actions by the District and Cavazos, as the District's agent, show a preference for the group of Unit members to decertify OE3, are likely to influence Unit employees to vote in favor of decertifying OE3, and are thereby likely to interfere with employees' exercise of free choice.

Prohibition on Public Employers Deterring or Discouraging Union Membership

A public employer shall not deter or discourage public employees from becoming or remaining members of an employee organization. (Gov. Code, § 3550.) To deter or discourage means to tend to influence an employee's free choice regarding whether or not to authorize representation, become or remain a union member, or commence or continue paying union dues or fees. (*Regents of the University of California* (2021) PERB Decision No. 2755-H, p. 3 (*Regents*)). The standard set out in *Regents* applies equally in an organizing context. (See *Regents of the University of California* (2021) PERB Decision No. 2756-H.) There, in response to an organizing flyer posted by a union, the employer posted a document on its website which compared salary increases between represented and unrepresented staff and made various claims about the employer's efforts to compensate, protect and support unrepresented employees. (*Id.* at pp. 1-2.) The Board found that the unfair practice charge filed by the union stated a prima facie case that the employer's conduct deterred or discouraged public employees and tended to influence employee decisions on union membership and support. (*Id.* at p. 9.)

To determine whether conduct is reasonably likely to deter or discourage employee choice on union matters, the Board looks to the context surrounding the employer's conduct. (Cf. *Los Angeles Unified School District* (1988) PERB Decision

No. 659, p. 9 [“Statements made by an employer are to be viewed in their overall context (i.e., in light of surrounding circumstances) to determine if they have a coercive meaning”].)

Here, at the direction of the District, Cavazos allegedly collected signatures from Unit members showing support for the decertification petition and promised Unit members a raise in exchange for decertifying OE3. Offering a raise to Unit members in exchange for decertifying OE3 and directing Cavazos, an employee perceived by Unit members as an agent of the District, to collect signatures in support of decertification is likely to encourage employees to vote in favor of decertification, and therefore likely to affect the outcome of the election.

Refusal to Bargain

A refusal to bargain serves as a basis to stay an election. Government Code, section 3506.5, subdivision (c), provides that it is a violation for a public agency employer to “refuse or fail to meet and negotiate in good faith with a recognized employee organization.” An outright refusal to bargain has the potential to frustrate bargaining and may be found unlawful as a per se violation of the duty to bargain in good faith. (*State of California (Department of Personnel Administration)* (2003) PERB Decision No. 1516-S, p. 4; see *Dublin Professional Fire Fighters, Local 1885 v. Valley Community Services District* (1975) 45 Cal.App.3d 116, 118.)

“Out of its wide experience, the Board many times has expressed the view that the unlawful refusal of an employer to bargain collectively with its employees’ chosen representative disrupts the employees’ morale, deters their organizational activities, and discourages their membership in unions.” (*Children of Promise Preparatory*

Academy, supra, PERB Order No. Ad-428, adopting administrative determination at p. 19.) The weakening of union support resulting from the employer's recalcitrance in bargaining an initial collective bargaining agreement ordinarily cannot be remedied by a subsequent bargaining order. (*Gompers Preparatory Academy* (2020) PERB Order No. Ad-481, p. 5.) As a result, "[r]efusing to bargain for a first contract is a powerful weapon in the arsenal of employers determined to remain union free, as it prevents a nascent union from ever getting off the ground." (*Id.* at pp. 5-6, quoting Fisk & Pulver, *First Contract Arbitration and the Employee Free Choice Act* (2009) 70 La. L.Rev. 47.) Further, the Board has held that "an election may properly be blocked where there has been a failure to bargain in good faith, since that conduct by its very nature undercuts support for an individual union or unions in general, and renders a fair election impossible." (*Grenada, supra*, PERB Decision No. 387, at p. 9.) This includes a refusal to bargain after the filing of a decertification petition because the focus remains not on the reasons for filing the decertification petition, but on the ability of the members of the unit to exercise free choice in an election. (See *Id.* at pp. 12-15 [the Board found the fact that some of the District's alleged actions occurred after the filing of a decertification petition rather than before is immaterial in determining whether or not a fair election is possible]; *Pittsburg Unified School District* (1983) PERB Decision No. 318, pp. 22-23.)

After the decertification petition (PERB Case No. SA-DP-284-E) was filed, OE3 attempted to continue contract negotiations with the District, and scheduled a bargaining session for March 15. OE3's Business Agent, Allen Dunbar, repeatedly requested that District negotiators provide initial CBA proposals prior to the scheduled

March 15 bargaining session. The District did not provide OE3 with any proposals prior to March 15, and, during the March 15 bargaining session, the District declared that it would not continue negotiations until the pending decertification petition is resolved. The District's refusal to continue contract negotiations until after the decertification process concludes eliminates OE3's ability to effectively negotiate with the District on behalf of Unit members, and could make OE3 appear weak and ineffective, contribute to employee dissatisfaction with OE3, and ultimately prevent a fair election. (See e.g., *Imagine, supra*, PERB Order Ad-431, at p. 10; *Children of Promise Preparatory Academy, supra*, PERB Order No. Ad-428, adopting administrative determination at pp. 19-20.)

CONCLUSION

Based on the facts, conclusions of law and entire record herein, OE3's request to stay the decertification election is **GRANTED**. Pursuant to PERB Regulation 61190, it is hereby **ORDERED** that Case No. SA-DP-284-M be placed in abeyance pending the resolution of *Operating Engineers Local Union No. 3, AFL-CIO v. Consolidated Irrigation District*, Unfair Practice Charge No. SA-CE-1231-M.

The administrative determination also contained an explanation of appeal rights; that portion of the administrative determination, which is superseded, is not shown here.