STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CERRITOS COLLEGE FACULTY FEDERATION, AMERICAN FEDERATION OF TEACHERS LOCAL 6215, Charging Party, v. CERRITOS COMMUNITY COLLEGE DISTRICT, Respondent.	Case No. LA-CE-6378-E PERB Decision No. 2819 May 6, 2022

Appearances: Law Offices of Robert J. Bezemek by David Conway, Attorney, for Cerritos College Faculty Federation, American Federation of Teachers Local 6215; Erickson Law Firm by Rachel Napier and Joshua Taylor, Attorneys, for Cerritos Community College District.

Before Banks, Chair; Shiners and Krantz, Members.

DECISION

BANKS, Chair: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by the Cerritos Community College District to a proposed decision by an administrative law judge (ALJ). The ALJ concluded that the District violated its duty to bargain in good faith with the Cerritos College Faculty Federation, American Federation of Teachers Local 6215 (Federation) over proposals on: (1) standards and procedures regarding discipline short of suspension or dismissal for full-time faculty; (2) the use of reassignment, assignment loss, and mandatory training as discipline for faculty; (3) misconduct investigations, including information the District will disclose to the Federation and accused faculty member during such

investigations; and (4) provisions for paid administrative leave. The District argues that the Education Code supersedes the Educational Employment Relations Act (EERA) with respect to the foregoing topics, and that therefore it had no duty to bargain over the Federation's proposals.[1]

We have reviewed the entire record and considered the parties' arguments in light of applicable law, and we affirm the proposed decision based upon the following findings and discussion.

PROCEDURAL BACKGROUND

On June 26, 2018, the Federation filed an unfair practice charge against the District, alleging that the District refused to bargain in good faith over the four proposals listed *ante* as well as a proposal regarding a discipline standard for part-time, temporary faculty. On June 11, 2019, PERB's Office of the General Counsel issued a complaint against the District. The complaint alleged that the Federation proposed a just cause discipline article during successor negotiations, and that the District declined the Federation's repeated requests to bargain over the proposal, including five specified subjects the proposal addressed. On July 29, 2019, the District filed an answer. On August 12, 2019, the District submitted a supplemental declaration and verification of its answer.

On September 16, 2019, the parties participated in an informal settlement conference, but were unable to resolve the matter.

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[1] EERA is codified at Government Code section 3540 et seq. All further statutory references are to the Government Code unless otherwise indicated. The Education Code can be found online at https://leginfo.legislature.ca.gov/faces/codesTOCSelected.xhtml?tocCode=EDC.

On July 10, 2020, the parties submitted their joint stipulation of facts and exhibits. On November 30, 2020, the Division of Administrative Law reassigned the case to the Chief ALJ, without objection from the parties.

The formal hearing took place on December 8, 9, 11, and 21, 2020, and January 11, 2021. On the first day of the hearing, the Federation orally moved to amend the complaint to clarify certain dates, add an aspect of just cause discipline that the District allegedly failed to negotiate, and specify legal theories with regard to the bad faith bargaining allegation. The District objected to some of the amendments.

In substance, the ALJ granted the motion. The amended complaint alleged that on December 1, 2017, and March 23, 2018, the Federation proposed a just cause discipline article to the District, and that from January 19, 2018, through April 20, 2018, the District declined the Federation's repeated requests to bargain over the proposal, which included: (1) a discipline standard for part-time faculty; (2) a standard for discipline short of suspension or dismissal for full-time faculty; (3) a provision regarding investigatory information, such as complaint information, that would be provided to the Federation and the accused faculty member during the investigative process; (4) administrative leave; (5) the use of reassignment, assignment loss, and mandatory training as discipline for faculty; and (6) procedures for misconduct investigations.

The ALJ issued a proposed decision on August 11, 2021, concluding that the District refused to bargain in good faith over the latter five topics specified in the amended complaint. The ALJ dismissed the allegation that the District failed to bargain over a discipline standard for part-time faculty.

The District filed timely exceptions to the proposed decision. The Federation filed a response to the District's exceptions but no exceptions of its own.[2]

FACTUAL BACKGROUND

The District is a public school employer within the meaning of EERA section 3540.1, subdivision (k) and a school district within the meaning of PERB Regulation 32001, subdivision (c). The Federation is an employee organization within the meaning of EERA section 3540.1, subdivision (d) and PERB Regulation 32001, subdivision (a). The Federation represents full-time and part-time faculty employees. Full-time faculty members are tenured or on a tenure track. Part-time faculty members are either adjunct or temporary.

The District and Federation were parties to a collective bargaining agreement (CBA) in effect from July 1, 2015, to June 30, 2018. In Fall 2017, the parties began successor contract negotiations.

On September 19, 2017, the Federation provided public notice of its initial bargaining proposals. Among other items, the Federation's notice stated, in part: "The Union proposes adding a 'just cause discipline' article to ensure faculty due process

[2] Notably, the Federation did not except to the ALJ's conclusion that the District had no obligation to bargain over the Federation's proposed discipline standard for part-time faculty because that subject is outside the scope of representation. In the absence of a specific exception, the ALJ's conclusion is not before us and is non-precedential. (*County of Santa Clara* (2018) PERB Decision No. 2613-M, p. 2, fn. 2; PERB Reg. 32300, subd. (c) [PERB Regulations are codified at Cal. Code Regs., tit. 8, § 31001 et seq.].) We accordingly express no opinion on whether the ALJ's conclusion was correct.

and union information rights are protected during employer investigations." On October 18, 2017, the District provided public notice of its initial bargaining proposals.

The parties held their first bargaining session on November 17, 2017. Adriana Flores-Church, the District's Vice President of Human Resources/Assistant Superintendent, served as the District's chief negotiator throughout negotiations. Kimberly Rosenfeld, a full-time tenured faculty member, served as the Federation's chief negotiator.[3] Federation President Stephanie Rosenblatt also served on the Federation's bargaining team.

At the parties' next bargaining session on December 1, 2017, the Federation passed a nine-page proposal to the District entitled "Article XX: Just Cause."[4] It provided:

> "**13.1 Just Cause Discipline and General Provisions**
>
> > "13.1.1 Definition: The terms 'disciplinary action' and 'discipline' as used in this Article shall mean any adverse action by the District resulting from a bargaining unit member's alleged wrongdoing or rules violations that affects his or her employment. Adverse action shall include, but is not limited to, requirements related to any punishment, chastisement, or corrective action; directives related to training; or involuntary reassignment or loss of assignment.[5]

[3] Flores-Church and Rosenfeld also served on their respective bargaining teams for 2015-2018 contract negotiations.

[4] The parties referred to the Federation's proposal interchangeably as its "just cause proposal" and "Article 13 proposal." We use the same shorthand herein.

[5] At the formal hearing, Rosenfeld and Rosenblatt testified that the references to "bargaining unit member" and "unit member" in the Article 13 proposal referred to all

"13.1.2 The following are not considered disciplinary actions and are specifically excluded from the provisions and procedures of this Article:

"(a) A suspension or dismissal action instituted pursuant to the Education Code, other than the application of Article 13.4 to such actions.

"(b) Actions taken by the District as part of the process of performance or tenure review pursuant to the negotiated performance evaluation process.

"13.1.3 Disciplinary action shall be imposed upon unit members only for just cause and pursuant to the terms of this Article. Any disciplinary action should be reasonably related to the nature of the offense committed by the Unit member and should take into account any prior discipline imposed on the Unit member or the lack thereof.

"13.1.4 No disciplinary action shall be taken for any cause that arose more than two years preceding the date of the notice of disciplinary action unless the cause was concealed or not disclosed by the Unit member when it reasonably could be assumed that the Unit member should have disclosed the facts to the District. Further, with regard to a tenured regular Unit member, no disciplinary action shall be taken for any cause that arose prior to the regular Unit member becoming a tenured employee, unless the cause was concealed or not disclosed by the Faculty member when it reasonably could be assumed that the Unit member should have disclosed the facts to the District.

[¶] . . . [¶]

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members in the bargaining unit, which includes full-time, part-time, instructional, and non-instructional faculty.

“**13.2 Misconduct Investigations**

“13.2.1 Mutual Respect for a Fair Investigative Process: The parties understand and agree that the District has the authority to investigate complaints, reports and/or other credible information that a unit member has engaged in misconduct. The parties further understand and agree that unit members are entitled to be presumed innocent of wrongdoing during the investigation process and are entitled to certain protections during the investigation process, including, but not limited to, the right to assert to any Constitutional or other legal rights to privacy, confidentiality or privilege.

“13.2.2 Misconduct Investigation Defined: A misconduct investigation is a District-initiated investigation of a unit member into allegations that the unit member has violated District policy and/or law, based on information received from a formal or informal complaint made by an identifiable author; a report of misconduct; manager observations; or other credible sources of information. An investigation is initiated at the point that the District determines to go beyond meeting with the accuser or complainant. An anonymous accusation shall not form the basis for initiating an investigation.

“13.2.3 Non-Investigatory Interviews: The parties understand and agree that in the day-to-day operation of the District, managers and unit members meet regularly to share information. These are not investigatory interviews. However, the parties further understand and agree that, if a manager reasonably expects that such a meeting may elicit information that warrants discipline, the manager shall notify the unit member in advance. The unit member so notified shall have the right to bring a Union representative to the meeting. In addition, a unit member may act independently to bring a Union representative to the meeting if the unit member reasonably believes that it could lead to discipline.

“13.2.4 Notice of Investigation and Complaint Copies: An employee who is under investigation shall be sent a copy of any complaint against him or her, or written document serving as the basis of that complaint, as set forth below no later than five (5) business days before his/her appointment for an investigatory interview.

“(a) Complaint copies:

“(i) If a complaint which involves academic activities or student performance, including but not limited to grading, the complaint shall be provided to the Unit member within 2 workdays of its receipt by the District.

“(ii) If a complaint does not involve academic activities or student performance, the complaint shall be provided to CCFF and the Unit member no later than 5 workdays prior to an investigatory interview, unless the President/Superintendent determines that providing the complaint would present a substantial and material threat of:

“• Placing the complainant or witnesses in significant danger of harm to person or property,

“• Leading to the destruction of relevant evidence, or

“• Leading to the fabrication of testimony.

[¶] . . . [¶]

“(b) Employee Notification Summary Form:

The Employee Notification Summary Form is in Appendix D. The Form is intended to provide employees subject to misconduct investigations with (1) an introductory statement describing the investigation process and (2) in those instances under Article 13.2.4(a)(ii) where a District does not provide a copy of the complaint or document serving as the basis of the investigation, a description of the subject matter

of the investigatory interview. The Form shall include the following:

[¶] . . . [¶]

"13.2.5 Placement on Paid Administrative Leave of Absence While an Investigation Is Pending: Placement of a member on Paid Administrative Leave of Absence while an investigation into alleged misconduct is pending shall conform to the following standards and procedures:

"(a) Placement on Paid Administrative Leave of Absence while an investigation is pending constitutes a non-disciplinary action;

"(b) Placement on Paid Administrative Leave of Absence shall not be automatic and it is not an action that the District takes lightly. The District will not take this step unless:

"(i) The allegations, if true, indicate that the employee poses a safety threat to him/herself or others;

"(ii) The allegations, if true, involve harassment, retaliation and/or dishonesty; and/or

"(iii) Other extenuating circumstances with the written approval of the Superintendent, which approval will state the nature of the extenuating circumstance.

"(c) The notice placing an employee on Paid Administrative Leave of Absence will provide information about the Leave, including but not limited to:

"(i) The basis or bases on which he/she is being placed on Paid Administrative Leave of Absence;

"(ii) That, as this investigation could lead to discipline, the employee is entitled to representation during his/her investigatory interview;

[¶] . . . [¶]

"(d) Placement on Paid Administrative Leave shall be limited to 90 days.

"13.2.6 Within 10 days of the conclusion of the investigation, the District shall provide the Unit member and exclusive representative with a (1) copy of any investigatory report or findings, including any exhibits or attachments, created by the District or its agents pursuant to the investigation and (2) a copy of any transcript which the investigator prepared or caused to be prepared of the Unit member's investigatory interview.

[¶] . . . [¶]

"**13.3 Notice of Discipline and Right to Grieve**

"Within 10 days of the conclusion of the investigation, the Superintendent President shall give the Unit member written notice of any intended discipline.

[¶] . . . [¶]

"13.3.3 The notice shall inform the Unit member of the charges as well as the effective date of discipline, which shall be not less than 20 (twenty) days after service of the notice. The notice shall contain a statement of the specific acts and/or omissions upon which the intended disciplinary action is based, and if it is claimed that the Unit member has violated a District rule or regulation, the rule or regulation shall be set forth in the notice.

"13.3.4 The notice shall inform the Unit member of the Unit member's right to grieve.

"13.3.5 A Unit member may grieve any imposed disciplinary action as provided by the parties' grievance procedure.

"**13.4 Selection of an arbitrator for discipline under the Education Code.**

> "If a regular faculty member is disciplined with dismissal or suspension under the California Education Code, the District and affected unit employee shall select an arbitrator, as opposed to an administrative law judge. Such arbitrator shall be selected from a list obtained by the parties from the State Mediation and Conciliation Service, with the parties alternately striking names from a list of seven names, until one is left, who shall be the arbitrator. When an employee subject to discipline is not represented by the Union, then the employee shall be entitled to make the strike-off on her or his own behalf, or through her/his representative."

When Rosenfeld introduced the Article 13 proposal, she explained it was identical to the proposal made during 2015-2018 contract negotiations, except that the updated proposal added a 90-day timeline for completion of investigations.[6] Rosenfeld stated that the addition of a 90-day timeline was to expediently resolve investigations. Aside from making these points, Rosenfeld did not elaborate on specific parts of the proposal during the meeting, as Flores-Church and Rick Miranda, another member of the District's bargaining team, were familiar with the proposal from the previous bargaining cycle. Rosenfeld asked the District team if they had any questions and they responded in the negative. The parties' discussion of the Article 13 proposal lasted approximately five minutes before they moved on to other topics. At the end of the meeting, the parties set the agenda for their next bargaining session. The District

[6] During 2015-2018 negotiations, the Federation dropped its just cause proposal after the parties reached impasse and commenced mediation. The District never provided a counterproposal.

agreed that it would provide a counterproposal to the Federation's just cause proposal at the January 12, 2018 session.

The parties met for bargaining on January 12, 2018, but the District did not provide a counterproposal to the Federation's just cause proposal.

On January 19, 2018, the parties held another bargaining session. When the just cause proposal came up for discussion, Flores-Church stated that she believed the proposal was attempting to address discipline and disciplinary procedures when a faculty member is accused of wrongdoing. She asserted that the Education Code dictates those topics, and that it would be too difficult to address the entire Education Code in the article. Thus, Flores-Church explained, the District was "not interested" in having the Article 13 proposal included in the contract but it would be willing to discuss the matter "outside" negotiations.[7] After Flores-Church cited Education Code section 87732 as the relevant statute with respect to discipline for faculty, Rosenblatt asked her what the remedy would be if the District violated the process. Flores-Church told her it would be to "go to PERB." The District did not ask any questions about the Federation's just cause proposal and did not provide a counterproposal to it. The entire discussion of the proposal lasted approximately 10 minutes.

At the parties' February 2, 2018 bargaining session, the Federation passed the same Article 13 proposal that it had presented on December 1, 2017. Rosenfeld told the District that the Federation had brought back the same proposal with no changes. She explained that the Federation wanted "consistency" for members both by creating

[7] The parties never had an "outside" discussion about the Federation's just cause proposal.

a contractual policy and ensuring that it covered "everyone." The District did not offer a response and did not ask any questions about the proposal. At the end of the meeting, the parties created an agenda for the next bargaining session scheduled for February 23. The District stated that it would provide a counter to the just cause proposal on that date.

The District did not present a counterproposal to the Federation's Article 13 proposal at the February 23, 2018 bargaining session.

On March 2, 2018, the parties met again for bargaining. When the parties turned to the topic of just cause, the District passed the Federation a copy of a four-page memorandum from its legal counsel, Randy Erickson, dated February 27, 2018. Erickson asserted that "EERA does not explicitly make discipline for community college faculty a mandatory subject of bargaining . . . Instead, the Education Code 'occupies the field' by expressly giving management the right to issue discipline short of dismissal for community college faculty." As Erickson presented it, the Education Code set an "inflexible standard" for discipline of community college faculty, and thus the Federation's proposals regarding discipline (Sections 13.1 and 13.3), paid administrative leave, and selection of an arbitrator were outside the scope of representation. While Erickson conceded that faculty evaluations and personnel files are "generally negotiable subjects," he stated that parts of the Federation's proposal placed "impermissible limits" on the District's statutory ability to investigate student and public complaints. He stated the District would therefore only agree to "follow applicable legal standards, board policies, and administrative procedures regarding the investigation of student and public complaints," and to not use the outcome of any

investigation during an evaluation or for disciplinary purposes without following the Education Code.

In addition to Erickson's memo, the District passed a counterproposal to the Federation on the just cause article. The District retitled the article from "Just Cause" to "Complaint Procedure" and struck out nearly the entire Federation proposal. Keeping only the title of Section 13.2, "Misconduct Investigations," the District proposed new language stating that it would follow applicable legal standards, board policies, and administrative procedures when investigating complaints. When the Federation asked for an explanation of the counterproposal and attempted to ask questions about it, Flores-Church did not give any substantive answers and instead repeatedly referred the Federation team to Erickson's memo. The entire discussion regarding just cause lasted 5-10 minutes.

At the March 23, 2018 bargaining session, the Federation passed the District a just cause proposal that was the same as the Federation's previous two proposals, except that it had stricken Section 13.4 – "Selection of an arbitrator for discipline under the Education Code." Rosenfeld explained that while the Federation did not believe its just cause article conflicted with the Education Code, it nonetheless removed Section 13.4 in response to concerns the District raised in its legal memorandum. Rosenfeld also told the District that procedure and communication are not covered by the Education Code, and she recited the names of six community college districts that she claimed had similar just cause language in their CBAs with faculty unions.

Neither Flores-Church nor anyone else on the District's team responded to any of Rosenfeld's statements, and no one on the District's team asked any questions

about the Federation's proposal. Rosenfeld then asserted that just cause is a mandatory subject of bargaining, and she asked the District if it intended to discuss the proposal. If not, she said, the Federation would take "appropriate steps." Flores-Church responded that the District was "okay . . . if [the Federation] want[s] to take it farther," but that it would not counter. She suggested the parties move on to other issues. The discussion of the just cause proposal was over in less than 10 minutes.

In an e-mail to Rosenfeld later on March 23, 2018, Flores-Church restated the District's position that the grounds and procedures for discipline are not mandatory subjects of bargaining. She stated that the District would be "willing to reconsider its position if [the Federation] is able to provide authority in support of its assertions," and she thus made a "formal request for information and clarification." Flores-Church stated that, upon receipt of the information, the District would consult with its legal counsel and "if it is determined that such an obligation exists, will bargain in good faith with [the Federation] on this issue."

On April 6, 2018, Rosenfeld sent Flores-Church a letter in response to the District's March 23 request. Rosenfeld stated that the Federation was not obligated to educate the District as to its legal responsibilities, but nonetheless, "in a final attempt to resolve this short of filing an unfair practice charge," the Federation outlined the reasons why the just cause proposals were within the scope of representation. (Underline in original.)

At the April 20, 2018 bargaining session, Flores-Church passed the Federation a counterproposal and a letter bearing the same date. The letter began: "[A]fter reviewing [the Federation's] arguments and referenced authority . . . the District stands

firm in its position [that discipline of community college faculty is not within the scope of representation].” The District then offered additional arguments in support of its position that the Federation’s proposal was outside the scope of representation.

The District’s counterproposal again retitled the article, this time to “Investigations and Administrative Leave.” As before, the counterproposal did not accept any of the Federation’s language. The District retained its previously proposed language regarding misconduct investigations and added language with respect to involuntary paid administrative leave that largely mirrored Education Code section 87623. In addition to specifically objecting to Section 13.1.4, stating that it was “directly contrary” to Education Code section 87675, the District also added in brackets its reasons for striking various sections of the Federation’s proposal:

> “[Dismissal and the imposition of any penalties (i.e., discipline) is expressly governed by Education Code Sections 87660 et seq. As a result, this language is in violation of that would undermine Ed Code would be in violation [*sic*] [citations omitted]. Further, the discipline of any employee is enumerated under Article 2 of the CBA as a ‘District Right.’]”

Flores-Church explained that the bracketed language served as the District’s clarification of its position and was not intended to be part of the District’s counterproposal. However, she did not explain the contents of its counterproposal. The discussion lasted no more than 10 minutes.

At the May 17, 2018 bargaining session, Flores-Church asked the Federation whether it had a counter to the District’s April 20 proposal. Rosenblatt stated that the District’s proposal did not constitute a proper counterproposal. Flores-Church did not respond.

On June 26, 2018, the Federation filed the unfair practice charge in this case. By that time, the parties had spent no more than 40 minutes in aggregate discussing the just cause proposal.

On October 31, 2018, the Federation passed a comprehensive economic proposal to the District that included an "Article XX, Just Cause." The article stated: "No bargaining unit member shall be reprimanded nor subject to disciplinary action without just cause."

On November 9, 2018, the District provided a comprehensive economic counterproposal to the Federation. Among other changes, the District struck the Federation's proposed Article XX without comment or suggested changes.

On February 7, 2019, the parties signed a tentative agreement for a successor CBA. The tentative agreement did not include language about just cause or the other issues raised by the Federation's just cause proposals.

On March 6, 2019, the Federation's membership ratified, and the District's Governing Board approved, the tentative agreement.

DISCUSSION

In resolving exceptions to a proposed decision, the Board applies a de novo standard of review. (*County of San Joaquin* (2021) PERB Decision No. 2775-M, p. 19.) Under this standard, we review the entire record and are free to make different factual findings and reach different legal conclusions than those in the proposed decision. (*County of Sacramento* (2020) PERB Decision No. 2745-M, p. 10.) However, the Board need not address issues that the proposed decision has adequately addressed or that would not impact the outcome. (*City of San Ramon* (2018) PERB

Decision No. 2571-M, p. 5; *Hartnell Community College District* (2018) PERB Decision No. 2567, p. 3.)

The central thrust of the District's exceptions is that most aspects of the Federation's just cause proposal were outside the scope of representation, and the District therefore did not have a duty to bargain over it. Before considering the District's arguments, we first address the scope of representation under EERA generally and then discuss how to determine whether a proposal on a subject covered by the Education Code is within the scope of representation.

I. Scope of Representation Generally

A. Scope of Representation Defined

The duty to meet and bargain is a central feature of California's public sector labor relations statutes.[8] (*Boling v. Public Employment Relations Bd.* (2018) 5 Cal.5th 898, 904; see *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, 599.) EERA requires a public school employer to meet and negotiate in good faith with an exclusive representative "with regard to matters within the scope of representation." (§ 3543.3; see also §§ 3543.2, 3543.5, subd. (c).) EERA defines the "scope of representation" to include "matters relating to wages, hours of

[8] EERA section 3543.3 requires public school employers and exclusive representatives of public school employees to "meet and negotiate . . . upon request with regard to matters within the scope of representation." Other statutes under PERB's jurisdiction require public employers and exclusive representatives to "meet and confer" over matters within the scope of representation. (E.g., §§ 3505 [Meyers-Milias-Brown Act]; 3517 [Ralph C. Dills Act]; 3570 [Higher Education Employer-Employee Relations Act].) Despite the differing statutory language, PERB construes the fundamental bargaining obligation consistently across all statutes. (*Bellflower Unified School District* (2014) PERB Decision No. 2385, p. 4, fn. 4.)

employment, and other terms and conditions of employment," and lists certain enumerated subjects as "terms and conditions of employment." (§ 3543.2, subd. (a)(1).)

Subjects within the scope of representation are known as "mandatory subjects of bargaining" (*Contra Costa Community College District* (2019) PERB Decision No. 2652, p. 8 (*Contra Costa*)), such that "parties to a collective bargaining relationship must meet and confer upon demand" over them. (*Anaheim Union High School District* (2016) PERB Decision No. 2504, p. 8.) The same obligation does not apply to subjects outside the scope of representation, which are called "non-mandatory" or "permissive" subjects. While parties may negotiate over such matters, neither party is required to do so. (*Eureka City School District* (1992) PERB Decision No. 955, pp. 17-18.) Although the District faults the ALJ for failing to distinguish between the scope of representation and the scope of bargaining, the ALJ did not err in using the exact term that EERA uses, "scope of representation," to refer to mandatory subjects of bargaining, just as both parties did during their negotiations.

EERA provides that "matters not specifically enumerated are reserved to the public school employer." (§ 3543.2, subd. (a)(4).) However, the Legislature balanced this restrictive language by expansively requiring negotiations over "matters relating to wages, hours of employment, and other terms and conditions of employment." (§ 3543.2, subd. (a)(1).) The California Supreme Court, noting that these EERA provisions are in tension with one another and that the Legislature authorized PERB to apply its expertise to determine which matters "relate to" employment terms and conditions, has specifically endorsed PERB's three-part test for distinguishing

between mandatory and non-mandatory bargaining subjects. (*San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 857-860 (*San Mateo*).)

Pursuant to that test, which the Board adopted in *Anaheim Union High School District* (1981) PERB Decision No. 177 (*Anaheim*), an exclusive representative's right to represent employees extends to a non-enumerated subject if: "(1) it is logically and reasonably related to hours, wages or an enumerated term and condition of employment, (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict, and (3) the employer's obligation to negotiate would not significantly abridge his freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the [employer's] mission." (*Id*. at pp. 4-5; *San Mateo*, *supra*, 33 Cal.3d at pp. 857-859.) With this understanding of the scope of representation in mind, we next explain the interplay between EERA and the Education Code.

B. Determining Whether a Proposal on a Subject Covered by the Education Code is Within the Scope of Representation

EERA requires an additional consideration unique to the statutes under PERB's jurisdiction. Because EERA exists alongside the Education Code, the former must give way to the latter when there is a specific conflict between the statutes. (§ 3540 [EERA "shall not supersede other provisions of the Education Code"].) However, as we proceed to explain, the Education Code's supersession over EERA is not absolute.

In *San Mateo*, *supra*, 33 Cal.3d 850, the California Supreme Court considered for the first time the relationship between the Education Code and EERA's scope of

representation. Approving PERB's *Anaheim* test as consistent with the purposes and intent of EERA, the Court rejected the employers' argument that EERA established a scope of representation strictly limited to its enumerated items. (*Id*. at pp. 857-859.) The Court reasoned, "[t]he fact that matters which touch both fundamental educational policy decisions and traditionally recognized conditions of employment are specifically included within the scope of bargaining (i.e., class size, evaluation procedures, layoff of certain probationary employees) shows that no rigidly limited scope was intended." (*Id*. at p. 860.) Rather, the Court stated, parties may bargain over matters that are regulated by the Education Code provided that its provisions would not be "'replaced, set aside or annulled by the language of the proposed contract clause.'" (*Id*. at p. 864.)

Notably, one of the *San Mateo* employers made the same argument the District makes here: that when the Education Code contains provisions on a particular subject, this demonstrates a legislative intent to "fully occupy the field" on that subject. (*San Mateo*, *supra*, 33 Cal.3d at p. 866.) The Court rejected the employer's preemption argument, finding "[t]he intent of [EERA] section 3540 is to preclude contractual agreements which would alter [the Education Code's] statutory provisions." (*Ibid*.) In the Court's view, parties can negotiate over subjects regulated by the Education Code provided a proposal "would not supersede the relevant part of the Education Code, but would strengthen it." (*Ibid*.) Thus, "[u]nless the statutory language [of the Education Code] clearly evidences an intent to set an inflexible standard or insure immutable provisions, the negotiability of a proposal should not be precluded." (*Id*. at pp. 864-865.) In endorsing this approach, the Court concluded:

> "PERB's interpretation reasonably construes the particular language of section 3540 in harmony with the evident

> legislative intent of the EERA and with existing sections of the Education Code. This, rather than the preemption theory offered by the [employer] is the correct approach when several provisions of state law address a similar subject . . . . It is consistent with the fact that the EERA explicitly includes matters such as leave, transfer and reassignment policies within the scope of representation, even though such matters are also regulated by the Education Code."

(*San Mateo*, *supra*, 33 Cal.3d at p. 865 [citations omitted].)

The Court reaffirmed this standard in *Board of Education v. Round Valley Teachers Assn.* (1996) 13 Cal.4th 269 (see *id*. at p. 286) and *United Teachers of Los Angeles v. Los Angeles Unified School Dist.* (2012) 54 Cal.4th 504 (see *id*. at pp. 515-516). In the latter decision, the Court labeled the relevant portion of EERA section 3540 as a "non-supersession clause." (*United Teachers of Los Angeles*, *supra*, 54 Cal.4th at p. 513.) It therefore is clear that an EERA supersession analysis is much narrower than the District contends, and, at a minimum, forecloses any preemption argument.

Under the *Anaheim/San Mateo* standard, a public school employer and exclusive representative have latitude to bargain over subjects expressly covered by the Education Code provided that contract terms do not replace, set aside, or annul Education Code provisions. For instance, parties may incorporate into a CBA mandatory Education Code provisions or additional employee protections beyond those afforded in the Education Code. (See *San Francisco Unified School District* (2009) PERB Decision No. 2040, p. 5, fn. 4.) Similarly, where the Education Code merely provides a governing board with discretion to determine employment terms or conditions, without specifying the terms that shall apply, the general grant of authority

does not extinguish the employer's bargaining duty. (*Los Angeles Unified School District* (2017) PERB Decision No. 2518, pp. 34-35 & adopting proposed decision at pp. 23-25.)

Following this well-established precedent, we next apply the "replace, set aside, or annul" standard to the Federation's just cause proposals.

II. Negotiability of Specific Federation Proposals

A. Standards and procedures regarding discipline short of suspension or dismissal for full-time faculty

Section 13.1 of the Federation's proposal, "Just Cause Discipline and General Provisions," contains multiple subsections addressing discipline. Section 13.1.1 defines "disciplinary action" and "discipline" as "any adverse action by the District resulting from a bargaining unit member's alleged wrongdoing or rules violations that affects his or her employment." The definition excludes a suspension or dismissal pursuant to the Education Code, and actions taken as part of the process of performance or tenure review. The proposal also calls for disciplinary actions to be based on just cause and to be initiated within two years of the alleged cause.

The District challenges the ALJ's finding that Section 13.1 is within the scope of representation, arguing that the Education Code "occupies the field" of community college faculty discipline with a "comprehensive statutory scheme" that governs the "dismissal of, and the imposition of penalties on, community college faculty."[9] By the

[9] The District also excepts to the ALJ's finding that the Federation intended its Article 13 proposal to apply to all unit members, i.e., both full-time and part-time, temporary faculty. Because the proposal did not differentiate between the types of faculty, and the ALJ dismissed the Federation's allegation that the District failed to bargain in good faith over a discipline standard for part-time, temporary faculty, the District contends that the logical conclusion should have been that all the Federation's

District's contention, the "comprehensive statutory scheme" covering all faculty discipline is set forth in Article 4, "Evaluations and Discipline," Education Code sections 87660 to 87683, and Article 6, "Termination of Services and Reduction in Force," sections 87730 to 87740. The District appears to derive the existence of a comprehensive scheme from Education Code section 87660, which states: "The provisions of this article govern the evaluation of, the dismissal of, and the imposition of penalties on, community college faculty." As discussed below, however, the "penalties" at issue in these provisions of the Education Code do not include forms of discipline short of suspension and dismissal.

The fundamental task in interpreting statutory language is ascertaining the Legislature's intent so as to effectuate the purpose of the law. (*Regents of the University of California* (2021) PERB Decision No. 2755-H, p. 20.) When PERB interprets a statute, usually "we begin with its plain language, affording the words their ordinary and usual meaning." (*Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M, p. 16, citing *Shady Tree Farms, LLC v. Omni Financial, LLC*

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proposals were outside the scope of representation. The District has not provided—nor have we discovered—any authority for the proposition that when a proposal is outside the scope of representation for some employees, it is therefore outside scope for all employees to whom the proposal may apply. Absent such authority, we find no merit to the District's exception. Moreover, the District's position was unreasonable and evinced a failure on the District's part to take its bargaining obligation seriously. (See *County of Ventura* (2021) PERB Decision No. 2758-M, pp. 36-37; *Davis Joint Unified School District* (1983) PERB Decision No. 393, p. 24 (*Davis*); see also *City of Palo Alto* (2017) PERB Decision No. 2388a-M, p. 33 [employer has a duty to clarify if it believes union has made a proposal over a non-mandatory subject].) Had the District not rejected the proposal out of hand, it would have required little of the District to seek clarification from the Federation or to analyze the proposal as applying to both types of faculty.

(2012) 206 Cal.App.4th 131, 137.) But when the statute itself gives the words a special meaning different from their ordinary and usual meaning, we must follow that special meaning. (*Irvine Valley College Academic Senate v. South Orange County Community College Dist.* (2005) 129 Cal.App.4th 1482, 1489.) If the terms of the statute are unambiguous, we assume the Legislature meant what it said; the plain meaning controls and there is nothing to interpret or construe. (*State of California (Office of the Inspector General)* (2019) PERB Decision No. 2660-S, p. 15.) Only when the statutory terms are ambiguous may we resort to extrinsic sources such as maxims of construction and legislative history to discern legislative intent. (*Region 2 Court Interpreter Employment Relations Committee & California Superior Courts of Region 2* (2020) PERB Decision No. 2701-I, p. 33.)

Based on the plain terms of Education Code section 87668, the District's proffered interpretation cannot hold. Education Code section 87668 provides: "A governing board may impose one of the following penalties: (a) Suspension for up to one year [; or] (b) Suspension for up to one year and a reduction or loss of compensation during the period of suspension." Thus, Article 4's provisions are limited to the evaluation of, dismissal of, and impositions of suspensions up to one year with or without pay, i.e., "penalties," on community college faculty, and nothing more. (See Ed. Code, §§ 87666 ["contract and regular employees are subject to *dismissal and the imposition of penalties*"]; 87667 ["[a] contract or regular employee may be *dismissed or penalized* for one or more of the grounds set forth in Section 87732"]; 87669 ["[t]he governing board shall determine whether a contract or regular employee is to be *dismissed or penalized*"]; 87671 ["[a] contract or regular employee may be *dismissed*

or penalized if one or more of the grounds set forth in Section 87732 are present"]; 87672 ["[i]f a governing board decides it intends to *dismiss or penalize* a contract or regular employee"]; 87675 ["[t]he arbitrator shall determine whether there is cause to *dismiss or penalize* the employee"]; 87680 ["no decision relating to the *dismissal or suspension of any employee* shall be made based on charges or evidence of any nature relating to matters occurring more than four years prior to the filing of the notice"] [emphasis supplied].) Because "penalties" refers only to suspensions up to one year, Article 4 does not cover lesser types of discipline.

Likewise, the provisions of Article 6 apply only to dismissals. (See Ed. Code, §§ 87732 ["[n]o regular employee or academic employee shall be *dismissed* except for one or more of the following causes"]; 87734 ["'[u]nprofessional conduct' and 'unsatisfactory performance' . . . refers only to, the unprofessional conduct and unsatisfactory performance particularly specified as a *cause for dismissal* in Section 87732"] [emphasis supplied].) The Education Code sections that the District cites are therefore inapposite to discipline other than dismissal or suspensions up to one year.[10]

[10] The District also relies on Member Porter's dissent in *Rancho Santiago Community College District* (1986) PERB Decision No. 602, for the assertion that "provisions of EERA cannot and do not invalidate or supersede Education Code sections dealing with the discipline and/or dismissal of teachers for unprofessional conduct, such as sections 87732(a) and 87734." (*Id*. at p. 36.) However, dissenting opinions are not considered precedential Board decisions. (See PERB Regs. 32320, subd. (c) ["all decisions and orders issued by the Board itself are precedential"] & 32030 ["'Board itself' means only the five-member Public Employment Relations Board, or members thereof authorized by law to act on behalf of the Board"]; *People v. Lopez* (2012) 55 Cal.4th 569, 585 [dissenting opinions are not binding precedent].) Further, Education Code sections 87732 and 87734 address only dismissals, not lesser forms of discipline.

More generally, the California Supreme Court in *San Mateo* rejected the argument that Education Code provisions "occupy the field." (*San Mateo*, *supra*, 33 Cal.3d at p. 866.) Accordingly, unless a bargaining proposal regarding discipline of community college faculty would replace, set aside, or annul a specific Education Code provision, there is no doubt that such a proposal is bargainable, since it falls within the scope of representation. (*Contra Costa*, *supra*, PERB Decision No. 2652, p. 9; *Rio Hondo Community College District* (2013) PERB Decision No. 2313, p. 15.) The District attempts to distinguish *Contra Costa*, *supra*, PERB Decision No. 2652, because that decision involved whether a union was entitled to receive information on behalf of a faculty employee in an extra-contractual forum. But the District ignores the decision's relevance. *Contra Costa* places discipline squarely within the scope of representation and holds that information pertaining to discipline is presumptively relevant even when the parties are not in bargaining and the union intends to use the information to represent the employee in an extra-contractual forum. (*Id*. at pp. 8-9.)

Thus, while *Contra Costa* does not directly control the outcome here, it reinforces other precedent in making clear that Section 13.1, a comprehensive scheme defining discipline and outlining standards for just cause discipline for full-time faculty, is negotiable unless it replaces, sets aside, or annuls one or more specific Education Code provisions. Education Code sections 87660 et seq. set forth procedures and grounds for dismissals and penalties, i.e., suspensions of up to one year, but contain no provisions for lesser forms of discipline for full-time community college faculty. Because Section 13.1 excludes dismissals and suspensions from its provisions and

procedures, we cannot identify any part of the Education Code that Section 13.1 would replace, set aside, or annul.

In reaching this conclusion, we reject the District's argument that Education Code section 87734 creates a "chastisement" and "corrective action" that falls short of dismissal or suspension. Section 87734 states:

> "The governing board of any community college district shall not act upon any charges of unprofessional conduct or unsatisfactory performance unless during the preceding term or half college year prior to the date of the filing of the charge, and at least 90 days prior to the date of the filing, the board or its authorized representative has given the employee against whom the charge is filed, written notice of the unprofessional conduct or unsatisfactory performance, specifying the nature thereof with specific instances of behavior and with particularity as to furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge . . . 'Unprofessional conduct' and 'unsatisfactory performance,' as used in this section, means, and refers only to, the unprofessional conduct and unsatisfactory performance particularly specified as a cause for dismissal in Section 87732 and does not include any other cause for dismissal specified in Section 87732."

This section delineates the procedures for acting upon dismissal charges tied specifically to an employee's unprofessional conduct or unsatisfactory performance, beginning with the requirement that the employer give the affected employee written notice of the unprofessional conduct or unsatisfactory performance at least 90 days before initiating dismissal procedures. Contrary to the District's assertion, the written notice of unprofessional conduct or unsatisfactory performance is not a discrete disciplinary action but a requisite procedural step for a dismissal based on such grounds.

We likewise find no merit to the District's assertion that Education Code sections 87675 and 87680 provide a statute of limitations for discipline less than suspension or dismissal. Section 87675 prescribes how an arbitration must be conducted following an employee's demand for a hearing. It provides, in relevant part:

> "No testimony shall be given or evidence introduced relating to matters that occurred more than four years prior to the date of the filing of the notice. Evidence of records regularly kept by the governing board concerning the employee may be introduced, but no decision relating to the dismissal or suspension of any employee shall be made based on charges or evidence of any nature relating to matters occurring more than four years prior to the filing of the notice."

As is clear from the plain terms of the statute, the four-year timeframe pertains only to charges or evidence underlying a dismissal or suspension; the timeframe is not applicable to lesser types of discipline. This is also true of Education Code section 87680, the second half of which uses the exact same language as section 87675. Accordingly, we find that the standards and procedures for lesser discipline in Section 13.1, as applied to full-time faculty, do not replace, set aside, or annul provisions of the Education Code. Section 13.1 therefore is within the scope of representation as it applies to full-time faculty.

B. Assignment and training as forms of discipline

Section 13.1.1 of the Federation's proposal defines "adverse action" to include "requirements related to any punishment, chastisement, or corrective action; directives related to training; or involuntary reassignment or loss of assignment." The ALJ found that, while "assignment of work is generally a management right," reassignment, assignment loss, and mandatory training are bargainable when employed as a form of

discipline. After finding that the Federation's proposal did not replace, set aside, or annul provisions of the Education Code, the ALJ concluded that Section 13.1.1 was within the scope of representation. The District agrees with the ALJ that the assignment of work is a management right, but challenges the finding that use of a reassignment, assignment loss, or training directive as discipline is within the scope of representation.

Although we agree with the ALJ's conclusion as to the ultimate negotiability of provisions regarding reassignment, assignment loss, and mandatory training as forms of discipline, we find that the ALJ misstated the law with respect to the negotiability of assignments. There are, in fact, several means of establishing that an employer must bargain regarding changes to represented employees' job duties, absent a waiver. Pertinent here, an employer must normally bargain a change to represented employees' job duties if it is a material change, meaning that the employer is assigning work that was not "reasonably comprehended within the employee's existing job duties." (*Oakland Unified School District* (2003) PERB Decision No. 1544, pp. 5-8 & adopting warning letter at p. 2.) The material change standard also covers decisions to transfer a job duty between employees within the same bargaining unit. (*Desert Sands Unified School District* (2001) PERB Decision No. 1468, pp. 3-4.) Furthermore, an employer also must bargain over a material change in represented employees' workload or performance standards. (*County of Kern* (2018) PERB Decision No. 2615-M, p. 10 & adopting proposed decision at p. 11.)

We find that both the involuntary reassignment and loss of assignment contemplated by Section 13.1.1's definition of "adverse action" constitute material

changes because the District would either assign work not contemplated within an employee's existing job duties, i.e., different classes, or reduce or eliminate an employee's workload. These issues therefore would be subject to bargaining even if they were not punitive. To the extent the ALJ asserted that *Davis*, *supra*, PERB Decision No. 393, held that an employer need not bargain over work assignments, the ALJ failed to acknowledge that employers must bargain over duties or assignments impacting workload, performance standards, or preservation of bargaining unit work, as well as over revised duties or assignments that are not "reasonably understood" to be among the employees' existing duties or assignments. (*Id*. at pp. 25-26 & fn. 11.) *Davis*' thrust was thus more muted than the ALJ's characterization suggested, and we disavow any categorical rule that work assignments are outside the scope of representation.

Accordingly, Section 13.1.1 of the Federation's proposal is negotiable unless it replaces, sets aside, or annuls provisions of the Education Code. The District argues that, by defining an "adverse action" to include reassignment or loss of assignment, Section 13.1.1 would replace or set aside Education Code section 72400, which states: "The governing board of each community college district shall fix and prescribe the duties to be performed by all persons in community college service in the district." The District interprets this section as an unfettered grant of authority to community college governing boards, and therefore as impermissibly at odds with Section 13.1.1. On examination, we cannot agree with the District.

This argument directly contravenes settled precedent. Indeed, as noted above, the Supreme Court specifically cited reassignments as an example of a subject that is

subject to bargaining even though it is also regulated by the Education Code. (*San Mateo*, *supra*, 33 Cal.3d at p. 865.) Education Code section 72400 is thus a quintessential example of an Education Code provision that grants a governing board discretion to determine employment terms or conditions, without specifying the terms that shall apply, and therefore does not extinguish the employer's bargaining duty. (*Los Angeles Unified School District*, *supra*, PERB Decision No. 2518, pp. 34-35 & adopting proposed decision at pp. 23-25.) For these reasons, Section 13.1.1's provision regarding assignment and training as forms of discipline does not replace, set aside, or annul provisions of the Education Code, and is therefore within the scope of representation.

C. Misconduct investigations and provision of information

Section 13.2 of the Federation's proposal sets forth certain standards and procedures regarding misconduct investigations including a presumption of innocence, a requirement that misconduct investigations be based upon credible information, acknowledgment of the right to a union representative at investigatory meetings, and a 90-day timeline for investigations. Section 13.2.2 defines a misconduct investigation as "a District-initiated investigation of a unit member into allegations that the unit member has violated District policy and/or law, based on information received from a formal or informal complaint made by an identifiable author; a report of misconduct; manager observations; or other credible sources of information." Section 13.2 also

requires that the District provide the Federation and accused faculty member a copy of any investigatory report or findings and certain other information.

As the ALJ found, misconduct investigations and information to be disclosed to the Federation and accused faculty member during such investigations are within the scope of representation. (*Contra Costa*, *supra*, PERB Decision No. 2652, p. 26.)[11] There is no specific language in the Education Code that addresses these subjects, despite the District's assertion that Education Code sections 70901, 70902, subdivision (b)(4), and 76232 are controlling. Sections 70901 and 70902, subdivision (b)(4) are broad statutes setting forth the authority and duties of the Board of Governors of California Community Colleges. The District does not refer to any specific aspect of these sections that addresses faculty misconduct investigations or the provision of information during such investigations.[12]

In a similar vein, Education Code section 76232 concerns *student* requests to correct or remove inaccurate or unsubstantiated information from their records and the corresponding process for doing so. Insofar as the statute details an investigation

[11] In *Contra Costa*, *supra*, PERB Decision No. 2652, Member Shiners disagreed that an exclusive representative has a statutory right to request and receive information from the employer solely for the purpose of representing an employee in an extra-contractual disciplinary appeal. (*Id*. at pp. 34-36 (conc. opn. of Shiners, M.).) He agrees, however, that a bargaining proposal regarding information to be provided to an employee who is the subject of a misconduct investigation and to the subject employee's exclusive representative is within the scope of representation because those subjects are reasonably related to disciplinary procedures.

[12] The District argues that disciplinary investigations are within the scope of representation, but not the scope of bargaining, an exception we have already rejected *ante*.

process, the subjects of that process are students and not faculty members. Thus, this section does not address faculty misconduct investigations or information provided to the Federation and accused faculty member during such investigations.

Section 13.2, relating to misconduct investigations, does not replace, set aside, or annul provisions of the Education Code, and is thus within the scope of representation.

D. Administrative leave

Section 13.2.5 of the Federation's proposal provides the terms under which the District could place a faculty member on paid administrative leave, narrows the types of allegations that could trigger such leave, requires the District to provide written notice, and limits leave to 90 days. The District argues that Education Code section 87623 vests it with unfettered authority regarding administrative leave and therefore it had no duty to bargain over Section 13.2.5. We are not persuaded.

EERA expressly lists leave as a subject within the scope of representation. (§ 3543.2, subd. (a)(1).) Section 13.2.5 is thus within the scope of representation unless it replaces, sets aside, or annuls provisions of the Education Code. Education Code section 87623 requires an employer to give notice to an academic employee subject to accusations of misconduct at least two days before the employee is placed on involuntary paid administrative leave, unless there is a serious risk of physical danger or other necessity which excuses such notice. (Ed. Code, § 87623, subds. (a), (b).) The notice must advise the employee of the general nature of the misconduct allegations that form the basis of the decision to place the employee on involuntary paid administrative leave. (*Id*., subd. (a).) Section 87623 also limits involuntary paid

administrative leave to 90 days, after which the employer must either initiate discipline proceedings against, or reinstate, the employee. (*Id.*, subd. (c)(1).) The final sentence of section 87623 states: "This section does not supersede the rights of labor organizations or employees pursuant to the Educational Employment Relations Act established in Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code."

We find that no part of Section 13.2.5, involving paid administrative leave, replaces, sets aside, or annuls Education Code section 87623. Section 13.2.5 places no time limits on when the notice of paid administrative leave must be given to the affected employee; it proposes only that notice be given. And by requiring that the notice contain the basis or bases on which the employee is being placed on paid leave of absence, Section 13.2.5 is consistent with Education Code section 87623, while also strengthening it by confirming a right to representation during an investigatory interview. (See *San Mateo*, *supra*, 33 Cal.3d at p. 866.) It is long-established that including EERA-established rights in a CBA does not replace or set aside EERA provisions, but rather "augments and reinforces them." (*Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375, p. 18.) The same is true of the 90-day requirement. Since Section 13.2.5 proposes the same 90-day timeline as Education Code section 86732, there is nothing to replace or set aside. Finally, Education Code section 86732, subdivision (e) makes it clear that the Legislature did not intend to remove the issue of paid administrative leave from the scope of representation. For these reasons, we find that the proposal is within the scope of representation.

III. Bad Faith Bargaining

Since we have found that the Federation's proposals are within the scope of representation, we next address whether the District satisfied its duty to bargain in good faith with the Federation. In determining whether a party has violated its duty to meet and negotiate in good faith, PERB uses a "per se" test or a "totality of conduct" analysis, depending on the specific conduct involved. (*City of Arcadia* (2019) PERB Decision No. 2648-M, p. 34.)

A. Per Se Violation

Per se violations generally involve conduct that violates statutory rights or procedural bargaining norms. (*City of Arcadia*, *supra*, PERB Decision No. 2648-M, pp. 34-35.) Unlike the totality of conduct analysis, a per se violation requires no inquiry into the respondent's subjective intent or finding of bad faith. (*Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M, p. 15 (*Fresno*).)

As the ALJ correctly concluded, the District's outright refusal to negotiate over lesser discipline of full-time faculty and paid administrative leave constituted a per se violation of its duty to bargain. (*City of Glendale* (2020) PERB Decision No. 2694-M, pp. 67-70; *Fresno*, *supra*, PERB Decision No. 2418-M, p. 15.) While finding this violation alone could end our inquiry as to the bad faith bargaining allegation, we also evaluate the District's conduct and find a violation under the totality of conduct test.

B. Totality of Conduct

The totality of conduct test applies to allegations of bad faith bargaining conduct that do not constitute a per se refusal to bargain. (*City of Arcadia*, *supra*, PERB

Decision No. 2648-M, p. 35.)[13] Under the totality of conduct test, a party is permitted to maintain a "hard bargaining" position on one or more issues, if the entire course of its bargaining conduct, both at the table and away from it, manifests good faith efforts toward reaching an overall agreement. (*City of San Ramon*, *supra*, PERB Decision No. 2571-M, pp. 7-8.) The ultimate question is whether the respondent's conduct, when viewed in its totality, was sufficiently egregious to frustrate negotiations. (*Id*. at p. 7.)[14]

A single indicator of bad faith, if egregious, can be a sufficient basis for finding that a party has failed to bargain in good faith. (*County of Ventura*, *supra*, PERB Decision No. 2758-M, p. 33, citing *City of San Jose* (2013) PERB Decision No. 2341-M, pp. 18-19 [referring to "the potentially detrimental effect that one indicator, by itself, may have on the course of negotiations or the parties' bargaining relationship"].) However, here the District's conduct demonstrates multiple bad faith indicia, including: failing to respond to proposals in a timely manner (*State of California (Department of Personnel Administration)* (1989) PERB Decision No. 739-S, pp. 4-5); failing to prepare adequately for negotiations and failing to take one's bargaining obligation

[13] The phrases "totality of circumstances" and "totality of conduct" are interchangeable, and either phrase describes the operative test. (*County of Sacramento*, *supra*, PERB Decision No. 2745-M, p. 9, fn. 8.) While PERB frequently refers to bad faith bargaining under this test as "surface bargaining," that label does not limit the scope of the relevant factors to only those involving superficial bargaining conduct. (*Ibid*.)

[14] PERB also considers whether the charging party engaged in bad faith conduct to a degree that mitigates the respondent's bad faith conduct, if any. (*Fresno*, *supra*, PERB Decision No. 2418-M, p. 52.)

seriously (*Children of Promise Preparatory Academy* (2018) PERB Decision No. 2558, p. 26; *Oakland Unified School District* (1983) PERB Decision No. 326, pp. 33-34 (*Oakland*)); failing to explain a bargaining position in sufficient detail or to provide requested information supporting a bargaining position, without an adequate reason for such failure (*City of Davis* (2018) PERB Decision No. 2582-M, pp. 19-20; *City of San Jose*, *supra*, PERB Decision No. 2341-M, p. 42); incorrectly labeling the other party's proposal as non-mandatory or failing to seek clarification of a proposal to determine if it relates to a mandatory subject (*City of Palo Alto*, *supra*, PERB Decision No. 2388a-M, p. 33; *City of Selma* (2014) PERB Decision No. 2380-M, p. 16); and making predictably unacceptable proposals (*Oakland*, *supra*, PERB Decision No. 326, p. 38). Taken in their totality, these indicia demonstrate the District's lack of intent to come to an agreement about any of the Federation's just cause proposals.[15] We explain.

Despite committing in advance to pass Article 13 counterproposals to the Federation at the January 12, 2018, and February 23, 2018 bargaining sessions, the District did not deliver its first counterproposal to the Federation until March 2, 2018. In contrast to the Federation's proposal which addressed multiple areas, the District's initial counterproposal contained language relating only to misconduct investigations, and only to the extent that the District agreed to "follow applicable legal standards,

[15] Conduct sufficient to amount to one or more separate, contemporaneous unfair practices also indicates bad faith under the totality test. (*City of San Jose*, *supra*, PERB Decision No. 2341-M, pp. 21 & 43.) This includes both violations away from the bargaining table and acts that could amount to a per se violation of the duty to bargain. (*City of Davis*, *supra*, PERB Decision No. 2582-M, pp. 9, 11-13.) The District's per se violation is thus another indicia of bad faith under the totality test.

board policies, and administrative procedures when investigating complaints." It did not respond to the Federation's proposals regarding discipline short of suspension and dismissal for faculty, supplying information to the Federation and affected employee during misconduct investigations, and paid administrative leave. While the District's delayed and deficient counterproposal constitutes an indicator of bad faith in and of itself (*County of Sacramento*, *supra*, PERB Decision No. 2745-M, p. 25), we note that the District did not use the intervening three-month period to engage with the Federation to clarify, better understand, or ask questions about the Federation's proposal such that it could sufficiently prepare a substantive response. Quite the opposite: at the January 19, 2018 session, Flores-Church stated that the District was "not interested" in having the Article 13 proposal included in the contract but that it would be willing to discuss the matter "outside" negotiations, an offer that did not satisfy the District's good faith bargaining obligation. (*Mt. Diablo Unified School District* (1983) PERB Decision No. 373, p. 24.) This conduct evinced a failure on the District's part to respond to the Federation's proposal in a timely manner, as well as a failure to adequately prepare for negotiations and to take its bargaining obligation seriously. It also demonstrated an unlawful insistence on piecemeal negotiations. (*City of San Jose*, *supra*, PERB Decision No. 2341-M, pp. 19-20, 27, 36-39.)

Likewise, the District's unwillingness to engage the Federation in legitimate discussion of the Article 13 proposal was another indicator that it did not treat its bargaining obligation with requisite care and seriousness. None of the parties' discussions of the Federation's proposal exceeded 10 minutes, and cumulatively, the discussions amounted to no more than 40 minutes.

The District's refusal to explain or answer questions about its first counterproposal on March 2, 2018, in spite of the Federation's entreaties that it do so, also demonstrated bad faith. After passing its incomplete counterproposal and legal memorandum, Flores-Church repeatedly shut down questions from the Federation and instead directed the Federation's team to Erickson's legal memo. The District failed to explain the substance of its bargaining position in sufficient detail and failed to provide an adequate reason for doing so.

From the outset and throughout negotiations, the District maintained its position regarding negotiability of the Article 13 proposal, i.e., that the Federation's discipline, information disclosure, and paid leave proposals were not bargainable. By incorrectly labeling the just cause proposal as non-mandatory, and sticking with that position, the District failed to negotiate in good faith.

As the ALJ noted, an employer may engage in hard bargaining if its inflexible position is "fairly maintained and rationally supported." (*City of San Ramon*, *supra*, PERB Decision No. 2571, p. 8.) What the District did here was beyond the bounds of permissible hard bargaining, given its rigid stance on negotiability that effectively led to an early impasse on the Article 13 proposal, as well as its lack of substantive counterproposals and engagement at the bargaining table. We thus find the totality of the District's conduct supported the ALJ's conclusion that the District engaged in bad faith bargaining. The ALJ also correctly found that the District's conduct derivatively interfered with the right of bargaining unit employees to be represented by the Federation, as well as with the Federation's right to represent bargaining unit employees.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, the Public Employment Relations Board (PERB or Board) has found that the Cerritos Community College District violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq., when it failed to meet and negotiate in good faith with the Cerritos Community College Federation, American Federation of Teachers Local 6215 (Federation) over proposals on: (1) standards and procedures regarding discipline short of suspension or dismissal for full-time faculty; (2) the use of reassignment, assignment loss, and mandatory training as discipline for full-time faculty; (3) misconduct investigations and information the District will disclose to the Federation and accused faculty member during such investigations; and (4) paid administrative leave. By this conduct, the District also interfered with the rights of unit employees to participate in the activities of an employee organization of their own choosing, and denied the Federation its right to represent unit employees in their employment relations with the District.

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

A. CEASE AND DESIST FROM:

1. Failing to meet and negotiate in good faith with the Federation regarding matters within the scope of representation.

2. Interfering with the rights of bargaining unit employees to be represented by the Federation.

3. Denying the Federation its right to represent bargaining unit employees.

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

1. Upon request by the Federation, meet and negotiate in good faith over: (1) standards and procedures regarding discipline short of suspension or dismissal for full-time faculty; (2) the use of reassignment, assignment loss, and mandatory training as discipline for full-time faculty; (3) misconduct investigations, including information the District will disclose to the Federation and accused faculty member during such investigations; and (4) paid administrative leave.

2. Within 10 workdays after this decision is no longer subject to appeal, post at all District locations where notices to employees in the Federation's bargaining unit are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays.[16] In addition to physical posting of paper notices,

[16] In light of the ongoing COVID-19 pandemic, the District shall notify PERB's Office of the General Counsel (OGC) in writing if, due to an extraordinary circumstance such as an emergency declaration or shelter-in-place order, a majority of employees at one or more work locations are not physically reporting to their work location as of the time the physical posting would otherwise commence. If the District so notifies OGC, or if the Federation requests in writing that OGC alter or extend the posting period, require additional notice methods, or otherwise adjust the manner in which employees receive notice, OGC shall investigate and solicit input from all relevant parties. OGC shall provide amended instructions to the extent appropriate to ensure adequate publication of the Notice, such as directing the District to commence posting within 10 workdays after a majority of employees have resumed physically

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

3. Within 30 workdays after this decision is no longer subject to appeal, notify the PERB General Counsel or designee in writing of the steps taken to comply with the terms of this Order. Continue to report in writing to the General Counsel, or designee, periodically thereafter as directed. All reports regarding compliance with this Order shall be served concurrently on the Federation.

Members Shiners and Krantz joined in this Decision.

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reporting on a regular basis; directing the District to mail the Notice to all employees who are not regularly reporting to any work location due to the extraordinary circumstance, including those who are on a short term or indefinite furlough, are on layoff subject to recall, or are working from home; or directing the District to mail the Notice to those employees with whom it does not customarily communicate through electronic means.

APPENDIX

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

After a hearing in Unfair Practice Case No. LA-CE-6378-E, *Cerritos College Faculty Federation, American Federation of Teachers Local 6215 v. Cerritos Community College District*, in which all parties had the right to participate, the Public Employment Relations Board has found that the Cerritos Community College District violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq., when it failed to meet and negotiate in good faith with the Cerritos Community College Federation, American Federation of Teachers Local 6215 (Federation) regarding certain proposals. By this conduct, the District also interfered with the rights of unit employees to participate in the activities of an employee organization of their own choosing, and denied the Federation its right to represent unit employees in their employment relations with the District.

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

A. CEASE AND DESIST FROM:

1. Failing to meet and negotiate in good faith with the Federation regarding matters within the scope of representation.
2. Interfering with the rights of bargaining unit employees to be represented by the Federation.
3. Denying the Federation its right to represent bargaining unit employees.

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

Upon request by the Federation, meet and negotiate in good faith over proposals on: (1) standards and procedures regarding discipline short of suspension or dismissal for full-time faculty; (2) the use of reassignment, assignment loss, and mandatory training as discipline for full-time faculty; (3) misconduct investigations, including information the District will disclose to the Federation and accused faculty member during such investigations; and (4) paid administrative leave.

Dated: _____

CERRITOS COMMUNITY COLLEGE 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.