



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

OAKLAND EDUCATION ASSOCIATION,

Charging Party,

v.

OAKLAND UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. SF-CE-3481-E

PERB Decision No. 2875

October 16, 2023

Appearances: California Teachers Association by Mandy Hu, Staff Attorney, for Oakland Education Association; Fagen, Friedman & Fulfrost by Roy A. Combs and Mary J. Breffle, Attorneys, for Oakland Unified School District.

Before Krantz, Paulson, and Nazarian, Members.

**DECISION<sup>1</sup>**

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB) on exceptions by Oakland Unified School District to a proposed decision of an administrative law judge (ALJ). The complaint involves two primary claims that the District violated its bargaining obligations under the Educational Employment Relations Act (EERA).<sup>2</sup> The first claim relates to a District policy prohibiting it from implementing a school closure, merger, or consolidation without a planning period

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<sup>1</sup> PERB Regulation 32320, subdivision (d) authorizes us to designate a decision, or any part thereof, as non-precedential. (PERB Regulations are codified at Cal. Code Regs., tit. 8, § 31001 et seq.) Applying the criteria the regulation enumerates, we designate as non-precedential Part IV of the Discussion, the remedial order, and the appendix. All other sections are precedential.

<sup>2</sup> EERA is codified at Government Code section 3540 et seq. All undesignated statutory references are to the Government Code.

lasting at least nine months following a vote to approve the action, unless stakeholders at the impacted school(s) propose a faster timeline. Specifically, the complaint alleges that the District changed this policy in January 2022 without affording Oakland Education Association (OEA) adequate notice and opportunity to bargain in good faith over the decision and/or the effects thereof. The second claim, which relates to a February 2022 District decision to merge or close certain schools (including partial closure by truncating certain grades), alleges that the District implemented the decision without affording OEA adequate notice and opportunity to engage in good faith effects negotiations.<sup>3</sup>

Although the parties and the ALJ often blended their discussion of the complaint's two primary claims, we read the proposed decision as dismissing the first claim while sustaining the second. The ALJ's proposed remedy would direct the District, among other steps, to comply with its bargaining duties and provide make-whole relief to the extent OEA establishes compensable harms in compliance proceedings. In its exceptions, the District admits it had an obligation to bargain over the effects of closure decisions, but it argues that the ALJ erred by: (1) finding OEA established a prima facie case that the District violated that duty; (2) not dismissing the complaint based on waiver or laches; and (3) issuing a make-whole remedy even absent any evidence of compensable harm. OEA filed no exceptions and urges several rationales supporting the ALJ's overall conclusions and remedy.

Having reviewed the record de novo, we depart from the proposed decision by partially sustaining the complaint's first claim. While we affirm the ALJ's central holding

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<sup>3</sup> Except where context dictates otherwise, we treat closures as a category that also includes, mergers, consolidations, and grade truncations.

that a decision to close schools is a non-mandatory subject of bargaining, we hold that an employer must bargain over the amount of notice employees receive, either in effects and implementation bargaining over a particular school closure decision or as a mandatory subject if the issue arises as a proposed new or changed policy of general application.<sup>4</sup>

### FACTUAL AND PROCEDURAL BACKGROUND

OEA represents the District's certificated employees. While the conduct OEA alleges to be unlawful did not commence until the winter of the 2021-2022 school year, the District adopted its nine-months' notice policy on school closures following post-impasse negotiations in 2019. We therefore begin by summarizing those negotiations.

#### I. The Parties' 2017-2019 Contract Negotiations

On June 30, 2017, the parties' 2014-2017 collective bargaining agreement (CBA) expired. The CBA included Article 12.9, entitled "Transfer/Consolidation Due to School Closure/Replacement," which provided employees with certain rights in the event of a school closure. Furthermore, Article 12.8 provided certain employee rights in consolidations, which can result from an enrollment decline or from a decision to consolidate schools, among other causes.

In June 2018, the parties reached an initial impasse in their negotiations for a successor to the 2014-2017 CBA. In fall 2018, the parties participated in post-impasse

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<sup>4</sup> "Non-mandatory" describes subjects about which parties need not bargain, although they may choose to do so. (*Cerritos Community College District* (2022) PERB Decision No. 2819, p. 19 (*Cerritos*)). These topics can equally be referred to as being "permissive," or as falling outside the "scope of bargaining" or "scope of representation." (*Ibid.*) Although such topics are sometimes labeled "non-negotiable," that is imprecise because it could also mean illegal bargaining subjects.

mediation, but they still could not reach an agreement. On January 31 and February 1, 2019, the parties participated in post-impasse factfinding. On February 15, 2019, the factfinding panel issued a report.

Meanwhile, in December 2018, the District publicly stated that it would have to consider school closures to save money to fund employee wage increases. OEA challenged that contention by e-mail dated December 21, 2018, asserting that closing schools is bad public policy and causes lost revenue from lower enrollment, which would offset any savings. In the same e-mail, OEA sought to bargain over what it called “the District’s intention to close and/or consolidate public schools and exacerbate [its] financial duress.”

In January 2019, the District’s Board of Education voted to close one District school after the 2018-2019 school year. On January 28, 2019, OEA reiterated its request to bargain over school closure decisions. The District responded by asserting that it had no duty to bargain over closure decisions but was willing to bargain over the effects thereof. While the District offered February 5 or 6 as potential bargaining dates, the parties were at the time working with the factfinding panel on a report, and accordingly negotiations did not occur until later that month, during a strike OEA held from February 21 through March 1, 2019. During the strike, the parties held bargaining sessions as well as meetings that included elected officials and other community stakeholders. Both the bargaining sessions and the stakeholder meetings contributed to the parties’ efforts to resolve the strike and reach a successor CBA.

On February 26, 2019, OEA proposed a moratorium on school closures. In response, the District reiterated that it would not negotiate over school closure decisions. Board of Education President Aimee Eng, who was not a member of the

District's bargaining team and had no formal bargaining authority, attended multiple meetings where she helped develop a proposed framework on procedures for school closures. The District's bargaining team, however, rejected including any such proposal in the CBA. Eng was present when this was conveyed, and she committed to sponsor a Board of Education resolution establishing procedures the District would follow before deciding to close a school. Eng worked with OEA bargaining team members to draft a resolution for Eng to bring before the Board of Education. Eng told OEA that because she was merely one Board of Education member, there were limits to what she could promise. Eng did not purport to represent any other Board of Education members when she engaged in discussions with OEA. At the District's request, OEA confirmed that the CBA would not include new procedures on school closure decisions.

On March 1, 2019, the parties reached a tentative agreement for a successor CBA, and on March 3, 2019, OEA members ratified the agreement. The parties ultimately finalized a new CBA effective from July 1, 2018, through June 30, 2021. The new CBA did not change Articles 12.8 and 12.9, though it added provisions elsewhere to assist teachers forced to move to a new site or within the same site.

On March 20, 2019, the Board of Education approved the resolution Eng proposed. Specifically, it passed a resolution entitled "Improving Community Engagement for Proposed School Changes" (Resolution 1819-0178), which included the following new procedures related to school closures:

"BE IT FURTHER RESOLVED, that no closure, merger, or consolidation would occur without inclusion of a planning period (no less than a school year or 9 months) between the vote to approve the action and its implementation, unless a recommendation has been brought forward by a

team representing multiple stakeholders from the impacted school communities to accelerate the implementation; and

“BE IT FURTHER RESOLVED, that prior to the Board’s final decision, staff shall present to the Board a preliminary financial analysis of foreseeable impacts of the proposed changes on the district’s budget, including student and staff projected attrition or growth, as well as projected costs associated with services, staffing and any facility improvement costs deemed necessary to implement the proposed changes; and

[¶] . . . [¶]

“BE IT FURTHER RESOLVED, to ensure the successful transition of students who are displaced by school closures, students will have access to priority enrollment, individual student and family ‘case management’ will be provided to support the transition to welcoming schools, and student progress will be monitored.”

In September 2019, the Board of Education voted to merge four schools into two after the 2019-2020 school year. In carrying out these mergers, the District complied with the nine-month requirement set forth in Resolution 1819-0178.

## II. The Parties’ Negotiations to Extend the 2018-2021 CBA

The parties negotiated over a potential extension to their 2018-2021 CBA, but they failed to reach agreement before June 30, 2021, at which point the CBA expired. In November 2021, the parties reached a tentative agreement to modify and extend the CBA until October 31, 2022. While OEA promptly ratified this tentative agreement in November 2021, the Board of Education did not ratify it until March 23, 2022.

## III. The District Decisions Giving Rise to This Dispute

On December 15, 2021, two Board of Education members introduced a proposed resolution directing the District’s Superintendent “to present the Board at the

soonest possible opportunity (e.g., a Special Board meeting) a list of school consolidations sufficient to achieve at least an estimated \$8 million in ongoing savings.” On January 12, 2022, the Board of Education adopted a final version of this resolution.<sup>5</sup> Unlike the earlier draft, the final resolution explicitly waived the nine-month requirement and other provisions of Resolution 1819-0178. Specifically, the final version directed the Superintendent to present the Board of Education with a list of school consolidations that could be reasonably implemented by Fall 2022 and/or Fall 2023, “notwithstanding” the requirements of Resolution No. 1819-0178.

On January 31, the Superintendent presented the Board of Education with a proposed resolution listing schools slated for closure, merger, or grade truncation following different school years, including six schools to be impacted at the close of the 2021-2022 school year (i.e., June 2022), timing that was possible only because the District waived the nine-month requirement in Resolution 1819-0178.

On February 3, OEA sent the District a letter seeking to bargain over the proposed school closures and the District’s decision to waive Resolution 1819-0178.

On February 8, the District responded as follows:

“[The District] disagrees with OEA’s position that the decision to close schools is subject to negotiations with OEA. Moreover, the impact of school closures has been contemplated in the negotiation of successor contract agreements and therefore the impact of school closures on OEA members is addressed in our collective bargaining agreement.”

About an hour after the District’s response, OEA e-mailed the District that it was “clarifying and amending” its February 3 letter by adding a request to bargain over “the

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<sup>5</sup> All further dates refer to 2022 unless otherwise noted.

impacts and effects of the decision to close or consolidate schools.” Approximately a half-hour later, the Board of Education held a meeting and voted to implement an amended list of school closures, consolidations, and grade truncations, including some scheduled to take effect in June, after the 2021-2022 school year.

Within days of the Board of Education’s vote on February 8, the District began implementing the closures scheduled for June, including by notifying impacted staff that they would be transferred and working with impacted families to choose new schools. For families, the District’s first communication was on February 9, when District Superintendent Kyla Johnson-Trammell notified the community of the upcoming closures. Two days later, on February 11, Johnson-Trammell sent families a further message, which “mapped out a timeline of next steps” and stated that the District’s goal was to notify families of new school placements for the next school year by March 10—“the same notification date as all other families who are applying through the enrollment process to new schools for next year.”

One of the schools slated for grade truncation after the 2021-2022 school year was La Escuelita; the Board of Education decided to truncate grades 6-8 while leaving the lower grades. On February 11, the principal at La Escuelita held a meeting with La Escuelita middle school teachers, to discuss how teachers “could help students and parents navigate the whole enrollment process.” Parents of students in the truncated grades at La Escuelita were given an “Opportunity Ticket” to allow their children to be transferred to schools of their choice. The teachers then “took on helping parents do [the enrollment process].” Specifically, a District teacher at La Escuelita, Jennifer Brouhard, helped students with the enrollment process. On February 18, the District’s



human resource department wrote to Brouhard about the recent truncation of La Escuelita middle grades, offering to help Brouhard find another job.

After OEA filed this charge on February 15, the District e-mailed OEA on February 28. The District's e-mail stated that the District viewed OEA's February 8 clarification as "substantially the same as the February 3, 2022 demand." The e-mail further stated that while the District continued to believe there were no bargainable effects of its decisions, OEA should specify which effects it sought to bargain, and the District would review OEA's response.<sup>6</sup>

PERB's Office of the General Counsel issued the complaint in this matter on March 4, and OEA filed a request for injunctive relief on March 22. We denied this request but expedited the matter at all levels. The ALJ held a formal hearing on May 20, August 9-10, and September 7. The parties submitted post-hearing briefs on November 11, and the ALJ issued the proposed decision on January 30, 2023.

### DISCUSSION

In resolving exceptions, we apply a de novo standard of review. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 5.) We have discretion to reverse a proposed decision or administrative determination even on issues as to which neither party appealed. (*State Employees Trades Council United (Ventura, et al.)* (2009) PERB Decision No. 2069-H, pp. 6-7; *Rio Hondo Community College District* (1979) PERB Decision No. 87, p. 3, fn. 3.) Here, though the parties focus mainly on the

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<sup>6</sup> The ALJ found that the parties' interactions after OEA filed this charge contributed to, or at least did not negate, the District's violations. While we find no cause to disturb those findings, there is no need to re-narrate the remainder of these events. As discussed *post*, the District had already violated EERA when OEA filed this charge, as by then it was too late for good faith negotiations over implementation and effects, including over alternatives and the amount of notice teachers would receive.

complaint's second claim, we exercise our discretion to also consider the first claim, involving the nine-month requirement in Resolution 1819-0178. We exercise our discretion in this manner because the two claims are integrally related, the nine-month requirement was a primary focus of OEA's efforts to bargain in 2022, and it lies at the center of this case. Furthermore, the proposed decision contained mistakes of law regarding the nine-month requirement, and the labor-management community would gain clarity from a precedential decision addressing it.

I. OEA's Prima Facie Case

If an employer wishes to change terms or conditions of employment for represented employees, it must provide the employees' union with adequate notice and opportunity to bargain before making its decision, and the employer must then bargain in good faith upon request. (*The Accelerated Schools* (2023) PERB Decision No. 2855, p. 13 (*Accelerated Schools*)). Even if the decision falls outside the scope of bargaining, the employer must provide adequate notice and opportunity to bargain in good faith over the implementation and effects of that decision, to the extent such implementation and effects are reasonably likely to impact represented employees. (*International Assn. of Fire Fighters, Local 188, AFL-CIO v. Public Employment Relations Bd.* (2011) 51 Cal.4th 259, 265 & 276 (*Richmond Fire Fighters*); *County of Santa Clara* (2013) PERB Decision No. 2321-M, pp. 8, 23-24 (*Santa Clara I*); *County of Santa Clara* (2019) PERB Decision No. 2680-M, p. 12 (*Santa Clara II*)).

For the sake of brevity, we use the word "effects" as shorthand for a broad category that comprises both the effects and implementation of a decision on a non-mandatory bargaining subject. (*Richmond Firefighters, supra*, 51 Cal.4th at pp. 265, 276; *City of Glendale* (2020) PERB Decision No. 2694-M, p. 54, fn. 12;

*Santa Clara II, supra*, PERB Decision No. 2680-M, p. 12; *City of Palo Alto* (2017) PERB Decision No. 2388a-M, p. 40; *Santa Clara I, supra*, PERB Decision No. 2321-M, p. 25, fn. 16; *Salinas Valley Memorial Healthcare System* (2012) PERB Decision No. 2298-M, pp. 6, 12, 14, 16-17, 20 & 22 (*Salinas*.) Negotiations over implementation typically include proposed alternatives. (*Accelerated Schools, supra*, PERB Decision No. 2855, p. 14, fn. 8; *Oxnard Union High School District* (2022) PERB Decision No. 2803, p. 52 (*Oxnard*); *County of Santa Clara* (2021) PERB Decision No. 2799-M, p. 27 (*Santa Clara III*.) For instance, even though an employer has no duty to bargain over a decision to lay off employees, the California Supreme Court has noted the scope of required effects bargaining includes “the timing of layoffs and the number and identity of the employees affected.” (*Richmond Firefighters, supra*, 51 Cal.4th at pp. 265, 276.) Thus, one purpose of effects bargaining is to permit the exclusive representative an opportunity to persuade the employer to consider alternatives that may diminish the impact of the decision on employees. (*Accelerated Schools, supra*, p. 14, fn. 8; *Oxnard, supra*, p. 52; *Santa Clara III, supra*, p. 27.)

Effects bargaining violations are equally harmful as decision bargaining violations, as each disrupts and destabilizes employer-employee relations by creating an imbalance in the power between management and employee organizations. (*Accelerated Schools, supra*, PERB Decision No. 2855, p. 17; *Santa Clara I, supra*, PERB Decision No. 2321-M, pp. 23-24.) In other words, the effects bargaining obligation is not an inferior duty. (*Accelerated Schools, supra*, p. 17; *Santa Clara I, supra*, p. 24; *Santa Clara II, supra*, PERB Decision No. 2680-M, p. 13.)

A. The Nature and Scope of the District's Bargaining Duty

The ALJ, citing *Bellflower Unified School District* (2014) PERB Decision No. 2385, p. 6, correctly explained that an employer need not bargain over school closure decisions but normally must bargain over the effects such a decision has on represented employees. However, further analysis is required regarding the District's change to the nine-month requirement in Resolution 1819-0178.<sup>7</sup>

The proposed decision correctly stated that a union can prove an employer changed or deviated from the status quo by showing: (1) deviation from a written agreement or written policy; (2) change in established past practice; or (3) a newly created policy or application or enforcement of existing policy in a new way. (*Oxnard, supra*, PERB Decision No. 2803, p. 31.) The proposed decision also correctly found that Resolution 1819-0178 was not a bilateral agreement. Although OEA's interactions with the District on this issue bled into collective bargaining, the parties reached a final settlement of their contract negotiations with no more than a promise that the Board of Education would consider the policy that the parties had worked on jointly and which eventually became Resolution 1819-0178. Thus, even though the parties negotiated over the resolution's language, its eventual passage was not promised when the parties reached a contract settlement, and its eventual passage therefore does not share critical characteristics of a bilateral agreement.

However, in evaluating whether OEA established a change in the status quo, the ALJ mistakenly relied on a standard for unwritten past practices. Citing *Pittsburg*

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<sup>7</sup> Although Resolution 1819-0178 provides an exception to the nine-month requirement if stakeholders at the impacted school(s) propose a faster timeline, the District does not claim that exception applied here.

*Unified School District* (2022) PERB Decision No. 2833, p. 12 (*Pittsburg*), the ALJ stated that a past practice can only establish the status quo if it was “regular and consistent” or “historic and accepted,” and the ALJ therefore found that Resolution 1819-0178 was not in effect long enough to establish a status quo. This was an error not only because the resolution was in effect almost three years, but more fundamentally because Resolution 1819-0178 reflected a *written* past practice. The “regular and consistent” or “historic and accepted” standards apply to unwritten past practices; they do not apply if there is a written document reflecting the past and/or new policy. (*Pittsburg, supra*, pp. 10-12 & fn. 6.) Thus, because Resolution 1819-0178 and the resolution changing it were written policies, the District changed a written policy, implemented a new written policy, and/or enforced an existing policy in a new way. (See, e.g., *Alameda County Management Employees Assn. v. Superior Court* (2011) 195 Cal.App.4th 325, 345 [employer’s duty to bargain over change in layoff policy does not turn on whether policy was contained in a collective bargaining agreement].)

Written policies and written agreements differ, however. Most notably, if a covered topic falls outside the scope of representation, then it matters whether the status quo is established in a policy or an agreement. We explain.

While a non-mandatory topic does not become mandatory merely because a bilateral agreement has a provision on that topic (*Salinas, supra*, PERB Decision No. 2298-M, p. 15), a mutually ratified agreement is binding, and repudiating such an agreement during its term can establish a per se violation or bad faith under the totality of the circumstances (EERA, § 3540.1, subd. (h); *Oxnard, supra*, PERB Decision No. 2803, pp. 46-47; *Region 2 Court Interpreter Employment Relations*

*Committee & California Superior Courts of Region 2* (2020) PERB Decision

No. 2701-I, p. 42; *County of Tulare* (2015) PERB Decision No. 2414-M, pp. 29-30 (*Tulare*); *Standard School District* (2005) PERB Decision No. 1775, adopting proposed decision at p. 16).<sup>8</sup> Accordingly, if a CBA provision covers a non-mandatory bargaining subject, the employer typically can decide to repudiate the provision only when the contract expires, whereas an employer can generally make such a decision at any time if the provision merely appears in a policy.<sup>9</sup>

As noted above, in this instance the District changed a policy rather than a bilateral agreement. With that background, we consider whether the nine-month requirement was a mandatory bargaining subject.

The most important purposes of the nine-month requirement, from the perspective of OEA and its members, were that it: (1) provided OEA time to bargain over alternatives or other measures to lessen or offset negative impacts; and (2) provided affected employees notice to plan their lives based on a likely upcoming reassignment or layoff, including such fundamental choices as whether to look for other jobs and whether to rent or buy housing near their current workplace. In both

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<sup>8</sup> We overrule *El Centro Elementary School District* (2006) PERB Decision No. 1863 (*El Centro*) to the extent it held that a party cannot violate its duty to bargain in good faith when it repudiates a collectively bargained provision on a non-mandatory subject during the term of the agreement. Indeed, as we noted a decade after *El Centro*, “a statute that encouraged the negotiation of agreements, yet permitted the parties to retract their concessions and repudiate their promises whenever they choose, would impede rather than promote good-faith bargaining.” (*Tulare, supra*, PERB Decision No. 2414-M, p. 29.)

<sup>9</sup> In either case, if the decision impacts terms or conditions of employment then the employer must still provide adequate notice and opportunity to bargain over implementation and effects.

respects, notice of closure is akin to notice of layoff. Accordingly, we rely on analogous precedent holding that an employer must bargain over the amount of layoff notice employees receive, either in effects/implementation bargaining over a particular layoff decision or as a mandatory subject if the issue arises as a proposed new or changed policy of general application. (*Richmond Fire Fighters, supra*, 51 Cal.4th at pp. 265, 276; *Anaheim Union High School District* (2016) PERB Decision No. 2504, p. 10; *Salinas, supra*, PERB Decision No. 2298-M, p. 16; *Placentia Unified School District* (1986) PERB Decision No. 595, p. 21 (*Placentia*); *San Mateo City School District* (1984) PERB Decision No. 383, p. 18.)

A school closure can often lead to a transfer or reassignment rather than a layoff, particularly for employees who have worked in the school district for some time. But this distinction does not aid the District, because EERA specifically states that an employer must bargain over “transfer and reassignment policies.” (EERA, § 3543.2, subd. (a)(1).)

For these reasons, we hold that an employer must bargain over notice of a school closure, either in effects/implementation bargaining over a particular closure decision or as a mandatory subject if the issue arises as a proposed new or changed policy of general application. Thus, while an employer has no duty to adopt a prospective policy providing for minimum notice of closures, where it does so—in this case via the nine-month requirement—that becomes the status quo, and a subsequent change normally requires decision bargaining, absent a valid business necessity defense.<sup>10</sup> A policy on notice of closure is by no means permanent, however, as the

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<sup>10</sup> The District’s exceptions do not argue such a defense.

employer need only bargain before changing it and retains “the ultimate power to refuse to agree on any particular issue.” (*Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 630, quoting *Building Material & Construction Teamsters’ Union v. Farrell* (1986) 41 Cal.3d 651, 665; accord *County of Sonoma* (2023) PERB Decision No. 2772a-M, p. 27 [requiring negotiations over county charter amendments involving peace officer discipline does not block reform, as employer need only bargain in good faith before making change].)

In the alternative, even if we were to deem precedent on notice of layoffs insufficiently analogous to guide the outcome, we would reach the same conclusion under the general test set forth in *Anaheim Union High School District* (1981) PERB Decision No. 177 (*Anaheim*), which states that a subject falls within the scope of representation if: (1) it is logically and reasonably related to hours, wages or an enumerated term and condition of employment, (2) it 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 its freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of its mission.<sup>11</sup> (*Id.* at pp. 4-5; *Oxnard, supra*, PERB Decision No. 2803, p. 42.)

Applying *Anaheim, supra*, PERB Decision No. 177, the test illustrates why a general policy on notice of closure is a mandatory bargaining subject, but notice is

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<sup>11</sup> Our conclusion under *Anaheim* is an alternate holding because there is sufficiently related precedent on notice of layoffs, and when there is such guiding precedent, we need not “reinvent the wheel” by applying the *Anaheim* test on a blank slate. (*Accelerated Schools, supra*, PERB Decision No. 2855, p. 15.)



merely a bargainable implementation matter when it arises in the wake of a particular closure decision. In either context, amount of notice is logically and reasonably related to an enumerated term and condition of employment such as transfer and reassignment, it 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. However, the third *Anaheim* element—the level of managerial freedom that may be abridged—tilts toward requiring decision bargaining when parties discuss a general policy of prospective application when no closure decision is pending, while it tilts toward only requiring effects bargaining when the issue arises because of a particular closure decision.

Here, when the nine-month requirement first arose in 2019, it was a potential general policy of prospective application. The District was therefore overbroad in the extent to which it refused to bargain, but this case contains no challenge to that 2019 conduct. In the same timeframe as the District made this overbroad pronouncement, it adopted the nine-month requirement via a Board of Education resolution. As noted above, the District certainly did not need to do so, but when it did, that written policy became the new status quo. Then, in 2022, OEA's bargaining request reflected a blend of the two scenarios contemplated above. OEA had a decision bargaining right as to the District's change in prospective policy, and it had a right to bargain implementation and effects of specific school closure decisions.

In the current procedural posture, however, OEA no longer pursues a decision bargaining remedy. Accordingly, we proceed to analyze the effects bargaining aspects of the complaint's two primary claims.<sup>12</sup>

B. The District's Implementation

In an effects bargaining case, the threshold issue is whether the employer provided adequate advance notice to allow meaningful negotiations before implementation. Absent adequate notice, a union has a valid unfair practice charge irrespective of whether it requests to bargain effects. (*County of Ventura* (2021) PERB Decision No. 2758-M, p. 42.) To trigger a union's obligation to request bargaining, the employer must provide notice that "clearly" informs the union of the nature and scope of the change. (*Id.* at p. 43.)

The ALJ focused on the fact that the District failed to afford OEA advance notice of the specific schools selected for closure or grade truncation, much less in a manner that would have allowed meaningful negotiations before the District began implementing its decision in February 2022. While we affirm that analysis, we also note that the District had at that point already committed an even more fundamental failure to provide notice and opportunity to bargain in good faith over its decision to waive the nine-month requirement set forth in Resolution 1819-0178. The District adopted this change without notice on January 12 and, still without providing OEA

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<sup>12</sup> Nothing in this decision should be construed to mean that the District had a bargaining duty relative to other aspects of waiving Resolution 1819-0178, beyond changing the nine-month requirement. For instance, while school districts must consult with certificated employee unions over "educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks" (EERA, § 3543.2, subd. (a)(3)), the scope of representation does not include priority enrollment or case management for families impacted by closures.

notice and an opportunity to bargain, implemented the change as early as January 31, when its list of school closures included multiple scheduled to take effect just over four months later. On February 3, OEA promptly sought to bargain over the District waiving the nine-month requirement, but OEA in fact had no duty to request bargaining given the District had not provided it with any advance notice, much less adequate notice.<sup>13</sup>

The District's change to the nine-month requirement constitutes a further reason supporting the ALJ's conclusion that the District did not provide adequate notice and opportunity to bargain in good faith over the implementation and effects of its specific school closure decisions. Thus, while the ALJ correctly found that the District's February 8 communication denied any duty to bargain effects and the District began implementation just days later without adequate time to negotiate in good faith over alternatives and other implementation and effects, the District had already prevented good faith negotiations by unilaterally altering the nine-month framework. That change fast-tracked the process to such a degree that the District had to begin implementation almost immediately, when OEA had previously relied on the fact that the nine-month requirement provided time to discuss alternatives. In this sense, the District's decision amounted to a unilateral change in the ground rules of bargaining

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<sup>13</sup> The District argues that OEA's February 3 request sought only decision bargaining. This argument is not dispositive for multiple, independent reasons: (1) The District had a decision bargaining duty as to changing its general policy of prospective application; (2) OEA had no duty to request or participate in bargaining given the District's lack of notice and precipitous implementation—OEA could simply file an unfair practice charge; (3) OEA's February 3 request elicited a broad refusal to bargain, specifically including both decision and effects negotiations; and (4) When OEA later clarified on February 8 that its request included effects, the District responded that it viewed this clarified demand to be "substantially the same as the February 3, 2022 demand."

over implementation, because ground rules include the amount of time allocated to bargaining and any deadline for meaningful discussion of alternatives. (See *City of Arcadia* (2019) PERB Decision No. 2648-M, pp. 35-36 [employer cannot unilaterally decide timing of negotiations, when to commence, deadlines for finishing, or other similar issues].)

While the District had to provide adequate notice and an opportunity to bargain before implementing its decision to waive the nine-month requirement in Resolution 1819-0178, the District is fully empowered to change the resolution after adequate notice and a reasonable opportunity to bargain. The District did not come close to doing so, especially given that the initial proposed resolution in December 2021 did not include the later-added explicit change to the nine-month requirement.

For similar reasons, we reject the District's argument that it complied with *Compton Community College District* (1989) PERB Decision No. 720 (*Compton*), which allows an employer to implement its decision before completing effects negotiations if it can establish each of three elements: (1) the implementation date was based on an immutable deadline or an important managerial interest, such that a delay in implementation beyond the date chosen would effectively undermine the employer's right to make the decision; (2) the employer gave sufficient advance notice of the decision and implementation date to allow for meaningful negotiations prior to implementation; and (3) the employer negotiated in good faith prior to and after implementation. (*Id.* at pp. 14-15.) Even assuming for the sake of argument that the District could satisfy the first element, the District did not show that it provided advance notice, much less with sufficient time to allow meaningful pre-implementation

negotiations. The District therefore cannot establish the second and third *Compton* elements.

The District's other arguments are primarily relevant to its waiver defense, which we analyze in Part II, *post*. However, to the extent relevant to OEA's prima facie case, there are multiple reasons why the District failed to afford OEA adequate actual or constructive notice that could substitute for the District's failure to write OEA with notice of its plans. First, a public meeting and its associated agenda or other documents generally do not provide sufficient notice to a union unless the public entity sends such a document to a union official, in a manner reasonably calculated to draw attention to a specific item and with adequate time for good faith negotiations to ensue. (*Regents of the University of California* (2004) PERB Decision No. 1689-H, adopting proposed decision at p. 45; *Victor Valley Union High School District* (1986) PERB Decision No. 565, pp. 5-6 & fn. 6.) The current facts do not remotely satisfy this standard.

Even if a public board agenda or document can be enough to provide adequate actual notice in limited circumstances, there is another, independent reason why that is not the case here. As noted, the Board of Education draft resolution in December 2021 did not include the later-added explicit change to the nine-month requirement, and when the Board of Education added such language to the January 12 version of the resolution, it was then enacted without sufficient time to bargain in good faith.

OEA sought to bargain on February 3, just three days after the district publicized a list of schools and their closure/truncation dates, showing certain actions to be taken in less than nine months. In its February 8 response, the District denied any duty to engage in either decision or effects negotiations, only to change its tune

somewhat later in the month, after OEA filed this charge. By then, the violation had occurred, and the District could not cure its violation unless it rolled back to an earlier point. As we held in *Santa Clara I, supra*, PERB Decision No. 2321-M: “In the face of unilateral implementation, a demand to bargain is futile,” because at that point there is no “level playing field” for fair negotiations to occur. (*Id.* at p. 24.) Accordingly, OEA was not required to pursue negotiations to perfect its charge. (*Ibid.*)

In sum, OEA has established a prima facie case that the District failed to provide adequate notice and opportunity to engage in good faith effects negotiations before implementing two decisions: (1) the decision to change the nine-month period requirement in Resolution 1819-0178; and (2) the decision to close schools and truncate grades after the 2021-2022 school year.

## II. The District’s Waiver Defense

Because waiver is an affirmative defense, a party asserting waiver bears the burden of proof. (*City of Culver City* (2020) PERB Decision No. 2731-M, p. 13 (*Culver City*.) A party seeking to establish waiver of the right to bargain may allege contractual waiver, waiver by inaction, or waiver by negotiations history, but any of the three types of waivers must be clear and unambiguous.<sup>14</sup> (*County of Merced* (2020) PERB Decision No. 2740-M, pp. 10 & 19 (*Merced*.) PERB therefore resolves any doubts against finding a waiver of the right to bargain. (*Ibid.*)

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<sup>14</sup> We have alternatively articulated the standard as whether contract language is “clear and unmistakable,” which means the same as “clear and unambiguous.” (*Merced, supra*, PERB Decision No. 2740-M, p. 10, fn. 7.)

A. Contractual Waiver

A contractual waiver must appear within a bilateral agreement rather than in a unilaterally implemented policy. (*Culver City, supra*, PERB Decision No. 2731-M, pp. 18 & 20.) A contractual waiver remains in effect only during the term of the contract, unless the parties have explicitly agreed that it continues past contract expiration. (*Id.* at pp. 13, 18-19.)

Here, when the District violated EERA by failing to provide adequate notice and opportunity to bargain over the implementation and effects of its decision, the parties had no CBA in effect because the District had delayed ratifying the parties' tentative agreement to extend their lapsed 2018-2021 CBA. An unratified tentative agreement cannot waive the right to bargain. (*Culver City, supra*, PERB Decision No. 2731-M, adopting proposed decision at p. 39.) In other words, a party cannot delay ratifying a tentative agreement while seeking to benefit from any waivers contained therein; rather, part of the employer's incentive to negotiate and finalize an agreement is to obtain the benefit of such waivers. Thus, we need not determine the extent to which the parties' CBA contained a waiver when it eventually took effect.

B. Waiver by Conduct

To establish waiver of the right to bargain based on evidence other than an effective contract, it is necessary to demonstrate "conscious abandonment" of the right. (*Culver City, supra*, PERB Decision No. 2731-M, p. 18.) Showing that a union consciously abandoned its right to bargain typically involves proof that "the union had clear notice, meaning *advance knowledge*, of the employer's intent to change policy with sufficient time to allow a reasonable opportunity to bargain about the change and then failed to request negotiations." (*Id.*, adopting proposed decision at pp. 25-26

[internal quotation marks omitted; emphasis original].) However, a union's acquiescence to a unilateral change in one or more instances does not waive its right to bargain regarding a future change on the same subject. (*County of Kern & Kern County Hospital Authority* (2019) PERB Decision No. 2659-M, p. 22, fn. 19.)

OEA's conduct does not reflect conscious abandonment of its right to bargain. In December 2018 and January 2019, OEA promptly sought to bargain after the District raised the possibility of school closures to pay for teacher salary increases. But the District refused, and it did so in an overbroad manner, failing to recognize, for instance, that notice of closures is bargainable either in implementation/effects bargaining or as a mandatory topic, depending on the circumstances. (See *ante* at pp. 14-17.) Even while the District refused to bargain, its Board of Education President helped to settle OEA's strike by negotiating language to bring before the Board of Education, including the nine-month requirement. Nothing about this history suggests OEA consciously abandoned its right to bargain. Thereafter, in January 2022, the District acted precipitously to eliminate the nine-month requirement and approve school closures on a fast track. Particularly considering the nine-month requirement's history, and the fact that the District did not provide adequate notice to OEA, the District cannot establish that OEA's 2022 conduct reflected conscious abandonment. Nor can OEA's conduct subsequent to the District's failure to provide adequate notice establish waiver.

### III. The District's Laches Defense

To establish laches, a respondent must show that: (1) the charging party unreasonably delayed in prosecuting its case, and (2) either the charging party acquiesced in the acts about which it complains, or the respondent suffered prejudice



from the charging party's unreasonable delay. (*Santa Ana Unified School District* (2017) PERB Decision No. 2514, p. 22.) The District cannot show any of these elements. OEA never acquiesced in the District's conduct, and OEA prosecuted the case vigorously. We find no reason to find that any litigation delays were unreasonable or attributable solely to OEA. Nor do we find evidence that any delays have prevented the District from taking any action, much less prejudiced its ability to defend this action.

For the foregoing reasons, the record is sufficient to establish the two bargaining violations alleged in the complaint.<sup>15</sup>

IV.\*

ORDER\*

APPENDIX\*

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<sup>15</sup> We also affirm the ALJ's conclusion that an employer's bargaining violations derivatively interfere with protected union and employee rights. (*Oxnard, supra*, PERB Decision No. 2803, pp. 2 & 54.)

\* See footnote 1, *ante*.