*** * * JUDICIAL APPEAL PENDING * * ***

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNITED TEACHERS LOS ANGELES, Charging Party, v. ALLIANCE COLLEGE-READY PUBLIC SCHOOLS, Respondent.	Case No. LA-CE-6728-E PERB Decision No. 2879 October 23, 2023

Appearances: Bush Gottlieb by Erica Deutsch and Dexter Rappleye, Attorneys, for United Teachers Los Angeles; ACLIENT by Ruben Escalante and Robert Escalante, Attorneys, for Alliance College-Ready Public Schools.

Before Banks, Chair; Krantz and Paulson, Members.

DECISION

BANKS, Chair: This case is before the Public Employment Relations Board (PERB or Board) for decision based on a stipulated record, pursuant to PERB Regulations 32215 and 32320, subdivision (a)(1).[1] We previously certified United Teachers Los Angeles (UTLA) as the exclusive representative of two separate bargaining units of certificated employees at Alliance Morgan McKinzie High School (Morgan McKinzie) and Alliance Leichtman-Levine Family Foundation Environmental Science and Technology High School (Leichtman-Levine) (collectively, Charter Schools). (*Alliance Morgan McKinzie High School et al.* (2022) PERB Order

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

No. Ad-491 (*Alliance III*).) The Charter Schools are two of 25 schools within the Alliance College-Ready Public Schools Network (Alliance Network). As a result of UTLA's certification as the exclusive representative, Respondent Alliance College-Ready Public Schools (Alliance)[2] became obligated, pursuant to the Educational Employment Relations Act (EERA), to recognize and meet and negotiate in good faith with UTLA.[3] (EERA, § 3543.5, subd. (c).)

In this case, UTLA alleges that the Charter Schools have refused to recognize and bargain with UTLA as the exclusive representative of their certificated employees, in violation of the Board's order in *Alliance III*, *supra*, PERB Order No. Ad-491. The Charter Schools admit they have refused to recognize and bargain with UTLA as the exclusive representative of their respective employees. They contend, however, that the Board wrongly decided *Alliance III* and that changed circumstances, namely, a corporate reorganization, render the certified units inappropriate. We conclude that the reorganization does not affect the appropriateness of the units, nor does it excuse the Charter Schools from recognizing or meeting and negotiating with UTLA.

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[2] Alliance underwent a corporate reorganization during the pendency of UTLA's representation petitions, detailed *post* at pp. 7-10. For this reason, in *Alliance Judy Ivie Burton Technology Academy High School et al.* (2022) PERB Decision No. 2809 (*Alliance II*) [judicial appeal pending], UTLA requested an amended certification pursuant to PERB Regulation 32761, subdivision (a) naming the new corporate entity as the employer required to recognize and bargain with UTLA. We found it appropriate to amend the certification because "an amendment in certification changes only the name of the employer or union—it does not change the contours of the bargaining units." (*Id.* at p. 29.) UTLA's unfair practice charge in the instant matter likewise names this new corporate entity as the employer.

[3] EERA is codified at Government Code section 3540 et seq. All further undesignated statutory references are to the Government Code.

FACTUAL AND PROCEDURAL SUMMARY[4]

UTLA's Organizing Efforts

UTLA is an employee organization within the meaning of EERA section 3540.1, subdivision (d). UTLA began organizing certificated employees at charter schools affiliated with the Alliance Network as early as March 13, 2015. During this organizing period, UTLA filed multiple unfair practice charges alleging Alliance-affiliated schools engaged in numerous unfair labor practices. The Board has sustained allegations against Alliance-affiliated schools in four decisions. (See *Alliance College-Ready Public Schools et al*. (2017) PERB Decision No. 2545; *Alliance College-Ready Public Schools et al.* (2020) PERB Decision No. 2716; *Alliance Environmental Science and Technology High School et al*. (2020) PERB Decision No. 2717; *Alliance Marc & Eva Stern Math & Science High School et al.* (2021) PERB Decision No. 2795 [judicial appeal pending].) In litigating the first of these cases, *Alliance College-Ready Public Schools*, *supra*, PERB Decision No. 2545, the respondent schools contended that each was functionally autonomous. (See *Alliance I, supra*, PERB Decision No. 2719, pp. 13-15 [describing prior representations as to the schools' autonomy].) Based on

[4] As we discuss further *post*, this case arises from nearly identical facts as those in *Alliance II*, *supra*, PERB Decision No. 2809, and *Alliance III*, *supra*, PERB Order No. Ad-491. The parties agreed, with the administrative law judge's (ALJ) approval, to enter into the record in this case proposed stipulations and a proposed stipulated record that includes the pleadings, documents, and prior administrative records from *Alliance Judy Ivie Burton Technology Academy High School et al.* (2020) PERB Decision No. 2719 (*Alliance I*) [judicial appeal pending] and *Alliance II*. We therefore draw the Factual and Procedural Summary in significant part from those decisions.

these representations, UTLA refocused its organizing strategy from a campaign seeking a single, network-wide unit to one focused on single school units.

To date, UTLA has filed five representation petitions in total at Alliance-affiliated schools, which we detail below.

The Initial Three Representation Petitions

On May 3, 2018, UTLA filed three separate petitions seeking recognition as the exclusive representative for bargaining units consisting of the certificated employees at Alliance Judy Ivie Burton Technology Academy High School (Burton Tech), Alliance College-Ready Middle Academy No. 5 (Middle 5), and Alliance Gertz-Ressler/Richard Merkin 6-12 Complex (Gertz/Merkin). UTLA provided proof of majority support from employees at the respective school with each petition.

In June 2018, after receiving a list of all employees in the petitioned-for units, PERB's Office of the General Counsel (OGC) issued administrative determinations finding that a majority of the employees supported each of UTLA's petitions. Pursuant to PERB Regulation 33190, OGC informed the three schools that they must recognize UTLA or file a statement contesting the appropriateness of the unit. Thereafter, each of the schools filed a statement refusing to recognize UTLA and disputing the appropriateness of the petitioned-for units. The schools claimed: "The minimum appropriate unit is a single unit encompassing all similar personnel employed at schools within the network of charter schools affiliated with Alliance College-Ready Public Schools (the 'Alliance Network'), not an individual unit that includes only [each charter school's] employees." The schools requested that PERB investigate and hold a hearing to determine the appropriateness of the units. These three representation

petitions were later at the core of *Alliance I*, *supra*, PERB Decision No. 2719, and a related unfair practice charge in *Alliance II*, *supra*, PERB Decision No. 2809, as we discuss *post*.

The Subsequent Two Representation Petitions

On April 9, 2019, UTLA filed two separate petitions seeking recognition as the exclusive representative for bargaining units consisting of the certificated employees at Morgan McKinzie and Leichtman-Levine. Along with the petitions, UTLA provided OGC with proof of majority support from employees at both schools.

On May 7, 2019, OGC issued administrative determinations finding that UTLA had submitted sufficient proof of support for each proposed bargaining unit. The administrative determinations advised the Charter Schools that, because UTLA evidenced majority support and no valid intervention had been filed, they were required to recognize the proposed bargaining units unless they doubted the appropriateness of the units.

On May 13, 2019, the Charter Schools denied recognition in both cases, asserting as it did with the previous three petitions that the Alliance Network schools operate as a single employer and that, pursuant to the statutory presumption in EERA section 3545, subdivision (b)(1), the only presumptively appropriate unit was a network-wide one. Arguing that UTLA had not rebutted this presumption, the Charter Schools contended that the single school units were inappropriate. The Charter Schools requested that PERB investigate this issue pursuant to EERA section 3544.5 and hold a hearing on the matter. Later that month, the parties agreed to place the

Morgan McKinzie and Leichtman-Levine petitions in abeyance pending the Board's decision on the initial three petitions.

At the time the Morgan McKinzie and Leichtman-Levine petitions were filed, each school's charter declared:

> "[The Charter School] is deemed the exclusive public school employer of all employees of the charter school for collective bargaining purposes. As such, Charter School shall comply with all provisions of the Educational Employment Relations Act ('EERA'), and shall act independently from [Los Angeles Unified School District] for collective bargaining purposes. In accordance with the EERA, employees may join and be represented by an organization of their choice for collective bargaining purposes."

The Alliance Network and Its Reorganization

When UTLA filed the petitions for recognition at Morgan McKenzie and Leichtman-Levine, the Charter Schools were separately incorporated as nonprofit public benefit corporations with separate boards of directors, articles of incorporation, and bylaws.[5] Each individual corporation held a separate charter with the Los Angeles

[5] As of the date UTLA filed its representation petitions, the Charter Schools had Administrative Services Agreements (ASAs) with a separately incorporated nonprofit charter management organization, Alliance for College-Ready Public Schools (Alliance CMO or Home Office). The ASAs required Alliance CMO "to provide a range of operational and managerial services, including human resources services, information technology support, and all other services reasonably requested, in exchange for a service fee." (*Alliance College-Ready Public Schools et al.*, *supra*, PERB Decision No. 2716, pp. 6-7.) In *Alliance Environmental Science and Technology High School et al.*, *supra*, PERB Decision No. 2717, the parties stipulated to the fact that Alliance CMO acted as the agent of the schools in certain instances, which was the basis for our finding the schools liable for the actions of the Alliance CMO and its high-ranking official. (*Id.* at pp. 4-6.)

Unified School District (LAUSD) to operate within the boundaries of the district. Those charters declared each individual corporation to be the "exclusive public school employer of all employees of the charter school" for collective bargaining purposes pursuant to Education Code section 47611.5, subdivision (b).

At all relevant times, LAUSD policy has required charter schools in the district to comply with the Ralph M. Brown Act (Brown Act, § 54950 et seq.), California Public Records Act (CPRA, § 6250 et seq.), and conflict of interest laws (Gov. Code, § 1090 et seq.). (LAUSD, Policy for Charter School Authorizing (approved January 12, 2010, revised February 7, 2012), p. 8 ["Charter schools shall comply with conflict of interest laws . . . A charter school is also responsible for complying with the Ralph M. Brown Act and the California Public Records Act"].) Pursuant to this policy, the Charter Schools declared in their charters that they would comply with the requirements of those laws.

In the midst of the representation proceedings, and prior to the Board's issuance of *Alliance I*, *supra*, PERB Decision No. 2719, the Alliance Network changed its structure, purportedly in response to the enactment of Senate Bill (SB) 126, which would take effect on January 1, 2020.[6] According to Alliance Chief of Staff Zainab Ali, Alliance CMO and the Alliance-affiliated schools "analyzed legal-compliance

[6] SB 126 added section 47604.1 to the Education Code, making explicit the application of the Brown Act, CPRA, Government Code section 1090 et seq., and the Political Reform Act (Gov. Code, § 81000 et seq.), to California public charter schools. Prior to the enactment of SB 126, on December 26, 2018, the California Attorney General published an opinion stating that under existing law, charter schools were subject to the Brown Act, CPRA, Government Code § 1090, and the Political Reform Act. (101 Ops.Cal.Atty.Gen. 92 (2018).)

implications of the law given the day-to-day operations of the organization given the passage of SB 126, and ultimately decided" to merge into a single legal entity.[7] Alliance contends that at a minimum, the reorganization enhanced the network's ability to comply with the law because the reorganized entity can hold a single, regular, public board meeting to accomplish what previously occurred through meetings of 25 different school boards for each of the Alliance schools. Alliance also contends that the reorganization helps it to avoid disputes regarding purported conflicts inherent in the integrated operations between Home Office and the Alliance Network. In support of these contentions, Alliance claims that SB 126 placed new requirements upon the Charter Schools, beyond those required by LAUSD policy.

On September 18, 2019, while *Alliance II* was before the Board for decision, Alliance sent a letter to the Board stating that it had decided to merge all Alliance-affiliated schools into a single legal entity, effective January 1, 2020. In *Alliance I*, *supra*, PERB Decision No. 2719, we noted that respondents did not provide information about the circumstances of the reorganization or make any argument about what effect, if any, the reorganization had on the pending representation

[7] According to Ali, Alliance had considered a possible reorganization in the past, as early as the end of 2016, in response to Assembly Bill (AB) 1478, a bill similar to SB 126 that did not become law. Ali claimed that, after AB 1478 failed to pass, "the urgency of this transition was reduced." In light of Alliance's repeatedly shifting positions with respect to UTLA's representation petitions, we decline to credit Ali's sworn testimony about the initial timing of Alliance's reorganization. In any event, this finding is not determinative as, even had Alliance begun contemplating a merger as early as 2016, Alliance did not notify the Board of it until late 2019, detailed further below.

petitions, or request to reopen or augment the record to include the letter or any other evidence concerning the reorganization. (*Id*. at p. 27, fn. 27.)

On September 24 and December 12, 2019, LAUSD held special board meetings to consider Alliance's reorganization. At the September board meeting, Alliance Chief Executive Officer Dan Katzir stated to school board members that the proposed reorganization was not linked to UTLA's unionization campaign, and that it was up to PERB to decide the issues related to unionization, which would not be based upon the school board's decision regarding the reorganization.

On January 1, 2020, all 25 Alliance schools and Home Office became one entity, Alliance College-Ready Public Schools.[8] Several changes ensued with the reorganization. Home Office and the Alliance schools ceased to be governed by separate boards of directors or managed by separate officers. Instead, Home Office and the Alliance schools are a single legal entity governed by a single governing board and a group of executives, with the sole authority to engage in collective bargaining and "to approve any collective bargaining agreement entered into by the Alliance."

Prior to the reorganization, the schools' charter petitions stated that each school "is deemed the exclusive public school employer of all employees of the charter school for collective bargaining purposes." After the reorganization took effect, the schools' charters stated that each school "hereby declares that Charter School,

[8] The newly merged entity is also referred to as the "Surviving Organization" and is distinct from Home Office, which was Alliance *for* College-Ready Public Schools.

operated as or by its nonprofit public benefit corporation, is and shall be the exclusive public school employer of Charter School's employees for the purposes of [EERA] . . ."

As a result of the reorganization, Alliance's liabilities, obligations, and assets are now held collectively by Alliance. Alliance continues to provide centralized support to Alliance-affiliated schools. Alliance has authority to review or reverse a school's decision to discipline or terminate a teacher, or to authorize an employee to "depart from networkwide policies or practices." This includes the policy of not hiring employees who were previously terminated for performance-related reasons or for misconduct at another Alliance school.

Also following the reorganization, the schools' principals report to their respective Instructional Superintendents, ceasing the practice of reporting directly to their individual school's board of directors. Instructional Superintendents are assigned to oversee non-overlapping cohorts of the Alliance schools and directly supervise each of the principals in their respective cohorts. Prior to January 1, 2020, Instructional Superintendents were employed by Home Office and, after January 1, 2020, they are employed by Alliance. Additionally, Home Office and schools no longer utilize separate Employer Identification Numbers (EIN) when reporting to state and federal agencies, but instead utilize a single EIN. Finally, Alliance adopted an Intracompany Service Agreement, replacing individual ASAs between the Alliance CMO and Network schools.

The Board Issues *Alliance I*

On May 18, 2020, the Board issued *Alliance I*, *supra*, PERB Decision No. 2719, certifying UTLA as the exclusive representative of certificated employee bargaining

units at Burton Tech, Middle 5, and Gertz/Merkin. In reaching its findings, the Board took administrative notice of the records from several unfair practice cases litigated prior to the filing of the representation petitions.[9] (*Id.* at p. 2, fn. 3.) In those prior cases, Alliance CMO and the three schools vigorously disputed the notion that the schools were part of any integrated operation and made statements that were inconsistent with the schools' later claims at the representation hearing regarding their alleged integration. (*Id.* at pp. 13-15.) The *Alliance I* Board considered and rejected Alliance's arguments that the schools constituted a single employer and that the only appropriate unit was a network-wide unit. (*Id.* at pp. 22-36, 44-48.)

In so doing, the Board found that Alliance's prior representations regarding each school's individual autonomy warranted application of judicial and equitable estoppel, since UTLA had relied on Alliance's past positions when deciding to organize on a school-by-school basis. The Board further found that Alliance's inconsistent representations regarding the schools' autonomy rendered Alliance's arguments unpersuasive, and that individual certificated bargaining units at each school were appropriate. (*Alliance I*, *supra*, PERB Decision No. 2719, pp. 33-48.) Based on these findings, the Board therefore certified UTLA as the exclusive representative of a certificated employee unit at each of the three charter schools, retroactive to the date of the filing of the petitions. On June 12, 2020, respondents filed a Request for Reconsideration of *Alliance I*, along with a Request for Judicial Review. On October 14, 2020, the Board denied both requests. (*Alliance Judy Ivie*

[9] The records were from PERB Case Numbers LA-CE-6061-E, LA-CE-6073-E, LA-CE-6165-E, and LA-CE-6204-E.

Burton Technology Academy High School et al. (2020) PERB Decision No. 2719a; *Alliance Judy Ivie Burton Technology Academy High School et al.* (2020) PERB Order No. JR-30.)

The Board Issues *Alliance II*

Following UTLA's certification as the exclusive representative for the certificated employee bargaining units at Burton Tech, Middle 5, and Gertz/Merkin, UTLA requested that the schools formally recognize it as the exclusive representative at each school. Alliance refused, stating that it did not consider UTLA to be the exclusive representative of its certificated employees, and "therefore shall not engage in bargaining with UTLA absent further guidance from the appellate courts."

The dispute ultimately gave rise to *Alliance II*, *supra*, PERB Decision No. 2809. In that decision, the Board concluded that Burton Tech, Middle 5, and Gertz/Merkin had unlawfully refused to recognize or bargain with UTLA as the exclusive representative of their certificated employees, in contravention of the Board's order in *Alliance I*. The Board rejected the schools' argument that Alliance's corporate reorganization affected the appropriateness of the certified bargaining units or excused the schools from recognizing or negotiating with UTLA. The Board ordered each of the three schools to recognize and bargain with UTLA as the exclusive representative of their certificated employees.

The Board Issues *Alliance III*

Days after the Board issued *Alliance I*, *supra*, PERB Decision No. 2719, UTLA requested that PERB remove from abeyance its representation petitions for Morgan McKinzie and Leichtman-Levine and certify UTLA as the exclusive representative at

both schools. UTLA argued that the schools were collaterally estopped from relitigating the issue of whether single schools constitute appropriate bargaining units, as the issue had been resolved in *Alliance I*. Subsequently, the parties, with the assistance of a PERB ALJ, met to discuss the petitions. The cases remained in abeyance pending these discussions. On November 24, 2020, UTLA again requested PERB remove the instant cases from abeyance and requested that UTLA be certified as the exclusive bargaining representative based on collateral estoppel. On December 9, 2020, the Alliance Network, on behalf of the Charter Schools, opposed UTLA's request, claiming that it did not meet the collateral estoppel elements. On December 11, 2020, UTLA replied to Alliance Network's opposition, arguing that Alliance was not entitled to a hearing where the Board's investigation finds there is no material issue as to the appropriateness of the unit.

On April 28, 2021, OGC issued an Order to Show Cause (OSC) as to why the petitions should not be granted. On May 20, 2021, the Charter Schools responded to the OSC and filed a supporting declaration of Alliance Chief of Staff Ali. On June 11, 2021, UTLA filed a response in support of the OSC. On August 13, 2021, after finding that UTLA had provided proof of majority support at each Charter School, OGC issued an administrative determination granting the petitions, which the Charter Schools timely appealed.

On March 23, 2022, the Board issued *Alliance III*, *supra*, PERB Order No. Ad-491.The Board concluded that, for the reasons set forth in *Alliance I* and affirmed in *Alliance II*, it did not need to hold another hearing to find that single school units are appropriate. (*Alliance III*, *supra*, PERB Order No. Ad-491, pp. 13-15.) In

doing so, the Board explicitly rejected the Charter Schools' argument that collateral estoppel did not apply, as the same parties had already litigated the precise issue at stake, and there were no material factual differences. (*Id.* at p. 15.) In the alternative, and in the interests of administrative economy, the Board reviewed the parties' submissions de novo and found that the petitioned-for units were appropriate on the merits. (*Ibid.*) The Board therefore upheld the administrative determination and certified UTLA as the exclusive representative of certificated employees at Morgan McKinzie and Leichtman-Levine. (*Id*. at p. 21.)

Alliance's Latest Refusal to Recognize or Bargain with UTLA

Within six months after the Board issued *Alliance III*, *supra*, PERB Order No. Ad-491, UTLA again requested recognition from the Charter Schools as the exclusive representative of employees in the requested bargaining units and demanded to commence bargaining for new contracts. Alliance again refused, stating that it intended to seek appellate review of *Alliance III* pursuant to EERA section 3542 and therefore would not bargain with UTLA "absent further guidance from the appellate courts."[10]

[10] On July 14, 2022, Alliance filed a unit modification petition (PERB Case No. LA-UM-1027-E) to "challenge" the Board's order in *Alliance III*, *supra*, PERB Order No. Ad-491 "by virtue of changed circumstances that accompanied a change in the law and consequent merger of 25 charter schools (effective 1/1/2020), which included the employers previously recognized by PERB in [*Alliance II*] into a single legal entity." Alliance again argued that the "only appropriate unit" would be network-wide and inclusive of more than 750 employees. OGC issued an OSC why the petition should not be dismissed, in light of the 12-month certification bar in PERB Regulation 32786, subdivision (b)(4), in addition to the petition's failure to satisfy any criteria in PERB Regulation 32781, subdivision (b). Alliance timely responded. On September 26,

On July 27, 2022, UTLA filed the underlying unfair practice charge alleging that the Charter Schools had unlawfully refused to recognize and bargain with UTLA following the Board's order in *Alliance III*, *supra*, PERB Order No. Ad-491. On July 29, 2022, OGC issued a complaint alleging that Alliance refused to recognize or bargain with UTLA following its certification as the exclusive representative of the Charter Schools. On August 10, 2022, Alliance answered the complaint, mostly admitting to the allegations, explaining that it engaged in the disputed conduct to obtain judicial review of *Alliance III*, *supra*, PERB Order No. Ad-491, and citing several affirmative defenses including "changed or special circumstances."

On September 13, 2022, the parties entered into the record proposed stipulations and a proposed stipulated record that includes the pleadings, documents, and prior administrative records from *Alliance I* and *Alliance II*. On December 22, 2022, the parties convened for a prehearing video conference with the ALJ, during which they agreed that the parties' stipulations and stipulated record constitute the evidentiary portion of the case. In addition, the ALJ took administrative notice of the parties' post-hearing and reply briefs from *Alliance I*. The parties filed their

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2022, OGC dismissed the unit modification petition. Alliance did not appeal the dismissal.

On December 27, 2022, Alliance requested that the ALJ take administrative notice of certain records in PERB Case No. LA-UM-1027-E. UTLA objected, arguing that the records were not relevant to the instant matter, although it did not contest the veracity of the records. On January 14, 2023, the ALJ granted Alliance's request, while allowing all parties the opportunity to argue relevance or lack thereof. To the extent Alliance challenges the dismissal of the unit modification petition in its post-hearing brief, we decline to consider such arguments as they are not properly before us, as we explain *post* at pp. 21-22.

post-hearing briefs on March 16, 2023, and filed their reply briefs on March 30, 2023. On April 7, 2023, the record for the instant matter was submitted directly to the Board itself for decision, pursuant to PERB Regulation 32320, subdivision (a)(1).

DISCUSSION

I. Technical Refusal to Bargain

As we have already noted, Alliance admits that it failed and refused to bargain in good faith with UTLA to obtain judicial review of the Board's unit determination in *Alliance III*, *supra*, PERB Order No. Ad-491. While EERA section 3542, subdivision (a)(2) permits a party to obtain appellate review of a unit determination by engaging in a technical refusal to bargain, a party's right to do so is limited in several respects.

As we stated in *Alliance II*, *supra*, PERB Decision No. 2809, a party engaged in a technical refusal to bargain must rely on evidence already in the administrative record of the unit determination, because the prior representation decision is treated as binding with respect to all issues that were, or could have been, litigated in the representation proceeding. (*Id*. at p. 13; *Regents of the University of California* (2019) PERB Decision No. 2646-H, pp. 4-6.) A party may not collaterally attack PERB's determination using evidence that it could have raised in the unit determination proceeding, nor may it use the technical refusal as an attempt to modify a unit while circumventing PERB's mandatory unit modification procedure. (*Regents of University of California v. Public Employment Relations Bd*. (2020) 51 Cal.App.5th 159, 174 & fns. 4 and 5; *Regents of the University of California*, *supra*, PERB Decision No. 2646-H, pp. 4-5, citing *Los Angeles Unified School District* (2007) PERB Decision No. 1884, p. 2.) Because a respondent in a technical refusal case should admit it is

refusing to comply with the underlying representation order, PERB can normally grant judgment on the pleadings to resolve a technical refusal to bargain.[11] (*Alliance II*, *supra*, PERB Decision No. 2809, p. 15.)

Moreover, a party engaging in a technical refusal takes on several risks aside from the risk of work stoppage or other consequences of labor strife. First, as in any case before it, PERB can issue litigation sanctions if any party takes a frivolous position in bad faith. (*Sacramento City Unified School District* (2020) PERB Decision No. 2749, p. 11; see also *Bellflower Unified School District* (2019) PERB Order No. Ad-475a, p. 4.) Second, even when there is no cause for litigation sanctions, if an employer pursues an unsuccessful technical refusal over a unit determination, the charging party union may be entitled to reimbursement of its increased costs outside of litigating the technical refusal charge, which may include increased costs for

[11] In *Alliance II*, *supra*, PERB Decision No. 2809, we rejected Alliance's argument that PERB should follow private sector precedent allowing for the consideration of an employer's reorganization as a defense to its technical refusal to bargain. (*Id*. at pp. 17-22.) We noted that, while PERB declined to follow private sector precedent with respect to this matter, even if we were to consider the persuasive value of *Frito-Lay, Inc.* (1969) 177 NLRB 820, the *Alliance II* facts stood in "stark contrast." (*Alliance II*, *supra*, p. 20.) In *Frito-Lay, Inc*., the National Labor Relations Board (NLRB) dismissed a charge alleging the employer's failure to bargain because the unit was no longer appropriate following a reorganization. The NLRB explained that one of the reasons for its decision was that the employer's reorganization had eliminated "the essential factor which made" the unit appropriate. (177 NLRB at p. 821.) In contrast, Alliance's reorganization did not affect the "essential factor" that was the basis for the certification of the units in *Alliance I*. (*Alliance II*, *supra*, p. 20.) The same holds true in the instant matter with respect to the certification of units in *Alliance III*, and we therefore decline to revisit this argument.

organizing, bargaining, lost dues, or legal costs beyond litigating the charge itself. (*City of Palo Alto* (2019) PERB Decision No. 2664-M, p. 8, fn. 6.)[12]

Alliance's principal argument is twofold: that the Board improperly certified the units under the facts initially presented in *Alliance III*, and that changed or special circumstances warrant reconsideration of the units certified therein. As to the first assertion, there is no need to address Alliance's arguments based on the evidence in the *Alliance III* record as the Board already rejected them. (See *Alliance III*, *supra*, PERB Order No. Ad-491, pp. 13-21; see also *Alliance I*, *supra*, PERB Decision No. 2719, pp. 22-48.) As noted above, when an employer engages in a technical refusal to bargain, our practice normally requires us to expedite judicial review by granting judgment on the pleadings at all levels of PERB, treating the prior representation decision as binding with respect to all issues that were, or could have been litigated in the representation proceeding. (*Regents of the University of California*, *supra*, PERB Decision No. 2646-H, pp. 4-6.)

For this reason, we again decline to revisit Alliance's arguments that PERB was required to both find the Charter Schools were a single employer and to extend

[12] Different considerations apply when an employer's technical refusal is based on good faith allegations of conduct that prevented a fair election and was sufficiently serious to "have affected the outcome of the election." (*J.R. Norton Co. v. Agricultural Labor Relations Bd.* (1979) 26 Cal.3d 1, 40.) Because we encourage judicial review of allegations concerning an election's fairness, make-whole relief for a technical refusal to bargain raising such issues is appropriate only in the absence of any good faith allegation of conduct or circumstances impacting election integrity to a degree that could have been dispositive in the outcome. (*Ibid.*) These considerations do not apply where, as here, a respondent merely disputes PERB's exercise of discretion in determining whether a union has petitioned for an allowable unit structure.

California Virtual Academies (2016) PERB Decision No. 2484 to mean that whenever a single employer relationship exists, there is only one allowable unit structure.[13] We already explained in *Alliance I* and recounted in *Alliance II* and *Alliance III* multiple independent reasons why each assumption in this syllogism is incorrect.

First, we will not revisit the argument that we erred by rejecting the applicability of the single employer doctrine. As we explained in *Alliance I*, the outcome of a single employer inquiry does not necessarily determine unit appropriateness, and the Board has never "looked beyond the plain language of the petition to decide whether two or more public school employers satisfy the single employer test and, if so, whether that relationship requires that we allow only a singular global bargaining unit despite the petitioning union's request for localized bargaining units." (*Alliance I*, *supra*, PERB Decision No. 2719, pp. 22-23, 27.) Nor will we revisit the argument that we erred by applying judicial and equitable estoppel, and by finding sufficient evidence to justify single school bargaining units.[14] As explained in *Alliance I*, the Charter Schools failed to prove that only a network-wide unit is appropriate since the evidence the Charter Schools presented "was directly contradicted by evidence in prior cases from Alliance personnel, including key executives and charter school administrators," and "the Charter Schools have not given a reasonable or persuasive account of their shifting positions." (*Id*. at pp. 34, 44.) Finally, we do not repeat the reasons why Alliance's interpretation that a single unit is the only appropriate unit when the single employer

[13] Alliance also made this argument in *Alliance II*, *supra*, PERB Decision No. 2809. We rejected the argument there (*id*. at p. 15), as we do here.

[14] We address Alliance's new collateral estoppel argument *post*.

test is satisfied, was a "constraining interpretation" that was "a bridge too far" in a case that presented a very different factual scenario.[15] (*Id.* at p. 26.)

II. Alliance's Claimed New Evidence

While Alliance has repeatedly asserted that it is engaged in a technical refusal to bargain, it nevertheless relies on what it purports is new evidence. Alliance claims that "changed circumstances," demonstrated through new evidence, is a valid ground for a technical refusal to bargain. This argument is, first, based on a faulty premise.

Alliance's allegedly new evidence—its corporate reorganization—existed before *Alliance I* issued on May 18, 2020. The reorganization occurred after the filing of the representation petitions and evidentiary hearing in *Alliance I* but became effective more than five months before *Alliance I* issued. Alliance informed PERB about the planned reorganization in its September 2019 letter, but decided not to provide UTLA or PERB with details about the new structure, file a motion to reopen the record, or provide any supplemental briefing, including as to its claimed impact on the pending petitions. Therefore, evidence of the reorganization is not newly discovered or previously unavailable evidence. Rather, it is evidence that Alliance could have

[15] Alliance's demonstrated history of anti-union speech in the course of UTLA's organizing campaign further undermines its credibility in arguing for a network-wide unit structure. (See *Alliance Marc & Eva Stern Math & Science High School et al.*, *supra*, PERB Decision No. 2795, pp. 52-75 [finding that e-mails from multiple Alliance-affiliated principals and assistant principals to certificated employees at their respective schools violated the Prohibition on Public Employers Deterring or Discouraging Union Membership, Government Code section 3550 et seq. because the communications tended to influence whether or not employees supported UTLA].)

introduced in the underlying unit determination proceeding, and it is therefore not an appropriate defense to its technical refusal to bargain.

Moreover, to the extent Alliance claims *true* changed circumstances consistent with PERB Regulation 32781, i.e., evidence that did not exist when *Alliance I* issued, the Board noted in *Alliance II* that respondents could not simply refuse to bargain; they were instead required to pursue a unit modification petition under PERB Regulation 32781.[16] (*Alliance II*, *supra*, PERB Decision No. 2809, pp. 17-18 & 23.) Here, Alliance filed a unit modification petition, but after the Board agent dismissed that petition, Alliance failed to appeal. Accordingly, Alliance has waived its right to pursue the petition.

Alliance II was a rare exception in which we considered the merits of a proposed unit modification that was not properly before us. In that case, respondents argued in their briefing to the Board that we should consider its alleged changed circumstances as part of resolving UTLA's unfair practice charge in that matter, rather than after the appropriate petition process, and threatened to refuse to bargain with UTLA while it litigated such a petition. (*Alliance II*, *supra*, PERB Decision No. 2809, p. 24, fn. 24.) Even as the Board admonished Alliance for this "patent misuse of

[16] While Alliance has also referred to "special circumstances," it has not provided any justification for considering its reorganization to constitute special circumstances. Indeed, in support of this proposition Alliance cites to *Brinks, Inc. of Florida* (1985) 276 NLRB 1, where the NLRB found special circumstances existed because the unit contained security guards with other positions, in direct violation of the clear statutory mandate of the National Labor Relations Act (29 U.S.C. § 151 et seq.). (*Id*. at p. 2.) The units here do not violate the clear mandates of EERA, and therefore the facts of this case are distinguishable.

PERB's processes which we do not condone" (*ibid.*), it exercised its discretion to consider the merits of Alliance's unit modification arguments based upon the voluminous stipulated record before it (*id.* at p. 23.). The Board explained that it took this unusual step in the interest of judicial and administrative economy, and to obviate delay and the additional litigation costs both parties would incur if Alliance were to file a subsequent unit modification petition. (*Ibid.*) After addressing each of Alliance's alleged changed circumstances and ultimately noting that there was "still only a weak argument in support of requiring that a larger unit is the only appropriate unit" (*id.* at p. 27), the Board concluded that Alliance had not established changed circumstances warranting reconsideration of the bargaining units (*ibid.*). We reiterated that "UTLA need only petition for *an* appropriate unit, not the *most* appropriate unit." (*Ibid.*, italics in original.)

Unlike in *Alliance II*, *supra*, PERB Decision No. 2809, here we will not excuse Alliance's further procedural misstep. This case, a technical refusal to bargain, is simply not an appeal of Alliance's unit modification petition, and we hold Alliance to its indisputable waiver in ceasing to pursue that petition when it failed to appeal the Board agent's dismissal.

However, we also note in the alternative that even if Alliance were permitted to raise its unit modification arguments here after failing to preserve its petition, the substantive reasons Alliance cannot prevail are as strong here as they were in *Alliance II*. To begin, a petition for unit modification is precluded "if, within the previous 12 months, the employer has lawfully recognized, or the Board has certified, the exclusive representative in the described unit or a subdivision thereof." (PERB

Reg. 32786, subd. (b)(4).) PERB considers this certification bar period to begin from the date the employer begins good faith negotiations with the union. (*Redondo Beach City School District* (1980) PERB Decision No. 140, adopting proposed decision at p. 4 (*Redondo Beach*).) In this respect, PERB Regulations do not condone an employer using a unit modification petition to decertify a union with which it has never agreed to bargain. Rather, if an employer claims that new, changed circumstances warrant a modification, it must continue to bargain in good faith even while it pursues its unit modification petition. (See *Alliance II*, *supra*, PERB Decision No. 2809, p. 19 ["particularly given the history in which Alliance led employees to believe that each school was autonomous, and then steadfastly refused to abide by majority wishes in the individual units, it would frustrate EERA's purposes to extinguish bargaining rights based on a January 1, 2020 reorganization that Alliance chose not to raise until after we issued *Alliance I*"].)

Furthermore, the petition raised arguments that we already rejected. (*Alliance III*, *supra*, PERB Order No. Ad-491, pp. 14-15.) For instance, as explained above and in *Alliance II* and *Alliance III*, the reorganization constitutes neither newly discovered nor previously unavailable evidence, given that it predated the relevant events. (*Alliance II*, *supra*, PERB Decision No. 2809, p. 24.) Moreover, individual school units remained appropriate because UTLA relied on the schools' initial representations that they were separate employers (*ibid*.), and for multiple other substantive reasons we have previously explained.

III. Per *Alliance III*'s De Novo Review, Single School Bargaining Units are Appropriate

As noted above, in *Alliance III*, we rejected the Charter Schools' arguments that collateral estoppel could not apply to the unit determinations in *Alliance I* and *Alliance II* "given that the same parties already litigated the precise issue at stake, and there are no material factual differences." (*Alliance III*, *supra*, PERB Order No. Ad-491, p. 15.) Here, Alliance again argues that the unit determinations must be decided on their merits via a hearing. We still disagree.

As we exhaustively explained in *Alliance III*, a hearing is not required to determine whether the petitioned-for units are appropriate. PERB Regulation 33237, subdivision (a) governs the investigation of representation petitions and provides:

> "Whenever a petition regarding a representation matter is filed with the Board, the Board shall investigate and, where appropriate, conduct a hearing and/or a representation election or take such other action as deemed necessary to decide the questions raised by the petition."

Thus, there is "no guarantee or entitlement to an evidentiary hearing." (*Children of Promise Preparatory Academy* (2013) PERB Order No. Ad-402, p. 16 (*Children of Promise*); see PERB Reg. 33237, subd. (a).) Rather, after completing an investigation, the Board agent may either "determine that sufficient evidence has been submitted to raise a material issue that necessitates an evidentiary hearing," or "that no material issue of fact exists and thus that a hearing is unnecessary." (*Children of Promise*, *supra*, PERB Order No. Ad-402, p. 17.) "In reviewing whether a Board agent has conducted a proper investigation, the Board generally has looked at whether or not the Board agent abused his or her discretion." (*Id*. at p. 13.)

In the current representation matters, the Board agent determined that UTLA had provided sufficient proof of support and informed the Charter Schools that they needed to either recognize UTLA as the exclusive representative of certificated employees at the Charter Schools, or dispute the appropriateness of the bargaining units. Morgan McKinzie and Leichtman-Levine argued that the entire Alliance Network of charter schools constituted a single employer, and that the only appropriate bargaining unit consists of certificated employees at all Alliance Network schools, an argument we already considered and rejected in *Alliance I* and *Alliance II*. The Charter Schools raised no other issues challenging the appropriateness of the petitioned-for units. We therefore found that the Board agent had not abused her discretion by deciding the relevant issues without an evidentiary hearing. (*Alliance III*, *supra*, PERB Order No. Ad-491, p. 14.)

Notwithstanding *Alliance III*'s rejection of respondents' arguments against the application of collateral estoppel to representation proceedings, we exercised our discretion to review the parties' submissions de novo. We found *on the merits* that the single school units are appropriate pursuant to section 3545's "statutory presumption that all certificated employees of a 'public school employer' should normally be included in a single bargaining unit—the '*Peralta* presumption,' bearing the designation of our landmark decision in *Peralta Community College District* (1978) PERB Decision No. 77." (*Alliance III*, *supra*, PERB Order No. Ad-491, p. 16; *id*. at pp. 15-21 [analyzing the community of interest, established practices, and employer efficiency factors to determine the appropriateness of the petitioned-for units].) Thus, we deemed each respondent school a public school employer and "'to the extent it

applies, the *Peralta* presumption largely favors school-by-school units.'" (*Id.* at p. 17, quoting *Alliance I*, *supra*, PERB Decision No. 2719, p. 25.) Because the parties stipulated that there were no material changes in the facts with respect to Alliance's operations or Alliance's relationship with Morgan McKinzie and Leichtman-Levine from July 14, 2021, the date the parties filed stipulations in the *Alliance II* case, to the date the stipulations were filed in the instant case, there is no cause to revisit our de novo analysis of the appropriateness of the single school units from *Alliance III*.[17]

For the foregoing reasons, we find that Alliance has failed to establish that changed or special circumstances warrant reconsideration of the petitioned-for units at Morgan McKinzie and Leichtman-Levine. Consequently, Alliance has failed to demonstrate that its refusal to recognize and bargain with UTLA was warranted. This conduct violates EERA section 3543.5, subdivision (c).

IV. Remedy

The Legislature has delegated to PERB broad powers to remedy EERA violations and to take any action the Board deems necessary to effectuate the Act's purposes. (*Sacramento City Unified School District*, *supra*, PERB Decision No. 2749, p. 10, citing EERA, § 3541.5, subd. (c); *City of San Diego* (2015) PERB Decision No. 2464-M, p. 42; *Mt. San Antonio Community College Dist. v. Public Employment Relations Bd.* (1989) 210 Cal.App.3d 178, 189-190.) In addition to serving restorative

[17] Although Alliance contends there is a "disputed issue of material fact" that requires an evidentiary hearing, the only fact that it offers in support is its January 1, 2020 reorganization. We have repeatedly dismissed the propriety of introducing this fact as "new" evidence, and in any event, we fully considered the reorganization in *Alliance II*.

and compensatory purposes, the ordered remedy should also deter future misconduct, so long as the order is not a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act. (*Sacramento City Unified School District*, *supra*, PERB Decision No. 2749, p. 11; *City of San Diego*, *supra*, PERB Decision No. 2464-M, pp. 40-42.)

In *Redondo Beach*, *supra*, PERB Decision No. 140, the Board considered the appropriate remedial order in light of the employer's technical refusal to bargain. In addition to ordering the employer to meet and confer with the exclusive representative upon request, the Board further directed:

> "in order that the employees in the appropriate unit will be accorded the services of their selected representative for the period provided by law, the initial period of certification shall be construed as beginning on the date the District commences to negotiate in good faith with the Federation as the recognized exclusive representative in the appropriate unit. See *Mar-Jac Poultry Co., Inc.* (1962) 136 NLRB 785; *Commerce Co. d/b/a Lamar Hotel* (1962) 140 NLRB 226, 229, enfd. (5th Cir. 1964) 328 F.2d 600 . . ."

(*Redondo Beach*, *supra*, adopting proposed decision at p. 4; see also *Van Dorn Plastic Machinery Co.* (1990) 300 NLRB 278, 280-281; *Richardson Engineering Co.* (1980) 248 NLRB 702, 704; *Burnett Construction Co.* (1964) 149 NLRB 1419, 1421.)

In *Alliance II*, *supra*, PERB Decision No. 2809, we found the circumstances warranted extending the certification bar to at least 12 months from the commencement of good faith bargaining, subject to extension if Alliance is found to have engaged in additional unfair labor practices. (*Id*. at p. 30.) Likewise, we find the circumstances here warrant extending the certification bar to at least 12 months from

commencement of good faith bargaining, subject to extension if Alliance is found to have engaged in additional unfair labor practices.

ORDER

Upon the foregoing findings of fact and conclusions of law, the entire record in the case, and the record of *Alliance Judy Ivie Burton Technology Academy High School et al.* (2020) PERB Decision No. 2719, and *Alliance Judy Ivie Burton Technology Academy High School et al.* (2022) PERB Decision No. 2809, the Public Employment Relations Board (PERB) finds that Alliance-College Ready Public Schools (Alliance) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5, subdivisions (a), (b), and (c), by failing to recognize and bargain with United Teachers Los Angeles (UTLA).

Pursuant to section 3541.3 of the Government Code, it hereby is ORDERED that Alliance and its representatives shall:

A. CEASE AND DESIST FROM:

1. Refusing to recognize or negotiate in good faith with UTLA as the exclusive representative of all classifications and positions in the certificated bargaining units;

2. By the same conduct, interfering with the rights of employees to be represented by their exclusive representative; and

3. Denying UTLA the right to represent its members.

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

1. Recognize and upon request, bargain in good faith with UTLA as the exclusive representative of the employees in the certificated units and if an understanding is reached, reduce it to writing and sign it. On commencement of good faith bargaining, UTLA's status as the exclusive collective bargaining representative of the certificated units shall be extended for a minimum of 12 months thereafter, as if the initial year of the certification has not expired.

2. Within 10 workdays following the date this decision is no longer subject to appeal, post at all work locations where notices to employees are posted, copies of the Notice attached hereto as an Appendix. An authorized agent of Alliance must sign the Notice. Once posted, the Notice shall remain in place for a period of 30 consecutive workdays. Alliance shall take reasonable steps to prevent alteration or defacement, as well as to prevent other materials from covering it. In addition to physically posting this Notice, Alliance shall post it by electronic message, intranet, internet site, and other electronic means Alliance uses to communicate with employees.[18]

3. Notify OGC of all actions taken to follow this Order by providing written reports as directed by OGC and concurrently serving such reports on UTLA.

Members Krantz and Paulson joined in this Decision.

[18] Any party may ask PERB's Office of the General Counsel (OGC) to alter or extend the posting period, require further notice methods, or otherwise supplement or adjust this Order to ensure adequate notice. Upon receipt of such a request, OGC shall solicit input from all parties and, if warranted, provide amended instructions to ensure adequate notice.

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-6728-E, *United Teachers Los Angeles v. Alliance College-Ready Public Charter Schools*, in which all parties had the right to participate, the Public Employment Relations Board found that the Alliance College-Ready Public Schools (Alliance) violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq.

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

A. CEASE AND DESIST FROM:

1. Refusing to recognize or negotiate in good faith with United Teachers Los Angeles (UTLA) as the exclusive representative of all classifications and positions in the certificated bargaining units;

2. By the same conduct, interfering with the rights of employees to be represented by their exclusive representative; and

3. Denying UTLA the right to represent its members.

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

1. Recognize and upon request, bargain in good faith with UTLA as the exclusive representative of the employees in the certificated units and if an understanding is reached, reduce it to writing and sign it. On commencement of good faith bargaining, UTLA's status as the exclusive collective bargaining representative of the certificated units shall be extended for a minimum of 12 months thereafter, as if the initial year of the certification has not expired.

Dated: _____

ALLIANCE COLLEGE-READY PUBLIC SCHOOLS

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.