STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DAVE LUKKARILA, Charging Party, v. CLAREMONT UNIFIED SCHOOL DISTRICT, Respondent.	Case Nos. LA-CE-5936-E LA-CE-5976-E PERB Decision No. 2654 July 10, 2019

Appearance: Fagen Friedman & Fulfrost by Milton E. Foster III, Attorney, for Claremont Unified School District.

Before Shiners, Krantz, and Paulson, Members.

DECISION

SHINERS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by the Claremont Unified School District (District) to the proposed decision of an administrative law judge (ALJ). The complaint alleged that the District violated the Educational Employment Relations Act (EERA)[1] by issuing a cease and desist letter to certificated employee Dave Lukkarila (Lukkarila) after he sent an e-mail to approximately 200 District staff regarding various workplace and union issues. Following a formal hearing, the ALJ concluded that the District retaliated against Lukkarila and interfered with his exercise of protected rights by issuing him the cease and desist letter.[2]

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

[2] This case was consolidated with Case No. LA-CE-5936-E for hearing. Neither party filed exceptions to the ALJ's dismissal of the complaint in Case No. LA-CE-5936-E.

Based on our review of the proposed decision, the entire record, and relevant legal authority in light of the District's exceptions, we affirm the proposed decision for the following reasons.

FACTUAL BACKGROUND

The District is a public school employer within the meaning of EERA section 3540.1, subdivision (k). The Claremont Faculty Association (CFA) is the exclusive representative of all certificated employees with the District within the meaning of EERA section 3540.1, subdivision (e). At all times relevant to this case, Lukkarila was a teacher at the District's Claremont High School (CHS), and thus a public school employee within the meaning of EERA section 3540.1, subdivision (j).

Petition Against Lukkarila

During the 2012-2013 school year, Lukkarila took leave pursuant to the Family Medical Leave Act (FMLA) and received approximately twenty days of catastrophic leave from the donations of bargaining unit employees, both benefits provided in the collective bargaining agreement between CFA and the District.

In January 2013, Lukkarila returned from family care leave. Shortly thereafter, Assistant Superintendent of Human Resources Kevin Ward (Ward) began hearing concerns from CHS employees, forwarded to him by CHS Principal Brett O'Connor (O'Connor), regarding Lukkarila: classroom instruction going off topic, filling instruction time with videos, speaking with his students about personal matters such as his wife's PERB case, and union organizing and representation. Other concerns forwarded to Ward dealt with Lukkarila's conduct during CFA meetings at CHS: not allowing others to speak, being aggressive toward

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Accordingly, we affirm the dismissal of the complaint in Case No. LA-CE-5936-E for the reasons stated in the proposed decision.

other teachers, and not respecting the agenda or the CFA president. As the school year progressed, Ward heard that other staff members were feeling harassed, intimidated, and threatened by Lukkarila.

On March 20 or 21, 2013, staff members reported to O'Connor that Lukkarila stated he could understand why Los Angeles Police Officer Christopher Dorner (Dorner) went on a killing spree as his union was not supporting him. Lukkarila's comment spread among the staff and their fear of Lukkarila increased.

By the morning of March 22, 2013, Lukkarila's Dorner comments had been reported to District Superintendent Jim Elsasser (Elsasser), who was concerned for staff safety as he considered the comments to constitute a threat and an escalation of Lukkarila's behavior.[3] He therefore began scheduling a meeting with his executive team of assistant superintendents to decide on a plan of action.

That same day, CFA President Dave Chamberlain (Chamberlain) and CFA Executive Board Member Kara Evans (Evans) requested an emergency meeting with Elsasser. During their meeting, they presented Elsasser with a petition signed by approximately 40 CHS employees requesting the District ensure a secure, safe, and effective working environment, and remedy the hostile work environment at CHS allegedly engendered by Lukkarila's behavior. The petition was set forth in a resolution format, and provided:

> Whereas Claremont High School staff members report concern[s] of being cornered in the staff work room and faculty parking lot[,] to be[ing] verbally lectured and/or pressured for information and/or otherwise verbally harassed by a colleague, and

[3] Lukkarila's comment about Dorner was close in time to Dorner's killing of his co-workers and their family members after Dorner was dismissed from employment with the Los Angeles Police Department. Both Elsasser and Ward were familiar with these incidents as they were highly publicized.

> Whereas Claremont High School staff members consciously avoid the staff work room after school to escape [the] aforementioned harassment, and
>
> Whereas Claremont High School staff members forgo accepting leadership positions of department and leadership committees to avoid [the] aforementioned harassment by a colleague, and
>
> Whereas Claremont High School members refuse to attend department and focus group committee meetings because of [the] perceived fear of irrational ranting behavior of a colleague, and
>
> Whereas Claremont High School staff members express anxiety about attending staff meetings because of [the] perceived fear of irrational ranting behavior of a colleague, and
>
> Whereas Claremont High School staff members report anxious and disruptive behavior from students in their classrooms as a result of inappropriate information shared with them in a colleague's classroom, and
>
> Whereas Claremont High School staff members express their uneasiness about a double standard in the evaluation process as a result of [a] growing disparity in being held accountable for professional conduct, and
>
> Whereas it is the district's responsibility to ensure a secure, safe and effective working environment for all its employees,
>
> Let it thereby be resolved that the district act definitively to remedy the condition of a hostile and stressful work environment at Claremont High School, and
>
> Let it furthermore be resolved that a formal grievance from the undersigned teachers will be necessary to rectify the situation if definitive action is not taken in a timely manner.

Chamberlain and Evans informed Elsasser that Lukkarila's escalating conduct was spreading stress and fear among the staff, and further explained that they were afraid for their lives after Lukkarila's Dorner comment.

After the meeting with CFA, Elsasser met with his executive team. Elsasser shared the petition with Ward[4] and asked Assistant Superintendent Mike Bateman to contact the police. Elsasser decided that afternoon to place Lukkarila on paid administrative leave while the District investigated the allegations contained in the petition.

On March 25, 2013, Ward issued Lukkarila a Notice of Paid Administrative Leave and Related Directives (Directive), which included, in relevant part, notice of the investigation and a directive prohibiting Lukkarila from contacting "any District employees," with the exceptions of Ward and CFA President Chamberlain or his designee. Elsasser and Ward believed the Directive was necessary to prevent further harassment, bullying, or threats by Lukkarila during the investigation.

Ward then hired a private investigation firm to conduct the investigation, instructing the firm to interview those who signed the petition, any other witnesses of the events set forth in the petition, and Lukkarila to obtain his version of what occurred.[5] The investigative firm was then to reduce the information to a written narrative and submit it to Ward. Ward did not instruct the investigative firm to interview any parents or students, and it did not do so.

[4] Ward later identified the signatures on the petition as teachers and other staff (including psychologists and nurses) working at CHS. Most of the signatures belonged to employees within the same bargaining unit as Lukkarila.

[5] The investigator scheduled Lukkarila to be interviewed on 11 separate occasions, but he did not appear. The investigation therefore closed without his being interviewed.

Lukkarila's E-mail to Joe Tonan[6]

Joe Tonan (Tonan) was the CFA president prior to Chamberlain. In June or July 2012, Tonan drove Lukkarila to see California Teachers Association (CTA) Group Legal Services attorneys Michael Feinberg (Feinberg) and Gening Liao (Liao), who had assisted Tonan's wife in the past. Lukkarila spent approximately four hours with the attorneys and showed them all of his grievances. At the end of the meeting, Feinberg stated that he was going to write a letter to the District's Human Resources department on behalf of Lukkarila.

On December 4, 2013, Feinberg sent a letter to Lukkarila stating that the letter which he had prepared for the District's Human Resources office had been completed. Later, CTA Representative Kimberly Breen (Breen) contacted Lukkarila and informed him that his "time" had run out and that Feinberg was not going to send a letter on his behalf.[7]

On December 11, 2013, Lukkarila sent an e-mail to Breen and CFA representatives, including Tonan,[8] asking a number of questions, including some about the Directive.

On December 19, 2013, Lukkarila sent an e-mail to numerous CFA officers, including Tonan, as well as attorneys Feinberg and Liao. Lukkarila asked numerous questions of the e-mail recipients, such as: whether they would respond to his questions, why he had been transferred to a CTA paid representative to represent him, whether CFA would inquire as to the status of his grievances, and whether Feinberg had sent a letter to the District's Human

[6] The facts under this heading form the basis for the allegations in Case No. LA-CE-5936-E. Because those allegations are not before the Board on appeal, we include these facts only to provide context for the allegations in the case before us, Case No. LA-CE-5976-E.

[7] Neither Tonan, Feinberg, nor Breen testified. Lukkarila's testimony was admitted only for the non-hearsay purpose of demonstrating Lukkarila's reason for sending e-mails on December 19 and 21, 2013, as discussed further below.

[8] As the CFA past president, Tonan was a member of the CFA executive board.

Resources department on his behalf. Lukkarila also stated that he wanted advice on pursuing a group grievance.

On December 21, 2013, at 5:08 p.m., Lukkarila sent an e-mail to Chamberlain and other CFA representatives, including Tonan, asking Chamberlain a number of questions regarding the CFA Executive Board and whether CFA failed to meet its statute of limitations in filing a grievance on his behalf, stating that he was requesting assistance from CFA in filing a group grievance, and that he was requesting that Kim Watkins, the CFA grievance committee chair, assist him.

After sending the e-mail, Lukkarila realized he had used an incorrect e-mail address for Tonan. Therefore, at 5:34 p.m., Lukkarila sent an e-mail to Tonan, which provided:

> Neglected to send this to you.
>
> Shamefully, you and Cindy[9] witness the destruction of a family.
>
> Mr. Feinberg, for you and Cindy—arrived in force.
>
> In the meantime, Mr. Feinberg—an honorable attorney—fails to support his promise to write me just one letter.
>
> In time, your shameful behavior will be exhibited.

Lukkarila explained that the "shameful behavior" referred to in the e-mail was that Tonan "lied" to him by acting as if he would help him by connecting him with Feinberg, and then CTA/CFA later withdrew any financial support to pay for Feinberg's legal services.

On December 22, 2013, Tonan forwarded the 5:34 p.m. e-mail[10] to Ward and requested that the District intervene, as follows:

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[9] "Cindy" is Tonan's wife.

[10] The 5:34 p.m. e-mail which Tonan forwarded to Ward did not include the e-mail which Lukkarila sent to Chamberlain and other CFA representatives at 5:08 p.m.

> I consider this email to be *threatening*. It smacks of extortion or blackmail. *I need to have a safe working environment*. I have contacted Kim Breen and Dave Chamberlain, but neither one can do anything as this is a member vs. member action. *The District needs to do something*. I am requesting that you do what you can to put an end to this. What do you propose to do to ensure that this type of behavior stops?

(Italics added.)

After Ward received the e-mail, he was concerned that Lukkarila had violated the Directive, and he sought to respond to Tonan's request for a safe working environment. Ward met briefly with Tonan to discuss the e-mail and his concerns.[11] Tonan stated he had attended a number of union meetings at CHS and observed Lukkarila's behavior, had spoken to a number of union members, and was himself becoming fearful of Lukkarila. Ward did not meet with Lukkarila because he recognized Lukkarila's e-mail address and, on that basis, determined that Lukkarila had sent the e-mail in question. He thus concluded that Lukkarila had violated the Directive.

On January 10, 2014, Ward sent the following e-mail to Lukkarila:

> The email below was forwarded to me by Joe Tonan. As you can see, he is concerned with your email correspondence as he considers your statements threatening.
>
> I must remind you of prior directives regarding your correspondence with staff during your Paid Administrative Leave.
>
> Immediately, you are to cease contacting Joe Tonan regarding such matters.
>
> Thank you for your adherence to this directive[.]

[11] Tonan was not one of the witnesses interviewed by the investigator hired by the District. He also did not sign the petition.

By sending this e-mail, Ward wanted Lukkarila to know how Tonan felt. He also wanted to remind Lukkarila of the Directive not to contact staff. He did not view his e-mail to Lukkarila as disciplinary and it was not placed in Lukkarila's personnel file or any other file.

Commencement of Disciplinary Procedures

In February 2014, Ward received the 176-page investigative report, which found support for the allegations in the employees' petition. On March 5, 2014, the District provided Lukkarila with a Notice of Proposed Intent to Immediately Suspend and Dismiss with an accompanying Statement of Charges. Therein, Lukkarila was advised of his right to respond to the Statement of Charges and present any and all information on his behalf at a *Skelly* hearing.[12] The *Skelly* hearing was scheduled for March 21, 2014. Lukkarila did not attend the *Skelly* hearing and did not submit a written response to any of the charges, except for requesting a last-minute continuance, which was denied.

On March 27, 2014, the District's administration recommended to the District Board of Education (District Board) that Lukkarila be dismissed. On April 3, 2014, the District Board voted to proceed with the proposed dismissal.

On April 7, 2014, Lukkarila sent an e-mail entitled "Confidential/Internal Union Memo" to Chamberlain, while copying approximately 200 or more District certificated employees at their private e-mail addresses. Lukkarila discussed a number of issues including, but not limited to: Lukkarila's *Skelly* hearing; whether Chamberlain questioned Ward about Lukkarila's sick leave request; whether the District Board informed Chamberlain of its April 3, 2014 decision; why Chamberlain did not respond to Lukkarila's request for representation at the District Board meeting; whether Lukkarila should make certain financial decisions in lieu

[12] The term "*Skelly* hearing" refers to a pre-disciplinary hearing that complies with due process requirements set forth in *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194.

of his proposed dismissal; Lukkarila's past family care leave; Lukkarila's father's poor health; an e-mail from Lukkarila's mother regarding his father's poor health; and how Lukkarila should "handle a potential CFA catastrophic leave request" or an FMLA request. Lukkarila closed his e-mail with the following caveat:

> PS If [the] CFA member receiving this e-mail is not a CFA member, please notify me of the error, so I can—respectfully—exclude one from future e-mails. If a CFA member does not wish to receive my e-mails, just spam my e-mail address, or notify me. No worries, whatsoever. I appreciated recent contacts and welcome anyone to e-mail me, call me [phone number], or correspond with me at [address].
>
> Note, I do not have the e-mail addresses of any member with the last names, "R" through "Z." . . . Mr. Chamberlain, would you please forward the "R" through "Z" names of CFA members from the CFA organiz[ational] list? Thank you.

Lukkarila testified that he intended to send the e-mail as a confidential communication to Chamberlain, and to all CFA members, whom he viewed as part of his representational team. He expressed a variety of concerns hoping to gain the support of CFA and its members, and especially wanted to be placed on FMLA and possibly collect catastrophic leave donations from other members as he had done in the past. His message regarding his father's poor health was an attempt to invoke members' sympathy to donate catastrophic leave to him. He added the postscript because he considered the e-mail to be confidential and did not want it shared with non-union members. Lukkarila testified that, in his view, the Directive did not exclude his contacting other union members.

The April 7, 2014 e-mail was forwarded to Elsasser. Upon review, he was concerned Lukkarila had violated the Directive prohibiting communication with District staff.

On April 8, 2014, Elsasser issued Lukkarila a memo entitled "Continued Inappropriate Email Contact of District Employees – Cease and Desist" (Cease and Desist Letter or Letter), providing:

> On or about March [25], 2013, you were placed on paid administrative leave when the District initiated its investigation into the allegations that you exhibited inappropriate conduct towards co-workers. The March [25], 2013 notice of administrative leave contained the following directives: "You may not enter any of the District's campuses or properties for any reason and **may not access the District's computer network** or any individual District computer." You were also directed "**not to confront, or otherwise contact any employee** or students of the District during your leave." (emphasis added)
>
> Further, on or about June 18, 2013, you were directed of the following, "given the District's ongoing investigation in response to a complaint [against you] and the lack of urgency regarding your campaign, the **District likewise directs you not to contact CFA members using your personal e-mail** during your leave." (emphasis added)
>
> It has come to our attention that you continue to contact District employee[s] and CFA staff in direct violation of these directives issued to you. In your most recent April 7, 2014 email, sent at 1:00 a.m., your discussion focuses on your pending dismissal and union representation. It appears once again that your *insubordinate email communication* was meant to illicit [sic] a response or rather support for your ongoing position and various disputes with the District and CFA. *Such conduct is completely inappropriate and clearly breaches the directives* provided in your March [25], 2013 notice of administrative leave and June 18, 2013 correspondence from the District on behalf of the District.
>
> Despite being counseled and informed on multiple occasions that such conduct was expressly prohibited, you continued to contact staff in violation of these repeated directives. **You must cease and desist with this conduct, including any and all contact of District students or staff members via their personal email accounts.** Your persistent violation of this directive is another further example of *your lack of judgment and inability to follow the directives* of your supervisors and District administration. This *continued insubordination* is another illustration of how you

> have completely undermined the District's trust in your honesty, ability and judgment.
>
> **You are not to have any contact with any District student or staff member, absent specific prior permission from the Assistant Superintendent, Human Resources.** The District cannot make this more clear to you. *If you continue to ignore these directives, the District will be forced to seek more serious measures, which may include amendment of the pending dismissal charges and/or appropriate legal action in a court of law*.
>
> Pursuant to Education Code section 44031,[13] *this letter shall be placed in your person[nel] file shortly*. If you desire, you may provide a written response to my attention which shall also be placed in that file.

(Bold text and internal parentheticals in original quotation; italics added.)

Elsasser issued the Cease and Desist Letter to Lukkarila because he believed Lukkarila's e-mail directly violated the Directive not to contact District employees other than Ward and Chamberlain. Neither Elsasser nor Ward considered the Letter to be a disciplinary document, but merely a further reminder to follow the prior directives and to cease and desist from violating those directives. Although the investigation had been completed, the District still had concerns about further hostile communications by Lukkarila, maintaining a safe work environment, and the potential escalation of Lukkarila's behavior during the pending dismissal

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[13] Education Code section 44031, subdivision (b)(1), provides:

> (b) In addition to subdivision (a), all of the following shall apply to an employee of a school district:
>
> (1) Information of a *derogatory nature* shall not be entered into an employee's personnel records unless and until the employee is given notice and an opportunity to review and comment on that information. The employee shall have the right to enter, and have attached to any *derogatory statement*, his or her own comments. . . .

(Italics added.)

process. Elsasser therefore decided not to lift the Directive until the termination process was complete.

On April 9, 2014, Ward delivered to Lukkarila a Notice of Immediate Suspension Without Pay and Intent to Dismiss. The dismissal notice informed Lukkarila that on April 3, 2014, the District Board voted to proceed with the dismissal as proposed in the March 5, 2014 Notice of Proposed Intent and Statement of Charges.

DISCUSSION

The complaint alleged that the District issued the April 8, 2014 Cease and Desist Letter in retaliation for Lukkarila's protected activity, and that the Letter independently interfered with his exercise of EERA-granted rights. We address each allegation in turn.

I. Retaliation

The District argues the retaliation allegation should be dismissed because: (1) the Cease and Desist Letter did not constitute an adverse action and (2) legitimate business reasons justified issuance of the Letter. We reject the District's argument on both points.

A. Prima Facie Case

To establish a prima facie case of retaliation in violation of EERA section 3543.5, subdivision (a), the charging party must show that: (1) the employee exercised rights under EERA, (2) the employer had knowledge of the exercise of those rights, (3) the employer took adverse action against the employee, and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210, pp. 5-6 (*Novato*).)

The District does not dispute that: (1) Lukkarila's April 7, 2014 e-mail was protected activity under EERA, (2) Elsasser was aware of Lukkarila's protected activity (i.e., sending the

e-mail), and (3) Elsasser issued the Cease and Desist Letter in response to the protected e-mail. Thus, whether Lukkarila has established a prima facie case turns solely on whether the Letter constituted an adverse action.

In determining whether an employer's action is adverse, the Board uses an objective standard and will not rely upon the subjective reactions of the employee. (*Chula Vista Elementary School District* (2018) PERB Decision No. 2586, pp. 24-25 (*Chula Vista*).) "The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment." (*Id.* at p. 25, quoting *Newark Unified School District* (1991) PERB Decision No. 864, pp. 11-12.)

PERB has found that placing documents "that could support future discipline in an employee's personnel file is . . . an adverse action." (*City of Long Beach* (2008) PERB Decision No. 1977-M, p. 13 [counseling memorandum threatening that continued behavior may result in discipline and which was placed in personnel file considered adverse].) For example, a notice of unsatisfactory acts, though not disciplinary in itself, was found to be adverse because it contained a threat of possible future discipline. (*Los Angeles Unified School District* (2007) PERB Decision No. 1930, adopting proposed decision at p. 11.) But a threat of discipline is not necessary for a finding of adverse action; it is enough that the document placed in the employee's personnel file accuses the employee of misconduct or substandard performance and thus potentially impedes the employee's advancement. (*County of Riverside* (2009) PERB Decision No. 2090-M, pp. 28, 30; *State of California (Department of Youth Authority)* (2000) PERB Decision No. 1403-S, pp. 32-33.) For instance, a formal letter placed in an employee's personnel file that summarily concluded the employee engaged in

"inappropriate and negative" conduct was found to be adverse. (*Alisal Union Elementary School District* (2000) PERB Decision No. 1412, pp. 19, 22-23.)

In this case, Elsasser definitively wrote to Lukkarila, "It appears *once again* that your *insubordinate email communication* was meant to illicit [sic] a response or rather support for your ongoing position and various disputes with the District and CFA. Such conduct is *completely inappropriate and clearly breaches the [March 25, 2013 Directive]*." (Italics added.) Elsasser then warned him, "*If you continue to ignore these directives*, the District will be forced to seek more serious measures, *which may include amendment of the pending dismissal charges* and/or appropriate legal action in a court of law." (Italics added.) In conclusion, he notified Lukkarila the Cease and Desist Letter would be placed in his personnel file.

The District claims the Cease and Desist Letter was not, nor was it intended to be, disciplinary in nature, arguing that it cannot be thought adverse because Lukkarila was permitted to and continued to communicate with his union representatives. But neither the District's intent nor Lukkarila's continued communication with his union representatives are relevant to the question of adversity. Rather, the relevant inquiry is "whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment." (*Chula Vista*, *supra*, PERB Decision No. 2586, p. 25.)

The Cease and Desist Letter repeatedly charged, in no uncertain terms, that Lukkarila—already facing potential dismissal for inappropriate conduct toward his co-workers—had "once again" insubordinately engaged in inappropriate communications. Though Elsasser did not explicitly say the District would impose discipline based on the April 7, 2014 e-mail, he warned Lukkarila that if his behavior continued, further such communications may be used to

amend the pending disciplinary charges and advised Lukkarila that he would place the letter in his personnel file. Because a reasonable person in Lukkarila's position would consider the Letter adverse to his or her employment, we find it constituted an adverse action. Because the other three elements of the *Novato* test are undisputed, Lukkarila has established a prima facie case of retaliation.

B. Employer's Affirmative Defense

Once the charging party establishes a prima facie case of retaliation, the burden shifts to the respondent to prove it would have taken the same adverse action even if the employee had not engaged in the protected activity. (*Chula Vista, supra*, PERB Decision No. 2586, p. 27; *Novato, supra*, PERB Decision No. 210, p. 14.) When it appears the adverse action was motivated by both lawful and unlawful reasons, "the question becomes whether the [adverse action] would not have occurred 'but for' the protected activity." (*Martori Bros. Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 729-730.) The "but for" test is an affirmative defense which the employer must establish by a preponderance of the evidence. (*McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 304.) The employer's evidence must establish both that it had an alternative, non-discriminatory reason for taking the adverse action, and that its proffered reason was, in fact, the actual reason for taking the adverse action. (*Palo Verde Unified School District* (2013) PERB Decision No. 2337, p. 31 (*Palo Verde*).)

The essence of the *Novato* test is to determine whether the employer acted for a discriminatory or retaliatory reason. (*Regents of the University of California* (2012) PERB Decision No. 2302-H, p. 3.) In making this determination, once the charging party establishes a prima facie case, we weigh the evidence supporting the employer's alternative, non-

discriminatory justification for the adverse action against the evidence of the employer's unlawful motive. (*Los Angeles County Superior Court* (2018) PERB Decision No. 2566-C, p. 19; *Rocklin Unified School District* (2014) PERB Decision No. 2376, p. 14; *Palo Verde*, *supra*, PERB Decision No. 2337, p. 33.) The outcome of a discrimination or retaliation case is thus ultimately determined by the weight of the evidence supporting each party's position. (*San Diego Unified School District* (2019) PERB Decision No. 2634, p. 16, fn. 12.)

The District does not dispute that it issued the Cease and Desist Letter in direct response to Lukkarila's April 7, 2014 e-mail. Nor does it argue that the e-mail lost statutory protection due to its content or the manner in which it was conveyed. Instead, the District asks us to examine the e-mail in the larger context of Lukkarila's pattern of harassing and intimidating behavior. As we recently affirmed, "context is always relevant" in determining whether an adverse action was unlawfully motivated by an employee's protected activity. (*County of Santa Clara* (2019) PERB Decision No. 2629-M, p. 11.) Moreover, the fact that the adverse action was taken, at least in part, in response to protected activity does not necessarily preclude the employer from proving the adverse action also was motivated by other non-discriminatory reasons, and that the employer would have taken the same adverse action even absent the protected conduct. (See *Regents of the University of California*, *supra*, PERB Decision No. 2302-H, p. 4 [concluding that the employer established its affirmative defense even though the employer took the adverse action partially in response to protected activity].) Viewing the April 7, 2014 e-mail in the larger factual context of the record before us, we find the District has not proven its affirmative defense.[14]

[14] The District's argument that we must consider the entire factual context includes multiple references to findings in the investigative report produced by the outside investigator retained by the District to investigate allegations of misconduct by Lukkarila. The

Although the record establishes that the District legitimately was concerned with protecting staff from further harassment and intimidation by Lukkarila, we nevertheless find the District would not have issued the Cease and Desist Letter absent Lukkarila's protected e-mail of April 7, 2014. Notably, that e-mail was different from the type of inappropriate conduct of which Lukkarila had been accused. For instance, the April 7, 2014 e-mail contained no threats, no intimidating language, and no statements similar to the one Lukkarila allegedly made about Dorner's killing spree. Nor is the e-mail similar to the types of inappropriate behavior alleged in the petition, e.g., being aggressive toward other teachers, interrupting speakers, ranting during meetings, etc. Moreover, the e-mail stated that any recipient who did not wish to receive further e-mails from Lukkarila could just let him know and he would remove them from his e-mail list. Thus, the e-mail's content provides no basis upon which the District reasonably could conclude that it was threatening, intimidating or harassing, thereby justifying a total ban on future communications with District employees.

The Cease and Desist Letter nonetheless expressly prohibited Lukkarila from communicating with other employees about his working conditions:[15]

> It has come to our attention that you continue to contact District employee[s] and CFA staff in direct violation of these directives

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investigative report was never admitted into the evidentiary record. Thus, the District's reliance on the report violates PERB Regulation 32300, subdivision (b), which states: "Reference shall be made in the statement of exceptions only to matters contained in the record of the case." (PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.) And, of course, because the report is not in the record, we cannot consider it in deciding this case. (*California State University, San Francisco* (1991) PERB Decision No. 910-H, p. 9.)

[15] "[T]here is no more fundamental right afforded employees under the statutory scheme than the right to communicate with others about working conditions." (*Los Angeles Community College District* (2014) PERB Decision No. 2404, p. 11, fn. 5 (*LACCD*).) Speech concerning the "autonomy and effectiveness of the exclusive representative" is also protected. (*Rancho Santiago Community College District* (1986) PERB Decision No. 602, p. 12.)

> issued to you. In your most recent April 7, 2014 email, sent at 1:00 a.m., your discussion focuses on your pending dismissal and union representation. It appears once again that your insubordinate email communication was meant to illicit [sic] a response or rather support for your ongoing position and various disputes with the District and CFA. Such conduct is completely inappropriate and clearly breaches the directives provided in your March [25], 2013 notice of administrative leave and June 18, 2013 correspondence from the District on behalf of the District.

The explicit statement in this paragraph that the District considered it "completely inappropriate" for Lukkarila to seek support from co-workers for his "ongoing position and various disputes with the District and CFA," coupled with the undisputed fact that the District issued the Cease and Desist Letter in direct response to those communications, is strong evidence that the District would not have issued the Letter absent Lukkarila's protected activity. (See *State of California (Department of Corrections & Rehabilitation)* (2012) PERB Decision No. 2282-S, p. 14 [finding no lawful basis for discipline where a written reprimand explicitly stated it was issued because of the employee's conduct during meetings where she was "acting as a representative" of her union].) Thus, although the District had legitimate concerns about protecting its employees from harassing and intimidating behavior by Lukkarila, the Letter went far beyond those concerns by banning all communications with District staff, not just those of a harassing or intimidating nature. Because the balance of the evidence weighs against the District, we conclude it failed to prove its affirmative defense that it would have issued the Letter notwithstanding the protected content of Lukkarila's April 7, 2014 e-mail.

II. Interference

Similar to its argument on the retaliation allegation, the District contends that issuance of the Cease and Desist Letter was justified by the legitimate business reason of preventing

District staff from being subjected to further harassing and inappropriate conduct by Lukkarila. And just as with the retaliation allegation, we find the balance of the evidence weighs against the District.

EERA section 3543 protects public school employees' "right to form, join, and participate in the activities of employee organizations" in matters concerning employer-employee relations. PERB's interference test does not require evidence of unlawful motive, only that the employer conduct at issue has a tendency to create at least "slight harm" to employee rights. (*LACCD*, *supra*, PERB Decision No. 2404, p. 5; *Simi Valley Unified School District* (2004) PERB Decision No. 1714, p. 17.) To establish a prima facie case, the charging party must demonstrate that the employer's conduct tends to *or* does result in harm to employee rights. (*Carlsbad Unified School District* (1979) PERB Decision No. 89, p. 10 (*Carlsbad*).) If the prima facie case is established, PERB balances the degree of harm to protected rights against any legitimate business interest asserted by the employer. (*Hilmar Unified School District* (2004) PERB Decision No. 1725, p. 17, citing *Carlsbad*, *supra*, at pp. 10-11.) "Where the harm is slight, the Board will entertain a defense of operational necessity and then balance the competing interests." (*Ibid.*) "Where the harm is inherently destructive [of protected rights], the employer must show the interference was caused by circumstances beyond its control." (*Ibid.*)[16]

In the area of employer rules and directives, PERB does not look favorably on broad, vague directives that might chill lawful speech or other protected conduct. (*LACCD*, *supra*, PERB Decision No. 2404, p. 6.) In cases where an employer has issued a broad directive to an

[16] In his dissent in *Contra Costa County Fire Protection District* (2019) PERB Decision No. 2632-M, Member Shiners disagreed that the concept of "inherently destructive conduct" should be part of PERB's interference standard. Nevertheless, he recognizes that extant Board law continues to include that concept in its interference test, and thus concurs in its application here for institutional reasons.

employee under investigation not to contact other employees, we have found harm to the employee's rights because the directive could be read "to prohibit the employee from participating in a variety of protected activities, including discussing his working conditions with his coworkers." (*San Diego Unified School District*, *supra*, PERB Decision No. 2634, p. 17; *County of Santa Clara* (2018) PERB Decision No. 2613-M, p. 9; *LACCD*, *supra*, PERB Decision No. 2404, p. 9.) In such cases, the employer bears the burden of proving the existence of an operational necessity for the directive as to that specific employee under the particular circumstances. (*San Diego Unified School District*, *supra*, PERB Decision No. 2634, p. 18; *County of Santa Clara*, *supra*, PERB Decision No. 2613-M, p. 12; *LACCD*, *supra*, PERB Decision No. 2404, p. 13.)

On its face, the Cease and Desist Letter prohibited Lukkarila from communicating with other District employees about his "ongoing position and various disputes with the District and CFA" in regard to his pending disciplinary proceedings and union representation. Because the Letter prohibited Lukkarila from "discussing his working conditions with his coworkers," it tended to harm Lukkarila's EERA-protected right to engage in such discussions. (*San Diego Unified School District*, *supra*, PERB Decision No. 2634, p. 17; *County of Santa Clara*, *supra*, PERB Decision No. 2613-M, p. 9; *LACCD*, *supra*, PERB Decision No. 2404, p. 9.)

The District asserts there was no harm to Lukkarila's communication rights for two reasons. First, the District argues the Cease and Desist Letter was not harmful to Lukkarila's rights because it explicitly allowed him to communicate with CFA representatives, even those who were District employees. But the right protected by EERA section 3543 "is the right to communicate with co-workers about working conditions." (*County of Santa Clara*, *supra*,

PERB Decision No. 2613-M, p. 15.) Thus, allowing Lukkarila to communicate with union representatives did not fully alleviate the harm to his protected rights. (*Ibid*.)

Second, the District contends the Cease and Desist Letter caused no actual harm to Lukkarila because after receiving it he continued to communicate with District staff and CFA members about his dissatisfaction with the District and continued to utilize union representation. "A finding of interference, coercion or restraint does not require evidence that any employee subjectively felt threatened or intimidated or was in fact discouraged from participating in protected activity; rather the inquiry is an objective one which asks whether, under the circumstances, an employee would reasonably be discouraged from engaging in protected activity." (*Hartnell Community College District* (2015) PERB Decision No. 2452, p. 24; *Clovis Unified School District* (1984) PERB Decision No. 389, p. 14.) The fact that the Letter did not actually discourage Lukkarila from continuing to communicate with his co-workers thus does not preclude finding that the Letter would have discouraged a reasonable employee from doing so.

Having found that the Cease and Desist Letter objectively tended to harm Lukkarila's protected right to communicate with other District employees, we turn to the District's asserted justification for the Letter.[17] To justify a directive prohibiting an employee from communicating with co-workers, the employer must prove it had a "legitimate and substantial business justification" for the prohibition. (*LACCD*, *supra*, PERB Decision No. 2404, p. 6; *Hyundai America Shipping Agency* (2011) 357 NLRB 860, 874.) In *County of Santa Clara* and *LACCD*, we found broad "no contact" directives unlawful where the employer offered no

[17] Because we find the District's conduct was not justified under the less stringent test applied to conduct that causes comparatively slight harm to employee rights, we need not determine whether the potential harm is comparatively slight or inherently destructive. (*Chula Vista*, *supra*, PERB Decision No. 2586, p. 29, fn. 11.)

rationale for the directive other than issuing the directive was the employer's standard practice when an employee is under investigation. (*County of Santa Clara, supra*, PERB Decision No. 2613-M, p. 12; *LACCD, supra*, PERB Decision No. 2404, p. 13.) In *San Diego Unified School District*, we found the employer's justification for a "no contact" directive lacking where the stated purpose was to prevent the employee under investigation from soliciting or encouraging staff members to submit comments to an online petition about the employee's conduct. (*San Diego Unified School District, supra*, PERB Decision No. 2634, p. 18.)

Here, the District asserts the Cease and Desist Letter's blanket prohibition on communications was necessary to protect District employees from being harassed and intimidated by Lukkarila. However, Lukkarila's April 7, 2014 e-mail was neither harassing nor intimidating on its face. Consequently, the District's asserted need to protect its employees from further communications like Lukkarila's April 7, 2014 e-mail is not a legitimate and substantial business justification for prohibiting all communication between him and District staff.

In finding unlawful interference here, we are mindful of an employer's obligation to protect employees from harassing or intimidating behavior by co-workers. We also acknowledge that when an employee communicates about working conditions in an inappropriate manner, it may be difficult to craft a directive that adequately protects co-workers while still allowing the employee to exercise their statutory communication right. Nonetheless, the key to an appropriate directive is that it is tailored to the particular circumstances. (*San Diego Unified School District, supra*, PERB Decision No. 2634, p. 18; *County of Santa Clara, supra*, PERB Decision No. 2613-M, p. 12; *LACCD, supra*, PERB Decision No. 2404, p. 13.) In some circumstances, a prohibition on the specific manner or type

of communications in which the employee has already engaged might be appropriate. As one example, the District was free to direct Lukkarila not to engage in harassing or intimidating conduct, whether in person or by e-mail. As another example, the District was free to direct Lukkarila to refrain from insensitively referring to incidents of gun violence. Here, however, the District made no attempt to tailor the Cease and Desist Letter to cover unprotected conduct. Instead, it issued a broad directive prohibiting *all* communications with District employees, which on the record before us unnecessarily restricted Lukkarila's right to communicate with his co-workers about working conditions and other protected topics.

III. Remedy

The District excepts to two portions of the ALJ's proposed order: (1) that the District "[n]otify the Commission on Professional Competence (CPC) of this decision if the April 7, 2014 e-mail was an allegation in the District's termination action against Lukkarila and the determination of the CPC is not yet final"; and (2) that the District "[n]otify the California Commission on Teacher Credentialing (CCTC) of this decision if the District utilized the April 7, 2014 e-mail as a reason to report Lukkarila to the CCTC pursuant to Education Code section 44030.5, subdivision (a), and the CCTC has not yet rendered a final determination on this referral." In support of its exceptions, the District has submitted a declaration by its counsel in this matter asserting that Lukkarila's April 7, 2014 e-mail was not used as a basis for his termination or for reporting him to CCTC. The declaration also asserts that Lukkarila's termination is now final. Based on the declaration, the District asks us to modify the ALJ's proposed order by striking the two portions quoted above.

Although we have no reason to doubt the statements in District counsel's declaration, we cannot determine solely from the declaration whether either or both of the challenged

portions of the order are now moot. We therefore decline to remove those portions from our order, and leave it to be determined in compliance proceedings whether the conditions obviating the District's need to notify the CPC and the CCTC of this decision have been met.

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-5936-E, *Dave Lukkarila v. Claremont Unified School District*, is DISMISSED.

Based upon the foregoing findings of fact and conclusions of law, and the entire record in Case No. LA-CE-5976-E, *Dave Lukkarila v. Claremont Unified School District*, it is found that the Claremont Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5, subdivision (a), by issuing Dave Lukkarila (Lukkarila) the April 8, 2014 Cease and Desist Letter in retaliation for and in interference with his protected employee rights of sending an e-mail to District employees seeking their support in work-related matters.

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

A. CEASE AND DESIST FROM:

1. Retaliating against Lukkarila for engaging in protected activity.

2. Interfering with Lukkarila in his exercise of employee rights.

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

1. Rescind the April 8, 2014 Cease and Desist Letter, remove it from Lukkarila's personnel file, and destroy it.

2. Notify the Commission on Professional Competence (CPC) of this decision if the April 7, 2014 e-mail was an allegation in the District's termination action against Lukkarila and the determination of the CPC is not yet final.

3. Notify the California Commission on Teacher Credentialing (CCTC) of this decision if the District utilized the April 7, 2014 e-mail as a reason to report Lukkarila to the CCTC pursuant to Education Code section 44030.5, subdivision (a), and the CCTC has not yet rendered a final determination on this referral.

4. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all work locations where notices to certificated employees in the District customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. The Notice shall also be posted by electronic message, intranet, internet site, or other electronic means customarily used by the District to communicate with certificated employees. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.

5. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on Lukkarila.

Members Krantz and Paulson joined in this Decision.

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-5976-E, *Dave Lukkarila v. Claremont Unified School District*, in which all parties had the right to participate, it is found that the Claremont Unified School District (District) violated the Educational Employment Relations Act, Government Code section 3543.5, subdivision (a), by issuing Dave Lukkarila (Lukkarila) the April 8, 2014 Cease and Desist Letter in retaliation for and in interference with his protected employee rights of sending an e-mail to District employees seeking their support in work-related matters.

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

A. CEASE AND DESIST FROM:

1. Retaliating against Lukkarila for engaging in protected activity.

2. Interfering with Lukkarila in his exercise of employee rights.

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

1. Rescind the April 8, 2014 Cease and Desist Letter, remove it from Lukkarila's personnel file, and destroy it.

2. Notify the Commission on Professional Competence (CPC) of this decision if the April 7, 2014 e-mail was an allegation in the District's termination action against Lukkarila and the determination of the CPC is not yet final.

3. Notify the California Commission on Teacher Credentialing (CCTC) of this decision if the District utilized the April 7, 2014 e-mail as a reason to report Lukkarila to the CCTC pursuant to Education Code section 44030.5, subdivision (a), and the CCTC has not yet rendered a final determination on this referral.

Dated: _____ CLAREMONT UNIFIED SCHOOL DISTRICT

By: _____
Authorized Agent

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