STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

PHILIP CRAWFORD AND DENNIS MEAKIN, Charging Parties, v. SAN JOSE/EVERGREEN FEDERATION OF TEACHERS, AFT LOCAL 6157, AND AMERICAN FEDERATION OF TEACHERS, AFL-CIO, Respondents.	Case No. SF-CO-839-E PERB Decision No. 2744 August 31, 2020

Appearances: Philip J. Crawford, on his own behalf and on behalf of Dennis Meakin; Law Offices of Robert J. Bezemek by Patricia Lim, Attorney, for San Jose/Evergreen Federation of Teachers, AFT Local 6157; Michael Piccinelli, Attorney, for American Federation of Teachers, AFL-CIO.

Before Banks, Shiners, and Krantz, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB) on an appeal by Philip Crawford and Dennis Meakin, who ask us to reverse the decision of PERB's Office of the General Counsel (OGC) to dismiss their first amended unfair practice charge. In that charge, Crawford and Meakin alleged that San Jose/Evergreen Federation of Teachers, AFT Local 6157 (Local 6157 or Union) and American Federation of Teachers, AFL-CIO (AFT) violated the Educational Employment Relations Act (EERA) by taking adverse actions against them in

retaliation for their protected activities and thereby interfering with their statutory rights.[1]

Local 6157, an affiliate of AFT, represents part-time and full-time faculty at the San Jose/Evergreen Community College District. Both full-time and part-time faculty members elect representatives to sit on the Union's ten-member Executive Board (board). This case arises from a severe schism between board representatives who strongly supported part-time faculty interests and the remainder of the board. In the wake of the Union's May 2018 board member election and the board's subsequent decision to appoint Meakin as an interim member, the board was equally divided (five to five) on most issues.[2] One faction, which strongly supported part-time faculty interests, consisted of Crawford, Meakin, Alex Lopez, Andres Quintero, and Union Vice President Fabio Gonzalez. The other faction consisted of Jessica Breheny, Nasreen Rahim, Elaine Ortiz-Kristich, Union President Paul Fong, and Union Treasurer Linda Ferrell. Solely for ease of reference, we refer to these groups as "Crawford's faction" and "Fong's faction."

On January 2, 2019, all five members of Crawford's faction filed the instant charge against Local 6157. On September 30, 2019, OGC issued a warning letter. In November 2019, Crawford and Meakin filed the amended charge, including only themselves as charging parties and dropping the remaining three members of

[1] EERA is codified at Government Code section 3540 et seq.

[2] In July 2018, Crawford recommended Meakin, his brother-in-law, to fill a Local 6157 Executive Board vacancy. The Executive Board voted to appoint Meakin as an interim board member. Meakin served the remainder of a term ending in June 2019.

Crawford's faction. Whereas the initial charge had named only Local 6157 as a respondent, the amended charge named both Local 6157 and AFT as respondents.

OGC dismissed the amended charge on February 10, 2020. Crawford and Meakin timely appealed, while Local 6157 and AFT urge us to affirm OGC's determination. Having reviewed the parties' arguments and all underlying pleadings, we affirm OGC's dismissal.

FACTUAL BACKGROUND[3]

I. Discord erupts within Local 6157, including competing discrimination claims.

In late 2017, Local 6157 searched for a new Executive Director. The Union ultimately chose Jennifer Bills over numerous other applicants, including Crawford. Bills started work in January 2018.

On July 19, 2018, Crawford and Bills traded written allegations of discrimination based on tensions that had been brewing for many weeks. In an e-mail to Bills and the full board, Crawford noted that Bills had accused him—and other men on the board—of gender bias and "a tendency to smother the voice of our female colleagues." Crawford, in turn, accused Bills of engaging in "a very rude attempt" to "interrogate (in full force cross-examination style) our Latino male VP." Crawford's e-mail also accused Bills of

[3] In the present procedural posture, we assume that a charging party's factual allegations are true, and we view them in the light most favorable to the charging party. (*Cabrillo Community College District* (2015) PERB Decision No. 2453, p. 8 (*Cabrillo I*); *Cabrillo Community College District* (2019) PERB Decision No. 2622, p. 4 (*Cabrillo II*).) We do not rely on a respondent's responses if they explicitly or implicitly create a factual conflict with a charging party's factual allegations, even if the respondent's contrary responses are stated more persuasively or appear as though they may be backed up by more supporting evidence, when compared to the charging party's allegations. (*Cabrillo I*, *supra*, PERB Decision No. 2453, p. 8; *Salinas Valley Memorial Healthcare System* (2012) PERB Decision No. 2298-M, p. 13.)

being “inclined to verbally assault Latino males among our constituency.” Just hours after Bills received Crawford’s e-mail, she e-mailed Fong and Ferrell to complain about “pervasive gender-based discrimination and harassment” by Crawford and Gonzalez against Bills and other women.

Fong and Ferrell consulted with Local 6157’s legal counsel, seeking guidance for responding to Bills’ employment discrimination complaint. The Union’s counsel subsequently wrote all ten board members to inform them that Local 6157 had a duty to investigate the complaint. Based on this advice, on or about August 13, 2018, Fong and Ferrell on behalf of Local 6157 hired an attorney, Susan Hatmaker, to investigate Bills’ complaint.

At a retreat in late August 2018, members of Crawford’s faction alleged that Fong and Ferrell had improperly provided a raise to Bills’ predecessor, Barbara Hanfling, without evaluating her or obtaining board approval. Crawford’s faction voted in favor of initiating a criminal complaint alleging that Fong and Ferrell had thereby embezzled union funds, but Crawford’s faction did not muster majority support to do so.

On September 7, 2018, Crawford published a newsletter to hundreds of part-time faculty members. In the newsletter, Crawford repeated his claims about the allegedly improper raise. Crawford’s newsletter also accused Fong and Ferrell of improperly spending union dues on an investigation, without board approval.

Fong defended himself in an e-mailed letter to the Union’s membership. In that letter, Fong stated that the Union’s normal practice would have been to refrain from notifying its membership of Bills’ complaint at least until the investigator issued a report,

but in response to Crawford's allegations, he felt compelled to notify members that Bills' complaint was a gender-based complaint against Crawford and Gonzalez.

In September 2018, Ferrell filed a complaint with the District, claiming members of Crawford's faction retaliated against her for acting to investigate Bills' gender-based harassment claims, and in so doing created a hostile work environment in her employment at the District. The District responded to the complaint by explaining that it would not investigate allegations relating solely to internal union affairs, and that it would therefore investigate the accused faculty members solely to the extent they had allegedly acted in their capacity as District employees. The District closed the investigation without taking any action against the accused faculty members.

Also in September 2018, Quintero submitted to Fong a letter complaining that Bills had mistreated him and another faculty member because they were Hispanic and male. On November 30, 2018, the board voted to investigate Quintero's complaint and to expand the sexual harassment investigation to include new parties and new claims. In January 2019, each member of Crawford's faction joined in filing the instant charge as well as in filing a lawsuit in Santa Clara County Superior Court against each member of Fong's faction. The plaintiffs alleged that the board's November 2018 meeting lacked a quorum. As relief for this alleged violation, the plaintiffs sought to nullify the actions the board took at that meeting, including the board's actions vis-à-vis investigating the various discrimination complaints. The superior court ultimately dismissed the lawsuit.

II. Hatmaker issues her report, and the District restricts and reprimands Crawford.

On February 18, 2019, Hatmaker issued a thirteen-page report regarding Bills' complaint (the Hatmaker Report). Hatmaker concluded that Bills raised valid complaints

of gender bias, while Crawford, in contrast, complained of anti-Latino discrimination with the goal of intimidating Bills into keeping quiet about gender bias.[4] Thereafter, Fong and Ferrell allegedly: (1) "caused the [Hatmaker] report to be distributed to faculty and administrative mailboxes"; (2) facilitated Chancellor Byron Breland's receipt of the report; and (3) at a meeting with Breland, demanded that the District terminate Crawford and Meakin.

On March 11, 2019, Breland issued a letter to Crawford (the Breland letter). The letter recounted that near the end of the preceding week, the District had received an "unsolicited copy" of the Hatmaker Report "from an anonymous source." The letter acknowledged the District was aware of internal union discussions regarding whether the report was confidential and averred that the District had no interest in intruding on those discussions. The letter also stated that "because the District has no interest in intruding on the Union's processes, we conclude that we must accept—and will not second-guess—the findings of the Union Investigation." In a footnote, the letter allowed that the District was "aware that there is a dispute within the Union as to whether the investigation was properly authorized. However, unless and until the District receives official notification that the findings of the investigation have been rejected by the Union, we do not see a basis to ignore the findings."

After recounting these preliminary considerations, the Breland letter explained that "it is not within the District's purview to address the hostile environment that

[4] Crawford claims that Hatmaker was wrong in most respects. In the current procedural posture, we presume only those aspects of Hatmaker's findings that neither explicitly nor implicitly conflict with the amended charge. (*Cabrillo I*, *supra*, PERB Decision No. 2453, p. 8.)

apparently exists within the Union," but "the Union's Investigation Report also reveals facts indicating that your conduct may have caused, or has the potential to cause, a hostile workplace environment—which is within the District's purview and duty to address." The Breland letter also criticized Crawford for using District e-mail and potentially other District resources for prohibited purposes, including "to engage in gender-based harassment against Jennifer Bills, the Executive Director of the Union."[5]

The Breland letter imposed several restrictions on Crawford, all of which, the District noted, were non-disciplinary and would not appear in Crawford's personnel file. First, the District directed Crawford to refrain from using District e-mail except to communicate with his department chair, dean, colleagues, and students on issues pertaining to classes or departmental matters. The letter warned Crawford that were he to violate this directive, the District might terminate Crawford's access to District e-mail. More generally, the District directed Crawford to refrain from using District resources, including copy machines and paper, to further his "private litigation."

Finally, the Breland letter returned to Ferrell's fall 2018 harassment complaint, even though the District had previously determined to take no action on Ferrell's complaint, and notwithstanding the fact that Hatmaker did not investigate or comment on Ferrell's allegations. The Breland letter stated: "As you also know, the District determined it did not have jurisdiction to investigate the complaint because the alleged conduct related to union matters. However, this does not absolve the District of its responsibility to stop and prevent a hostile workplace environment." Based on this

[5] Hatmaker's report in no way indicates that she had considered District policies on use of employer-sponsored e-mail or made any findings that Crawford violated such policies.

reasoning, the letter directed Crawford to restrict his communications and interactions with Ferrell as follows:

> "You are instructed not to use any District network, platform or device to communicate with Linda Ferrel [sic] on any subject matter. This includes sending messages from or to a District email address, and calling from or to any District telephone number;
>
> "While you are on District property, you are to stay at least 50 feet away from Linda Ferrel,[sic] her office and classes, unless you are engaged in concerted activity during a time and place generally authorized for concerted activity. If this would require you to leave a work-related meeting or activity, you are required to do so;
>
> "If you find yourself in a work-related meeting or activity with Ms. Ferrel [sic], and are able to keep the requisite distance, you will not speak to or interrupt her, or otherwise behave in a manner that would reasonably be seen as bullying or intimidating; and
>
> "You are instructed not to attempt to execute service of process on Ms. Ferrell, or any other district employee, while that employee is at work, or otherwise interrupt an employee at work in furtherance of your legal claims.
>
> "Please note that, as these measures indicate, the District will not regulate your attendance or conduct at union meetings. The District also will not regulate or intrude on your use of personal email addresses, telephone numbers or social media platforms to engage in concerted activity. It will be up to the Union to determine how it wishes to remediate the apparent hostile environment within the Union." (Bullet points omitted.)

The amended charge alleges that the Breland letter restricted Crawford's "ability to engage in future concerted activity," and that the District did so "without any independent investigation" beyond that done by Hatmaker. Crawford further alleges that

the District imposed these restrictions "with no due process and without a single item of evidence, nor any allegation suggesting that Ferrell had ever experienced any behavior from Crawford that might justify a concern for her safety."

Following a May 2019 vote by the Union's membership, Crawford and Gonzalez remained on the board, but the other three board members in Crawford's faction were replaced.

On October 1, 2019, the District's Acting President, Roland Montemayor, issued a letter of reprimand to Crawford. The reprimand began by recounting the restrictions on e-mail, communications, and interactions that the District had imposed in March 2019, characterizing them as having been needed to address misuse of District e-mail and to "prevent [Crawford's] harassment of Linda Ferrell during Union-related communications from impacting her work environment." The reprimand next stated that after Crawford received the Breland letter, he twice violated its restrictions, as described below.

First, the reprimand recounted that on September 20, 2019, Crawford attended a one-hour meeting as part of administering an adult education program established under the California Education Code. The meeting location—a conference room—was adjacent to Ferrell's office, and Crawford thereby came within 50 feet of Ferrell. Ferrell called the police when she observed Crawford was present. The reprimand asserted that Crawford should have either changed the meeting location or refrained from participating in-person. The reprimand stated that by attending in-person, Crawford had adversely affected Ferrell's work environment and disrupted District operations.

Second, the reprimand recounted that on September 16, 2019, Crawford sent an e-mail from his District account for a purpose unrelated to his faculty duties. That e-mail,

which the District attached to the reprimand, showed Crawford had responded to an e-mail another faculty member sent from his District e-mail account, accusing Crawford of improperly seeking to "install himself" on the Academic Senate. The reprimand thereby appears to have afforded greater leeway to faculty members working to elect a different faculty member competing against Crawford for the Academic Senate position.

III. AFT holds a hearing, issues a report, and censures Crawford.

On January 18, 2019, Fong's faction asked AFT to investigate, pursuant to the AFT Constitution, the schism within Local 6157's board. According to the request, the board was deadlocked 5-5 on most issues, which prevented the Union from making decisions needed to carry out its representational functions. Crawford's faction responded by requesting that AFT instead provide training.

On May 22, 2019, the AFT Executive Council authorized an investigation and appointed a panel of three AFT vice presidents to chair the Investigation Committee. The committee invited both factions to present witnesses and arguments. Twenty-one witnesses provided oral testimony and three more provided written statements. In July 2019, the AFT Executive Council approved the committee's report, finding that Crawford failed to act according to AFT values of equity and nondiscrimination.[6] The report rejected allegations that others had committed malfeasance, though it found numerous areas in which the Union needed to adopt new policies or tighten compliance with various norms.

The Executive Council directed that:

[6] As described *ante*, in the current procedural posture, we presume only those findings that neither explicitly nor implicitly conflict with the amended charge. (*Cabrillo I*, *supra*, PERB Decision No. 2453, p. 8.)

“1. The board adopt guidelines and suggestions about the proper distribution of union materials and the proper use of employer-maintained email addresses and lists.

“2. The board attend and participate in trainings provided by the AFT on proper parliamentary procedure.

“3. The local adopt a conflict of interest policy. The AFT will provide sample polices for use by the local.

“4. The local adopt a code of conduct and reporting/investigation policy applicable to elected leaders, members and staff of the local, covering all legally protected classes in the state of California. The AFT will provide sample codes of conduct and reporting policies for use by the local.

“5. The local amend its constitution or bylaws such that the president has the explicit power to vote on any matter before the board, and such that the executive board consists of an odd number of members.

“6. The local amend its constitution or bylaws such that one of the duties of a member besides the president of the executive board is to be responsible for the recording of the minutes of every meeting.

“7. The outgoing and incoming board members engage in a restorative justice process that allows for reconciliation between board members, builds trust and understanding among board members, and creates an environment whereby Philip Crawford and Fabio Gonzalez acknowledge and accept responsibility for the harm they have caused. The AFT will provide assistance and models for this process.

“8. Philip Crawford is formally censured by the AFT Executive Council. A copy of the below formal censure shall be delivered to Mr. Crawford, current members of the executive board and incoming members on the executive board, and emailed to the personal email address of every member of the local.

> "9. Philip Crawford shall only attend executive board meetings via telephonic conference until his present term expires; Mr. Crawford shall still be able to vote on matters via telephone or by email, as provided in Section 5.10.8 of the local's bylaws.
>
> "The committee shall retain jurisdiction for six months after the date of this order to hold any necessary additional hearings and recommend any necessary additional actions to the AFT Executive Council."

Crawford asserts that AFT ignored exculpatory evidence, allowed telephonic testimony, and "severely restricted" Crawford in unspecified ways when he objected to hearsay evidence. Crawford also alleges that Fong and Ferrell distributed the Executive Council's report and that AFT approved, ratified, or sanctioned their conduct by declaring the report to be non-confidential. Crawford lastly asserts that a newly elected board member, Loraine Levy, cited the report in attempting to have Crawford banned from Academic Senate committees.

IV. Faculty members seek to undo the District's decision to hire Meakin. The District terminates him and later rehires him to a lesser position.

On November 14, 2018, faculty members Marciela Martinez, Padma Manian, and Javier Chapa filed with the District a grievance in which they contended that Meakin did not meet the minimum qualifications for his position and that the District had improperly failed to advertise the position internally before hiring Meakin. By letter dated March 1, 2019, the District terminated Meakin effective April 1, 2019. The termination letter explains that Meakin was an at-will employee, the District had recently discovered a flaw in the recruitment process through which he had been hired, and Meakin was free to apply for future positions. Meakin promptly reapplied for the position, but he alleges

that the District responded by eliminating the position he had held and replacing it with a lesser position.

By e-mail dated April 5, 2019, Martinez, Manian, and Chapa wrote to the District's Trustees to assert, inter alia, that Crawford engaged in nepotism and other improprieties designed to favor Meakin over internal candidates. The e-mail alleged, for instance, that Crawford: (1) used his position on District committees to revise the required and desired job qualifications, and (2) convinced the Academic Senate to grant Meakin an equivalency for his missing degree. Moreover, at an April 2019 Academic Senate meeting, another faculty member, Charles Heimler, criticized Meakin. Although Manian became a negotiator for Local 6157 after April 5, 2019, the amended charge does not allege that she was a union officer before that time. The amended charge does not allege that Martinez, Chapa, or Heimler served in any official union capacity at any relevant time.

Meakin filed a grievance against the District regarding his termination. Local 6157 assisted Meakin in pursuing this grievance. Meakin claims that Manian, in her new role as the union's chief bargaining officer, advocated in internal closed session board meetings that Local 6157 should not assist Meakin because he is unqualified. He further alleges that she did so in retaliation for his past votes on the board to deny her the paid position of grievance officer. However, the amended charge does not allege that Manian's view prevailed, nor does it allege any deficiencies in the Union's efforts representing him in the termination grievance.

In September 2019, the District rehired Meakin, though at a 20% reduced position and with loss of rights he asserts he should have been afforded.

DISCUSSION

In resolving a dismissal appeal, we review OGC's decision de novo. (*Lake Elsinore Unified School District* (2018) PERB Decision No. 2548, p. 6, fn. 5 (*Lake Elsinore*); *City of San Jose* (2013) PERB Decision No. 2341-M, p. 47.) At this stage of the case, a charging party's burden "is not to produce evidence, but merely to allege facts that, if proven true in a subsequent hearing, would state a prima facie violation." (*County of Santa Clara* (2013) PERB Decision No. 2321-M, p. 13, fn. 8.) Furthermore, "where a material factual dispute turns on the respondent's state of mind," we consider that motive is generally within the respondent's own knowledge and that there is little opportunity for pre-hearing discovery. We therefore impose on a charging party a relatively low burden to allege facts tending to show the requisite state of mind. (*Ibid*.)

Mere legal conclusions, however, are insufficient to state a prima facie case. (*Lake Elsinore*, *supra*, PERB Decision No. 2548, p. 18.) Moreover, although we do not resolve conflicting factual allegations, it is appropriate to dismiss an alleged violation without issuing a complaint if the parties' filings disclose undisputed facts sufficient to defeat the claim. (*Cabrillo I*, *supra*, PERB Decision No. 2453, p. 9.)

I. Statute of Limitations Analysis

The amended charge, which Crawford and Meakin filed in November 2019, added multiple new allegations occurring more than six months earlier. When a charging party amends an unfair practice charge and thereby adds new allegations, the statute of limitations for the newly-added allegations is generally the six months prior to the date the charging party filed the amended charge, unless the new

allegations relate back to the allegations in the initial charge, or another recognized exception applies. (*County of Santa Barbara* (2012) PERB Decision No. 2279-M, p. 10.) Newly-added factual allegations in an amended charge relate back to those in the initial charge if they clarify or provide further detail regarding the facts initially alleged or assert facts that are a logical and sequential manifestation of the same course of conduct initially alleged. (*Monterey Peninsula Unified School District* (2014) PERB Decision No. 2381, pp. 37-39.) The relation back doctrine also allows a charging party to add new legal theories, provided that such new theories rely on allegations included in the initial charge and/or allegations that satisfy the relation back standard. (*Id.* at pp. 37-38.)

Two of the new allegations in the amended charge relate back to allegations in the initial charge. First, the amended charge contains new allegations regarding the content of the February 2019 Hatmaker Report. That report was a logical and sequential manifestation of the same course of conduct alleged in the initial charge—Fong and Ferrell's decision to hire Hatmaker to investigate Bills' complaint.

Second, the amended charge alleges that Manian, Martinez, and Chapa acted against Meakin by sending an April 2019 e-mail to the District's Trustees. That allegation is plausibly a logical and sequential manifestation of the course of conduct the same three actors allegedly began the prior fall when they filed a grievance claiming the District had improperly hired Meakin.

However, we reach a different conclusion with respect to several new allegations that appear in the following cursory phrases included in the amended charge: (1) Fong and Ferrell allegedly "caused the [Hatmaker] report to be distributed to

faculty and administrative mailboxes"; and (2) "Ferrell and Fong facilitated [Breland's] receipt of the [Hatmaker] report and then met with [Breland] demanding that Crawford and [Meakin] be terminated."

It is a bridge too far to suggest that, when Fong and Ferrell hired Hatmaker to investigate Bills' complaint (as alleged in the initial charge), the logical and sequential manifestation of that course of conduct would be that they would leak the eventual report and use that leak to urge the District to fire Crawford. The new allegations are on their face vastly different, more serious, and hardly a logical next step arising from the earlier decision to hire an attorney to investigate an internal union complaint. These new allegations therefore are untimely.

Nor has Meakin asserted facts suggesting that Fong and Ferrell allegedly urging the District to fire Meakin logically and sequentially flowed from his initial allegation that three faculty members filed a grievance regarding his hiring. The earlier conduct involves faculty acting in their capacity as District employees to raise fairness concerns, while the later conduct involves Local 6157 officers potentially acting in their official union capacities to urge his firing. Because the allegations involving Fong and Ferrell's actions toward Meakin do not relate back to the initial charge, they are untimely.

II. Prima Facie Case Analysis

In evaluating a discrimination or retaliation claim, PERB generally applies the same test irrespective of whether the respondent is an employer or a union. (*AFT Part-Time Faculty United, Local 6286 (Peavy)* (2011) PERB Decision No. 2194, pp. 12-13.) In order to establish a prima facie case of retaliation, a charging party must

allege facts showing that: (1) one or more employees engaged in activity protected by a labor relations statute that PERB enforces; (2) the respondent had knowledge of such protected activity; (3) the respondent took adverse action against one or more employees; and (4) the respondent took the adverse action "because of" the protected activity, which PERB interprets to mean that the protected activity was a substantial or motivating cause of the adverse action. (*City and County of San Francisco* (2020) PERB Decision No. 2712-M, p. 15.) If the charging party establishes these factors, certain fact patterns nonetheless allow a respondent to prove, by a preponderance of the evidence, that it would have taken the same action even absent the protected activity. (*Id.* at pp. 15-16, citing *NLRB v. Transportation Management Corp.* (1983) 462 U.S. 393, 395-402 (*Transportation Management*) and other authorities.)[7]

Additionally, in an unfair practice charge alleging that a union discriminated or retaliated against protected activity, the charging party must allege facts showing that the union's conduct impacted the employer-employee relationship. (*California State Employees Association (Hard, et al.)* (1999) PERB Decision No. 1368-S, pp. 27-28 [overruling prior precedent]; *California State Employees Association (Hard, et al.)* (2002) PERB Decision No. 1479-S, pp. 13-17 (*CSEA (Hard, et al.)*), citing *Service*

[7] In *Transportation Management*, *supra*, 462 U.S. at p. 403, the United States Supreme Court approved the NLRB's decision to adopt this framework and noted that its origins lie in a First Amendment retaliation case, *Mt. Healthy City School District Board of Education v. Doyle* (1977) 429 U.S. 274. This line of cases can provide PERB with persuasive precedent. For instance, we find federal precedent persuasive in explaining that "substantial" and "motivating," as used in the fourth element of the test, are interchangeable terms that do not have separate meanings. (*Id*. at p. 287.)

Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106 (*Kimmett*).)[8]

We look to agency principles to determine whether a respondent may be held liable for alleged wrongdoing. A union, like an employer, is liable for the acts of those bearing either actual or apparent authority to act on its behalf. (*National Union of Healthcare Workers* (2012) PERB Decision No. 2249-M, p. 14.) Actual authority is that which an organization intentionally confers upon the agent, or intentionally or negligently allows the agent to believe himself or herself to possess. (*Chula Vista Elementary School District* (2004) PERB Decision No. 1647, p. 7.) Apparent authority may be found from manifestations by the principal that create a reasonable basis for others to believe that the principal has authorized the alleged agent to perform the act in question. (*Ibid.*) In general, a respondent' s high-ranking officials, particularly those whose duties include employee or labor relations matters, are presumed to act and speak on behalf of the respondent, meaning that the respondent is generally liable for their conduct. (*City of San Diego* (2015) PERB Decision No. 2464-M, p. 23.) However, there is no blanket rule that an elected union representative always acts as the union's agent. (*Morgan Hill Unified School District* (1986) PERB Decision No. 554a, p. 7.)

[8] The *Kimmett* doctrine does not apply, however, to allegations that a union has failed to establish or follow reasonable membership restrictions or disciplinary procedures impacting membership. (*California Association of Professional Scientists (Rachlis)* (2015) PERB Decision No. 2417-S, pp. 9-10; *CSEA (Hard, et al.)*, *supra*, PERB Decision No. 1479-S, pp. 14-17.)

Here, Crawford and Meakin have sufficiently alleged that they engaged in protected activity and that Local 6157 and AFT knew of this protected activity.[9] However, in their timely-filed allegations, neither Crawford nor Meakin have sufficiently alleged facts that would, if proven, establish that an agent of Local 6157 or AFT took any adverse, retaliatory action that impacted their employment relationships with the District. We explain.

A. Crawford's Allegations Against Local 6157

Several of Crawford's timely-filed allegations assert conduct that arguably impacted his employment relationship with the District. For the reasons discussed below, we conclude that some of these allegations would not, if proven, show that the alleged perpetrator acted on behalf of Local 6157, while other allegations that might be attributable to the Union do not amount to adverse action in retaliation for protected conduct.

Crawford first alleges that Local 6157 took a discriminatory adverse action in August 2018, when Fong and Ferrell hired Hatmaker to investigate his conduct and issue a report. There is no question that in doing so Fong and Ferrell acted on behalf of the Union. It is also well-established that initiating an investigation of alleged misconduct is an adverse action. (*Service Employees International Union, Local 221 (Gutierrez)* (2012) PERB Decision No. 2277-M, p. 9; *California Union of Safety*

[9] While the *Kimmett* doctrine prevents a charging party from stating a prima facie case unless a respondent's conduct impacted the employer-employee relationship, it does not negate the allegation that both Crawford's faction and Fong's faction engaged in a wide array of protected activity while participating in internal union affairs. Crawford and Meakin also engaged in protected activity by filing a lawsuit seeking to enforce the Union's bylaws and by pursuing the instant charge.

Employees (Coelho) (1994) PERB Decision No. 1032-S, p. 12.) And the resulting report eventually impacted Crawford's employment relationship with the District, as the amended charge alleges that the report was an integral part of the chain of events leading the District to restrict Crawford's interactions with other faculty and later to reprimand him for violating those restrictions.[10]

There are nonetheless sufficient undisputed facts to support OGC's decision to dismiss Crawford's retaliation claim based upon Fong and Ferrell's decision to hire Hatmaker. In analogous cases in which a public employer receives a facially valid discrimination complaint, our precedent prescribes the standards the employer must follow in determining how to avoid retaliating against or interfering with protected activities. (See, e.g., *Trustees of the California State University (Northridge)* (2019) PERB Decision No. 2687-H, p. 5 [discussing standards regarding decision to investigate] & fn. 6 [discussing limitations on manner of investigation]; *Chula Vista Elementary School District* (2018) PERB Decision No. 2586, pp. 29-31 [explaining a

[10] A union's decision to investigate an internal discrimination complaint does not normally impact a bargaining unit employee's relationship with his or her employer. Indeed, Crawford's faction acknowledged as much in the superior court litigation, explaining to the court in January 2019 that the plaintiffs need not file a PERB charge because the factual allegations in their lawsuit had no impact on their employment relationships. Two months after making that representation to the superior court, circumstances changed when the District took adverse actions against Crawford and Meakin, making the instant case an unusual one in which an internal union action initially appears not to impact any employer-employee relationship but ultimately appears to do so. The link between the Hatmaker Report and the Breland letter and written reprimand represents a colorable allegation. Even though the Breland letter largely addresses District concerns not mentioned in the Hatmaker Report—use of District resources and protecting Ferrell from a potential hostile work environment—Crawford plausibly alleges that the leaked Hatmaker Report influenced the District, as shown by Breland's references to the report.

public employer's obligations in balancing need to investigate with need not to interfere with the statutory rights of an accused wrongdoer]; *California Virtual Academies* (2018) PERB Decision No. 2584, pp. 22-34 [where employer receives complaint against employee who has engaged in protected activity, employer must respond in same manner as it would absent such protected activity].) Here, Crawford does not allege the type of facts we have found in other cases to establish that an investigation was unlawful.

Virtually the only relevant fact Crawford alleges regarding the Union's motive relates to the timing of its decision to hire Hatmaker. While the Union did so *before* Crawford engaged in protected activity by accusing Fong and Ferrell of approving an unauthorized raise, voting to initiate a criminal complaint, e-mailing a newsletter to other faculty, filing a superior court lawsuit, and filing the instant charge, the Union hired Hatmaker one month *after* Crawford alleged that Bills discriminated against Latino males. Even if EERA protected Crawford's complaint, this proximate timing is not sufficient to warrant a complaint (*Metropolitan Water District of Southern California* (2009) PERB Decision No. 2066-M, p. 12), particularly given that Crawford does not dispute the Union's assertion that Fong and Ferrell hired Hatmaker based upon reasonable legal advice that the Union must investigate Bills' employment complaint. Beyond the timing of the Union's decision to hire Hatmaker, Crawford suggests that Fong and Ferrell manifested a retaliatory motive by doing so without board approval. But the amended charge fails to state facts which, if proven, would tend to show that the absence of board approval was improper or otherwise evidenced an unlawful motive. Because the board was on hiatus for the summer, a majority of the three

Local 6157 officers were authorized to hire Hatmaker without board approval. Fong and Ferrell constituted a majority. Furthermore, the third officer, Gonzalez, was recused given he was a subject of the underlying complaint.

Crawford further alleges that Ferrell's fall 2018 complaint, accusing members of Crawford's faction of gender-based discrimination and harassment, contributed to the Breland letter and the written reprimand. Crawford thus sufficiently alleged that Ferrell's complaint impacted his employment relationship with the District. However, Crawford has not alleged facts sufficient to show that Ferrell was acting as an agent of Local 6157. While Ferrell was a union official when she filed the discrimination complaint, she filed it in her own name and in her capacity as a District employee. Nor is there any timely allegation that the Union took action to authorize, condone, or ratify the complaint Ferrell filed with her employer.[11]

According to Crawford, the Breland letter and reprimand also resulted, in part, from two alleged events that we have found to fall outside the statute of limitations: Fong and Ferrell's alleged act in leaking the Hatmaker Report, and a meeting in which Fong and Ferrell allegedly demanded that the District fire Crawford and Meakin. Because Crawford failed to file a timely amended charge regarding these allegations,

[11] This case well illustrates that in the sharp-elbowed world of internal union politics, union officials or candidates may take a variety of actions that are not necessarily imputed to the union. For instance, were Ferrell's discrimination complaint with the District seen as an act of Local 6157, the same could be true for any number of actions that members of Crawford's faction allegedly took, such as complaining of anti-Latino discrimination, filing the superior court lawsuit, filing the instant charge, or voting to file criminal embezzlement charges against Fong and Ferrell. While those acts may arguably have been motivated by the other faction's protected activity, none were official acts of the Union that could give rise to a charge against the organization.

we do not consider whether they allege a prima facie case that the Union violated EERA.

At the pleading stage, PERB will not penalize a charging party for failing to assert a theory that may fit the allegations, and we instead must issue a complaint based on any and all legal theories for which the alleged facts state a prima facie case. (*Hartnell Community College District* (2015) PERB Decision No. 2452, p. 51, fn. 20 *(Hartnell)*.) Accordingly, we assess potential theories that charging parties did not assert. For the reasons discussed below, we do not direct OGC to issue a complaint under any such theories.

First, we have considered whether the facts state a prima facie case of interference independent of retaliation. We find no prima facie case for many of the same reasons set forth above, and because union officials lacking control over the employment relationship do not have the same capacity as an employer's agent to discourage protected activity. (*Oxnard Federation of Teachers (Collins)* (2012) PERB Decision No. 2266, adopting warning letter at p. 6; *California Faculty Association (Hale)* (1988) PERB Decision No. 693-H, adopting warning letter at p. 5; see also *City of Oakland* (2014) PERB Decision No. 2387-M, p. 25, fn. 5; *Hartnell*, *supra*, PERB Decision No. 2452, p. 25.)

Second, we note that had Crawford named the District as a respondent, the amended charge alleges facts that would have supported a prima facie case that the Breland letter and the written reprimand interfered with Crawford's exercise of protected rights. (See *Claremont Unified School District* (2019) PERB Decision No. 2654, p. 21 [letter prohibiting employee from using employer's e-mail system to

communicate with other employees interfered with employee's rights].) However, the District is not a named respondent.

Third, we consider whether to direct OGC to issue a complaint alleging that Local 6157 violated EERA section 3543.6, subdivision (a) by causing or attempting to cause the District to violate EERA. There is split authority as to whether an employee may bring such a charge or only an employer may do so. (See *Santa Maria Joint Union High School District Faculty Association* (2015) PERB Decision No. 2445, p. 18, fn. 19 [describing split authority] (*Santa Maria*).) This is not the appropriate case to clarify Board precedent, as the parties have not briefed any issues pertaining to the split of authority.[12] We decline to order additional briefing to iron out these issues because, as explained *ante*, Crawford and Meakin were untimely in alleging the only Union conduct that arguably may have violated section 3543.6, subdivision (a).

For the foregoing reasons, we affirm OGC's decision to dismiss Crawford's retaliation and derivative interference claims against Local 6157.

B. Crawford's Allegations Against AFT

Crawford alleges that AFT violated EERA when it agreed to investigate the schism within Local 6157, held a hearing, issued a report, made that report non-confidential, censured Crawford, and ordered him to participate in board meetings telephonically. As an initial matter, Crawford has failed to allege facts tending to show

[12] As one example of the unsettled issues in this area, even if an employee may bring a section 3543.6(a) claim, it is unclear whether the employer may or must be joined as a party to allow for full relief, to apportion damages, and/or because assessing a claim under section 3543.6(a) involves evaluating whether actual or potential employer conduct would be lawful. (*Santa Maria*, *supra*, PERB Decision No. 2445, p. 13.)

that AFT served as an agent of Local 6157 and has failed to address whether AFT may be held liable even though it was not Crawford's exclusive representative.[13]

Moreover, even were AFT a proper respondent, Crawford cannot state a prima facie case because he complains of purely internal union matters. By censuring Crawford and ordering him to attend board meetings telephonically, AFT did not impact his employment relationship with the District. Nor did AFT fine him or impact his membership, meaning these allegations do not fall into the narrow *Kimmett* exception for allegations that a union has failed to establish or follow reasonable internal procedures regarding disciplinary fines or membership restrictions. (See, e.g., *Coalition of University Employees (Higgins)* (2006) PERB Decision No. 1855-H, adopting warning letter at pp. 2-3 [dismissing charge against union that removed its elected president but issued no fine or membership suspension].)

Even setting aside these threshold obstacles to Crawford's case, we find no factual allegations suggesting that AFT failed to establish or follow reasonable procedures. In this inquiry, our touchstone is fairness. (*California Association of Professional Scientists (Rachlis)*, *supra*, PERB Decision No. 2417-S, p. 10.) In order

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[13] While Crawford's claims differ from those in which we have held a parent labor organization to be an improper respondent, neither party has briefed whether Crawford's claims against AFT should fare differently, and we decline to resolve that issue sua sponte. (See, e.g., *California Teachers Association (Bussman)* (2009) PERB Decision No. 2047, p. 4; *California Teachers Association and Oakland Education Association (Welch)* (2006) PERB Decision No. 1850, adopting dismissal letter at p. 2; *California Teachers Association (Torres)* (2000) PERB Decision No. 1386, adopting dismissal letter at p. 2; *California Teachers Association (Abbot)* (1988) PERB Decision No. 665, p. 2; *Police Officers Research Association of California and California Association of Food and Drug Officials (Eckstein)* (1987) PERB Decision No. 644-S, p. 2; *Fresno Teachers Association and Fresno Unified School District* (1982) PERB Decision No. 208, pp. 23-24.)

for internal union procedures to be fair, an accused union member must receive notice of alleged wrongdoing and "rudimentary rights of defense" that provide "substantial justice," but "the refined and technical practices which have developed in the courts cannot be imposed upon the deliberations of workingmen and the form of the procedure is ordinarily immaterial if the accused is accorded a fair trial." (*Ibid.*, internal quotations and citations omitted.) Indeed, even when a union unreasonably applies or departs from its own rules, a charging party must show how the alleged unfairness impacted the outcome. (*Id.* at p. 11.) Technical or minor imperfections are not sufficient to show that a union denied a charging party substantial justice. (*Id.* at pp. 11-14.)

Crawford alleges that AFT violated EERA by restricting him in unspecified ways when he objected to hearsay evidence, allowing telephonic testimony, ignoring unspecified exculpatory evidence, and failing to make its report confidential. These allegations do not state a prima facie case that AFT's conduct denied him substantial justice. Indeed, to the contrary, there are sufficient undisputed allegations to conclude that AFT's procedures were substantially fair.

We therefore dismiss Crawford's allegations against AFT.

C. Meakin's Allegations

Rank-and-file bargaining unit members are not agents of a union. (*San Bernardino Public Employees Association (White, et al.)* (2018) PERB Decision No. 2572-M, partially adopting proposed decision at p. 28; *Los Angeles Community College District* (1982) PERB Decision No. 252, p. 17.) Meakin does not allege facts tending to show that Martinez, Manian, Chapa, or Heimler held a Local 6157 position

or otherwise acted as the Union's agent when taking the actions Meakin alleges. For this reason, Meakin does not allege facts sufficient to hold Local 6157 responsible for their acts against him.[14]

The amended charge also does not allege facts showing that Local 6157 assisted Manian, Martinez, and Chapa in their grievance claiming that the District followed an improper process in hiring Meakin and that Meakin did not possess sufficient qualifications. In fact, there is no dispute that Meakin filed a grievance against the District regarding his termination, and Local 6157 assisted him in pursuing this grievance. While Meakin claims that Manian urged the Union to refrain from assisting him, he does not allege that Manian's view prevailed or that the Union breached its duty of fair representation.

OGC thus was correct in its decision to dismiss Meakin's allegations against Local 6157.

ORDER

The amended unfair practice charge in Case No. SF-CO-839-E is DISMISSED WITHOUT LEAVE TO AMEND.

Members Banks and Shiners joined in this Decision.

[14] Furthermore, Meakin's claim that Fong attempted to block him from completing his term on the board—because he was no longer a District employee—fails because it neither qualifies as timely under the relation back doctrine nor alleges an impact on his employment relationship with the District.