

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



UNITED TEACHERS LOS ANGELES,

Charging Party,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. LA-CE-5863-E

PERB Decision No. 2588

October 17, 2018

Appearances: Holguin, Garfield, Martinez & Quiñonez by Jesús E. Quiñonez and Michael Wertheim, Attorneys, for United Teachers Los Angeles; Littler Mendelson by William J. Emanuel and Barrett K. Green, Attorneys, for Los Angeles Unified School District.

Before Banks, Shiners, and Krantz, Members.

DECISION

SHINERS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by the Los Angeles Unified School District (LAUSD or District) to the proposed decision of an administrative law judge (ALJ). The proposed decision concluded that LAUSD violated the Educational Employment Relations Act (EERA or Act)¹ by: (1) denying a request by United Teachers Los Angeles (UTLA or Union) that LAUSD send an announcement regarding upcoming Union meetings to all bargaining unit members' District e-mail addresses on behalf of UTLA, and (2) refusing to bargain over the Union's proposal for LAUSD to send such broadcast e-mails to unit members on behalf of UTLA via the District's e-mail system.

¹ EERA is codified at Government Code section 3540 et seq. All statutory references are to the Government Code unless otherwise indicated.

Based on our review of the proposed decision, the entire record, and relevant legal authority in light of the parties' submissions, we reverse in part and affirm in part the proposed decision. Specifically, we reverse the ALJ's ruling that EERA section 3543.1, subdivision (b), requires a public school employer to send e-mails on behalf of an employee organization via the employer's e-mail system. We affirm, however, the ALJ's ruling that LAUSD unlawfully refused to negotiate over UTLA's proposal that LAUSD send e-mails to unit members on UTLA's behalf via the District's e-mail system.

FACTUAL BACKGROUND

Pursuant to PERB Regulation 32207,² the parties submitted a stipulated factual record in lieu of a hearing. Consequently, the facts in this case are undisputed.

UTLA represents LAUSD's certificated bargaining unit. UTLA and LAUSD were parties to a Collective Bargaining Agreement (CBA) that was in effect beginning in 2008 and continuing throughout all times relevant to this case. CBA Article IV describes UTLA RIGHTS, including Section 1.0, entitled Access. That section states in relevant part: "[a]ny authorized UTLA representative shall have the right of reasonable access to District facilities, including teacher mailboxes, for the purpose of contacting employees and transacting UTLA matters."

CBA Article II, Section 1.0, entitled EFFECT OF AGREEMENT, contains a "zipper" clause, stating that the parties' CBA resolves "all outstanding bargaining issues between them, and jointly recognize full and complete performance and satisfaction of their bargaining duties except as expressly provided below." There are exceptions to this language for: (1) limited

² PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32207 provides that a hearing is not required when there are no facts in dispute.

reopeners; (2) successor CBA negotiations; and (3) negotiations by “mutual written agreement.”

Nothing in the CBA explicitly addresses whether LAUSD must e-mail bargaining unit members on UTLA’s behalf. Nor is there evidence that LAUSD has, in the past, e-mailed bargaining unit members on UTLA’s behalf.

LAUSD’s E-Mail System

LAUSD assigns an “lausd.net” e-mail address to nearly every member of UTLA’s bargaining unit. LAUSD has an Acceptable Use Policy (AUP) governing employees’ use of all computer and network systems, including its e-mail system. Employees must agree to the policy upon activating or updating their LAUSD e-mail accounts.

The AUP describes both acceptable and unacceptable uses of LAUSD computer systems. Although under the AUP, network access “is provided primarily for education and District business[,]” employees may also “use the Internet, for incidental personal use during duty-free time.” The AUP prohibits activity such as unauthorized collection of e-mail addresses, “spamming,” spreading viruses, and using threatening, profane, or abusive language. Improper use may result in loss of access, discipline, or legal action.

UTLA’s Request that LAUSD Send an E-mail to Unit Members on UTLA’s Behalf

On August 14, 2013, then-UTLA President Warren Fletcher sent then-LAUSD Director of Labor Relations John Bowes an e-mail message “formally asserting its right to use of institutional bulletin boards, mailboxes and other means of communication to communicate with members of the UTLA bargaining unit.” (Some internal punctuation omitted.) Fletcher then requested that LAUSD “[p]lease send this document to the lausd.net email accounts of all UTLA bargaining unit members.” He included the text of an announcement regarding UTLA’s

upcoming regional area meetings. Fletcher suggested that LAUSD could send the message outside of its regular business hours “to avoid interference with regular District business[.]” Bowes replied two days later, stating that LAUSD was reviewing the request.

On August 19, 2013, LAUSD Labor Relations Administrator Rob Samples e-mailed Fletcher, stating in relevant part:

After review, we could find no authority under which a school district may use its internal email system to transmit an email on behalf of a union. Such transmittal would be the electronic equivalent of the District using its own staff to place a letter in an envelope and deliver it – on behalf of the union – to a third party. To do so may or may not be permissible, given the use of public resources and State law.

Even if permissible, we could likewise find no authority under which the District has authorized such use, either for UTLA, for a competing union or an existing union, or a private party.

On August 22, 2013, UTLA’s attorney, Jesús Quiñonez, stated in a letter that access to LAUSD’s e-mail system was required under EERA section 3543.1, subdivision (b). Bowes replied to Quiñonez on September 3, 2013, stating “I believe we will end up treating this as a matter to be resolved in negotiations in that it involves significant logistical and compliance issues, review of user protocols etc.” Bowes stated that, in the meantime, UTLA’s request would not be granted.

UTLA’s Proposed Side Letter on E-Mail Access Issues

On September 25, 2013, UTLA proposed a side-letter agreement regarding UTLA’s use of LAUSD’s e-mail system “for the purpose of District-wide announcements concerning Internal Union business, such as meeting schedules and announcements of organizational activities and special events, and on other legitimate communications concerning the exercise of rights guaranteed by the EERA[.]” UTLA proposed certain restrictions including that

e-mails would be: (1) subject to LAUSD's AUP; (2) sent only to LAUSD e-mail accounts; (3) subject to the content limitations used for other forms of authorized communication; (4) e-mailed to LAUSD staff relations at least one day in advance by designated UTLA contacts; (5) limited to 150 kilobytes; and (6) sent by the District between 6:00 p.m. and 3:00 a.m. to avoid interference with LAUSD business.

On October 28, 2013, UTLA filed the underlying unfair practice charge with PERB. On November 5, 2013, Bowes sent UTLA an e-mail message stating, among other things, that "although it is not clear that this is a mandatory subject of bargaining, the District remains willing to negotiate the matter with UTLA." There is no evidence in the record that LAUSD and UTLA ever negotiated over the Union's September 25, 2013 side letter proposal.

DISCUSSION

PERB must adapt its jurisprudence to address changing circumstances in the workplace. (*Napa Valley Community College District* (2018) PERB Decision No. 2563, p. 19 (*Napa Valley CCD*); see *NLRB v. J. Weingarten, Inc.* (1975) 420 U.S. 251, 266 [holding that the National Labor Relations Board has a similar responsibility to adapt its body of law "to changing patterns of industrial life"].) As we recently observed, "e-mail is a fundamental forum for employee communication in the present day." (*Napa Valley CCD, supra*, PERB Decision No. 2563, p. 19.) As a result of this technological change, over the past decade PERB has had to address the issue of permissible use of employers' e-mail systems to send protected communications. In *Napa Valley CCD*, we held that "employees who have rightful access to their employer's e-mail system in the course of their work have a right to use the e-mail system to engage in EERA-protected communications on nonworking time." (*Id.* at p. 19.) In this case, we must address the ability of employee organizations to use an employer's e-mail system to send protected communications. Although we conclude that EERA section 3543.1, subdivision (b),

grants employee organizations the right to communicate with employees via the employer's e-mail system, we reject UTLA's claim that this right obligates the employer to send e-mails to employees on the employee organization's behalf.

1. Interference with Access Rights Granted by EERA Section 3543.1, Subdivision (b)

The proposed decision concluded that LAUSD unlawfully interfered with UTLA's statutory access rights when it refused to send an e-mail on behalf of the Union to employees at their District e-mail addresses. "[I]n order to establish a prima facie case of unlawful interference, the charging party must establish that the respondent's conduct tends to or does result in some harm to [] rights granted under EERA." (*State of California (Department of Developmental Services)* (1983) PERB Decision No. 344-S, p. 12; *Carlsbad Unified School District* (1979) PERB Decision No. 89, p. 10.) "[A]n interference violation may only be found where the pertinent statute provides the rights claimed by the charging party." (*Hartnell Community College District* (2018) PERB Decision No. 2567, p. 5.) Unlike the ALJ, we conclude that no interference occurred here because EERA does not give UTLA a right to have LAUSD send an e-mail to District employees on the Union's behalf.

As an initial matter, the ALJ concluded that EERA grants employee organizations the right to use a public school employer's e-mail system to communicate with employees. EERA section 3543.1, subdivision (b) provides, in relevant part: "Employee organizations shall have . . . the right to use institutional bulletin boards, mailboxes, and other means of communication, subject to reasonable regulation." PERB has long recognized that this right includes use of the employer's internal mail delivery system, which is an "other means of communication" under EERA. (*Richmond Unified School District/Simi Valley Unified School District* (1979) PERB Decision No. 99, pp. 9-10, 13 (*Richmond/Simi Valley*)). Today, an

employer's e-mail system serves the same function as its physical mail delivery system did when EERA was written. Accordingly, we hold that a public school employer's e-mail system is an "other means of communication" under EERA section 3543.1, subdivision (b), which employee organizations have a right to use to communicate with employees.

The ALJ went further, however, ruling that EERA section 3543.1, subdivision (b), obligates the employer to send e-mails to employees on the employee organization's behalf. In so ruling, the ALJ relied on *Richmond/Simi Valley, supra*, PERB Decision No. 99. In that decision, the Board ruled that the two respondent school districts interfered with union access rights by refusing to distribute union materials through their internal mail systems. (*Id.* at pp. 3, 11-12.) The ALJ noted that sending an e-mail is less burdensome on an employer than physically transporting documents, and concluded from this that EERA, section 3543.1, subdivision (b), requires an employer to send e-mails on behalf of an employee organization.

We disagree with the ALJ because we find *Richmond/Simi Valley* distinguishable. There, the Board required the employers to transport union materials to school sites. That task was necessary for the unions to actually exercise their statutory right to use the employers' physical mail system to communicate with employees. (See *Richmond/Simi Valley, supra*, PERB Decision No. 99, pp. 11-12 [noting other employee organization rights under EERA section 3543.1 that require specific conduct by the employer to effectuate, such as dues deductions, release time, providing meeting rooms, and escorting union representatives at the worksite].) Here, a bargaining unit member or a non-employee UTLA representative can send an e-mail to employees at their District e-mail addresses without any assistance from LAUSD.³ Thus, the employer's participation is not necessary for an employee organization to fully

³ If UTLA lacks employees' District e-mail addresses, it can obtain them from LAUSD via an information request or California Public Records Act request.

exercise its statutory right to communicate with employees via the employer's e-mail system. Consequently, we decline to compel employers to send employee organization e-mails through their e-mail systems.

Because neither our decisional law nor state labor policy supports a contrary result, we hold that EERA section 3543.1, subdivision (b), does not require a public school employer to send e-mails to employees on behalf of an employee organization.⁴ We therefore dismiss the complaint allegation that LAUSD interfered with UTLA's statutory access rights by refusing the Union's request that the District send an e-mail to employees on the Union's behalf.

2. Failure to Negotiate over UTLA's Proposed Side Letter on E-Mail Access Issues

EERA section 3540 imposes a duty upon a public school employer to meet and negotiate in good faith with the exclusive representative of its employees on all matters within the scope of representation. The proposed decision concluded that: (1) UTLA's September 25, 2013 side letter proposal addressed matters within the scope of representation, (2) the CBA's zipper clause did not preclude negotiations over the proposal because Director of Labor Relations Bowes' November 5, 2013 e-mail constituted a written agreement to negotiate over the proposal, and (3) the District refused to bargain over the proposal. LAUSD did not except to the first two conclusions, and they therefore are not before us on appeal. (PERB Reg. 32300, subd. (c).) Consequently, we address only the conclusion that the District refused to bargain over UTLA's proposed side letter.

⁴ Our holding is consistent with the Board's observation in *Redwoods Community College District* (1987) PERB Decision No. 650, that "[w]hile employee organizations may be entitled to use the mail *system*, this provision of the Act does not contemplate the employer actually conducting a mailing for an employee organization by providing, among other things, secretarial help or stationery." (*Id.* at p. 59, fn. 27, emphasis added.)

The record evidence relevant to this issue is easily summarized. On September 3, 2013, Bowes e-mailed UTLA's attorney, saying he thought the Union's request should be addressed in negotiations. On September 25, 2013, UTLA sent LAUSD a draft side letter agreement proposing that LAUSD e-mail unit members on UTLA's behalf via the District's e-mail system. LAUSD did not respond to the proposal until November 5, 2013, when Bowes said LAUSD was willing to negotiate over the matter. The evidence of what happened after Bowes' November 5 e-mail consists solely of the following stipulation: "After conferring with UTLA, the District ultimately declined to negotiate a provision whereby the District would use its internal email system to transmit communications from UTLA to UTLA's unit members."

In its exceptions, LAUSD claims it did not refuse to bargain over e-mail system access because "the District repeatedly offered to negotiate over this matter and UTLA did not accept the offer." But the evidence does not show that UTLA declined LAUSD's two offers to negotiate. UTLA responded to the District's first offer to negotiate by sending a proposed side letter agreement, which LAUSD ignored for over a month. The record is silent as to any Union response to the District's second offer. But, given that the second offer was made eight days after UTLA filed the instant unfair practice charge alleging LAUSD's refusal to bargain, we cannot construe the Union's alleged failure to respond to the District's second offer as an abandonment of its right to negotiate over that subject. We therefore find nothing in the record to support LAUSD's contention that UTLA "did not accept" the District's offer to negotiate over UTLA's proposal.

Notably, LAUSD's exceptions do not address the stipulation stating that the District "declined to negotiate a provision whereby the District would use its internal email system to transmit communications from UTLA to UTLA's unit members." There is no evidence the

parties ever discussed the substance of UTLA's side letter proposal, much less that they reached an impasse in negotiations over the proposal. Absent such evidence, the only conclusion that can be drawn from the stipulation is that LAUSD refused to bargain over UTLA's side letter proposal.

ORDER

Based on the foregoing findings of fact and conclusions of law, and the entire record in this case, we find that the Los Angeles Unified School District (LAUSD) violated Educational Employment Relations Act (EERA) section 3543.5, subdivisions (a), (b), and (c), by refusing to bargain with United Teachers Los Angeles (UTLA) over UTLA's proposal that LAUSD e-mail unit members on UTLA's behalf via the District's e-mail system.

Pursuant to EERA section 3541.5, it hereby is ORDERED that LAUSD, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Refusing to negotiate with UTLA over UTLA's proposal that LAUSD e-mail unit members on UTLA's behalf via the District's e-mail system.
2. Denying UTLA its right to represent bargaining unit employees in their employment relations with LAUSD.
3. Interfering with the right of bargaining unit employees to be represented by the employee organization of their choosing.

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

1. Meet and negotiate with UTLA, upon request, over UTLA's proposal that LAUSD e-mail unit members on UTLA's behalf via the District's e-mail system.

2. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all work locations where notices to employees in the certificated bargaining unit customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of LAUSD, 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, and other electronic means customarily used by LAUSD to communicate with employees in the certificated bargaining unit. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. LAUSD 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 UTLA.

Members Banks and Krantz joined in this Decision.



**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-5863-E, *United Teachers Los Angeles (UTLA) v. Los Angeles Unified School District (LAUSD)*, in which all parties had the right to participate, it has been found that LAUSD violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq., by refusing to bargain with UTLA over UTLA's proposal that LAUSD e-mail unit members on UTLA's behalf via the District's e-mail system.

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

A. CEASE AND DESIST FROM:

1. Refusing to negotiate with UTLA over UTLA's proposal that LAUSD e-mail unit members on UTLA's behalf via the District's e-mail system.
2. Denying UTLA its right to represent bargaining unit employees in their employment relations with LAUSD.
3. Interfering with the right of bargaining unit employees to be represented by the employee organization of their choosing.

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

1. Meet and negotiate with UTLA, upon request, over UTLA's proposal that LAUSD e-mail unit members on UTLA's behalf via the District's e-mail system.

Dated: _____

LOS ANGELES 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.