STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION & ITS CHAPTER 349, Charging Party, v. WILLIAM S. HART UNION HIGH SCHOOL DISTRICT, Respondent.	Case No. LA-CE-6024-E PERB Decision No. 2595 November 9, 2018

Appearances: Andrew J. Kahn, Chief Counsel, and Christina C. Bleuler, Lead Staff Attorney, for California School Employees Association & its Chapter 349; Littler Mendelson, by Barrett K. Green and Laila S. Tafreshi, Attorneys, for William S. Hart Union High School District.

Before Winslow, Shiners, and Krantz, Members.

DECISION

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on William S. Hart Union High School District's (District) exceptions to a proposed decision (attached) by an administrative law judge (ALJ). The District's exceptions concern the ALJ's conclusion that the District violated the Educational Employment Relations Act (EERA)[1] by asking Amber Medina (Medina) whether, in her role as a steward for California School Employees Association & its Chapter 349 (CSEA), any represented employees had complained to her about Armando Yoguez (Yoguez), another represented

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

employee.[2] The District argues that its questioning of Medina was not unlawfully coercive, that any harm to employee rights was outweighed by the District's legitimate business justification, that EERA and PERB case law failed to provide the District adequate notice that its questioning could violate EERA, and that the ALJ's proposed order was overbroad.

Having reviewed the proposed decision and the entire record in light of the parties' submissions, we affirm the proposed decision, except as modified below.

FACTS

Yoguez was employed at the District's West Ranch High School (West Ranch) as a night shift custodian. Medina was employed at a different District site, but her work as a steward frequently took her to West Ranch, which she described as her "problem child," particularly during the 2013-2014 school year. Medina was especially concerned about Yoguez, who had entered into a "last-chance" agreement in May 2013 to avoid termination.

Early in the 2013-2014 school year, District officials caught wind of rumors that Yoguez and Medina were romantically involved and had been meeting in a car in the West Ranch parking lot during Yoguez's shift. Later, when these rumors gave way to formal reports, the District hired a private investigator, who observed Yoguez and Medina meeting in a car in the West Ranch parking lot on September 22, 23, and 25, 2014.

[2] CSEA has not excepted to the ALJ's dismissal of the complaint's allegation that the District retaliated against Medina for engaging in protected activity, or to the ALJ's conclusion that most of the District's questions to Medina were justified by the District's legitimate business interests. In the absence of exceptions regarding these issues, they are not before the Board and the ALJ's conclusions regarding these issues are binding only on the parties. (PERB Regs. 32215, 32300, subd. (c); *City of Torrance* (2009) PERB Decision No. 2004, p. 12.) (PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.) CSEA withdrew the complaint's other allegation, that the District retaliated against Yoguez for engaging in protected activity.

On October 6, 2014, the District conducted an investigatory interview with Yoguez, who was represented by Medina and a CSEA staff representative, Valerie Hollins (Hollins). During the interview, Yoguez denied receiving any visitors during his shift other than his wife.

On October 10, 2014, the District issued a statement of disciplinary charges against Yoguez. Yoguez was accused, among other things, of meeting with Medina during his shift to engage in "non-work activity (most likely sexual activity)," and of dishonesty during his interview when he denied having received any visitors other than his wife.

On October 21, 2014, the District held a pre-disciplinary meeting concerning the charges against Yoguez. Yoguez was again represented by Medina and Hollins. Yoguez admitted to having met with Medina during his shifts to discuss CSEA business, but explained that he did not consider her a visitor because she was his union steward.

On October 22, 2014, the District's assistant superintendent of human resources, Michael Vierra (Vierra), conducted an investigatory interview of Medina, who was represented by Hollins. Greg Lee, the District's human resources director, also attended. During the interview, Medina acknowledged meeting with Yoguez at West Ranch, but said that they only met to discuss CSEA business. Vierra asked whether Yoguez and Medina had engaged in sexual activity at West Ranch. Medina said they had not.

Vierra then asked Medina questions about her activities as a CSEA steward. Hollins disputed the relevance of those questions. Vierra explained to Hollins that he found it unlikely that Medina and Yoguez were conducting union business in the parking lot in her car, and needed to understand Medina's normal practices. He proceeded to question Medina regarding

her training and her record-keeping practices. Vierra also asked Medina whether any unit members had complained to her about Yoguez.[3] Medina responded to all of these questions.

Vierra then questioned Medina specifically about her meetings with Yoguez on September 22, 23, and 25, 2014. Medina admitted to meeting with Yoguez at West Ranch on each of those nights, but said the two were discussing CSEA business.

Following the interview, the District issued a statement of disciplinary charges against Medina. In particular, the District accused her of engaging in "non-work activity (most likely sexual activity)" at West Ranch on September 22, 23, and 25, dishonestly claiming that she was meeting Yoguez for CSEA business, and "abandon[ing] [her] responsibilities towards other CSEA unit members at the site in order to cover up [her] affair with Mr. Yoguez."

DISCUSSION

Interference

The District excepts to the ALJ's conclusion that it interfered with protected rights by questioning Medina about whether other bargaining unit members had complained to her about Yoguez. It argues that Vierra's questioning was not coercive and that, even if it was, the District's legitimate need to investigate Yoguez and Medina's conduct outweighed any harm to employee rights. We reject these arguments.

EERA makes it unlawful for an employer to "[i]mpose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by

[3] As we discuss *post*, the exceptions before us relate only to the legality of this single question. We mention Vierra's other questions for context, but we express no opinion as to their legality.

this chapter." (§ 3543.5, subd. (a).) It is also unlawful for an employer to "[d]eny to employee organizations rights guaranteed to them by this chapter." (§ 3543.5, subd. (b).)

The Board's framework for analyzing allegations of unlawful interference is well settled. "A prima facie case of interference is established by allegations that an employer's conduct tends to or does result in some harm to employee rights under our statutes." (*Jurupa Unified School District* (2012) PERB Decision No. 2283, p. 28, citing *Carlsbad Unified School District* (1979) PERB Decision No. 89 (*Carlsbad*).) "If the harm to protected rights is slight and the employer offers justification based on operational necessity, the competing interests are balanced. [Citations.] If the harm to employee rights outweighs the asserted business justification, a violation will be found." (*Cabrillo Community College District* (2015) PERB Decision No. 2453, pp. 13-14, citing *Carlsbad*.) "Where the employer's conduct is inherently destructive of protected rights, it will be excused only on proof that it was caused by circumstances beyond the employer's control and that no alternative course of action was available." (*Id.* at p. 14.)

The ALJ concluded that the District's questioning concerning whether other employees had complained to Medina about Yoguez caused at least slight harm to protected rights. We agree. EERA gives employees the "right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." (EERA, § 3543, subd. (a).) This right includes serving as a union steward. (*Klamath-Trinity Joint Unified School District* (2005) PERB Decision No. 1778, p. 2.) EERA also guarantees the right of employee organizations to represent employees in their employment relations with the public school employer. (EERA, § 3543.1,

subd. (a); *Hartnell Community College District* (2015) PERB Decision No. 2452, p. 56 (*Hartnell*).)

It is also beyond dispute that an employer's inquiries into discussions between employees and their union representatives have a tendency to chill the protected activities of both the employees and the representatives. (E.g., *County of Merced* (2014) PERB Decision No. 2361-M, pp. 7-8, 10 [employer order that union president disclose identity of bargaining unit members informing union of safety concerns constitutes interference].) As the National Labor Relations Board (NLRB) has explained, allowing an employer to compel disclosure of the substance of conversations between an employee and his or her union steward "manifestly restrains employees in their willingness to candidly discuss matters with their chosen, statutory representatives" and "inhibit[s] stewards in obtaining needed information from employees." (*Cook Paint & Varnish Co.* (1981) 258 NLRB 1230, 1232 (*Cook Paint*).) Such conduct also interferes with protected rights more generally, because it "cast[s] a chilling effect over all of [the] employees and their stewards who seek to candidly communicate with each other over matters" concerning their employment. (*Ibid.*)

In *Cook Paint*, the employer questioned a union shop steward, under threat of discipline, about his conversations with an injured employee concerning the incident that led to the injury. (*Cook Paint*, *supra*, 258 NLRB 1230, 1231.) The NLRB ruled that because the union steward was not an eyewitness to the incident and was questioned solely due to his status as a steward, the employer's coercive conduct constituted unlawful interference. (*Id.* at p. 1232.)

In this case, the evidence establishes that Vierra first asked Medina whether any CSEA unit members expressed concerns to her about Yoguez, and then asked follow-up questions ("[w]ho, what, where, when, why," according to Vierra's notes) about a site meeting where

employees allegedly expressed their concerns. Thus, the District exceeded the scope of any permissible inquiry when it sought the identity of unit members who attended the meeting and the substance of conversations between bargaining unit members and their union steward.

The District argues, however, that Vierra's questioning of Medina was not coercive, and therefore did not harm protected rights. The District claims that Medina "voluntarily answered" and that Vierra "never said or even suggested that failure to provide answers would result in discipline."

We disagree with the District's claim that the questioning was not coercive. When an employer's questions veer into matters protected by EERA, it is the employer's obligation to assure the employee that his or her response is voluntary. (*State of California (Department of Corrections)* (1995) PERB Decision No. 1104-S, adopting proposed decision at pp. 16-17, quoting *Johnnie's Poultry Company* (1964) 146 NLRB 770; *Clovis Unified School District* (1984) PERB Decision No. 389, p. 16 (*Clovis*) [no interference where administrator assured employees of their "right to remain silent"].) There is no evidence that Vierra gave such assurances to Medina. And the context of the questioning affirmatively communicated that Medina's responses were not, in fact, voluntary. The questioning occurred during an investigative interview regarding Medina's misconduct, and after the District had already initiated its disciplinary process against Yoguez, based in part on the night-time meetings with Medina. Moreover, Vierra proceeded with his questions about Medina's union activities even after Hollins objected.[4] Therefore, we reject the District's exception and agree with the ALJ that Vierra's questioning was coercive and harmed protected rights.

[4] Although there was conflicting testimony about whether Hollins posed an objection, the District did not except to the ALJ's resolution of that conflict, or otherwise argue that the

Having concluded that Vierra's questioning caused at least slight harm to protected rights, we turn to the District's claim that its need to investigate Yoguez and Medina's conduct outweighed any harm to those rights. The ALJ found that the District had a legitimate interest in determining whether Medina and Yoguez had been engaged in union business, to test the veracity of their defense that their meetings were proper.[5] But, he concluded, Vierra's questions about whether other employees had complained to Medina about Yoguez "bear no clear relationship to Medina's assertion that her meetings with Yoguez at West Ranch were for CSEA business."

In its exceptions, the District argues that "if Medina had received complaints from other CSEA members about Yoguez and failed to investigate those complaints against Yoguez, it tends to show she had a personal or romantic relationship with Yoguez." This might be a logical inference to draw if the complaints concerned potential grievances against the employer or another matter the union had a duty to investigate. However, such an inference would be a weak one. The possibility that Medina was covering up a personal or romantic relationship with Yoguez is only one of several inferences that could be drawn from Medina's failure to investigate complaints against Yoguez. Another reasonable inference could be that CSEA had exercised its discretion not to pursue other employees' complaints against Yoguez. (See, e.g., *California School Employees Association & its Chapter 379 (Dunn)* (2009) PERB Decision No. 2028, p. 9.) As a result, discovering that Medina failed to investigate complaints against

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ALJ was incorrect. The District has therefore waived any exception to the ALJ's finding that Hollins objected. (PERB Reg. 32300, subd. (c).)

[5] In the absence of an exception by CSEA, we assume without deciding that the District had a legitimate interest in determining whether Medina and Yoguez were engaged in union business during their meetings.

Yoguez would have supplied the District only weak evidence that the two had a personal or romantic relationship.

Even if the District had a legitimate reason to ask Medina about her protected communications with employees, we conclude that the harm to protected rights outweighs the District's interests. Balanced against the minimally probative nature of Vierra's question is the problem that it struck at the heart of matters in which the District had no legitimate interest: the adequacy of Medina's representation of bargaining unit members. This was an issue to be raised, if at all, by the unit members themselves, not the District. (*Orange County Water District* (2015) PERB Decision No. 2454-M, p. 25, fn. 20 [unit members, not employers, have standing to charge an exclusive representative with breaching its duty of fair representation]; see also *Hartnell, supra*, PERB Decision No. 2452, p. 56 ["the employer has *no* role in deciding or influencing matters of employee choice or the administration of an employee organization's internal affairs" (emphasis in original)].) By pursuing that line of inquiry in a formal investigatory interview, the District converted Medina's efforts as a steward into a disciplinary matter. This was starkly demonstrated by the District's later assertion that Medina had "abandoned [her] responsibilities towards other CSEA unit members at the site in order to cover up [her] affair with Mr. Yoguez."

Also problematic is the possibility that the District's inquiry into the complainants' identities and the subjects of their complaints against Yoguez could have forced Medina to provide additional evidence of Yoguez's wrongdoing. An employer's legitimate investigation into alleged wrongdoing cannot include quizzing the shop steward about the substance of communications between employees and their union representatives, thereby deputizing the union as the employer's agent for conducting disciplinary investigations.

Under these circumstances, we cannot conclude that the District's need to inquire into other employees' complaints about Yoguez outweighed the harm to protected rights.

The District's final argument regarding the merits of the case concerns the ALJ's finding that the District violated Medina's rights. The District argues that if its conduct did violate EERA, "the rights that were allegedly violated are those of CSEA and not those of Medina." We disagree. By interfering with Medina's rights to act as a steward, the District violated Medina's employee rights and CSEA's rights. (*State of California (Department of Corrections & Rehabilitation)* (2012) PERB Decision No. 2285-S, p. 17.) The District also violated the rights of the employees CSEA represents by "cast[ing] a chilling effect over all of its employees and their stewards who seek to candidly communicate with each other over matters" concerning their employment. (*Cook Paint, supra*, 258 NLRB 1230, 1232; cf. *Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M, pp. 23, 26 [discrimination against a union activist has a chilling effect on the rights of all employees].)[6]

Due Process

Relying on *F.C.C. v. Fox Television Stations, Inc.* (2012) 567 U.S. 239 (*Fox*), the District argues that a finding of interference is improper under the "void for vagueness" doctrine because the District lacked adequate notice that Vierra's questions to Medina could violate EERA. The ALJ properly rejected this argument.

Fox, supra, 567 U.S. 239, described the "void for vagueness" doctrine, grounded in the Due Process Clause of the Fifth Amendment. It explained that a "fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." (*Id.* at p. 253.) Further, "[a] conviction or punishment fails to

[6] Although the only employee rights addressed in the proposed order are Medina's, we correct this oversight in our order.

comply with due process if the statute or regulation under which it is obtained 'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.'" (*Ibid.*)

In *Fox*, the Federal Communications Commission abruptly implemented a sea-change in its position on whether fleeting expletives and brief nudity are unlawful "indecency," without giving notice to regulated parties that what was previously considered lawful is now considered unlawful. (567 U.S. at p. 258.) The ALJ deemed *Fox* inapposite to this case because there has been no sudden change in PERB's position on coercive questioning of employees regarding their protected activity.

In its exceptions, the District acknowledges that there has been no change in PERB's view of coercive questioning, but argues that it has been denied "fair notice" of the types of questions prohibited by EERA. It maintains that neither *Clovis*, *supra*, PERB Decision No. 389, nor any other case has addressed "which sorts of questions are appropriate during a district's legitimate investigation." This argument is untenable.

EERA's broad prohibition against interference with protected rights is akin to similar provisions found in numerous other state labor relations laws in California and other states, as well as to provisions under federal law governing private sector employees and federal employees. In each of these instances, the law vests an expert agency with authority to interpret the broad protection of employee rights on a case-by-case basis, thereby providing guidance through legal interpretations and fact-specific holdings in precedential decisions. Such jurisprudence has a long history in the common law and is part and parcel of the American legal system. No precedent suggests that a court or agency violates due process

when it applies the law to a new set of facts that varies in one or more ways from the factual scenarios at issue in prior cases.

In addition, "fair notice" does not mean the kind of precise, exacting notice the District seeks. As one Court of Appeal recently explained, the standard for showing that a law is unconstitutionally vague "is hard to meet, and its stringency is not accidental. Language itself is notoriously imprecise." (*Diaz v. Grill Concepts Services, Inc.* (2018) 23 Cal.App.5th 859, 870.) Vagueness is not established simply because a law is difficult to apply or because its meaning is difficult to discern, but "only if it is impossible to give the law a 'reasonable and practical construction.'" (*Ibid*.) "A statutory scheme is not required to isolate and specify, or provide detailed plans and specifications concerning, every precise activity or conduct that is intended to be required or prohibited. . . . And an administrative agency properly can choose to resolve some aspects of the implementation of a statutory scheme through ad hoc adjudication rather than by general rule." (*Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 503-504, citation omitted.) Moreover, civil statutes that regulate economic conduct, such as EERA, are subject to less scrutiny under the vagueness doctrine. (See *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1181.)

EERA's prohibition on interfering with protected rights has been given a reasonable and practical construction over more than four decades of agency adjudication, beginning with *Carlsbad*, *supra*, PERB Decision No. 89—which is itself grounded in decades of administrative and judicial precedent interpreting similar provisions of the National Labor Relations Act (NLRA). Despite this lengthy history, as well as the existence of numerous other collective bargaining laws prohibiting interference with protected rights, the District cites no case (and our own research discloses none) even suggesting that these provisions or the

administrative interpretations of them are unconstitutionally vague.[7] We therefore reject the District's argument that EERA section 3543.5, subdivision (a), cannot be applied to find a violation here.

Remedy

Finally, we turn to the District's exception that the ALJ's cease-and-desist order is vague and "unfairly broad, and possibly unconstitutionally so." The relevant portion of the proposed order is:

> The District violated EERA by interrogating Amber Medina, a steward for California School Employees Association, and its Chapter 349 (CSEA)[,] about whether represented employees had complained to her in her capacity as a steward about another represented employee. All other claims were dismissed.
>
> 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. Interfering with Medina's protected rights.
>
> 2. Interfering with CSEA's right to represent its bargaining unit.

This order is not vague or overbroad. It is prefaced with a specific finding that the District violated EERA by interrogating Medina "about whether represented employees had complained to her in her capacity as a steward about another represented employee." The cease-and-desist portion of the order is read in conjunction with that finding as well as the remainder of the decision. (See *Jurupa Unified School District* (2015) PERB Decision

[7] In fact, one federal court rejected out of hand the argument that section 8(b)(1) of the NLRA, which prohibits a union from "restrain[ing] or coerc[ing]" employees in the exercise of their protected rights (29 U.S.C. § 158(b)(1)), was unconstitutionally vague. (*NLRB v. Union Nacional de Trabajadores* (1st Cir. 1976) 540 F.2d 1, 11, fn. 9.)

No. 2458, p. 7.) The District's claim that the order subjects it to contempt for any conduct "regardless if connected in any way to the issue raised here" is inconsistent with Board precedent holding that it will seek to enforce an order only when a respondent's actions are sufficiently similar to the ones litigated. (*San Francisco Community College District* (1994) PERB Order No. Ad-258, p. 5.) Thus, the broad language of the ALJ's cease-and-desist order is sufficiently tempered by the specific description of the violation committed by the District, and we reject the argument that it is vague and overbroad. That being said, in this case a more narrowly tailored cease-and-desist order will effectuate the purposes of the statute equally well. We therefore modify the order to more precisely state the scope of the enjoined conduct.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the William S. Hart Union High School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5, subdivisions (a) and (b). The District violated EERA by interrogating Amber Medina, a steward for California School Employees Association and its Chapter 349 (CSEA), about whether represented employees had complained to her in her capacity as a steward about another represented employee. All other claims were dismissed.

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:

Interfering with employees' and CSEA's protected rights by interrogating CSEA stewards regarding whether they have received, in their capacity as union officials, complaints from represented employees about other represented employees.

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

1. 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 CSEA's bargaining unit 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, and other electronic means customarily used by the District to communicate with employees in CSEA's 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.

2. 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 CSEA.

Members Shiners and Krantz 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-6024-E, *California School Employees Association & its Chapter 349 v. William S. Hart Union High School District*, in which all parties had the right to participate, it has been found that the William S. Hart Union High School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq., by interrogating Amber Medina, a steward for California School Employees Association & its Chapter 349 (CSEA), about whether represented employees had complained to her in her capacity as a steward about another represented employee.

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

A. CEASE AND DESIST FROM:

Interfering with employees' and CSEA's protected rights by interrogating CSEA stewards regarding whether they have received, in their capacity as union officials, complaints from represented employees about other represented employees.

Dated: _____

WILLIAM S. HART UNION HIGH 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.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION & ITS CHAPTER 349, Charging Party, v. WILLIAM S. HART UNION HIGH SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-6024-E PROPOSED DECISION (October 25, 2016)

Appearances: Christina C. Bleuler, Lead Staff Attorney, for California School Employees Association & its Chapter 349; Littler Mendelson, P.C., by Barrett K. Green and Laila S. Tafreshi, Attorneys, for William S. Hart Union High School District.

Before Eric J. Cu, Administrative Law Judge.

In this case, an exclusive representative accuses a public school employer of retaliating against a union steward because of her representational activities and unlawfully interrogating the steward about her union activity. The employer denies any violation.

PROCEDURAL HISTORY

On April 21, 2015, California School Employees Association & its Chapter 349 (CSEA) filed the instant unfair practice charge with the Public Employment Relations Board (PERB or Board), accusing the William S. Hart Union High School District (District) of retaliation and interference in violation of the Educational Employment Relations Act (EERA).[1]

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

On September 9, 2015, the PERB Office of the General Counsel issued a complaint alleging that the District issued steward Amber Medina and unit member Armando Yoguez separate notices of possible dismissal because they engaged in EERA-protected activities. The complaint also alleges that the District interfered with Medina's protected rights by interrogating her about her union activities. The District filed its answer on September 29, 2015, denying the substantive allegations and asserting multiple affirmative defenses.

An informal conference was held on November 3, 2015, but the matter was not resolved. The parties participated in a formal hearing on March 21-23, 2016. During the hearing, CSEA withdrew the retaliation allegations pertaining to Yoguez. In its case in chief, the District sought to introduce a video file as an exhibit (Respondent's Exhibit G). CSEA objected on relevance grounds, which I, as the assigned administrative law judge, overruled. However, the admission of the exhibit was delayed due to technical issues with the video file format. Those issues were resolved by April 1, 2016. On April 7, 2016, CSEA acknowledged that the formatting issue had been resolved, but maintained its original relevance objection. Noting that CSEA's objection had already been preserved in the record, I admitted Respondent's Exhibit G on April 7, 2016.

Each party submitted a closing brief on July 20, 2016. At that point, the record was closed and the matter was considered submitted for decision.

FINDINGS OF FACT

The Parties

The District is a "public school employer" within the meaning of EERA section 3540.1, subdivision (k). CSEA is an "exclusive representative" within the meaning of EERA section 3540.1, subdivision (e), and represents the District's classified bargaining unit. Medina

is a "public school employee" within the meaning of EERA section 3540.1, subdivision (j). Prior to his termination, Yoguez was also a "public school employee" within the meaning of EERA section 3540.1, subdivision (j). At the times relevant to this case, both Medina and Yoguez were part of the classified unit.

The District's Discipline Process for Classified Employees

The District's Governing Board has authority to discipline employees, based on recommendations from District administration. Article 24.2 of the Collective Bargaining Agreement (CBA) between CSEA and the District specifies that discipline may only be imposed for just cause. CBA Article 24.0 enumerates specific causes for discipline. Among the causes relevant to this case are "Dishonesty" (Art. 24.0(B)), and "Incompetency, inefficiency, insubordination, inattention to or dereliction of duty, discourteous treatment of the public or fellow employees, or any other willful violation" of the Education Code, District rules, or Personnel Commission rules. (Art. 24.0(I).) Article 24.1 states that progressive discipline should be followed, but may be bypassed if warranted by a serious offense.

If the District suspects that an employee has engaged in misconduct, it typically conducts an investigation. The investigation may involve holding investigatory interviews with the employee at issue, with CSEA representation.

If the District elects to continue pursuing discipline, then it prepares a "Preliminary Notice Of Possible [Discipline] And Statement of Charges" (Statement of Charges).[2] The Statement of Charges explains to the employee that the District is considering recommending

[2] According to assistant superintendent of HR Dr. Michael Vierra, the District typically identifies the maximum possible discipline under consideration, even if the District ultimately imposes lesser discipline or no discipline at all. Vierra said that he considered it inappropriate for the District to, for example, notify an employee that the District is considering suspending the employee, and then ultimately decide to proceed with dismissal.

discipline to the Governing Board. The document enumerates specific charges of suspected misconduct. If the District contemplates a suspension, demotion, or dismissal, then, under CBA Article 24.4, the employee is entitled to a pre-disciplinary meeting with the assistant superintendent of human resources (HR). The employee may have CSEA representation and may respond to the Statement of Charges and provide exculpatory or mitigating information. The District may add or delete allegations from the information gathered during the pre-disciplinary meeting, or may decide against proceeding with any discipline at all. If allegations are added, the District amends the Statement of Charges and the employee may have another pre-disciplinary meeting.

If the District decides to proceed with discipline, pursuant to CBA Article 24.5, the District prepares a "Notice Of Recommendation for [Discipline] And Statement of Reasons." This document is based on those allegations in the Statement of Charges that the District believes warrants discipline after concluding its investigation. The employee is informed of his or her right to address the Governing Board, with CSEA representation, before the Governing Board approves or rejects the recommendation.

If the Governing Board approves the discipline, the employee is notified in writing and may appeal that decision to the District's Personnel Commission, who may sustain or overturn the discipline.

West Ranch High School's Facilities and Maintenance Department

In the 2013-2014 school year, West Ranch High School (West Ranch) had 13 full-time custodians working two different shifts. The day shift starts at 6:00 a.m. and ends at 2:30 p.m. The night shift starts at 2:30 p.m., and ends at 11:00 p.m. Assistant principal Dr. Juliet Fine supervises the custodians. Humberto Almaraz is the West Ranch plant manager, which is part

of the classified unit, but he also plays some role in overseeing the work of the custodians. He works the day shift.

A night lead oversees the custodians on the night crew. This position is also part of the classified unit. Although the position does not assign work, it appears to have some "lead" responsibilities, such as meetings with vendors and setting up for events. Night custodians also contact the night lead via radio when taking lunch or other breaks. Night custodians have fixed lunch periods to ensure that there is coverage throughout the night shift. Some are assigned a lunch period of between 5:00 and 6:00 p.m. The others are assigned a lunch period between 6:00 and 7:00 p.m. Prior to the incidents discussed below, Armando Yoguez was the night lead. He did not testify.

Rumors From the Night Crew about Yoguez and Medina

Starting in Fall 2013, Fine began hearing informal reports from custodians that Yoguez was receiving a visitor in a white car at night in the West Ranch parking lot. Fine also testified that there were jokes and rumors amongst the night crew that Yoguez and Medina were romantically involved and were meeting at night. In addition, night custodian Maria Yniguez reported to Fine that Yoguez would leave his assignment and walk around campus for two or three hours at a time a few times a week.

By Summer 2014, Fine started receiving more formal reports of Yoguez meeting with someone in the parking lot. Night custodian Janie Serrano also reported seeing Yoguez outside of campus while he was scheduled to be working.[3] Fine reported her concerns to Vierra and expressed some interest in investigating the nature of Yoguez's nighttime visitor. Vierra discouraged her from doing so. Eventually, night custodians discovered that Yoguez's

[3] It was Serrano's day off.

meetings were with Medina. After meeting with other night custodians, Vierra decided to hire a private investigator to observe Medina and Yoguez.

Medina's Activities as a CSEA Steward in Summer 2014

Multiple times during her testimony, Medina described West Ranch as her "problem child," because she had to meet with unit members, and custodians in particular, at that site frequently during the 2013-2014 school year. Medina said she was particularly concerned with Yoguez because, in May 2013, he had entered into a "last chance agreement"[4] with the District, whereby his employment at the District would terminate if he engaged in any future misconduct covered under that agreement. The CBA entitles CSEA to use "the District's facilities and buildings at times other than normal working hours and hours of student instruction," if CSEA requests usage from a supervisor. (Art. 3.5.) In addition, as night lead, Yoguez has access to a lockable office with a desk. Others on the night crew have access to the office when it is not locked.

On or around May 22, 2014, Fine met with Yoguez about her expectations for him and the other members of the night crew. Medina attended as well, at Yoguez's request. The following day, Fine issued Yoguez a "Summary of Understanding," apparently covering the subjects of the prior day's meeting. Shortly afterwards, Medina contacted Fine requesting

[4] According to Vierra, Yoguez had a physical altercation with another employee resulting in that employee's hospitalization. He said that Yoguez denied ever striking the employee, but the District concluded that Yoguez was dishonest. He was also disciplined for inappropriate contact with students. Vierra testified that he originally considered dismissing Yoguez outright, but instead entered into the last chance agreement. Under the agreement, Yoguez served a 30-day suspension and agreed not to engage in any physical violence, misconduct with students, or dishonesty, for two years. Yoguez did not seek CSEA's representation for that agreement.

clarification about whether the memo was considered discipline. Fine agreed to amend the memo to address Medina's concerns.

On July 3, 2014, Medina accompanied night custodian Joe Garcia in a meeting with Fine and West Ranch principal, Mark Crawford, to discuss Garcia's concerns that the plant manager favored some custodians over others and used vulgar language and derogatory names. Later that day, Medina also represented Yoguez in a meeting with both Fine and Crawford concerning the quality of Yoguez's work during an overtime assignment over the weekend.

On August 13, 2014, Yoguez contacted Medina over an increase to his daily cleaning assignment. According to Medina, the night lead has a smaller assignment from others because of his lead duties.

Medina testified that, on August 18, 2014, Yoguez contacted her about an e-mail he received from Vierra stating that he was under investigation. The two of them met that evening in the West Ranch parking lot to review and discuss Vierra's e-mail.

On August 21, 2014, Fine spot-checked Yoguez's work. She testified that she inspects custodial work regularly in the morning before students arrive on campus. Fine said that several areas of Yoguez's work did not meet her expectations. On August 22, 2014, Fine issued Yoguez a verbal warning for his work performance. Medina later met with Fine to discuss both the discipline and Yoguez's workload.

On August 27, 2014, Medina met with Vierra to discuss concerns raised by another West Ranch night custodian, Edwin Herrera. Like Garcia, Herrera had complained about the plant manager favoring some custodians over others and using inappropriate language.

Medina's Meetings With Yoguez in September 2014

On September 10, 2014, Vierra e-mailed Yoguez, expressing that "concerns have been raised about your interactions with female custodians in your department." Medina and Yoguez met in the West Ranch parking lot at around 7:30 p.m., to discuss the e-mail. Later that evening, Medina contacted Vierra by telephone to get more detail about the District's investigation. Vierra declined to elaborate, stating only that the District would provide additional information at a later time.

On Friday, September 19, 2014, Fine issued a memo instituting a new policy requiring the night crew to sign out during their lunch break and sign back in upon their return to duty. Previously, custodians were only required to sign in and out during the start and end of their shifts. Fine explained that she started the lunch policy because she needed some custodians on campus at all times during the night shift. Fine said that, one evening, the fire alarm went off at the site and District technology staff could not determine who from the night crew was on campus to address the alarm. Yoguez contacted Medina about the new policy memo.

On Monday, September 22, 2014, Medina visited Yoguez at West Ranch to review Fine's memo from the previous week. Medina arrived at West Ranch at around 9:30 p.m. She said she called Yoguez as she approached and he suggested that they meet at a narrow service road near the site's athletic field and across the site's main parking lot. At hearing, Medina explained that the field was lit at the time which illuminated the service road so she could read documents in her car. The two met for around 30 minutes. Medina said that the two reviewed and discussed the September 19, 2014 memo. She said Yoguez also asked about the status of his September 16, 2014 complaint, but she did not have any new details.

Yoguez contacted Medina again on September 23, 2014. According to Medina, Yoguez reported that Fine instructed Yoguez and another custodian to sign out for lunch at 6:00 p.m. When Yoguez explained that he did not take lunch at 6:00 p.m., Fine instructed him to nevertheless sign out as though he had. Medina testified that she told Yoguez that misrepresenting his time on District records constitutes "fraud," and that she wanted to meet and discuss what transpired. Medina parked in the site's main public parking lot, which is also lit. Yoguez joined her in the car at around 8:00 p.m. Medina said that the two of them discussed Fine's directive. Around 10 or 15 minutes later, they decided to leave the site. During her direct examination by CSEA, Medina said she decided to leave campus to "review documents," but she did not identify which documents they reviewed. During cross examination, Medina said that the two discussed the directive and Medina's conversations with others at CSEA about the lunch sign out policy, Yoguez's September 16, 2014 complaint, and the possibility of pursuing a grievance. Medina drove Yoguez back to work before 9:00 p.m. Medina testified that she parked and waited in her car for Yoguez to retrieve a document for her. Yoguez returned at around 9:30 p.m., and he stayed with Medina in her car until around 10:00 p.m. At hearing, Medina said she wanted Yoguez to retrieve Fine's September 19, 2014 memo. She acknowledged seeing the memo during her visit the previous evening, but said that she "did not take possession of it" at the time. She said that the two also discussed the possibility of filing a grievance.

On September 25, 2014, Medina received a courtesy copy of e-mail correspondence between Fine and CSEA representatives about the lunch sign out policy and West Ranch overtime records. Medina testified that she wanted to update Yoguez and she met with him at the service road near the West Ranch athletic field around 8:20 p.m. She said that Yoguez told

her that he was on his lunch break. According to Medina, they discussed the e-mails, as well as other concerns he had at the time. She left before 9:40 p.m.

Unbeknownst to either Medina or Yoguez, the District's hired private investigator observed Medina's meetings with Yoguez on September 22, 23, and 25, 2014. The investigator determined that the two had met on each of the three dates and at the approximate times discussed above. The investigator was unable to hear or observe what took place while Yoguez was inside Medina's car. The investigator produced a report of his findings, dated September 30, 2014.

On September 30, 2014, at around 8:00 p.m., Medina met with Garcia and Herrera in the West Ranch main parking lot, near the gym. Medina had prepared a complaint under the District's uniform complaint procedure based on their ongoing concerns with plant manager Almaraz. Herrera testified that Medina met with both himself and Garcia at the same time, in her car. She explained the content of the complaint she drafted and asked them to review it before signing it. Both Garcia and Herrera signed the document and left Medina's car. Medina filed the complaint with the District shortly afterwards.

Yoguez's October 6, 2014 Investigatory Interview

At some point, the District informed Yoguez and CSEA that it had scheduled an investigatory meeting for Yoguez for October 6, 2014. Medina and CSEA staff representative Valerie Hollins attended with Yoguez. Vierra questioned Yoguez about whether he had mistreated coworkers, acted aggressively towards women, or failed to perform his work duties. Yoguez denied any wrongdoing or poor performance.

Vierra then asked Yoguez if he ever received any visitors at West Ranch during his shift. Yoguez denied having any visitors aside from his wife. He said his wife drives a white

car. Medina asked for permission to speak, which Vierra denied, stating that the interview was over. Two days later, on October 8, 2014, the District placed Yoguez on paid administrative leave, directing him not to enter District property without permission.

On October 10, 2014, the District issued Yoguez a Statement of Charges, indicating possible dismissal, drafted by Vierra. In the document, Vierra stated that the District is "considering recommending" that Yoguez be dismissed from employment because he:

> on repeated occasions a) engaged in sexual relations and other non-work activity on District property and during work hours, and b) accepted pay for time in which you were not performing work because you were either on school property engaged in sexual relations or other non-work activity, or you had departed school property altogether.

The October 10, 2014 Statement of Charges included the claim that Yoguez's meetings with Medina at West Ranch on September 22, 23, and 25, 2015, were to engage in "non-work activity (likely sexual activity)." The document specified the times and location of each of the three encounters, and the parties agree that those details are at least approximately accurate. Yoguez was also accused of being dishonest about his meetings with Medina, threatening his coworkers, and poor work performance. The Statement of Charges detailed Yoguez's prior discipline history including his last chance agreement. Vierra e-mailed a copy of Yoguez's Statement of Charges to Medina, at her request.

Medina's October 15, 2014 Meeting with Garcia and Herrera

On October 15, 2014, Medina returned to West Ranch to meet with Garcia and Herrera in her car. She discussed with them a grievance she had filed on October 9, 2014, about violations of the overtime rotation policy at West Ranch. Both Medina and Herrera testified that Yoguez was not present.

Yoguez's October 21, 2014 Pre-Disciplinary Meeting

Yoguez's pre-disciplinary meeting was held on October 21, 2014. Yoguez attended with Medina and Hollins. According to Vierra, Yoguez acknowledged that he previously said he had not received any visitors other than his wife, but said that it did not occur to him to discuss his meetings with Medina because he did not consider her to be a visitor.

Medina's October 22, 2014 Investigatory Interview

On October 22, 2014, the District held an investigatory interview for Medina. Medina appeared with Hollins. During the meeting, Medina acknowledged meeting with Yoguez, but said that they only met to discuss CSEA business. Vierra explicitly asked whether Yoguez and Medina engaged in sexual activity at West Ranch, which Medina denied.

Vierra then asked Medina a series of questions about her role as a CSEA steward. Hollins disputed the relevance of those questions. At hearing, Hollins admitted that some of the questions about Medina's meetings at West Ranch pertained to the District's investigation, but expressed concern that questioning employees about the details of their union activity "sends a very chilling effect." Vierra explained to Hollins that he found it unlikely that Medina and Yoguez were conducting union business in the parking lot in her car, and needed to understand what Medina's normal practices were. At hearing, Vierra admitted to never previously questioning any employee about his or her union activity. He proceeded to question Medina over Hollins' opposition. His questions covered topics including her level of training and her record-keeping practices. Vierra also asked her whether any unit members had complained to her about Yoguez. Medina responded to all of these questions.

Vierra then questioned Medina specifically about the events of September 22, 23, and 25, 2014. Medina admitted to meeting with Yoguez at West Ranch on each of those three

nights, but said that the two were discussing CSEA business. Vierra then asked Medina to review the private investigator's report. During the interview, Medina acknowledged the content of the report was accurate.

According to Vierra's notes of the October 22, 2014, he asked Medina whether she knew why Yoguez requested that the District serve Medina with his October 10, 2014 Statement of Charges. Medina responded that she is his local CSEA representative.[5] The notes submitted for the record also indicate that Vierra asked whether she appeared with Yoguez at West Ranch on October 15, 2014, in contravention of the District's administrative leave order. She denied ever doing so.

Yoguez's Amended Statement of Charges

On October 28, 2014, the District issued Yoguez an amended Statement of Charges. Relevant to this case, the District added the allegation that Yoguez appeared at West Ranch on the evening of October 15, 2014, with Medina and that his presence "appeared calculated to intimidate witnesses during an ongoing investigation." At hearing, Vierra explained that this allegation was based on a report from custodian Serrano that she saw Yoguez and Medina at West Ranch that day. The District also provided Yoguez with a copy of the private investigator's report. The District scheduled another pre-disciplinary meeting to discuss the amended Statement of Charges.

Medina's October 31, 2014 Statement of Charges

On October 31, 2014, the District issued Medina a Statement of Charges, authored by Vierra. The document enumerates 11 "specific acts or omissions, individually and

[5] Hollins's notes from the meeting differed slightly, but corroborated that Medina was asked why Yoguez wanted the District to contact her regarding his Statement of Charges.

collectively, upon which your dismissal is being considered[.]" As with Yoguez, the District accuses Medina of engaging in "non-work activity (most likely sexual activity)" at West Ranch on September 22, 23, and 25. In the document, Vierra concludes that Medina's explanation that they were meeting over union business is "dishonest, not credible, and does not pass muster." He accuses Medina of assisting Yoguez with his misconduct, facilitating misuse of District time, and dishonesty during the District's investigation.

Vierra also alleges that Medina "abandoned [her] responsibilities towards other CSEA unit members at the site in order to cover up [her] affair with Mr. Yoguez." He also alleges that Medina "made sure to intercept the letter [placing Yoguez on administrative leave] so that it would be received by you and not Mr. Yoguez's wife." On or around November 10, 2014, Medina filed a uniform complaint procedure complaint alleging that the District was pursuing discipline against her because of her active role as a CSEA steward. The outcome of that complaint was not specified for the record. To date, the District has not either formally disciplined Medina or rescinded or amended her Statement of Charges. At hearing, when asked why the District has not taken further action, Vierra responded "Well we've had a number of items that have kind of all come together with this matter and just haven't done it yet. We haven't done anything with it."[6]

[6] The District proceeded with its plans to dismiss Yoguez. It held a second pre-disciplinary meeting on November 10, 2014. Two days later, it issued its formal dismissal recommendation. The recommendation accused Yoguez of engaging in "non-work activity" without any reference to "sexual activity." It also did not reference Yoguez visiting West Ranch after his administrative leave. On November 20, 2014, the District's Governing Board approved the dismissal. Yoguez appealed to the District's Personnel Commission and a hearing was originally scheduled for January 28, 2015. The hearing was later moved to June 29, 2015. Eventually, the Personnel Commission sustained Yoguez's dismissal.

ISSUES

1. Did the District issue Medina the October 31, 2014 Statement of Charges in retaliation for her CSEA activities?
2. Did the District's questions during Medina's October 22, 2014 investigatory interview about her CSEA steward activities interfere with protected rights?

CONCLUSIONS OF LAW

1. Retaliation Claim[7]

The PERB complaint in this case alleges that the District issued the October 31, 2014 Statement of Charges in retaliation for Medina's service as a CSEA steward and for seeking CSEA representation herself. To demonstrate that an employer discriminated or retaliated against an employee 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

[7] The District argues that CSEA should be prohibited from litigating its retaliation claim before PERB because the Personnel Commission found that Yoguez's dismissal, under similar circumstances was for just cause and not done in retaliation for his protected activity. At hearing, I rejected this argument and denied admission of the Personnel Commission's decision as an exhibit (it remains marked as Respondent's Exhibit V). I decline to reverse that determination. Whether an employer has retaliated against a public employee for activities protected under EERA is an issue within PERB's initial exclusive jurisdiction. (EERA, § 3541.5.) The jurisdictional differences between issue presented to the Personnel Commission in the Yoguez matter and those presented to PERB in this case make collateral estoppel inappropriate. (*Anaheim Union High School District* (2015) PERB Decision No. 2434 (*Anaheim UHSD*), pp. 11-12, proposed dec., p. 4; *State of California (Department of Industrial Relations)* (1998) PERB Decision No. 1299-S, pp. 9-10; *Trustees of the California State University* (1990) PERB Decision No. 805b-H, pp. 7-9.) In addition, whether the District retaliated against Yoguez for his CSEA activities requires a fundamentally different analysis from whether the District retaliated against Medina for a wholly different, more expansive, set of union activities.

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. 6-8 (*Novato USD*).)

In this case, the parties do not dispute that Medina is an active CSEA steward and that she has met with District administrators, represented unit members, and filed grievances and other complaints in that capacity. She also indisputably requested CSEA assistance during her own personnel matters. These activities are protected under EERA. (*Los Angeles Unified School District* (2012) PERB Decision No. 2244, pp. 7-8; *Klamath-Trinity Joint Unified School District* (2005) PERB Decision No. 1778, p. 2; *City of Monterey* (2005) PERB Decision No. 1766-M, proposed dec., pp. 8-9; *Ventura County Community College District* (1998) PERB Decision No. 1264 (*Ventura County CCD*), p 16.) It is also undisputed that key District administrators, such as assistant superintendent of HR, Vierra, and assistant principal Fine, knew that Medina is a steward and personally met and/or corresponded with Medina in that role. Vierra initiated the District's investigation of Medina based initially on reports from Fine and Vierra authored the October 31, 2014, Statement of Charges. That document also acknowledges Medina's role as a CSEA steward. These facts are sufficient to establish the first two elements of the *Novato USD* analysis.

a. <u>The Statement of Charges as an Adverse Employment Action</u>

The parties dispute whether Medina's Statement of Charges constitutes an adverse employment action. The issue is "whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment." (*Newark Unified School District* (1991) PERB Decision No. 864, pp. 11-12; *Palo Verde Unified School District* (1988) PERB Decision No. 689, pp. 7-8. 12.) It goes without say that formal discipline, including dismissal, is adverse. (*Fallbrook Union Elementary School*

District (2011) PERB Decision No. 2171, p. 8.) Likewise, both the unequivocal notice of the intent to pursue discipline and the threat to pursue discipline also constitute adverse actions. (*Monterey Peninsula Unified School District* (2014) PERB Decision No. 2381, pp. 34-35; see also EERA, § 3543.5, subd. (a); *County of Merced* (2008) PERB Decision No. 1975-M, p. 3, citations omitted.)

However, as the District points out, not all references to discipline qualify as adverse actions. In *State of California (Department of Health Services)* (1999) PERB Decision No. 1357-S (*DHS*), PERB found that a supervisor's non-specific comments that she would be "seeking adverse action," without further detail, was not in-and-of-itself adverse, reasoning that the employee's subjective apprehension about theoretical future discipline was insufficient. (*Id*. at dismissal ltr., p. 2.) In contrast, the employee did suffer an adverse action when he was later informed that he would be terminated. (*Id*. at warning ltr., pp. 2-3.)

In *County of Merced*, *supra*, PERB Decision No. 1975-M, the Board reaffirmed the holding in *DHS*, *supra*, PERB Decision No. 1357-S, but concluded that "the case applies only when the employer's notice does not indicate that it has made a firm decision to impose discipline, such as when the notice fails to provide any specifics of the action sought or the reasons therefore." (*Id*. at p. 3.) The Board in *County of Merced* similarly found no adverse action where an employer notified an employee who had been absent without leave that it would begin the termination process unless he returned to work. (*Id*. at p. 4.) The Board concluded that the notice was not an unequivocal decision to terminate the employee because the employer's decision still hinged on whether the employee decided to return to duty. (*Ibid*.)

Short of full disciplinary action, the Board has also found that "[t]he initiation of an investigation into alleged misconduct constitutes an adverse action against the investigated

employee." (*City of Torrance* (2008) PERB Decision No. 1971-M, p. 17, citing *State of California (Department of Youth Authority)* (2000) PERB Decision No. 1403-S (*DYA*).) The investigation is considered adverse even if no discipline results. (*Ibid*.) But, some inquiries into misconduct are not considered objectively adverse. For example, in *Service Employees International Union, Local 221 (Gutierrez)* (2012) PERB Decision No. 2277-M (*SEIU Local 221*), an employee was contacted by his employer about whether he was improperly performing union work while on duty. The entire inquiry was dropped the following day after the charging party showed that he was on jury duty during the times he was accused of misconduct. (*Id*. at pp. 3-4.) In declining to find any adverse employment action, the Board drew an analogy to *DHS, supra*, PERB Decision No. 1357-S, concluding that the employee's subjective fears about receiving a call from his employer were not objectively adverse to employment. (*Id*. at pp. 7-8.) In *DYA*, the Board found an employer's investigation into "discourteous" treatment towards students was adverse where the investigation lasted around six months, involved specific allegations of misconduct, and included formal investigatory interviews. (*Id*. at proposed dec., pp. 16-19, 32.) In that case, no discipline resulted from the investigation. (*Id*. at proposed dec., p. 19.)

In the present case, the District is correct that it has not actually dismissed Medina from employment or given unequivocal notice of its intent to dismiss her. Nevertheless, this case is unlike *DHS, supra*, PERB Decision No. 1357-S, in that the Statement of Charges contains both detailed allegations and specific contemplated discipline. And, unlike in *County of Merced, supra*, PERB Decision No. 1975-M, the District's decision to initiate the discipline process did not depend on Medina correcting her behavior. Rather, the District informed her that it is contemplating discipline primarily on her alleged past conduct. In addition, the District

acknowledges that the Statement of Charges is part of the District's information gathering process in that it provides employees with the opportunity to present additional evidence prior to making any discipline recommendation. In that sense, this situation is similar to *City of Torrance*, *supra*, PERB Decision No. 1971-M, where the employer's disciplinary investigation was found to be adverse. Unlike in *SEIU Local 221*, *supra*, PERB Decision No. 2277-M, the District's efforts involved more than just a passing inquiry. Rather, it was more like the employer in *DYA*, *supra*, PERB Decision No. 1403-S, where Statement of Charges was the product of months of investigation consisting in formal interviews. The District spoke with West Ranch employees, hired a private investigator, and interviewed both Yoguez and Medina about their alleged misconduct. The Statement of Charges itself triggered Medina's right to formally respond with exculpatory or mitigating evidence. Even though no discipline has been issued to Medina to date, I conclude that the issuance of the Statement of Charges constitutes an adverse employment action for purposes of PERB's retaliation analysis.

b. Evidence of the District's Retaliatory Motive

The final element of CSEA's prima facie case for retaliation is whether there Medina's protected activities were a motivating factor in the District's decision to issue her the Statement of Charges. Evidence of motive is considered to be the nexus between the protected conduct and the adverse act. "'[D]irect proof of motivation is rarely possible, since motivation is a state of mind which may be known only to the actor. Thus, . . . unlawful motive may be established by circumstantial evidence and inferred from reading the record as a whole.'" (*Palo Verde Unified School District* (2013) PERB Decision No. 2337 (*Palo Verde USD*), p. 10, citations omitted; see also *San Bernardino City Unified School District* (2004) PERB Decision No. 1602, p. 21.) In other words, "the employer's motivation may be proven by either direct

or circumstantial evidence, or a combination of both." (*Omnitrans* (2010) PERB Decision No. 2121-M, p. 10, citing *Carlsbad Unified School District* (1979) PERB Decision No. 89 (*Carlsbad USD*).) Where there is direct evidence of a retaliatory motive exists, no additional evidence is required to establish a prima facie case. (*Regents of the University of California* (2012) PERB Decision No. 2302-H (*UC Regents*), proposed dec. p. 19, citing *Regents of the University of California (Davis)* (2004) PERB Decision No. 1590-H; *Omnitrans*, p. 10, citing *Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C.)

1. Timing as Circumstantial Evidence of Nexus

PERB considers the timing between protected activities and the adverse action an important circumstantial factor when determining the presence or absence of a nexus. (*North Sacramento School District* (1982) PERB Decision No. 264, proposed dec., p. 23) Adverse actions occurring concurrent with or shortly after an employee's protected activities imply an unlawful motive. On the other hand, the passage of a significant amount of time weakens the nexus inference. (*Los Angeles Unified School District* (1998) PERB Decision No. 1300, dismissal ltr., p. 1.) In either case, timing alone is typically not determinative and other evidence is required to establish a prima facie case. (*Ibid*.)

In this case, Medina was active at West Ranch in her capacity as a CSEA steward throughout the time the District was investigating her for the misconduct alleged in her Statement of Charges. In September 2014, Medina contacted Vierra by telephone about the nature of the District's investigation of Yoguez. She also filed complaints concerning working conditions for Garcia, and Herrera, and Yoguez. In early October 2014, Medina attended Yoguez's investigatory interview and his pre-disciplinary meeting as his representative. Medina herself requested CSEA representation during her October 22, 2014 investigatory

interview, around a week before receiving her Statement of Charges. The timing between these activities and the Statement of Charges supports CSEA's nexus claim.

2. Allegation that Medina "Abandoned" Her CSEA Steward Duties

One of the allegations in the October 31, 2014 Statement of Charges is that Medina "abandoned [her] responsibilities towards other CSEA unit members at the site in order to cover up [her] affair with Mr. Yoguez." This allegation is problematic because I can conceive of no valid justification for an employer to initiate discipline based on an employee's competency as union agent. Unsurprisingly, CBA Article XXIV does not list abandoning one's duty as a CSEA officer as a possible cause for discipline. The duty of fair representation runs from an exclusive representative to the members of its bargaining unit. (*Jurupa Unified School District* (2012) PERB Decision No. 2283 (*Jurupa USD*), p. 13.) For that reason, only members of the bargaining unit have standing to challenge the adequacy of a union's representation. (*Alameda County Management Employees Association (Harper)* (2011) PERB Decision No. 2198-M, p. 6; see also *Orange County Water District* (2015) PERB Decision No. 2454-M, p. 25, fn. 20.)[8] An employee likewise has no cause of action against the employer for a union's failure to represent his or her interests. (*Jurupa USD*, p. 13.) And, for the most part, a union has wide discretion in how it serves its bargaining unit, so long as its decisions are not arbitrary, discriminatory, or made in bad faith. (*Coalition of University Employees (Hall)* (2010) PERB Decision No. 2095-H, pp. 4-5.) This is true even where a union's representation benefits some members to the detriment of others. (*Id*., citing *California School Employees Association & its Chapter 379 (Dunn)* (2009) PERB Decision

[8] At the time this proposed decision issued, the Board's decision in *Orange County Water District*, was under consideration for appeal. (petn. for review pending, G052725.)

No. 2028; *Castro Valley Unified School District* (1980) PERB Decision No. 149.) Accordingly, Medina's decisions as a steward, including who she decides to represent, are a matter within her discretion and is protected under EERA section 3543.1. Thus, including this allegation in the Statement of Charges constitutes direct evidence that the document was issued, at least in part, because of Medina's decision-making as a CSEA steward.

Moreover, there was simply no factual basis for this allegation. There was no evidence that any unit member ever complained to Medina, or anyone else at CSEA, about Yoguez. Nor was there any showing that Medina declined to assist any unit member requesting her assistance. Finally, there was no evidence that Vierra had any reason to believe that Medina was derelict in her duty as a steward. Therefore, even if it were true that Medina could be considered for discipline based on the adequacy of her representation as a steward, the total lack of any factual support for this claim would still be evidence of nexus.

3. Allegation That Medina "Intercept[ed]" Yoguez's Communications

The October 31, 2014 Statement of Charges also alleges that Medina "made sure to intercept [Yoguez's administrative leave] letter so that it would be received by [Medina] and not Mr. Yoguez's wife." I view this allegation similarly to the one discussed above. Yoguez has the protected right to seek CSEA's assistance in his personnel matters. (*Jurupa Unified School District* (2015) PERB Decision No. 2420, proposed dec., p. 37, citing *County of Riverside* (2011) PERB Decision No. 2184-M.) This includes designating a union representative to assist him during disciplinary proceedings. (*City of Monterey*, *supra,* PERB Decision No. 1766-M, proposed dec., pp. 8-9.) Medina, likewise, has the protected right to act as Yoguez's union representative. (See *Ventura County CCD*, *supra*, PERB Decision No. 1264, p. 16.) Subjecting Medina to possible discipline because Yoguez designated her as

his representative and that she may have accepted that designation further demonstrates a direct connection between the Statement of Charges and Medina's protected steward activities. Furthermore, there is, once again, no evidence that Medina even took steps to intercept any District communications or that Vierra had any basis to believe that this was the case. Accordingly, even if Medina could be disciplined for accepting Yoguez's documents at his request, the lack of any factual support for this allegation would be further evidence of nexus.

4. CSEA's Other Nexus Claims

CSEA also asserts that threatening Medina with possible dismissal was unusually harsh. It questions why Medina, with no record of discipline or poor evaluations, would be issued the same punishment as Yoguez, who has had a long disciplinary history, including a "last chance agreement." An employer's unusually severe punishment may constitute evidence that the punishment was administered for retaliatory reasons. (See *State of California, (Department of Developmental Services, Napa State Hospital)* (1984) PERB Decision No. 378-S, pp. 32-33.) The charging party has the burden of proving that the discipline was disproportionate to the alleged misconduct. (*Id*., see also *Riverside Unified School District* (1987) PERB Decision No. 622, proposed dec., p. 64.) The charging party does not carry this burden where it was not shown that the discipline was more severe than other similar misconduct or where the record shows that each discipline case is considered by its own circumstances. (*Id*.) CSEA's argument is unpersuasive in this case for two reasons. First, is untrue that the District recommended the same level of punishment for both Yoguez and Medina. The District has not yet recommended any discipline for Medina and the uncontroverted evidence is that the District regularly references the maximum possible discipline in its Statement of Charges and then decides which discipline, if any, to recommend at a later step in the process. Second,

CSEA offered no evidence suggesting that the District typically contemplated lesser discipline for allegations involving dishonesty and assisting another employee in misappropriating District work time, if proven. CSEA's assertion that, in general, the District follows progressive discipline practices is not in-itself persuasive without a showing that the alleged misconduct here was of the type where lesser discipline was typically considered beforehand.[9]

CSEA also points out that the District harassed Medina by using private investigators to continue following both Medina and Yoguez even after he was placed on administrative leave. At hearing, Vierra asserted that he felt continued surveillance was warranted because both Medina and Yoguez denied having any personal relationship and he thought that Yoguez in particular might be dishonest in his dismissal hearing in 2015 before the Personnel Commission, given his history of dishonesty. While I tend to agree with CSEA that this was an unconventional practice, I have a difficult time ascribing the District's behavior to animus towards protected activity. There was no evidence that the District attempted to monitor any other aspect of Medina's steward activities, such as meetings with other unit members. Rather, the investigation continued to focus on Medina and Yoguez's meetings. In that sense, the District's asserted justification seems at least defensible. I myself found the evidence from that later investigation marginally relevant to determining Medina's general credibility as a witness. Under the circumstances, I reject that argument that the District's use of an investigator after Yoguez left West Ranch supports CSEA's prima facie case.

[9] Evidence of Yoguez's discipline history showed that the District found him to be dishonest, and imposed a 30-day suspension, not dismissal. But the record did not indicate whether the District initially issued Yoguez a Statement of Charges indicating possible dismissal or a lesser punishment. Vierra testified that the District originally contemplated dismissing Yoguez for his misconduct, but ultimately entered into the last chance agreement instead.

In summary, I hold that CSEA has established the final element of its prima facie case for retaliation. This holding is based on the close timing between Medina's CSEA steward activities and the issuance of the Statement of charges as well as the fact that the Statement of Charges directly references matters within Medina's discretion as a CSEA steward as possible bases for discipline. Because all elements of a prima facie case are met, the burden of proof shifts to the District.

c. The District's Burden of Proof

CSEA has established all the elements of a prima facie case, the District now bears the burden of proving that it would have issued the October 31, 2014 Statement of Charges to Medina even if she did not engage in any protected activity. (See *Martori Bros. Dist. v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, p. 730; *Chula Vista Elementary School District* (2011) PERB Decision No. 2221 (*Chula Vista ESD*), p. 21, citing *Novato USD*, *supra*, PERB Decision No. 210.) In cases where an adverse action appears to have been motivated by both protected and unprotected conduct, the issue is whether the adverse action would have occurred "but for" the protected acts. (*Los Angeles County Superior Court*, *supra*, PERB Decision No. 1979-C, p. 22.) This requires the employer to establish both:

> (1) that it had an alternative non-discriminatory reason for the challenged action; and (2) that it acted because of this alternative non-discriminatory reason and not because of the employee's protected activity.

(*Palo Verde USD*, *supra*, PERB Decision No. 2337, pp. 18-19, citations omitted; see also *County of Orange* (2013) PERB Decision No. 2350-M, p. 16.) The mere existence of evidence suggesting animus evidence is not determinative in retaliation cases. (*Bellevue Union Elementary School District* (2003) PERB Decision No. 1561, proposed dec., p. 37.) In *UC Regents*, *supra*, PERB Decision No. 2302-H, PERB found that discipline may ultimately be for

non-retaliatory reasons even where there is direct evidence of nexus. (*Id*. at proposed dec., p. 33.) In that case, as here, the adverse employment action directly referenced the employee's protected conduct. Nevertheless, PERB concluded that the employee's other substantial misconduct was the true motivation behind the discipline and the employer would likely have issued it even in the absence of any protected activity. (*Ibid*.)

In this case, Medina's Statement of Charges expressly references matters within Medina's discretion as a CSEA steward as the basis for possible discipline. However, it abundantly is clear that those matters were not the thrust of either the District's investigation or the Statement of Charges itself. Rather, the vanguard of the District's inquiry was whether the nighttime meetings at West Ranch were improper and whether Medina was honest when discussing those meetings. Both parties recognize this and both focus their arguments on whether the allegations about Medina's meetings with Yoguez were reasonable.

CSEA argues the District's allegations lack any justification because it has no evidence of any sexual activity. However, I find this argument unpersuasive because the possibility of sexual activity on District property was only one of the more serious charges under consideration. Other possible charges included assisting Yoguez in misappropriating District time and dishonesty. The private investigator's report, which Medina accepts as accurate, indicates that Yoguez and Medina met during times that are inconsistent with Yoguez's reported lunch breaks. In addition, the District has reports from other custodians that Yoguez was not working during duty time. Accordingly, the District has reason to be concerned over whether Yoguez misused his on-duty time and whether Medina had a role in that misconduct.

In addition, the weight of the evidence shows that the District has reasonable basis to be concerned about the nature of Medina's nighttime meetings with Yoguez. In Fall 2013, vice

principal Fine began hearing jokes and rumors among the night crew that Medina and Yoguez were meeting up at night in the parking for romantic encounters in Medina's car. Multiple custodians reported seeing Yoguez with a visitor at night, later identified to be Medina. A private investigator confirmed that Medina and Yoguez met in the parking lot three times.

CSEA is correct that neither the private investigator nor any District employee ever observed any sexual activity between Medina and Yoguez. But I still conclude that it is rational to question the assertion that the two were meeting for official CSEA business. Two of the three visits between Medina and Yoguez were at a relatively unpopulated area of the campus, which I find highly unusual, even suspicious, given that there were readily available alternatives for those meetings.[10] In addition, Yoguez initially denied having any visitors other than his wife during his shift. Taking this evidence together with the statements from other custodians, I find that the District had a valid basis for examining whether Medina and Yoguez were engaging in misconduct, sexual or otherwise, during their late night meetings at West Ranch.

I recognize that some of the information relied upon by the District is in dispute. The exact nature of Medina's meetings with Yoguez remains in dispute as well. Nevertheless, I find that the District had a legitimate and pressing need to examine the nature of these unorthodox meetings. When evaluating the employer's justification, the issue is whether that justification was honestly invoked and was the true reason behind any adverse employment action. (*Anaheim UHSD*, *supra*, PERB Decision No. 2434, p. 11, citing *Chula Vista ESD, supra*, PERB Decision No. 2221, p. 21.) Under these facts, I conclude that the District had a

[10] Yoguez, as the night lead, had access to a lockable office with a desk and, presumably, conventional lighting that could have been used as a meeting place. CBA Article 3.5 also provides for CSEA access to buildings and facilities outside regular business hours.

non-discriminatory reason for issuing the Statement of Charges and that the District likely would have pursued a substantially similar course of action even if Medina had not engaged in the protected activities alleged in the complaint.[11] Whether the District may later rely upon disputed evidence in any future effort to actually impose discipline on Medina is beyond the scope of this proceeding to decide. CSEA's retaliation claim is therefore dismissed.

2. Interference Claim

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 at least "slight harm" to employee rights results. (*Simi Valley Unified School District* (2004) PERB Decision No. 1714, p. 17 (*Simi Valley USD*).) The Board described the prima facie standard as follows:

> [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 employee rights granted under EERA.

(*Ibid*., quoting *State of California (Department of Developmental Services)* (1983) PERB Decision No. 344-S; *Carlsbad USD*, *supra*, PERB Decision No. 89, p. 10.) PERB examines

[11] The serious nature of the District's investigation naturally raises questions about why the District has not either formally pursued or abandoned any discipline of Medina. The record does not provide a clear explanation. Vierra testified that the District has not acted on Medina's Statement of Charges one way or the other because "a number of items that have all kind of come together" at once. This explanation was certainly vague, but I note that, on November 10, 2014, Medina filed an internal District complaint alleging that the Statement of Charges was issued in retaliation for her protected activity. In addition, Yoguez's termination hearing before the Personnel Commission was, at one point, scheduled to begin in January 2015. By April 2015, the instant case had been filed with PERB, also alleging that the Statement of Charges was retaliatory. These related and concurrent actions provide a plausible basis for delaying action on any contemplated discipline for Medina.

whether the respondent's actions "'reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.'" (*Clovis Unified School District* (1984) PERB Decision No. 389 (*Clovis USD*), pp. 14-15, quoting *NLRB v. Triangle Publications* (3d Cir. 1974) 500 F.2d 597, p. 598.) That "'no one was in fact coerced or intimidated is of no relevance.'" (*Ibid*.) PERB considers the totality of the circumstances when making these determinations. (*Los Angeles Community College District* (1989) PERB Decision No. 748, proposed dec., p. 16.)

If a prima facie case is established, then PERB balances the degree of harm to protected rights against the employer's asserted interests. (*Hilmar Unified School District* (2004) PERB Decision No. 1725, pp. 16, citing *Carlsbad USD, supra*, PERB Decision No. 89 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*.) On the other hand, "[w]here the harm is inherently destructive [of protected rights], the employer must show the interference was caused by circumstances beyond its control." (*Ibid*.) The employer bears the burden of proving the necessity of its actions. (*Simi Valley USD, supra*, PERB Decision No. 1714, pp. 17-18, citing *Carlsbad USD*.)

As the District points out, not all employer questioning or interrogations about union activity is considered harmful to employee rights. (*Clovis USD, supra*, PERB Decision No. 389, citing *Blue Flash* (1954) 109 NLRB 591.) The Board examines the totality of the circumstances to determine whether the questioning had a tendency to be threatening or coercive. (*Ibid*.) The Board's analysis does not focus on the specific words used during the inquiry, but whether the employer, through its questioning, conveys disapproval toward the union. (*Id*., citing *PPG Industries, Inc*. (1986) 251 NLRB 1146.) Using a similar approach

under federal labor relations authority, the National Labor Relations Board (NLRB) does not recognize a "blanket rule" prohibiting employers from any inquiry into conversations between employees and union representatives. (*Cook Paint and Varnish Co*. (1981) 258 NLRB 1230 (*Cook Paint*), pp. 1231-1232.)

In *Clovis USD, supra*, PERB Decision No. 389, the Board found that a school administrator's questioning employees about their opinions of an upcoming union election did not cause even slight harm to employee rights. (*Id*. at p. 16.) There, the administrator was "low-key" and well-liked by faculty, and took steps to quell any anxiety among employees that they would face retaliation for their responses. (*Ibid*.)

In *Compton Unified School District* (2003) PERB Decision No. 1518 (*Compton USD*), PERB found that a principal's questioning of a rank-and-file unit member about who called a union meeting held on school grounds to be unlawfully coercive. (*Id*. at proposed dec., pp. 25-26.) There, the principal asked the question at least twice and then removed the employee from a coveted leadership position after she refused to answer. PERB found under the circumstances that the principal's actions conveyed the employer's disapproval and implied that the meeting was improper activity. (*Id*., citing *Clovis USD*, *supra*, PERB Decision No. 389.) PERB concluded that the questioning caused at least slight harm to employee rights.

In *Cook Paint*, *supra*, 258 NLRB 1230, the NLRB found that an employer's questioning about the substance of an employee's conversation with his steward, followed by a demand for the steward's notes of that conversation was unlawfully coercive. It reasoned that allowing the employer "to compel the disclosure of this type of information under threat of discipline manifestly restrains employees in their willingness to candidly discuss matters with

their chosen, statutory representatives." (*Id*. at pp. 1231-1232; see also *H.S.M Machine Works, Inc*. (1987) 284 NLRB 1282, p. 1283.)

Here, the issue is whether subjects covered during Medina's October 22, 2014 investigatory interview interfered with protected rights. As alleged in the PERB complaint, the evidence shows that Vierra questioned Medina about her role as a CSEA steward, including CSEA procedures and records, her conversations with Yoguez, and whether other members ever complained or expressed concern to Medina about Yoguez. This questioning caused some harm to protected rights. At the time, the District was already pursuing discipline against Yoguez for his meetings with Medina. The October 22, 2014 meeting with Medina was a formal investigatory interview which typically precedes discipline. Vierra, who conducted the interview, is a high ranking administrator and the same person who is responsible for making discipline recommendations to the District's superintendent and Governing Board. Although, as the District asserts, Vierra never told Medina that she could be disciplined for refusing to answer his questions, under the circumstances, another employee in Medina's place would be concerned that she too could face discipline charges based on her responses. No one from the District ever informed her otherwise.

At the same time, I find that the level of harm is mitigated by some important factors. First, it was Medina herself that raised the issue of her CSEA steward activities to counter the accusation that her meetings with Yoguez were improper. In doing so, Medina had some expectation to be questioned on the nature of her meetings with Yoguez to test the veracity of that defense. In addition, CSEA staff representative Hollins was present and she was able to engage Vierra about the rationale behind these questions. Unlike in *Compton USD*, *supra*, PERB Decision No. 1518, Vierra did not express or imply any opinion about Medina's CSEA

activities during the October 22, 2014 interview. And I find no evidence of a larger inquisition into CSEA's activities at the District. Rather, the questioning appeared to be limited to understanding the nature of Medina's evening visits with Yoguez. Thus, I find that Vierra's questions about Medina's CSEA activities and communications with members caused only slight harm to protected rights.

Turning next to the employer's justification, the District asserts that inquiring into Medina's CSEA activities was a necessary element of its investigation into possible misconduct occurring on the West Ranch premises. I agree to an extent. The District was examining the nature of Medina's nighttime meetings with Yoguez even before she asserted that they were meeting for CSEA business. Some probing into Medina's practices as a CSEA steward and her conversations with Yoguez was relevant to the District's ongoing investigation. It was also justified given the unusual manner in which Medina chose to meet with Yoguez, i.e., outside of the time he stated as his lunch period and in an unpopulated area of the campus when there were readily available alternative meeting locations. Vierra's questions about CSEA procedures and communications with Yoguez were reasonably related to testing the truthfulness of Medina's asserted defense. (See *State of California (Board of Equalization)* (2012) PERB Decision No. 2237-S, proposed dec., p. 8 citing Evid. Code, § 780 [holding factors such as consistency in testimony and existence or nonexistence of facts testified to are relevant when assessing witness credibility].) Unlike in *Cook Paint*, *supra*, 258 NLRB 1230, Vierra did not ask Medina for any actual notes or records from her meetings with any unit members and his questions appeared to focus less on obtaining a detailed understanding of CSEA's processes, than on examining the truth of Medina's assertion that she was engaging in union activity at all.

Under the circumstances, I find that any harm caused by Vierra's questioning regarding CSEA procedures or Medina's discussions with Yoguez was outweighed by the District's need to fully investigate questionable behavior observed at West Ranch. When Medina raised union activity as a defense to any misconduct allegations, she made some questions on those subjects relevant to the District's investigation. (See *Oakland Unified School District* (2007) PERB Decision No. 1880, p. 22, citing *State of California, Department of Transportation* (1982) PERB Decision No. 257-S [holding that employees cannot insulate themselves from any review by the employer simply by asserting that the activity was protected].) Moreover, an employee engaging in otherwise protected activities may still be subject to discipline when the employee's conduct interrupts legitimate work and violates existing work rules. (*Konocti Unified School District* (1982) PERB Decision No. 217, p. 7 [holding that employees engaging in protected activity may still be subject to employer scrutiny when their activities interrupt legitimate work and violates existing work rules].)

However, I reach a different conclusion regarding Vierra's questioning over whether other unit members ever expressed concerns or complained to Medina about Yoguez. Unlike with the other areas of questioning, these questions bear no clear relationship to Medina's assertion that her meetings with Yoguez at West Ranch were for CSEA business. And, interrogating employees about union sympathies or requests for union assistance interferes with employees' exercise of protected rights. (*Horton Automatics* (1988) 298 NLRB 405, p. 414; *H.S.M Machine Works, supra*, 284 NLRB 1282, p. 1283.) The District offers no specific justification for this line of questioning. In this instance, the District's need to investigate Medina and Yoguez did not outweigh the coercive nature of these questions.

The District argues that any interference violation is improper under the void-for-vagueness doctrine. According to *FCC v. Fox Television Stations* (2012) 132 S.Ct. 2307 (*FCC*), the doctrine requires invalidation of impermissibly vague laws on due process grounds. (*Id*. at p. 2317.) The Court held:

> A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."

(*Id*., quoting *U.S. v. Williams* (2008) 553 U.S. 285, p. 306.) In *FCC*, two television broadcasters challenged the FCC's determination that broadcasts including fleeting use of obscene words or a brief depiction of partial female nudity were actionably indecent. (*Id*. at p. 2314.) The FCC's determination reversed prior determinations and pronouncements which concluded that repetition and persistent focus on the offending depictions were key aspects of determining whether a broadcast violated decency laws. (*Id*. at pp. 2314-15.) The Court found that the FCC's history of finding the passing nature of a depiction weighed against an indecency finding meant that the two broadcasters had no notice that the fleeting depictions in that case would constitute violations. (*Id*. at p. 2318.)

The District in this case argues that there is no existing legal authority which would guide the District as to what questions were permissible under PERB's interference standard. (District's brief, pp. 24-25.) This argument is hard to square with the fact that the District's own brief cites to *Clovis USD*, *supra*, PERB Decision No. 389, one of PERB's leading cases on the subject of coercive interrogations. That case was decided more than 30 years ago and references NLRB authority (also cited by the District) that was decided more than 60 years ago. According to those cases, and their progeny, the specific words used during an

employer's questioning about union activity is not as important as whether the employer, through its questioning, acts coercively or conveys disapproval toward the union. (See *Clovis USD*, pp. 15-16.) This is, moreover, essentially the same standard that PERB applies in to all interference claims involving employer speech. PERB examines the employer's statements and conduct in light of its overall context to determine whether the statements made would tend to coerce or interfere with the exercise of protected rights. (See *Los Angeles Unified School District* (2005) PERB Decision No. 1791, warning ltr., pp. 4-5, citing *Rio Hondo Community College District* (1980) PERB Decision No. 128.) The District cites to no authority referencing any dramatic change in its position similar to what occurred in *FCC*, *supra*, 132 S.Ct. 2307. Accordingly, this argument is unpersuasive.

In conclusion, Vierra's questioning Medina about whether represented employees complained to her, as a steward, about Yoguez had some tendency to interfere with employees' protected rights. The District offered no persuasive justification for these questions. Accordingly, its conduct violated EERA section 3543.5, subdivision (a). (See *Compton USD*, *supra*, PERB Decision No. 1518, proposed dec., p. 27.) This action also interfered with CSEA's ability to represent its bargaining unit. When employees are intimidated to not participate in union activity, the collective strength of the whole union is weakened. This conduct therefore also violates EERA section 3543.5, subdivision (b). (*Ibid*.) All other interference claims are dismissed.

REMEDY

It has been found that the District violated EERA by questioning Medina about whether CSEA unit members have approached her in her capacity as a steward to discuss concerns or

complaints about Yoguez. PERB has broad remedial powers under EERA section 3541.5, subdivision (c), including:

> The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

In cases where an employer's instructions to employees were found to interfere with protected rights, PERB has ordered the employer to cease and desist from future interference and post a notice concerning the violation. (*Los Angeles Community College District* (2014) PERB Decision No. 2404, proposed dec., pp. 21-22; *State of California (Employment Development Department)* (2001) PERB Decision No. 1365a-S, pp. 11-12.) These are all appropriate remedies here. Accordingly, the District is ORDERED to cease and desist from interfering with protected rights and to post a notice of this violation in all work areas were notices to classified bargaining unit members are customarily placed. The notice posting shall include both a physical posting of paper notices at all places where certificated bargaining unit members are customarily placed, as well as a posting by "electronic message, intranet, internet site, and other electronic means customarily used by the District to communicate with its employees in the [faculty] unit." (*Centinela Valley Union High School District* (2014) PERB Decision No. 2378, pp. 11-12, citing *City of Sacramento* (2013) PERB Decision No. 2351-M.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the William S. Hart Union High School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5, subdivisions (a) and (b). The District violated EERA by interrogating Amber Medina, a

steward for California School Employees Association, and its Chapter 349 (CSEA) about whether represented employees had complained to her in her capacity as a steward about another represented employee. All other claims were dismissed.

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. Interfering with Medina's protected rights.

2. Interfering with CSEA's right to represent its bargaining unit.

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

1. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees in CSEA's bargaining unit 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. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material. The Notice shall also posted by electronic message, intranet, internet site, and other electronic means customarily used by the District to communicate with employees in CSEA's bargaining unit.

2. 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 CSEA.

Right to Appeal

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960
E-FILE: PERBe-file.Appeals@perb.ca.gov

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)